Constitutional Law classnotes, Fall 2004. Professor R. Miller.

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Tuesday, August 24

Course outline

1. Constitutional Law I: concerning the structures created by the constitution. I.e., "who decides?"
2. Constitutional Law II: concerning individual liberties.

The theme for this semester: "The sociology of federalism"

- What does the constitution constitute?
  - The nation: our country—the constitution constituted, into the U.S. of A., thirteen things that fought the war.
  - The people: us—"the U.S.A. and the citizens thereof..."
  - The states

  The problem is that the constitution doesn't strike the balance between these. This conflict is called:

  Federalism

  We want to know... what does federalism tell us about community? What does it *do* to community?

  Questions
  - Is community in decline?
  - If so, can federalism slow that decline?
  - Has the Rehnquist court contributed to or hindered that decline?

Constitutional interpretation

Tribe: "constitutional law is constitutional *reading*."

Why is there ambiguity in the constitution? Well, for one thing, a *reader* is part of the process... of *reading*.

...but, there's more to the constitution than its text. In fact, there are some provisions in the constitution that are *not* in the text. E.g., "all cases in *law* and *equity*"; what's "law" and what's "equity"?

Wednesday, August 25

Constitutional interpretation

Methods of constitutional interpretation

- Textual: this method has some value, but it usually doesn't end things. It is maybe best used as an *exclusionary* tool—i.e., "what are we *not* talking about?" So, in other words, the text is a place to begin.
    - N.b., Philip Bobbitt's *Constitutional Fate* (highly recommended by Miller): the textual argument is drawn from the *present sense* of a provision's words.
    - The textualist movement in SCOTUS begins in the 1930s. This is surprising, Miller remarks, because those justices, who were very "activist," were trying to use the textual approach as a *restraint* on their activism. That's surprising in light of Bobbitt's comment, that the textual approach *contemporizes* interpretation.

- Historical
    - Why does reliance on history make sense in the *law*, e.g., in constitutional interpretation, but not in science? I.e., science doesn't look backward to stagnant ideas in order to shape present understanding. Why should the law?
        - Well, because maybe the founders wanted to *lock* some certain values down, for all time.
    - There are two general kinds of historical approaches:
        1. Original intent
        2. Original meaning

        N.b., that Massey suggests another kind of approach—the "vectors" of history.
    - There are some problems with the historical interpretation idea:
        - If we're so concerned about intent, isn't the framers' intent about constitutional interpretation *itself* going to be important? I mean, these people were *revolutionaries*! (See Brands *Atlantic Monthly* article for this argument.) (Also note Jefferson's "tyranny of the generations," I say.)
        - Whose intent? This is like the problem of determining congressional intent.
        - Bobbitt—it's really hard to figure out what the framers would think nowadays, since things are so so different.

- Structural: finding a meaning implicit in the structures of the government created by the constitution.

- Doctrinal: looking to the accretion of precedent for assistance. You might be able to find an evolution of meaning here.

- Prudential: looking at the political impact of a constitutional interpretation.
    - Brandeis: "the most important thing the Supreme Court does is nothing."

Federalism

Federalism controversies

- Should the federal government be able to prosecute a high school student for bringing a gun to school?
- Should the federal government be able to tell a farmer what crops to grow?
- Should the states be able to institutionalize discrimination? School segregation? Marriage?

It's the *options* here that are the point—they are what federalism is.

Miller's definition of federalism:

The division of power between two separate authorities, each of which enforces its own laws against its citizens.

- What's at stake? The theory of federalism.
    - Limited government
        - Separation of powers between the branches of government.
        - Federalism is a way to limit federal power.

        How is federalism created by the constitution?
            - A federal government with enumerated powers. See, e.g., A1§8, where we have an 18-clause catalog of congressional powers. (The Commerce Clause (A1§8c3) is the one congress has siezed on to expand its power.)
            - The states get the rest. See am10.
            - But the states' powers are also reduced: A1§10.
            - Other infrastructural protection of the states, throughout.

Thursday, August 26

Community

Mike Stern, guest lecturer. Does research on community and issues around domestic violence.

Community

- What is it?
  - Connection. I.e., with others.
  - Place.
  - Shared interests.

  Is community in the mind of the beholder?

Individualism versus democracy
- Tocqueville
- Tönnies *Gemeinschaft und Gesselschaft* ("Community and Society").
  - We have community-type relations *and* we have society-type relations, which Tonnies sets up as a spectrum, from community to society.
  - The Industrial Revolution was a change from a tradition-based (community) to a mass society (society) world.

The "community loss" thesis: we don't *need* community anymore, now that we've got mass society, with all its helpful infrastructure.
- Sociology thought community was dead. For about seventy years (1990–1970, about).

The "community found": noticing horizontal (everybody helps everybody out) and vertical (everyone has the state do everything) ties. This is about 1970.
- N.b. *Against All Odds*, Don Dilmon (phonetic spelling).

The "community liberated"
- Barry Wellmon (phonetic spelling): community doesn't need a *place* anymore—technology is making communities stronger.
  - "Networked individualism": you are a dot in the center, connected outwardly to all your various "communities" (e.g., state, bar, school, chatroom, D&D, municipality).
    - This has a significant bearing on federalism—because if you don't *need* your local community, why care about it?
    - And, n.b., do you even need to know the person next door, if you are a "networked individual"?
- But, others say "no"... community needs a place.

Putnam's *Bowling Alone*: arguing that weakening family bonds, increasing globalization of markets, and capitalism are endangering community.

- Stern remarks, "Doesn't capitalism increase networked individualism?"

Friday, August 27

Marbury v. Madison

Before *Marbury*, the idea of judicial review of other branches was a truly radical idea.

Background:

- The Federalists (Adams, Marshall, Marbury). (Note the irony of the name—a way of "spinning" the word.)
- ...and the Anti-Federalists (Jefferson, Madison, Lee).

- What's at stake here?
  - Federal*ism* (i.e., state vs. federal) balance of power.
  - Feder*al* (i.e., branches of government) distribution of powers.
  - Integrity of the judiciary (i.e., it could be in danger if SCOTUS is politicized, especially considering the threat of impeachment by the Republicans).
  - The meaning of the constitution.

  (N.b., see the suggested reading for today, a German opinion.)

Holdings?

- Historic holdings?
  - Judicial review of executive decisions
  - Judicial review of legislative acts

  With these holdings, how can we say that *federalism* is implicated here? We can say it because *Marbury* emboldens the federal central government by strenthening the federal judiciary.

- The real holding?
  - What's the real *dispute*, first of all? It's whether Marbury gets to be a judge. And the answer is "No." Why? Because the court doesn't have the power to issue a mandamus. (So, does this mean that the rest of the opinion is just Marshall's "obiter dissertation," as Jefferson called it?)

Judicial review of executive decisions

- Can the courts intermeddle with the preregatives of the executive?
    - Sometimes yes, sometimes no.
    - Marshall says that you can't call something a "right" if there's is no possible remedy for its violation.
        - Is this true? Consider am14—beyond its enforceable value, doesn't it have an *aspirational* value? I mean, it wasn't even really enforced for nearly a century. (Also consider, I say, "life, liberty, and the pursuit of happiness..." Same idea.)
    - Marshall finds a right, and so he empowers the court to discuss a remedy.
        - But, he leaves open the question, "When does an executive action implicate a right, and when does it just implicate a political action?"

Constitutionality of § 13 of the Judiciary Act

- § 13 of the Act appeared to add original subject matter jurisdiction beyond that listed in A3.
    - The pedigree of the act, though? It was one of the first acts passed in the U.S. George Washington signed it, for Christ's sake!! How could *they* pass an unconstitutional law!? (Consider historical versus textual analysis.)
- To say § 13 is unconstitutional, Marshall has to find a contradiction between the act and the constitution, and then say that the constitution wins over a legislative act (nobody had said this before).
    - Note how it's possible that the congress may have considered themselves to have been interpreting the constitution by passing the act. And doing so as the proper branch to do it. But Marshall says, no, the legislature doesn't do that... the judiciary does. (!)

Why should it be the judiciary?

- The constitution is silent on this. So textualism won't work. Marshall uses a structural approach, noting that the judiciary has a unique job.

Judicial review of state courts' judgments

- *Hunter's Lessee*: [see the outline in the powerpoint slides for this date].

Tuesday, August 31

- A review of our study of *Marbury* so far: in *Marbury*, Marshall summons judicial review from the *thin air*, Miller suggests. I.e., it can't be found in the text of the constitution.

  And that is a mighty power, so now we will want to...

Limiting the judiciary

- Alexander Bickell, *The Least Dangerous Branch*:
  - Isn't judicial review undemocratic? Bickell labels it the "Counter-Majoritarian Difficulty." [See quotations on today's powerpoint slides.] He characterizes the federal judiciary as a "bevy of platonic guardians."
  - When SCOTUS declares an act unconstitutional, it acts against the people, who had voiced the act through their representatives, Bickell argues.

  How persuasive is Bickell? Well, how did Marshall justify himself in *Marbury*?
  - Marshall said that the constitution *set up* this "counter-majoritarian difficulty." And the constitution is inviolable.
  - (Consider what the point of life tenure in the judiciary might be.)

- At any rate, we have limits on the judiciary's review powers that come in...

<u>Limits on the federal judiciary's review powers</u>

- <u>Interpretive methods as limits</u>: e.g., with textualism, you're limited to the text. And likewise with other methods. This is a self-limitation—one the judiciary imposes on itself.

- <u>Checks and balances</u>
  - (Recall the rope tying the three "branches" together in Lorenzetti's "Allegory of Good Government.")
  - Particular checks and balances:
    - Jurisdictional limits.
    - Justiciability:
      - Ripeness
      - Mootness
      - Case in controversy
      - No abstract review
    - Congress establishes inferior courts (and so could debilitate the judiciary if it wanted to, note).
    - Presidential appointment of judges, with the "advice and consent" of the senate.
    - Congress sets the number of SCOTUS justices.
    - Impeachment of justices.

Congress versus the Supreme Court: see A3§2c2, the Exceptions Clause: allowing for some acts of congressional *stripping* of jurisdiction from the federal judiciary.

- E.g., the Helms School Prayer Bill (1979) (see the powerpoint slides for the text of the bill).
    - The bill says, basically, "states—feel free to enact school prayer legislation; the Supreme Court won't be able to interfere."
    - N.b., can congress legislate directly on this issue? No—so what the bill seeks to do is give legislative power over to the states and prevent SCOTUS from fucking anything up.
        - Why use this stratagem? Because the only other real option is constitutional amendment, and that's just too cumbersome a process.
- So, this involves federalism.
    - E.g., Helms doesn't do away with judicial review, but just leaves it *only* to the *state* courts.
        - Is there a problem with this?
            - Inconsistency among jurisdictions.
            - Most state court judges are elected. (N.b., how subject to the majority's will should government be?)
- Pros and cons of jurisdiction strippping
    - Pros:
        - Textualism—i.e., a reading of A3.
        - Structural—we need this kind of check/balance.
        - Prudential—it would be imprudent to give unlimited power to the judiciary.
        - Doctrinal—*McCardle* and *Felker*.
    - Cons:
        - Doctrinal—*Klein*.
        - Historical—it looks like the exceptions clause was aimed at limiting SCOTUS's review of *facts*. Not its jurisdiction.

N.b., how can we distinguish *Klein* from *McCardle* and *Felker*?

- *McCardle* was decided during a crisis (the civil war).
- In *Felker*, jurisdiction stripping was okay because SCOTUS still retained *some* jurisdiction to hear habeas cases.

Wednesday, September 1

Justiciability

- What justiciability doctrines derive directly from A3's "case in controversy" requirement?
    - No advisory opinions.
    - Standing.
    - Ripeness
    - Mootness

    Then, there's a fifth, the political question doctrine, which does *not* derive from A3's "controversy" requirement. The PQD derives, instead, from pure interpretation.

The Political Question Doctrine

- Remember that even Marshall felt the judiciary should have limitations ("questions in their nature political . . . can never be made by this court," he said in *Marbury*).
- Is the PQD misnames? Yes, Miller thinks, because clearly the federal judiciary engages in all kinds of disputes that have political implications (e.g., *Bush v. Gore*, campaign finance reform, political primary rules).
- What is a "political question"?
    - Miller defines it as "subject matter which the court holds to be inappropriate for judicial review because it should be left to the 'political' branches for a decision."
- Where has the PQD found application?
    - Disputes about political institutions
    - Congressional self-government
    - Foreign affairs
    - Impeachment
    - Ratification of constitutional amendments
- So, wait—why do we even need the PQD?
    - Well, for one thing, all the courts have at the end of the day is their integrity and credibility.
    - For another, the courts aren't well-informed enough to manage some issues (e.g., foreign affairs).

PQD and political institutions

- The Guarantee Clause: A4§4, guaranteeing a republican form of government in every state.
    - This is one constitutional matter that is *clearly* resolved—A4§4 questions are *not* justiciable. The court won't touch them.
- Equal protection: am14.
    - Malapportionment—numbers: do congressional districts have

equal numbers?
    - This is justiciable as an am14 claim. The court has said that apportionment must approximate one person, one vote.
- Districting
    - Racial gerrymandering
    - Political gerrymandering

Thursday, September 2

(PQD, continued)

- *Baker v. Carr* (p78): which sets out six factors to be considered in a PQD analysis.

- *Vieth* (p31s)
    - Why are we even talking about this? The Court already said districting questions *were* justiciable. Why are we readdressing it?
        - Because *Bandemer* didn't set forth a standard. See the *Baker* elements, especially the second one—"a lack of judicially discoverable and manageable standards for resolving it." It's been 20 years and we haven't found a standard.
    - Reading *Vieth*
        1. What is the Court's judgment?
            - Well, what is its question? It's "Are these districting claims justiciable?" It's answer is "No—these are political questions," by a plurality (four + Kennedy), and so not precedential.
        2. So it's important here to understand the plurality and the dissents (so that you can figure out where five could come from in the future).

- What is really at stake in these PQD disputes? It's *not* whether there is actually a constitutional violation. It's *just* whether the Court is even going to way whether there's a violation or not.
    - See, e.g.,. Kennedy's concurrence, where it's clear that he thinks there's a constitutional problem here. Kennedy sugggests that am1 might hold a standard somewhere in it. (Also see the *Economist* article in today's suggested readings.)

Congressional self-governance

- *Powell v. McCormack* (p81): are A1§5 claims justiciable?
    - A1§5 says "each house shall be the judge of the elections . . . of its own members."
    - The court says this *is* justiciable, invoking *Baker* element #1 (textual committment).
        - The court finds no textual committment, after engaging in both a textual and a historical analysis.
            - Texual analysis: A1§2 establishes standing requirements, and so determines the limits of A1§5. Thus, had this dispute been about disqualification over *age*—that would have been a political question.

Foreign policy

(We'll deal with this more when we study the executive.)

- *Goldwater* (p84): which *Baker* elements apply here?
    - Clear *textual committment* to executive, the Court says.
    - *Imprudent* to review foreign affairs questions.

N.b., that what we're seeing is that a selection of a *Baker* element leads to a particular interpretive method.

- Textual committment—textual interpretation.
- Prudential concerns—structural interpretation.
- Manageable standard—doctrinal interpretation.

Impeachment

- Who can an impeached, convicted president appeal to? Nobody. (Except maybe public opinion.) Because that's a political question.
- *Nixon* (p86): n.b. that this is the clearest SCOTUS case on impeachment and PQD.

Friday, September 3

- A brief review of our study of the federal judiciary:
    1. The aggrandizement of the federal judiciary (*Marbury*)...
        - ...and how it implicates federalism (*Martin*).
    2. The limiting of the federal judiciary...
        - ... and how it implicates federalism:
            - PQD

- Jurisdiction stripping

Next, we'll study congressional powers. But first...

Community

- Elements of community:
  - Place
  - Common interest
  - Connection
- Tonnies
  - Gemeinschaft—community; horizontal connections. (Like "family" and "friends.")
  - Gesselschaft—society; vertical connections. (Like "government," or "state.")

  And these are just ends of a spectrum.

- What did the U.S. have at its founding?
  - (Which is why we read the *Federalist Papers* and Tocqueville.)

  N.b., *process federalism*: procedural aspects of federalism that ensure that the states will survive. E.g., ratification and amendment, the electoral college.

Tuesday, September 7

Federal legislative powers

- The founders all understood that the *real* power would be congress (and, for another thing, they didn't envision *Marbury*).
  - Note how this necessarily implicates federalism—the residue of powers that were *not* given to congress would go to the states.

The legislative powers

- A1§8: enumerated power catalog. Note how defining congress's power necessarily (implicitly) defines the states' powers.
- A1§9: what congress *can't* do.
- A1§10: what the states can't do. (N.b. that this shows that the founders understood what was going on with this.)
- am10: Making what was going on explicit—leaving the unenumerated powers to the states, and the people.

- *McCulloch v. Maryland* (p93)
  - Marshall considers to questions:
    1. The federal legislative power
    2. Federalism
  - Why did Hamilton want a national bank?
    - Well, banks raise money.
    - Also, a federal bank could control currency. (At this time, there were *nine* currencies circulating in the U.S.)
    - A bank is a creditor—most especially, it can be a creditor to the federal government.
  - So, to answer the two questions, we need to know:
    1. Can congress create a corporation—a bank?
    2. If so, can a state tax that bank?

    The Maryland courts said, "Yes, Maryland can tax it." (How can SCOTUS review a state court decision? *Hunter's Lessee*.)

    1. Can congress create a bank?
       - It's not enumerated in A1§8.
       - So, Marshall looks at the broad spectrum of A1§8 powers and concludes, employing the Necessary and Proper clause there, that congress has to have the means to accomplish these broad powers. These means aree the *implied powers* of congress.

Wednesday, September 8

- How does Marshall justify his conclusion that congress can create a bank?
  1. We've done this before, he says, and we benefitted from it. (!!!) This is a historical pedigree argument.
  2. Implied powers (his structural analysis).
  3. Necessary and Proper clause (a hardcore textual analysis).
     - Where does Marshall find the meaning of "necessary and proper"?
       - He uses the *modern* (at that time) meaning, for one thing.
       - ¶2p96: "convenient and useful" can be "necessary," he says.
       - N.b., that Maryland argued that N&P gives only the power to make *laws* to effect the enumerated powers. Marshall

says that reading is too restrictive—the constitution would be a dead letter that way.

2. Can Maryland tax the bank?
    - Maryland argues that it's the states that *created* the union—so why would they create something that could overtake their own sovereignty?
    - In response, Marshall defines federalism—the *people* created the union, he says.
        - N.b., in the 1990s, Thomas, J., in a dissent, says it wasn't the people of the *United States* that created it—it was the people of the *states* that created it.
    - Also, Marshall looks to the text, notably the Supremacy Clause.
    - N.b., case language saying that if Maryland can tax the federal government, it can destroy it.

The Commerce Clause

...and the tenth amendment.

<u>Commerce Clause / Amendment X eras</u>

1. Up to 1890: the CC is broadly defined.
2. 1890 to 1937 (the Industrial Revolution): CC narrowly defined, am10 as a limit on congress.
3. 1937 to the 1990s: CC broadly defined, am10 not a limit on congress.
4. 1990s forward: CC narrowly defined, am10 a limit on congress.

Right now, we have two projects:

1. What does "commerce" mean?
2. What does "among the several states" mean?

<u>Thursday, September 9</u>

- *Gibbons* (p103)
    - Marshall "not-limitedly" defines "commerce," broadening it beyond the obvious—to include, here, navigation. This, most importantly, *heads off* a narrow interpretation (rather than, necessarily, setting up a broad interpretation).
    - "Among the states," Marshall declares, is more than just border-to-border—it

actually seeps *inside* the states themselves, to some extent.

The transitional period

- *DeWitt* (¶3p105)
    - The Court strikes down a law regulating illuminating oils, saying that the regulations are purely *police* regulations. The states' *police powers* are the *essence* of the powers that inhere in an autonomous sovereign, the Court says.
        - Re: police powers, see *E.C. Knight* at ¶3p106.
- *The Trademark Cases* (¶4p105)
    - The Court strikes down a law because it regulates wholly *intrastate* matters.

The first limited period: 1890 to 1937

...then, we have the Industrial Revolution, and we move out of the initial, not-limited era.

- The American Industrial Revolution brings *massive* development. And this development was significantly managed by the Supreme Court during this time. The justices were not just interpreters. They were men of *particular backgrounds*:
    - They were former advocates of capitalist interests.
    - Brewer, J., even said: "it is unvaryingly the natural law that the wealth of the community will be in the hands of the few."
- So, why do the robber barons care about the Commerce Clause? Because an expansive reading will impede enterprise, of course.

Attempts to regulate commerce

- 1887: railroad regulation
- 1890: Sherman Antitrust Act

- *E.C. Knight* (p106)
    - The law involved here is the Sherman Antitrust Act, here affecting the sugar refining industry, which was thoroughly monopolized at this point.
    - "Commerce": the Court says "commerce" is *not* manufacturing. Manufacturing is to be governed by the states, as part of their police powers. This commerce/manufacturing distinction will last until the New Deal.
        - But, what is "manufacturing"? In manufacturing, you're just *making* things—not putting them into the stream of commerce (so, commerce, then, is just the disposition of the things made).

- *Carter Coal* (p108): dealing with the Bituminous Coal Act.

Tuesday, September 14

- The commerce/manufacturing distinction: the real limitation on the CC during this period was derived from this distinction, party of the "commerce" definition the court employed.

- But now, what about "among the states" during this era? We have two concepts:
    1. Direct/indirect effect
    2. Stream of commerce

    These distinctions are efforts at giving meaning to Marshall's "intermingling" idea from *McCulloch*.
        - N.b., but ask: how adequate are these for figuing out if something is "intermingled," really?

    (And, always, ask how this affects federalism.)

    - *Schechter* (p110)
        - What is this safe chicken regulation really trying to regulate?
            - Labor conditions—collective bargaining, child labor, 40-hour work weeks.
            - Health and welfare—the regulation prohibits requirement that buyers have to buy all the chickens in the coop, including the sick ones; this way, the regulation can prevent sick chickens from being passed on.
        - What argument is there that this is interstate commerce? Well, all these chickens are coming into NYC from all across the country. (In fact, 96% of all poultry coming into to NYC at this time came from out of state.)
        - The Court employs the indirect/direct distinction—and says, No, there's an indirect effect, and so congress didn't have the power to pass this law.
            - So, note that even while the Court is striking *down* this statute, it is still giving congress some power. I.e., the Court could have just said, No, this is only in NYC and when that's the case, no CC power.)

    - *Shreveport Rate Cases* case
        - Here, a Texas company that ships wholly *intra*state is underselling its *inter*state competition.
        - The Court again employs the direct/indirect distinction, but this

time, it finds a direct effect.

How can we distinguish these two cases, then?

- By the competitive advantage angle of the *Rate Cases* case.
- By the nature of the commercial activity: buying and selling (*Schechter*) versus transportation (*Shreveport*).
- The *Rate Cases* were not wholly opposed by industry (unlike *Schechter*).

Wednesday, September 15

- Tonnies "dissolution"--the people at *war*.
  - This results, he says, from a shift from the organic, gemeinschaft of the village to the gesellschaft, individualism of the city—where existence and meaning is determined by money and power (as opposed to relationships). There, community leaves the equation.

Does federalism give any help to reversing this process?

- Miller believes that Tonnies would probably say it doesn't—he would say *all* government is gesellschaft.

The Commerce Clause: the expansive era, 1937 to 1990s

- FDR's New Deal hinges on SCOTUS changing its CC jurisprudence. So, he threatens them with the court packing plan. But, Roberts, J., switches sides under political pressure (or not, so he says), and so the packing plan isn't needed.

- *Jones v. Laughlin* (p120)
  - Labor standards are at stake in this one—especially, union organizing rights.
  - The Court scraps the commerce/manufacturing distinction, saying that *all* commerce *could* be subject to congressional regulation.
  - What's the new test? Does the regulated activity have a *substantial effect* on interstate commerce.

- *Darby* (p123)
  - Labor regulations again—minimum wage and workday hours. The law involved gets to these things by regulating the *shipment* of goods.
  - The Court here explicitly scraps the direct/indirect distinction.
  - What's the new idea? Production can be regulated by regulating the shipment of its products.

- *Wickard* (p125)
    - The Court here abandons:
        - the production/commerce distinction
        - the direct/indirect distinction
        - and even the stream of commerce limitation

      and allows wholly *intra*state regulation. It does this by looking at *combined*, *aggregate* effects.

Thursday, September 16

Why did the Court switch like this?

- Well, for one thing, the Court was not blind to the Great Depression. It even says this (*J&L*: "we are asked to shut our eyes . . .").

But, still, how radical, really, is the Court's departure?

- *J&L Steel* (p120)
    - What argument is there that this case *does* follow precedent?
        - The direct/indirect distinction—even the limited era Court conceded that congress could regulate activities that have direct effects on interstate commerce. So, how different from that idea is the "substantial effect" test? Could it be that the Court itc. is just clarifying "direct"?
            - (Or is itc. *really* a Court wholly departing from precedent?)
- *Wickard* (p126)
    - What's so wrong with this to some people?
        - Textual interpretation concerns—how can this be "commerce"?!
            - Well, how would the Court respond? They might say, "we're not wholly divorced from commerce here—since the farmer is self-sufficient, that means he's *not* spending money. I mean, remember how absurd the whole "manufacturing isn't commerce" distinction was, after all."
        - Is there a way of justifying the obliteration of the commerce/non-commerce distinction?
            - The court itc. is focued on the regulations. They don't see themselves as enforcing the regulation against this *one* farmer. They are considering the *aggregate*. The farmer is participating in commerce by *not* going on the market.

- But, isn't this totally open—can't everything be regulated, then? Presumably not. Why? Because of the "substantial effect" limitation. There has to be an *actual* aggregate out there that *actually* affects commerce.

The Civil Rights Cases

- *Heart of Atlanta Motel* (p128)
  - What argument will the motel want to make? "We're local. Come on!"
    - But, it serves *inter*state travelers—which the statute anticipated. The Court looks for a "substantial" and "harmful" effect; if there is one, "local" doesn't matter.
    - Note, though, how the Court gives exaggerated consideration to the legislative record (no congressional findings, e.g.) of the Civil Rights Act.
      - So, this means that congress gets to basically say what "substantial" and "harmful" *are*. (!!) I.e., the Court's saying, "we trust congress."

- *Katzenbach* (p130): where the court explicitly sets out what deference it's going to give congress—the "rational basis" test.

Tuesday, September 21

Tying together our study of the CC expansive era

- During this era:
  - The Court abandoned the direct/indirect and commerce/manufacturing distinctions.
  - In their place, the Court set up the "substantial effect" standard, including the possibility of finding a substantial effect through aggregation (cumulative effects).
  - Also, the Court establishes rational basis deference to congress.

N.b., *formalism* versus *functionalism* in constitutional theory.
- Formalism: interpretation based on strictly defined tests.
- Functionalism: saying, "shouldn't the constitution be used to get to the most functional result?"

So, with the new approach, what's left? I.e.,. what could possibly evade congressional regulation?

- (Well, things which violate other parts of the constitution.)
- What's so disturbing about this, though?
    - Partly, the concern over regulation itself—a libertarian concern.
    - But mainly the fact that it's going beyond the CC power enumerated in the constitution—a federalism concern.
- Okay, but if you don't want the federal congress regulating you, how is it any better if the federal judiciary is deciding about this regulation instead? It's still the federal government, after all.
    - Then again, who else could decide about this regulation? (The states. (?))

Transitional cases

- *Perez* (p132): is this the maximum extension of the CC—to criminal law??
- Rehnquist, as an associate justice, begins to stir, suggesting a return to a limited era.

Now, remember last time we had the Great Depression as a socio-political trigger for the shift from limited to expansive CC jurisprudence. What trigger this time?

- The collapse of the Soviet Union?? I.e., the end of a need for strong national security?

N.b., Douglas, J., concurrence in *Atlanta Motel*, saying he'd rather have discrimination ended by am14, not the CC. He says there's a spiritual cost in using the CC to end discrimination—it involves characterizing people as just parts of commerce. He'd rather a direct principal be used instead.

The second limited (?) era

- *Lopez* (p143)
    - Rehnquist's opinion, for the Court
        - He beings with "first principals"
            - A federal government of enumerated powers.
            - Constitutionally created structures that limit the federal government. Most importantly, federalism.
        - Then, he reverts back to a formalist analysis, identifying three categories of CC application:
            1. Channels of interstate commerce (*Darby*, *Atlanta Motel*).
            2. Instrumentalities of interstate commerce.
            3. Activites that have substantial effects on interstate commerce.'

Wednesday, September 22

Note that we'll have three considerations in the cases we read going forward:

1. How do we measure what a "substantial" effect is?
2. Is the aggregate method still viable?
3. What deference is due to congress?

- *Lopez* (p143)
  - What are the Court's concerns?
    - The *nature* of the regulation (here a criminal regulation).
      - Is "possession" an economic/commercial activity.
    - The lack of a *jurisdictional nexus*.
      - Congress didn't even make a sefl-conscious effort to recognize that it was regulating commerce.

  After *Lopez*, congress added a jurisdictional nexus clause and some findings to the statute.
    - But recall how in the *Civil Rights Cases*, there weren't any findings at all (just as in *Lopez*). So, in *Lopez*, the Court just says that findings would have helped. They aren't necessary.

  - Kennedy and O'Connor's concurrence:
    - The decision itc. is necessary, but it is *limited*.
      - It's necessary because the expansive era jurisprudence was beginning to threaten the state/federal balance of power.
      - it's limited because we have a national economy nowadays, and that requires *some* degree of centralized oversight.
  - Thomas's concurrence: using an originalist/textualist approach, arguing for abandonment altogether of the "substantial effect" category of CC application.
  - The dissenters: they also argue for a better balance of power, but they're talking about the balance between the federal congress and the federal judiciary.

Thursday, September 23

The Tenth Amendment

...an intimate partner of the CC. As O'Connor says in *New York*, the inquiries into the CC and am10 are "mirror images" of one another.

- The CC: a positive—what congress *can* do.

- am10: a negative (or at least it can be read that way)—what congress can *not* do, maybe.

The question is: does am10 reserve a sphere of power for the states? That is, does am10 establish a *judicially* enforceable limit on congress?

- Well, some say "yes" and others say "no."

Am10 jurisprudence follows—but only roughly—the CC jurisprudence eras.

- Era I: *Hammer* and *Ames*—we don't get a clear answer from these.
  - *Hammer* (p114): the Court strikes down a child labor regulation, saying that the act really seeks to regulate production, despite what the plain language says.
    - So, the regulation fails because of the CC.
    - But this is an am10 ruling nevertheless, because it says that production is a *local* action and that these *local* actions are the province of the states.
      - I.e., it's not *just* that production isn't commerce. It's also that production is the kind of thing that states were meant to regulate.
  - But then *Ames* (p117): the Court says the regulation here focuses not on a *local* activity, but on an interstate activity. That is, a lottery, not child labor.
    - This is an am10 decision, because the Court identifies something that isn't a purely local activity.
    - The Court's saying (??) that moral questions fall outside the protected sphere of the states' competences.

[left class early]

Tuesday, September 28

Federalism and community today

So, who's ahead these days? The Federalists or the Anti-Federalists?

- If it's the Federalists, did it *have* to come out this way? Consider, e.g., Kennedy & O'Connor's concurrence in *Lopez*, where they say the holding in that case was a "necessary" holding, because the modern national economy requires some centralization, but neverthless a "limited" holding.
- For instance, as the U.S. tried to compete in a globalized world, it is necessary for the country to operate as a united whole?
  - Consider the U.S./Canada softwood lumber conflict.
- And, is it necessary for the U.S. to operate as a whole in order to prevent internal conflicts?

        - Consider whether Idaho could take advantage of, say, Florida in its time of need, and thus fracture the union.
    - Or, would it be better to give more authority back to the states?
        - Would that move power closer to the people?
        - Would that encourage experimentation?
    - Maybe... but what about crises? Like the Great Depression (recall Hughes, C.J.: "we are asked to shut our eyes to the plainest facts . . . ."). Or terrorism. I mean, why do we have the TSA now?
    - And also, what about civil rights? Do we want to give states so much authority that they can, say, segregate schools? Recall, here, Justice Douglas's concurrence in *Atlanta Motel*, where he despairs protecting civil liberties with the Commerce Clause. The CC doesn't adress the *spiritual* content of the wrong, he says.

    - The Viteritti & Russello article: this article has insight into one of the problems with saying that federalism can enhance community—there's just not that much power at the *local* level. But V&R assume, tacitly, that "community" cannot mean the states. That is, they're assuming "community" must mean municipalities. And, true, the constitution is blind to municipalities (however, it's the states that manage the municipalities).

Wednesday, September 29

Taxing and spending

A1§8c1: the taxing and spending power of congress. It was conspicuously absent from the Articles of Confederation.

- Is the T&S power limited?
    - Well, we have this "general welfare" phrase—what does that mean?
    - What about the T&S clause and the Necessary & Proper clause as bookends of A1§8? Can we argue that neither of these are specific, substantive powers—that they are just meant to support the other enumerated powers? I.e., that the T&S power was intended only to give congress the power to raise money in order to do the *other* enumerated powers?
    - And, of course, am10 provides an additional limitation, beyond the limits of the T&S clause itself.

<u>The power to tax</u>

- *Butler* (p181)
    - The Court here considers two approaches to what the scope of the taxing power might be:

1. The Madisonian approach (Anti-Federalist): give the T&S a narrow reading—limit it to supporting the other enumerated powers.
2. The Hamiltonian approach (Hamilton was the guy, remember, that wanted the federal bank so badly): give the T&S an expansive reading—treat it as a free-standing enumerated power (i.e., not like the N&P clause).

The Court adopts the Hamiltonian view. *But*, it says that the taxing power is not an unlimited power—it's limited by am10.

- This way, the Court doesn't have to define "general welfare," since they see the regulation in question her as impinging on state powers beyond what am10 will allow.
- In holding that, the Court uses the formalist method of *categorizing* what the federal government is allowed to be concerned with and what states can be concerned with.

- Note the judicial approaches apparent itc.:
  - Justice Roberts, for the Court, says that the judiciary's obligation is to test—for constitutionality—any statute that's brought before it.
  - Justice Stone, dissenting, says the judiciary needs to show some restraint and defer sometimes to the legislative process.

  (Then, Miller ranted for a while about the "activist judges" debate.)

- Note, also, that although "general welfare" wasn't defined in *Butler*, it has since received the *most* expansive reading ossible. See *Steward Mach* (p183). In fact, *Butler* (decided in 1936) was the last case to strike a tax.

<u>The power to spend</u>

- Conditional spending—see *South Dakota* (p184), concerning conditional spending plans that arose after MADD brought enormous pressure to bear on congress, making it make 21 the national drinking age.
  - Consider—could congress assert the Commerce Clause for this one??
  - At any rate, congress *can* use the T&S clause here, the Court says.
  - *But*, the court sets out some requirement for valid conditional spending:
    1. general welfare
    2. unambiguous
    3. reasonably related to some federal interest
    4. no other independent constitutional limitation

Thursday, September 30

Federal legislative power review:

- Basic principles:
  - Express (or implied) power
  - Limited, enumerated powers
  - The shadow, on congressional authority of federalism and am10
- The key questions:
  - Does congress have the authority to do this thing?
  - If so, does the enactment violate another provision of the constitution? (I.e., check provisions external to the enumerated powers.)

So far, we have considered:

- The Commerce Clause (A1§8c3)
- The Taxing and Spending power (A1§8c1)

now, we'll do one last one—the legislative empowerment clauses of the Civil War Amendments (ams13, 14, and 15). When these new rights were created, congress got new powers to fulfill them. We'll focus on am14§5—where congress is empowered to fulfill the Due Process and Equal Protection clauses.

Sovereign immunity

- State sovereignty and federal court jurisdiction:
  - A3§2c1 jurisdiction: "between a *state* or its citizens and foreign states or their citizens."
  - *Chisolm v. Georgia*, which prompts am11, reversing that holding and articulating the idea that states are sovereign.
  - And congress often takes advantage am14§5 to create federal jurisdiction.
- Exceptions that the courts have carved out of am11's protection of state sovereign immunity:
  1. State officers can be sued under a narrow range of circumstances, such as for injunctive relief, or for damages that will come out of the officer's own pocket.
  2. States can consent to being sued in federal court.
     - Why would a state do such a thing?
       - Well, see *Lapides* (ps71), where the state tried to remove to federal court and then argue for immunity there. (The court said no—removal is an expression of consent.)
       - Or, when federal courts offer better law or better remedies.
  3. Some suits are authorized by am14§5.
     - The Court understands that this interpretation threatens state sovereignty. But, the Court says, that was the intent of am14§5. See *Ex parte Virginia* (1880).
     - *Pennsylvania v. Union Gas* (p204, in text): the Court says that *any*

federal enumerated power can constitute an exception to am11. (!!!) But, that was just a brief lapse...

- *Seminole Tribe* (p205): the Court says these am11 exceptions are limited to *only* am14§5. And so here, the indian CC can't be an exception to am11. This returns the Court to the more comprehensive understanding of state sovereign immunity (pre-*Union Gas*).

So, the next question, then, is: What's the scope of congress's am14§5 power?

- Some argue for a narrow interpretation: that the power is only for enforcing the rights *specifically* articulated in am14.
- Others argue for a broad interpretation: that am14 is a vision of equality. So, congress should be allowed to create new rights, beyond the rights specifically articulated in am14, in order to realize that vision.
- *Nevada Dep't* (ps83): the Court says that congress can abrogate sovereign immunity if:
    1. its intent to abrogate is absolutely clear, and
    2. it acts pursuant to a valid exercise of its am14§5 power.

Wednesday, October 6

The executive power

Now, we're talking about separation of powers—*not* federalism.

- Larry Sidentop's *Democracy in Europe*:
    - Separation of powers is good because:
        - It distinguishes the *functions* of government; for instance, it separates rulemaking from rule-administering.
        - It affirms the importance of keeping different powers in different hands. And so, it prevents monolithic central government (even though it does create inefficiencies).
            - N.b. that in Germany, not only are the powers separated in theory, they're separated *geographically*.
            - What's good about the citizenry seeing the branches of government at each other's throats?
                - It could prompt more dialogue.
                - It could slow down the process of government—and the separated structure (n.b. that the constitution was passed before the bill of rights was certain to be added) can preserve freedom (n.b. that Madison said that there can be no freedom with a centralized government).

- Because it helps the citizenry understand these conflicts and makes us comfortable with participating. And it makes us *un*comfortable if we see power centralizing.

- There are two views of separation of powers that we'll consider:
  1. Formalism: the idea that there's a clear constitutional command (although implicit) for separation of power—powers that are pitted against one another. That is, a strong belief in categories.
  2. Functionalism: the idea that it's not worth sacrificing all functionality on the alter of separation of powers—it's still important sometimes to have the trains run on time.

- Article II: a catalog of powers:
  - A2§2
    - c1: commander-in-chief; opinions; pardons
    - c2: treaty-making power, with advice and consent of the senate; appointment power
    - c3: temporary appointment power
  - A2§3
    - state of the union requirement
    - necessary and expedient measures
    - convene and adjourn congress
    - receive foreign ambassadors
    - faithfully execute the laws (this is the most open-ended of the executive powers)
    - commission officers
  - Also, A1§7c3: approve or veto legislation

- Some comments on the presidency:
  - The Federalist Papers:
    - The executive should serve at the will of the *people*.
    - The executive should be independent of all but the *people* themselves.
  - Tocqueville: the executive power is dependent on the *people*—it's subject to the will of the *nation*.

  But what about the electoral college? How does that capture the will of the people? Hmm. But is there any better way of having the people express their will?

- What *inherent* powers does the executive have?
  - The inherent power, of A2§3, to "take care that the laws be faithfully executed."
  - Are there powers that are inherent to the *office* of the executive?

  - *Youngstown Sheet & Tube* (p232)

- Justice Black, for the majority, says a congressional command is enough to empower the executive. Why? Because, for one, separation of powers isn't a big concern when congress has expressly approved, and, for another, the constitution says "faithfully execute . . . ."
- Justice Jackson, concurring, makes the opinion that survives today as the paradigm for analyzing executive authority:
    - The executive's authority is not *wholly* tied to his textual constitutional authorization. Rather, Jackson sets out three zones of executive authority:
        1. Congressional and constitutional authorization: where the executive is at max power.
        2. Constitutional authorization but congressional silence: here, we have to determine whether the congressional silence is congressional *acquiescence*.
        3. Against congressional will: here, the executive has only his constitutional authority.

Thursday, October 7

- Justice Frankfurter offers a more functionalist analysis than either the majority or Jackson. He says the circumstances are relevant, and so is the nature of the power the executive is asserting.
- But it's the dissenters who put forward the real functionalism itc. That say, "We need to beat the communists!" I.e., what good is separation of powers if the communists overrun southeast Asia?!

Executive privilege

- Note that some have made textual arguments that the executive privilege is a myth, since it can't be found in the constitutional text.
- *Nixon* (p242): the Court here is willing to be embrace a *qualified* executive privilege. The Court recognizes that candor has a value in the executive's internal deliberations. But, here there are due process concerns that weigh more heavily, since this is a criminal case in which Nixon isn't a party—the accused have a right to hear the evidence against them.
- *Cheney* (ps115): the Court says itc. that the executive privilege is broader than an ordinary individual's is. So that means, for one thing, that the Court is recognizing that the executive privilege *does* exist. And, it's implying that the *Nixon* privilege limitation should be limited to criminal cases.

Tuesday, October 12

Congressional expansion of executive powers

First, recall the justifications for separation of powers:

1. It prevents tyranny.
2. It promotes efficiency.
    - Does it? Well, it allows for specialization. But, there's a strong argument that separation of powers actually leads to *in*efficiency.

- *Clinton v. New York* (p246)
    - N.b., how did the line item veto work?
        - Well, the president could only use the line item veto under certain circumstances (see ¶5p247).
        - And the veto required some congressional participation:
            - The president had to report (with a "special message") to congress within five days of using the veto.
            - Congress could respond with a "disapproval bill."

            Note how, in this process, it almost seems like congress was responding to Justice Jackson's "zones of powers" analysis—it's setting up a system where congress and the president work together.
    - Constitutionality of the line item veto:
        - What arguments for its constitutionality? It's a policy-oriented response to a budgetary crisis. That is, congress is saying "we need to be reined in!" (That, and "we'd like to pass the buck.") Also, the constitutional text leaves open the possibility of a line item veto (however, then there's the textual argument that the constitution gives congress *all* legislative power, and leaves none for the executive to have).
        - The Court takes a formalist approach—not a functionalist approach recognizing the bdget crisis. It says that the line item veto grants too much lawmaking power to the executive.
            - How does it identify what's too much?
                - (Especially since the executive has some lawmaking power already:
                    - He must sign bills to pass them into law.
                    - He can "return" bills (i.e., veto them).)
                - How is the line item veto different than a "return"?
                    - A return comes *before* an act has (or would have, that is) become law.
                    - The line item veto, on the other hand, concerns law that has *already* been passed—both by congress and with the executive's signature.
                - But how does this violate separation of powers—how is this *more* lawmaking power?
                    - Because it's kind of like *changing* law. And the constitution contemplates that that would be bone

through the whole congressional process.
- Also, the "(pass) all (of the bill) or nothing (of it)" argument.
- Also, the "finely wrought process" argument—that that process is a work of art, fought through at the constitutional convention.
    - The dissenters' functionalist response is that the framers were not envisioning the complex budget that we have today.

The administrative state

Why do we have the administrative state?
- Agencies can address the details.
- Agencies can specialize, and so have expertise.

- Note the problem that the administrative state creates a democratic accountability problem, since congress is sending its authority into the more-or-less democratically untouchable agencies.
    - But—is there an alternative?

- *Whitman* (ps120)
    - The non-delegation doctrine:
        - *Schechter* (1935)
        - *Panama Oil* (1935)

        This doctrine comes to its demise, eventually. E.g., itc. It's replaced with the "intelligible principle" doctrine, found, for instance, in *Mistretta* (p254). (N.b. how Scalia's dissent in *Mistretta* is cured when he adheres to doctrine, writing for the majority in *Whitman*.)

Wednesday, October 13

[Federalism debate]

Thursday, October 14

What do agencies do?
- make rules
- enforce rules
- adjudicate rules

So, we've got some separation of powers concerns. Do agencies have too much authority??

What's congress's role?

1. Can congress create these agencies? (That's the delegation question.)
2. Can congress retain control over these agencies? (That's the legislative veto and appointment/removal question.)

The (non-)delegation doctrine

- The non-delegation doctrine said that "congress may not delegate its authority to administrative agencies." It came out of, for instance, *Schechter Poultry* and *Panama Oil* (both in 1935).
    - In *Panama Oil*, the Court was concerned with the statute in question there because it gave the executive too broad of discretion in his authority.
    - In *Schechter*, the Court set out specific limits for congressional delegation.
- But, since then, the Court hasn't used the non-delegation doctrine. This is the new era.
    - *Mistretta* (p254)
        - The delegation here was to the judiciary (namely, to the sentencing commission), but that's irrelevant to the delegation analysis.
        - The Court says delegation is okay as long as congress lays out an "intelligible principle." And itc., the Court can find oone—it finds three goals congress laid out, and a mechanism it laid out for achieving those goals.
        - The Court says itc. that the non-delegation doctrine simply can't work anymore—things are too complex now.
        - Justice Scalia dissents on formalist grounds—he says the legislature should be the only one legislating...
    - ...but then, Scalia upholds a delegation in *Whitman*, applying the *Mistretta* standard. (!) (But, look at the language here—Scalia says the "intelligible principle" in the act in *Whitman* is at least as intelligible as other delegation language that the Court has upheld before. So, maybe he's kind of being sarcastic.)

The legislative veto

- *Chadha* (p260)
    - Here, the Court asks:
        - Does congress's act have the "character and effect" of legislative activity?
            - Something is legislative in "character and effect" if it alters the rights and duties of entities *external* to the legislature. Here, the decision itc. affects those rights and duties—those of the attorney general, for one thing.
        - Is the action a policy decision in some way?

And the Court answers those questions for itself and says it *is* a legislative act, here.

- Then, it asks: has congress acted within the constitutional lawmaking process—the "finely wrought process"?
    - Has it satisfied the bicamerality requirement?
    - Has it satisfied the presentment (to the executive) requirement?

And the Court says, no, the legislative veto itc. fails *both* of these requirements.

- Note how these questions implicate both separation of powers *and* federalism —because the senate has a stake in the process.
- So, under these rules, congress is left with two options—either:
    1. Don't delegate in the first place, or
    2. Pass a new law completely undoing the agency.

    That is, it's all or nothing.

    (But, Miller asks, if we *need* these agencies—if things are too complex, anymore—how wedded should we be to the "finely wrought process"?)

Appointment and removal

What's the constitutional language here?

- A2§2c2: the president "shall nominate . . . ." But, congress may vest appointment of "inferior" officers.
    - The nominee targets have been strictly limited to those listed.
- Constitutional silence:
    - What's "inferior" mean?
    - What removal power does the president have?
    - What removal power does congress have?
    - What about employees of the executive—can they appoint or remove people?
    - And if congress has removal powers, does that mean they have (some) executive powers?(!)

<u>Appointment</u>

- *Morrison* (p268): must independent counsel be appointed by the president?
    - To decide this, we have to decide whether independent counsel is an "inferior" officer or not. The Court, to answer this, considers four factors:
        1. Is the officer subject to removal by a higher executive branch official?
        2. Does the officer have limited duties? (I.e., he has limited duties

if he can't formulate policy.)
3. Is the officer's jurisdiction limited?
4. Is the officer's tenure limited?

If the answer to all of those questions if "yes," as it is here, then the officer is definitely "inferior."

Removal

- With removal, we don't have any express language to start from. So, we have to discern some kind of rule from a bunch of cases:
  - *Myers* (p274): the removal power of the executive is plenary.
  - *Humphrey's executor* (p275): the removal power *can* be limited, somewhat, by congress. The court asks:
    - Is the officer merely a unit of the executive branch? If so, that officer is inherently subject to presidential removal, only.
    - Is the officer acting in some kind of quasi- role? If so, then congress might limit the executive's removal power, somewhat.
  - *Wiener* (p276): adjudicatory officers are excluded from at-will presidential removal (i.e., the executive must have some cause to remove).
  - *Bowsher* (p278): congress can't create an executive officer an retain removal powers over him.
  - *Morrison* (p279): where the Court does some loosening of the *Humphrey's* categories. The question is now whether the limits will impede the president's ability to perform.

Tuesday, October 19

Foreign policy

Is it constitutionally correct to associate foreign policy with the executive?

- Well, what are the various constitutional competences wrt. foreign affairs?
  - Congress:
    - International commerce
    - Declare war
    - Raise armies and navies
    - Define international crimes
  - President:
    - Commander-in-Chief
    - Treaty-making (with advice and consent of the senate)
    - Appoint ambassadors (with advice and consent)
  - Constitutional silences? That is, is this list of competences adequate to

lay out a blueprint for dealing with foreign affairs? (Note how the judiciary won't be any help here, since it thinks foreign affairs matters are political questions and thus non-justiciable.)

- Constitutional silence—like, what is "war"?

The questions we'll be asking here:

1. What is the *nature* of the executive's foreign affairs authority?
2. *How* can the president act?
3. What is "*war*"?

<u>The nature of the executive's foreign affairs authority</u>

- Hypo: suppose the current president declared that no Iraq reconstruction contracts would be awarded to nations that didn't participate in the invasion of Iraq.
  - Can the president do this?
    - Well, it's *congress* that has the power over international commercial affairs (A1§8c3).
    - But:
      - Does the president have an enumerated power that might allow this? Well, maybe the Commander-in-Chief power.
      - Has congress delegated authority for this to the president?
      - Is this rule-making? And if so, does the president have the power to legislate, at all?

      So, unless there's been a delegation, we'll have to find an *inherent* power in the executive if this thing is going to fly.

- How does *Curtiss-Wright* (p282) characterize the executive's inherent foreign affairs authority?
  - First, the Court distinguishes internal from external affairs matters.
    - The Court is basically making a federalist claim here—that the constitution assigned governmental authorities, and that the constitution gave the federal government *plenary* power wrt. foreign affairs. That is, we do *not* have a government of enumerated powers when it comes to this most important matter—foreign affairs.
    - How does the Court justify this?
      - It notes that the states *never* had foreign affairs authority. Originally, foreign affairs authority was held by the English Crown.
      - With the founding of the new nation, foreign affairs authority vested in the federal government. And it (a) didn't vest in the judiciary, for sure, and (b) vested in the

executive. Why the executive? Because he's the boss of the ambassadors, for one thing, and because "he alone negotiates," for another.

How can the executive act?

- Treaty-making. And treaties become the supreme law of the land if approved by at least two-thirds of the senate.
- Executive agreements:
  - *Dames & Moore* (p286): the executive agreement is just as good as a treaty, basically.
    - However, Justice Jackson's zones of authority analysis may be working in the tacit background, here—the type of executive agreement at issue here had a long-standing tradition of congressional authorization.

Wednesday, October 20

- *Is* it Justice Jackson's zones of power that allow for the balance between executive and congressional authority wrt. foreign affairs?
  - In *Curtiss-Wright*, we have congressional approval.
  - In *Dames & Moore*, though we have only congressional acquiescence, we have a long-standing tradition of congressional approval of similar executive agreements.
  - In *Quirin*, we have congressional approval.
  - In *Hamdi*, we have congressional approval (Miller says, but I see only four justices itc. saying there's congressional approval).

  So, Miller thinks this shows that the Court thinks foreign affairs authority should be *shared* by the executive and congress.

War powers

- How relevant is the framers' intent here?
  - On the one hand, the framers had intimate acquaintance with war and tyranny. So, we might give their intent wrt. war powers special deference.
    - As a matter of fact, the convention record confirms their pre-occupation with the balance of war powers. E.g., Madison said that the most we have to fear from the executive will be in his exercise of war powers.
  - On the other hand, if anything's changed since the framers' time, it's war. So, maybe we should basically ignore the framers' intent wrt. war powers, anymore.
- The War Powers Resolution (1973): here, congress reaffirms the *sharing* of

war powers between congress and the executive. In fact, they say this explicitly (see § 1541(A) (p289)).

- Under the WPR, the executive can introduce armeed forces *only* if:
  1. Congress has declared war;
  2. He's received specirfic statutory authorization from congress; or
  3. There's a national emergency created by an attack on the U.S.
- And, if the executive does introduce armed forces, he must consult with congress:
  - He has to report to congress within 48 hours of introducing armed forces.
  - And he must remove them within 60 days (+30 in special cases) unless there's a declaration of war or a specific authorizing resolution from congress.

- *Cambell v. Clinton* (p292, in text): Miller thinks that if the Court had considered this (rather than ruling in nonjusticiable under the PQD), they would have applied the Justice Jackson zones of power analysis.
  - So, the Court would have wanted to know what congress had said and done, and the history of congressional action in analogous situations.
- *John Doe I* (online as supplemental reading for 10/19/04): concerning the recent Afghanistan actions. The Court wouldn't consider this war powers issue because it wasn't ripe—military action was only imminent at the time of suit. However, here, unlike in *Campbell*, there was explicit congressional authorization.
- Military commissions:
  - What commitment, by the Court, to sharing the war powers can we see in these cases?
    - *Quirin* (ps6): there's explicit congressional authorization, in the Articles of War.
    - *Hamdi* (ps123): ???

Thursday, October 21

Checks on executive power

Civil suit immunity

- Note that the constitution *explicitly* provides for congressional immunity against some criminal charges—but there's no textual commitment to presidential immunity.
- However, the Court has found that the executive does have immunity in some situations. There's two possibilities:
  1. Qualified immunity
  2. Absolute immunity, which the Court picks in *Fitzgerald* (p292).

But, then in *Clinton* (p295), the Court says the executive has no immunity for acts done prior to taking office.

- Why do we allow for executive immunity?
  - The Court doesn't want to open up, to lawsuits, the official actions of the executive.
  - The Court wants to protect the executive from distraction. (However, note that this argument didn't work in *Clinton*, even though the damage prayer there was only $175K (!!).)
  - The Court notes the history of executive service:
    - A tradition of integrity of the office.
    - Sensitivity of the information the executive handles.
  - The Court thinks impeachment is a better check on executive power than civil lawsuits are.

<u>Impeachment</u>

- The Court invokes the PQD on this one. So, that means that congress gets to interpret the constitution when it comes to impeachment.
- What does the constitutional text say?
  - A2§4: providing for the removal of the executive on impeachment conviction.
  - A1§2c5: the house has the sole power to impeach.
  - A1§3c6: the senate has the sole power to try impeachments, with a two-thirds vote required for conviction.
  - A1§3c7: the punishment for impeachment conviction is removal, and criminal liability is not excluded.
- What does "high crimes and misdemeanors" mean?
  - First, let's do a comparative analysis:
    - A1§6c1: "treason, felony, or other crime."
    - A4§2c2: "treason, felony, or other crime."
    - am5: "capital, or otherwise infamous crime."

    So, the framers didn't use *that* language wrt. impeachment. Thus, the HC&M language must (could) mean something special.

  - Next, what did they say at the convention?
    - The original phrase was going to be "treason, bribery, and corruption." But "corruption" was dropped, then later HC&M was added.
  - There's also Federalist Paper #65, where Madison says HC&M meant crimes that damage society itself.
  - In any case, whatever it is, it is *not* limited to statutory crimes. We know this because two presidents havee been impeached for non-statutory "crimes."

Today, there are two basic interpretive views:

1. HC&M is *any* crime, since any crime would violate the executive's oath of office (to uphold the laws of the U.S.).
2. HC&M is truly limited to only "high" crimes.

- How political should impeachment be??

Election: specifically, consider the electoral college as it implicates federalism. See the online supplemental readings for 10/21/04.

Tuesday, October 26

Limits on state power

- Recall that so far we've been talking about the powers of the federal government—specifically, how it's a limited government of enumerated powers, with three branches.
- Now, we want to know: what's left?
  - Whatever it is that's left, it's power that resides in the states.
    - am10
    - Police powers
      - What *are* these? See *E.C. Knight* at ¶3p106, where the Court says that the police powers are *not* restrained by the constitution.

      But that's not exactly true—there *are* limits on state power:
      - A1§10 (the "no-state-shalls").
      - A6 Supremacy Clause: from which the Preemption Doctrine arises.
      - A1§8c3 Dormant Commerce Clause.
      - A4§2c1 Privileges and Immunities Clause

The preemption doctrine

- (Note that the "liberal" wing of SCOTUS today says that the preemption doctrine, *not* the Commerce Clause, is where the states' right fight ought to be fought.)
- The preemption doctrine arises from the A6 Supremacy Clause. But what *is* the preemption doctrine?
  - *Gade* (p305, in text) lays it out: "any state law . . . which interferes with or is contrary to a federal law, must yield."

- Express preemption
  - *Cipollone* (p306): which lays out two basic rules:
    1. Inclusion of preemption language in legislation implies that matters beyond that's language's scope were *not* meant to be

preempted.
2. There's a presumption *against* preemption of state police power.

- Itc., the state activity potentially in conflict with federal law is state *common* law. The court says:
  - With respect to the 1965 federal language—no preemption.
  - With repsect to the 1969 federal language—preemption of *some* of the state common law civil actions.

- What's the Court's role in determining preemption? Well, like with the Commerce Clause, the Court strives to decide between a country with manifold regulations and a country with harmonized, consistent regulation.

- Implied preemption: see the powerpoint lecture slides for 10/26/04.

Wednesday, October 27

- Even though we have the Supremacy Clause, that doesn't spell out a preemption doctrine, necessarily, or explicitly. The preemption doctrine is *court-created*. The Supremacy Clause is just the textual basis for the preemption doctrine.

- *Lorillard* (p306): here, we have a federal act up against a state act (unlike in *Cipollone*, where we had a federal act up against state common law).
  - Note how we see in these cases that the Court's taking preemption doctrine cases on a case-by-case basis. There's a lot of gray.
  - N.b. the 5–4 split here, where the conservative justices are siding with a strong fedeal government (!!) and the liberal justices are siding with the states (!!).

Tuesday, November 2

The Dormant Commerce Clause

Does the Dormant Commerce Clause have a textual basis? No—not exactly.

Wednesday, November 3

Why do we have the Dormant Commerce Clause?

- First, how do we justify it, constitutionally?
    - Is there a structural argument? Well, maybe. In any case, structurally speaking, the judiciary is empowered by the Dormant Commerce Clause.
- There's a historical argument:
    - That's what the *Hood* Court uses. And the Court has to use hyperbole to make that argument work—because it has to make the argument despite a government of *enumerated* powers. That is, it doesn't have much—textually—to go from.

The Dormant Commerce Clause analysis:

1. Is it a state law?
2. If yes, is it discriminatory?
    - Is it facially discriminatory? Or is it facially neutral, but discriminatory in impact or purpose?
        - If yes, the there's a presumption against the law—the state must show that the law is necessary and important.
    - If it's not discriminatory, there's a presumption in favor of the law.

Thursday, November 4

The early DCC method:

- From *Gibbons* (1824) and *Cooley* (1851):
    1. Is it commerce?
    2. Is it local—is it something that's within the states' police powers?

    This is a category-based approach. Recall how this is similar to the CC approach in the earliest limited period of CC jurisprudence, where the Court made a distinction between production/manufacturing and commerce.

    Then, in the modern CC era, the Court shifted to a balancing approach—the "substantial effect" analysis.

We see the same thing with the DCC—a shift from a categorical to a balancing analysis.

- Why do we see these shifts? We're seeing judges recognizing that maybe they're actually, unavoidably making policy—realizing that they are conscious, in their decision-making, of possible outcomes.
    - We see this especially in the New Deal CC cases.
    - This shift is found *throughout* U.S. constitutional jurisprudence.
    - There's an Freudian aspect to this, Miller posits.

The DCC balancing method:

- The Court asks about the benefits and burdens of possible approaches. (But isn't this what the *legislators*, not the courts, are supposed to do?!!)
- *Southern Pacific v. Arizona* (p327): the Court recognizes that the old categories are still useful as termini of the spectrum. For instance, some things are clearly within the states' police powers—and in that case, the DCC does not operate to invalidate state law.
- *Pike v. Bruce Churce* (p350): the Court will uphold a state law unless it burdens interstate commerce more than it benefits the state.
- Justices Thomas and Scalia don't like this balancing approach—they'd like to return to a more categorical approach.

The method:

1. Discriminatory?
    - Yes—then, there's a strong presumption against the state law.
    - No—then there's a presumption in favor of the state law.

    A law can be either:
    - Facially discriminatory
        - This kind of law betrays pure economic protectionism. Look for:
            - Geographically-based discrimination
            - Import or export barriers

            Carbone (p333): the law here is facially discriminatory because the processing of waste could not move freely—i.e., the processing was subject to an import/export barrier.

    - Facially neutral, but discriminatory in impact or purpose

Tuesday, November 9

- Discriminatory laws: if a law is discriminatory, it's (nearly) *per se* invalid. It can only get out from the per se invalidity if the state can show it is:
    - Necessary, and
    - Important
- Non-discriminatory laws: if a law is not discriminatory, then the Court balances its benefits against its burdens to determine if the law is constituitonal.

Again, the modern DCC method:

1. Is it discriminatory?
    - *Carbone* (p333): the law here is facially discriminatory because of:

- Geographic concerns: overt pretotection wrt. geography.
- Import barrier: the processing can't be imported.

So how is *Carbone* different from *Hunt* and *West Lynn* (facially neutral laws)?

- *Hunt* (p338): the law here is facially neutral because there is no explicit protectionism in the law. The law is still discriminatory in impact, however, because it raises the cost of selling apples for Washington growers, while North Carolina growers' cost stays the same. And that, in the fact of Washington's huge marketing campaign.
- *West Lynn* (p343): as in *Hunt*, the law here is facially neutral because it applies to everyone. It has a discriminatory purpose, however, the Court says—but the Court has to look all the way to the only partly related subsidies to find that purpose.

2. If discriminatory:
   - Then the law is in great risk of being unconstitutional:
     - Nearly per se invalid
     - Only a narrow class is not invalid
     - The Court looks at these laws with rigorous scrutiny
     - The locality bears the burden to show:
       - Importance: a legitimate local interest, AND
       - Necessity: no non-discriminatory alternatives
   - *Dean Milk* (p347): the law here is discriminatory, and fails the necessity test. It doesn't fail the importance test, because health and safety are important enough, the Court says. But it's not necessary—the state could have protected safety by just requiring certain grades of milk; it didn't have to restrict the source of milk geographically.
   - *Maine v. Taylor* (p348): this law is discriminatory, but survives the rigorous scrutiny of the necessity and importance tests.
     - Importance: Maine's police power itself is important enough (here, its power over its own fish habitat).
     - Necessity: it would be too hard to protect the fish habitat otherwise. (However, note how it's unclear what science will ultimately say—but the court allows the law to pass the necessity test even in the face of this doubt. (!!!))
3. If not discriminatory:
   - Then the Court balances benefits and burdens—*Pike* (p350), *Kassel* (p354), and *CTS* (p357).

Wednesday, November 10

Community and federalism