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Constitutional Law

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*Constitutional
Law*

*B. U. School of Law
Prof. Biesel*

Shelly v Kramm - 121

Prof. Biesel

(1)

9-17-1787: signing of the U.S. Const. in Philadelphia. 4 years after peace treaty w/ Britain. Ratification: 3-3-1789, i.e., the official beginning of govt.

1774 - 1st Cont. Congress. All 13 colonies were represented except Ga.

1775 (May 10) - Second Cont. Congress.

1781 - Cornwallis surrendered. The Second Cont. Cong. endured until the U.S. govt. was estab. Arts. of Confed. were ratified.

2nd Cont. Cong. more like a gentleman's agreement. This confederation was, however, ineffectual as a functioning govt. It had no power to:

- (1.) collect taxes.
- (2.) regulate commerce.
- (3.) regulate internal order.
- (4.) Draft for Army.
- (5.) Direct foreign policy.

There was also a strong sentiment among some factions for state regulation. The Congress operated upon all three ~~for~~ "branches." i.e. It acted as the judiciary, legis. and Executive.

1787 - Annapolis Convention in Va. called to work out some commercial agreement between the States. The most important thing that came out of this was a motion to have a Constitutional convention. This was sent to Second Cont. Cong. and a resolution was declared by that to the effect that one would be held "for the sole and primary purpose of

(2)

revising" the existing Articles.

Govt. - two basic types:

(1) Unitary - one level. e.g., England, France.

(2) Federal - layers of govt., State and Federal. The Second Cont. Cong. was in agreement that it should be some form of fed. govt. but it was widespread disagreement re the form of fed. govt.

Compromise was struck between the big state plan - Va. Plan - and the small state plan = a bicameral legis. unit: Senate (equal rep.) and House (proportional rep.).

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The Const. is a document of compromises. Slavery played an important part in fixing a bicameral legis. because the House has proportional rep. and the Senate has equal rep. - 2 senators per state.

This document did not go back to any fixed governmental body or agency, but went back to a legal agency (ad hoc) who was estab. for the sole purpose of deciding if a const. was needed, and, if so, what that would be. Therefore, the delegates were elected to this constitutional convention specially and solely for that convention. Thus, their political ties had no

effect on their decisions.

Del. was the first to ratify followed by Pa. + Ga. But, Mass! had a big upheaval. An internal rebellion (Shay's Rebellion) of a type was splitting the state into factions. The fear of the Const. was that it would give rise to a strong, tyrannical, central govt. like the old English govt. ~~to~~ wh the Americans had just evaded.

A compromise was struck - a firm promise by James Madison - that a Bill of rights could be amended to the const. So, the const. was eventually ratified in 3-3-1789. Then, the legis. was estab. w/ Washington as Pres. and John Adams as V.P. being popularly elected.

The Sup. Ct. became estab. on 2-2-1790.

2-2-1790

This was the first federal union of this type and size in modern times. This is the first written const. dealing w/ any federalistic problems.

[I.] Judicial Review

Marbury v. Madison

(p. 3)

Name case.

The "lame duck" Congress of 1801 passed the Judiciary Act of 1801 designed to increase the judicial positions so that Federalists would have jobs. When the new ^{Republican} Congress of 1801 came in, it postponed the next session of the Sup. Ct. The 1801 act had

(4)

also done away w/ circuit riding & had provided that y were to be set up some J.P.s for the D. of C. Adams had signed & sealed a commission for Wm. Marbury but the parchment became lost in the Secy. of State's desk (John Marshall). W/ that paper, Marbury could do nothing, however. (Note: the new Congress [Republican] passed an Act of 1802 repealing the Act of 1801 and re-estab. circuit riding wh could until the Civil War.)

The commission for Marbury had been signed and sealed but not delivered, and the latter was all Marbury sought.

Marbury himself sought out relief, not the aid of counsel, thru the Sup. Ct. via a Writ of Mandamus - one which orders an officer of the govt. or some other official to do a ministerial act. e.g., handing over a piece of paper.

To get into a fed. ct., two requirements:

- (1) Const. provision allowing ct. to take juris.
- (2) Cong. authorization, ^{in some form or another} allowing ct. to take juris.

Since this action arose in D. of C., and since y was at that time no lower ct. than the Sup. Ct., Marbury had to go to the Sup. Ct. Under Art. III, sec. 2, Marbury saw that his action arose under "the laws of the U.S." The law that Marbury found wh covered his situation was the Fed. Judi-

(5)

ciary Act of 1789 which provided for a writ of Mandamus. Marbury relied on Sec. 13 of the Act of 1789.

The Ct. held that the writ stated a good c/a under the ~~the~~ C.L. & the stat. that Madison, as Secy. of State (then) had a duty to turn over and deliver the commission to Marbury. i.e., The Ct. assumed to tell Madison, and Pres. ~~James~~ Jefferson, that they had acted contrary to their legal duty.

The Ct. also held that the Act of 1789, rather sec. 13 thereof, was unconstitutional. Thus, the court assumed the power to rule on the constitutionality of acts of Congress and powers of the executive.

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This case estab. Judicial supremacy via judicial review. Ct. held that sec. 13 of the Act, as it applied in Marbury's case, was unconst.

Art. III, sec. 2: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Sup. Ct. shall have orig. juris." This means the juris. of the Sup. Ct. in those cases is exclusive and original.

Statutory
Construction

The Anglo-Saxon method or canon of construction of a positive stat. is that the negative side is implied, i.e., No other court but the Sup. Ct. shall have orig. juris. in those cases.

Therefore, since sec. 13 of the Act of

1789 broadened the orig. juris. of the sup. ct. per Art IV, sec. 2, that act was contra to the Const., ∴ it (sec. 13) was null and void, i.e., unconst.

However, sec. 13 could be interpreted to mean that the sup. ct. can issue the writ of mandamus in the cases in wh. the sup. ct. has orig. juris.

The ct. will not go out of its way to find Constitutional issues on it can avoid them. — The present-day view.

Thus Marshall did what he did deliberately to estab. the rules that the ct. has the final say as to what the const. means, and that the const. is the supreme law of the land to wh. all laws must not run contrary.

Quaere: what was the effect of declaring sec. 13 of the Act of 1789 unconst. ?? — Sec. 13, insofar as applicable to the situation of the Marbury case, was inoperative. However, it will be operative in cases on it does not conflict w/ the const.

On a stat. or a part of a stat. is so completely contrary to the const. that it will have no application under any circumstance, the stat. will be unconst. If the part of the stat. declared unconst. is so intertwined w/ and dependent upon the remainder of the stat., such remainder will be unconst.

Thus, the Const. is the law of the land, the most supreme and final word on all issues.

This is a govt. and law of lawyers.

This does not mean that Ambassadors cannot go to a Dist. Ct. but means that ambassadors can ^{straight} go to the Sup. Ct. if they want to.

The enumerated class of cases over wh the Sup. Ct. has orig. juris. is exclusive. i.e., An ambassador can go to another court, but the sup. ct. has ^{orig.} juris. only in the cases so named.

To declare an act unconst. is ~~to~~ to necessarily declare it null and void.

Unitary states don't look upon the judiciary as having the final say - so, but upon the Legislature.

Ex parte Rawl

(p. 11)
This is the opposing point of view to Marbury. (Note: This same Judge later publicly repudiated his decision here.) Held, the Sup. Ct. does not have supremacy via jud. review.

FEDERAL JUDICIARY SYSTEM

The Sup. Ct. ~~shall~~ was the only fed. Ct. created by the Const. Art. III, sec. 1.

The "Colonists" felt that it would be a waste to duplicate perfected state systems. So, a compromise was struck.

Assignment:

Read: Chap. II + first two cases in Chap. III.

The very first federalist Congress after the ratification of the Const. enacted a full federal judicial system.

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⊗ Three types of cts:

Art. III, sec. 1

(1) Constitutional courts - those created pursuant to Art. III. Two perogatives:

- (a.) Life tenure - impeachment only for ^{violated tenure}
- (b.) Salary protection - cannot be diminished while he's in office.

(2) Legislative Cts. - created pursuant to Congress' powers under Arts. I^{sec. 8} and IV.

(a.) Tenure - anything set by the legis.

(b.) Salary - can be diminished while judge has bench.
e.g., "old" Ct. of Claims, territorial cts. In 1953, Ct. of Claims switched to Const. Ct.

(3) "Mixture" Cts. - part legis. and part const.

⊗ Structure of Fed Ct. System.

(1) Supreme Ct. - 9 Justices

Warren, C.J. (Calif.)

Black (Ala.)

Douglas (Wash.)

Frankfurter (Howard)

Brennan (N.J.)

Harlan (N.J.)

Whittaker (8th Circuit)

Stewart (6th Circuit)

Clark (ex U.S. Atty. Gen.)

(2) 3 Judge Dist. Cts. (Ct. of — Circuit)

⊗ 4 is direct appeal to Supd Ct.

BETHS C

- (3) Ct. of Appeals for the Circuits - next under Sup Ct. 9 circuits.
- (4) Dist. Cts. - appeals usually go from these fed. cts. thru the Cts. of Appeal.
- (5) Ct. of Claims - hears claims against U.S. in tort, K, etc. Const. Ct.
- (6) Other specialized cts. -
 - (a) Ct. of Customs
 - (b) Ct. of Patents

* State Cts. systems - in some cases, appeal is direct. That's one of the methods of removal to a fed. ct. Another method of removal is to the fed. dist. Ct. for that district.

Except for its orig. juris. ^{of the Sup Ct} Cong can control the juris. of all fed. cts. Congress gets its power to do so from its creative power of these cts.

Congress can add to or subtract from the juris. of the dist. cts. The Cong. can even abolish the cts., even tho' it can't abolish the judges w/ tenure.

Re appellate juris., Cong. can alter or do what it may w/ the fed. cts. Congress says, by virtue of Art. III, sec. 2, ~~that~~ what will be the app. juris. of the fed. cts., including the Sup Ct. If Congress has not ruled on the app. juris. of Sup. Ct. or any fed. Ct., silence means no juris.

So, it must be a stat. of Cong. under wh you come into a fed. Ct. If Cong repeals a stat. wh

19 L. Ed. 264

you are claiming under while you are in the process of going before the fed. Ct. you fall w/ the stat. Ex Parte Macartell, 19 L. Ed. 264. That case involved the reconstruction acts after the Civil War. Even after oral arguments had been made and briefs filed before the Sup. Ct. Cong. wiped off of the books the stat. giving Macartell ~~power to~~ appeal rights to Sup. Ct. under the Act in question, and Macartell fell back to the mercy of the then circuit Ct. (trial Ct. of the old fed. system).

There is no such thing as ~~the~~ gen. Federal C. L. Juris, i.e., is not deter. by or based upon the C. L. The fed. basis of juris. must be Congressional. Good example, i.e., of the "checks and balances" of fed. govt.

Congress can specify size of the Sup. Ct.

Three methods of Appeal to Sup. Ct.

(1) Appeal as of right. Must have congressional stat. as basis of juris. Title 28, the Civil Judicial Code of U.S., and Title 18, the Criminal Jud. Code of U.S., confer the juris.

Even if you get it, you have no guarantee of a

hearing on the merits. The Sup. Ct. will sift out the ones that don't pose a "substantial" Const. or fed. question.

(2) Writ of Certiorari - appeal as a matter of grace. The Sup. Ct. will either admit or deny the writ. The denial is a blank wall. But, if four justices vote to hear a case, then it will be docketed.

(3) Certification of questions - seldom used. When used, primarily from Ct. of Claims and Ct. of Appeals. The Sup. Ct. if it decides to accept this, will answer the question certified and no more.

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Juris. arises in 2 categories:

- (1) Subj. matter
- (2) Parties

Subj. Matter - laws + treaties of the U.S. Art. III, sec. 2; Cases "arising under this Const."; Admiralty and Maritime are specialized examples.

Parties - e.g., diversity juris. (\$10K minimum); citizens of one state against another state or the U.S.; citizens of foreign states.

Vast majority of fed. cases have no const. problem involved.

Many cases deal w/ public law questions: e.g., tax cases; also, crim. cases; admin. cases; tort claim cases under stat.

Assignment:

Ch. II ✓

Brief: Muskrat, p. 44

Colegrove, p. 50

✓ Adler, p. 67

Read: Cbk. pp. 57-58;
84-103, 119.

Chap. II * Power of Jud. Review of State Decisions *

Marbury dealt only w/ jud. review w/in the fed. realm.

It is appeal from state cts. to the Sup. Ct. Review can be
 (1) by appeal as of right and (2) by writ of certiorari.

Martin v. Hunter's Lessee (p. 20)

Lord Fairfax owned many lands in Va. He devised to P, a citizen of England. Va. confiscated the land (reaction against the British). A deed was then conveyed to Hunter, and Hunter brought action of ejectment to quiet title. Sup. Ct. of Va. gave judg. for Hunter.

Martin appealed and the Sup. Ct. reversed. But, the Va. Ct. refused to obey the mandate ordering conveyance to Martin. This case then came up when Martin sought to have the Sup. Ct. enforce its mandate.

Va. said that the Sup. Ct. lacked the power to order a state ct. to do something against its will. Story, J. wrote the opinion (Marshall, C.J. disqualified himself) re-affirming his previous view of the Supremacy Clause of the const.

Sup. Ct. issued its mandate to the Dist. Ct. of Va. & it was obeyed.

Martin was claiming

The Sup. Ct. is superior to state courts, tho' compliance by state cts. is usually merely out of respect, etc., for the Sup. Ct. as the latter normally lacks coercive power to compel compliance.

under certain U.S. - British treaties Va. was claiming title thru the exercise of state prerogatives. So, the Sup. Ct. properly took jurisdiction. State cts. can deal w/ certain fed. questions, const. or non-const. Congress can confer the power.

Sup. Ct. only really concerned w/ state law when it involves fed. questions or conflicts w/ fed. law or the Const.

REFERENCE WORKS

- Procedure before Sup. Ct. : (Sources)
- ① Sporn & Dressman (2nd ed.)
 - ② Roberts and Kirkland
 - ③ Sup. Ct. Rules
 - ④ Titles 18, 28 of U.S.C.

Chap. III * Judicial Review in Operation *

Requirement for Jurisdiction

what can a ct. do?
Cases - civil and crim.
controversies - only civil } Art. III, Sec. 2

* Doctrine of Justiciability - three elements:

(1) Must be adverse parties.
 The general rule is that courts can handle only certain matters, and those must be justiciable matters, matters involving cases and/or controversies.

(2) Must be real, honest, vital and viable dispute. It can't be collusive or merely abstract.

(3) Case must be such that the ct. can decide it w/ finality, i.e., can put it to rest.

* This "doctrine of case and

controversy" is the Const. stat. of the C.L. doctrine of justiciability, and applies to all Constitutional courts.

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Integration Case

MUSKRAT v. U.S.

43 S. 2^d

{ See (re State Ct. "defiance") ^{Virgil} Hawkins v. Board _____, 93 S. 2d 354.

Sup. Ct. here declared a stat. (procedural) of Cong. unconst. because the stat. tried to confer juris. w/o fulfilling requirements of case and controversy. Art. III is a limitation upon Congress as well as the Sup. Ct. Thus, Cong. cannot give the Sup. Ct. more than Art. III provides.

The first two elements of the requirement of case and controversy, are in question. Were P. & really adverse parties, and wasy a real dispute? The Sup. Ct. held no. The addition of the minor Indians to the lists is purely contingent because is no guaranter that they will reach majority, or that even P. here will live to that point if it comes to pass. is no real issue created or present; P is not trying to sell his land now under threat of loss of his land.

The U.S. further, is not really an adverse party because the U.S. is not contesting the attempted alienation by Muskrat

of his lands.

Sup. Ct. probably did not like the way Congress did this: intentional creation of a test case on no underlying dispute existed. So, the Court nipped ~~this~~ ^{practice} in the bud.

However, it could be argued that definitely vested prop. rights have been disturbed as of the 1906 Act. Why, then, should Muskrat have to wait until he tries to sell his prop? Is this a valid argument in favor of saying it is a case or controversy here? Is some author, saying yes, and saying this case was improperly held. Davis, Admin. Law.

[Cf. 221 U.S. 286, and 224 U.S. 640. In these, however, were real adversities.

In Muskrat, also, a strong mandate was issued: it sent the suit back down to the Ct. of Claims and ordered it to be dismissed; no leeway for a rehearing allowed.

[This case is an example of the Doctrine of Juris. to Deter Juris. The Ct. will take procedural juris. to deter. if it has juris. to go to the merits.

This was also an "indictment" of advisory opinions. Const. Ct. cannot perform ~~admin.~~ acts, but only judicial acts. That's another distinction between Const. and Legis. Cts. Cong. can decree that a Legis. Ct. handle these types of matters.

Gen. Rule

It must be a case or controversy for the Sup. Ct. or any const. ct. (e.g., Ct. of Claims) to handle a suit.

But, 13 states' courts render advisory opinions. These opinions, however, are not res judicate. In N.H., the cts. will not render these ad. opinions on existing stats. — Mass. is one of the 13 states. Also, N.H. + Me.

⊗ DECLARATORY JUDGMENTS

It was no fed. declaratory judg. stat. at the time of Muskrat. It is now one, and most states (40 or over) have such a statute.

Quere: Is it a case or controversy when you have a petition for a D.T.? — Here, the third element ~~is~~ is lacking? Ct. must be able to speak w/ finality. However, the cts. ~~do~~ speak w/ finality here, because the D.T. is final and will be res judicate.

The D.T. must have all the requisites of case and controversy for a Const. Ct. to pass on it.

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Assignment:

1. Brief

a. McCulloch v. Md., p. 126

b. Johnson v. Md., p. 721

2. Read

cbk. pp. 134, 719-21, 722-25.

[D.T.
FED. STAT. (300 U.S. 227)
(288 U.S. 249)] →

Team Case — Tenn. stat provided for a D.T. But, upon appeal to Sup. Ct., even w/ the Tenn. Statute, the requirement of case and controversy still must be satis.

Quere: Was Muskrat such that a D.T. could have been brought? (assuming

it was a fed. statute.) Yes. However, today, if Muskrat were to sue U.S. in the same way, it would be thrown out because of lack of real adverse parties. He was merely suing the "great, big non-entity, the U.S." not some specific, pertinent officer of U.S. govt. or agency of U.S.

In D.C., there is no compulsory process - no judgment, no writ, no mandate, etc. no injunction order which carries contempt upon pain of non-compliance. This is merely a shut of ~~contingent~~ rights. However, the et. puts to rest the doubts as to the ~~contingent~~ rights.

The declaration allows some action to be taken before any damage has been done and before the parties have irretrievably changed their positions.

Adler v. Board of Education (p. 67)

The other side of the coin is case and controversy. The Dissent is the really important thing. The majority went too far.

There must be case or controversy; i.e., it must be ripe for action and the party "standing to sue" must be one of the group allegedly wronged.

Note:

"Ripeness for action" was in question. This case tried to challenge the Feinberg Law before the machinery provided for by that Law had even been tested.

Frankfurter (dissenting) is the strictest federal procedure man on the bench, being a disciple of Brandeis.

Movie Censorship - Chicago is the strictest. Police Dept. inspects all movies and either ok's or rejects them. In one case, movie corp. sought a restraining order of some type to restrain them from taking any action w/ respect to films. The Court would not buy the argument of the movie company. Court said the co. would have to first show it so that the police dept. could censor it and then criminally prosecute the movie co. after it goes ahead & screens it publicly. Then, it would be a case and controversy and not merely an abstract question of law. It must be a genuine justiciable case and/or controversy. [READ ASHWANDER V. TENN. V.A., p. 80. Another example that shows the screening process used by the Court.]

Political Questions - a little different from C+C. Court won't hear these. There are 4 ~~major~~ major areas in which the court will refuse to deal w/ the merits of the case on, technically speaking, there ~~are~~ are political questions involved:

① Republican form of govt. - Court will not say whether a state has a republican form of govt. The legis. decides that, or sometimes, the executive.

(2.) Some matters under Art. V -
Court will say that the
powers of Congress are ~~the~~
supreme here, re amending of
Const. Court will look on this
area as involving the political
question doctrine. (See *Coleman v. Miller*.)

(3.) President of the U.S. - under
the const., his determination
is supreme and binding in
the areas on his powers
as (a) Supreme commander of the
armed forces and as the
chief and (b) top foreign rela-
tions "ambassador" and spokes-
man. E.g., ~~the~~ on the Pres.
recognizes the de jure govt. of
a foreign state, and the Court will
not review or interpret his action.
Also, the Pres. can unilaterally
send troops into Cuba, and
the Courts will not look at it.
(4.) Electoral process - courts will
not look at this area either.

Colegrove v. Green (p. 50)

There was a gerrymander here and
this "case" was held by the Court
to be lacking "C. and C."

TEST OF
"Case and
Controversy"

Test of whether a fed. ct. has
author. to make a declaration
for deter. whether ~~a fed. ct.~~
~~has author.~~ the controversy
"would be justiciable in this
Court if presented in a suit
for injunction."

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Electoral Process - considered political.
e.g., Ga. county unit system.

The pol. question doctrine is one of avoidance. But, the ct. does not avoid all "pol." questions. e.g., The ct. has dealt w/ minority voting rights on the basis of "race and/or color."

Another problem in Colegrove v. Green was that the election was only a few months off, and ct. said that more harm than good may be done. Therefore, the court exercised its equity juris. and discretion and refused relief on the ground of its discretion.

Congress can refuse to seat an elected Congressman. So, if the Sup. Ct. gets involved in the re-districting, a question might be raised re whether the Court has assumed the final say - so re this matter on the court has already said that Congress shall have the final voice here. This touches "a little bit" on case and controversy.

The "pol. question doctrine" is a loose, broad doctrine of self-abnegation or avoidance. Even tho' only three judges ruled on this, the doctrine has grown and become more solid. This was followed in 355 U.S. 281; 339 U.S. 276. This is not a problem by wch state relationships have been imposed and resolved, but is a fed. problem.

Major Areas today of Sup. Ct.:

- (1) Taxation
- (2) Civil Rights
- (3) Criminal Law

Major Settled areas:

- (1) Fed. reg. of Commerce
- (2) Fed. Taxation
- (3) Treaty powers.

Assignment:

Cases pp. 162-172.

* Nat'l. and State Power: The Early Struggle Toward Standards

McCulloch v. Maryland (p. 126)

W/o Cong. action is immunity from state + local taxation, implied from the Const. itself, of all prop., functions + instrumentalities of the fed. govt. — Invoked much dispute. — Why did Marshall discuss the constitutionality of the enactment creating the Bank of the U.S.? This was really a case involving the taxation of power of a state.

There are two basic state taxes:

- (1) Prop. tax — deter. per the value of the prop. (real)
- (2) Excise tax — a tax upon the happening of an event, e.g., a sale or biz trans. action.

This was an excise tax upon bank notes issued by all banks not chartered under Md., i.e., foreign corps. The Bank of U.S. had its home office in Philadelphia and a branch in Baltimore. It issued its own bank notes.

So, why did Marshall have to discuss the legality of the Bank of the U.S.? This could be looked upon as a political essay to the country. But, it had a legal

Fed. agent involved.

significance.

The Md. tax was held valid under Md. law by the Md. Ct., and the Sup. Ct. accepted that finding. There was no fed. question there, but we were dealing with a fed. fiscal agent who was a United States bank. It was mainly a depository for U.S. (fed) funds, chartered under fed. statute. So, we have a Md. stat. valid under Md. law, and a fed. stat. Do these conflict? If the fed. stat. immunizes the bank, the Md. stat. will have to give way. So, one must be supreme or is an irreconcilable conflict between the two.

RULE OF LAW

REQUISITES TO
SUPREMACY;
REASONING

The Supremacy Clause of the U.S. Const., Art VI, clause 2, states the rule. So, Marshall had to first find that the fed. stat. was constitutionally enacted before it could be declared supreme. Once that is shown, the irreconcilable conflict between the fed. stat. and Md. stat. can be settled by resort to the Supremacy Clause.

Where does Congress get its power to create a bank? Art. I — the Congressional article — sec. 8 says nothing specifically. ⊗ Doctrine of Enumerated Powers — congress doesn't get its powers like many other governments. The fed. govt. has only those powers given it by the Const.

of notes
go to p. 23, first

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23a

Step #1 - valid under State law. Step #2 - valid under fed. law; #3 - an irreconcilable conflict between the two laws; #4 - Marshall approach under Supremacy clause makes fed. law win out every time.

But, before ct. can get to step #4, it must first decide that Bank is valid under fed. law. Is this power found in the Const.? Can Congress charter a Nat. Bank? Const. is quiet. But, in Art I, sec. 8, Congress is given financial powers. The last clause of sec. 8 is the "implied powers" or "necessary and proper" clause.

Ms. argued that this clause should be read narrowly; that Congress must be able to show why they need use this.

Sup. Ct. read clause as (1) a power-granting clause of itself, (2) broadly. (3) So long as it had a reas. connection w/ Congress's enumerated powers, it's not necessary to show this absolute connection.

Congress wanted some kind of fiscal agency. The "necessary and proper" clause enabled them to get such. The end was a fiscal agency; the means was the Nat. bank. The power ~~was~~ to act by Congress must be traced to the Const., same w/ Sup. Ct. and Pres. — The Enumerated Powers Doctrine. If you cannot find that form maintained, it is danger. McCulloch says that from the express power, we can imply other powers — and Congress has a wide choice.

If Congress wants to view the

Ct. of Claims as a legis. ct. or as a Const. Ct. / it may do either by virtue of secs. 1, 8, + 18 of art. I. - Policy matter.

The only thing a ct. will do is
overturn an obvious abuse of power.

Conflict problem - what, if any-
thing, is in conflict here? Is any-
thing in the Const. wh creates a
conflict, wh says that a state c/w tax
a fed. agency or instrumentality, etc.? As
a practical matter, if the bank could
operate and pay the \$1,500⁰⁰ per year,
would the laws be considered in
conflict? But, to get to Supremacy
Clause, it must be an irrecon-
cilable conflict. If Congress put in
Bank's Charter that no state shall
tax this Bank, a head-on colli-
sion w/ state tax law.

Can you say that endowment
of Bank free of state taxes is a
necessary & proper step to pro-
tect Bank? - Yes; Need this
for immunity of bank. But, we
don't have this here. Banking act char-
ter is silent on the matter.

On if is conflict, could be one
of two things: (1) Implied immunity
given by Congress, or (2) In this
kind of situation, it can be a Const.
implied immunity. Trouble w/ this
case is that we cannot be sure
on immunity comes from. This is the
essential ambiguity of the case. It is general-
ly believed that #2 is the reason, but not
quite sure.

Would this happen to any state tax
on any fed. agency? - No, c/w so far.
Ct. indicated that this was a tax on a
function of the bank. This could burden &

perhaps even control the bank's operation. Ct. had no factual finding that Md. tax was controlling & burdening bank, but it was ~~not~~ a possibility. "The power to tax induces the power to destroy."

Final phase: must look behind to see what judge is doing. Marshall did not want to give credence to a principle of state power to tax fed. agencies. A doctrine of res. taxation could have been worked out. But, Marshall saw this as a clash of powers & principles, not of facts. Marshall ~~d/n~~ want a series of cases on the Court would have to weigh state taxes over fed. agencies.

Wh must give way? Art. 6 says Const. is supreme law of the land. But, problem is not so obvious. Marshall's position: once you have found these four steps, then in every case, Const. is supreme.

If you want to minimize supremacy clause, d/n find the 4 steps, or read the supremacy clause w/ exceptions.

23d

GEN. RULE

Everytime any fed. power is asserted, it must be Const. support for it. This is the problem of "tracing the power" — any exer. of fed. power must be traced to the Const. (Note: when you come to Treaty & War powers, you may have to have a different approach.) Another doctrine of fed-state rels. is the Supremacy Clause Analysis.

See Notes 9 Feb. 60 here →
(supra)

10 FEB. '60

Johnson v. Maryland (p. 721)

Postal truck driver arrested & fined for driving that truck in Md. w/o a Md. license.

To what extent are federal ~~ex~~ controllable by State law? Can the licensing of the State affect the truck per se? The driver? These states are perfectly good w/in their sphere. But, is there a conflict between the state and fed. states? This is too minor for Congress to deal w/. — The fed. states deal here w/ carrying on the functions of the postal service. If there were a fed. statute or valid postal regulation immunizing the fed. ~~stat~~, the state statute would obviously not prevail.

Here, the State regulation goes right to the functioning of the dept. But, is there a conflict and, if so, how acute is it? It said it (stat.) did attempt to reg.

a fed. instrumentality, and that
 it was an acute conflict.
 Thus, the fed. law will be
 supreme and, the state
 stat. is here inapplicable.
Thus, the police power of
 the state must give way
 on it conflicts w/ fed. func-
 tionings.

Under Marshall's view, the
 fed. stat. supremacy in
 cases of conflict is absolute
 & is no circumstance,
 under this view, on the
 state stat. will prevail.

hypoi:

Postmaster tells truck (mail)
 driver to break the law
 and speed above the limit
 so as to get a load of ^{air} mail
 to Logan Airport in time
 for a certain plane. —
The fed. stat. authorizing postal
 operations will prevail!

Fed. bldgs. pay no city taxes.

Marshall, in McCulloch,
 said that the tax burdened,
 retarded and impeded the functions
 of the Bank.

Since Congress had the power
 to create the Bank, it has the
 power to protect it in what-
 ever way it deems necessary.

Real Estate taxes — ask yourself
 whether the tax goes to &
 affects the heart of the function —
 one of the agency? If not, then
 maybe the tax would be allowed.

But, in McCulloch, the tax went to the very functioning of the Bank.

Assignment:

Supplement -

Last 3 in

vol. I of the

Supp. (Michigan + Detroit cases)

case p. 694 + note at

701 - 702

case p. 715 - 717.

Cases vol. 162 - 171.

* It would be hard to convince a ct. that Cong. authorized the postmaster to authorize a violation of the crim. law. e.g., speeding.

* TAXATION (STATE) *

General
Issues

The State taxing power is an anciently recognized one. Is the state slt. appropriately drawn, and is the thing taxed a proper subject of that taxation?

The State has many functions wh must be carried on.

State's power to tax is a matter of law + is ltd. by law. To what extent? what law limits it?

State can tax any arrangement or activity w/in its juris. as it chooses when this is not otherwise ltd. by the Const.

12 Feb. 60

BROWN v. Md.

Case re Md. stat. (taxing) - license fee. "All importers of foreign articles selling the same shall, before they sell, take out a license costing \$50." Seems to be a test case. Brown lost in Md. cts. - Marshall handles opin-

ion in 2 parts: (1.) Export-import clause of Art. I, sec. 10 - no state shall, w/o consent of Congress, lay import or export taxes except those necessary for inspection. Necessity of cts. defining what import is becomes a key concept; what is a duty?

(2.) We want to know what an import is for a state to lay an impost on it. Definition controlled by problem. Goods coming in from abroad. Md was an active port. P came into contact w/ the state taxing power w/ a license to sell. Q. Can Md. get to P + tax these imports? Q. Does clause mean that import c/n be taxed in any form? =

Md.'s position: as soon as goods hit dock at Md. & are transferred from ship to dock, they are no longer imports. This was Taney's position. Net effect of this position: Md. c/n tax privilege of moving goods from ship to dock. Taney wants, for policy reasons, to read clause as narrowly as possible.

Marshall d/n accept Taney's position. He felt that concept of importation must extend beyond the mere phy. intro. of goods into the state. He held that they are imports until sale, so Md. cannot tax Brown until sale. Otherwise, Md. could bar all goods from their docks by high tariffs. Marshall extended the immunity to Brown's selling. So, Brown cannot be required to take out a license to sell.

When "imports" stop being imports -

Marshall reads this from sec. 10. Via dictum, Marshall goes on to indicate how far the immunity would extend. He indicated that goods could retain an immunity. He is concerned w/ : when these goods finally become part of the mass of goods in Md. they would lose their character as imports. But, time is not of the essence. If goods are stored in warehouse in their orig. form, they retain the immunity. But, if Brown (1.) breaks down goods from orig. packaged form and displays them, imports change to domestic goods; or (2.) one sale from mass of goods would be enough. So, Brown cannot be made to take out a license, for goods not taxable until either of these two things occurs. But, this is dictum.

What if Ct. had drawn line too narrowly? Merchants would seek to have Congress change this. This is a pol. question. Marshall treated it as a matter of law.

To some extent, this gives imports an advantage over domestics. If he commingles the goods, he may subject them to a personal prop. tax, but still not be subject to the sales license tax.

Why did Marshall use the double-barrelled shotgun approach here?

Art I, sec. 10 - takes care of the case nicely - tax angle. But, what of

Commerce Clause (Art. I, sec. 8, cl. 3).
Art. I - §10 limits states: "No state
 shall." Art. I - §8, says "Congress shall
have power to reg. trade w/
foreign nations." This is a grant
of power to Congress. Is it ∴ a
limitation on the states?

Brown, by paying his
 commerce duties, in effect, gets
 the right to sell. That is what
 Marshall reads into Art. I, § 3.
Implication is that states c/n
run contra to commerce
clause itself nor against tariff
act. This indicates that the
 states taking power is ltd. by
this clause.

What if Congress had not
 acted - we had tariff before
Article? Would Brown have been
 in a worse position? - seems not.

Congress d/ta Tax movement of
 goods between the states.

So, the fact that Congress
 is given the power is in itself
 a limitation on state taxing
power. Marshall was laying
 the foundation.

In Woodruff v. Parham, the
 power of Congress was held to be
ltd. to foreign states, limits I, 10;
excluding goods between states

15 Feb. 60

Brown v. Md.

(p. 162)

Issue: whether the legis. of a state Express limitation on state taxing can const. require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported? NO.

The second part of the case deals w/ the effect and force of the limitation. Marshall "scratched around" and found a Congressional stat. which he then preyed upon + used.

So, what is the effect of the tax on "imports" by state prohibited by Art. I, sec. 10, cl. 2, and importation is the act of importation and the thing imported. If the Conf. stat. come into conflict w/ the state stat. i.e., power to reg. Commerce, + an importer purchases that priv. by paying duties to Govt. So, here the state was in conflict w/ Congress's power and must fall. The taxing power of a state is ltd. to cases on apply.

It's not in conflict w/ an act of Cong. regulating Commerce.

Brown v. Houston

(p. 171)

Woodruff v. Parham - a state may tax even the first sale in the orig. package after interstate transit. Policy is to preserve equality between competing merchants by requiring all biz to pay its just share of the local tax burden. Part I

But, by 1890, it was found that the Commerce Clause definitely restricted the state taxing power.

If a state discriminates against foreign or interstate Commerce, then that enactment is void as against the Const. This is a basic, black-letter rule of law.

* Problems - Mimeographed *

#1 (A) Q. Was this a tax on the fed. govt.? James v. Dravo Contracting Co. (p. 694) - the co.

James v. Dravo King Co. (p. 694) when making a bid, will include the tax (in the bid) that will have to be paid under W. Va. gross income tax. So, in effect, this will be carried over to the fed. govt. for whom the K_{or} was going to do the work. No matter! Here, K_{or} forgot to include the tax in his bid and now ~~he~~ alleges that he should be required to pay the tax because it would be an indirect tax on the fed. govt. due to the above reasoning, and a state cannot tax the fed. govt.

Respondent has no Const. right to immunity from non-discriminatory local taxation & the mere fact that the tax in question burdens respondent is no defense. But, if the tax is actually laid upon the gross receipts placed a direct burden upon Fed. Govt. so as to interfere with the performance of its functions, it ~~could~~ would be invalid.

Held The W. Va. Tax so far as it is laid upon the gross receipts of respondent derived from its activities within the borders of the State does not interfere in any substantial way with the performance of its functions & is a valid exaction.

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The ^{eventual} bearing by U.S. of the full amt. of the tax is not given determinant nature of the invalidity of the state tax.

Suppose you are advising the Army, and suppose I submit bill for \$20,600⁰⁰, i.e., \$600⁰⁰ tax tacked on. Should Army pay the full amt. or only \$20,000? Must Army pay as a matter of law assuming I have been a K for the "cost" of the chickens? ~~\$20,000⁰⁰~~

Suppose the Army has no legal obligation to pay I (seller), would I still have to pay the State of Heltrick? Yes, if the tax is valid, and here it is.

In the problem, the K price is

Army would only have \$206 and does not include the \$600.
 to pay \$206 per K. If U.S. is immune from pay.
 as a matter of law. But, of the tax, is D also sheltered w/
 this would not excuse immunity? = Not necessarily, and here, No.
 D from having to pay ~~absorb~~ the tax. But, it has
 the tax.

Eventually, the Govt. will
~~absorb~~ the tax. But, it has
 no legal obligation to do so unless
 it K's to absorb the tax by pay-
 ing the \$600.

D (seller) must pay. Govt. may
 or may not pay.

Altho' the taxing act may give
 D a derivative immunity, the Const.
 may not. - Quare?

A state can't be treated better
 than the fed. govt. & vice versa,
 as that would be inequality
 and \therefore discriminatory.

D was not Agent
 here as matter of
 substance.

(B.) Assuming K has no immunity,
 it would have to pay both the
 sales & use taxes. But, under the
 A.E.C. Act, "activities" of the A.E.C.
 are tax exempt. Q. Were K's activi-
 ties those of the A.E.C.? = Yes, if
 K is agent of A.E.C. No, if
 K is ~~TK~~, and this latter
 is more likely under
 the facts of the latter, K has
 no immunity.

(I recited here.)

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(I recited here.)

Source of
Governmental
Immunity

The implied immunity of the Govt. from state taxation arises from the whole Const. wh. permits the carrying on of govt. functions. The A.E.C. could not be taxed. Could not tax the prop., privilege to K not use by A.E.C.

Q. Would Du Pont or K have to pay? = If the purchaser is the agent of U.S. Govt., it would not have to be paid. Kern-Limerick v. Scarlock, 347 U.S. 116 (1954).

Only \$10,000⁰⁰ of the \$406 would be use taxed - cannot have "duplication of the tax" under the statute of Hetchick.

Re the \$40,000 equipment use tax, ~~K~~ obviously bought the things for his own use in the construction. So, K would pay that \$106. This problem must be approached on a Const. basis.

(C) What was Cong. intent here? = Was it to extend the Const. immunity of the A.E.C.? =
If K is A.E.C.'s purchasing agent, then the last line would make no difference.

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Kern-Limerick was in effect overruled by the case of Detroit v. Murray.

Two types of Immunity:

- ① Express [Cong.]
- ② Derivative Immunity.

Looking at Kern-Limerick, we first say if can be no tax on the govt. If it is an "agent," you got to get that party in the Govt.'s shoes to avoid liab. of that party for the tax. This Kern-Limerick held that the purchasing agent under K w/ Govt. was immune.

Ala. v. King & Boozer, Danes v. Dravo King Co. were two cases, along w/ the three Michigan cases, supporting

Problem I

("No duplication of the tax.")

(B.)

Sales Tax

\$ 30,000

200,000

230,000

.03

\$6,900.00 - sales taxUse tax

\$ 10,000

200,000

210,000

.03

\$6,300.00 - use tax

353 U.S. 489 ←

I contend that K would have to pay for the reasons set out in Detroit v. Murray Co., reasoning that ~~the~~ even if K is an agent of the Govt., the tax is on the purchase, and K was the one making the purchase and the one eventually using the materials & equip. for his own private ends. See Detroit Case, supra; Alabama v. King & Boozer.

I contend:

1.)

The taxable event is the use. K was the one using the equip. & materials, not the Govt., ∴ K should bear the tax. This is not a tax on the Govt., nor its prop. Further, K was using the prop. for his own private ends. U.S. v. Detroit; U.S. v. Muskegon; Detroit v. Murray Corp. In point: Curry v. U.S., 314 U.S. 14

The first thing I noticed when I stepped
 out of the plane was the cold. It was
 a sharp contrast to the heat of the
 desert. I had heard that the weather
 was perfect, but this was different.
 The wind was strong, and it felt like
 it was trying to strip me of my clothes.
 I pulled my jacket tighter around me
 and looked out over the landscape.
 It was a vast, open plain with a few
 scattered trees in the distance. The
 sky was a pale blue, and the sun
 was just beginning to set. I felt a
 sense of awe and wonder. This was
 a new world, and I was about to
 explore it.

→ 8-11-73

1) Location:
 2) Time:

the state taxes.

Gout. officials were in a reactionary mood & favored the state taxes for not extending the taxation immunity.

- (C) (1) Note: the stat. of Settrick makes seller liab. for the tax even if the seller cannot get ~~repaid~~ repaid by buyer. ^{due to buyers non-liab. for the tax.} On the other hand, if this happens & sues the state, he can allege violation of due process.

(A) Equipment - belongs to K.

Congress is presumed not to make futile acts. So, we can say that the Const. was silent re the immunity and that Cong. was \therefore extending the immunity.

- (2) Would not affect the Comm. because it would leave it as it was before the stat. w/ the same immunity of the Const. Thus, since Cong. makes no futile acts, it can be implied that it must have been intended to have some effect. What effect? =

- (D) What is the reason behind this?

Prepare these problems re the use tax.

2-28-60

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(D) (cont'd.)

(a)(1) of §112 applies to any ~~one~~ acting for the Govt. or any agency or instr. of the Govt.

- If this language is effective, it hammers away at Kern - Limerick Case. If, \therefore , Kern - Limerick is abrogated, then are the three Detroit cases effective? - If the three "are", then what use is this act? =

U.S. v. Allegheny County, 322

U.S. 174, held, Govt. -

owned prop., to the full ex-

tent of the Govt's interest y-

in, is immune from taxa-

tion, either as against the

Govt. itself OR AS AGAINST

ONE WHO HOLDS IT AS A BAILEE

Allegheny Case is not over-ruled by the Detroit cases, but is greatly weakened.

In Detroit v. Murray Corp. (Supp.),

the state tax was upheld as being

not a tax upon the Govt., but upon

Murray; saying this was

not a tax on the prop. but upon

the privilege of using the ~~prop.~~

the Ct. further saying that

it will look behind the state's

characterization of the tax and

will look at the substance,

not mere technical form. Post.

by Murray Corp. was for its

own use.

The Ct. admits that title

rests w/ the Govt., but

says that it is not a tax

ON the Govt.; that legally, the

Govt. is not being made a

taxpayer under the statute. The

Ct. took a sharp, legalistic look.

No tax on Govt. because no legal

incidents of taxation fell

on Govt.

Kern - Limerick was not a

constitutional case. What would

PROBLEM IN DET. V. MURRAY CORP.

is whether & to what extent

private parties who do biz

w/ the Govt. should be given

immunity from state taxes?

Cong. has the power to de-

cide this.

happen to that case today? =

It is a const. immunity from the payment of tax on govt. obligations (bonds, except one). Suppose the Cong. stat. so providing were wiped off the books. Would this mean that the States could then tax the U.S. Govt. bonds? If so, we (as citizens) would have to pay the tax, and the only thing shifted to the Govt. is the burden of having to compete w/ other bonds on an equal basis. However, that might be too great a burden. Quære?

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(E.) (i) Sales tax - Heltrick, seller's state, has the sales tax. Cases from p. 573 to p. 614 of ch. 1. Western Livestock Case - re a tax on the privilege of doing biz, not a sales tax. It was on the gross receipts. Freeman v. Hewitt - the tax was

on interstate transaction and was not discriminatory. Here, the tax was held invalid because it was a burden on interstate commerce. The privilege tax is of a type which has been regarded as mere.

A seller-state cannot impose a sales tax on an interstate transaction on it creates a burden on interstate commerce. (?) - Involved an intangible.

Adams Mfg. Co. v. Stoen (p. 578) - not really concerned w/ on the receipts. It will take place. - what

The vice sought to be avoided: multiplicity of taxes. (Involved a tangible.)

Hettrick stat. makes buyer also responsible, even tho' most of the old sales taxes apply only to sellers.

How about ~~tax~~ in buyer's state? In seller's state? If the tax is invalid, why is it? =

(F.) Re the use tax. What's the taxable event? How often is the use tax assessed, only once or periodically? Is this in the nature of a prop. tax or an excise tax? The tax seems to always go on the privilege of using the prop. ~~not~~ on the prop. per se, altho' it could well be argued that this is a tax on the prop. — This is called, generally, a "compensating use tax." It's used to compensate on the sales tax does not operate.

Here, can the use tax be imposed by buyer's state? By seller's state?

What is I.C.? What makes something within the purview of the com. cl. of Art. I, sec. 8?

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Once you show that a state is discriminatory, it will be struck down.

Note:

[when solving problems, write them out + make your own little memorandum, citing cases, etc.]

NOTE: due process may destroy a state tax. If γ is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue". Thus, "due process" & "commerce clause" conceptions overlap to some extent.

Adams Mfg. Co. v. Storen — for our purposes, a gross income tax is the

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Adams Mfg. Co. v. Storen — for our purposes, a gross income tax is the same as a sales tax. Here, seller's state sought to impose sales tax on seller for goods shipped out of state, and Court said it was unconstitutional. — On did K arise, in wh state? Law of the state on K consummated is the law wh will govern. Here, K was consummated in Ind. What if K is "out of seller's state" can latter tax? = [In Hewitt Case, K in N.Y. on the floor of the N.Y. Stock Exchange by use of agents.] No: Not within its jurisdiction.

Quaere:

Hypoi X goes from Mass. to N.Y. and buys typewriter at Macy's intending to take it back to Mass. N.Y. is seller-state and ~~has~~ has sales tax. - This ^{transaction} has multi-state overtones, but would the tax here be valid? =

(G.) A tax directly on the army would naturally fall due to its obvious

immunity.

But here, would this tax by the buyer state on the buyer - restaurant be valid?

Mc Goldrick Case -

Does it make a diff. on the Ka-rose? (i.e., consummated)?

In Mc Goldrick, Brach office in N.Y. handled all Ka-rose matters in N.Y., but in McLeod Case, all Ka-rose matters were handled in the seller ~~state~~ state of P. Tenn. This is the big diff. between the two.

Quere: Could Pa. have sales taxed the same ~~transaction~~ as did N.Y. in Mc Goldrick? = No, Adams Case in point: can't have multiplicity of taxation.

Could Tenn. have taxed the same transaction in McLeod case? Yes. Case in point? (Maybe Adams Case.)

Use Tax

(F.) What about the use tax? No tax could go on the Army. So here the use tax would be obviously invalid.

What if it were not the Army but a restaurant in Mass. ~~Hell~~ using the chickens? = Would D have to pay? = Note: ^{use} tax on the restaurant could not be enforced because Helltrick would have no way of knowing how many chickens were used by the Restaurant in Mass. So, could D be required to collect the use ~~tax~~ upon pain of having to pay the use tax himself? = This would be a tax held probably valid.

29 Feb. 60

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If you wrote Macy's for a typewriter, that would be fully exempt, N.Y. couldn't tax - Adams Case; Mass. couldn't tax - McLeod. What about Berwind-White Case? Buyer state imposed the sales tax. Does that case represent good law still? We must now look at the Norton Case.

Norton Co. v. Dept. of Revenue

Does this support, expand, or refute McGoldrick v. Berwind-White Case?

Anything that funnelled thru the Chicago branch office could be reached by Ill. tax, as held the Sup. Ct.

In Berwind-White, it was a sales office in N.Y. which handled & made the sale. This was a sales tax.

2 theories of sales tax: (same effect)

- (1) Seller liab. directly to state & has an action over against the purchaser. - Heltick type.
- (2) Purchaser must pay seller, & seller is agent of the state.

Does the fact that a K was made in N.Y. take it out of IC? Was it an IC problem in McGoldrick? Merely because you have an interstate transaction does not mean that it is immune.

In McGoldrick, it found that the tax was not on IC, it therefore valid as imposed by the buyer state.

In McGoldrick, L.H. Co. Case, & Norton, it was the physical presence of the seller in the state.

In McLeod, Y was only an itinerant salesman in the buyer (taxing) state.

Quare: What does the existence of a sales office in the taxing state have to do w/ IC and prevent the tax from being burdensome? The out-of-state seller would become a local seller, and Y would then be no discrimination against out-of-state sellers in favor of local sellers. But, this does not relate necessarily to Burden. Actually, "burden" is not a good concept to compare all of these cases.

We know that that one completely immune transaction exists re sale tax - on all trans. is via phone, etc., across state lines. But, the purchaser would be liable to the buyer (taxing) state for the USE TAX.

Under the sales tax, if Y is a branch office, liable. Is the same true of the use tax? Suppose a mail order house has no place of biz in the taxing state. Can that seller be made to collect the use tax if purchaser is in taxing state? And, if seller in State X does not collect the use tax from the buyer in State Y, can State Y require the seller to pay? In Miller Bros. Co. v. Maryland, the Court said that P did not have to pay the

use tax, even this, on occasion he used his own trucks to deliver the purchases. But I did not do any biz in Delaware, the taxing state. i.e., Court ~~seemed~~ to blow the whistle on use tax on seller has no "base" in the taxing state. In Gen. Trading Co. Case, Ct. seemed to say that solicitation in the taxing state was a suffi "base," and that, i., the tax on the seller was valid.

113 ALR 28444

Look at the "double-barrelled" concepts of IC and jurisdiction. — Do problems II + III.

1 MARCH 60

* PROBLEM II *

Quarrr: Is D engaged in IC? = Yes. Why?

This is a hybrid-type tax — has aspects of the gross income tax and a set per annum tax.

This is a tax on occupations, domestic and foreign. So, to that extent it's not discrim., "at least not in its impact."

A peddler has his goods w/ him. A drummer has no goods w/ him but solicits orders for later delivery. D, here, was a drummer. — Cases would go differently depending on who one is. The ptf.

Quarrr: Can a state tax one for the privilege of engaging solely in IC? =

No.

If this occupation tax is invalid, why is it? In Brown v. Md. Marshall argued that that occupation tax was, in effect, a tax on the goods, & ∴ a tax on IC, & ∴ invalid.

257 F.2d 910
328 P.2d 589

This case was held valid by the N.M. Sup. Ct. - 328 P.2d 589. It was appealed, and by dictum, said that the tax was invalid. 257 F.2d 910.

* PROBLEM III *

Gross income is quite close to gross sales even tho' it is some diff.

Net income means income less certain allowable deductions. It's somewhat similar to profit.

Gross receipts tax can actually be levied on a bankrupt corp.

(A) In U.S. Que Co. v. Town of Oak Creek, it was a domestic corp. doing IC biz. This question of domesticity is a big thing; the question is how big. But, here D is not a domestic corp.

Presumably, every state thru wh the cars pass ~~can~~ will be able to subject the cars + D to the same tax.

This stat. given to us, Maynard, is just the part applicable to non-residents, but it is the same tax on residents (assume).

The legis. wants to make

sure that non-resident corps.
pay this tax. But, is this tax
const. ? =
Quare: What about risk of multi-
plicity ? =

2 Mar. 60

(C) Internat'l. Shoe Co. v. Wash. (see abstract)

Quare: Would P be subject to the Heltrick tax?

Quare: Under the Northwestern States Portland Cement Co. Case, would the Heltrick tax be valid on the Internat'l. Shoe Co.? In the Cement Co. case, y was a net income tax on a co. doing only Interstate biz.

Northwestern States Portland Cement Co. Case -

An apportioned net income tax based on salaries, sales, prop.

There is a sales office w/ co. furniture, salesmen, sec'y. y is no real estate in Minn., no warehouse, no goods kept y.

In Shoe Co. case, y was no sales office, but ~~only~~ 3 salesmen who lived y. Q. Would the Heltrick tax or Minn. tax be valid on the Shoe Co. ? = Heltrick probably would under Portland Case.

(B) Yes.

Suppose Shoe Co. had nothing but travelling salesmen out of St. Louis. Or, suppose men only went into Minn. to talk to prospective customers for advertising purposes.

Clearly, if nothing but mail were sent into Minn., the tax would not be valid. ~~Here,~~ the Shoe Co. would not be amenable to service of process. Or would it?

[Consider] The nexus of the operations of a Co.'s activities to the state and the benefits it, in turn, confers on the corp. Q. Is this a double-barreled problem: due process + IC? Q. Or does IC come in here? Quarre: Is a mail order house, having nothing in the taxing ~~step~~ state, "doing biz w/in the state"? Q.

Assign: Consider the Cong. stat. Q. What case was Cong. seeking to effect? Q. Did Cong. succeed? Q. What effect did the Spector case have on the Northwestern + Shoe Co. cases, if any? Q.

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There is a cleavage in thinking between IC and Due Process thinking. What would be done if we have a strictly mail order biz - no salesmen, no sales office, no trucking in the buyer (taxing) state. The mail order house is located in another state. In the buyer state, it is advertising via radio, papers, ad agencies.

Quarre: How does Due Process affect IC? Q. How could the Taxing State sue the M.O. house?

The last paragraph of the Northwestern States Cement Co case talks of Due Process. See also here, Miller Bros. v. Md., the majority and dissenting opinions!!!

Quere: Now, what about the tailor?
Quere: Would he be liable for the tax in problem B? See in relation to problem E, the Spector Co. case.

(E) In Spector Motor Service, Inc. v. O'Connor, (136 p. 655), the statute which imposed a tax on the franchise of corps. for the privilege of carrying on or doing biz in the state, whether they be domestic or foreign, "was held invalid."

Here, + in Northwestern Portland, both companies were doing exclusively interstate biz in the sense that all sales are interstate. So, under the Spector Stat., measured by "net earnings" appropriately apportioned, the Northwestern Portland Co. would not have to pay the Conn. tax. The two cases cannot be factually distinguished.

Quere: If a test case were ~~to~~ to arise before the Sup. Ct. today, what would probably be its ruling? = The issue: will the Court preserve the labels? = The Court, under Detroit v. Murray, said that it will look behind labels to uphold or invalidate a statute and the tax thereby imposed.

Quere: What activity is taxed in the Northwestern? = Is the key that it can be "no tax on it?"

and that γ is a tax on IC when γ is a tax on the privilege of engaging in IC? Q. Isn't that, however, still adhering to labels? =

The dissenters in Spector are in the majority w/ Clark writing in Northwestern.

And, Frankfurt, of the major, in Spector is the only existing one from Spector who dissented in the Detroit Case.

So, what would happen to Spector today? 104 S.E. 2d 403, cert. denied to Sup. Ct. (N.C. net tax.)

(2.) Yes.

Spector, Northwestern and the N.C. case gave rise to the act of Congress we have mimeographed. Also, a case which involved the sales of a whiskey Co. which employed promotional agents, no salesmen. — They were taxed down the line. γ was "sufficient nexus."

Quarrs: Does Internat'l Shor get an immunity under this fed. enactment? Yes, under Sec. 101 (a)(1).

Quarrs: What about the liquor agents and those net income taxes? Under Sec. 101 (a)(2), they were intended by Cong. to be immunized.

What about the tailor under problem B; would he get immunity

under the statute assuming that he would otherwise be liable? He might come under 101 (a) (2), or might he? Is (a) (2) designed to get at the Ga. case, or does it apply to the tailor? Probably the former (judging Brandeis' attitude).

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* Re Taxing, you are 3 sets:

- (1) Immunity cases (Mich. cases)
- (2) Northwestern and Ga. cases
- (3) 358 U.S. 522; 358 U.S. 534

Quere: All 3 have one basic theme: is the Court forcing the State tax law to a position on Cong. must act if anything is to be done about giving biz any immunity on the basis of (a) export-import clause, (b) govt. instrumentality, or (c) IC ?? =

It seems that in all three areas, the Ct. is forcing Cong. to act if Cong. wants to have these businesses immune from State taxation.

* Now we move to another phase of Commerce. *

* Power of Congress to Regulate Commerce Among the Several States
Gibbons v. Ogden (p. 137)

Name case. Popular opinion of Marshall. This arose from the steamboat monopolies and navigation.

Fulton obtained exclusive rights of navigation on N.Y. waters

by steamboats. ~~Congress~~ legis. of N.Y. gave that to Fulton. He then assigned his rights to Livingston. As a result of that "exclusiveness," the waters between N.Y. and N.J. were allegedly open only to those claiming thru Fulton & Livingston. A N.J. citizen challenged this monopoly. This was a valid K w/ N.Y. protected by the "K clause" of the Const. (see Fletcher v. Peck).

Gibbons didn't feel bound by the monopoly and a case, therefore, arose to test the validity of the source of the monopoly.

The Const. has no provision guaranteeing free enterprise. So, Gibbons had to estab. some litigious base on wh. to proceed. They, thus, dragged in a fed. statute. — Note: In Livingston v. Van Ingen, the P did not succeed because it could not find or employ a fed. stat. w/wh the state stat. could conflict.

(Kent, Ch. J.) —

— The fed. statute was an enrolling statute whereby a qualified vessel plying coastal routes could enroll and qualify to fly the Amer. flag.

Marshall found that under that fed. stat. Gibbons gets rights of navigation. So, how does this become a case? If you find that Cong. has vested qualified persons w/ a right,

you must trace that power to see if Cong. had power to grant that right.

Commerce Clause

Marshall's definition of "commerce."

Under the Commerce Clause (Art. I, §8): "The Cong. shall have Power ... to regulate Commerce w/ foreign nations, & among the several States, & w/ Indian tribes."

Marshall adopted a canon of broad construction of "Commerce" to include buying & selling of goods, the fact of transportation and the use of carriage, and said that it included even the transportation of people. Marshall said that "Commerce" includes intercourse in all its aspects.

"Among the several states" - Marshall's interpretation of this phrase has been attacked.

(1) One current writer says that Marshall did not construe it as broadly as he could and should have; that it means ALL commerce regardless of on or how it occurs, even if only w/in a state.

(2) Kent's view - a line exists which separates state from fed. power and never the two shall mix; that when the two do mix or meet, state must give way.

(3) Marshall's view - the word "among" is comprehensive but has its limits, and that on this commerce involves or

"concerns more ^{states} than one", then the power of Congress has license ~~to be~~ exercised. It does not include "those [concerns] completely within a ~~particular~~ state." However, ~~once those concerns involving more states than one~~ are present, Cong. has power over them even after they go into a state.

Marshall then found that Cong. vested qualified enrollees w/ a right to ply their coastal trade all over the coast and that between N.Y. + N.J. is coastal; that Cong. had the power to vest that right; that the state stat. conflicted w/ the fed. stat. + that, ∴, it must fall.

This was profound because it rebuked Kent's position of juridical power of Cong. w/ stops at state lines. Marshall said to find "Commerce" first; among the several states", and the Cong. power will follow that Commerce wherever it goes. The state takes over only when Congress's power ends, i.e., there is no limitation on Congress's powers by virtue of the existence of states, but that Congress's power is limited only by the Const. e.g., Due Process Clause, no "search + seizure", et al limitations. — This was a literal reading of the Supremacy Clause of the Const.

So, once you estab. The factual attributes of the concept of the power of Congress, that power goes on and on as long as the facts go on and on. Congress's powers are never at an end merely because of the existence of states & state powers.

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Kent said the stat. of fed. Govt. was a good one but inapplicable because Cong. never intended, allegedly, that it apply. What if Marshall had taken the same position in *Gibbons v. Ogden*?

Willson v. Black Bird Creek Marsh Co. (P. 149)

Delaware legis. author. D to dam up a navigable stream in Dela. D's boat crashed thru and passed for dams.

D's boat was enrolled here under fed. stat. I used the argument that the Dela. stat. was une.

Marshall held that the Dela. stat. was ε, but did nothing constructive as to resolving the ? of the dormancy of the ε power of Congress.

Congress had passed no act in conflict w/ the Dela. stat. and, until it does, the state statute will be and remain constitutional.

Due to the wording of the Com. Cl., it is not stated what rights the states shall not have, but only what rights and powers Cong. shall have. ^{P.S.} So when you talk of a state's rights & powers re Com. Cl., what is the effect of saying what the powers of Cong. are? —

Cp. 150
(1851)

Cooley v. Board of Wardens of Port of Phila.
Big case, still binding. A great compromise.

Name
Case

1803 Pa. stat. required certain matters as to pilots and author. the pilots being paid by the ships' masters.

In 1789, a fed. law was passed re pilots, but since this was before 1803, the Pa. stat. was not affected by the 1789 law.

So, as far as this case is concerned, Congress is silent. Cong. could have passed an act wh. would have superseded the 1789 act and wh. would have regulated these pilots and the other allied matters since these are matters of IC, but Cong. did not.

Issue

So, when Cong. is silent, what is the effect of the Commerce power granted to Cong?

W/in its jurisdiction, the state regulated a matter wh. could have been in conflict w/ fed. power if Cong.

had acted.

Original
Cooley
Rule
Re "National" I/C

Whatever subjects of this power are in their nature nat'l, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require EXCLUSIVE legislation by Congress. i.e., On Cong. is silent, the state may act in re local I/C only - Cooley Rule

Here, the matters sought to be regulated by Pa. were local and focused on only that area. Now, the Cooley Rule has been modified. Under the orig. rule, on a uniform nat'l system is necessary and required, only Cong. can act - an EXCLUSIVE POWER. This part satisfied the "fed. group." The rule that on I/C regulated by state is of a local nature, the state may act on Cong. is silent, was the compromise to the states' rights.

Cooley Rule
re "Local" I/C

The prohibition movement gave rise to a modification of the Cooley Rule.

Lewis v. Hardin

Iowa had stat. prohibiting alcohol in Iowa and sought to prevent any alcohol from coming into Iowa. (p. 172)

The Iowa state was held wrong. The T.I. dictum in this case is that "inasmuch as IC, consisting in the transportation, purchase, sale and exchange of commodities, is nat'l. in its character,

and must be governed by a uniform system, so long as Cong. does not pass any law to regulate it, or allowing the states so to do it, thereby indicates its will that such commerce shall be free and unframmelled."

In re Rahrer involved the Wilson Act (of Cong., 1890) wh. came a year after the Leisy case and wh. was Cong. provision that the states shall regulate alcohol even tho' Interstate.

Thus, these two cases effected the modification.

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Modified
Coolidge Rule
re "National" I/C

The Coolidge Rule (orig.) - re nat'l matters of I/C, only Cong. could regulate. Modification - Cong. could grant the power to states to reg. nat'l I/C matters.

Due to prohibition law, a brewer would not be sustained to ~~his~~ transport across state lines by C.L. K law. So, he can find, maybe, support via the Com. Cl.

Leisy Case - Northwestern Portland is like the dissent in Leisy as far as argumentation goes. The dissent argued that the state (Iowa) statutes related only to the liquor in Iowa not the movement into the state of Iowa. The majority said that the statute related also to the movement.

It was a right to import, and

a right to sell [like Brown v. Md.].
 These rights are grounded in Const.,
 "by wh ~~the~~ act alone it would
 become mingled in the common
 mass of prop. w/in the State.
 Up to that point of time, we hold
 that, in the absence of cong. per-
 mission to do so, the state had no
 power to interfere by seizure, or
 any other action, in prohibition
 of importation & sale by the
 foreign nonresident importer."
— Lacey Case.

In Re Rahrer - Cong. took the hint
 & enacted the Wilson Act wh
 allowed Iowa to regulate that
 liquor.

Orig. Cooley Rule - Obviously, state
 could regulate local commerce,
 and "local" IC, but ONLY cong.
 had the power to regulate
 "nat'l." IC.

Modification - Cong. must act to al-
 low states to have power here, i.e.,
 Cong CAN give that power to the
 states, i.e. that power is not
 EXCLUSIVE TO Cong. But, Congressional
 inaction in "nat'l." IC means
 negation - no giving of that power
 to the state. But, in "local IC",
 Cong. inaction means permis-
 sion to the states to have & exer.
 that power.

Webash, St. Louis & Pac. Ry. v. Ill.

(p. 181)

Ill. had stat. wh prohibited RRs from
 making discriminatory Rs - charging
 different rates for same thing. Fortunes
 were lost this way - & made this way

RR relied upon Comm. Clause for its immunity from the Ill. stat. Held, still inviol. This case is the straightforward application of the Cooley Rule, and \therefore put the finger on Cong. to act. That was 1886. In 1887 Cong. passed the Interstate Commerce Act wh began to get at these discriminatory RR rates & Ks. - If Ill. could govern these Ks, so could Ind, & Ohio & Pa & N.J. on the way to the N.Y. market, and, the states did not have that power (even tho' they were goodly motivated), but only Cong. did. \therefore Cong. acted via the IC Act.

The Wilson Act had two loopholes:

- ① It did not cover consignments of liquor for personal use.
- ② It applied only to the consignee and not the transporter due to the use of the word "arrival." Thus, the shipper was still immunized.

To combat the two loopholes, the Woff-Kenyon Act was enacted, & the Clark Case (1886) followed.

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Clark Distilling v. Md. Ry. (p. 666)

Webb-Kenyon Act - the shipment of liquors from one state to another will be subject to state law.

Quere: This raises the question of uniformity: is Cong. required to make its acts and laws uniform? is nothing required by the Const. that the laws passed by Cong. be uniform, even this in taxation, the laws are uniform.

What about the type of legis.? It might be alleged that Cong. has delegated to the states, and that would be ~~bad~~ bad. Cong. cannot delegate to the states "in a legal sense."

Here, however, Congress has "de-
I/Commercialized" liquor (sic), but this would not be delegating. It simply takes away the privileges, powers, rights and immunities which inhere in the Com. Cl. in regard to this one area of liquor. Cong. has not adopted the state states, nor specifically told the states to legislate as to prohibition. Nor could it be argued that this would be allowing each state to control the policy of the nation re IC for this act applied only to one phase, liquor.

If each state was going dry, why was it necessary to have the 18th Amend., and why then the 21st to repeal the 18th? Liquor today is in a special cate.

liquor

5
gory, and most subject to state regulation ~~of~~ than any other subject of I.C.

* State Regulation of Insurance -

The Sherman Anti-Trust Act has been interpreted to apply to Ins. Cos. States had virtually completely reg. Ins. So, the Ins. Cos. sought immunity under the Com. Cl. Thus, the McCarran Act (1944) → Cong. silence not indicative of imposition of any barriers to state regulation. Thus, states could still ~~subject~~ reg. Insurance.

Later, a S.C. stat. imposing a discriminatory tax on an ins. co. was upheld. (1946) Prudential Ins. Co. v. Benjamin, 328 U.S. 408.

Actually, Cong. via the McCarran Act is removing the immunities of ins. cos. and leaving it open to the states to apply their own law. Thus, the Com. Cl. was removed from the scene by Cong., & rightly so, so that it would not collide w/ state law. Thus, actually congress is controlling the matter by allowing the state to reg. Cong. has the power to do that.

* 3 major problems involved in a state reg. situation:

- ① I.C.
- ② Due Process
- ③ Equal protection - least important

* DUE PROCESS *

Munn v. Illinois

(p. 1147)

When private prop. is ~~is~~ ^{is} grain involves IC necessarily. Ill. voted to public use, it is put a maximum price limit on the subject to that extent to grain elevator operators. What public regulation. has the Com. Cl. to do w/ this? =

Held, the Ill. legis. can at the time of this case, pre-set maximum charges for ^{the} storage of grain in elevators. The owner of prop. is entitled to a REAS. compensation for its use, even tho' it were he clothed w/ a public interest, & what is reas. is a legis. question. A maximum charge is one beyond which any charge would be unreasonable. The controlling fact is the power to reg. at all. If that exists, and it does here, the right to estab. the max. of charge, as one of the means of reg., is implied.

At the time of this case, pre-set maximum charges for ^{the} storage of grain in elevators. The owner of prop. is entitled to a REAS. compensation for its use, even tho' it were he clothed w/ a public interest, & what is reas. is a legis. question. A maximum charge is one beyond which any charge would be unreasonable. The controlling fact is the power to reg. at all. If that exists, and it does here, the right to estab. the max. of charge, as one of the means of reg., is implied.

Cooley Rule. Cong. had not spoken; if the commerce was local, the states could reg.; if the commerce was nat'l., states could not reg. in view of Cong. silence. Where did this fall? The Ct. talked of the local aspects of the elevator operations and de-emphasized the nat'l. incidents, thus causing the IC aspect to drop out. Thus, the 14th Amend. arose as the predominant issue — not excluding altogether the ? of IC, however.

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The date here, 1876, is important because it was a time on IC was not as important as it is today.

Barron v. Mayor and City Council of Baltimore

(p. 729)

Marshall, Ch. J., held that the first 10 amendments did not apply to the states but only to the fed. govt. These 10 amendments are the Bill of Rights.

The 14th Amend. — "... nor shall any State deprive any person of life, liberty, or prop., w/o D.P. of law; nor deny to any person w/in its juris. the equal protection of the laws.

Prop. becomes clothed w/ a public interest when used in a manner to make it of public consequence, & affect the community at large, and from such clothing the right of the Legis. is stat. deduced to control the use of the prop. and to deter. the comp. wh. the owner may receive for it.

In Munn Case, P lost out when he tried to rely on the Ill. Const. So, he tried to rely on the 14th Amend. Was he seeking to rely on a right inherent in the 14th, or was he trying to say that the 14th struck down Ill. stat., leaving the Ill. C.L. intact (i.e., making Ill. incapable of changing its C.L.)

The 14th has procedural aspects (criminal law) and substantive aspects as embodying a rule of law. - T.E.

The exer. of the Legis. of that power must be reas. and what is "reas." is subject to judicial deter., requiring D.P. of law for its deter.

A stat. is presumed Const. and the one denying its constitutionality has the B/P. So, this presump. of Constitutionality makes a big wall for the attacker to tear down. He must carry the B/BF and the B/P.

Webash, St. L. & Pac. Ry. v. Ill. - P. How can Munn claim that he is being deprived of his prop. w/o D.P. of law? He claimed that when the state cut into his C.L. right to make Xs wh. were otherwise brought from w/o the State or destined to point outside of it. In this respect, Congress' power over IC is exclusive because this species of reg. is one wh. is of a general & nat'l. character and cannot be safely & wisely re-mitted to local rules or regs.

Legal and not against public policy, the state of Ill. lessened the value of his prop. and that constituted taking his property because lessening prop. value = deprivation of prop.

The general rule is that a State cannot take prop. w/o justly compensating the owner. On this happens, it is true. On state exercises power of eminent domain, must pay. If it exer. its police power, need not pay. Which was here?

Munn lost on that argument because of the doctrine that on the end is permissible, the means of achieving that end is justified. The Ct. recog. the legitimacy of the State's interest in the regulation of market process.

Ill. would not be able to pay Munn and all the "other Munn's" down the line for a loss in value. If Ill. were required to do so, it would not be able to afford to regulate an activity in which it has a legitimate interest.

Quaere: Could this regulation of the market process fall within the police power? Yes, and no compensation is necessary. It is an exer. of the police power in the sense that the regulation is a means to effectuate the end: doing away w/ evil practices.

So, the Ct. held that this loss of value, the taking of prop. in the general sense, is not a deprivation of prop. within the E sense.

Holding

Rationals

Rationale: one builds and holds his prop. subject to any legitimate exer. of the police power.

Bizs as affected w/ a public interest have a greater responsibility to the public and had to charge a reas. amt. (even under C.C., e.g., w/ common carriers and innkeepers), and, thus, it fell within a class of biz subject to the state police power. Thus, even tho' it was a loss of prop., the state did not have to compensate for the lost value. So this class of biz is not within the E purview.

Quaere: What class is within the E

purview? =

Re Inspection Laws, a review the legis. act because the State has concurrent remedy is at the polls. But the power w/ Cong. to Ct. uses some method to 'clamp' reg. and may reg. down.

until Cong. speaks
so long as the reg.
does not so unnecessarily
burden Interstate
Transportation as to
contravene the Com.
Cl. Mintz v. Baldwin, p. 350.

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In Munn, reasonableness of rate left completely w/n the discretion of the Legislature.

This did not remain viable law. Changed shortly after Munn.

On the first major test, Sup. Ct. shifted on who should determine reasonableness.

Ct. noted that Commission set rates, not th Legis. Thus, came to conclusion that "reasonableness" of rate is a "judicial matter". No longer a matter of complete Legis. discretion.

Ct. also became very rigid in their approach to the fixing of rates. Thus, pattern became very complicated. But, in 1940's, position of Ct. changed: rates set by the Commission will stand unless clearly arbitrary and capricious. The Ct. will look at the total problem, picture.

As to what biz would come w/n police power, Ct. has always said that this was a matter to come w/n judicial determination. -- Public utilities and monopolies have always been subject to police power. Next step, however, is to categorize businesses that are "affected w/ a public interest".

Modern rule on bizs affected w/ a public interest is set out in NEBBIA v. N.Y. (p. 1181):

Says that any biz may be regulated if the facts disclose the social necessity and the means are reas. to accomplish the object.

Thus, y is a very narrow area that is not subject to reg. Nebbia is good law today.

The Legis. makes initial determination as to the existence of a social problem. Then, the Ct. need only deter. whether the Legis. has acted arbitrarily or capriciously. (Question left open: What if people disagree re existence of social problem and how it should be solved?) NOTE: y must be a case-to-case determination re the 5th and 14th.

See that this analysis introduces a degree of flexibility. It does not depend on some broad conceptualistic notion of what bizs are or are not affected w/ a public interest.

Note that the facts must always support the reasonableness of the Legis. O.K.

Have been dealing thus far w/ problems concerned w/ the rights of prop.

*** Problems in the area of Contracts ***

K is nothing but dealings between people.

*** Allgeyer v. La. (p. 1156)**

Re ability of State to deal w/ problems beyond its juris. P has a marine ins. policy w/ a N.Y. co. Policy said that shipments would be covered whenever the co. was notified. P mailed notice from New Orleans.

Stat. in La. is attempting to control ins. in La.

Y is no doubt that if ins co. had a local rep. in La., then dealings between p and rep. would be subject to K. Also, if P bought thru a rep. in La., the matter would be subject to stat. But, here P mailed the letter himself; thus, the co. was not "doing biz" in La.

Stat. here is attempting to bring a foreign ins co. under State regs. If the Co. was doing biz in the State in any sense, it could be reached.

Why couldn't La. reg. this transaction? It has been historically held that ins. biz is not IC. Thus, it has never been immune from State reg. It has recently been held, however, that for purposes of fed. reg. ins is IC.

Note that in Allgeyer, the k was made in N.Y. All financial aspects of the K were localized in N.Y. Thus, La. could not reach up into N.Y. and reg. You see the same sort of analysis in COOLEY. That is, more than one State involved in the transaction so that it is necessary to have uniform regulation system.

Allgeyer-- often cited for the proposition that a man may make a K w/ one out of the State and it will not be subject to State reg.*** Ct. here said that Allgeyer was being deprived of his liberty w/o due process of law. Still not clear where the right to K emanates from.

Note that D/P as a substantive matter draws a line beyond which State regulative power may not extend. Must be something occurring w/n the State. (This is juris. argument.) Allgeyer lays down this basic doctrine. See tax cases for the covering of the same principle.

LABOR Ks -- Real battleground of reg. fought out here. In Holden, maximum hours law held Constitutional.

Lochner held another hours law unconst. It distinguished Holden, but did not overrule it. There seem to be factual distinctions. Working in mines (Holden) is dangerous, and more danger arises the longer the hours. But, Lochner does represent a difference in philosophy.

Lochner polarization: (CONCEPT)

"pol. power" "liberty to K"

Ct. Determination of Reasonableness: in Holden, Ct. says that Legis has come to the conclusion that the work is dangerous. Then, Ct says that so long as the sanction of the Legis is reas., it will not be upset.

State here has interfered w/ the right to K.

Question: Is there sufficient REASON to justify the interference w/ the right to make Ks?

Ct says so long as there are "sufi grounds" for believing so, the Legis will not be upset.

14th Amend. - "no state shall deprive any person of life, liberty, or prop. w/o D/P of law; nor deny to any person w/n its juris. the E/P of the laws."

The liberty of pursuit - the right to follow any of the ord. callings of life - is one of the privileges of a citizen of the U.S. under the Const. and the right to enter in to all Ks wch may be proper, necessary, + essential to his carrying out to a successful conclusion that and other incidental purposes, is included in the concept of "liberty."

The State has an acknowledged right to enact such legis. in the legitimate exer. of its police power or other powers as to it may seem proper. But, the exer. by the State of such power cannot infringe upon & protected rights of the citizen.

The mere fact that a citizen may be w/n the limits of a particular State does not prevent his making a K w/o its limits while he himself remains w/n it.

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Holden v. Hardy (p. 1160)

Utah stat. regulating the "Hours of ~~Emt~~^{Emt} in Underground Mines & in Smelters and Ore Reduction Works", held a valid exercise of the State police power and not repugnant to the 14th Amendment of the Const. of the U.S.

Rule of
Law

The right of K is itself subject to certain limitations wh the State may lawfully impose in the valid exr. of its police powers, a power inherent in all govt. The State has a valid interest in the protection of the health, safety and morals of the public, and on the Legis. has adjudged that a limitation is necessary for the health of ~~Ees~~^{Ees}, and if are REAS. grounds for believing that such determination is supported by the facts, its decision upon this subject cannot be reviewed by the Fed. cts. "The question in each case is whether the Legis. has adopted the stat. in exr. of a REAS. DISCRETION, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

TEST

Reas. grounds here: (1.) labor carried on underground increases danger to health due to bad air, high temperature etc. (2.) miners and smelters would not take it upon themselves to complain for fear of discharge, and the ~~Ees~~^{Ees}, ~~Ees~~^{Ees} here are unequal. The mere fact that both parties are of full age and competent to K. does not necessarily deprive the State of the power to interfere on the parties do not stand upon an equality, or on the public health demands that one party to the K shall be protected against himself."

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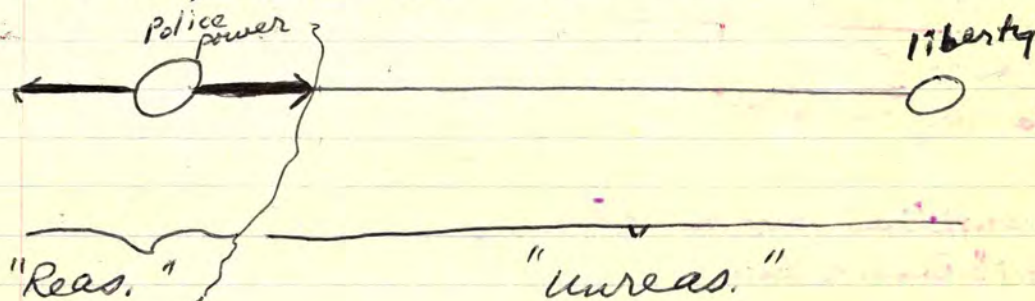
Vol. I - pp. 460 - 473 Re legis. juris.

The Lochner philosophy is gone.

The Sup. Ct. was alarmed about ideas of public regulation. They did not favor public reg. It was rationalized thru Lochner Case: it can be reg. by legislature but it must be "reas."

Holden
holding

The Ct. said it will allow some reg. by the states, but within the boundaries, wh boundaries are not fixed, but deter. by what the Ct. deems "reas." * A polar analysis (extremes) can be made.



But, this line can be moved depending on the facts wh will deter. what is reas.

The N.Y. hour law, passed to avoid an outbreak or increase of T.B. and pneumonia among battery workers, was held une.

Holden was not quite the same. It said to look at the facts and they will govern w/ the use of discretion. The rule as to the wth of evid. required of ap will govern also. But, there are doubts here as in all areas of social problems.

* Another view would be to say that as long as it is some

or any substantiation, for the state regulation, it should be upheld, or rational basis.

Quere: Which of these views under the Holmes rule will we use?? = This depends on how strictly the tests of reas. or facts (?) is applied. They are ways of examining reasonableness.

This is seldom used by fed. ct. But, these matters are rightly handled by the state courts.

On the fed. ct. finds the state reg. reas., it by precludes itself from handling the matter. It will not invade that sphere of reasonableness.

West Coast Hotel Co. v. Parrish (p. 1190)

Goes the opposite way from Hochner, see p. 1193.

Holding: test of "Reasonableness"

Held, the legis. judg. is affirmed so long as it is not arbitrary and capricious, i.e. ~~the~~ The judg. is reas. so long as there is some or any logical basis for it.

Old Rule:

This is like Kent's view of taxing power: power operates in permissible areas, w/in categories. This rule ~~was~~ ruled for about 30 years.

General Rule Today:

We are here dealing w/ judicial review of legislative "judgments". So now, the gen. rule is that the state may exer. their legis. power so long as it has some rational basis and does not conflict w/ a C provision (e.g., search, seizure, and others in the Bill of Rights). The state legis. is set up anyway to work on problems as they

arise

"Not arbitrary or capricious" is the test.

This rule has rejected the Kent views of the tests that should be used in the tax problem area + here.

Ry. Express Agency v. New York (p. 1486)

Stat. here against advertising on side of trucks, exempting an owner advertising his own biz on his own truck.

Holding:

Sup. Ct. upheld the N.Y. stat. saying that as long as there is some logical basis, the power is valid. It just must not be arbitrary or capricious.

Thus, the rule becomes more empirical and rejects the Kent "fluctuating boundaries" concept.

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The old idea is rep. historically by the Lochner test: You had on one hand police power, and on the other hand, liberty, and the Ct. would choose between them. Now, Cts. don't use this too much in due process as a test. Now the factors are carefully examined to draw a line between the arbitrary and the discretionary. "Any rational basis" is the prevailing rule, but it can be made more severe by examining "reasonableness" and finding no "reasonableness." The Sup. Ct. does not use Lochner anymore, but may call for a stricter application of reasonableness.

(348 U.S. 483) Williamson v. Oklahoma - re validity of Okla. stat. regulating optometrists & optometrists. - This case has the best start. of the present D.P. Clause test.

Though this stat. had economic overtones, it had a rational basis. Any rational basis will sustain the statute.

Caveat!! [But, the modern rule will not always prevail in every case.]

* Equal Protection (14th Amend.) *

Segregation issues are involved here.

Yick Wo v. Hopkins Case (1886) (118 U.S. 356) (p. 1470)

However, while the police leading case. Chinese man refused license to run laundry. power cannot be put forward as an excuse for this required to get the license. an oppressive + unjust legislation, it may lawfully be resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a "large discretion" is necessarily vested in the legislature [of the State] to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Q. Is this a DP issue here? = Yes.
How easily is it resolved? = Can the state reg. by requiring licenses? = The state was not out primarily to make revenue. If the stat's purpose was to protect the health, safety, and/or welfare of the public, the stat. was valid. Is a DP? here, but the stat. is valid as long as the ends (health, etc.) are permissible. Stat. can even reg. structure of the bldg.

As the facts are looked at, it was apparent that regardless of the structure of the bldg., few if any Chinese were being licensed. The showing of these facts is

for the purpose of raising the inference that y is discrimination.

Quaere: If the Ct. draws that inference (that native whites are being preferred over Chinese), so what??

Q. Is it illegal?? You can next allege that, \therefore , the Chinese is being denied the E/P of the laws. E/P of what laws??

2 ways to look at this:

(1) Denial of E/P of the licensing stat.; or

(2) Denial of E/P of other state laws, namely, property laws.

Requisites to invalidity of stat. as a denial of E/P of the laws:

So, after showing different treatment, y are 2 problems:

(1) Are they being denied E/P?

(2) Is there a lack of basis recog. as a matter of law for the denial of E/P?

If both are shown, then the Ct. will find that y is discrimination, and, therefore, not as denial of E/P.

Quaere: What are some recognizable bases ~~for~~ as a matter of law, which support the denial of some people from doing something which other people (of a similar biz or trade, etc.) are allowed to do?? = e.g., If Stat. refused to allow licensing to wooden laundry bldgs. so as to insure safety of the community against fire, y is a rational basis, so D/P is satis. ~~But if~~ And, this same test applies to E/P. But, if it is shown that the only people w/ wooden bldgs. denied licenses are Chinese, then

there will be no rational basis for the law.

Held, alienage and racial origin are not rational as a base, not permissible as a base.

Basis for denial of E/P must be rational and suffi.

But, it is a basis for the stat. because the Chinese as a people can compete more cheaply. However, this is not suffi basis.

If the stat. is discriminatory on its face or administered discrim., the stat. will fall as unequally fast.

14th Amend. says "persons", not citizens. So, you don't have to be a citizen of the U.S. nor of the state to be entitled to the protection of the E/P clause.

"Legal discrimination" is fatal to a statute or administration of the stat.

Problems in Equal Protection Area:

- ⊗ E/P - must see:
- (1) Diff. in treatment being claimed - if there is any rational basis to support the law, E.
 - (2) What law is denying you E/P?

⊗ E/P is usually involved w/ D/P. - Re advertising on trucks. Ct. applied the D/P test: any rational basis, & sustained the stat. Ry. Express Agency v. N.Y. (p. 1486.)

⊗ In the big area, the E/P argument is usually the last resort because it's usually considered weak. Jackson, J., said that E/P should be elevated above D/P because once a stat. is declared une on the basis of E/P, the area would be taken out of the purview of state regulation. Good argument, but legally unsubstantiated.

Re women bartenders (p. 1484), I had good dissent by Douglas. Even this, he wrote majority opinion in the Ry. Express case. But, he is not trying to write a new test. Gossert v. Cleary (1948)

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Goesaert v. Cleary
(cont'd.)

- The stat. not only distinguished between male + female bartenders, but also between certain female bartenders. It allowed daughters + sisters of bar owners to be bartenders. - This was not E/P of the laws. So, the legis was left to correct the stat. - If the stat. had been declared ~~une~~ on D/P grounds, the legis would then be prohibited from dealing w/ the entire matter of male + female bartenders so that female bartenders would not be allowed to work.

"Any allowable judg." means any judg. w/ a rational basis.

Morrey v. Dowd (1 L. Ed. 2d 1485 (in Supp.))

Ill. Community Currency Exchanges Act was overthrown. It sought to put this check-cashing, M.O.-making co. under restriction while exempting Ry. Express and W. Union.

The Ct. said y was no rational basis for exempting Ry. Express and W. Union and not the P.O.

* PROBLEMS *

[IV]

This stat. is found in 27 states. In 15 of those states, the ~~EE~~ is required to pay the worker.

As far as the wording of the stat. and the facts are concerned, y has been a violation. But, if the stat. is ~~une~~, y has been no stat. to violate.

We start out w/ the technical by-

Questions to
be Raised:

pothesis that the stat has been violated.

Q. Is this stat. valid as applied to the co.? = Q. Did it have any rational basis for the stat.? = Q. What was the legis.'s purpose and what was the end desired.? = The end desired, was the encouragement of voting and greater voting. But what about the "means" used by the legis.? The gen. rule: the means must have a logical rel. to the ends.

We don't talk about legis. motive, but only about the objective (i.e., end) sought and intended.

The legis. objective is the encouragement of voting.

Rule of
Law

On a ct. finds that y is a rational basis to support the means, it will not question the wisdom of the means.

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hypo: Suppose stat. required that grocers give to each voter a \$10.00 basket of groceries. Would the rational basis of encouraging voting justify this imposition? No. Is that basis suff. justification for the requirements imposed upon the grocers? No.
Q. What about a "balancing" theory here? =

Allowable judgments - the legislator could say that human nature is such that it will not go to the trouble of going to the polls during

the couple of hours before & after work; and that an EE is a "captive" during working hours.

So, rationality must be such as to make the req. of the biz (EE) logically related to the effectuation of the end, and the party sought to be protected must be logically related to the regulated persons. So you must look at the facts. The grocer hypo shows that it is not logically related to the effectuating of the end: the grocery biz as to EEs in general is not logically related.

This is D/P problem here thus far, but it is an E/P problem here.

⊗ A stat. requiring time off will almost always be upheld for this purpose.

Quaere: What about the requirement that the EEs be paid for the time off? — This will eliminate hesitancy of EEs to lose wages, & this is logically related to the biz affected.

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It must be rational in relation to the persons regulated and in relation to the persons sought to be protected.

Under the Parrish Rule, the fact that expenses of biz will increase due to minimum wage law (DOES NOT GUARANTEE THAT PRODUCTIVITY WILL INCREASE) does not mean that the law must be found une.

Y is a rational basis here. This is pymt. for non-services, however.
Quaere?

If Y is an alternative, the legis must be so convinced of a change in the stat. is to be effectuated. The ct. only examines the choice of the legis, and will not kill the stat. merely because Y are alternatives, but only on the stat. is unreason., arbitrary or capricious.

Other tests

Quaere: Is Y some other test than rational basis test? Suppose the test were "just + reas." - Could argue that it is unjust to make this ~~ser~~ bear the burden of what should be a civic responsibility for what is, admittedly, a good goal. Under this test, the ct. will not confine itself to the rational basis test, but will evaluate and weigh.

Other tests:

- ① Means cannot be unrelated to the ends
- ② Means cannot override the natural demands of justice.
- ③ Substantial justice, et al.

Naturally, you will begin your case in a State ct., and that State ct. is not bound to follow the rational basis test. So, you've got to argue to that State ct. with whatever argument you can.

On the test is whether the means are reasonably related to the ends, you show that the ends

are permissible and that the means are reas. related to the effectuation of the ends. What is "reas." will be weighed and evaluated via the facts.

Y is also an E/P problem because a certain group (out of the big group of voters) has been selected to be affected by the statute, and a certain group is regulated. However, the results here would be the same as under D/P. The rational basis test would apply and the result thereunder would be the same. Also, the other tests would lead to the same result that they would precipitate under D/P. See Ry Express Cases

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hypo: Suppose stat. required holiday on voting days. — Probably valid because it would still be a rational basis between that as a means and greater voting as an end.

But, if the stat. required Eers to pay wages for that holiday to Eers, that would be doing too far. Wages paid would not be logically related to getting out the vote since Eers would already be free from work so that they could vote.

72 S. Ct. Rep. 405 (1952) - Mo. Sup. Ct. sustained a stat. like this one (problem IV), and U.S. Sup. Ct. affirmed.

128 N.E. 2d 690 (1955) - Ill. Sup. Ct. struck down a similar stat., applying Ill. law to do so. It was not bound by the Sup. Ct. of U.S. decision in the Mo. stat. because Ill. law was applied, and the U.S. Sup. Ct. would have to find Ill. stat. invalid as under Ill. law, if at all.

A state is given much latitude to deal w/ econ. matters so long as they have a rational basis. Not rational if based on race, color, religion, ethnic differences.

In Problem 10, the state is regulating manufacturing, not "commerce", and manufacturing is not "commerce" necessarily because "commerce" includes a sale or some sort of commercial transaction. Further, this statute applies uniformly to all pers in the state.

We must consider the degree of burden imposed before the imposition (i.e., regulation) can be properly declared une.

A burden on commerce, to be une, must be direct or undue or excessive. Here, by regulating manufacturing, only an indirect burden is placed on "commerce", so the statute will withstand the commerce clause test.

Under the Cooley Rule, the first step is to find that the state is regulating "commerce." So, by the above argument, "you can avoid the troublesome Cooley rule."

What is precedent for this?
Is the Eisenberg Case?

ASSIGNMENT:

PP-423-431

99 L.Ed. 68

3 L.Ed. 2d 1003

Supp.

Reap!!

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In Eisenberg Case (p. 378), the ct. found the stat. valid by applying the Cooley Rule w/ its usual weighing process. (See p. 379) The Cooley Rule permits reg. of IC to some degree.

The only way Eisenberg could be used as precedent is to say that the state was going much further than State M, and since the Eisenberg statute was allowed, a fortiori, State M's stat. should be allowed.

The Day Brite Case (State M hypo, problem IV) was resolved w/o even talking about IC. It was decided by discussing the fact that regulation of production was within the state's power. IC need not be bothered w/ here.

[PROBLEM VI]

The atty. for M had the tactic of trying to have the ct. invalidate the stat. ^{on the face} early, believing that the stat. was not E.

S. Dubin (reciting) cited Mintz v. Baldwin, 289 U.S. 346 (p. 350 clb), as being directly in point; that, in both, the state was protecting its citizens. Goodman distinguished the Mintz Case by saying that either a cow has or has not Bangs disease and control of the incoming cattle is more simple, whereas milk's standards might vary greatly and control thereof might assume the proportions of reg. of IC.

Hood Case stat. was fine because the objective was the protection of local econ. interests.

Quere: what about Dean Milk Co. (cl. 352)??

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Can a D.T. be sought in this kind of situation? Is it a "case and controversy"? The Sup. Ct. of U.S. may have a different standard (stricter) of justiciability (called case & contro.) than that of the State.

An abstract decision on this stat. would take the form of an advisory opinion as to the general validity of the Statute.

Under the State law, many state cts. are much more broad and liberal than the U.S. Sup. Ct. on this. See Adler v. Bd. of Ed. - held, it was c & c but Frankfurter dissented.

On a statute is clearly une on its face, the ct will not require futile steps (requesting and being refused a license) to satis. c & c. But, it are serious doubts as to whether this is une on its face.

(cb. 352) Back to the merits: Cohen said that Dean Milk Co. Case applies. Ct. it said it was a health interest and that was an and w/in State's purview, but the means used were attacked. The stat. required that milk coming in for sale be processed and bottled w/in 5 miles of Madison, Wis. IP Ct. said that it were many economic overtones; that IC was unnecessarily burdened, and that the permissible end of health could have been effectuated by other means. This method used by Wis. was really an economic measure. Is this stat. the ans. to the Dean Milk stat.? Is it a "soft spot"?

What about the possibility of multiplication (i.e., multiplicity)? Not the same as the Arizona rail carrier case because the milk co. is not by its nature necessarily Interstate.

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The State could not have made a motion to dismiss ~~merely~~ on the ground of no case or controversy. M had some standing under the statute as one of the group w/in the legis. mind.

M bed-rocks this case on the contention that the stat. is unconstitutional because it violates the Commerce Clause: M is Interstate Dealer & must pay to sell in the state due to license requirement; thus, a burden on IC is present here. However, those being the merits, the case will fail on the merits because the burden on IC would be so small and indirect.

However, Case & contro. would not be fatal to M's case here.

Now, suppose that M has sought a permit, Commissioner looked at his milk & denied the permit on the ground that the sanitary conditions under which M worked his milk were not equal to those of Hettrick.

In Hood Case, we saw that the end of econ. regulation was

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an impermissible end in that
it sought to reg. ISC.
In Mintz, however, the
end of health was per-
missible.

The difference between these two cases
is the Dean Milk Co. case. The
ct. did not completely brush
aside the ? of local econ.
interest, but it said that y.
really was a health prob-
lem and that the two could
not be divorced. So, this was
double-barreled.

The difference between Hood
& Mintz is the real empha-
sis and end sought. In Mintz,
as may be the problem of
local econ. int., but that is
so minor in relation to
the true end of local health
that it drops out of the picture.

What kind of stat. have we
in Hettrick? Does it seek
to reg. and primarily affect
econ. interests? Not on its face.
like the Seelig Co. case stat. in
N.Y. wh. reg. its price. (p. 349)
In Hettrick ~~stat.~~ problem, even w/
the discretion, the Commission-
er would have a hard
time reg. econ. interests
under the stat.

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γ is an Administrative Law problem - interpretation of the stat.

γ are different methods of controlling sanitary condns. in diff. States. Suppose that in Hettrick, every farm gets inspected and each one tested. However, in Albers, a random sampling technique twice a year is used by the State. Now, suppose M says that his milk is good but Hettrick won't allow M's milk to come into Hettrick saying that M's milk did not meet Hettrick's standards. - This will raise a ϵ question.

If X, a Hettrick milk dealer, were to oppose the stat. he would not win under the Commerce clause because γ is not IC involved. E/P clause would not help because all Hettrick dealers are in the same boat. D/P would not help because, tho' the standards are high, the State legis. has not acted unreas. and had the right & power to act in this area.

If M, of Albers, were to sue against the Hettrick Commissioner under the statute, the facts are settled and only a ϵ ? remains. Will it take the D/P approach? The legis. had a rational basis for the statute. Here, γ would be a violation of IC, but would it be unreas.?

In Seelig Case (p. 369), the stat. was struck down because γ was an econ. discrimination.

We can say that the Court will not handle the D/P problem the same as an IC problem, but how is the IC problem handled here? =

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* Bibb Case - dealt w/ multiplicity of burdens. (3 L. ed. 1003 - Supp.) The latest case dealing w/ the Cooley Rule (IC problem).

The first point to look for in a Cooley problem is what has Congress done. On Cong. is silent and the matter sought to be regulated is local in nature, the state is deemed to have power to regulate reasonably, even tho' IC may be affected.

It was an old Ga. case which went to the Sup. Ct. which involved a Ga. stat. requiring trains to slow down to 15 MPH at crossings & blow the whistle. The stat. was held unconstitutional solely on the ground that it was a "direct burden on IC." It did not even bother to talk of the reas. or unreas. of the direct burden. It was found that schedules of trains were lengthened considerably.

In a later case, Stone, J. dissented from this straight + fast rule ("kiss of death") of direct burden, saying that the burden tho' direct, must be looked at in a manner not solely mechanical.

Stone became C.J. and opined

(p. 423)

in S. C. v. Barnwell Bros., wherein a statute, imposing 70 in. width limitation on trucks and 20,000 lb. limit, was upheld.

In the SC area, always look to see if the stat. is discrim. or if it seeks to "get at" SC.

Now, in Bibb Case, the language seems to follow that of Barnwell Case, but the stat. (also dealing w/ roads) was held une.

Next, we see Southern P. Co. v. Arizona (p. 431) w/ Stone, C.J. again. Has he here moved away from his methodology used in Barnwell Case? Note, Barnwell = roads; Arizona = railroads. Is Arizona Case still good law?

Quarrie: What about presump. of C of state stat.? - Three approaches.

1. Is stat. presumed C & ^{does} the attacker have a heavy B/P?
2. Is stat. now presumed une.?
3. Is γ any presump. now?

The Arizona Case is Stone's culmination of his earlier dissenting opinions. Has Cooley rule now become solely one of balancing of interests? Safety thru reg. of trains was the purpose in Arizona case.

Arizona saw a weighing, and weighing will be done only on Cong. has not acted. Further, using weighing process, conceptual talk and analysis has given way

to an examination of the facts to then deter whether the nat'l. interest or local interest is involved. "Old" Cooley Rule (after Leisy & Le Lahrer) would first decide whether it is nat'l. or local interest and then apply the facts to the conceptual decision.

Quaere: Altho' safety is involved in the road cases, is it a diff. "safety" from the safety of health? Would the reasoning in road cases apply to food health cases?

Any state statute in question will involve consideration of the Cooley Rule. Is Cooley Rule involved in Hood Co. v. Du Mond? This was a reg. of IC. N.Y. said the stat. was invalid and was not a health, safety & welfare measure. On appeal, the Sup. Ct. held the stat. C. Here, it was a dispute as to what the ultimate objective of the stat. was in dispute. In Ariz. Case, objective of safety was stipulated by the parties.

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Some students of Const. Law feel that the Ariz. case and Barnwell Case rep. two rules, one for roads and one for railroads. Others think the two cases are rep. of Stone's growth in the judicial process.

The Bibb Case is like Barnwell Case in so far as the weighing process is concerned. "It looks as though the court is dealing w/ Bibb the same as w/

Barnwell." In Bibb, the ct. wound up w/ a bare-faced judicial pronouncement.

Queser: All of that language by Douglas in Bibb Case, about presump. of validity and equality of all of the state statutes, may or may not have any special significance. Or, could it have any bearing as an attack on Dean Milk and Hood Cases? Maybe. But, it probably is technical ineptness in opinion construction.

All of these cases deal w/ the Cooley Rule.

In problem VI, also, a good argument is that M would have to go thru elaborate administrative committees and processes, and that that constitutes a burden, and a continuing burden, too. Whether it would be enough of a burden is uncertain.

This problem is unsettled to day. In the balancing process, you must first identify the interests.

VII. Interstate Commerce - (assuming M to be out of state). As a class, manufacturers are being regulated alike. No discrimination. The goods have come to rest in the state before the stat. can have any application. It is no IC problem here. The interstate journey has ended before the stat. can apply.

So, IC does come to an end some day.

⊗ Due Process Problem - ⊗ What is the state trying to do here? This stat. is valid even tho' it imposes an econ. burden. However, burden is immaterial because of no IC.

D/P STEPS:

- (1) Protection of local econ. interests = end.
- (2) Elimination of priority requirement = means.
- (3) Hubs, y is a rational basis and a rational connection.

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* CIVIL LIBERTIES *

AMENDMENT I -

"Cong. shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the govt. for a redress of grievances."

Art. I - Freedoms of Religion, Speech, Press, Assembly, and peaceable petition.

Art. II - D/P Clause

The incorporation of these previously political principles into the Const. made these principles of pol. wisdom become law and thus, limitations on the fed. ~~powers~~ powers.

1688 - "beginning" of religious freedom in England.

1689 - Parliament was opened to free and open discussion. U.S. has it in Art. I, sec. 6 - absolute immunity and privilege for stmts. made on the floor. If that is published, e.g., in the Record, the privilege will probably be less.

Re speech - seditious libel was one method of keeping check on speech and publication.

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Bill of Rights

The holding in Baron v. Baltimore confined B/Rights to the fed. govt. Now, the 13th, 14th + 15th are restrictive upon the States.

The Sedition Act of 1798 expired by its own terms. It was a big Federalist blunder + made the way for the Jeffersonian party to come in.

Gillow v. NY.

Had Gillow's liberty been interfered w/ under the 14th? = The was the first real case to test this question.

After this case, we have the 1st Article being embodied in the 14th Amend. parenthetically around the D/P clause. This is not a rule of law, but every Art. I freedom will probably be found in the 14th Amend. So, now, as a result, the 1st Art. applies to the States.

This case dealt w/ the freedom of speech.

Right of petition to the govt. has had no real test as yet.

We are dealing w/ limitations upon States, Cong. and municipalities.

States are often involved w/ censorship, subversive activities and religious matters (e.g., Sunday laws).

In Gillow - the Criminal Anarchy Act. was passed in N.Y. in 1902. Was largely unused until the world war I period. Gillow wrote and had published + distributed a

Manifesto of the Left Wing.
 This Manifesto advocated, not merely opined or expounded facts. Gitlow alleged that the N.Y. Stat. was unconst. The ^{statutory} punishment was for advocacy of the forceful overthrow of the govt. ^{Quaere:} Can the state punish the utterance of that speech? The prosecution did not develop by evid. of any type that what Gitlow did had any discernable effect. Why does that raise a problem? =

Quaere:

Gitlow holding:

The Ct. here held that the N.Y. state stat. was and that the state could punish the speaking so long as the state reas. thought the speaking - advocacy - was an evil.

Reas. relation of the means to the end.

The end of the stat. was the avoidance of danger to the public peace and to the security of the state. Is the means employed - the prohibiting of certain speech - reas. related to the effectuation of that end? =

Yes. "We (the Ct.) cannot hold that the present stat. is an arbitrary or unconst. exer. of the police power of the state, unwarrantably infringing the freedom of speech or press; & we must, to sustain its constitutionality, we indulge presumptions."

Rule of
Construction

in favor of the state - If the state did not act arbitrarily or unreasonably.

Schenck v. U.S.

(P. 1254)

Holmes, J.

* The "Clear and Present Danger" Doctrine - "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear + present danger that they will bring about the substantive evils that Cong. has a right to prevent. It is a question of proximity + degree."

Holmes, J.

This test would require a showing in a case of a clear + present danger in the particular case by the state. So, a state would have to show not only ~~that~~ that the (1) falls w/in a stat., but that w/in the stat., it's own words created a clear + present danger. — This test adheres more closely to the limitation side of the 1st Art.

The Abrams Case dissent explains Holmes' view.

* Schenck + Gittow seem to differ. But, let us see:

(1) Schenck was a fed. case.

(2) " was being prosecuted under a fed. espionage act wh. required acts and actions. His only actions were those of speech. The distribution of leaflets. Did those activities of Schenck obstruct

the carrying out of the orderly functions of the govt.?
 Did these acts of Schenck constitute a conspiracy to obstruct, incite insubordi- nation?

(3) Holmes was probably not closely watched by the others on the Bench because they did not care.

This "clear & present danger" doctrine was not followed in later cases, rendering it of little use as a precedent. Schenck was found guilty anyway under Holmes' test.

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Gitlow v. N.Y. - hauled along same lines as Holden v. Hardy.

Rule of Law

As long as it is on a rational basis, an "econ." stat. will be held valid by the Sup. Ct. Morey v. Doud merely said that sometimes, on dealing w/ an econ. stat., the Sup. Ct. will look more closely than just a finding of a rational basis.

Morey v. Doud

When dealing w/ a specifically protected right - the right of free speech - Holmes showed us in Schenck that a tighter test is desirable: this speech either falls w/in or w/o the State's permissive regulation. His test was that the speech itself must be involving a clear and present danger in w/ the State has an interest. Brandeis elaborated on this test to say that

Holmes' test of "Clear and Present Danger"

Brandis' strict. of
"Clear + Present
Danger" Test

There must be an immediate danger before the state can prohibit that speech.

Rational Basis
Test

This represents an attempt to move over to the other side of the "test scale" previously applied to "economic statutes" which required only a rational basis. "Clear + present" danger is more strict.

Dennis et al. v. U.S. (p. 1401)

Sets out new pronouncement of Holmes' test. Is it a whole new test which rejects Holmes' view, or does it merely modify?

* PROBLEM VIII

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(1) Would you advise Norman to go ahead and speak and take his chances?

Note that this statute gives the Mayor discretion to grant or deny licenses. See Kuntz v. N.Y., p. 1361.

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(2) Regulation of time, place and number of speakers on those grounds and for those purposes, i.e., avoiding too many speakers in one place. However, regulation of speech by prior restraints due to nature of the speech may constitute a prior restraint & that's unconstitutional.

Prior
Restraints

Most states have statutes like that in the Finer case. Only a dozen or so have statutes which forbid certain specific types of speech.

Quaere: What if the Mayor believes that this fellow will cause a breach of the peace? = This seems to introduce an exception to the general rule re prior restraints.

Exception to
Prior Restraints

Note that the Common is used for all speakers & here one person is sought to be restrained. Thomas could not demand that the city open its facilities if they were not already open to all speakers.

General Rule

The gen. rule is that a speech cannot be restrained merely because the Mayor does not like the subject matter.

Personal Liability of Public Official

You should go to the Mayor as a lawyer & talk to him & explain the law as being opposed to his decision. If he then refuses to grant the license you could inform him that he may be personally liable - in tort for, e.g., assault & battery, false imprisonment, false arrest, on the part of a public official, relies on a statute, rule or its fact. The basis of this is the Civil Rights Act and the Constitution. So the Mayor should be so advised if he were to attempt to forcibly restrain Thomas.

Quaere: How could you force Mayor to issue the license? You may have a writ of Mandamus available (varies from state to state as to scope & power), or some ⁽¹⁾ compulsory bill in e.g. The strongest method on you feel that the Mayor will actively restrain Thomas, is an ⁽²⁾ injunction to restrain the Mayor from interfering.

Quaere: Suppose we go to court, & there the Mayor said that he felt that Thomas would cause trouble? (Back to (1)). Quaere: Suppose Mayor said that he has strong reason to believe that trouble would occur, and that he does not feel that he must wait until some heads get bashed in? — May have to postpone the May 24th date.

Remember the exception to the gen. rule.

Quaere: Does the Mayor have any grounds for denying the permit, or must he grant permit & then take action? — See Beilan & erner cases.

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Assignment:

Group I - c/B, chap. 13A
c/B, pp. 1023-51
pp. 1078-85

Group II - c/B pp. 901-923
Supp. Rice v. Sioux City
99 L.Ed. 897

Group III - c/B pp. 1473-1478
c/B pp. 1509-1519
Supp. N.A.A.R.P. v. Ala.
2 L.Ed. 1488

On Reserve, Cooper v.

Aaron 358 U.S. 1, 3 L.Ed. 2d 5
78 S.Ct. 1401 (1958)

Group III - c/b 137-149.
c/b 178-181; 185-190.
c/b 205-213;
220-233;
268-285

Group IV - c/b 213-219;
233-258;
c/b. chap. 17.

Mass.

NOTE:

It is known that the object of the speech is the advocacy of unlawful actions, then clearly the speech can be restrained priorly or subsequently. — EXCEPTION TO GEN RULE OF PRIOR RESTRAINTS.

The Finer Case deals w/ how you handle speakers after they have begun speaking.

See also the Kuntz Case.

In Mass. membership in the Communist Party is a crime, but is a Communist Party in Mass. whether membership is a

fed. offense has yet to be decided by the Sup. Ct. in a case before that Ct. — Scales Case.

→ Thomas v. Collins — probably the best case re the doctrine

of prior restraint.

✱ In Kuntz Case, Frank-
furter said that the mayor
or may (?) restrain.

JEHOVAH'S
WITNESSES

The Jehovah's Witnesses won
their cases. It was held that
our parks had been used
w/o interruption by other
religious groups, the Je-
hovah's witnesses could
not be refused the right
to speak there. This is so
even tho' they are high-
ly unpopular in many
areas.

(b) In Lerner v. Casey, Beilan
v. Board of Education, the
employees were denied
continuance of their ^{emp} because
they refused to
swear that they were
not members of the
Communist Party. They
stood on the 5th Amend-
ment.

In Lerner, the Sup. Ct.
upheld the City in its dismissal
all even tho' Lerner op-
ly stood on the Fifth Amend.
In both cases, there had
been Cong. investigations.

✱ Stockower v. Bd. of Ed. - a
professor w/o tenure took
the Fifth Amend. and
the Ct. held that his dis-
missal was unjustified.
In N.Y., the Bd. of Ed. said they

HOLDING OF
STOCKHOWER
CASE

were going to fire Stockower because he took the Fifth. Sup. Ct. said "no", that an inference of guilt cannot be gotten from the taking of the Fifth. In Lerner & Berlin, the dismissals were upheld because the Supers had the foresight to put in additional reasons for dismissal: lack of candor and insubordination. This was upheld even tho' the taking of the Fifth was one reason.

Answer to (2)(b) of Problem 8: taking of the 5th Amend, w/o more, not ground for denying license.

In this part of the problem, it would be obviously illegal to withhold the license solely on that ground.

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* PROBLEM 9 *

In order to take a charitable deduction, chief officers of the organization must take loyalty oath.

Quaere: What Const. objections, if any, can be raised about this affidavit? Speiser v. Randall held this to be unconst. in that the B/P that D was Communist was on the P. But, y we are dealing w/ a State govt., whereas in this problem we are dealing w/ the Fed. govt.

Doud Case - Union officials had to file affidavit. Why was oath upheld in Doud Case? (Note: today, clear and present danger test can be satisfied w/o finding immediate peril.) Doud Case would uphold oath; but Doud deals w/ labor - objective was to prevent Communist union leaders (going by past records) from starting strikes wh would in turn impair commerce. Cong. cannot impair strikes as such, that is, political strikes. Under N.L.R.A., management gets certified and must bargain w/ their union. Cannot bargain w/ any other union.

Quaere: what relationship has oath-taking to political strikes? Do the means justify the ends, and, if so, how? This is a device to make someone disclaim; if he disclaims falsely, perjury will lie against him.

Literally speaking, a union cannot last one year if govt throws it

out of the N.L.R.B.-no govt. aid in bargaining.

If the govt. takes action wh goes against free speech, we ^{seem} have a free speech case. Does the Sup. Ct. recognize Doud Case as a free speech case? Yes.

HYPOT: What if they said, "No union whose members are other than those of the Caucasian race, can come under N.L.R.A." - This would not be a free speech case, but a 5th Amendment D/P collision. So, Doud Case is a permissible interference w/ free speech.

⑧ SPEISER Case - attempt to force veterans to sign loyalty oath in order to get a tax deduction. What was the end in view?

Quere: If an organization qualifies as a charitable organization, how can you argue that the organization is doing an evil?

Second Hour Class

In order that an individual get his exemption, what would be the reason given?

What did Calif. pose as its objective in Speiser? Practical aspect was to outlaw Communist Party, but what was its stated objective? - Exposure of these people might be, but is that permissible? Y is a tendency to say NO. So, what is a valid objective? If the govt. is to benefit someone, this is not a class that will benefit.

An end must be pr-missible.

⑧ Doud Case - you can show evil of political strikes. Ct. held that this was an objective that Cong. could deal w/ under Congress' powers of Commerce and War. But, this argument cannot be made in this problem.

Quere: Suppose we were taxed on our gross income? No objection to this. Neither need Congress give us any tax exemption. This exempt. is designed to encourage support of activities beneficial to the public. So, govt. says "We give this privilege, but we demand this price. This is the stated govt. objective. This is strictly a legislative argument."

Legislative

Argument

Rule of law

But, price that is demanded cannot be arbitrary or capricious (and a requirement of being Caucasian is arbitrary).

Why was it stricken down in Speiser? The exemption did not have to be granted, but the Ct. said that these procedures place the B/P on the taxpayer, and that that is a violation of the 14th Amendment. A DISCRIMINATORY DENIAL OF TAX EXEMPTION FOR ENGAGING IN FREE SPEECH IS A LIMITATION ON FREE SPEECH. If y are to be illegal activities or govt. sanctions, the govt must be made to make out an affirmative case.

SPEISER v.
Randall

One of the real inherent difficulties in this as a Const. case: how will charitable corp. get a test case if officers do not sign? (He leaves this open.)

⑧ SUMMARY

- (1) Where lies the presumption of constitutionality?
- (2) What is the status of the "clear and present danger" test?

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① Is there any diff. between free speech as handled under the 14th or the 6th? Is Cong. held to any diff. standard re municipalities and states?

② Doctrine of Constitutionality - Just what is this presumption? - Some have said this is a presumption of rule in civil liberties cases. - An unfortunate use of words.

Every act of any public official is presumed to be regular. In a free speech case, therefore, what an official has done is presumed valid.

Thus, any challenger must carry the burden of showing that the official's act was unlawful. Someone must come forward and make the challenge, thereby making a justiciable controversy. He must show how it (official's act) impinges upon some right.

When that is shown, the state, acting in official's behalf, must justify + explain the interference, the restriction. Thus, the B/G.

Tests: (whether interference w/ speech is justifiable - tests as used by courts)

① Rational Basis test - only is a const. protected interest, and an intrusion by the state as a matter of rule of law the challenger has a heavy burden of persuasion of fact & argument to overcome presumption of validity of the state's exer. of power. - An evaluative judgment is made by the Ct. as to whether the challenger has overwhelmingly persuaded the Ct. that the exer. of power did not have even one rational basis. That's all the state needs - one rat. basis.

Usually applied in "economic" question cases.

② In E/P cases, Morley v. Doud, Ct. seem to refuse to use the rat. basis test in certain types of cases. This test: are the means rationally related to the end. - Gives judge much latitude. Balancing by judge of pros against the cons, not just whether it is a rational basis. In the "rat. basis" test, if there is any rat. basis, the state will prevail, and any doubts militate in favor of state.

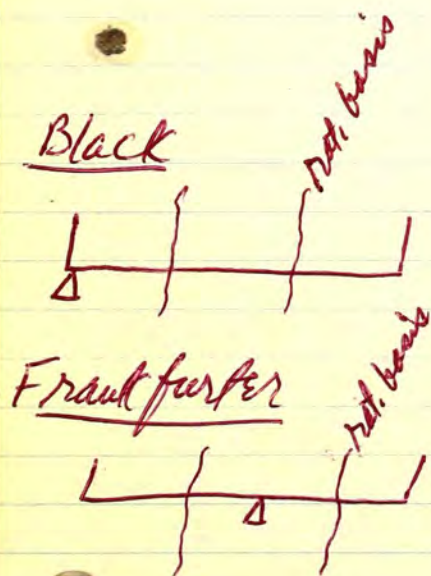
Thus the Cooley Rule comes in to balance the two interests. In Holden v. Hardy, it was a more open, even weighing than in Lochner.

It is only in the more recent years that the words "presumption" were used in relation to Cooley Rule. The more recent cases talk about the presumption. In those cases, the challenger carries a heavier burden. Thus, there is a trend of moving toward, tho' not to reach, the rational basis test.

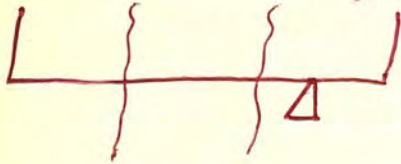
In Civil Liberties problems, the Ct. varies as to on the fulcrum on the scale should be put. Black goes to the far left end of the scale, while Frankfurter seems to be about in the middle (i.e., that the civil liberties cases should not be accorded special eminence).

The further to the left of the scale the heavier the state's burden will be, i.e., if the state cannot show good reasons for the interference, it will be struck down as a rule of law by the Black group.

Frankfurter is tied to his position by his philosophy of federalism — giving substantial weight to States' interests. He is a strong civil libertarian, but



Clark (Spies Case Dissent)



on he will stand is not easily predictable.

So, it is error to say that γ is a presumption of une. Actually, γ is a heavier burden to the State to show that their interference was justifiable.

In free speech cases, the State cannot merely say that the D has failed to show that there was an unjustified interference, but must show that ~~is~~ their interference was justified.

Quarrie:

Why these differences of view? In tax cases, we see some help in answering this question: no ~~totally~~ avowed attempt to weight. If γ was a tax on IC, it was une. Is γ a friend to adopt this "rule of law" approach?

Why shouldn't a D/P case in the econ. area be decided in the same way as a D/P case in the civil liberties area?

The Ct. does differentiate on the basis of the type of problem, how the State interferes and to what extent. We must look at history of the kind of problem involved and the nature ~~of~~ or formation of the legal basis (e.g. 14th Amend. is generally stated).

When the specific rights are set out (e.g., First Amend.), it is

different from the way a general stat. (14th Amend.) is handled. In tax cases, e.g., *Hood Case*, some judges use a resort to the rules and whether the State has stat. for its own econ. advantage, and, on that is found, *fine*. - The mechanical approach.

(3) Clear + Present Danger Test -

In civil liberties cases, is a strong doubt as to whether this test exists today.

Definitely, it exists in subversion cases, tho' modified.

Under this test, the burden on the state to show a clear + present danger, if this test is used indiscriminately re municipalities in non-subversion cases, is HEAVY - very heavy.

Philosophically, this test is the best formulation which requires the Ct. to focus on what the speech is doing. It pushes the judicial inquiry to testing what the speech is doing rather than leaving the speech in a more theoretical posture. In *Gitlow*, e.g., the court was permitted to treat the speech more abstractly rather than consider that, actually, *Gitlow's* words were in their effect *de minimus*.

The heavy test of C + P D, was so heavy because it was formulated in subversion cases, for

Holmes & Brandeis, it would have to be an emergency. So, it grew a need for a test that could be applied in these municipal cases, and that's on Frankfurter comes in. Here is, however, an unsettled area.

In the field of fed. preemption - represents move from Nelson case to the Alphause Case.

* Nelson Case - the Pa. stat. was just held not to be operative; that the fed. acts were not only supreme, but preempted the area of supervisory control. Pa. Ct. held that Cong. had occupied the whole field; that the supremacy clause ruled. So what silent has the Taft-Hartley Act pre-empted the field of labor-management relations? So, this Ct. held it was an irreconcilable conflict, and that, due to the Supremacy Clause, the fed. act prevails.

* Alphause Case - the N.H. stat. was not declared inv. the Ct. holding that it was no irreconcilable conflict between the state stat. & the fed. act, and that, other questions being equal, the state stat. will stand.

This rep. a shift from the Nelson case, in the law.

Cox v. Young (Not in cb.), Nelson, Stockman case, Watkins, and the two bar-admission cases led to what became a crisis in U.S. a few years ago. Cong., under Art. III, i., debated the advisability of limiting the appellate jurisdiction of the Sup. Ct. Nelson v. Brown v. Bd. of Ed. really lit the dynamite.

The junior Bill was introduced to limit the appellate jurisdiction of the Court. It failed — barely. Sought to limit app. juris. as to:

- ① Fed. investigative cases
 - ② Bar Examiners cases
 - ③ Fed. Security cases
 - ④ State Security cases. (Alphano case).
 - ⑤ Bd. of Ed. Security cases.
- If it had passed, it could have been 50 different views today re those matters.

Anyway, that is part of the background of the transition from Nelson to Alphano.

(Chap. 13) REQUIREMENTS OF FAIR PROCEDURE
Criminal Law & Procedure

Barron v. Baltimore (Marshall, J.) — Bill/Rights (Amends. 1-8) applicable only to Fed. govt. and not to the States. That left Arts. I & II the only restrictions on the States.

Fourteenth Amendment
Slaughter House Cases

Draft of the phrase "privileges or immunities of citizens of the U.S." — That's the second class.

The first clause of the 14th was put in to overrule the Dred Scott decision & provide for all citizens (slaves & children of slaves; children of foreign ambassadors born here).

The Slaughter House Cases literally struck out that second clause — "privileges and immunities of citizens of the U.S." — Ct. held that the priv. and immunities set out in the 14th relate only to the very ltd. one wh. we as citizens of the U.S. have; but, those privileges and immunities wh. relate to biz, money, laissez-faire, etc., are strictly a matter of Louisiana law. i.e. That second clause does not relate to the state, but are some ltd. privileges and immunities wh. are protected not by the 14th, but by the Supremacy Clause.

In Art. IV, is another "privileges and immunities" clause (called the "Interstate p + i clause"). i.e. If I go from Ga. to Mass. I am protected in Mass. It says "p + i. in the several states."

When Sup. Ct. came to a discussion of that Art. IV Clause, it misquoted (maybe intentionally) by saying "... of the several

states." That supported the Ct. position.

So, the 14th amend "p. or i" clause has literally disappeared. This was the result of a strict reading.

Later this monopoly, previously granted by the legis. of La. to the Slaughter House Butchering Co., was repealed by La. and the Slaughter Co. appealed under the contract clause of Art. I, sec. 10. Sup. Ct. upheld La. legis.

So, the Due Process Clause of the 14th amend. emerges as the most important promise of the Const. wch. relates to the States.

(Sec. A) * The Bill of Rights & The Meaning of Procedural Due Process

To what extent is the B/R applicable to States and binding on States?

Barson v. Baltimore said the B/R did not apply to States.

Twining v. New Jersey (p. 924)

The real question was whether the failure of a D in a crim. case to take the stand can be referred to by the prosecutor as raising an inference of guilt.

N.J. had a state c privilege against self-incrimination, and has stat. allowing reprieve to a D's failure to take the stand.

Admitted, in any fed. Ct.
can be no reference to a
D's spec. of his privilege
against self-incrimination.
It here held:

① The B/R has no relation to
 the privileges or immunities
 clause. - Slaughter House Cases.

② The D/P clause had no re-
 lation to the B/R here be-
 cause this privilege was
 not so fundamental & in-
 herently basic a privilege.

This point of view pre-
 vailed until

Palko v. Conn.

(p. 935)
 The 14th Amend. did not give
 this D protection against Conn.
 stat. allowing double jeopardy.

Admittedly, y can be no
double jeopardy in any fed. Ct.

Are all rights of B/R
 carried over & applied against
 the States thru the 14th, or
 only some of the rights? i.e.,
 Did the Framers intend that
 all of the B/R be carried over?
 Palko said no.

⊗ Adams Case (p. 940)

This is the law, and is a
 reaffirmation of Swining Case
 along Palko lines.

[The Palko Doctrine - only those
 are brought over as are as
 fundamental as the bases of
 liberty that w/o them liberty
 would be impossible.

Black's dissent in Palko —
all of the B/R rights are carried
over.

This split is a hot one in
jurisprudential circles, but Adams
is the law (per Cardozo, J.).

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What is this content of D/P? Palko
is a concept of selective incorpo-
ration, and it requires quite a
bit of selection. This will be
resolved as we go along.

Quarrie: What sanctions are imposed
by Sup. Ct. for breach of D/P?

- ① Reversal — a powerful one.
- ② Exclusionary Rule — certain
types & kinds of evid. are ex-
cluded from the case, and
can never be used w/ re-
spect to this D for this charge.
- ③ No specific or direct sanction
to vindicate violation of a right.

Right to Counsel —

Powell v. Alabama (cb. 1023)

It sparked the great atten-
tion wh is now focused on
the procedural & aspects of
criminal law.

Here again we come to the conflict
between flexibility and stability.

The law is clear re the right
to counsel. We are talking about
the indigent counsel, i.e., assign-
ed counsel.

In the fed. Cts., any offense
of any seriousness requires that
the D who cannot afford counsel

must be assigned counsel. The judge who fails to do so, acts at his peril.

In very serious matters (felonies), the state must assign counsel. From this point, the matter recedes into gray areas.

On it is found that the matter required counsel, failure to provide counsel will be sanctioned on appeal by reversal. Same, on the counsel is found to be ~~competent~~ incompetent. This is definite on it is found that y has been a denial of D/P.

* Confessions —

Y are few cases. Usually arise on confessions are gotten by alleged brutality.

Law here substantially covered by C.L. There has been no real necessity on the fed. level to develop extensively the C law on this matter.

Illegal Confessions are called "coerced or involuntary confessions", and are a violation of D/P. The sanctions: reversal and exclusion from use forever the confession.

In search & seizure (illegal), any clues or evid. obtained as a result thereof are unusable themselves and this goes also to leads obtained from the clues or evid.

In the confession, however, ~~the~~

is a plug; the leads derived from the confession may now be used. Leading case in coerced confessions by phy. brutality: Brown v. Mississippi.

* Chambers v. Florida - confession obtained by mental inducement and extreme psychological means, is excluded & denial of D/P.

"Involuntary" and "coerced" are used voluntarily.

C.L. View

The C.E. was essentially devoted to trustworthiness, i.e., regardless of how obtained, if the confession was voluntary, it was used as being trustworthy. However, the D/P law depends upon the fairness and reliability of the means by which the confession of D was obtained.

Rochin v. California

(ob. 947)

Quasi:

How far will Sup. Ct. & fed. govt. interfere w/ criminal procedure of a state? Here, cops who arrested D, had his stomach pumped to get two capsules of morphine which D had hurriedly swallowed. Sup. Ct. said that the evid. (real evid.) which was used at trial was shockingly obtained and that it was error to allow it to be used at trial. So, J/Calif. ruled: Ct held that D/P was denied because the method used was so shocking to the conscience.

* So, on D phy. resists, law

enforcement officers are not privileged to commit assault and battery to obtain evd.

Use of blood or urine sample is not an encroachment upon a D's right against self-incrimination.

* Confessions obtained during period of illegal detention - this is a problem. It arises even on D was not mistreated. But, under the law, the prisoner is entitled to be brought promptly before a preliminary magistrate to determine if it is probable cause for holding ~~the~~ him. (These are arrests made on suspicion and/or for investigatory purposes.)

Mallory Case - 77 Sup Ct. 1356 - if fed. officers do not promptly produce prisoners before prelim. magistrate, the confession is excluded. That is the clear fed. rule. The fed. rule allows no more than four hours, and then only if the officers can show sup. reason for taking that long. This is the rule of fed. Crim. procedure (Rule 5) and follows McDabb case, and arose again in the Mallory case, above cited. - Not a rule of the law. Fed. Rules Crim. Procedure - Rule 5. It does not bear on the States necessarily.

McNabb v. U.S.,
318 U.S. 332

In Allegas v. Nev., D, who spoke no English, lay in a Nev. jail for three weeks before he confessed.

and was brought before the State Ct. Sup. Ct. held that the confession was not constitutionally invalidated, and that the State's use of the confession was not error.

357 U.S. 433 - college grad. denied atty. of his choice. He (Crooker) was offered an atty., but insisted on having the one of his choice. - By 5 to 4, Sup. Ct. said that this right was not w/in D/P here.

Weeks case - 232 U.S. 383 - The Court has no sanction for illegal search and seizure by a state officer, even tho' the right is carried over to the 14th amend. (Palko doctrine).

- Leading case on exclusionary sanctions. The Court held that in a fed. prosecution the Fourth Amendment barred the use of evid. secured thru an illegal search and seizure.

Quarrie: The general question in these cases is this: Does a conviction by a State Court for a State offense deny the "due process of law" required by the 14th Amend., solely because evid. that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a fed. law in a Ct. of the U.S. because it deemed to be an infraction of the Fourth Amend. as applied in Weeks v. U.S.? See Wolf v. Colorado, Ch 1078: held, in a prosecution in

Gen. Issue

Wolf
Rationale

a State ct. for a State crime the 14th Amend. does not forbid the admission of evid. obtained by an unreasonable search & seizure. i.e., Although the search & seizure was in violation of the Fourth Amendment, it was no viol. of D/P because it seems that today, as a practical fact, security of one's privacy against arbitrary intrusion by the police is not so basic to a free society as to be implicit in the concept of ordered liberty (the D/P test used here).

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Search and Seizure (Fourth Amend.) -

The Weeks rule (excludes evid. obtained by an illegal S. & S. and any leads or clues obtained therefrom) is the main exclusionary rule under the S. & S. clause; but, you have two loopholes:

- ① Searches incident to a lawful arrest or warrant.
- ② Extent to which they can search w/ warrant.

Other areas of S. & S. difficulties:

- ① Health area - hospitals, rest homes
- ② Illegal S. & S. by State officers from which evid. is turned over to fed. officers.

Wolf v. Cole

(cb 1078)

Palko theory was applied, but Ct. said they would not apply the exclusionary rule. So,

State officers can illegally S. & A. but the Ct. will not sanction. Nor is there sanction of evid. gotten thereby. The complainant would be forced to rely on C.L. tort remedies, violation of state statutes, and on found, prosecution of the officer under crim. stats. by the state.

Wire Tapping

The most pervasive invasion of privacy in practice today.

Oliver v. U.S., 277 U.S. 438 (1928)

The Sup. Ct. lost control on wire tapping here. The Ct. was unable to see the taking of info. as a result of the tap so that it would fall within the Fourth Amend. Brandeis gave one of his most brilliant dissents. So, the major. held there was no base to fight wire tapping.

In D.C., an officer must go to a judge to get "permission" to tap, i.e., a model of search warrant.

The Fed. Communications Act has been seized upon by the Sup. Ct. to try to curb tapping. In Wardone v. U.S., 302 U.S. 379 (1937); 308 U.S. 338 (1939): the FCA was prohibitive against using info. w/o permission of the talkers.

The FCA, however, does not have the scope nor applicability

of the S. + S. Clause.

In this gen. area of S. + S., the atty. must make a pre-trial motion to suppress the evid. obtained by the illegal S. + S. If the order is granted, it becomes res judicata as to the admission of that evid.

* Illegal Arrests

Quere: How far can arresting officer go when legally arresting? = Sometimes, officers may even go into another state & literally kidnap the arrested. However, no matter how illegal the arrest, once the state Ct. gets him, it can exercise its juris. and have trial, and the Sup. Ct. cannot interfere.

* Equal Protection Clause -

this comes in here on you have criminal cases or matters involving races.

There must be a fair representation on a grand or petit jury of the racial complex of the community. A man has a right to be tried by his peers.

These are essentially problems of fairness and E.P.

* Forms of Criminal Procedure under the Constitution:

① Accusatorial
 ② Inquisitorial

i.e., Presumptions (innocence), requirements as to burdens of proof, adversary systems, etc. That's the first major philosophical base in processes of criminal protection.

The second philosophical base: protection of the innocent.

The third: for purposes of the law the dignity of the human is preserved. Even the lowest of human life and the highest are accorded the same protection (at least in theory).

* Racial Segregation Cases & E/P *

Major Area today.

Involves the E/P Clause. There were a no. of cases before Brown Case. Brown was the culmination of a line of cases. It was one case requiring that quies be unsegregated.

Rule of Law

"It is known that race is not a permissible means" or classification.

Plessey v. Ferguson

The "separate but equal" doctrine, a compromise.

Brown v. Bd. of Education

name Case

Any form of segregation in education is unlawful, as being a denial of E/P. If you segregate people, the mere fact of segregation defeats equality of itself. The very act of segregation is a denial of E/P.

and D.P.
 See Cooper v. Aaron (Faubus' use of Natl. Guard to prevent integration.) 78 Sup. Ct. 1401. This gave Little Rock Bd. of Ed. a delay of two years.

The 13th, 14th and 15th Amendments have a slightly different meaning due to slightly different wording. The 13th applies to everyone and prohibits slavery or involuntary servitude. Now, in the 14th, the wording is that "no STATE ..." In the 15th, the State is referred to. So, in the 14th and 15th Amendments, we have the problem of STATE ACTION.

What is STATE ACTION?
 A private citizen can practice segregation, but a Govt. official cannot due to 14th & 15th Amendments, which are a command to the State not to segregate. But, how far down can the State go to affect social legislation?

Corrigan v. Buckley,
 271 U.S. 323.

In Buckley Case, zoning due to race was declared unconst. The U.S. Govt. is one of the worst offenders in the field of restrictive covenants, the method developed to circumvent Buckley Case. These covenants ran w/ the land.

NAME CASE

Shelley v. Kraemer (Ch. 906)

This case tested the legality of

racial restrictive covenants. Buyer from owner resold to a member of a prohibited group contrary to a restrictive covenant. Then, owner sued in equity to restrain the transfer of title and to have the deed set aside.

"... The action inhibited by the 1st section of the Fourteenth Amendment is only such action as may fairly be said to be that of the State. Not Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The action of state cts. and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment. The prohibitions of the Amendment extend to all action of the State, deriving all of the laws, whether it be action by one of these agencies or by another. (The State may act thru different agencies, — either by its legislative, its executive, or its judicial authorities.)

It has been recognized that the action of state courts in enforcing a substantive C.L. rule formulated by those cts., may result in the denial of rights guaranteed by the 14th. Even though the judicial proceedings in such cases may have been in complete accord w/ the most rigorous conceptions of procedural due process.

Here, "... but for the active intervention of the State Courts,

The great prohibitions of the 14th are addressed to that action alone which manifestly said to be that of the States. supported by the full panoply of state power, petitioners would have been free to occupy the ~~premises~~ props. in question w/o restraint."

These are cases in which the States have made available to such individuals the full coercive power of govt. to deny to petitioners, on the grounds of race or color, the enjoyment of prop. rights in the premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

Judicial action is not immunized from the operation of the 14th Amend. simply because it is taken pursuant to the State C.L. policy. (Bridges v. Calif., 314 U.S. 252; A.F. of L. v. Swing, 312 U.S. 321.)

"State action, as that phrase is understood for the purposes of the 14th, refers to exertion of state power in all forms. And, when the effect of that action is to deny rights subject to the protection of the 14th, it is the obligation of this Court to enforce the commands."

Held, "that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the 'E/P' of the laws and that, therefore, the action of the state courts cannot stand."

"Freedom from discrimination by the States in the enjoyment of prop. rights was among the basic objectives sought to be effectuated by the framers of the 14th Amend." "Was such discrim. here."

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These restrictive covenants run w/ the land. Good to compare these w/ ~~a~~ valid covenants (e.g., against taverns in X block). If the eq. action brought by the one invoking eq. juris. to set aside the conveyance and deed and restrain the ~~grantee~~ ^{grantee} from taking poss., involved a "tabern" covenant, y is no doubt that the deed would be set aside and the covenant enforced.

Corrigan v. Buckley - In the Wash., D.C. case (1926), a racial restrictive covenant was upheld, the Ct. saying that the 14th and 15th did not apply to private discrimination, but only to state action. This was held even tho' state Ct. had upheld the restrictive covenant, Sup. Ct. saying that a full, legal trial was had & ¹⁴ was no denial of D/P. This was under the D/P clause of the 5th.

The 14th, 15th +, a fortiori, the 5th, are restrictive against the States and the Fed govt., but not individuals. The 13th applies to individuals.

Kelly v. Kraemer (cont'd.)

The R/C was valid in and of itself when made as far as not subjecting the parties to the covenant to crim. or civil liab. However, when X went into state court and invoked the state court's judgment via mandatory decree, was that Ct's mandatory "state action"? Held, yes.

Now, was that state action

violative of any E rights? Held,
yes. Off what law have these
appellants been deprived?

① Right to K.

② Right to own + peaceably occupy
and alienate prop.

They are derived from the C.L.
of Prop. However, how could the
Grantor, who had covenanted w/
the bigot, be deprived of those
rights when he freely entered
into the covenant?

Quære: What about the grantee of
~~the~~ prop.? = Bigot would be ar-
guing that since the covenant was
superior to all else, the grantee
got no rights. However, the classi-
fication here is race, and that
simply is not a permissible
classification. ~~If~~ gas stations
were covenanted against, the
classification would be econom-
ic, and the K provisions
would supervene.

The use of race as a
classification results in the de-
nial of equal protection. The
race thing is the invalid-
ity. So, grantee's rights would
be putative and are superior
to the K clause and prop. rights.
Thus, it is a conflict of assert-
ed claims, but the lesser
must fall, i.e., the covenant-
based right.

The use of race as a
classification is a denial of E/P
and asserted, putative rights.

So, if it is state action, the
14th Amend. is supreme to the State.

The State cannot use its action to deny equal P.

* Re the sit-ins: 2 problems.

① Or is there "State action"?

② Or is y denial of E/P of what law?

Or y is segregation on city buses, but no ordinance requiring segregation or is there state action? Via the public utility statute. The bus co. is almost always a monopoly. It is held to high standards, under the C.L. of public utilities. It will not be allowed to superimpose its segregation on the public. Clearly, y is state action.

May make a diff. or y is a multiple-dept. store, or or y is just a lunch counter or store.

In the bus cases, the law being denied E/P of is "public utilities law". But what about the lunch counters?

5 MAY 60

When the officer arrests the "sit-ins", that's the State acting.

Re Trespass - Are the lunch counter operators under any more special duties than would be a private indiv. who wants an unwanted trespasser ejected from his home by cops? = If they are under a higher duty, and exer. their duty in a discriminatory manner, denial of E/P.

Bus cases - legal status of bus

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is
Co. under a diff. duty than a private person; and, when cops are called in, who in turn support segregated seating based on race, then the State has acted. The bus Co. cannot use the State to aid it in derogation of its duties w/o being censured.

If State owns land (e.g., park, beach), that land and its State-owned facilities must be w/in E/P, and segregation of those things (auditoria, etc.) is int as being repugnant to E/P.

In area of land, further, State cannot use the method of lease for public, not purely private, use as a means of evading the Constitution.

In the area of financing by the State of industries, etc., and private schools, housing, the question arises as to how far the State can go in the use of its prop. powers (e.g. eminent domain, etc.) w/o having State action.

Dorsey v. Stuyvesant Town Co. (912)

Ct. of N.Y. held that this was much activity of the State, it was not suff. to satisfy "State Action."

The "private school plans" in the South will fail due to much State action.

* Performance of State Functions By Private Persons

Most frequently found in area of voting and primaries. Due to one

party system (in effect) in the South, the real & T.I. election is the primary.

The Southern States opened the general election to all, but put the control of primaries in the hands of the Democratic Party. Sup. Ct. cut thru this (Texas & S.C.) and got to the guts of the matter and held that this was state action and that, yfore, all elections must be opened up to all qualified voters, and that to do otherwise would be repugnant to the 15th Amendment.

Marsh v. Alabama

Private persons, required by the State to live up to its standards, ~~and~~ were held to be acting for the State, and, yfore, w/in 14th & 15th. So, y was state action.

Rice v. Sioux City Cemetery (Supp.)

Wife of dead Amer. Indian was denied right to bury her husband in this cemetery, the D depending on the ground of a clause in his land K.

The Sup. Ct., on appeal by P, split 4 to 4 (Harlan J. not participating), thus automatically affirming the Ct. below.

Later, Iowa passed stat. outlawing the discrimination in any cemetery.

Girard College Case

Trust of Stephen Girard set up institution for "poor, male white students." Later, Pa. set up special

admin. agency to handle all trusts ^{reposed} in the State, and Girard left his to Philadelphia. — This was held to be State action.

Pa. then set up private administrative agency to handle these "State" trusts. Cert. was denied to Ps on appeal, and it was held that it was not sup State action.

How can Stuyvesant, Rice and Girard Cases be distinguished? On their peculiar facts. In Stuyvesant, City of N.Y. passed stat. In Rice, State passed stat. In Girard, the facts there were so peculiar to it that it cannot be said to be a precedent for anything in this area. The denial of cert. merely means that 4 justices could not agree that the matter was appropriate for review.

Civil Rights Acts

Come under the legislative power and sec. 5 of the 14th Amend. Thus, the Acts here apply only to the States. Also, under sec. 2 of the 15th.

There must be State action here too, therefore, since these C.R. Acts come under the 14th + 15th.

Barrows v. Jackson

Action for damages by the bigot against the one who breached the covenant. Sup. Ct. said NO, obviously backing up the Shelly v. Kraemer

case. (P here had failed in action against Negro to let aside the dead.)

Ct. said that breacher - D could raise the objections of the class to wh Negro belonged; that Negro was specifiably identifiable, but not identified; that actually, therefore, the rights of Negro were involved.

No E/P Clause in the Bill of Rights.

* Fed. Govt.

Quere: Will the Fed. Govt. be held to the same standard as the State? Under 5th Amend., D/P clause takes over & applies to the fed. Govt.

To turn this thing around, the State, pursuant to its police power, can dictate that it cannot be discrimination. 326 U.S. 98; FEPC upheld. State had its own FEPC.

* Other areas on questions are raised and discrimination found:

- ① Education
- ② Labor
- ③ Housing

In labor, two questions and two areas of discrimination:

- ① In admission to unions; and
- ② In equal treatment if admitted.

6 MAY 60

* Powers of Congress as to Commerce in this area -
It is generally farm.

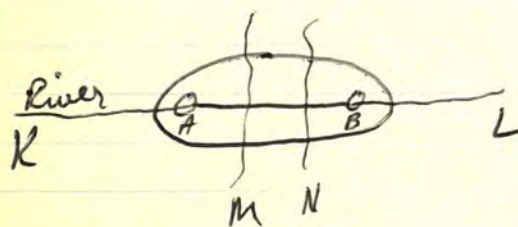
Gibbons v. Ogden

Marshall defined commerce "among the several States" in such a way as to let the regulatory power of Cong. extend past the borders and into

The State so long as it was commerce.

This case still is the main one in this area, but it has gone thru evolution.

The Daniel Ball



Interstate Commerce vessel (ship) on navigable streams and rivers. The stream ran thru Michigan but the vessel plyed its trade only w/in the state.

The question: Can Cong. regulate this? Held, yes.

On is the I/C? Two parts:

(1) The concept of statute - did it cover this stream as used by the shipowner (i.e., ship captain)? Statute covered navigable streams and rivers. - Ct. decided that this boat came w/in the Stat.

(2) Therefore, is the statute valid as applied to Ball? Held, yes. Thus, it was found IC here. But, where? (Note: Ct. will try to avoid C questions on possible.)

Since boat never left territorial boundaries of the state, the Ct. had to look at what was being transported.

Some of the goods originated at pt. A and went to pt. B on some were unloaded, and the remainder went out of state. Some other goods originated at pt. A, were taken over by some other type of carrier, & went out of state to pt. C.

Ct said that these goods were moving in I/C and were, i.e., Interstate goods. The

activity of Daniel Ball effected
 "more states than one" (Marshall);
 and, therefore, Daniel Ball was
 involved w/ matters affecting
 more states than one.

If Ball did not carry
 any interstate goods nor passen-
 gers, but the river were
 a navigable stream used by
 other interstate boats, Congress
 could still come in and regu-
 late. There are two ways that it
 could regulate (discussion later).
The river would be an inter-
 state "highway".

Note that the facts in these cases
 will deter, to a great degree, the re-
 sult.

Note: the mere fact that some-
 thing is deter. to be I/C does not
 preclude some State power to regu-
 late. So, you must know that
 I/C and local commerce are not
 mutually exclusive. Congress &
 the State can regulate. However,
 once found to be I/C, we
 then find that Congress can exer-
 cise its great regulatory powers
 in I/C.

This was a regulation of the
 carrier by setting up standards.
I/C Act (1887) followed this
case (wh followed Gibbons down
the line) by six years. Since the
I/C Act, there has been no really
major case (equal, e.g., to Gibbons)
attacking the I/C Act.

Conf. can deal w/:

- ① Carrier
- ② Equipment

- ③ Safety features
- ④ Service rendered
- ⑤ Biz methods.
- ⑥ Bs/L used & liability limits in Bs/L.
- ⑦ Rates charged
- ⑧ Corp. structure, etc., etc., etc.

So, y is no doubt about Congress' control over the carrier involved in I/C.

But, what about the power of Cong. to regulate the goods? - ~~Two~~ major cases: Lottery Cases and Hammer v. Dagenhart. These two cases challenged the core of Gibbons v. Ogden wherein Marshall spoke of the extent and nature of Congress' power. (Co-extensive "...")

Lottery Case

This followed Gibbons by 5 to 4 votes. In Dagenhart, we find a 180° turn - about, and adoption of the Lottery Case minority.

Here, a stat. forbade anyone to cause lottery tickets to be carried or "sent" across state lines.

This was action for writ of habeas corpus. The accused argued that despite the doing of the phy. acts charged, he did not do it in I/C and "sending" the tickets did not const. I/C.

Note: Cooley Rule used when state's power is being challenged. Note that we are now dealing w/ powers of the fed. govt.

The accused lost even tho' he further argued that the ticket was all, a close in action wh more-ly represented the thing or wrong sought to be curbed by Cong. via the statute.

Sup. Ct. said the tickets were tangible, were shipped by D, and were, i.e., I/C and w/in Congress' purview.

D made further argument: "to forbid the tickets to go across State line is not regulation, but prohibition; that prohibition = police power, and that it is no fed. police power."

Ct. said "regulate" (Art. I, §8) is broad enough to include the complete ~~reg~~ prohibition. Thus, Cong. can use this broad power to regulate to ex., in effect, police power, something.

The act of causing to be shipped is suff. to come w/in the I/C power.

So, sanction is on him (D), not on the carrier here.

Hammer v. Dagenhart

Re goods produced by child labor. Fed. Stat. sought to prevent manufacturers of goods by child labor from moving those goods in I/C.

In Lottery, note, Ct. said that the tickets were susceptible of shipment and were shipped.

Also, that the power to regulate included the power to prohibit and any other w/in the broad sweep.

of power to regulate. So, that case used two steps:

- ① Is it commerce?
- ② If so, the plenary powers of Cong. takes over and Cong. can be stopped from exer. that power only by the Constitution, and the Const. does not say anything in restriction.

9 MAY 60

Hammer Case (Cont'd.) - this stat. was modeled along the lines of the stat. involved in the Lottery Cases. This was the first effort of the Fed. govt. to legislate in the area of fair labor practices. It was held une.

A 5 to 4 decision here. How could it have been held une in view of Gibbons v. Ogden + the Lottery cases?

Two ways that the act was invalid:

- ① The Act read "No one shall ship goods of that kind." This concerned the movement of goods and seems to be commerce involved. We know that Gibbons Case said that Cong. could regulate commerce. So, the Ct. here, to get around that, looked at "the objective, the end, the purpose"; then Ct. asked "Did Cong. have power to regulate the end here?" What was the objective? - If it was, and the Ct. so held, a reg. of the children's working hours, then it was a reg. of health, welfare, safety + morals of the public. Held, Cong.

does not have the power to reg. the health, etc., of the public. Therefore, these were matters properly reserved to the State.

② Secondly, it was une because Cong. was invading the province of a power reserved to the States. So, we are again seeing Kent's respective spheres of power. In theory, they are separate even tho' the lines between the two spheres — fed. and State — is not sharply defined.

So, Congress' goal was not the regulation of I/C, but to go into the State's sphere and regulate as an end, the health, safety, welfare and morals of that State's citizens.

So, it is a reserved State power, and if the fed. govt. tries to reg. in the sphere of that power of the State, the regulation will fall as une.

Quere: How did the Ct. distinguish Lottery Case, the Mann Act cases, et al? Ct. said, that the other things were bad in themselves, e.g., bad food, prostitutes. Either one, if eaten, can be very harmful. However, the products of child labor are not evil in themselves.

A state could not bar the entrance of these products of child labor. See the liquor cases. Nor could it require that such incoming goods, made by child labor in another state, be set at a

higher price than products of non-child labor-produced goods. Lochner v. N.Y.

Yellow-dog Ks have been sustained.

So, under Hammer, we find a preservation of 'laissez-faire', i.e., free enterprise under the Constitution.

In Carter v. Carter Coal Co. - the Bituminous Coal Act was declared unconst.

In the Shechter Case, the Nat'l. Recovery Act was declared unconst.

In Butler Case, the Agricultural Act was held unconst.

So, most of the New Deal legislation was held unconst.

But, the N.L.R.B. (Wagner Act) was held const. by a two vote margin. Jones & Laughlin Case.

The Parrish Case wiped out Lochner and that line of cases. Under Parrish v. West Coast Hotel, States have much power to reg. labor so long as it does not try to reg. Int'l.

* Darby Case

Turns right back to Gibbons v. Ogden. Re the "Wage & Hour Act", sec. 15 (a) (1): minimum wages & max. hours. This directs itself to non-union labor. Actually called the Fair Labor Standards Act. - The sec. 15 (a) (1) make unlawful the

NAME
Case

in I/C
 shipment of any goods produced
 in violation of any of the pro-
 visions of the Act.
 This Act was sustained by the
 Court: the shipment of goods
 manufactured in one State in
 interstate commerce is I/C,
 and this Act was a regu-
 lation of commerce.

10 MAY 60

Darby Case - the thing regulated for the
 stat. is the shipment of these goods. The
 Ct. did not look further to say that
 this was a reg. of commerce, and
 that this was commerce was a fact.
 Ct. said that prohibition was within
 the concept of regulation.

Does anything limit this
 power of Congress to reg. commerce?
 It is nothing in the Bill of Rights
 which applies to this stat. However, if
 Cong. were to pass a law deal-
 ing w/ shipment of Bibles or Sunday
 School materials, a 1st Amend. prob-
 lem would come in. Or, if Cong.
 were to pass a law author. the
 "illegal" search and seizure of
 goods in I/C, a 4th Amend. prob-
 lem ~~is~~ would arise.

Now, Marshall said (Gibbons
 v. Ogden) that so long as it was
 I/C, Congress' power to reg. would
 follow the goods no matter how
 far into the State they go. Same
 if Cong. reg. safety features, wheels, etc.
 of a carrier. So, Congress' power to reg.
 I/C, if it is I/C, goes on, and on and
 on. The State only comes to bear

when the fed. power exhausts itself. It has no reserved State power. — This is the whole philosophy of the Darby Case: The fed. power can be neither ltd. nor barred by the exer. or non-exer. of State power. The fed. power is not circumscribed unless by some other Constitutional provision.

So, Cong. has "something akin to police power" under the I/C power.

Quarrel! So, what has become of the 10th Amendment? The Ct. answered this by saying that the amendment says that all is retained which is not surrendered. — So the 10th Amend. is a purely redundant in light of the doctrine of delegated power under McCulloch v. Maryland as espoused by Marshall.

*Power
Fed. Analysis*

So, when dealing w/ Congressional powers, (1) look at the Const., Art. I. and ask yourself positively whether the power is in (in State analysis, you take the negative approach: is it police power, but how far can it extend before being ltd?). (2) Next, is it a limitation on Congress' powers? So, when dealing w/ fed. power, you must "trace" it and deter. on it is: then, is it a limitation on the power?

The Darby Case and approach is very stable today. The dis-

function between Darby & Hammer v. Dagenhart is so great that the Ct. overruled Hammer, and, therefore, left no doubt that Hammer has no viability any longer.

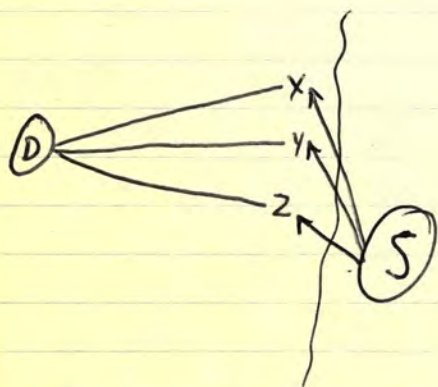
So, having decided that Cong. had power to pass the Fair Labor Standards Act, we move on now to interpretation: did Cong. intend that a fact situation come within the Act? How far did Cong. intend to go?

Now, we come to a line of cases on Congress deals w/ I.R., but the fed. exer. of power "hits in a different way."

Shreveport Case

Shreveport was a big marketing area, and competed w/ the Dallas-Ft. Worth marketing area for control of East Texas. Now, the R.R. set up discriminatory rates w/ preferred (favored) the Dallas-Ft. Worth area. The Texas R.R. Board authorized the preferential rates even tho it was farther from D to pt. X than from S to pt. X. So, L.A. shippers paid more for a shorter distance.

The I.C. Comm'n. ordered the R.R. to raise rates D-X, D-Y, D-Z to be made equal w/ rates S-X, S-Y & S-Z. The activity, therefore, sought to be affected by the I.C.



is a purely intrastate activity. So, the I.C.C. is reg. local commerce in an attempt to protect the Shreveport market area.

So, does protection come when "regulate" as that word appears in the Const.?

The I.C.C. was really concerned w/ I/C and its protection by the removal or correction of rate structures wh affect adversely I/C. So, Cong. (or a fed. admin. agency) must always be basically concerned w/ I/C here before it can go in and reg. local commerce.

The power to reg. this local activity comes from the Const. & Cong. shall have power to do whatever is "necessary and proper" to "regulate" I/C.

Suppose now, Cong. sought to demand that certain rail-road cars wh are purely intrastate, meet fed. safety standards. — So long as the rail b'd on wh the rail-road train ran was an interstate highway, Cong. can demand the above. This goes back to the Daniel Ball Case.

As long as the measures taken by fed. govt. are necessary & appropriate to effectuate the ends of fostering and protecting I/C,

TEST
for "necessary +
proper"

Cong. can regulate. If not, Court cannot regulate. So, that is the test of when Cong. goes too far. It must bear a real and substantial use of relationship to the ends. So, the Ct. must deter. when Cong. has gone too far, and will do so, when Cong. has acted arbitrarily and capriciously, the reg. will be struck down. This is the "means - end" test.

However, the Ct. has not moved as far as the "rational basis" test.

The real problem is when we turn to the production and/or manufacture of goods as bearing on the above analysis.

11 MAY 60

The major objective of the Shreveport reg. was I/C, and to do so was allowed to control intrastate Commerce.

This was the reas. rel. test between the means and the end. State cts. use this in the D/P cases, too, and fed. cts. also as we saw under early D/P cases.

Carter v. Carter Coal Case -

Sup. Ct. rejected this type of reg. on you are not dealing w/ carriers. This was a Cong. attempt to deal w/ coal. I/C problem here.

Agency was set up. The ~~subject~~ ^{subject} of reg. here was production (wages, hours & prices of sale of coal). The device here was to have a big group (a "Code") who was joined by people induced by big tax savings who would result from joining.

In theory, this is the same kind of case as Shrevesport, w/ Hammer coming back in. The Ct., therefore, struck this reg. down.

The test here: "the direct-indirect" test. If the matters regulated were directly affecting I/C, Cong. could reg. If it only affects I/C indirectly, Cong. cannot reg.

The diff. between direct & indirect is not ~~only~~ one of magnitude, but of the rel. of the matter to I/C. Not a question of degree or magnitude, but a question of the nature of the matters sought to be reg. The rel. of ~~the~~ ^{the} ~~is~~ ^{is} a purely local one, the Ct. said; and the Ct. followed Hammer & Lochner right down the line. This case was the zenith of that line of thought. After that the whole line of reasoning breaks down. See Jones & Laughlin Steel Co. Case.

Darby Case II

The ~~2nd~~ ^{2nd} who employs these people

in the production of goods for I/C, can be regulated.

This case turned Carter around completely so far as it is inconsistent w/ this case, but it was not overruled, because it involved complicated and multiple issues dealing not only w/ I/C, but also w/ big tax questions.

So, the activity wh results in the production of goods for I/C, can be regulated, tho' local, for the protection of I/C. Dorby is the case in this area of Congress' power to reg. local commerce.

Both parts of
Sec. 15 were
upheld.

Wicker Case

Produce intended to stay upon the local household economy. Farmer grew produce on his own acreage for the feeding of his own animals. Can Cong. control the production of this grain?

Cong. is concerned w/ the whole wheat market, and sought to control the wheat market by setting prorated limits on acreage to be used for growing of wheat.

The farmer's own personal demand is w/in the full picture of wheat demands. Thus, it is penalty for sowing on prohibited acreage.

This repudiates direct - indirect test. Cong. can reg. production of

wheat to control. If wheat mar-
ket on that is necessary to
control I/C in wheat, must
be a real and substantial
rel. between the thing regu-
lated and the end sought to
be controlled: the means-
end test.

This was not concerned w/
the econ. wisdom of the regu-
lation, only that it was
not illformed.

Cong. acted thru the
Agricultural Admin. employing
the Agricultural Act.

So, these things, w/ really are
not "commerce" but purely
local, even personal; how-
ever, Cong. can reg. these
things where there is a
real and substantial rel. be-
tween such reg. and the
fostering and protection of I/C.
Commerce means more
than just movement; it also
includes futures, machinery
used.

Stafford v. Wallace "Flow (or Stream) of Commerce"
doctrine — no longer necessary af-
ter Darby. Re whether activities
in Chicago Bd. of Trade & stockyards
can be reg. by Cong. Cong. was
held to have acted validly when
Cong. regulated stockyard
activities. It sits aside "the
great flow of commerce. Same
for Chicago Bd. of Trade.
This theory of stream of

Commerce is older & prior to Turkey.
Not necessary now.

12 MAY 60

FEDERAL TAXATION

Law is fairly well settled.
 Child Labor Tax Case -

If an 8^{th} wanted to use this child labor, he had to pay fed. gov. an excise tax of 10% on his net income.

Under Art. I, sec. 9(?), Cong. is allowed to assess an excise tax, but it must be uniform. Under Art. I, sec. 9, it can be a capitation tax. So, there are two basic types of taxes that Cong. can impose:

1. Direct - a tax on, e.g., prop.
2. Sales (excise) tax - i.e.,
 INDIRECT TAX - a duty, a tax on a transaction.

All direct tax is real, personal, or capitation.

The 16th Amend. was to avoid the requirement on Cong. that direct taxes be apportioned. If indirect, they need only be uniform throughout the states. So long as Cong. meets those requirements, they undoubtedly have the power to levy the taxes.

"Apportionately" - in the same ratio as the population. This is really unrealistic if a gov't seeks to impose a direct tax. Cong. cannot tax exports, an-

cannot make preferential taxes. The tax on wages was left open by the Pollack Case due to 4 to 4 split on the question. Thus, this Child Labor Tax Act was thought to be valid and indirect, the only requirement, i.e., being uniformity.

Sup. Ct. declared this act unconst. The old Veazey Case (on Conf. purpose of 10% tax was to drive out of use certain commercial notes was held to be not precedent for this case, i.e., Cong. was using this tax to drive out of practice the use of child labor. In Veazey, Cong. could have driven out and forbid the use of these notes even w/o the tax. So, the end was a permissible: stability of econ. & abolition of the notes. However, here the objective was not revenue but the control of labor standards. This was at the time of Hammer v. Dargatzis, and it was followed there. Since Cong. did not have power to reg. the labor standards, it did not have power to do "other-wise." Thus, unconst. The end was prohibited.

Under Darby, the end was permissible, and the tax for regulatory purposes was valid. Must distinguish between taxes for regulatory purposes

and taxes for revenue purposes. Once the tax meets the standard of the Const. (uniformity or apportionment), it will not be defeated under I/P for being too much or too little.

Under Pollock Case, there are certain State immunities from taxation; municipal & State notes, bonds, etc. However, State officers' salaries are not tax exempt.

Ct. implied that if the Statute here had been drafted so as to make the tax one for revenue purposes.

Re drugs (dope) - These transactions (legal) are so far within the life of the State that to try to control these local activities via I/C clause would be almost impossible. So, the Court decided to use the taxing power to control the flow of drugs via licensing requirements. e.g., you pay a fee if you want to deal w/ drugs (e.g., Mary Jane), you must pay \$250 per year and the minimum price per ounce of Mary Jane. However, if one does not get license, then he must pay 4x the minimum amt per year, i.e., \$1000. So, either way, if narcotics traffic takes place, some revenue will come in. So, Ct. held this act to be for revenue purposes. It was always going to be some revenue always coming in. Secondly, it was uniform.

Thus, the fed. govt. could

set up a "policing" squadron (Narcotics Bureau) to correct the noncompliances and enforce the Harrison Narcotics Act. Even tho' the revenue was not enough to support the Narcotics Bureau, it was upheld. Ct. correctly said that so long as the revenue power was properly exercised, it was not for the Ct. to draw lines as to when that tax power was for some other purpose in addition to revenue. Cong. regulated oleomargarine via tax: $\frac{1}{4}$ ¢ on lb. shipped of uncolored oleo; 14¢ per lb. of colored oleo.

"Bookie" taxes - a State cannot remove from the fed. taxing power any social rels. by declaring those rels. criminal.

Summary of Fed Taxation

A fed. tax for revenue purposes may be imposed on any social or biz activity (readily identifiable for tax purposes) whether onerous or high or even on the activity is disallowed by the State.

Taxes can be used in aid of other Cong. powers even tho' such taxes are not for revenue but for regulation. However, the objective must be within the regulatory powers of Cong.

Test for revenue v. regulation:

1. Motive immaterial
2. The stat. on its face
3. If the tax (onerous) can be escaped by alternative conduct of a like kind, then the tax will be for regulation (i.e., on the alternative conduct produces some revenue)
4. If the alternative conduct ~~of~~ of a like or comparable kind does produce some revenue, no matter how small, it is a tax for revenue.

The amt. of the tax is not a subject for judicial deter.

13 MAY 60

Butter v. U.S.

Frontal assault on New Deal Agricultural program. Cotton Mill had gone into receivership. *Agri-cultural Adjustment Act*: farmers + govt. voluntarily agreed to plant X no. of acres. If a cotton farmer stayed out, he was subject to take a chance on the market. If he signed up, he was guaranteed \$X.

Govt. imposed excise tax on processing of cotton into cotton products. This kind of tax is usually passed on to consumer via price.

When govt. sought this tax, receivers declared to pay. They went to Ct. This tax was uniform throughout the states and was no possible D/P objection.

Receivers said the tax was making them support an illegal deal. The taxes were

for the purpose of supporting the Ag. Adjust. Plan, and receiver said this was an illegal plan.

Mass. v. Mellon Case and Frothingham (p. 58) -

Fed. Maternity plan attacked as illegal. State of Mass. attacked this as being unconst. Miss (or Mrs.) Frothingham sued Mellon as Secy. of State saying she did not have to pay taxes to support an illegal Act or plan. - They were both thrown out for want of jurisdiction: no case and controversy. State couldn't show injury to proprietary ints.

Mass., being as *parens patriae* (father of the people), was told that here the fed. govt. was *parens patriae*.

Frothingham's case thrown out for want of juris.: no case + controversy. She was said to be representing the Amer. taxpayers as a class. Ct. said she did not have right to attack a fed. spending program merely because she is an income taxpayer (you can on State level - Taxpayer's Bill to challenge State or municipal spending). Her money, as income tax, goes into a general fund, and she cannot show how HER pocketbook was hurt. If you sue as a taxpayer, you must show how your pocketbook is hurt. Further, her interest is *de minimis*. Same in Doremus case (King James version of the Bible read in schools in N.Y.).

Now, a tax designed esp. for support of a particular spending plan, Butler Case might be expanded.

(Butler: a taxpayer of an earmarked tax can attack on the merits the spending program the tax supports)

There can be ^{power to spend} a tax by Cong. to provide for the general ~~defense~~ and common welfare. The power to tax + spend ~~are~~ independent powers in themselves. They are just as viable as other Cong. power.

2. The power to provide for the general welfare is a limitation on the power to tax and spend, primarily on the power to spend. The phrase is a modifying limitation on the power to spend, i.e., "to provide for the gen. welfare."

— This was dictum in *Butler*. That point of view was the Hamilton — Story, J. pt. of view.

However, the Ct. said that the tax was not valid because the plan was not good in *Butler*. The plan was illegal because it invaded the reserve power of the state: it was a regulation of agriculture; of production, and, in those days, *Hammer v. Dagenhart* was followed. Cong. did not have power to author. the govt. to make bilateral Ks w/ the farmers.

(Name Case) *Wickert v. Philbrick* — upsets the holding of *Butler* and renders it unviable today. So, Basic doctrine of *Butler* as to agriculture is not good law today. However, the "earmark tax" rule remains good law along w/ the dictum.

How can you attack a fed. spending program? It's practically impossible. E.g., oath required under Nat'l. Defense Education Act.

TREATIES

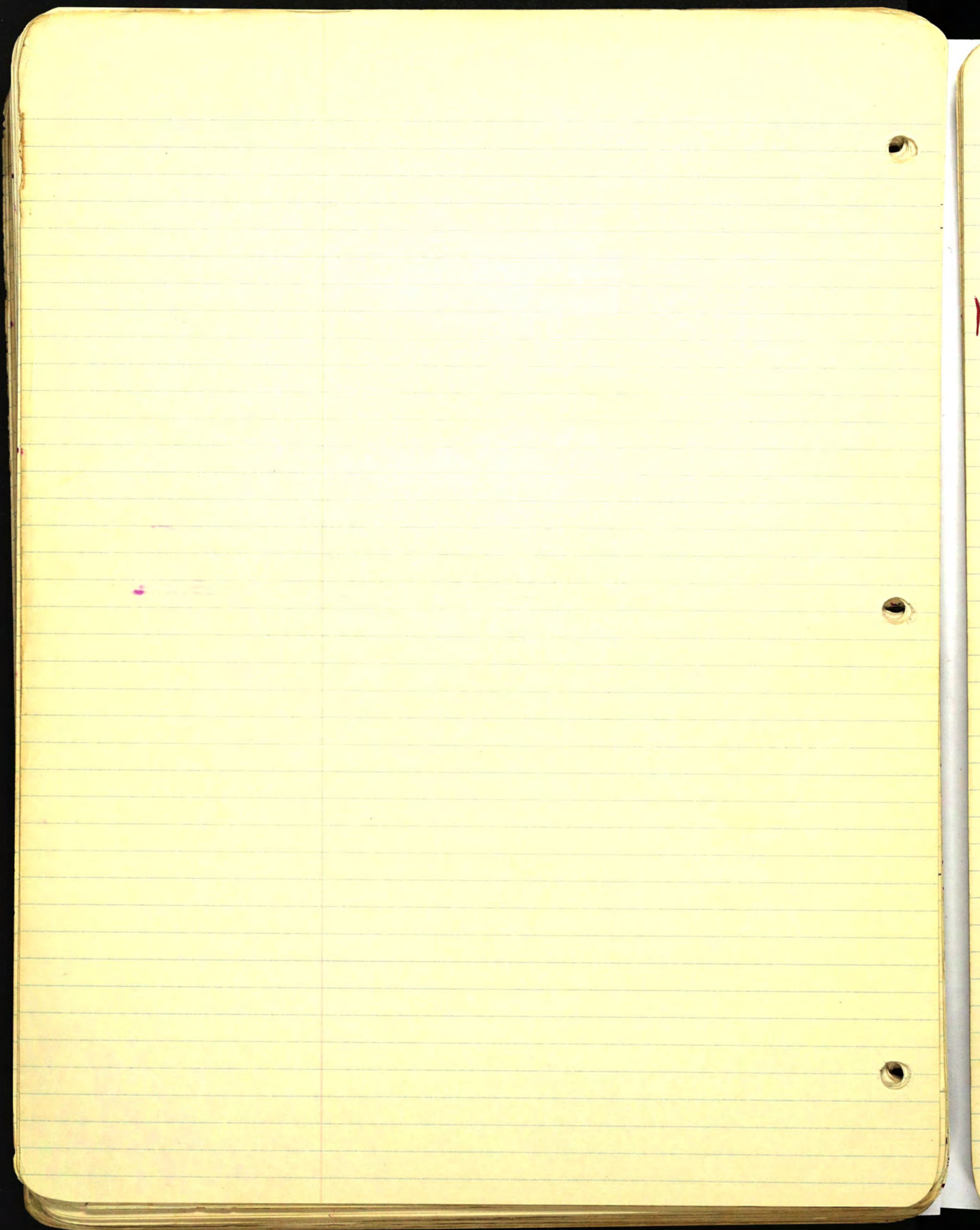
Treaties supersede state law when y is an

irreconcilable conflict. The treaty law will support fed. power to carry out the treaty provisions. So, a treaty might support exer. of power in an area on fed. govt. would not have had it before. eg., I/c "deep" w/in State; intestacy of alien's property.

EXAM - all essay.

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ABSTRACTS



CON. LAW

ABSTRACTS:

Marbury v. Madison (1803) (p. 3) (sic)

Facts: P alleges that his ^{formal} appointment ^{by the Pres.} as a J.P. of D.C. was withheld by Secy. of State, the D.

Rule was granted, requiring the secretary of state to show cause why a mandamus should not be issued, directing him (D) to deliver P his commission as a J.P. for Washington County, in the D. of C.

D did not show cause, and the present motion is for a mandamus.

- Issues:
- (1.) Has P a right to the commission he demands?
 - (2.) If he has such a right, and that right has been violated, do the laws of the U.S. afford him a remedy?
 - (3.) If they do afford him a remedy, is it a mandamus issuing from this court?

Holding: Rule discharged (J/P/A)

Reasoning:

- (1.) P has a right to the commission because he was duly appointed; and once the executive has decided to so appoint, and does so per the provisions of law, the discretion of the executive ends and law takes over. Thus, to withhold P's comm. was violative of a vested right.
- (2.) On the heads of depts. are the political or confidential agents of the executive, merely to execute the will of the Pres, or rather to act in cases in which the exec. possesses a constitutional or legal discretion, nothing is clearer than that their acts are only politically examinable. **But**, once a specific duty is assigned by law, and indiv. rights depend upon the performance of that duty, it seems equally clear that the indiv. who considers himself injured, has a right to resort to the laws of his country for a remedy.

- (3.) Under Art. III, sec. 2 of the U.S. Const., "the Sup. Ct. shall have orig. juris." etc. "In all other cases, the Sup. Ct. shall have appellate juris." The Const. is the supreme law of the land. Thus, any other laws

Name
Case

which contravene it where such contravention is obviously disallowed by the Const., are void.

Further, since the judicial power of the U.S. is extended to all cases arising under the Const., The Sup. Ct. is competent to declare Congressional legis. unconst.

PROBLEM I - E, F and G

ABSTRACTS (in connection w/ problems I - E, F & G.)

① Western Livestock v. Bureau of Revenue (p. 573)

cf. p. 1
All of these taxes in one FACTS: A stat. of N.M. levied on all engaged w/ way or another add to the ex- in the State in the biz of publishing news-
pense of carrying on inter- papers or mags, a privilege tax of 2% on
state C., & in that sense burden the gross receipts from the sale of ad-
it; but they are not for that vertising. Appellants, whose only office
reason prohibited. & place of biz was w/in the state,
prepared, edited & published a journal,
the circulation of wh was partly in-
terstate. Part of their receipts from ad-
vertising was derived from Ks w/ ad-
vertisers out of the State. Such Ks in-
volved interstate transmission,
from advertisers to appellants, of
cuts, mats, info, copy, etc.; also figmt.
thru interstate facilities.

Issue: whether this tax infringes the com. cl. because it is mea-
sured by gross receipts where-
To some extent augmented by
app.'s maintenance of an
interstate circulation of their
mag? Issue: whether this tax imposes an uncon-
stitutional burden on interstate commerce (IC)?

② The vice characteristic of the local taxes, mea- Held: No. 5/D/A. The tax as applied to appellants
measured by gross receipts in respect of the sums rec'd. under
from IC, wh have been such advertising Ks did not infringe
held unconst. is that they the commerce clause of the Const.
have placed on the commerce The mere formation of a K between per-
sons of different States is not w/in the
burden of such a nature as to be capable, in point of sub-
protection of the com. cl., unless the per-
formance, of being imposed or is w/in its protection, at least in the
added to w/ equal right by absence of Cong. action.

every state wh the Commerce Taxation of a local biz or occu-
touches, merely because IC pation wh is separate and distinct from
is being done, so that w/o the the trans. and intercourse wh are
protection of the com. cl. it IC is not forbidden merely because, in
would bear cumulative the ord. course, such trans. or in-
burdens not imposed on lo- tercourse is induced or occasioned by
cal commerce. This would be biz. If the com. cl. does not relieve those
spec the destruction of IC engaged in IC. from their just share of the state
& renew the barriers tax burden, even tho' biz cost be thereby increased.

sought by the com. cl. to This was a tax on the privilege of doing biz,
be removed. But, sustained & all the events upon wh the tax is conditioned - preparation,
when fairly apportioned to local commerce printing & publishing the mag adver. - occur in N.M. & not elsewhere.

(2)

Adams Mfg. Co. v. Storen

(p. 578)

Facts: App. (P) = Ind. corp. Ind. sought to levy what it termed a "gross income" tax on income (gross) derived from sources within the state. P sells 80% of its products to all residents and every non-resident's customers in other states + foreign countries upon order taken subject to approval at the home office. P here sought a D.T., alleging that appellants were demanding that it report + pay taxes upon income rec'd in interstate + foreign commerce.

Tax by Ind. - the sellers in interstate + foreign commerce. T/P. Rvsd. by Ind. Sup. Ct. Rvsd. in part by U.S. Sup. Ct.

Issue: Whether an unapportioned tax on gross receipts from interstate + intrastate activities is a tax on IC, and ∴ unconst.?

Held: Yes. This was a tax upon gross receipts from commerce regardless of the name given the tax by the State. "It is because the tax, forbidden as to IC, reaches indiscriminately + w/o apportionment, the gross compensation for both IC + intrastate activities that it must fall in its entirety so far as applied to receipts from sales interstate."

Since any state touched by this commerce could levy this type of tax if it is allowed, it is a risk of multiple tax burden on IC, ~~and that~~ to wh intrastate commerce is not exposed, and wh The Com. cl. forbids.

Dissent: Should not invalidate merely because other states could also tax. Cong. has the power to formulate rules, regs. + laws to protect IC from merely possible future unfair burdens, and until it exercises that power and fixes a different policy,

states should remain free to adopt tax systems imposing uniform + non-discrim. taxes upon inter. and intra. biz alike.

③ Mc Goldrick v. Berwind-White Coal Mining Co. (p. 581)

Facts: 2% ~~sales~~ (tax) of the receipts upon every sale in N.Y.; taxable event = transfer of title or poss. or both ... for consideration. Buyer state tax upon the buyer, seller being liab. only if he fails to collect & pay over. Appellee = Pa. corp. who made Ks of sale of coal (to N.Y. buyers) thru sales office in N.Y.C. Deliveries made w/in N.Y.C. Appellee contends this tax is a tax on IC, and discriminates against IC.

HELD: This is a tax on a local activity — delivery of goods w/in the state upon their purchase for consumption — and ∴ is not subject to the objection applicable to a tax on gross receipts from IC, which exacts tribute for the commerce carried on both w/in and up the state.

Adams Mfg. Co. v. Storer, distinguished.

The only relation of the tax to IC arises from the fact that, immediately preceding trans. of poss. to the purchaser w/in the state, the merchandise has been shipped in IC.

Merchant doing biz interstate, is not placed at a disadvantage in competition w/ retail sales by merchants w/in the state as all are equally taxed per the happening of the taxable event.

General Rule
(starting point)

A state taxing stat. can be invalidated under the com. cl. only if it subjects IC to such a burden as is tantamount to an interference w/ the power of Cong. to reg. com. among the several states. whether it does interfere w/ IC is a ? of fact.

* Dissent by Mr. J. Hughes (p. 587)

(1) Delivery is integral part of interstate & it succeeds sale.

(2) A direct tax upon IC not saved because of same or similar tax laid upon intra state commerce. (3) Danger of multiple taxation still exists.

(4)

Nelson v. Sears, Roebuck & Co.

(p. 590)

Facts:

Re use tax of Iowa. P (respondent) is N.Y. corp. w/ retail stores in Iowa. The tax was upon the priv. of use (by every person) in Iowa of tangible personal prop. If the retailer ^{doing business in Iowa} failed to collect the tax from the purchaser, he (retailer) would be liable therefor. (see p. 590). P refused to collect the tax on mail orders sent by Iowa purchasers to its (P's) out of state branches and filled by direct shipments thru the mails or a common carrier from those branches to the purchasers.

Action: to enjoin revocation of P's permit because of such refusal, alleging, inter alia, that the Act as applied violates Art. I, sec. 8 and the 14th Amendment of the Const.

Holding: J/P/R. (1) The purchaser is in Iowa, and the tax is upon the priv. of use in Iowa after commerce has come to an end, regardless of the time + place of passing title + regardless of the time the tax is required to be paid.

(2) Held, this use tax does not prohibitively discriminate against IC because the tax is on an Iowa transaction - the use in Iowa of tangible prop.

(3) Held, the inconvenience of having to collect the tax and ~~the~~ P's inability to collect from all purchasers the tax on all sales, are no defenses and do not make the use tax a substan. burden on IC because: (a) P is "doing biz" in Iowa (per stat.) and Iowa has the power to exact a price for the benefits P receives as a result thereof; and (b) P cannot claim a Const. immunity because it may elect to deliver the goods to purchasers before the tax is paid, by affording them a method of tax avoidance.

(5)

McLeod v. Dickworth Co.

(p. 592)

Facts: Sales tax here. Respondents (Ps) are Tenn. corp. Ark. has sales tax — tax on the transfer of ownership. Respondents have home offices in Tenn.; no place of biz in Ark.; orders come to Tenn. via telephone or mail after being solicited in Ark. by travelling salesman domiciled in Tenn.; acceptance of all orders in Tenn. office + on approval goods are shipped from Tenn.; title passes upon delivery to carrier in Tenn. + collection of sales price not in Ark. So, sales are consummated in Tenn. for delivery of goods in Ark.

Issue:

Whether a sales tax on an event occurring beyond taxing state's limits, is repugnant to the Com. Cl. + i. unconst. on that state might have validly imposed a use tax?

Held:

YES. I/P/A. (1.) A state shall not impose a tax on a trans. of ownership and seek to sustain it, on the trans. was made beyond the state limits, as a use tax on that prop. simply because the State, MIGHT, as far as the Const. is concerned, HAVE enacted a use tax + such a use tax MIGHT HAVE been collected on the enjoyment of the goods sold.

The Ark. tax falls because Tenn. could tax the transaction and, as between the two states, has exclusive power to do so. This is so because "the sale — the transfer of poss. — was made in Tenn."

(2.) A sales tax differs from a use tax, to wit; a sales tax is a tax on the freedom of purchase (and on that freedom is ever interstate, as here, only Cong. has the right to tax it), and a use tax is a tax on the enjoyment of that wh. was purchased.

(3.) A state ct. cannot render valid, by misdescribing it, a tax law wh. in substance and effect is repugnant to the Const.; neither can it render unconst. a tax, that in its actual effect violates no E provision, by inaccurately defining it.

Dissent: (Mr. Justice Douglas) A use tax & a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. And it should be no diff. in result under the Com. Cl. ~~or~~, as here, the practical impact on the interstate transaction is the same. (The Sales Tax's) only relation to the commerce arises from the fact that immediately preceding transfer of poss. to the purchaser within the state, which is the taxable event regardless of the time & place of passing title, the merchandise has been transported in IC & brought to ~~the~~ its journey's end. Such a tax has no different effect upon IC than a tax on the 'use' of prop. which has been just moved in IC.

The majority's interpretation of the Com. Cl. puts local industry at a competitive disadvantage w/ interstate biz.

- (6) Gen. Trading Co. v. State Tax Comm. (p. 596)
- Facts: D (appellant) is foreign corp. not qualified to do biz in Iowa and has no place of biz in Iowa. From Minn. it ships goods ordered from travelling salesmen based in Minn. by purchasers in Iowa. Orders are accepted only in Minn. Goods shipped by common carrier or mail.
- Iowa sought to impose use tax on the prop. shipped into Iowa to Iowa purchasers. The tax was on "the use in this state of tangible personal prop. purchased ... for use in this state." i.e., a buyer state use tax on goods used in buyer state. If the consumer does not pay, retailer must.

Issue: Whether a buyer state can impose ^{liab. for} use tax, on the use of ^{interstate} goods w/in its borders, on a foreign corp. not ^{maintaining a place of biz} w/in its borders?

Holding: Yes, $\frac{1}{2}$ (state) / A. Tax valid.

(4) D's activities were suff. to make it "a retailer maintaining a place of biz" w/in the meaning of the statute.

(1) This was a non-discriminatory excise upon all personal prop. consumed in Iowa and against the ultimate consumer - the Iowa resident.

(2) To make the distributor the tax collector for the State is a familiar & sanctioned device.

(3) The mere fact that the prop. has come into one's poss. via I.C. will not preclude the obligation of such person bearing his fair share so long as fair share does not include legislation obviously hostile or practically discriminatory toward I.C.

(7) Internat'l. Harvester Co. v. Dept. of Treasury (p. 598)

FACTS: Indiana Gross Income Tax. Appellant was a corp. chartered under the laws of other States; maintains places of biz in Ind. and makes sales y. Also, has places of biz outside of Ind. and in sister states.

The Ind. Sup. Ct. found that the following transactions may be taxed w/o infringement of the Fed. Const.:

(1) Class C: sales by branches located outside Ind. to dealers and users located w/in Ind. The orders were solicited in Ind. and the customers took delivery to themselves at the factories in Ind. to save time & expense of shipping.

(2) Class D: Sales by branches located in Ind. to dealers & users residing w/o Ind., in wh the customers come to Ind.

and accepted delivery to themselves in Ind.

(3) Class E: sales by branches located in Ind. to dealers and users residing in Ind., in wh the goods were shipped from points outside Ind. to customers in Ind., pursuant to Ks so providing.

Holding: Affirmed.

(8)

Freeman v. Hewitt

(p. 604)

Facts: Appellant (P) was taxed (Ind. Gross Income Tax) on the sale, in N.Y.C. by a broker, of securities. After N.Y. broker deducted his expenses + commission, balance was sent to P. Securities had been mailed to N.Y.

Sup. Ct. of Ind. sustained the tax on the ground ~~that~~ the situs of the securities was in Ind.

Holding: Reversed.

(1) Tax unconst. because it constituted a direct burden on IC, and, therefore, violated the Com. Cl.: sale was in N.Y. and the tax was a tax on the proceeds from that sale, i.e., a sales tax.

(2) Whether tangible or intangible prop. immaterial.

(9)

Norton Co. v. Dept. of Revenue

(p. 611)

Facts: Buyer - state - imposed occupation tax "upon persons engaged in the biz of selling tangible personal prop. at retail in this state." The base for computation of the tax is gross receipts from all sales to inhabitants of Ill. This included some sales the orders for wh were merely processed in Ill. Appellant = Mass. Corp. doing biz in Ill w/ office y.

Holding: This was a tax on the vendor by

the buyer state, and as to ~~sales~~ all income from Ill. sales thru the Ill. retail outlet, the tax was valid because it submitted itself to the taxing power of the state.

On a corp. chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders wh are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs suff to bring the transaction within its taxing power, the vendor is not taxable.

Held, orders sent directly to Worcester, Mass. ^{by the customer} and shipped directly to the customer in Ill. from Worcester are not subject to this tax.

Petitioner could avoid taxation on its direct sales only "by showing that ... [they] are dissociated from the local biz and [are] interstate in nature. The gen. rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of estab. his exemption." Petitioner failed to meet this burden.

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ABSTRACTS !!
PROBLEM II

Protection of the Local Economy + Welfare
(1.) State Restrictions on Marketing of Extrastate Goods.

Weldon v. Mo.

(p. 332)

Facts: Mo. stat. imposes license charge upon all peddlers who sell goods which are not the growth, product, or manufacture of the State.

Plin error convicted of dealing as a peddler w/o the license required by the statute, and was fined \$50.
Judg. aff. by State Sup. Ct.

Issue: Whether legis. discriminating against the products of other States in the conds. of their sale by a certain class of dealers, is valid under the Commerce Cl. of the Constitution?

Held: No. T/Mo. Rwd.

The commercial power of the Congress continues until the commodity has ceased to be the subject of discriminating legis. by reason of its foreign character, i.e., no longer in its original form and package in which it was imported. If the State's power of taxation conflicts w/ the fed. power at any time before the goods can no longer be distinguished as foreign goods, the state stat. must fall as being inv.

Robbins v. Shelby County Taxing Dist. (p. 334)

Facts: Respondent sought to impose a tax upon P in error, Robbins. Robbins was a drummer for an Ohio corp. who had no place of biz in Tenn., the buyer (taxing) state. Robbins solicited sales and showed samples for that purpose.

Tenn. stat., applicable only to Shelby Cty., required all ~~other~~ drummers for foreign sellers to pay ^{weekly or mo.} for privilege of selling or offering for sale goods.

Robbins refused to pay, alleging the tax to be unconst. as being a levy on IC.

Fine upheld by Tenn. Sup Ct./App. on writ of error. Reversed.

Issue: Whether it is competent for a state to levy a tax upon the citizens or ~~other~~ inhabitants of other states, for selling or seeking to sell their goods in such State before they are introduced there-in?

Holding: No. T/Robbins.

A State "cannot impose taxes upon persons passing thru the state, or coming into it merely for a temporary purpose" such as itinerant drummers.

This was a tax imposed upon an agent soliciting orders for an extra-state merchant who would subsequently fill the orders for interstate transportation. When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general prop. & amenable to its laws, provided that no discrimination be made against them AS goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are.

Ct.
Watch this!! May be giving apparent universality to its decision by supplementary reliance upon a gen. rule for the particular decision.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is IC. IC cannot be taxed at all, even tho' the same amt. of tax should be laid on domestic commerce, or that wh is carried on solely within the state. This tax was discriminatory.

in that merchants of Shelby Cty. were not liab. for the tax.

The tax not only operated as a restraint upon IC, but was intended to have that effect so that local merchants would have less competition.

It is commercially expedient for this manner of doing biz to be carried on and a tax on same would be a burden on IC.

Wagner v. City of Covington

(p. 340)

Facts: A nonresident manufacturer of "soft ~~but~~ drinks" was doing a biz in Covington (of the taxing state, Ky.) wh ~~largely~~ consists in carrying a supply of such drinks from one retailer's place of biz to another's upon the vehicle in wh the goods were brought across the state line, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the orig. unbroken cases. ~~and~~ Covington ordinances required all soft drinks wholesalers to take out licenses and pay license fees. - All sales in Covington are made from the vehicle by the driver, but they were made to estab. customers who understood that their soft drink needs would be supplied, whatever the needs might be.

~~Issue: whether a tax on a nonresident importer for the privilege of selling goods in the original packages is a tax on IC, and, if, yes?~~

Holding: No. T/D/A. The tax is valid.

Reasoning: ~~There is a distinction between such a tax and the right to impose a tax on the orig. packages after they reach their destination and come to rest in the state.~~

Issue: Whether a ^{intra-state} tax upon the biz of itinerant vendor of goods as carried on, w/in the State, — a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and w/o discrim. against goods manuf. in other states, is a state tax on IC, and, if, true? = No.

Reasoning: A license regulation or tax of this nature, imposed by a state w/ respect to the making of such sales of goods w/in its borders, is not to be deemed a reg. of or direct burden upon IC, although enforced impartially w/ respect to goods manufactured w/o as well as w/in the state, and does not conflict w/ the "com. cl."

Admitted, the transportation of goods across state lines is IC, but that is not what is taxed, nor is such commerce a part of the biz that is taxed, or anything more than a preparation for it. To the extent that Ps dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in local packages or not.

ABSTRACTS - PROBLEM 111

United States Glycer Co. v. Town of Oak Creek (p. 56)

Facts: ~~State~~ Income tax on net income by seller in wh P is a resident corp.

Question as to whether the following transactions could be taxed:

- (1) about \$65,000⁰⁰ from goods sold to customers outside of the state and delivered from its Wis. (seller state) (taxing state) factory.
- (2) about \$31,000⁰⁰ from goods sold to customers outside of the state, the sales having been made & goods shipped from P's branches in other states, and the goods having been manufactured at P's plant and shipped before sale to said branches.

State Court held tax valid. Appealed by writ of error. Off.

Issue: Whether a state, in levying a gen. income tax upon the gains & profits of a domestic corp., may include in the computation the net income derived from transactions in IC, w/o contravening the com. cl.?

Held: Yes; the tax is valid.

The ct. here distinguished between an invalid direct levy wh placed a burden on IC and a such charge via net income derived from profits from IC. P Deals w/ corp domestic to the taxing state or wh had "estab. a commercial domicile" y.

Taxes imposed upon prop. or franchises employed in IC must be paid from the net returns of such commerce, and distinguish them in the same sense that they are diminished by taxes imposed upon the net returns themselves. Such a net income tax is only an indirect burden, if at all, on IC, and such an indirect burden is not within the rule that a state may not directly burden IC, either by taxation or otherwise.

If this were a tax on gross receipts, none because it would = a direct burden upon I.C.

Internat'l. Shoe Co. v. State of Wash. 326 U.S. 310

Facts: Activities w/in Wash. of salesman (13) in the employ of a foreign (Dela.) corp. (wt principal place of biz in St. Louis, Mo.), exhibiting samples of merchandise and soliciting orders from prospective buyers to be accepted or rejected by the corp. at St. Louis, were systematic and continuous for a number of years (at least 3), and resulted in a large volume of interstate biz. Corp. had no place of biz in Wash. and only 3 of the salesman resided in Wash. No txs were made in Wash. - all in St. Louis. A stat. of the State requires ers to pay into the state unemployment comp. fund a specified percentage of the wages paid for the services of ers w/in the state. Assessment made on basis of commissions earned by the salesman for their sales in Wash.

Issues: 1. Whether, w/in the limitations of the due process cl. of the 14th Amend, Corp. has by its activities in Wash. rendered itself amenable to proceedings in the Ct. of that state to recover unpaid U.C. contributions alleged owed?
2. Whether the State can exact those contributions consistently w/ the d.p. cl. of the 14th Amend?

Facts:

Two cases: Minn. statute and Georgia statute involved. Both cases concern the constitutionality of nondiscriminatory state net income tax laws levying taxes on that portion of a foreign corp.'s net income earned from and fairly apportioned to biz activities within the taxing state when those activities are exclusively in furtherance of interstate commerce. In both cases, the corp. had its principal place of biz in a foreign state, maintained a sales office and salesmen and secretaries in the taxing state, strenuously and continuously solicited orders and processed same, and received and transmitted claims against the corp. Orders were subject to approval in the corp.'s state, and deliveries were direct from the corp.'s state to the customer in the taxing state. Both states levied net income taxes on net incomes "received by every corp., domestic or foreign, owning property or doing biz in the state." It is contended that each of the state statutes, as applied, violates both the due process and the Commerce Clauses of the Constitution.

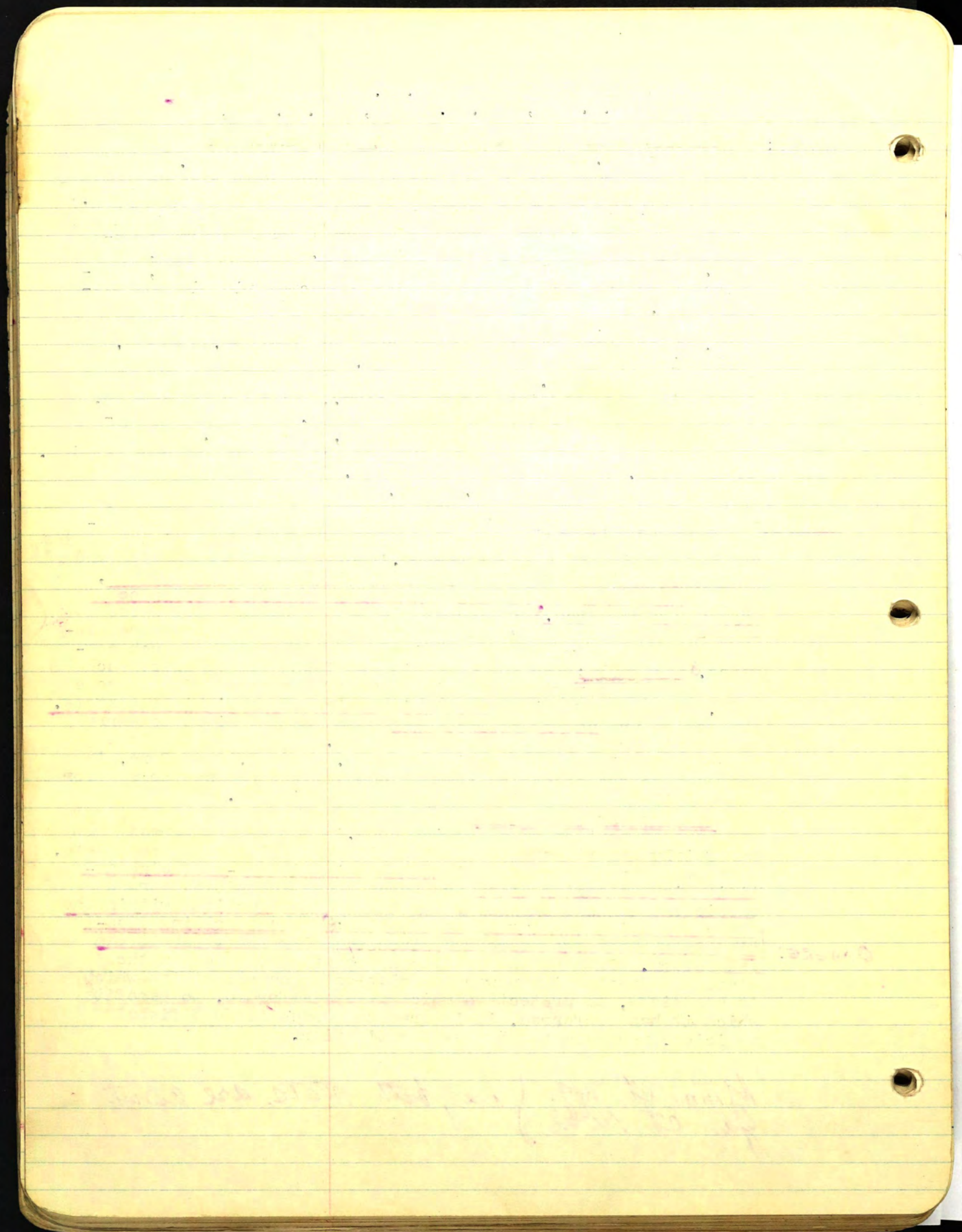
Cts. Below: Minn. court upheld the statute. Georgia statute was held unconstitutional by the Ga. court.

Holding: The commerce clause of the Federal Constitution is not violated by state statutes levying nondiscriminatory net income taxes on that portion of a foreign corp.'s net income earned from and fairly apportioned to biz activities within the taxing state, even though these activities are exclusively in furtherance of interstate commerce. Distinction is made between a tax whose subject is the privilege of engaging in interstate commerce (invalid) and a tax whose subject is the net income from such commerce. Rationale: the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state govt. in return for the benefit it derives from within the state. The levies are not privilege taxes based on the right to carry on biz within the state levying the tax. The states are left to collect only through ordinary means. The tax, therefore, is not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce.

The Due Process Clause is not violated by a state net income tax on that portion of a foreign corp.'s net income earned from and fairly apportioned to biz activities within the taxing state, where the taxpayer engages in substantial income-producing activity in the taxing state and hence these activities form a sufficient nexus between the tax and the transactions within the state for which the tax is an exaction. the controlling question is whether the State has given anything for which it can ask return. Since by the practical operation of the tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred, it is free to pursue its own fiscal policies, unembarrassed by the Constitution.

QUAERE:

*Minn. ct. aff. } i.e., both states are const.
Ga. ct. ruled.*



International Shoe Co. v. State of Washington
326 U.S. 310

Facts: Activities within Wash. of 13 salesmen in the employ of P (a Delaware corp. with its principal place of biz in St. Louis, Mo.), exhibiting samples of merchandise and soliciting orders from prospective buyers to be accepted or rejected by the corp. at St. Louis, were systematic and continuous for at least 3 years, and resulted in a large volume of interstate biz. The salesmen sometimes rented display rooms or hotel rooms to show samples. Corp. had no place of biz in Wash. All contracts were consummated in St. Louis. A Wash. statute requires employers to pay into the State unemployment compensation fund a specified percentage of the wages paid for the services of employees within the State. Assessment made on the basis of commissions earned by the salesmen for their Wash. sales.

Issues: (1) Whether, within the limitations of the due process cl. of the 14th Amend., ~~the~~ corp. has by its Wash. activities rendered itself amenable to proceedings in the Wash. courts to recover unpaid U.C. contributions allegedly owed? **YES**
(2) Whether the State can exact those contributions consistently with the due process clause of the 14th? **YES.**

Holding: Yes to both. J/Wash./Affirmed. (1.) In view of 26 U.S.C. sec. 1606(a), providing that no person shall be relieved from compliance with a State law requiring payments to an unemployment fund on the ground that he is engaged in interstate commerce, does not relieve such person from liability for payments to the State U.C. fund. (2) There were sufficient activities to subject the corp. to suits in Wash. courts.

- (a) The activities in question establish between the State and the corp. sufficient contacts or ties to make it reasonable and just, and in conformity to the due process cl. requirements, for the State to enforce against the corp. an obligation arising out of such activities.
- (b) In such a suit to recover payment due to the U.C. fund, service of process upon one of the corp.'s salesmen within the State, and notice sent by registered mail to the corp. at its home address, satisfies the requirements of due process.
- (3.) The tax imposed by the State U.C. statute---construed by the State court, in its application to the corp. ~~as~~ as a tax on the privilege of employing salesmen within the State--- does not violate the due process clause.

Con. Law Assignment

- ✓ 1. Brief cases in C/B pp. 135-154
- ✓ 2. Read and Note cases in C/B pp. 172-177; 666-672
- ✓ 3. Read and note cases in C/B pp. 1147-1156; 181-185; 345-352
- ✓ 4. Brief cases in C/B pp. 1156-1175; 1190-1199
- ✓ 5. Read + note cases in C/B at p. 1175.

Assign:

1. Read + Note cases in C/B pp. 369-374, 378-381, 384-400, 431-440.
2. " " " " pp. 474-485
3. " " " " pp. 1209-1211
4. " " " " pp. 1470-1473, 1484-1489.

✓ Motor v. Donald 1 L. Ed. 2d 1485 (in supp.) - 4 may be

discrimination, but "discrimination in a state stat."

must be based on differences that are

near related to the purpose of the statute.

Not so here! Thus, the stat. appears preempting

Quar. Express Co. from regulation held null. 5/1/4.

(6 per, 3 dissent - Black, Frankfurter + Harlan)

ABSTRACTS - CIVIL LIBERTIES

1. Freedom of Speech and Belief

Schenck v. U.S. (1919) ^{and convicted} p. 1254

Facts: D was indicted on 3 counts: (1.) Conspiracy to violate the Espionage Act of 6-15-'17, by conspiring to and circulating a document to draftees, the alleged tendency of wh was to cause intended obstruction and insubordination in the Armed Forces of U.S., and ~~obstruction~~ ^{obstruction} in the drafting & enlistment of men to serve therein; (2.) Conspiracy to commit a crime against U.S. by use of the mail for transmission of the document; & (3.) unlawful use of the mails.

D and some fellow Socialists resolved at an executive committee meeting of their party to have printed (on the backs of another circular) 156 leaflets to be mailed to draftees, and for distribution. D, w/ \$25 allotment, arranged for the printing and mailing of the circular. Mailing took place about Aug., 1917, during W.W.I.

D alleged ^{on appeal} that the 1st Amend. precluded Congress enacting any law abridging the freedom of speech or of the press.

Holding: 5/U.S./Aff.

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

[The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic.]

Abrams v. U.S. (1919)

p. 1256

Facts: Ds were convicted under the Espionage Act of 1917 for uttering, etc., 2 leaflets urging curtailment by munitions workers of their work ~~because of America's planned intervention in the Russian war~~, and for conspiracy on four counts. D were found guilty. Aff. by majority.

Dissent: (Holmes, J.)

1. It was not a violation of the Act because "intent", as used therein, means a specific intent to produce a certain consequence; and, the evid. did not show that the overt acts were done w/ specific intent.
2. Congress has power to restrict speech, but should be careful to do so only when that speech or expression of opinion so immediately threatens immediate interference w/ the lawful and pressing purposes of the law, or private rights are not concerned.
3. A man should not be punished for his beliefs.

Gitlow v. New York (1925)

p. 1260

Facts:

Manifesto published and distributed by D, a Communist. It said that mass action ~~was~~ and mass strikes were necessary to ~~overthrow~~ "crush" the "old order", and that "the proletarian revolution and the Communist reconstruction of society — the struggle for these — is now indispensable."

N.Y. statute prohibited the advocacy, advising or teaching the duty, necessity or

propriety of overthrowing or overturning organized govt. by force, violence, or any unlawful means, or the printing, etc., [of] any book, paper, etc., advocating, etc., the doctrine that organized govt. should be overthrown.

D convicted of violation of the N.Y. stat., by N.Y. court. D appealed, alleging, inter alia, that the statute was unl as repugnant to the Due Process Clause of the 14th.

held: affirmed (stat. is con). and press on

- ① Freedom of speech is not absolute right.
- ② A State, in the exer. of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, endanger the foundations of organized govt. and threatening its overthrow by unlawful means.
- ③ Assumed, for purposes of the case, that freedom of speech and of the press are among the personal rights & liberties protected by the D/P clause of the 14th from impairment by the States.
- ④ Words uttered need not be viewed in the light of circumstances. to see if they are of such a nature as to create a clear and present danger that they will bring about the substantive evils where the legis. itself has previously determined the danger of substantive evil arising from utterances of a specified character.

Whitney v. California (1927) p. 1267

Facts: Appellant (D) convicted under Calif. Crim. Syndicalism Act as "[One] who... organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism... Is guilty of a felony and punishable by imprisonment." D had attended and participated in the organizational convention of the Communist Labor Party of Calif.

D alleges that she could not foresee that the character of the state organization would be so radical; that she was not intending to help create an instr. of violence, but favored use of ballot to effectuate the change; that because of her opposition to the less temperate policies which prevailed, her mere presence was not a crime.

Issue: Whether this Act and its application in this case is repugnant to the D/P clause and E/P clause of the 14th?

Held: No. 5/Calif. / Affirmed.

- (1) The Act is not repugnant to the D/P clause by reason of vagueness + uncertainty of definition. It is sufficiently definite and specific.
- (2) The Act is not repugnant to the E/P clause either because it does not discriminate.
- (3) The Act is not repugnant to D/P as a

restraint of the rights of free speech,
assembly, and association.

Reasoning: The freedom of speech is not absolute, and a State in the exer. of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, to disturb the public peace, or endanger the foundations of organized govt. and threaten its overthrow by unlawful means.

Every presumption is to be indulged in favor of the validity of the state, and it may not be declared ~~un-const.~~ unless it is an arbitrary or unreason. attempt to exer. the author. vested in the state in the public interest.

That such united & joint action involves even greater danger to the public peace & security than the isolated utterances & acts of individuals, is clear.

Brandis, concurring: Though the right of free speech is fundamental, it is not absolute, and it may be restricted, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, econ. or moral. Further, it must be a clear & present danger of substantive evil. The legis. must obviously decide in the first instance whether a danger exists wh calls for a particular protective measure. But on a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone estab. the facts wh are essential to its validity.

To justify suppression of free speech, y must be (1.) reas. ground to fear that serious evil will result if free speech is practiced; (2.) reas. ground to believe that the danger apprehended is imminent; + (3.) reasonable ground to believe that the evil to be prevented is a serious one.

Even advocacy of violation, however reprehensible morally, is not a justification for denying free speech on the advocacy falls short of incitement + y is nothing to indicate that the advocacy would be immediately acted on.

In order to support a finding of clear + present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

No danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before y is opportunity for full discussion. Only an emergency can justify repression.

As a statute, even if not void on its face, may be challenged because invalid as applied, the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged

to have been invaded, it must remain open to a defendant to present the issue whether γ actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a *rebuttable presumption* that these *conds.* have been satisfied.

