CONGRESS, DIVERSION, AND THE COURT: AN ANALYSIS

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Abstract: *Sometimes, Congress passes 'diversionary legislation': legislation that pursues extra-constitutional ends by virtue of Congress' power to pursue constitutionally enumerated ends. This paper argues a twofold thesis: first, that the Court in three specific cases upheld diversionary legislation on the basis of faulty reasoning; second, that diversionary legislation is unconstitutional per se. The paper has three parts. The first analyzes and criticizes two 20th-century cases in which the Court upheld diversionary legislation. The second analyzes a 20th-century case in which the Court struck down such legislation. This second section also argues for the broader claim that all diversionary legislation is unconstitutional. The final section treats a 21st-century case in which the Court upheld diversionary legislation.*

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Starting in the 1890's, the Progressive era wrought far-reaching changes to American constitutionalism. With respect to legislative power, the old constitutional orthodoxy said that Congress' powers could only be used for the attainment of constitutionally enumerated ends. During the Progressive era, Congress challenged this orthodoxy by pursuing extra-constitutional ends by virtue of its power to pursue enumerated ends. Since Congress' tactic in this kind of legislation was to circumvent longstanding constitutional limitations, this paper refers to such legislation as *diversionary legislation*.[1] In plain terms, diversionary legislation is that by which Congress, under the guise of enumerated powers, does what would be unconstitutional for it to do directly. During the Progressive era, diversionary legislation came before the Supreme Court several times, where short-term mixed results eventually gave way to jurisprudential acceptance. This paper argues a twofold thesis: first, that the Court in (at least) three cases upheld diversionary legislation on

1 This term is not meant to carry any normative weight; it is merely descriptive.

the basis of faulty reasoning; second, that diversionary legislation is unconstitutional.[2]

The paper takes three parts. First, it lays out two cases in which the Court upheld diversionary legislation, and argues that these rulings were faulty. Second, it examines a case in which the Court struck down diversionary legislation, and argues both that this ruling was correct and that its reasoning demonstrates the unconstitutionality of all diversionary legislation. Finally, it examines a recent case in which the Court upheld diversionary legislation. This last section both argues against the Court's ruling and mentions similarities among Court opinions upholding diversionary legislation.

Diversionary Legislation during the Progressive Era

Diversionary legislation has two main aspects: extraconstitutional and constitutional. The

2 Throughout, this paper uses "the Court upheld diversionary legislation" and similar phrases in the place of "the Court upheld the constitutionality of diversionary legislation" and similar phrases. This is solely for the sake of space; this paper only addresses the constitutionality of diversionary legislation *qua* diversionary legislation – not whether a given piece of diversionary legislation is good or bad policy.

extraconstitutional aspect is the true purpose of diversionary legislation. It is also, however, a purpose that Congress lacks the constitutional power to accomplish by normal means. The constitutional aspect is the part of the legislation which, Congress claims, grants congressional authority to enact the legislation. It is important to note that not all laws with constitutional and extraconstitutional aspects count as diversionary legislation. Most legislation has some extraconstitutional side effects; a law is only diversionary legislation if its main purpose is to do something Congress lacks the authority to accomplish directly.[3] This section of the paper critically examines cases in which the Court either upheld or struck down diversionary legislation, as such.

In Favor: *Missouri v. Holland*

In 1912, Congress passed a regulation to limit bird hunting throughout the United States, because some

3 A tariff on foreign steel, for example, might decrease overall domestic steel production and thereby decrease net carbon emissions. But this would only count as diversionary legislation if the main purpose of the law was to regulate emissions rather than to regulate foreign trade.

conservative states refused to pass conservatory legislation themselves. This regulation clearly exceeded Congress' constitutional authority, and challengers brought it to court on those grounds. The Wilson administration responded by negotiating the Migratory Bird Treaty of 1916 with Britain.[4] Congress subsequently enforced the treaty via the Migratory Bird Treaty Act of 1918.[5] In this case, the extraconstitutional aspect of the treaty and law was their allowing Congress to regulate what had hitherto been considered the property of the states (namely, wild game). The treaty and law did, however, respectively constitute and enforce an agreement between the United States and a foreign government. This was the constitutional aspect of the legislation; article six of the Constitution plainly states that treaties (along with the Constitution) are the supreme law of the land.[6] The Court upheld the treaty and law in *Missouri v. Holland*.

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4 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 377-378.

5 *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, 11 Am. J. of Int'l. L. , 62-66. Migratory Bird Treaty Act of 1918, Gr. Brit.-U.S., July 13, 1918 (16 U.S.C. 703).

6 U.S. Const. art. VI, § 2.

Justice Holmes wrote the Court's majority opinion. Holmes quite correctly states that the law is merely a necessary and proper execution of the treaty and that the real issue is thus whether the treaty itself is constitutional.[7] And, since Congress unaided by a treaty has no constitutional authority to regulate bird hunting, the constitutionality of the treaty depends on whether Congress can use the treaty power to do what it would otherwise have no power to do. Missouri argued before the Court that Congress cannot use the treaty power to exceed its normal limitations, and Holmes flatly denies this claim. He cites two cases in which a district court struck down similar federal regulations as unconstitutional.[8] About those cases, he says:

> Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.[9]

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7 Missouri v. Holland, 252 U.S. 416, 432 (1920).

8 Id. at 432 *See* United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915).

9 *Id.* at 433.

Here, Holmes is asserting that Congress can wield power in excess of its article one, section eight limitations so long as that power is exercised via a treaty. This is a direct affirmation of the constitutionality of diversionary legislation: Holmes' opinion entails that the constitutional aspect of the law (i.e. its status as a treaty) constitutionally justifies its extraconstitutional aspect (i.e. its exercise of powers not granted to the federal government).

But this is only the conclusion of Holmes' argument. His argument itself is structuralist in nature, and goes something like this:

1. For every exigent matter, the power to act is found in some level of government.
2. But in some matters of national exigence, the states are incompetent to act.
3. In such cases, therefore, another level of government must have the power to act.
4. The only other place this power could feasibly rest is in the federal government.
5. Therefore, in cases of national exigence where the states are incompetent to act, the federal government has the power to act.[10]

10 Missouri v. Holland, 252 U.S. 416, 433 (1920).

A clarification: Holmes uses the phrase "incompetent to act" to refer to states which refuse to enact hunting regulations. This is the same language used in the 1787 Virginia Plan, which (had it been adopted) would have given the federal government the power to act when the states *could* not – but not, as Holmes uses the phrase, to act when they *would* not.[11] Holmes provides no justification for this apparent misuse of terminology, and it would seem that this misuse *prima facie* disqualifies his argument from applying to the case at hand.

Even if Holmes' argument is sound, it has nothing to do with the treaty power. Holmes does spend a significant amount of time discussing the treaty power elsewhere; specifically, he states (seemingly without support) that the treaty power is what enables the federal government to exercise powers that would normally be reserved to the states by the Tenth Amendment.[12] But if Holmes' primary argument is sound, this invocation of the treaty power is entirely unnecessary. This is because

11 The Virginia Plan (1787), para. 6.

12 Missouri v. Holland, 252 U.S. 416, 434 (1920).

Holmes' reasoning effectively adds another enumerated power to article one, section eight: the power to act in cases of national exigence in which the states are incompetent to act. And it hardly takes a glance at *Gibbons v. Ogden* to see that congressional exercises of enumerated powers automatically supersede conflicting state laws.

It seems that Holmes holds that Congress has done what it could not have otherwise done by invoking the treaty power, which in his attempt to support this stance, Holmes ends up saying that Congress would have been able to do what it did *even without* the treaty power. Holmes' opinion thus offers support for the constitutionality of the legislation at hand without supporting the constitutionality of diversionary legislation – which is what the opinion itself claims to be doing. Perhaps another case will provide better support for diversionary legislation's constitutionality.

In Favor: *Champion v. Ames*

Though it is a much earlier case, *Champion v. Ames* has significant constitutional commonalities with *Missouri*

v. Holland. In 1894, Congress passed the Act for the Suppression of Lottery Traffic, which banned the interstate transport of lottery tickets in an effort to suppress lotteries themselves. The constitutional aspect of the law was its regulation of interstate commerce. The extraconstitutional aspect was the law's aim to suppress lotteries on moral grounds. This goal is extraconstitutional because the promotion of public morality is one of the police powers reserved to the states. The Court ruled in Congress' favor in the 1903 case *Champion v. Ames*.[13]

Harlan's majority opinion is fairly straightforward. His argument that the law is constitutional is as follows:

1. The commerce clause is both plenary and is broad enough to encompass commercial traffic. (Harlan cites a multitude of cases in support of this point.)[14]
2. The interstate transport of lottery tickets is a form of commercial traffic.[15]
3. Therefore, Congress has the authority to regulate

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13 Champion v. Ames, 188 U.S. 321 (1903).

14 *Id.* at 347, 348-352.

15 This point was hotly debated; in fact, most of the four-man dissent (penned by Fuller) depends on the claim that lottery tickets are merely the signification of a contract which has already been assented to. But even if Harlan is right about this, the law is still diversionary in nature and he thus still needs to defend it.

the interstate transport of lottery tickets, "subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it."[16]

4. No Constitutional limitation exists which would bar Congress from banning the interstate transport of lottery tickets.
5. Therefore, Congress has the authority to regulate the interstate transport of lottery tickets.[17]

Harlan spends much of his argumentative effort defending premise four against the challenge of the Tenth Amendment. Harlan himself describes the aim of this legislation as "guarding the people of the United States against the 'widespread pestilence of lotteries'…"[18] Since this is clearly a moral regulation and thus constitutes an exercise of police powers (which are implicitly reserved to the states by the 10th), how is it that the law does not violate that amendment? Harlan's first response is this:

16 Champion v. Ames, 188 U.S. 321, 353 (1903).

17 Harlan also spends quite a lot of time arguing that prohibition is a form of regulation, since the law bans tickets rather than regulating them *per se*. This is moot with respect to the present discussion.

18 Champion v. Ames, 188 U.S. 321, 357 (1903). More precisely, Harlan states that another of the legislation's goals is "to protect the commerce which concerns all the states." (par. 30). Since it is almost impossible to divine what this could mean (will interstate commerce become infected with vice-carrying lottery-bacteria, as if it were good meat packed with rotten meat?), this paper does not take it up.

> If it be said that the act of 1894 is inconsistent with the Tenth Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.[19]

This is less a response and more a refusal to acknowledge that the legislation is really a congressional exercise of police powers: it goes without saying that, if this law were really just regulating commerce, it would not be in violation of the Tenth Amendment. But Harlan, just one paragraph away from his acknowledgement that this law is a federal exercise of police powers, simply ignores the law's true intent and speaks as if this were a simple case dealing merely with commerce regulation.

Harlan's second response is to argue that the law does not violate the Tenth Amendment because (a) many states had already banned lotteries themselves, and (b) the law does not ban intrastate transport of lottery tickets, but only interstate transport.[20] This response, again, misses the mark. It is difficult to see how either of these considerations

19 *Id.* at 357.

20 Champion v. Ames, 188 U.S. 321, 357 (1903).

have anything to do with Congress' ability to exercise police powers via its power to regulate commerce.

Harlan's *Champion* opinion acknowledges that the law at hand has a constitutional and an extraconstitutional aspect, and that the law uses its constitutional aspect as a mere justification for its extraconstitutional one. In the same breath, Harlan's opinion seems to pretend that the constitutional aspect of the law is all there is to consider. This oddity is similar to Holmes' inconsistent stance in *Missouri*, which claimed to uphold the law's diversionary nature even while providing an argument which ignored that nature. These Court rulings both fail to provide a good rationale for the constitutionality of diversionary legislation. The next step is to examine an argument to the contrary and see if it fares better.

Against: *Bailey v. Drexel Furniture Co.*

In 1919, Congress passed the Child Labor Tax Law, which put a 10% excise tax on employers who used child labor.[21] This law was Congress' second try at regulating

21 Bailey v. Drexel Furniture Co., 259 U.S. 20, 21 (1922).

child labor; the Court in *Hammer v. Dagenhart* had recently struck down Congress' attempt to do so via the commerce power.[22] The extraconstitutional aspect of the law, and its real aim, was its nationwide regulation of employment practices. Employment regulation, of course, falls under states' broad police powers to regulate in the interest of citizens' health, morality, and general welfare. The constitutional aspect of the law was that it placed an excise tax on businesses; this falls under Congress' article one, section eight taxing power. In 1922, the law came before the Court in *Bailey v. Drexel Furniture Company*. The Court struck down the law.[23]

Chief Justice Taft wrote the majority's opinion. Taft's argument that the law is unconstitutional is as follows:

1. The law shows on its face that it is primarily aimed at regulation of employment, and not at taxation. (Taft cites the law itself in support of this point; his citations are compelling, to say the least.)[24]
2. The regulation of employment is among the police

22 Hammer v. Dagenhart, 247 U.S. 251 (1918).
23 Drexel Furniture Company, 259 U.S. 20 (1922).
24 *Id.* at 34-35.

powers reserved to the states.[25]

3. It is unconstitutional for Congress to exercise police powers reserved to the states.
4. If a law shows on its face that it is primarily aimed at an unconstitutional end, then that law is unconstitutional.
5. Therefore, the law is unconstitutional.

Premise four is the only controversial premise in this argument; premise three would be called into question by an appeal to the idea of a living constitution, but that debate is involved and convoluted enough to fall beyond the bounds of this paper.[26] Taft does not state premise four explicitly, but his argument falls without it. He gives two lines of support for this claim. First is the structuralist support. Taft points out that, if Congress can exercise any police power it pleases under the guise of a tax, then federalism is as good as dead. In such a case, Congress

25 *Id.* at 36.

26 It is worth noting that Holmes' opinion in *Missouri* does in fact invoke the living constitution. But his argumentation on this point is very unclear. He seems to view the Living Constitution as a way out of Tenth Amendment troubles. But, again, if he has shown what he thinks he has shown, this is unnecessary. And anyway, if the Living Constitution really nullified the Tenth Amendment, there would be no need at all for the kind of diversionary legislation considered in these cases.

would be able to regulate any subject at all, so long as it did so by framing its regulation as a tax. The states would be left with no reserved powers.[27] Taft's second line of support is an appeal to precedent (though the precedent it cites is early enough to make this nearly an originalist appeal). Taft quotes Marshall in *McCulloch v. Maryland*:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted [sic] to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[28]

Marshall here anticipates the advent of diversionary legislation, and preemptively declares it to be unconstitutional. Specifically, it is unconstitutional because it constitutes an extension of Congressional power beyond its proper bounds, and such an extension flies in the face of the system of enumerated powers the Constitution established. Marshall's strong reasoning and authoritative

27 Drexel Furniture Company, 259 U.S. 20, 38 (1922).
28 McCulloch v. Maryland, 17 U.S. 316, 423 (1819).

status make the above quotation perhaps the strongest support available for Taft's fourth premise.

It seems that Taft's *Bailey* opinion offers a sound argument that the law in question is unconstitutional. But this argument applies equally to any and all diversionary legislation: Taft's argument covers every law that is primarily aimed at an unconstitutional end. And diversionary legislation is, by definition, primarily aimed at unconstitutional ends – this includes the laws in question in *Champion v. Ames* and *Missouri v. Holland*.[29] Diversionary legislation is therefore unconstitutional.

A Contemporary Case: *National Federation of Independent Business v. Sebelius*

The 2010 Affordable Care Act (ACA) included a provision (in its Part III-B) penalizing non-exempt Americans for failing to maintain at least a minimal level of health insurance coverage. This penalty took the form of a

29 I have been referring to these ends as "extraconstitutional" for the sake of ecumenism. But it seems clear enough that the laws in question in these two cases extend Congress' power into the sphere of protected state powers, which (given the Fifteenth Amendment) makes their extraconstitutional ends unconstitutional.

"shared responsibility payment," which was payable to the IRS like a tax.[30] The text of the ACA itself described this payment as a "penalty" rather than as a tax.[31] In *National Federation of Independent Business v. Sebelius*, one of the crucial issues at hand was whether Part III-B was constitutional. Part III-B's extraconstitutional aspect was its goal of compelling individuals to buy a product. This is well beyond the scope of Congress' enumerated powers. The constitutional aspect, according to the government lawyers defending it, was that it constituted either a regulation of interstate commerce, a necessary and proper means of accomplishing the ACA's main goals, or an exercise of the taxing power.[32] In 2012, the Court upheld Part III-B as a constitutional exercise of Congress' taxing power.

Justice Roberts wrote the majority's opinion. He starts by establishing that Part III-B cannot be justified by either the commerce clause or the necessary and proper

30 Legal Information Institute, *syllabus for* National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

31 *Id.*

32 National Federation of Independent Business v. Sebelius, 567 U.S. 519, (2012).

clause.[33] From there, Roberts' argument goes like this:

1. If "the Government's alternative reading of the [mandate] – that it only imposes a tax on those without insurance – is a reasonable one," then the mandate is constitutional under Congress' taxing power.[34] (Roberts cites several past Supreme Court decisions to support this premise.)[35]
2. "The mandate can be regarded as establishing a condition – not owning health insurance – that triggers a tax…"[36]
3. Thus, the mandate need not be regarded as a command to buy insurance.[37]
4. Thus, the government's reading of the mandate as a tax increase is a reasonable one.
5. Therefore, the mandate is constitutional under Congress' taxing power.

The problem with this argument is that its second premise faces a dilemma. Either the second premise means, "the mandate can *possibly* be regarded as establishing a condition – not owning health insurance – that triggers

33 *Id.*

34 *Id.*

35 *See* Parsons v. Bedford, 3 Pet. 28 U.S. 433, (1830); Crowell v. Benson, 285 U.S. 22, (1932); Hooper v. California, 155 U.S. 648, 657 (1895); Blodgett v. Holden, 275 U.S. 142, 148 (1895).

36 National Federation of Independent Business v. Sebelius, 567 U.S. 519, (2012).

37 *Id.*

a tax…" or it means, "the mandate can *reasonably* be regarded as establishing a condition – not owning health insurance – that triggers a tax..." The first reading gives the mandate an extremely low bar to jump over: so long as it is possible, in however strained a way, to read the mandate as a tax rather than as a means of forcing people to buy a product, the mandate is constitutional. And, of course, the mandate could clear this bar. But on this lax reading, the argument is invalid. Premise one's if-then statement is restricted to *reasonable* readings; it does not cover all possible ones. And premise one could not be modified to cover all possible readings without cutting off its connection to the cases Roberts cites to support it, because those cases dealt with reasonable readings of statutes rather than merely possible ones. So this reading of premise two will not work.

The second reading sets a higher bar for the mandate to clear. On this reading, there need only exist one reasonable interpretation of the mandate that reads it as a tax. Roberts spills a lot of ink arguing that such an interpretation exists. The ultimate problem for this reading,

however, is this: if the phrase "reasonable interpretation" is not entirely vapid; that is, if the phrase rules out *any* interpretations as unreasonable, it should certainly rule out interpretations that plainly ignore the undeniable intention of the law in question. It is difficult to imagine an interpretation being less reasonable than one which interprets a *self-described* "penalty," which is admittedly designed to punish people for failing to buy health insurance, as a mere tax.[38] Yet this is precisely the kind of interpretation that Roberts characterizes as "reasonable." Roberts' reasoning here falls short precisely because it ignores the fact that Part III-B of the ACA is diversionary legislation. This error bears an eerie resemblance to Harlan's mistake in *Champion v. Ames* and to Holmes' mistake in *Missouri v. Holland*. The three opinions hold in common an odd duality: they acknowledge that the law at hand is primarily extraconstitutional, only to ignore this conceded fact in their subsequent legal reasoning.

At first glance, it seems odd that the three above-discussed opinions supporting the constitutionality of

38 *Id.*

diversionary legislation are themselves so diversionary. The opinions seem to dance around the issue, but they never quite argue head-on that Congress can pursue extraconstitutional ends under the guise of exercising broadly construed constitutional powers. In purely legal terms, this may be because no argument to that conclusion can stand constitutional muster. But this strictly legal analysis does not explain why the Court has repeatedly ruled as it has on the matter.[39] Legal analysis fails to account for such rulings because rulings do not happen in a vacuum, and they are not always decided on legal grounds alone. Every case has its attendant social and political pressures, and Supreme Court justices are not immune simply because of their lofty status. In the bluntest terms: sometimes Congress desperately wants to remedy problems that it lacks the authority to remedy, and the Court has often allowed Congress to try. Regardless of political and social

39 *See* Hammer v. Dagenhart, 247 U.S. 251 (1918) for a notable exception. Additionally, South Carolina v. Katzenbach, 383 U.S. 301 (1966) is an oddity in that it upheld Congress' right to determine whether state voting laws were mere pretenses for violations of the Fifteenth Amendment. The Court here seems to have said that diversionary legislation, at least when implemented by state governments, should be evaluated based on its true aims (and possibly, effects) rather than on any constitutional aspects it might have.

pressures to give Congress this leeway, it does not seem a stretch to say that the Court is not legally justified in doing so.