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QUESTION 1

Dissenting opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

I write this opinion from the vantage point of 2012, rather than 1936, because the general issue of inherent executive power in foreign affairs remains a major point of contention in American politics. The issue in *Curtiss-Wright*, may potentially come before the Supreme Court of the United States again. Erwin Chemerinsky, *Constitutional Law*, 372 (3d ed., Wolters Kluwer, 2009). My dissenting opinion in *Curtiss Wright* is intended as the basis for overruling that decision in a present day case.

In *Curtiss-Wright*, the Court held constitutional a Joint Resolution of Congress authorizing the President to halt arms sales to warring South American countries. The Court's doctrine on non-delegation of legislative power to the executive branch, which might have struck down legislation applied purely to domestic policy, did not do so in this case. The court based its reasoning on the President's inherent power in foreign affairs. Since that decision, the Court has moved away from the non-delegation doctrine discussed in *Curtiss-Wright*. Cf. *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457 (2001).

Nevertheless, *Curtiss-Wright* still stands, and thus so does the contradictory logic of its holding. On the one hand, the Court permitted a Constitutional violation it would normally invalidate. On the other, the Court added that the President's power in foreign affairs, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." No doubt the Court saw this thinking as a pragmatic approach, granting "a degree of discretion and freedom from statutory

restriction which would not be admissible were domestic affairs alone involved." Such reasoning opens a dangerous loophole. It permits Congress to ignore existing Supreme Court case law so long as a statute rests on inherent Presidential powers in foreign affairs. A President, too, might creatively find new statutory authority in this way. The Court, in effect, created a tool for the other branches to shield their actions against restraint by judicial review. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

This result originates in *Curtiss-Wright's* analytical core, which is not only about Presidential supremacy over Congress. Rather, the supremacy of the President in foreign policy, according to the opinion, flows from an alleged Constitutional distinction between domestic and foreign affairs. In the former, the federal government obtained only specific powers ceded by the states upon ratification of the Constitution. In the latter, the states never had any power at all, and the federal government received inherent, unlimited power directly from the British Crown, subject only to a few specific constraints mentioned in the 1787 founding document. That document conveyed this inherent, barely limited power entirely to the President.

The text and structure of the Constitution, however, indicate otherwise. If unlimited foreign affairs power with only a few constraints lay in the executive alone, we would expect a simple sentence in Article II vesting a foreign affairs power, followed by a few constraining sentences relying upon the word "not." Instead, the Constitution divides specific foreign affairs provisions between the executive and the legislative, including the powers to declare war, command the military, make treaties, appoint officials, and control spending. Why do this if only the executive has inherent power?

And if the provisions are restraints on an otherwise unlimited ability to act, why does the Constitution use language indicating such power for the states but not for the President? Article I, for example, allows the states to act unless its specific provisions dictate otherwise. § 8, 9, 10. See also *Federalist, No. 39*, and *New York v. United States*, 505 U.S. 144 (1992), at 222 (in casebook). Article II has no equivalent, specific language describing foreign policy. Alexander Hamilton and others might insist that the article still has that effect, asserting that the first sentence conveys a unitary, non-enumerated "executive power." Their theory fails to explain why affirmative grants of authority over foreign relations reside not in Article II alone but also in Article I.

Curtiss-Wright, moreover, fails the test of history and case law. It is not true, for example, that the states never had any foreign affairs power, because under the Articles of Confederation they expressly permitted a weak central government to conduct diplomacy in their stead. Nor did the federal Constitution obtain some power from the states and the rest from a foreign monarchy. *Federalist No. 51*, for example, speaks of power – without any distinction for foreign relations – granted only by "the people" to the new national government, not by the states or the British Crown. *McCulloch v. Maryland* confirms this view, explicitly affirming that the people alone, not the states (or anything else), transferred any power granted to the federal government. 17 U.S. (4 Wheat) 316 (1819), at 130 in casebook. *Curtiss-Wright*'s theory of a distinct Constitutional source of vast, inherent Presidential power has no foundation.

Therefore, the case should be overruled and, as defined earlier, I would dissent.

QUESTION 2

We hold today that the Federal Compulsory Education Act (FCEA) exceeds the power of Congress under the Commerce Clause, because it regulates a non-economic activity without effective limits confining its application to commerce.

The rule for validity of a statute under the Commerce Clause is set forth in *United States v. Morrison*, 529 U.S. 598 (2000). This rule permits Congress to regulate interstate commerce when a law applies to (1) channels of such commerce, (2) instrumentalities of such commerce, or people or things in interstate commerce, and (3) activities that Congress determines have a substantial effect on interstate commerce.

The statute in this case does not regulate channels of interstate commerce, such as a motel catering to out of state tourists, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). A child's high school diploma or GED does not, like a motel, accommodate the travel of buyers, sellers, products or services from one state to another. Nor does the statute at issue here address an instrumentality or a thing in interstate commerce, such as a train crossing state borders. *Houston, East & West TX Railway Co. v. United States*, 234 U.S. 342 (1914). Again, a document signifying completion of a high school education does not convey anything or anyone involved in delivering goods and services between states.

The FCEA does regulate under the third category in the *Morrison* rule, regarding activity that Congress determines has a substantial effect on interstate commerce. In *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court interpreted the substantial effects

criterion to require that Congress have a rational basis for finding such an effect. This rational basis could find a substantial effect from purely local activity, even when it did not produce items for sale – if failure to regulate that activity would have a collective impact undermining interstate commerce.

The question here is whether the FCEA meets these requirements for a substantial effect. To answer this question, *Morrison* applied a further four part test. A statute will be invalid if it (1) regulates activity clearly non-economic in nature; (2) contains no express jurisdictional element limiting its reach to specific commercial activities; (3) shows no evidence that Congress legitimately found an impact of the regulated activity on commerce; (4) regulates based on a causal chain too remote and attenuated in its connection to commerce.

In the case of the FCEA, Congress appears, at first glance, to meet the third requirement, because it made specific, detailed findings of an alleged impact on commerce. In particular, Congress attempted to quantify the monetary impact of high school dropout rates on the national economy. It provided specific dollar estimates for how dropouts reduced income and thus tax contributions, while increasing consumption of government services. We note that in *Morrison*, an even more detailed set of quantitative assertions failed to validate the Violence Against Women Act, because this Court found that any loss to the economy from the targeted crimes occurred far down the causal chain in time and space from the initial crime under Morrison's factor (3). This causal remoteness made the quantitative data provided by Congress unpersuasive. Here, the causal connection is less remote. Social science data will readily support a

correlation between education level and performance in the job market, for example. Thus, the FCEA appears capable of meeting elements (3) and (4) in the *Morrison* test for a substantial effect.

This difference from the facts in *Morrison* does not by itself rescue the FCEA, because we have yet to apply the remaining two factors in the effects test. Like the statute in *Morrison*, the FCEA contains no express element limiting its jurisdiction, under factor (2), to particular circumstances having an impact on commerce. Instead, like the Violence Against Women Act, the FCEA simply asserts blanket application to a sweeping category of circumstances – in this case, the secondary schooling of every person residing in the United States. A statute similarly lacking in jurisdictional bounds to particular circumstances failed to survive our Commerce Clause scrutiny in *Lopez v. United States*, 514 U.S. 549 (1995). To be sure, the statutes in *Lopez* and *Morrison* applied to crimes committed by or against individuals, rather than to educational policy. One might argue that the FCEA does contain suitable jurisdictional limits, because it clearly applies only to individuals obtaining a secondary education. In *Lopez*, however, his court, however, we found no such limits in a statute regulating every school in the United States, and we likewise find unlimited a statute affecting every school-age child in the United States and therefore all future, unborn residents who will attain that age.

This impermissible scope is magnified even further by FCEA's inability to meet factor (1) of the substantial effects test in *Morrison*, weighing heavily against regulation of activities clearly non-economic in nature. Although we declined in *Morrison*, at 198, to erect a categorical rule against aggregating local, non-economic activity to evaluate

Commerce Clause regulations, we did note the historical presumption against laws based on such aggregation. In *Lopez*, we struck down the Gun-Free School Zones Act on that basis, for criminalizing non-economic activity – gun possession – near schools. The FCEA does not criminalize behavior near schools, but in *Lopez* we described examples of future legislation that would likewise impermissibly target non-economic activity under the Commerce Clause. One such example was Congress imposing a direct federal curriculum in all the nation's schools, maintaining that ineffective school curriculums have an aggregate impact on the national economy. Such reasoning, we declared, would obliterate any federal limits over a non-economic activity traditionally within the sovereignty of the states, laying the groundwork for other such intrusions. Based on this reasoning, we conclude that if Congress cannot mandate a local school curriculum under the Commerce Clause, because doing so regulates clearly non-economic activity, Congress may not mandate completion of that curriculum for the same reason.

In concluding, we note specifically that our precedents allowing regulation of local activity outside the sphere of commerce do not apply here to factor (1) of the *Morrison* substantial effects test. Wheat withheld from commerce can nevertheless affect commerce, and therefore is economic in nature. *Wickard v. Filburn*, 317 U.S. 111 (1942). Similarly, marijuana held for home use is a thing in interstate commerce, and therefore economic in nature, subject to a larger federal regulatory scheme of interstate commerce. *Raich*, 545 U.S. 1.

QUESTION 3

No statute conveys standing on the harm alleged in this case. See, e.g. *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). Nevertheless, both plaintiffs in this case have standing, because they meet all the constitutional and prudential requirements.

A party meets the first constitutional requirement, regarding injury, when that person alleges past or imminent harm as a result of specified events. Here, the plaintiffs allege harm from facing a burden not required of others in the same situation, in that a discriminatory rule forces them to take the Orange state bar exam whereas others are not so compelled. Such harm is absent when a party fails to demonstrate any direct, personal impact from the alleged events, as when parents failed to allege that their children had personally been denied admission to private schools allegedly practicing racial discrimination. *Allen v. Wright*, 468 U.S. 737 (1984). Here, the plaintiffs do contend that they personally have been denied a privilege available to others, of avoiding a state bar examination. The plaintiffs do not lack standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where a party who alleged personally suffering an illegal chokehold failed to secure an injunction because he failed to plausibly allege imminent repeat of the harm. Here, at the time plaintiff law school graduates filed their complaint, they faced, in actuality, the imminent prospect of illegally being denied avoidance of the Orange state bar exam, unlike the *Lyons* plaintiff who faced no likely, imminent harm. The fact that one plaintiff subsequently passed this bar exam, and the

other failed, is irrelevant, because the prospect of imminent harm existed at the time of pleading.

The plaintiffs in this case also meet the standing requirements for causation and redressability. Causation requires that the alleged harm be fairly traceable to the opposing party's actions, a condition not satisfied when patients denied care at a hospital failed to trace that outcome precisely to specific content of IRS regulations. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Here, there is no such lack of precision. The judicial rule at issue specifically mandates the outcome: plaintiffs must take a bar exam while others do not. Similar precision exists on redressability. In *Simon*, lack of a clear causal relationship between statutory content and the alleged harm clouded the prospects that court action against the regulation at issue could remedy the harm. Here, the relationship of the rule at issue to the alleged harm is clear, and so the requested remedy of an injunction against the rule will remedy the harm.

The plaintiffs in this case have standing on prudential grounds because, first, they assert their own legal rights rather than those of an ineligible third party affected by the statute. See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). Second, the plaintiffs do not assert only a grievance alleging generalized government violation of a law affecting taxpayers or the citizenry as a whole, but rather a specific injury to themselves. *United States v. Richardson,* 418 U.S. 166 (1974).

The plaintiffs' first claim alleges that the Orange state judicial rule is preempted by federal law. This can occur when federal law expressly overrides the state rule,

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); or makes simultaneous compliance with a conflicting state law physically impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); or states an objective impeded by a state law, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Organization* 461 U.S. 190 (1983); or federal law comprehensively occupies a given policy field. *Hines v. Davidowitz*, 312 U.S. 52 (1941). None of these apply in the case at bar, because preemption requires that a relevant Congressional statute exist and in this case it does not.

The state's judicial rule, however, does fail under the Dormant Commerce Clause. The Dormant Commerce Clause principle holds that a state law can unconstitutionally interfere with interstate commerce under the Commerce Clause, even when Congress has not expressly passed legislation under that clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In the modern approach to the Dormant Commerce Clause, courts test a state law's validity by asking, first, whether it discriminates facially against out-of-state persons *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). If, on the other hand, the law is facially neutral in its treatment of outsiders, the next step asks whether it nevertheless discriminates covertly in its purpose or effect. *West Lynn Creamery Inc. v. Healy, 512 U.S.* 186 (1994). If the law is discriminatory, whether facially or covertly, the court may uphold it only if the law serves a vital local purpose and no less restrictive means of achieving that purpose is available. *Hunt v. Washington State Apple Advertising Commn.*, 432 U.S. 333 (1977).

In this case, the law is facially discriminatory. In *Philadelphia*, a New Jersey statute expressly prohibited out-of-state cities – but not in-state persons or organizations – from contracting with New Jersey landfills for the disposal of waste. Here, an Orange state judicial rule expressly prevents out of state law school graduates from taking the bar exam under the same conditions as those who graduated from Orange state laws schools. In both cases, a state law openly imposes on outsiders, without pretense of neutrality, an obstacle to obtaining an economic benefit that residents of the state do not face.

The Orange state law does not serve a valid local purpose justifying its discrimination. If preventing landfill overflow in the service of public health failed to justify an open restriction against external waste in *Philadelphia*, an open restriction against outside law graduates, merely to increase the familiarity of lawyers with state laws, must likewise fail. Even if the judicial rule at issue here did serve a valid local purpose, it would fall because other, less discriminatory means are available to serve that purpose. For example, a municipal requirement that milk be pasteurized within five miles of the city legitimately served a local interest in public health, but failed Dormant Commerce scrutiny because the city had alternatives that didn't exclude more distant milk pasteurization facilities in other states. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In *Dean Milk*, the city could serve public health by, for example, relying on U.S. government certification of outside pasteurization facilities. In our case, similarly, the state could produce more lawyers familiar with state laws by, for example, subsidizing new faculty positions and student scholarships at Cornwall Law School,

which highlights state law in its curriculum. Such action, unlike the present rule, would fall under the market participation exception to the Dormant Commerce Clause, because by conducting consensual transactions in the market the state avoids the coercive commercial impact of naked regulation. *Reeves Inc. v. William Stake*, 447 U.S. 429 (1980). In *Reeves*, favoring state customers of a state-run business was valid, just as favoring in-state students attending a state-run law school would be. Such action is not present here. Finally, the only case on record to uphold an openly discriminatory state law did so because unique circumstances made no alternative possible, and such is not the case here. *Maine v. Taylor & United States*, 477 U.S. 131 (1986).

In addition to violating the Dormant Commerce Clause, the state rule in this case fails under the Privileges and Immunities Clause. A state law fails under this provision if it denies out-of-state citizens the same right as its own citizens to pursue an economic livelihood, without both a substantial interest justifying the differing treatment and a chosen means substantially related to that interest. A state supreme courts rule failed this test when it precluded non-residents from being admitted to the state bar. This rule, the U.S. Supreme Court held, did not serve a substantial state interest, because, inter alia, there is no evidence that non-state residents would be any less knowledgeable of local law, once admitted to practice, than local citizens. *Supreme Court of New Hampshire v. Kathryn A. Piper*. 470 U.S. 274 (1985). Here, the rationale for an obstacle imposed on non-citizens is identical, and so the rule at issue in this case likewise violates the Privileges and Immunities Clause.