SEX, DRUGS, ALCOHOL, GAMBLING, AND GUNS: THE SYNERGISTIC CONSTITUTIONAL EFFECTS

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INTRODUCTION 307
I. THE TAXING CLAUSE 308
II. THE INTERSTATE COMMERCE CLAUSE 317
III. PRIVATE PROPERTY 324
IV. SEARCH AND SEIZURE 327
CONCLUSION 329

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Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

— *Justice George Sutherland*[1]

INTRODUCTION

The tendency of government is to grow. There is a one-way ratchet of government aggrandizement that depends upon seemingly innocuous departure from principles. Then, in the words of Thomas Jefferson, "A departure from principle in one instance becomes a precedent for a second; that second for a third; and so on, till the bulk of the society is reduced to be mere automatons of misery, [and] to have no sensibilities left but for sinning and suffering."[2]

Although Mr. Jefferson may have been too pessimistic with the words "automatons of misery," his diagnosis of the problem is accurate. All deviations from the principles of limited government can become floodgates for newfound government power. A tiny and seemingly innocuous modification in formerly principled limits will often not stay tiny.

In this Article, we discuss the synergistic relationship between the "wars" on drugs, guns, alcohol, sex, and gambling, and how that relationship has helped illegitimately increase the power of the federal government over the past century. The Constitution never granted Congress the general "police power" to legislate on health, safety, welfare, and morals; the police power was reserved to the States. Yet over the last century, federal laws against guns, alcohol, gambling, and some types of sex have encroached on the police powers traditionally reserved to the states.[3]

[1] Carter v. Carter Coal Co., 298 U.S. 238, 295–96 (1936).

[2] Thomas Jefferson, Letter to Sam Kercheval (July 12, 1816), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 674 (Adrienne Koch & William Peden eds. 1998).

[3] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 234 (3d.

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Congress's infringement of the States' powers over the "health, safety, welfare, and morals"[4] of their citizens occurred slowly, with only intermittent resistance from the courts. In no small part due to this synergistic relationship, today we have a federal government that has become unmoored from its constitutional boundaries and legislates recklessly over the health, safety, welfare, and morals of American citizens.

In part I, we discuss how the Taxing Clause[5] was the original conduit for congressional overreach. In part II, we analyze the Interstate Commerce Clause's role in augmenting government power. Part III examines how that overreach has affected citizens' property rights, and Part IV looks at how civil liberties, particularly Fourth Amendment protections, have been negatively affected by the federal government's synergistic wars against sex, drugs, gambling, and guns.

I. THE TAXING CLAUSE

In 1914, Congress passed the Harrison Narcotics Act "[t]o provide for the registration of, with collectors of internal revenue, and to impose a special tax on all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes."[6] The Act played on Americans' fears of "drug-crazed, sex-mad negroes",[7] and was one of the first times the federal government made a concerted effort to pass morals legislation through the taxing power. Of course the law had no legitimate tax purpose; the smallness of the tax, one dollar per year, made it a doubtful source of revenue.[8]

Specified paperwork forms were required for narcotic sales, and sales forms could only be used for the sale of opiates for medical purposes, not for recreational ones.[9] As enacted and

ed. 2006) ("[A] key difference between federal and state governments is that only the latter possess the police power.").

[4] FRANK AUGUST SCHUBERT, INTRODUCTION TO THE LAW & LEGAL SYSTEM 6, 566 (10th ed., 2012).

[5] U.S. Const. art. I, § 8, cl. 1.

[6] Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970, and replaced with the Controlled Substances Act).

[7] *How Did We Get Here?,* ECONOMIST, July 26, 2001, *available at* http://www.economist.com/node/706583.

[8] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986, at 98 (1990).

[9] *Id.*

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initially enforced, the law was used for regulating sales, but federal officials soon shifted to a prohibitory approach.[10] "In other words, no addicts could be served, whether or not they paid the tax."[11]

The Supreme Court spent a decade and a half struggling with the Harrison Narcotics Act. The first case involved the scope of the Act itself. In *United States v. Jin Fuey Moy*,[12] the Court limited the application of the Act to only persons in the class contemplated by the statute: namely "[a]ll [p]ersons [w]ho [p]roduce, [i]mport, [m]anufacture, [c]ompound, [d]eal in, [d]ispense, [s]ell, [d]istribute, or [g]ive [a]way [o]pium" and the other substances in the statute.[13] The Court limited section eight of the Act, which "declared unlawful for 'any person' who is not registered and has not paid the special tax to have in his possession or control any of the said drugs."[14] Read broadly, section eight made a "very large proportion of citizens who have some preparation of opium in their possession criminal or at least prima facie criminal, and subject to the serious punishment[.]"[15] Justice Oliver Wendell Holmes recognized that the Act had "a moral end as well as revenue in view"; yet the Court did not believe that Congress had a general power over morals. Therefore Court agreed with the district court that the statute should be read narrowly, limited to "those ends as to be reached only through a revenue measure, and within the limits of a revenue measure[.]"[16] Thus, section eight "cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—the persons who are required to register by § 1."[17]

The Court revisited the Harrison Narcotics Act in *United States v. Doremus*, and sustained the Act as within Congress's taxing power.[18] Whereas the district court had overturned the Act because "it was not a revenue measure, and was an invasion

[10] Alexander M. Bickel & Benno C. Schmidt, Jr., *The Judiciary and Responsible Government 1910–21, in* 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 436 (1984).
[11] *Id.* at 435.
[12] United States v. Jin Fuey Moy, 241 U.S. 394 (1916).
[13] *Id.* at 399.
[14] *Id.* at 400 (quoting 38 Stat. at L. 1929).
[15] *Id*. at 402.
[16] *Id.*
[17] *Id.*
[18] United States v. Doremus, 249 U.S. 86, 95 (1919).

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of the police power reserved to the states[,]"[19] the Supreme Court, in an opinion by Justice William Day, held that "[t]he only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States."[20] Moreover, "[t]he act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it."[21] Finally, as for whether the law was passed for moralistic reasons that infringe upon traditional areas of state sovereignty, the Court said:

> Of course, Congress may not in the exercise of federal power exert authority wholly reserved to the states. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.[22]

Justice Day correctly observed that courts enter difficult territory when they attempt to inquire into the motives of legislatures. At the same time, he recognized that Congress could not be the judge of its own powers: "Congress may not, in the exercise of federal power, exert authority wholly reserved to the states." Justice Day's error was to look only at whether the narcotics tax was in the form of a tax. Instead, he should have heeded Chief Justice John Marshall's rule in *McCulloch v. Maryland* that part of judicial review is to scrutinize whether a congressional enactment attempts "the accomplishment of objects not intrusted to the government."

> Should [C]ongress, in the execution of its powers, adopt measures which are prohibited by the [C]onstitution; or should [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted 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.[23]

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[19] *Id.* at 89.
[20] *Id.* at 93.
[21] *Id.* at 94.
[22] Doremus, 249 U.S. at 93.
[23] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

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Doremus should have been a perfect case to heed Marshall's words.[24] The control of what people put in their bodies was never an object entrusted to the federal government.

In other instances the Progressive-era Court was willing to investigate legislative motives. Four years prior to *Doremus*, in *Guinn v. United States*, the Court "s[ought] in vain for any ground which would sustain any other [non-discriminatory] interpretation" of an Oklahoma "Grandfather Clause" that denied the vote to anyone whose grandfathers were ineligible to vote prior to January 1, 1866.[25]

Despite the ruling in *Doremus*, over the next few years the Court struck some *ultra vires* congressional misuses of the taxing power.[26] Unlike *Doremus*, however, these cases were not related to drugs. In *Bailey v. Drexel Furniture*, the Court struck down a congressional "child labor tax" on the principle that "[i]t is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the states."[27] Chief Justice William Howard Taft wrote that Congress would not be allowed to evade its limited powers via verbal tricks:

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.[28]

The same year as *Bailey*, in an opinion also by Chief Justice Taft, the Court struck down the Futures Trading Act of 1921.[29] Taft referenced *Bailey* (the "decision, just announced")[30] as

[24] Doremus, 249 U.S. at 89–90.
[25] Guinn v. United States, 238 U.S. 347, 365 (1914).
[26] *See* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922).
[27] *Bailey*, 259 U.S. at 37.
[28] *Id.* at 38.
[29] Hill, 259 U.S. at 66–67.
[30] *Id.*

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"completely cover[ing] this case."[31] The Chief Justice described the Futures Trades Act as:

> [I]n essence and on its face a complete regulation of Boards of Trade, with a penalty of 20 cents a bushel on all "futures" to coerce Boards of Trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power.[32]

In 1925 the Court revisited the Harrison Narcotics Act in *Linder v. United States*.[33] This time the Court examined whether a doctor who was accused of giving drugs to an addict to alleviate addiction symptoms could be prosecuted as having dispensed narcotics for a non-medical purpose.[34] Recognizing that *Jin Foey Moy* limited the Act to actions that can "be reached only through a revenue measure and within the limits of a revenue measure[,]" the Court overturned the doctor's conviction on the grounds that "direct control of medical practice in the States is beyond the power of the Federal Government[,]"[35] and the "[i]ncidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."[36] Justice James Clark McReynolds continued:

> Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.
>
> . . . .
>
> The Narcotic Law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil

[31] *Id.*
[32] *Id.* at 66–67.
[33] Linder v. United States, 268 U.S. 5 (1925).
[34] *Id.* at 16.
[35] United States v. Jin Fuey Moy, 241 U.S. 394, 402
[36] *Linder*, 268 U.S. at 17–18 (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 402).

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orderly collection of revenue from sales.[37]

Because the Court had allowed Congress to use the constitutional tax power in a limited way as a pretext for the exercise of a police power over opiates, Congress continued to look for new ways to use the tax power for non-tax purposes. Attempts to do so with laws about child labor and commodities trading were rejected by the Supreme Court in the 1920s, but President Hoover's four appointments in 1930-–32 produced a Court less inclined to inquire into illicit congressional motives.[38]

The National Firearms Act of 1934 put a $200 excise tax on the making and transfer of certain arms, particularly machine guns and short barreled shotguns.[39] (As originally drafted, the Act would also have applied to handguns, but they were removed from the bill at the request of the National Rifle Association).[40] The prohibitory purpose of the Act was clear—as the Bureau of Alcohol, Tobacco, Firearms and Explosives—which today is charged with enforcing the tax—explains:

> NFA was enacted by Congress as an exercise of its authority to tax, the NFA had an underlying purpose unrelated to revenue collection. As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms. Congress found these firearms to pose a significant crime problem because of their frequent use in crime, particularly the gangland crimes of that era such as the St. Valentine's Day Massacre.[41]

A challenge to the Act reached the Supreme Court in 1937 in *Sonzinsky v. United States*.[42] The petitioner challenged the law as "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government."[43]

In an opinion by Justice Harlan Stone, the Court upheld the tax and attempted to distinguish *Bailey v. Drexel Furniture*,[44] *Hill*

[37] *Id.* at 17, 22.

[38] *The Taft Court, 1921—1930*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/history-of-the-court-2/the-taft-court-1921-1930/ (last visited Apr. 16, 2013).

[39] 48 Stat. 1236 (1934).

[40] David B. Kopel, *The Great Gun Control War of the Twentieth Century—and its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1533 (2012).

[41] *National Firearms Act*, *supra* note 39.

[42] Sonzinsky v. United States, 300 U.S. 506, 511 (1937).

[43] *Id.* at 512.

[44] Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

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v. Wallace,[45] and other cases that overturned taxes as *ultra vires* overreaching into areas of traditional state concern. According to Justice Stone, *Sonzinsky* was not a case like *Bailey v. Drexel Furniture*, "where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations."[46]

Justice Stone was right about that; the law in *Bailey* was supposed to be enforced by the Department of Labor (not by the Treasury Department), via inspections of factories, and the tax scheme was facially punitive—the full "tax" applied to any factory which employed even a single hour of child labor during a year.[47] In contrast, the NFA was to be enforced by the Treasury Department, and the tax system ($200 every time a NFA firearm was made or transferred) was structured like an ordinary excise tax[48] (with the exception that the hefty tax of $200, at a time when the minimum wage was 10 cents per hour[49]—was obviously intended to suppress the activity, rather than raise revenue from it).

"[I]t has long been established," wrote Stone, "that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."[50] He continued, contra Chief Justice Marshall in *McCulloch*: "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."[51]

With this abdication of judicial scrutiny, the Court broadened Congress's ability to control local or state matters through national taxing schemes. Wasting no time, Congress passed the Marihuana Tax Act of 1937 only months after the Court issued the opinion in *Sonzinsky*.[52] The Act imposed taxes on importers, manufacturers, producers, sellers, and dispensers of marijuana

[45] Hill v. Wallace, 259 U.S. 44 (1922).
[46] *Sonzinsky*, 300 U.S. at 513.
[47] *Bailey*, 259 U.S. at 34–35.
[48] *National Firearms Act*, *supra* note 39.
[49] Cam Merritt, *Section 6A-1 of the Fair Labor Standards Act*, HOUS. CHRONICLE, http://smallbusiness.chron.com/section-6a1-fair-labor-standards-act-56442.html (last visited Apr. 7, 2013).
[50] *Sonzinsky*, 300 U.S. at 513.
[51] *Id.* at 513–14.
[52] Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937).

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but did not criminalize the possession or use of the drug.[53] In many ways the Marihuana Tax Act was structurally similar to the National Firearm Arms, which had been upheld in *Sonzinsky*. The Marihuana Act eventually reached the Supreme Court in 1950 in *United States v. Sanchez*.[54]

Again the tax was challenged as beyond Congress's powers.[55] Again, citing *Sonzinsky* and other cases, the Court brushed aside any arguments for the unconstitutionality of a tax that explicitly sought to coerce behavior and that produced little revenue.[56] The Court did so even though the legislative history explicitly showed Congress's intent to control marijuana consumption:

> First, the development of a plan of taxation which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively.[57]

Here we see fully manifest the synergistic relationship between Congress's regulation of guns and drugs. Prior to the drastic expansion of the commerce power,[58] the taxing power offered the easiest means for Congress to regulate the daily lives of citizens. Without judicial scrutiny of pretextual motives (the type of scrutiny that the Court frequently employs for other parts of the Constitution, such as the First Amendment),[59] Congress quickly succumbed to the temptation of using the tax power as a *de facto* police power.

That synergy was then extended to gambling in the Revenue Act of 1951.[60] One section "lev[ied] a tax on persons engaged in the business of accepting wagers, and require[d] such persons to register with the Collector of Internal Revenue."[61] The Act was challenged on two grounds: 1) the now-familiar argument that the tax was a thinly veiled attempt to encroach on the police

[53] *Id.* at 551–52.
[54] United States v. Sanchez, 340 U.S. 42, 43 (1950).
[55] *Id.*
[56] *Id.* at 44–45.
[57] *Id.* at 43 (quoting S. Rep. No. 900, 75th Cong., 1st Sess. 3).
[58] See discussion *infra* Part II.
[59] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 454 (1996) ("[T]he strict scrutiny test operates as a measure of governmental motive.")
[60] Revenue Act of 1951, ch. 521, 65 Stat. 452 (1951).
[61] United States v. Kahriger, 345 U.S. 22, 23 (1953).

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powers of the states; 2) the registration requirement violated the Fifth Amendment right against self-incrimination.[62]

Justice Stanley Reed addressed the argument that the federal gambling tax usurped states' police powers.[63] Petitioners hoped to distinguish their case from *Sonzinsky* and *Sanchez* by pointing out how little revenue the tax would raise. To that argument, Reed responded that the Court had previously let Congress get away with "tax" measures which raised trivial amounts of revenue, and which were designed to prohibit opiates, machine gun, marijuana, and low-cost dairy products:

> One of the indicia which appellee offers to support his contention that the wagering tax is not a proper revenue measure is that the tax amount collected under it was $4,371,869, as compared with an expected amount of $400,000,000 a year. The figure of $4,371,869, however, is relatively large when it is compared with the $3,501 collected under the tax on adulterated and process or renovated butter and filled cheese, the $914,910 collected under the tax on narcotics, including marihuana and special taxes, and the $28,911 collected under the tax on firearms, transfer and occupational taxes.[64]

Reed applied *Linder* and other cases to hold that the Revenue Act (like the National Firearms Act) contained no extraneous provisions that were clearly not reasonably calculated to collecting the tax. He wrote, "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. All the provisions of this excise are adapted to the collection of a valid tax."[65]

While the *Kahriger* Court, consisting entirely of New Deal Justices, had an easy time with the tax issue, the Court was sharply divided on the Fifth Amendment question. The majority ruled against the Fifth Amendment claim, but the dissent's theory would later carry the day in *Marchetti v. United States*

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[62] *Id.* at 24.

[63] *Id.*

[64] *Id.* at 28 n.4. When referring to taxes on "filled cheese," Justice Reed is referencing the federal government's long history of regulating so-called "filled" dairy products—that is, products where other oils (animal, vegetable, etc.) are added to "fill out" skim milk. *See, e.g.*, Cornell v. Coyne, 192 U.S. 418 (1904) (holding that filled cheese manufactured expressly for export is still subject to tax); United States v. Carolene Products Co., 304 U.S. 144 (1938) (holding that the Filled Milk Act did not exceed Congress's powers under the Commerce Clause).

[65] *Id.* at 31.

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(1968).[66] In an another interesting example of the synergy between federal laws against guns, drugs, and gambling, the Court decided *Haynes v. United States* the same day as *Marchetti*.[67] In *Haynes* the Court held that the registration provision of the National Firearms Act of 1934 also violated the Fifth Amendment's guarantee against self-incrimination.[68] The next year, in 1969, the Court would apply the same reasoning to the Marihuana Tax Act of 1937, ruling that the registration requirement in the Act violated famed drug-proponent Timothy Leary's Fifth Amendment right against self-incrimination.[69] Justice Harlan wrote, "[i]f read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a 'real and appreciable' risk of self-incrimination, within the meaning of our decisions in *Marchetti, Grosso,* and *Haynes*."[70] All of the relevant laws were soon revised to fix the Fifth Amendment problem.

Although the 1968–69 Court correctly protected the Fifth Amendment, the issue should never have reached that point. A right is only useful as a carve-out from a power granted to the government. Had *Doremus*, *Sonzinsky*, *Sanchez*, and *Kahriger* correctly held that the Constitution does not give Congress the power to tax for police power purposes, then a Fifth Amendment carve-out would not be necessary.

By the time *Kahriger* was decided in 1953, Congress now had other constitutional clauses—the Commerce and Necessary and Proper Clauses—that the Supreme Court had expanded to allow for the regulation of purely local economic matters. Meanwhile the Commerce Clause had sometimes been used as a police power for non-economic purposes, but the most massive expansions of the Commerce power beyond economic regulation still lay ahead.

II. THE INTERSTATE COMMERCE CLAUSE

Unlike the tax power, the commerce power did not escape constitutional boundaries primarily because of guns, drugs, or alcohol. Rather, it was gambling and sex that started Congress down the slippery slope.

[66] Marchetti v. United States, 390 U.S. 39, 41–42 (1968).
[67] Haynes v. United States, 390 U.S. 85, 86 (1968).
[68] *Id.* at 95.
[69] Leary v. United States, 395 U.S. 6, 26–27 (1969).
[70] *Id.* at 16.

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The main precedent is the *Lottery Case*[71] (a 5–4 ruling that Congress can ban interstate shipment of lottery tickets, even into states where lotteries are legal). This is quickly followed by the Mann Act, prohibiting interstate transportation of women for immoral purposes.[72] The Court first upheld the Mann Act in a prostitution context, and then a few years later upheld a Mann Act prosecution involving mere noncommercial fornication.[73] The commerce power grew further in 1964 when the Court allowed Congress to use the interstate commerce power in the Civil Rights Act of 1964 to bar racial discrimination by businesses that had only the most tenuous connection to actual interstate commerce.[74] This opened the way for the Gun Control Act of 1968 (controlling simple possession of firearms),[75] which was followed by the Controlled Substances Act of 1970 (simple possession of drugs).[76]

The 1903 *Lottery Case* dealt with a question of "great moment": whether Congress could prohibit the interstate transportation of lottery tickets.[77] The arguments offered by petitioners were in many ways similar to those offered against the taxing power: that a regulation of interstate commerce that was passed for purely moralistic reasons is an invalid encroachment on the traditional police powers of the states. Justice John Marshall Harlan offered a counter-argument quite similar to those offered in the taxing power cases:

> If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to

[71] Champion v. Ames (*Lottery Case*), 188 U.S. 321 (1903).

[72] 18 U.S.C. §§ 2421–24 (2012).

[73] Hoke v. United States, 227 U.S. 308, 320–321 (1913); Caminetti v. United States, 242 U.S. 470, 482–83, 495–96 (1917).

[74] One case involved a motel next to an interstate highway. There, Congress has a strong factual basis for concluding that the refusal of such motels to serve black travelers was a serious barrier to interstate commerce and to exercise of the right of interstate travel. Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964). The harder case involved Ollie's Barbeque, a restaurant whose patrons were almost entirely local, and whose only genuine connection to interstate commerce was buying some of its supplies from interstate vendors. Katzenbach v. McClung, 379 U.S. 294, 296–97 (1964).

[75] Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213.

[76] Controlled Substances Act, Pub. L. No. 91–513, 84 Stat. 1242 (1970).

[77] Champion v. Ames (*Lottery Case*), 188 U.S. 321, 345 (1903).

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> another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals?[78]

Harlan's opinion commanded only a bare majority. Three justices joined Chief Justice Melville Fuller's dissent, which argued:

> The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one state to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested. . . .

The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called, of police.[79]

Seven years after the *Lottery Case*, Congress passed the Mann Act and once again encroached on areas of state concern under the guise of interstate commerce.[80] The Act (which is still in effect, with amendments) made it a felony to "knowingly transport" females "in interstate or foreign commerce . . . for the purpose of prostitution or debauchery, or for any other immoral purpose[.]"[81] In *Hoke v. United States* in 1913, the Court first addressed the constitutionality of the Act.[82] As in the tax power cases, the plaintiffs argued that the Act was a "subterfuge and an attempt to interfere with the police power of the states to regulate

[78] *Id.* at 356.
[79] *Id.* at 364–65 (Fuller, C.J., dissenting) (internal citations omitted).
[80] White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910).
[81] *Id.*
[82] Hoke v. United States, 227 U.S. 308, 317 (1913).

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the morals of their citizens, and . . . that it is in consequence an invasion of the reserved powers of the states."[83] Justice Joseph McKenna had "no hesitation" in declaring the Act constitutional because "Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."[84] (Note that Justice McKenna's opinion was not upholding the transportation ban as an exercise of the Commerce Power itself; rather, his use of the term "incident" meant that he was upholding the ban an incidental power justifiable under the Necessary and Proper Clause, as a supplement to the Commerce Clause itself.[85])

As we have come to expect, the Mann Act was then expanded in *Caminetti v. United States*.[86] There, the Court examined whether the Mann Act could extend to transportation of women for illicit, but *noncommercial* purposes.[87] Interpreting the plain language of the statutory language for an "immoral act," and following the reasoning in the *Lottery Case*, the Court sustained the convictions, writing that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[88]

Two more times the Court read congressional authority under the Mann Act very broadly. In *Athanasaw v. United States*, the Court held that the Act's language "for the purpose of prostitution or debauchery, or for any other immoral purpose," could be applied to "debauchery" in the sense of a female who never had sex with anyone, but who was induced to spend time entertaining men of dubious moral character.[89] *Cleveland v. United States*

[83] *Id.* at 321.
[84] *Id.* at 323.
[85] For a discussion of the doctrine of incidental powers in the Necessary and Proper Clause, *see* Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011). Chief Justice Roberts's opinion for the Court in *NFIB v. Sebelius* analyzes the Necessary and Proper Clause pursuant to the doctrine of incidental powers—as of course did Chief Justice Marshall's opinion in *McCulloch v. Maryland*. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577, 2579 (2012).
[86] Caminetti v. United States, 242 U.S. 470, 482 (1917).
[87] *Id.* at 484–85.
[88] *Id.* at 491.
[89] Athanasaw v. United States, 227 U.S. 326, 331–32 (1913).

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held that the Mann Act can be used to prosecute a married woman if the marriage is polygamous.[90] In a sternly worded dissent, Justice Frank Murphy wrote that the ruling in *Caminetti* was being taken too far and should be overruled:

> The consequence of prolonging the Caminetti principle is to make the federal courts the arbitrers of the morality of those who cross state lines in the company of women and girls. They must decide what is meant by "any other immoral purpose" without regard to the standards plainly set forth by Congress. I do not believe that this falls within the legitimate scope of the judicial function. Nor does it accord the respect to which Congressional pronouncements are entitled.[91]

Throughout the 1930s, Congress vastly extended its use of the interstate commerce power into local economic transactions. When the new laws were challenged, and sometimes upheld, the Lottery and Mann Act cases were cornerstone precedents.[92]

After *NLRB v. Jones & Laughlin Steel Corp.* upheld the National Labor Relations Act's regulation of hours, wages, and working conditions in businesses over a certain size, the interstate commerce power became a fundamentally different thing.[93] *Jones & Laughlin* itself had a fairly close tie to interstate commerce. Worker strikes at factories did in fact obstruct the channels of interstate commerce, particularly at factories that brought a huge amount of raw materials from out of state and then sent vast shipments to out-of-state buyers.

But in *Wickard v. Filburn*,[94] the Court abdicated any responsibility to enforce constitutional limits on the interstate commerce power (as augmented by the Necessary and Proper Clause), essentially announcing that the Court would defer to the Congress's own determinations about necessity and propriety.[95] Two decades later, in *Katzenbach v. McClung*, the Court applied the reasoning of *Wickard* to uphold the Civil Rights Act of 1964 against a challenge by Ollie's BBQ in Birmingham, Alabama.[96] There, the Court found that Congress "had a rational basis for

[90] Cleveland v. United States, 329 U.S. 14, 18–19 (1946).

[91] *Id.* at 29 (Murphy J., dissenting) (internal citations omitted).

[92] *Id.* at 18–19; Heart of Atlanta Motel v. United States, 379 U.S. 241, 256–57 (1964).

[93] Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43–44 (1937).

[94] Wickard v. Filburn, 317 U.S. 111 (1942).

[95] *Id.* at 124–25.

[96] Katzenbach v. McClung, 379 U.S. 294, 305 (1964).

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finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce," and thus could make Ollie's serve African Americans.[97]

Four years after *Katzenbach*, Congress passed the first major federal gun law since the New Deal.[98] The Federal Firearms Act of 1938 (FFA) had required a federal license for firearms dealers who shipped or received firearms in interstate commerce.[99] The FFA was replaced by the Gun Control Act of 1968 (GCA), which directly controlled personal possession of firearms.[100] Much like the reasoning in *Wickard*, the findings of the GCA claim that "only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible."[101]

Similarly, Congress cited the rule of *Wickard v. Filburn* as the constitutional authority for the Controlled Substances Act of 1970:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce[.][102]

As a matter of statutory interpretation, the Court ruled a few years later in *United States v. Bass* that for GCA purposes, the gun must have previously been part of interstate commerce.[103] The *Bass* rule, which has been repeated verbatim in 13 subsequent cases, is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[104] Because federal law about intrastate guns would have changed the balance, the Court adopted a

[97] *Id.* at 304.

[98] Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213.

[99] Federal Firearms Act, ch. 850 § 2(a), 52 Stat. 1250 (1938).

[100] Gun Control Act of 1968, Pub. L. No. 90-618, § 101(3), 82 Stat. 1213, 1217 (1968).

[101] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(3), 82 Stat. 197, 225 (1968).

[102] 21 U.S.C. § 801(3) (2012).

[103] United States v. Bass, 404 U.S. 336, 336 (1971).

[104] *Id.* at 349.

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narrower reading of the GCA's jurisdictional language.[105] *Bass* foreshadowed the Court's rule in *Gregory v. Ashcroft* that Congress will not be presumed to have intended to intrude into a traditional state power unless Congress makes a plain statement to that effect.[106]

Nevertheless, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives continued to enforce most of the GCA provisions without regard to whether the particular gun ever crossed state lines.[107]

Moreover, in *Scarborough v. United States*, the Court interpreted *Bass* and the GCA to apply to any gun which had at any time, no matter how distantly, once crossed an interstate border.[108] Professor David Engdahl derides this as the "herpes" theory of the Commerce Clause: once an object has some interstate commerce on it, the object forever after is subject to Congress's interstate commerce power.[109]

As for drugs, even the minimal limitations of *Bass* and *Scarborough* do not apply, as the Court has ruled that the CSA can reach even the cultivation of marijuana for personal use in conformity with state law.[110] In 21st century commerce clause jurisprudence, the anti-sex cases (Mann Act) tend to be ignored as an embarrassment, while the anti-gambling case (Lottery Case) remains a foundational precedent. On the tax side, the anti-gambling case (*Kahriger*) has become the major precedent for use of the tax power as a police power, and *Sonzinsky* is also often cited to the same effect.[111]

The bottom line is that Americans live in a nation in which Congress, which was never granted a police power by the Constitution, exercises an usurped power to declare which individuals can possess firearms, and what kind of substances those individuals can ingest (even if those substances have never

[105] *Id.* at 340.

[106] Gregory v. Ashcroft, 501 U.S. 452, 452 (1991).

[107] United States v. One Assortment of 89 Firearms, 465 U.S. 354, 355–56 (1983).

[108] Scarborough v. United States, 431 U.S. 563, 563 (1977).

[109] *See* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 120 (1998); David E. Engdahl, Review, *Casebooks and Constitutional Competency*, 21 SEATTLE U. L. REV. 741, 784 (1998).

[110] Gonzales v. Raich, 545 U.S. 1, 29 (2005).

[111] United States v. Kahriger, 345 U.S. 22, 28–29 (1953); Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

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left the state in which they were created).[112] Congress is exercising a police power, and the foundations for Congress's current controls on guns and drugs were created a century ago, when the Court let Congress use the interstate commerce power against gambling and sex.

III. PRIVATE PROPERTY

In waging wars against alcohol, guns, and drugs, the federal government has increasingly encroached upon private property rights. For alcohol, guns, and drugs, seizing private property became one of the government's favorite tactics. Alcohol was involved in one of the first cases involving asset forfeiture that was not a maritime case,[113] *Dobbins's Distillery v. United States*[114]

In *Dobbins's Distillery*, the lessor of a distillery was brought under asset forfeiture proceedings after his lessee was accused of "neglect[ing] and refus[ing] to keep the books required by law, and make the required entries in the same; that he made false entries in the books kept in the distillery, and that he omitted to enter in the same the facts required by law, with intent to defraud the revenue[.]"[115]

The lessee had been accused of violating a federal taxing scheme for distilled spirits. The lessor pleaded ignorance to the schemes of the lessee.[116] Justice Nathan Clifford ruled that the lessor's ignorance did not offer a defense:

> Nothing can be plainer in legal decision than the proposition that the offense therein defined is attached primarily to the distillery and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.[117]

During the waning years of prohibition, the Court heard another alcohol seizure case, *Various Items of Personal Property v. United States* (1931).[118] Like *Dobbins's Distillery*, *Various*

[112] *Kahriger*, 345 U.S. at 29.

[113] The Brigg Ann, McClain, Master, 13 U.S. 288, 288 (1815); The Schooner Adeline and Cargo, 13 U.S. 244, 245 (1815).

[114] Dobbins's Distillery v. United States., 96 S. Ct. 395, 396 (1877).

[115] *Id.*

[116] *Id.* at 397.

[117] *Id.* at 401.

[118] Various Items of Personal Property v. United States, 282 U.S. 577, 578

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Items stemmed from a violation of the Revenue Act of 1918, which placed a tax on distilled spirits diverted for beverage purposes.[119] The Court held that the distillery, warehouse, and denaturing plant of the Waterloo Distilling Corporation could be seized without violating the Double Jeopardy Clause of the Fifth Amendment because "[t]he forfeiture is no part of the punishment for the criminal offense."[120]

Civil asset forfeiture was upheld in the context of firearms sales in *United States v. One Assortment of 89 Firearms* (1984).[121] The defendant in the case, Patrick Mulcahey, successfully pleaded entrapment to defend against a charge of illegally trafficking firearms without a license.[122] The government, however, insisted on pursuing confiscation of the weapons even after the criminal charges had been defeated.[123]

Mulcahey challenged the civil asset forfeiture proceedings as being an instance of double jeopardy and as violating the rule against collateral estoppel.[124] The Court denied both arguments. Regarding the collateral estoppel claim, Chief Justice Warren Burger wrote that

> the jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business. Mulcahey's acquittal on charges brought under § 922(a)(1) therefore does not estop the Government from proving in a civil proceeding that the firearms should be forfeited pursuant to § 924(d).[125]

The Chief Justice also made short work of Mulcahey's double jeopardy argument. Looking at the statute, the Gun Control Act of 1968, Burger divined that the intent behind the forfeiture section was remedial rather than punitive:

> Section 924(d) plays an important role in furthering the prophylactic purposes of the 1968 gun control legislation by discouraging unregulated commerce in firearms and by removing from circulation firearms that have been used or intended for use outside regulated channels of commerce. Keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal

(1931).

[119] *Id.*

[120] *Id.* at 581.

[121] United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1983).

[122] *Id.* at 355–56.

[123] *Id.* at 356.

[124] *Id.* at 361–62.

[125] *Id.* at 362.

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plainly more remedial than punitive.[126]

The remedial-rather-than-punitive rationale has also been used by lower federal courts to uphold ex post facto changes in federal bans on gun ownership. For example, a person pleaded guilty to tax evasion in 1965, and then in 1968, Congress outlawed gun possession by anyone convicted of a felony.[127] Under standard ex post facto doctrine, the retroactive enhancement of a punishment (here, augmenting the punishment to include a ban on exercise of Second Amendment rights) is a classic example of an unconstitutional ex post facto law.[128] However, lower courts have ruled that the purpose of the prohibition is protecting public safety, rather than punishing the convicted defendant, so the gun possession ban is not an ex post facto law.[129]

The *89 Firearms* case played an important role in the expansion of civil forfeiture into a government revenue bonanza in the modern "war on drugs." In *United States v. Ursery* (1996),[130] "Michigan Police found marijuana growing adjacent to respondent Guy Ursery's house," so the United States "instituted civil forfeiture proceedings against the house[.]"[131] After paying off his settlement over the asset forfeiture proceeding, Ursery was convicted of manufacturing marijuana.[132] The Sixth Circuit overturned the criminal conviction as a violation of the Double Jeopardy Clause of the Fifth Amendment.[133]

Citing the "oft-affirmed rule" of *Various Items* and *89 Firearms*,[134] Chief Justice William Rehnquist made it clear that asset forfeiture did not violate the Double Jeopardy Clause:

> Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme. Though the two-part analytical construct employed in 89 *Firearms* was more refined, perhaps, than that we had used over 50 years earlier in *Various Items,* the conclusion was the same in each case: *In rem*

[126] *Id.* at 364.
[127] United States v. Bass, 404 U.S. 336, 337 (1971).
[128] Calder v. Bull, 3 U.S. 386, 390 (1798).
[129] *See, e.g.*, United States v. Brady, 26 F.3d 282, 291 (2d Cir. 1994). The rationale for this interpretation of the Ex Post Facto Clause is inconsistent with an earlier Supreme Court case holding that deprivations of the right to arms are within the scope of the Clause. Cummings v. Missouri, 71 U.S. 277, 332 (1866).
[130] United States v. Ursery, 518 U.S. 267 (1996).
[131] *Id.* at 271.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 279.

Electronic copy available at: https://ssrn.com/abstract=2232257

> civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause.[135]

As a result of these mutually reinforcing civil asset forfeiture cases involving alcohol, guns, and drugs, the civil asset forfeiture "business" is thriving. In 2008, for the first time the U.S. Department of Justice Asset Forfeiture Fund topped $1 billion.[136] By comparison, in 1986, the year the fund was created, the fund only had $93.7 million.[137] Because much of the seized money and assets go directly to the seizing department, there are huge incentives for abuse, and much evidence that abuse occurs.[138] Moreover, in most states the standard of proof required to seize property suspected to be part of criminal activity is substantially less than the standard of proof (beyond a reasonable doubt) required to show the defendant was engaged in criminal activity; property can often be seized before there is any judicial hearing.[139] Because of this difference, "upwards of 80 percent of forfeitures occur absent a prosecution."[140]

IV. SEARCH AND SEIZURE

In *Terry v. Ohio* (1968), the Supreme Court ruled that the Fourth Amendment permits police officers talking to someone to perform "a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him."[141] In order to perform the search an officer must have "observe[d] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous[.]"[142]

Later, and probably inevitably, the Court ruled that drugs discovered during a *Terry* stop were admissible for evidence.[143] In

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[135] *Ursery*, 518 U.S. at 278.

[136] MARIAN R. WILLIAMS ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 6 (Institute for Justice, 2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[137] *Id.* at 7.

[138] *Id.*

[139] *Id.* at 22.

[140] *Id.*

[141] Terry v. Ohio, 392 U.S. 1, 30 (1968).

[142] *Id.*

[143] *See* Michigan v. Long, 463 U.S. 1032, 1050 (1983) ("If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as

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Minnesota v. Dickerson (1993), the Court ruled, however, that an officer conducting a Terry stop could not further search a pocket to discover drugs if the initial pat-down reveal no evidence of a weapon.[144]

Although *Dickerson* seemed to limit the ability of police officers to blatantly use *Terry* stops to search for drugs, recent evidence indicates that such searches may be widespread. Recently, NYC police officers have been charged with abusing the *Terry* stop exception in order to harass racial minorities and to discover drugs.[145] In particular, critics have charged that NYC cops are demanding suspects empty their pockets during a *Terry* stop, so the police can find small quantities of marijuana.[146] Because NYC decriminalized the mere possession of small amounts of marijuana in the 1970s, an arrest requires at least the public display of the drug.[147] After the person has "exposed" the marijuana, the officer then arrests her for publicly displaying marijuana.[148] Some public defenders and legal aid practitioners have estimated that between two-thirds and three-fourths of arrests for small marijuana occurred after the drugs were displayed at the officer's demand during a purported *Terry* stop.[149]

In response to public protests, a 2011 NYC Police Commissioner memo stated that such involuntary exposure should not result in arrests: "A crime will not be charged to an individual who is requested or compelled to engage in the behavior that results in the public display of marijuana."[150] The NYC stop-and-frisk program has also been accused of racial profiling.[151] According to the NYPD's own numbers, African-Americans were 55 percent of the suspects in the 533,042 *Terry* stops conducted in 2012, and Hispanics were 32 percent.[152]

In January of 2013, a federal district court judge for the

here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.")

[144] Minnesota v. Dickerson, 508 U.S. 366, 378 (1993).

[145] Elizabeth A. Harris, *Police Memo on Marijuana Warns Against Some Arrests*, N.Y. TIMES, Sept. 23, 2011, at A15.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Harris, *supra* note 145.

[151] Jamie Schram & Josh Hall, *Major Decline in NYPD Stop-Frisks*, N.Y. POST, Feb. 9, 2013, at 2.

[152] *Id.*

Electronic copy available at: https://ssrn.com/abstract=2232257

Southern District of New York ruled the NYPD's stop-and-frisk program unconstitutional.[153] Judge Shira A. Scheindlin ruled that the mere presence of a person outside a building covered by the department's "Trespass Affidavit Program" (TAP)—a program that allows "police officers to patrol inside and around thousands of private residential apartment buildings"[154]—coupled with an officer's observation of "furtive movements" do not create constitutionally necessary "reasonable suspicion."[155]

In her opinion, Judge Scheindlin recounts the stories of numerous stop-and-frisks experienced by the plaintiffs challenging the program.[156] In many of the cases, plaintiffs were interrogated about drugs during the stops. In one case the plaintiff was handcuffed and placed in the back of a van where he was asked "where was the drugs or the guns at."[157] Other plaintiffs were also repeatedly asked about drugs.[158]

The *Terry* stop, of course, is a limited exception to the Fourth Amendment probable cause requirement. It exists to ensure officer safety in situations where a gun may be present.[159] It is not a general excuse to search everyone entering an apartment complex, and it is also not a method for better prosecuting the drug war.[160] Granted, as the Court has said, drugs found pursuant to a *Terry* stop need not be ignored, but *Terry* stops for the purpose of finding drugs are an explicit violation of civil liberties.

Not that we should be surprised. As we've seen, policies aimed at drugs and guns, as well as alcohol and gambling, have formed an unfortunate alliance for increasing government's control over our lives.

CONCLUSION

Gambling, drinking alcohol, using drugs, owning guns, and engaging in sex (or non-sexually "debauching" with persons of loose morals) are all consensual activities. Unlike *malum in se* crimes, for which there is an unhappy victim who can inform the police, the voluntary activities can only be suppressed by a

153 Ligonv. City of New York, No. 12 Civ. 2274 (S.D. N.Y. Jan. 8, 2013).
154 *Id.* at 7.
155 *Id.* at 143.
156 *See, e.g.*, *id.* at 53–54.
157 *Id.* at 56.
158 *See Ligon*, 12 Civ. 2274, at 54.
159 Terry v. Ohio, 392 U.S. 1, 29 (1968).
160 *See id.* at 30.

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government that is ever more powerful and intrusive. The unhappy constitutional story of the various governmental wars on gamblers, drinkers, drug users, gun owners, and people who have non-marital sex (or who associate with those who do) show how a single government transgression of constitutional limits can function as a "gateway" to greater and greater transgressions. As with most forms of addiction, the addiction to unconstitutional power creates its own cravings; a government that was sated with a certain amount of unconstitutional power last year may feel the need for even more power next year.

In terms of violating constitutional limits, Congress has shown that it is incapable of moderation, temperance, or self-control. This would hardly have surprised the Founders, but the Founders might be disappointed to see how often the Supreme Court has acted as an enabler, rather than performing the judicial duty of declaring usurpations of power to be unconstitutional.[161]

[161] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton) (extolling judicial review as a check on potential congressional exercise of ungranted power).

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