

Constitutional Law Outline

- I) *Marbury v. Madison*
 - 1) There is authority to review executive action when it impacts the rights of an individual and the law requires the executive to comply. However, there is a domain of discretion, which is immune from review.
 - A) Political Question doctrine.
 - 2) Created judicial review on the basis that law conflicts with the Constitution, which is supreme.
 - (i) *Marbury* wanted a writ of mandamus from the Supreme Court to Madison for his commission.
- II) U.S. states are precluded from taking actions which violate the Constitution, but can do everything not prohibited to them. The federal government needs a positive grant of power.
- III) Art I, § I: All legislative powers herein granted-enumerates powers.
 - 1) *McCulloch v. Maryland*
 - A) Power is not enumerated, but it is implied.
 - B) Whatever is expedient or desirable and not prohibited can be “Necessary and Proper.”
 - (i) Maryland wanted to tax the bank of the U.S.

Commerce Clause

- I) *NFIB v. Sebelius*: not a valid commerce clause power.
- II) Gave Congress the power to regulate competition between the states.
 - (i) *Gibbons v. Ogden*: *Gibbons* was given a ferrying monopoly from New York and *Ogden* was operating a competing service under a federal license.
- III) Among means intermingled with, not what is solely local.
- IV) Police regulation left to the states.
- V) 19th Century to 1937:
 - 1) The court narrowed the meaning of commerce; it didn't include production, mining, or manufacturing.
 - 2) Also, narrowly applied it to the states, only that activity which had a direct effect on interstate commerce.
- VI) 1937-1990's
 - 1) *NLRB v. Jones and Laughlin*-Allowed for regulation of activity which had a “close and substantial relation” to interstate commerce.
 - 2) *Wickard v. Filburn*-Allowed for aggregation of intrastate activity; if in the aggregate, the impact is substantial, it can be regulated.
 - (i) *Filburn* made too much wheat for his own consumption.
 - 3) *Heart of Atlantis v. U.S.*-Activity which affects travel affects interstate commerce.
 - A) Rational basis test.
- VII) 1990's-now:
 - 1) Three areas Congress can regulate:
 - A) Channels of interstate commerce (e.g., roads, railroads).
 - B) Instrumentalities, persons, or things in interstate commerce (e.g., railroad terminals).
 - C) Activities having a substantial relation to interstate commerce.
 - (i) Activity must be economic to regulate here.
 - 2) In order for activity to be economic, it must:
 - A) Regulate activity which is economic in nature.

- B) Regulate activity that is “an essential part of a larger regulation of an economic activity.
- 3) If it is not economic activity, then it cannot be aggregated.
- 4) Economic Activity is:
 - A) Production, distribution, or consumption of goods.
 - B) Action which involves the exchange of money.
- 5) Cases:
 - (i) U.S. v. Lopez: Congress wanted to regulate guns in school zones.
 - (ii) U.S. v. Morrison: Congress made a tort statute to allow victims of gender based violence to recover under a tort action.

VIII) Rules:

- 1) Regarding intrastate economic activity:
 - A) Where an activity is commercial, the Court will likely uphold the regulation of completely intrastate activity, as long as there is a rational basis for finding that the regulated activity is a part of a class of activities which substantially affects interstate commerce.
 - (i) Gonzales v. Raich: California created a law allowing medical marijuana, even though federal law criminalized it.
- 2) Regarding intrastate noneconomic activity:
 - A) Where an activity is noneconomic, the Court will likely reject regulations of completely intrastate activity, unless Congress can factually show a substantial economic effect on interstate commerce without aggregation.

Tenth Amendment

- I) Two approaches
 - 1) It is a reminder that Congress’s powers are enumerated.
 - 2) Protects state sovereignty and laws are invalidated by the court.
- II) Two step approach
 - 1) Is there an enumerated power?
 - 2) If yes, does the law infringe upon the States?
- III) Rules on Commandeering:
 - 1) The Constitution does not give the Federal government a right to force States to regulate.
 - (i) New York v. U.S.: Congress required states to take low level radioactive waste or regulate according to federal standards.
 - 2) Congress cannot force State executive branches to act, even temporarily.
 - (i) Printz v. U.S.: Congress enacted legislation requiring local law enforcement officers to conduct background checks on prospective gun purchasers.
 - (a) What about in situations of emergencies?
- IV) The federal government cannot require the states to regulate, but they can regulate the states.
- V) Federal law will be applied to important state activities, only if there is a clear statement from clear that it was meant to apply.

Taxing Power

- I) Competing views:
 - 1) Congress can only tax and spend to carry out its enumerated powers.
 - 2) Congress may tax and spend for the general welfare.

- II) The taxing power is not limited by the powers enumerated in § 8, but in the clause which confers that power.
- III) The discretion is for Congress to decide how to tax and spend, unless the choice is clearly wrong.
- IV) NFIB v. Sebelius: Not what you call the power in a statute, it is to be determined by what it does.
- V) Conditions on Funds must be:
 - 1) Designed to serve general public purposes;
 - 2) Explicitly states the purpose and not ambiguous or coercive;
 - 3) The condition is directly related to the purpose; and
 - 4) Not compulsive.
 - 5) Does not violate provisions.
 - (i) South Dakota v. Dole: Congress related funds to a drinking age of 21.
 - (ii) NFIB v. Sebelius: it is compulsive if a state can lose all its funding for not complying.

Necessary and Proper Clause

- I) The necessary and proper clause probably allows enforcement of a law related to an enumerated power. However, if it is not enumerated, then the law is more subject to attack.

Preemption

- I) Express Preemption: State laws are expressly preempted if the statute explicitly states it.
- II) Implied Preemption: Takes place when Congress manifests the intent to preempt but does not explicitly state it.
 - 1) Florida Lime v. Paul: Federal law is a baseline which the states can add to, but not take from.
- III) Direct Conflict Preemption: Where compliance with the Federal and State laws are impossible, the federal law wins. Depends upon statutory interpretation (e.g. whether the federal standard set minimum or maximum requirements).
- IV) Field Preemption: The federal law is exclusive in the area and preempts state laws even if the state law does not impede but compliments the implementation of the federal law.
 - A) Arizona v. U.S.: Arizona created legislation regulating immigration making it illegal for an alien to knowingly apply for work, allowing state officers to arrest without a warrant on probable cause that the person could be removed, and making reasonable attempts to determine immigration status of persons detained.

The Dormant Commerce Clause

- I) The principle that state and local laws that place an undue burden on interstate commerce are unconstitutional.
- II) Analysis:
 - 1) Is it discriminatory?
 - A) On its face
 - B) Purpose
 - (i) Impact
 - (ii) Effect
- III) Discriminatory

- 1) If the terms of the law distinguish between in-state and out-of-state actors, it is facially discriminatory.
- 2) A statute that is even-handed on its face (facially neutral) may be found to be unconstitutional due to discriminatory purpose or effect.
- 3) Factors likely to make a law discriminatory:
 - A) If it excludes virtually all, rather than some, out-of-state actors.
 - B) If it imposes costs on out-of-state actors, that in-state actors avoid.
 - C) Court believes law is motivated by protectionist purposes.
- 4) Rule:
 - A) Laws that discriminate against out-of-staters will be upheld only if the law is shown to be the least restrictive means for the achievement of an important, legitimate, by some accounts compelling, objective.

IV) Non-discriminatory

- 1) Rule:
 - A) Pike balancing test: If a law is non-discriminatory and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.
 - (i) Often safety legislation is upheld.

V) Exceptions to the Dormant Commerce Clause

- 1) Congressional approval allowing the state to take the action. Congress has taken action and spoken about the dormant commerce clause.
- 2) The Market Participant Exception
 - A) Where a state is acting as a participant, rather than a regulator, it is free from the dormant commerce clause and should be given the same protection as other proprietors.
 - B) There can be no downstream regulation; states cannot use this exception to allow in-state third parties to benefit.

Privileges and Immunities Clause

I) Prevents states from discriminating against out-of-staters with regard to fundamental rights or important economic activities.

- (i) Applies only to people, not corporations.
- (ii) Aliens not considered to be covered.
- (iii) Applies to municipalities.
- (iv) No market participation exception.
- A) Pursuing professions (common calling), transfers of property, and activities to formation.

II) Preliminaries:

- 1) The law must treat differently citizens (residents) and noncitizens (nonresidents) of the state and discriminate against noncitizens; and,
- 2) The law must be challenged by a flesh and blood nonresident; and
- 3) The discrimination must adversely affect a privilege or immunity of state citizenship.
 - A) Basic rights or essential activities that are fundamental to the promotion of interstate harmony.

III) If preliminaries are satisfied, two part test:

- 1) Does the state or locality have a substantial reason for treating nonresidents different? (source of the evil); and
 - 2) Does the discrimination against nonresidents bear a substantial relation to the government's objective?
 - A) Availability of less restrictive means?
- IV) Government employment and right to gain access to recreation activities are not essential activities.

Statutory Interpretation

- I) Tools used:
 - 1) Dictionaries
 - 2) Expert witnesses.
 - 3) Ordinary v. technical meaning
- II) Canons of constructions: Textual
 - 1) Ejusdem generis (of the same kind): General terms following specific terms are interpreted in relation to the specific words.
 - 2) Noscitur a sociis (a word is known by its associates): A word is interpreted with its surrounding terms.
 - 3) Expressio unius est exclusion alterius: The inclusion of one thing is the exclusion of another.
- III) Whole act cannons
 - 1) Whole act rule: View words as a part of the entire legislation.
 - A) Identical words have a consistent meaning.
 - B) Rule against redundancy and surplusage
 - 2) Whole code canon: Assumption of consistency across statutes.
- IV) Substantive cannons: If statute is ambiguous:
 - 1) Rule of Lenity: If a criminal statute is ambiguous, the interpretation is in favor of the defendant. Done for fairness.
 - 2) Constitutional Avoidance: When a statute can be read two ways, the Court is required to interpret the statute in a way that is not open to a constitutional challenge.
 - A) Assumption is that if the legislature passed the law, they meant it to be constitutional.
 - 3) The Presumption Against Preemption: If possible, choose the interpretation that does not lead to preemption.
 - 4) Scrivener's Errors and Absurd Results:
 - A) Directs courts to correct legislative drafting mistakes.
 - B) Avoid interpretations that produce absurd results.
 - (i) Courts cannot freely rewrite statutes to improve their clarity or minimize harsh effects.
- V) Intent/Purpose
 - 1) Legislative History:
 - A) Committee Reports:
 - (i) Highest regard as they are written by those charged with the responsibility of the bill.
 - B) Author or Sponsor Statements
 - C) Member Statements
 - D) Hearing Records

- E) Other Legislative Statements
- F) Presidential and Agency Interpretations.
- 2) Social choice-Collective intent does not reveal actual intent.
- 3) Public choice-Politicians done for reelection.

Executive Power

- I) Art. II: All executive powers shall be vested in a President of the United States.
- II) Youngstown Sheet & Tube, Co. v. Sawyer: President issued an executive order to take possession of steel mills during a strike: Jackson Test:
 - 1) There is an Art. II power and congressional authorization, President's authority is at its maximum.
 - 2) There is an Art. II power but no congressional authorization. Zone of twilight in which there may be concurrent authority between President and Congress.
 - A) Case-by-case analysis
 - B) Imperative of events.
 - C) Contemporary imponderables.
 - 3) Acts incompatible with the will of Congress, the President can act only on his own powers minus any congressional powers over the matter.
- III) Congress cannot delegate law-making or amendment powers to the President as it violates the Presentment Clause.
- IV) Impeachment
 - 1) House draw articles of impeachment.
 - 2) Senate tries with Chief Justice presiding.
 - 3) 2/3 of the members present must vote to convict.

Agencies

- I) Agency is a unit of government created by statute.
 - 1) Delegated authority by the legislative branches with authority limited by that granted by their organic statutes.
 - 2) Agencies can be created by the President under his authority to take care that the law be faithfully enforced.
 - A) They can only exercise authority the President already had.
- II) Types of agencies:
 - 1) Executive branch agencies are headed by an official the president appointed and can fire at will.
 - 2) Independent agencies are run by a multi-member commission (or board), the members of which serve fixed and staggered terms, are sometimes subject to bi-partisan requirements, and are removable only "for cause" (neglect of duty or malfeasance).
- III) APA:
 - 1) Procedure
 - 2) Judicial review
 - 3) Helps insufficient and deliberative.
- IV) 5 Functions of Agencies:
 - 1) Promulgate
 - 2) Enforcement
 - 3) Adjudication

- 4) Research and investigation
- 5) Guide and educate public
- V) Delegation and Specificity
 - 1) Explicit delegation: Statute contains direct instructions to agencies to issue regulations.
 - 2) Implicit delegation: Statute contains ambiguous language that creates agency discretion.
- VI) Limits on delegation:
 - 1) Non-delegation doctrine:
 - A) Congress is vesting legislative power in an agency against the constitution.
 - (i) Court developed it to address separation of powers issues.
 - B) Congress can delegate as long as they provide an “intelligible principle” to which the agency “is directed to conform;” they do not need to give a determinate criterion.
- VII) Rule Making:
 - 1) Initiating a rule:
 - A) Agency’s own initiative.
 - B) Call for review from the Office of Information and Regulatory Affairs (OIRA).
 - C) Response to governmental or private party petitions.
 - 2) Notification of Proposed Rulemaking (NPRM) published in the federal register.
 - 3) Opportunity for public comment.
 - 4) Issue a rule or take no action.
 - A) Must give a statement of basis for rule.
- VIII) Congress may revoke delegated authority.
- IX) Tools of Statutory Interpretation:
 - 1) Chevron v. NRDC: EPA created a rule changing “source” from any building structure, facility, or installation to devices within the same grouping.
 - A) Rule:
 - (i) Has Congress spoken directly to the precise issue in question? If yes, then that is the end.
 - (ii) If no, then is the agency’s answer a permissible one? If yes, the court will defer.
 - 2) Tools
 - A) Scientific Analysis: An evaluation by agencies of relevant risks and appropriate responses. Risk is the knowledge that a bad thing will happen with some probability.
 - (i) Risk Assessment:
 - (a) Toxicology
 - (i) Uncertainty
 - 1. Must extrapolate from animals to humans.
 - 2. Must extrapolate high doses to normal doses.
 - 3. Must isolate compounds, whereas the interaction matters.
 - (b) Epidemiology
 - (c) Statistical analysis
 - (i) Incomplete reporting.
 - (ii) Needs interpretation
 - (iii) Lumped categories.
 - (ii) Risk Management
 - (a) Scientific/Policy judgements.
 - (b) Scientific study/analysis.
 - B) Economic analysis

- (i) Statutes often mandate consideration of economics in some form.
 - (a) Do not consider the costs. Adequate margin.
 - (b) Demonstrate benefits threshold. Significant risk.
 - (c) Only if reasonable cost to industry.
 - (d) Demonstrate that the benefits outweigh or justify costs. Unreasonable risk.
- (ii) Executive orders require Cost/Benefit Analysis.
 - (a) Monetize the costs.
 - (b) Monetizes the benefits.
- (iii) Common sense.
- C) Political Analysis factors:
 - (i) Public attitudes.
 - (ii) Distributional effects.
 - (iii) Presidential preferences.
 - (iv) Congressional preferences.

Presidential Control of Agencies

- I) The appointment power of Art. II, § 2 distinguishes between Officers of the United States and Inferior Officers.
 - 1) Principal Officers are appointed only by the President, with no other superiors.
 - A) Cabinet members.
 - B) Ambassadors.
 - 2) Inferior officers can be appointed by the President, federal judiciary, or department heads.
 - A) Morrison v. Olson rule for inferior officers:
 - (i) Subject to removal by a higher executive branch official.
 - (ii) Empowered only to perform certain limited duties.
 - (iii) Limited in jurisdiction.
 - (iv) Limited in tenure.
 - (i) Morrison v. Olson: Independent prosecutor was created.
- II) The Removal Power:
 - 1) Impeachment
 - 2) The power to remove is incident to the power to appoint, not to advise and consent.
 - A) Congress cannot condition the removal of an executive officer.
 - 3) A member of an independent agency can be made removable only for cause.
 - A) These officers serve quasi-legislative or quasi-judicial purposes and their removal can be conditioned by Congress.
 - B) More than one layers of conditions is too much.
- III) Through OMB and Office of Regulatory Affairs, President can control.
- IV) Prompt letters may suggest where further regulation might be modified.
- V) Return rule: President

Congressional Control

- I) Fire alarms when political constituents raise the alarm about regulations and alert congress.
- II) Oversight
 - 1) Ability to compel testimony and contempt power.
 - 2) Police patrols require agencies to submit reports to Congress.

- 3) Legislative vetoes: A statutory provision that enables Congress to reverse an agency decision without enacting new statutes.
 - A) Positive: Requiring an agency to obtain congressional approval.
 - B) Layover: Requiring an agency to report to a specified committee and wait for a period of review.
 - C) Negative: Reversing an agency's decision by bicameral, one house, or one committee.
 - (i) INS V. Chadha: The AG recommended a suspension of Chadha's deportation and the House overruled.
 - (a) If Congress is acting to amend or repeal a statute, it must conform with the Constitutional requirement of bicameralism and presentment.
- 4) Removal?
 - A) The only method Congress has to remove an executive officer is through impeachment.

Judicial Control

- I) Chevron test: Review of agency's statutory interpretation.
- II) Arbitrary and Capricious test (Hard Look Review Rule): Review of agency policy making.
 - 1) Motor Vehicle Manufacturers Ass'n v. State Farm:
 - A) NHTSA abandoned the passive restraint rule.
 - (i) A rule is arbitrary and capricious if the agency:
 - (a) Relies on factors which Congress intended it not to consider;
 - (b) Entirely failed to consider an important aspect of the problem;
 - (c) Used flawed reasoning;
 - (d) Failed to respond/consider substantial arguments or comments;
 - (e) Failed to consider important alternatives without justification;
 - (f) Offered an explanation for its decision that runs counter to the evidence; or,
 - (g) Is so implausible that it could not be ascribed to.

Justiciability

- I) No advisory opinions
- II) Standing
 - 1) Constitutional requirements:
 - A) Injury
 - (i) Plaintiff must show that as a result of the act, she suffered or is likely to suffer a concrete injury in fact.
 - (a) To health and safety.
 - (b) To economic interests
 - (c) To quality of life (e.g. pollution).
 - B) Causation
 - (i) Past injuries are not sufficient for an injunction, a plaintiff must show that he or she is likely to be injured again in the future.
 - C) Redressability.
 - (i) Even if you have an injury which is traceable to defendant's conduct, the relief sought must fix this issue.
 - 2) Prudential: Congress can override
 - A) Cannot claim an injury for a third party.

- B) No taxpayer standing.
- III) Ripeness-not yet time for the court to address.
- IV) Mootness-issue is no longer relevant.
- V) Political question.

Constitutional Interpretation

- I) Procedure
 - 1) Start with the text of the Constitution.
 - 2) Look to the intent of the framers.
 - 3) Historical materials (e.g. Declaration of Independence, Federalist papers).
 - 4) Court precedents.
 - 5) Look forward (Non-originalism).
- II) NLRB v. Canning:
 - (i) President appointed members to the NLRD during a three day intra-session recess. Art II creates the Recess Appointment power which allows the President to fill vacancies.
 - (a) Non-Originalist looked to the practice and history to create a working answer.
 - (b) Originalist looked to the words of the Constitution for their answer.