

## CON LAW OUTLINE

### Introduction – Nation's History

- I. The Constitution of the United States
  - A. Sets out our fundamental beliefs as a society and the structure of our government.
    - i. Bill of Rights (1791) – limited power of the federal government
      - a. 1<sup>st</sup> Amendment: Freedom of expression, press, assembly, religion clauses
      - b. 2<sup>nd</sup> Amendment: Keep and bear arms clause
      - c. 3<sup>rd</sup> Amendment: Quartering of soldiers clause
      - d. not an absolute prohibition, only applies during peacetime; during war, have to quarter
      - e. 4<sup>th</sup> Amendment: Search and seizure clause
      - f. no warrant shall be issued except on probable cause
      - g. 5<sup>th</sup> Amendment: grand jury, double jeopardy, self-incrimination, due process, takings clauses
      - h. 6<sup>th</sup> Amendment: criminal trial clauses
      - i. 7<sup>th</sup> Amendment: civil jury trial clauses
      - j. 8<sup>th</sup> Amendment: bail/punishment clauses
      - k. 9<sup>th</sup> Amendment: unenumerated rights clauses
      - l. 10<sup>th</sup> Amendment: Reservation of Powers (to states) clause
- II. The Regulatory State
  - A. The process by which Congress uses its power to **enact legislation**,
  - B. The tools regulatory agencies use to **implement statutory mandates**,
  - C. The means by which **A)** congress, **B)** the President, **C)** the Judiciary, and **D)** the public control regulatory agencies.
- III. Why have we seen a rise in the regulatory state?
  - A. Rise in automobile accidents, deaths, etc.
  - B. In response to the needs of society and to respond to things that are harmful to our society.
  - C. Limitations of Tort and Contract Law.
  - D. Economic Justifications:
    - i. Adjust for market failures—sometimes the market does not supply consumers with the best options (i.e. compensate for externalities, environmental fixes, other free-rider problems, consumer protections, public goods, unequal bargaining power, etc.)
  - E. Social Justifications:
    - i. As a society, we may aspire to certain norms of conduct for their own sake (i.e. prohibit discrimination, moral obligations to animals, future generations, etc., fairness)

### Federal Judicial Power – US Const. Art. III, sec. 1.

- I. Judicial Review
  - A. The power of the judiciary to decide the constitutionality of
    - i. (1) laws (created by the elected legislatures) and
    - ii. (2) executive actions (taken by elected representatives)
  - B. There is scant textual authority, other than *Marbury v. Madison*.
    - i. Analysis – judicial review of executive actions, depends on nature of act:
      - a. If action is political = **no review**
      - b. If action involves duty assigned by law, or affects individual rights = **review**
    - ii. Analysis – judicial review of legislative actions
      - a. “In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction,

both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” Article III, § 2[2].

- b. Marbury held that the original jurisdiction is to be strictly construed, and that a conflicting statute is unconstitutional.
  - Michigan v. Long (1983) – U.S. Supreme Court will NOT review a state court opinion that is decided on “adequate and independent *state grounds*”
- c. When there is a discrepancy between state and the Constitution, and when that happens, the Constitution is paramount (Supremacy Clause).

## II. Government Structure and Reconstruction Amendments

A. These amendments shifted power away from the states and back to Congress because the states were not fulfilling their obligations and upholding basic human rights (i.e. the Bill of Rights)

### i. 13th Amendment - Abolition of Slavery

a. § 2: “Congress shall have power to enforce this article by appropriate legislation.”

### ii. 14th Amendment - Civil Rights (citizenship; privileges or immunities; due process; equal protection)

a. § 5: “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

### iii. 15th Amendment - Black Suffrage

a. § 2: “Congress shall have power to enforce this article by appropriate legislation.”

## III. Limits on Federal Judicial Power

A. **Interpretive Limits** – raises the question of how the Constitution should be interpreted

i. Textualism: looking at the plain text the Constitution.

ii. Originalism: Original intent, meaning from the framers, look to historic documents, federalist papers, etc.)

iii. Non-originalism: The Constitution is a living, breathing document, no need to look to the original intent.

iv. Structuralism: the structure of the government and Constitution dictates that another outcome occurs, the Constitution mandates that there is one Supreme Court and the inferior courts are up to Congress to create. Congress can eliminate all the inferior courts, but structurally, that would not work.

B. **Congressional Limits** – refers to the ability of Congress to restrict federal court jurisdiction

i. The Exceptions and Regulations Clause

ii. Congress does NOT set the Court’s jurisdiction, except when Article III allows it to.

iii. Congress has the right to define the Supreme Court’s appellate jurisdiction.

C. **Justiciability Limits** – a series of principles based on what the case or controversy requires; it can’t give advisory opinions, cannot give advice.

i. Five Major Doctrines (all are based on “case or controversy” requirement):

#### a. No Advisory Opinions

- Case or controversy does not exist – where the court is being asked to decide on a matter where there is no real dispute.
- City of LA v. Lyons (1983); p. 59

#### b. Standing

- Whether a litigant is entitled to have the Court decide the merits of an issue.
- Constitutional Requirements (MA v. EPA (2007))
  - Injury – is there a legally cognizable injury?
    - For injunctive damages, must prove future injury (City of LA v. Lyons)
  - Causation – is the injury caused by the Δ?
  - Redressability – if the judiciary takes the case, will the decision remedy the situation?

- Prudential Requirements
    - No third-party standing – someone cannot bring a lawsuit on behalf of another person
    - No generalized taxpayer or citizen standing – as a taxpayer, if you don't like how the US is handling foreign affairs, you cannot bring a suit on this ground without more.
      - First, taxpayer must establish a logical link between his status as a taxpayer, and the legislative enactment attacked. (no incidental expenditure)
      - Second, taxpayer must prove that the challenged enactment exceeds specific Constitutional limitations, and not just generally. (has to be injury and causation)
        - Exceptions: Singleton v. Wulff (1976) (abortion case)
          - The sufficiently close relationship between the litigant to the person whose right he seeks to assert – “inextricable bound”
          - The ability of the third party to assert his own right – there are some situations where women would not want to advocate for this matter but some of these obstacles are not impossible to pass by. Regardless though, there seems to be little loss in terms of advocacy from allowing its assertion by a physician
        - Supreme Court has only one exception where taxpayer standing is permitted: to challenge government expenditures as violating the Establishment Clause of the First Amendment.
    - Zone of Interest – essentially has to be within the zone of interest protected by the law involved
- c. Ripeness
  - A case or controversy does NOT YET exist
  - Poe v. Ullman (1961)
  - Court considers:
    - Fitness of the issues for judicial decision
    - Hardship of the parties
- d. Mootness
  - A case or controversy NO LONGER exists.
  - US Parole Commission v. Geraghty (1980): Respondent was a federal prisoner who was denied parole twice from a federal prisons. He brought suit challenging the validity of the US Parole Commission's Parole Release Guidelines, but was released from prison while his appeal to the court of appeals was pending.
  - 3 exceptions:
    - (1) Capable of repetition but evading review (pregnant)
    - (2) Voluntary cessation:
      - The actor could resume the activity.
      - When there is voluntary cessation that creates a moot case, the D has to meet a pretty high standard to do so. The allegedly wrongful behavior has to reasonably be expected to not reoccur. They must show that it is not going to happen again. (*Friends of the Earth*)
    - (3) Class actions:



- a. Must be economic activity.

#### V. Taxing and Spending Power – Article I, § 8[1]

- A. “Congress shall have power to lay and collect taxes . . . to pay debts and provide for the common defense and general welfare of the United States; but all [taxes] shall be uniform throughout the United States.”
- B. Spending – Congress must meet certain requirements when it attached conditions to funds to state/local governments (SD v. Dole)
  - i. (1) spending must be in pursuit of the general welfare;
  - ii. (2) the conditions must be unambiguous; and
  - iii. (3) the conditions must be related to a federal interest in a particular national project/program.

#### VI. The Reconstruction Amendments

- A. Shifted power away from the states and back to Congress because the states were not upholding basic human rights (i.e. the Bill of Rights)

#### Limits on Congress’s and Judiciary’s Power

##### I. 11<sup>th</sup> Amendment

- A. Judicial power shall be construed to extend to any suit against one of the states by citizens of another state, or by citizens of any foreign state. (state sovereign immunity)
- B. 3 ways around the 11<sup>th</sup> Amendment in Federal Court:
  - i. Sue state officers
  - ii. States waive immunity
  - iii. Congress may authorize suits against state government (using its 14<sup>th</sup> amendment power)

#### Limits on State Regulatory and Tax Power

##### I. Supremacy Clause

- A. “This Constitution, and the Laws... and all Treaties... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Art. VI
- B. Two Scenarios for Constitutional Limits on State Power
  - i. Where Congress has ALREADY acted: (preemption – Supremacy Clause)
    - ✓ Key is all preemption cases is Congress’s intent
      - a. Express Preemption
        - Clear language of the statute – also looks to legislative history.
      - b. Implied Preemption
        - Field preemption
          - where the scheme of federal regulation is so pervasive that reasonable inference is that Congress left no room for States to supplement it
        - Conflict preemption
          - where compliance with both federal and state regulations is physically impossible
        - Federal Objective
          - where state/local law impedes the achievement of federal objective
    - ii. Where Congress has NOT acted:
      - a. Dormant Commerce Clause
      - b. Privileges and Immunities Clause

II. In the absence of Congress action, the *judiciary* determines that a state/local government is placing an undue burden on interstate commerce

A. Test:

- i. **First**, is there a discriminatory purpose?
  - a. If yes, struck down without question
  - b. If no, go to step 2 balancing
- ii. **Second**, balancing
  - a. Is the provision discriminatory on its face? (strict scrutiny)
    - If yes, heavily presumed invalid
      - State has the heavy burden of proving the measure is almost certain to achieve its legitimate purpose, and the unavailability of adequate, non-discriminatory alternatives.
    - If no, go to next step
  - b. Is the provision discriminatory in effect? (intermediate scrutiny)
    - If yes, measure is presumed invalid
      - State has burden of proving that the measure is likely to achieve its legitimate purpose, and the unavailability of adequate nondiscriminatory alternatives.
    - If no, go to next step
      - Is the measure even-handed in effect? (rational basis)
        - If yes, measure is presumed valid.
      - Challenger has the burden of proving that the measure's burden on interstate commerce is clearly excessive in relation to state benefits.

B. Exceptions to the Dormant Commerce Clause:

- i. Congressional approval (laws, channels, instrumentalities, substantially affects interstate commerce)
- ii. Market participation exception:
  - a. A state may favor its own citizens when dealing with government owned business and receiving from government run programs.
  - b. Even an even-handed law that creates clearly excessive burdens on interstate commerce will be struck down. The court is fairly aggressive.

III. Privileges and Immunities

- A. Those that bear upon the vitality of the nation as a single entity. The Bill of Rights, important economic activities (i.e. the ability to earn a livelihood).
- B. Limits the ability of a state to discriminate against out-of-staters with regard to fundamental rights or important economic activities
  - i. Most cases under privileges and immunities clauses involve challenges to state and local laws that discriminate against out-of-staters with regard to their ability to earn a livelihood
- C. Such discrimination will only be allowed if it is substantially related to achieving a substantial state interest
- D. Test:
  - i. **First**, does the law affect a constitutional right/important economic interest?
    - a. If yes, go to 2
    - b. If no, there's no violation
  - ii. **Second**, does the state have
    - a. a substantial reason/objective for the discrimination? AND
    - b. is the discrimination substantially related to the state's reason/objective? (*NH v. Piper* 1985)
      - if yes to both, state/local law is upheld

- if no to either (or both), state/local law is struck down
  - consider the availability of less restrictive means

## Legislation and Statutory Interpretation:

### I. Structure of a Modern Statute

- Title
- Enacting Clause
- Short Title
- Statement of purpose, preamble, findings
- Definitions
- Principal operative provisions
- Subordinate operative provisions; exceptions
- Implementation provisions
- Specific repeals and related amendments
- Preemption provisions (if any)
- Savings clause
- Temporary provisions (if any)
- Expiration date (if any)
- Effective date (if different from date of enactment)

### II. Interpretive Tools and Theories

#### A. Text Based Tools:

##### i. (1) Ordinary Meaning vs. Technical Meaning:

###### a. Factors:

- Degree to which terms have accumulated settled meaning under common law
- Audience to which statute is addressed (i.e. penal statute is addressed to the public—thus, ordinary meaning)
- Whether there is an industry understanding
- Whether the term appears in a technical context

##### ii. (2) Textual Canons of Construction

###### a. Linguistic Canons

###### ▪ **Ejusdem generis:**

- “Of the same kind”
- When a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects
- EX: Federal statute protects social security benefits from executing levy, attachment, or other legal process.

###### ▪ **Noscitur a sociis:**

- “A thing is known by its companions”
- A term is interpreted consistently with surrounding words so as not to unduly expand statutes beyond their reasonable reach (often interchanged with ejusdem generis)
- EX: statute bars claims against USPS arising from loss, miscarriage, or negligent transmission of letters or postal matters. Negligent transmission only includes negligence involving failure to transmit mail or damages to its contents.

###### ▪ **Expressio unius est exclusio alterius:**

- “The mention of one thing is an exclusion of another”
  - EX: where congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are NOT to be implied. When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.
  - **Other:**
    - punctuation,
    - last antecedent rule: a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows
    - conjunctive vs. disjunctive: terms connected by a disjunctive should be given separate meanings, unless the context dictates otherwise
    - may vs. shall, dictionary act.
  - b. Whole Act Canons – look to the rest of the state to construe
    - Views statutory terms as part of the entire legislation in which they were enacted.
    - Identical words get consistent meanings
    - Avoiding redundancy and surplusage:
      - A statute ought to be construed that no clause, sentence, or word shall be superfluous, void, or insignificant (if you can)
        - That said, it is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.
  - c. Whole Code Canons – look to other statutes to construe
    - In pari materia:
      - Separate statutes addressing the same subject matter generally should be read as if they were one law.
        - Applies with greatest force when the statutes were enacted by the same legislative body at the same time.
      - A later act can be regarded as a legislative interpretation of an earlier act.
    - Inferences across statutes: Even if not (i), the court may draw inferences from separate statutes.
      - When congress uses the same language in two separate statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text have the same meaning in both statutes.
    - Repeals by implication: [presumption against] (not favored and will not be presumed unless the intention of legislature to repeal is clear and manifest)
      - Different from other canons because it can be overcome by clear language to the contrary.
- iii. (3) Substantive Canons of Construction (eg, Babbitt).
- a. **Rule of Lenity:**
    - Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.
    - Rule applies when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.
  - b. **Constitutional Avoidance Canon:**
    - When there are two possible interpretations of a statute, a statute must be construed so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.
    - Only available when the statutory provision is ambiguous.

- c. **Federalism Clear Statement Rule:**
  - If Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.
- d. **Presumption Against Preemption:**
  - The historic police powers of the states are not to be superseded UNLESS that was the clear and manifest purpose of Congress.
- iv. (4) Intent and Purpose-Based Tools
  - a. Forms of Legislative History:
    - Committee Reports
      - Committee Reports
        - written by those responsible/most-informed about bill
        - circulate with bill to whole chamber (Congress)
        - read widely by members & staff (for fairly plain language)
        - neg.: not subject to whole vote of Congress
        - neg.: can't be amended (don't reflect disagreement)
    - Author and Sponsor Statements
      - prepared by person knowledgeable about bill
      - neg.: reflects only one voice; may be laden with bias or "sales talk"
    - Member Statements
      - Certain members may be experts on the topic
      - Neg.: not much weight if on the losing side
    - Hearing Records
      - records of oral testimony, written reports, questions from committee members
      - a court may use to understand info or discern awareness of committee
    - Other Legislative Statements
      - legislative history of other statutes, past & future, serve as interpretive guides (recall "whole code" canon)
    - Presidential and Agency Statements
      - authoritative: signing statements come from actor with constitutional role in enacting legis.
      - President/agency may have proposed/drafted original version of bill, so possess special understanding
      - agency has responsibility for interpreting legislation in the course of implementing it
    - Other
      - committee "mark-up" debates;
      - analysis by legislative or executive counsel
      - etc
  - b. Judicial Reliance on Legislative History:
    - *Moore v. Harris*: Looks to legislative history to find that the intent was to address the black lung disease regardless of the employment status of the miners.
- v. (5) Tools for Considering Changed Circumstances
  - a. Bob Jones Univ: The IRS was protected in its decision to revoke tax exemption of Bob Jones University, which did not meet the public policy. Looked as well to legislative history and the fact that congress revisited this ruling; congress's silence amounts to acquiescence.
- vi. (6) Theories of Statutory Interpretation

- a. Textualism
  - the ordinary meaning of words (ascertained through dictionaries and textual canons)
  - Directs courts to stop with the text of statute; NOT to engage in broader search for legislative intent.
  - Rationale: only the text is enacted law, per Article I, § 7 process.
  - Objective intent: what a reasonable person would gather from the text of the law.
- b. Intentionalism and Purposivism
  - Determining the intent/purpose of the legislature
  - Intentionalism: suggests collective legislative intent is coherent (i.e. general intent of majority is ascertainable)
  - Purposivism: once legislative purpose is determined, interpret the text to carry out that purpose as best it can (but in doing so, don't give words a meaning they won't bear)
- c. Imaginative Reconstruction
  - The intent of the legislature with respect to an issue it did not consider.
  - Also looking at the values and attitudes of the periods in which the legislation was enacted.
- d. Dynamic Interpretation
  - The statute's meaning in light of changed circumstances.
  - Analyze statute as if it had been enacted yesterday, and tries to make sense of it in today's world (*Bob Jones Univ.*)

### Implementation of Statutory Mandates by Agencies

- I. What is an Agency?
  - A. Usually created by Federal Legislature, occasionally by executive order, then followed by legislation by Congress establishing the agency and delegating authority to it.
- II. Powers of Agencies
  - A. To act with force of law, by issuing regulations (legislative) and issuing orders after adjudication similar to judicial hearing
  - B. Power also to conduct research, provide public info, produce guidance documents, etc.
  - C. There are a huge volume of regulations and adjudications (in 2008, there were 284 statutes; 3,955 regulations)
- III. Composition of the Regulatory State
  - A. 15 cabinet departments and their sub-cabinet agencies (plus other agencies)
  - B. Federal government employs over 2.5 million (including 1,100 full-and-part-time Senate confirmed political appointees, plus other presidential appointees, career civil-servants, and other non-political government workers)
  - C. Because of the size and scope of the agencies, there is a continual quest for control of their decisions by president, congress, regulated parties, public interest groups, courts.
- IV. Factors Contributing to Agency Legitimacy
  - A. **Expertise/Institutional Competences:**
    - i. Broad access to information, specialized knowledge, trained staff
  - B. **Fairness/Rationality:**
    - i. Subject to Administrative Procedure Act (APA)
  - C. **Interest Representation:**
    - i. Through open process of notice and comment rule-making
  - D. **Political Accountability:**
    - i. Indirectly accountable to the President
  - E. **Efficacy and Flexibility:**

- i. Especially as compared to Congress
- F. **Coordination:**
  - i. With other agencies
- G. **Efficiency:**
  - i. Required to do cost-benefit analysis for expensive regulations
- V. Executive Branch Agencies
  - A. Run by officials who can be fired at-will by the President.
  - B. Includes Departments headed by a Secretary
    - i. Subdivisions of Departments, i.e. National Highway Safety Transportation Administration within the Department of Transportation or the FDA within Health and Human Services.
- VI. Independent Agencies
  - A. Heads serve fixed terms that expire in staggered years.
  - B. Removable by the President only “for cause” or “good cause”
  - C. Usually run by a multi-member commission or boards
    - i. Bi-partisan requirements
    - ii. i.e. Federal Communications Commission (FCC); Federal Reserve Board (the Fed); and the SEC.
- VII. Procedural Requirements of the Administrative Procedure Act (APA) Apply
  - A. APA provides default procedures
  - B. Divides action in two basic categories:
    - i. Formal
      - a. Requires agency to conduct trial-type hearing resulting in order resolving dispute between two parties (formal adjudication), or rule with future effect (formal rule-making [more rare])
    - C. Informal
      - i. Notice and comment rulemaking
        - a. Agency relies on written submissions from interested parties
        - b. Little procedure required for guidance materials and staff manuals.
  - D. Publications for Agencies
    - i. Federal Register (Fed. Reg.)
      - a. Contained federal agency regulations; proposed rules and notices; and executive order proclamations, and other presidential documents.
      - b. Published daily by NARA, in partnership with GPO (what does this even mean???)
    - ii. Code of Federal Regulations (CFR)
      - a. Codification of general and permanent rules published in the Federal Register.
      - b. Divided into ~50 titles
      - c. Updated once each calendar year; print copy issued quarterly.
  - E. The Process once the Agency decides to proceed with the proposed rule
    - i. Publish note of Proposed Rulemaking in Fed. Reg. (NPRM)
      - a. Must contain reference to legal authority under which rule is promulgated either the terms/substance of the proposed rule or description of the subjects involves and a statement of time and place of any public proceedings.
    - ii. Provide reasonable time for interested parties to submit written comments
    - iii. Issue final rule (or don't)
      - a. Must contain a concise general statement of rules' general basis and purpose.
  - F. Impetus to initiate the rule-making process
    - i. Agency's own initiative per:
      - a. Its own statutory mandates
      - b. Regulatory action plans
      - c. New scientific data

- d. Triggering events (i.e. increase in car accidents or lawsuits based on accidents)
  - ii. Response to prompt letter from OIRA calling for regulatory review
  - iii. Recommendations by other agencies or government bodies
  - iv. Petitions for rule-making from private parties or groups.