

CONSTITUTIONAL LAW OUTLINE

I. Introduction to the Constitution

A. Basic Principles

1. The U.S. Constitution is a delegation of power from the people enumerating the government's powers and the limitations on those powers
 - a) Authorization examples: Article I, §8
 - b) Limitation examples: Amendment I
2. Under the Constitution, state governments have *general* powers and the federal government has *enumerated* powers.
3. With every action of the federal government, ask yourself:
 - a) Does a constitutional provision authorize the federal government to take this action? (this does not apply for state governments) and
 - b) Does any constitutional provision prohibit this action? (this does apply to state governments)

B. Important Features of the Constitution

1. A written Constitution
2. Constitutional supremacy
 - a) Art. VI, Clause 2: **The Supremacy Clause**: "The Constitution, laws, and treaties of the United States are the 'supreme law of the land.'" and
 - b) "The judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."
3. Popular sovereignty
4. Federalism
5. Protection of Individual Rights
6. Our imperfect constitution
 - a) The Parchment Barriers problem: Discussed by James Madison in the Federalist Papers

C. Sources of Constitutional Meaning

1. Text
2. History
3. Precedent
 - a) Stare decisis (vertical v. horizontal)
4. Purpose
5. Consequences
6. National Ethos

D. Primary Principles of Constitutional Interpretation

1. Originalism: method for interpreting a constitutional provision by seeking to uncover its meaning at the time of its adoption. It envisions a constitution that adopts permanent, not evolving, values
 - a) Original Intent: What did the constitutional framers *intend* when they wrote the original Constitution?
 - b) Original Meaning: aka Originalism 2.0; what is the objective *meaning* that a reasonable observer would have assigned to the constitutional provision when it was enacted? (using text, contemporary dictionaries, evidence of usage in

the Constitutional Convention, and the state ratification conventions, the Federalist Papers, etc.

2. Living Constitution: Envisions a constitution that evolves over time to meet the changing norms and needs of a modern society

II. The Judicial Power

*Article III, § 1 creates the Supreme Court, and allows for the creation of lower courts

*Article III, § 2 describes the cases the federal courts may adjudicate

A. Overview of the Judiciary

1. The Federal Court System

- a) Trial courts are the U.S. District Courts
- b) There are 13 U.S. Circuit Courts of Appeal; appeal from most district courts is taken to geographically-oriented Circuit Court of Appeal
- c) The Supreme Court has discretionary jurisdiction
 - (1) The petitioner is the appealing losing party; the respondent was the winning party in the lower court case

2. The Counter-Majoritarian Difficulty

- a) The judiciary as a check on the political branches
- b) The judiciary as the “least dangerous branch”
- c) The judiciary as the “sober second thought”

3. NFIB v. Sebelius

a) Voting alignments

- i. Unconstitutional under Commerce Clause (5 votes): Roberts, Scalia, Kennedy, Thomas, and Alito. The remaining 4 justices dissent.
- ii. Constitutional under the Taxing & Spending Clause (5 votes): Roberts, Ginsburg, Stevens, Kagan, and Sotomayor. The remaining 4 justices dissent.

b) Article I, Section 8

- i. Clause 3. “To regulate commerce with foreign nations, and among the several states and with the Indian tribes.” (Commerce Clause).
- ii. Clause 18. “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” (Necessary and Proper Clause)

c) Commerce clause

- i. Government’s argument. “[T]he failure to purchase insurance has a substantial and deleterious effect on interstate commerce by creating the cost-shifting problem.”
- ii. Text. “The power to regulate commerce presupposes the existence of commercial activity to be regulated.”
- iii. Precedent. “As expansive as our cases are construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’”
- iv. Wickard distinguished. “The farmer in Wickard was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce.”
- v. Roberts draws a distinction between prohibiting an existing activity and mandating a non-existent activity. “Congress already enjoys vast power

to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do.

- vi. Consequences. "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority."
- vii. History. "The Framers gave Congress the power to regulate commerce, not to compel it."

d) Necessary and Proper clause

- i. Clause 18. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." (Necessary and Proper Clause).
- ii. The N&P Clause "vests Congress with authority to enact provisions incidental to the enumerated power, and conducive to its beneficial exercise."
- iii. "Each of our prior cases upholding laws under [the N&P Clause] involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."

B. Judicial Review

1. Arguments for Judicial Review

a) The nature of the written constitution

- i. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

b) The nature of the judicial function

- (1) "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

c) The "arising under" jurisdiction

- (1) "The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into?"

d) Constitutional restrictions on Congress

- (1) "Ought the judges to close their eyes on the constitution and only see the law?"

e) The judges' oath

f) Supremacy Clause

- (1) Article VI: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."
- (2) "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first

mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.”

2. Marbury v. Madison

- a) #1. Does Marbury have a right to the commission he demands? General Answer. “The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”
- i. Discretionary actions. Where executive officials “act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.”
 - ii. Non-discretionary actions. “But where a specific duty has been assigned by law, and individual rights depend on the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.
- b) #2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- i. This question in turn depends on two questions; The nature of the writ and The power of the court
 - 1. The nature of the writ: Is the Secretary of State subject to mandamus?
 - 2. “The province of this court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”
 - ii. “If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding.”
- c) #3. If they do afford him a remedy, is it a mandamus issuing from this court?
- i. The power of the court: Can a mandamus issue from this Court?
 - ii. Judiciary Act of 1789: The Supreme Court may “issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”
 - iii. Article III, Section 2, Clause 1 (defines the jurisdiction of the federal courts). “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”

- iv. Article III, Section 2, Clause 2 (allocates the Supreme Court's jurisdiction between appellate and original).
- v. Original jurisdiction. "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction."
- vi. Appellate 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."
- d) The constitutional problem
 - i. Judiciary Act of 1789 = The Court has original jurisdiction.
 - ii. The Constitution (Article III, Clause 2) = The Court doesn't have original jurisdiction.
 - iii. "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."

C. Checks on Judicial Power: Legislative Checks

- 1. Cooper v. Aaron
- 2. Ex Parte McCordle
 - a) Chronology
 - (1) Congress passes the Habeas Corpus Act of 1867
 - (2) After losing in lower courts, McCordle appeals the U.S. Supreme Court using the Habeas Corpus Act of 1867
 - (3) The Supreme Court hears oral arguments in March 1868
 - (4) Before the Supreme Court issues a decision, Congress enacts a provision, over presidential veto, repealing the part of the Habeas Corpus Act of 1867 that gave the Supreme Court appellate jurisdiction over McCordle's appeal.
 - b) Article III, Section 2
 - (1) "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction."
 - (2) "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."
 - c) The Court's opinion
 - (1) "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

D. Checks on Judicial Power: Constitutional Checks

- 1. Advisory Opinions
 - a) Federal courts may rule on legal issues only in resolving an actual dispute
- 2. Standing: a jurisdictional issue

- a) "The question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." Flast v. Cohen
- b) Three requirements
 - (1) Injury-in-fact
 - (a) Is the injury-in-fact sufficiently particularized and imminent?
 - (i) This must be more than theoretical injury
 - (ii) The injury need not be economic
 - (iii) If injury is too generalized, there can be no standing. Thus people have no standing merely "as citizens" to claim that government action violates federal law or the Constitution. Congress cannot change this rule by adopting a statute that would allow persons to have standing merely as citizens to bring suit to force the government to observe the Constitution or federal laws [Lujan v. Defenders of Wildlife]
 - (2) Causation or traceability
 - (a) Has the action/inaction cause the injury-in-fact?
 - (i) The injury must be traceable to the challenged conduct of the defendant and not attributable to some independent third party not before the court
 - (3) Redressability
 - (a) Will the requested relief redress the injury-in-fact?
 - (i) If a court order declaring a government action to be illegal or unconstitutional (and ending that government action) would not eliminate the harm to the litigant, then that individual does not have the type of specific injury that would grant him standing to challenge the government action.
- c) Goals of Standing
 - (1) Adversary presentation
 - (2) Concreteness of legal issues
 - (3) Judicial restraint/separation of powers
- d) Lujan v. Defenders of Wildlife
 - (1) "Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." Endangered Species Act (ESA) Section 7(a)(2).
 - (a) 1978 Interpretation. The consultation obligations under Section 7(a)(2) extend to actions taken in foreign nations.
 - (b) 1986 Interpretation. The consultation obligations under Section 7(a)(2) apply only to actions taken in the United States or on the high seas.
 - (2) The judicial power of the United States shall extend to "cases" and "controversies." Article III, Section 2.

- (a) “Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing.”
 - (b) “[T]he injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”
 - (c) “Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.
- (3) Injury-in-fact : plaintiffs nexus theory
 - (a) Ecosystem Nexus
 - (i) “A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it.”
 - (b) Animal Nexus & Vocational Nexus
 - (i) “It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist.”
 - (ii) “It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.”
- (4) Injury-in-fact: the lower courts theory
 - (a) Procedural Injury
 - (i) “Any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”
 - (ii) Court of Appeals held that “anyone can file suit in federal court to challenge the Secretary’s failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure.”
 - (iii) “We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”
 - (iv) The plaintiff must show that “he has sustained or is immediately in danger of sustaining some direct injury

as the result of the [statute's] enforcement, and not merely that he suffers in some indefinite way in common with people generally."

(5) Injury in fact. The lower courts theory

- (a) "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in court is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.' It would enable the Courts . . . to become virtually continuing monitors of the wisdom and soundness of Executive action."

(6) Redressability

- (a) [T]his would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question."
- (b) "A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project."

e) Massachusetts v. EPA (2007)

(1) Two issues before the Court:

- (a) #1. Do the plaintiffs have standing to sue? #2. Did the EPA err in failing to regulate greenhouse gas emissions by new motor vehicles?

(2) Two preliminary considerations

- (a) "Special solicitude" for Massachusetts. "It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual."
- (b) Procedural right under Section 7607(b)(1). States can challenge in court the failure of the EPA to implement environmental quality standards.
- (c) "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."

(3) Preliminary Questions

- (a) What is the injury-in-fact?
 - (i) The loss of Massachusetts's coastal land.
- (b) What is the action/inaction being challenged?
 - (i) The EPA's failure to promulgate emissions standards for new motor vehicles.
- (c) What is the requested relief?
 - (i) An injunction requiring EPA to issue emission standards for new motor vehicles.

(4) Injury in fact

- (a) Is the injury-in-fact—loss of coastal land—sufficiently particularized and imminent?
- (b) The majority

- (i) “Because the Commonwealth owns a substantial portion of the state’s coastal property, it has alleged a particularized injury in its capacity as a landowner.”
- (ii) “That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”

(c) The dissent

- (i) The injury is not particularized. “The very concept of global warming seems inconsistent with this particularization requirement.”
- (ii) The injury is not imminent. “Accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.”

(5) Casuation

- (a) Has the EPA’s failure to promulgate emissions standards for new motor vehicles caused Massachusetts’ loss of coastal land?

(b) The majority

- (i) “[EPA’s] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. . . . Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”

(c) The dissent

- (i) “In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners’ alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.

(6) Redressbility

- (a) Is Massachusetts’ loss of coastal land redressable by the EPA’s issuance of emission standards for new motor vehicles?

(b) The majority

- (i) “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”

(c) The dissent

- (i) “The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

f) Clapper v. Amnesty International (2013)

(1) What is the injury-in-fact?

- (a) #1. The plaintiffs' communications will be acquired under Section 1881a at some point in the future, which is a future injury.
 - (b) #2. The plaintiffs took costly and burdensome measures to protect against the risk of surveillance, which is a present injury.
- (2) What is the action/inaction being challenged?
 - (a) Surveillance by various government agencies under Section 1881a.
- (3) What is the requested relief?
 - (a) An injunction against Section 1881a-authorized surveillance
- (4) Injury-in-fact
 - (a) Injury-in-Fact Theory No. 1
 - (b) "Respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending."
 - (i) #1. The government will target the plaintiffs' foreign contacts.
 - (ii) #2. The government will choose to invoke its Sec. 1881a authority.
 - (iii) #3. The government's proposed surveillance will be authorized by the Foreign Intelligence Surveillance Court.
 - (iv) #4. The government will successfully intercept the communications.
 - (v) #5. The plaintiffs will be parties to the intercepted communications
 - (c) Injury-in-Fact Theory No. 2
 - (d) "Respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."
- (5) Causation
 - (a) Respondents can "only speculate as to whether any (asserted) interception would be under Sec. 1881a or some other authority, they cannot satisfy the 'fairly traceable' requirement.
- g) United States v. Windsor (2013)
 - (1) Article III standing on appeal
 - (2) Appellant: United States, Appellant: BLAG, Appellee: Ms. Windsor
 - (a) "Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."
 - (3) Prudential standing on appeal
 - (a) "Article III standing . . . enforces the Constitution's case-or-controversy requirement."
 - (b) "Prudential standing . . . embodies judicially self-imposed limits on the exercise of federal jurisdiction."

- (4) #1. The Executive's agreement with Windsor's legal argument.
 - (a) "Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon that concrete adverseness" between the parties.
- (5) #2. The cost of not hearing the case.
- (6) #3. Separation of powers concerns.
 - (a) The political question Doctrine
- (7) "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."
 - Marbury v. Madison (U.S. 1803)
- (8) Political questions are legal questions that the judiciary cannot decide because the Constitution has placed the decision in question in an institution other than the judiciary.
- h) Standing must be met at all stages of litigation, including on appeal
- 3. Political Question Doctrine
 - a) Political questions are legal questions that the judiciary cannot decide because the Constitution has placed the decision in question in an institution other than the judiciary.
 - b) Baker v. Carr (1962)
 - (1) Political cases v. Political questions
 - (a) "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' . . . The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."
 - (2) Separation of powers v. Federalism
 - (a) "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"
 - (3) Defendant's argument: "The apportionment of representatives is a political question left to state legislatures."
 - (a) Textual Criterion
 - (i) "Textually demonstrable constitutional commitment of the issue to a coordinate political department."
 - (b) Functional Criteria (focuses on the courts' institutional capacity)
 - (i) "Lack of judicially discoverable and manageable standards for resolving it."
 - (ii) "The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"
 - (c) Prudential Criteria (focuses on the decision's institutional consequences)
 - (i) "Impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"
 - (ii) "Unusual need for unquestioning adherence to a political decision already made."

(iii) “Potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

c) Policial cases v. Political questions

d) Separation of powers v. Federalism

(1) Political questions are a separation of powers issue and not a federalism issue

4. Mootness, Ripeness, and Other Limitations

a) Appointment process

b) Impeachment

E. The 11th Amendment

III. The Legislative Power

*Art I, § 1 : “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

*Art 1, § 8 : Lists the major grants of authority

A. The Necessary and Proper Clause

B. The Commerce Clause

C. The Taxing and Spending Clause

D. Implementing Treaties

E. The 10th Amendment

F. The Civil War Amendments

IV. Other Federalism Limitations and the Constitution

V. The Executive Power

*Article II vests this power in the President: “He shall take care that the laws be faithfully executed.”

*Article II, §2 : Lists the major grants of authority