

MONTEREY COLLEGE OF LAW

CONSTITUTIONAL LAW

– Midterm Examination

Fall 2016

Prof. M. Cohen

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

* Answer Outline not available .

1. In reaction to State laws legalizing marijuana use, the newly elected President and his Attorney General proposed legislation to the United States Congress called the Weed Control Act (WCA). Congress passed the legislation and the President signed the legislation into law. The WCA:
 - i. Imposes a 375% sales tax on all products containing marijuana or chemicals extracted from marijuana plants;
 - ii. Withholds federal transportation funds from any State that has failed to prohibit driving under the influence of marijuana; and
 - iii. Requires that all States, on request, place local state police department officers under the direct supervision of the United States Drug Enforcement Agency to enforce violations of federal criminal drug possession and distribution statutes.

The Governor of California, a state that had by initiative and direct vote of its citizens legalized recreational use of marijuana, in an open address announced: "The Independent Bear Republic of California will not enforce federal drug statutes that criminalize possession, use or distribution of marijuana that complies with state laws and regulations, and will prevent United States federal authorities from taking any action within the State's borders that infringe the rights the people have elected for themselves within this Republic."

- a. Are the provisions of the WCA constitutional?
- b. Can California follow the Governor's direction? Discuss both enforcement of federal laws, and preventing enforcement of federal laws that the Governor described.

2. The newly elected President, following his campaign promise, proposed legislation prohibiting any person from a nation on the President's "Islamic Terrorist" list from entering the United States. The President's list of nations included most of the Middle East, north Africa, northeast India and Pakistan, much of southeast Asia and some Baltic nations.

In a widely watched Roll Call vote televised on C-SPAN, the United States House of Representatives declined to pass the legislation by a vote of 335 against it to 100 for it. Similarly the United States Senate voted the legislation down 91 against it to 9 for it. Accordingly, by wide margins, the legislation failed both chambers of the United States Congress.

Undeterred in his policy objectives, the President issued Executive Order 666, which provides:

"To secure the United States and its territories, assist the War on Terrorism, and assure the safety of the nation in a time of extreme conflict and threat to its existence:

- i. No United States law enforcement agency, including the United States Customs and Border Patrol, Department of Homeland Security, or Transportation Safety Administration, shall permit any person from a nation on the President's Islamic Terrorist List to enter the United States or its Territories.
- ii. All United States citizens following Islamic faith must register themselves with the United States government providing their residential and professional work addresses, mobile phone numbers and identifying all persons residing in their households."

The law enforcement agencies described in Executive Order 666 are the exclusive agencies responsible for immigration into the United States, and all are Executive Branch agencies reporting directly to the President. The President's Islamic Terrorist List was identical to the List in the legislation the President had proposed but that Congress failed to pass.

- a. Does the President have the power under Article II of the Constitution to issue Executive Order 666?
- b. Discuss the constitutionality of Executive Order 666 Section (ii) under the Equal Protection Clause.

3. To preserve its environment, California passed legislation banning all natural resource extraction by “fracking” -- a process that uses hydraulic pressure to inject liquid into subterranean rocks forcing open fissures allowing extraction of oil, gas and other natural elements.

The California legislature concluded, based on scientific environmental impact studies it commissioned, that fracking contaminates natural water supplies in the State. The State legislature also concluded that fracking irreparably injures natural geology, including rock formations, mountains, foothills, and water tables which hold underground water supplies.

To allow existing “frackers” a one-year period to safely and efficiently shut down operations, the California “Anti-Fracking Act” provides that it will become effective January 1, 2018.

The Big Texas Oil Company (BT Oil), a corporation headquartered in Houston where it also has its principal place of business, brought an immediate lawsuit in the United States District Court for the Northern District of California in San Francisco seeking a declaratory judgment that the Anti-Fracking Act violates the Dormant Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. Believing the lawsuit well founded, the American Frackers Association, a trade association of Fracking company executives, joined BT Oil as a plaintiff in the litigation.

- a. Are the two lawsuits by BT Oil and the American Frackers Association justiciable?
- b. Discuss the constitutionality of the California Anti-Fracking Act under both the Dormant Commerce Clause and the Privileges and Immunities Clause.

1) (a)

Tax and spending clause-

Taxing clause- congress has the power to lay and collect taxes for the general welfare of its citizens. The tax must be uniform throughout the states and must be rationally related to the general welfare.

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Here congress passed the WCA that imposes a 375% sales tax on all products containing marijuana.... The act is uniform because it does not levy a higher tax on a particular state. ✓
The tax is rationally related b/c marijuana can be considered a dangerous drug and this tax will be used to deter people for purchasing and smoking marijuana. The court will grant the government great deference when determining whether the tax is rationally related to the general welfare. Petitioners might claim that this tax is overly burdensome b/c it is a 375% tax. However this argument is likely to fail b/c congress has the plenary power to lay and collect taxes. The court will likely conclude that this tax is constitutional. ✓

excellent

Spending clause- congress has the power to spend for the common defense and general welfare of its citizens.

Conditions on spending are constitutional if the condition is rationally related to the spending, if the condition is unambiguous and is not coercive.

good

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Here congress has placed a condition to withhold federal transportation funding if the state has failed to prohibit driving under the influence of marijuana. The court will likely conclude that the condition is rationally related to the spending b/c driving under the influence can cause accidents with federal transportation. However a petitioner can claim that this condition is ambiguous b/c it is not clear what driving under the influence means. How will the courts define driving under the influence. The court will likely conclude that the condition is unambiguous b/c it is near impossible to know for certain if a person is driving under the influence of weed. It is also not clear how much federal funding will be withheld. The biggest issue of this condition is that it may be coercive. Here if the condition withholds all federal funding the courts will likely conclude that this condition is coercive. If the condition only withholds 2% of funding it is likely that the courts will rule that this condition is constitutional. The courts have held that withholding 100% of funding is coercive b/c the state does not have a choice but 2% is not coercive.

- Coercion is not determined by all or none, but by States ability to proceed w/o funding & use own money -

10th amendment states sovereignty-

The Federal government cannot make the states enforce their laws, they can encourage the states to follow federal laws but cannot force them to.

Here the act requires the states to place local state police to ENFORCE violations of federal criminal drug possession statutes. This act is in direct conflict with the 10th amendment states sovereignty. For this act to be constitutional the DEA must enforce the act and not the local state police. The government may argue that the act is on request therefore it is not mandatory, however the states will argue that the Act REQUIRES. The court will likely conclude that this act is not constitutional b/c it conflict with states rights. Anything that is not enumerated to the federal government is reserved to the states.

✓
8
✓
✓

Supremacy clause preemption-

Any state law that expressly or impliedly conflicts with Federal law will be preempted and federal law shall be supreme. Implied preemption is shown in 3 ways, it conflicts with federal law, state law impedes on federal law or field (immigration).

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- Under Supremacy Clause State does not have to enforce, but Fed can enforce & state cannot supercede federal illegality.
- state cannot impede federal enforcement.

Here the federal government will claim that the Governor's direction is preempted and the WCA shall be supreme. Although it is not expressed in the WCA that the act shall preempt the Governors direction however the Federal government will claim that it is impliedly preempted. The Governors direction is in direct conflict with the WCA b/c it states that it will not enforce the federal drug statutes and the WCA states that the local state police is required to enforce violations. The State act and the federal WCA are in direct conflict with each other and if the WCA is constitutional, WCA shall preempt the governors direction. The court will also likely rule that the governors direction also impedes the WCA b/c the governors direction makes it almost impossible to accomplish.

The State of California will argue that iii. of the WCA is unconstitutional. b/c iii. of the WCA is unconstitutional the governors direction does not conflict with the WCA. The courts will likely conclude that the State of California can follow the governor's direction.

Commerce clause- congress has the plenary power to regulate commerce that effects channels (roads, waterways), instrumentalities (cars, boats) and activities the substantially effect interstate commerce.

Here Congress passed legislation of the WCA. B/c marijuana can pass through the states

(channels) congress has the power to regulate and tax Marijuana sales. Marijuana also travels in cars, boats and planes (instrumentalities) congress can regulate.

If the courts conclude that congress does not have the power through channels or instrumentalities they can claim marijuana distribution has a substantial effect on interstate commerce. Here the government will show that marijuana distribution has a substantial effect on interstate commerce b/c marijuana users can become drug addicts and no longer participate in commerce and will be a drain on society.

If the activity is intrastate only the activity must be economic in nature and must show a rational basis in concluding that the activity has a substantial effect on interstate commerce.

Rational basis is the Act is rationally related to a legitimate government interest.

Here the government will argue in the aggregate that if there is not a serve tax on marijuana citizens will be more inclined to smoke weed and become a drug addict.

The court will likely conclude that congress has the power to regulate marijuana distribution through channels, instrumentalities and through actions that substantially effect interstate commerce.

END OF EXAM

1) (b)

1. Weed Control Act

A. Are the provisions of the WCA constitutional?

"...prohibiting medicines or chemicals

B. The Governor's Announcement

Refusal of State Enforcement

As to the Governor's statement that CA will not enforce federal drug statutes, a few issues are raised. First, we have discussed the 10A above. This is an area of legitimate concern. The state of CA may be well within its constitutional rights to refuse to enforce federal laws that criminalize a substance that is legal within the state. In the courts, the power of the federal government has often been checked by state sovereignty in areas that have been "traditionally within the realm of state law." The substantive realms of Health, Safety, and Welfare are traditionally areas where deference and authority has been given to the states. The WCA attempts to intrude into these areas.

Preemption

On the other hand, there may be preemption issues that work against the Governor here. Preemption can express in the language of the federal legislation itself. Preemption may also be implied. There are three species of implied preemption: conflict preemption; preemption due to state law impeding the administration of federal law, and; field preemption.

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The facts do not indicate express preemption. However, the case here may touch upon all three types of implied preemption. First, the state law and the federal law are in obvious conflict. In such cases, federal supremacy reigns. Second, if state authorities, in recognizing the legality of marijuana, refuse to arrest, detain, or confiscate marijuana from the people, then it could be shown that state law is impeding the enforcement of federal law. And lastly, the federal government can make a case for field preemption. Field preemption can be implied by showing the federal government has an intent to "occupy the field" in a certain area, in this case marijuana-related conduct. The facts do not indicate such an intent with the three provisions in the fact pattern. Hypothetically, extensive legislation on the topic may raise the issue of field preemption.

In areas traditionally reserved for state control (health, welfare, safety) there is a presumption that state law is *not to be preempted* by federal law unless there is a clear intent in the statute to do so.

Federal Enforcement

Whereas legitimate arguments exist to support the Governor in merely *not enforcing* the WCA, the second part of the Governor's statement regarding preventing federal authorities from action within the state is devoid of constitutional authority. This position only exacerbates the preemption issues and raises state-federal conflicts that will likely be decided in favor of the federal government due to the supremacy clause. ✓

good

California has a constitutional basis for refusing to enforce federal law and refusing to allow its state police to be commandeered by the DEA. California has no basis for actively preventing federal law enforcement from its activities. ✓

END OF EXAM

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Blue Book

NAME _____

SUBJECT Con Law

INSTRUCTOR Cohen

EXAM SEAT NO. _____

SECTION

midterm Q2(a)

DATE Dec 4th

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Question 2

Executive Order 6666:

a. Article II

Under Article II of the U.S. constitution, the executive power is vested in the President of the U.S. (POTUS).

The POTUS has several enumerated powers under Art II, including ~~executing~~ entering treaties, issuing vetoes, appointing officials, dealing with foreign relations, and issuing executive orders. The courts are split on whether POTUS has any inherent power. ✓

The first principle in determining inherent power is that the executive cannot usurp another branches power, and Congress cannot expand the executive power. Then, the Jacksonian Factors help determine whether POTUS has any inherent power to act. excellent

First, if Congress allows the executive action and okays it, then the conduct will likely be constitutional. Next, if Congress is silent or has failed to act on a subject, then the executive action might be constitutional. Lastly, if Congress says no to an executive action, then the use of inherent power will likely be unconstitutional.

POTUS would first argue that Executive Order 13766 ~~is an ex~~ falls within his enumerated power because of the power to deal with foreign relations. Also, POTUS would argue that POTUS does not need Congressional approval to issue an executive order. However, the executive order must still be within the confines of the constitutional executive power. ✓

Though the language of the order states the war power, Congress would argue that the specifics of the order extend beyond Art II enumerated powers, because Art II does not grant POTUS power to prevent people from entering the U.S., or to call out U.S. citizens of a certain faith and invade their privacy.

Therefore, whether POTUS has inherent power must be addressed. ✓

Because Congress declined POTUS's legislation by a wide margin, in both Senate and House, Congress would categorize this conduct as acting when Congress does not approve of the action. Therefore, Congress would argue this executive order will likely be unconstitutional.

POTUS would argue that Congress has not acted, because there is no

statute that specifically forbids this type of conduct. Therefore, this would put the order in more of the twilight zone of the court maybe finding the conduct constitutional.

However, Congress would argue that the wide margin in which the legislation was voted down indicates Congress specifically disapproves of the order. Because executive inherent power is controversial enough to begin with, Congress would argue that when both the House & the Senate disapprove, the conduct should be considered unconstitutional. ✓

POTUS would argue that even if he does not have inherent authority, he has an enumerated appointment power, and he can delegate his foreign relations power to his executive agencies.

Nonetheless, the court would likely conclude the specifics of the order fall outside the bounds of his enumerated Art II powers, and here, he has no inherent authority.

good

put his proposed "legislation" into effect via executive order. This, of course, echoes the defeated Taft-Hartley amendments proposed at the close of WWII, and places the newly-elected president's EO into Jackson's "third zone." The president, via EO 666, is acting in opposition to specific congressional action, that being the very clear defeat of his proposed legislation. Thus, upon review, it is most doubtful that EO 666 will be found to be a legitimate exercise of presidential power. The president's Order is not constitutional.

Question (2b)

B. Constitutionality of Executive Order 666 (Equal Protection)

Strict Scrutiny for Religious Classification

A law that is facially discriminative on the basis of religion or faith is presumed unconstitutional and shall be reviewed under strict scrutiny. To survive review under strict scrutiny, the legislative action must be necessary to achieve a compelling state interest.

"Necessary" means that no alternative exists by which the compelling state interest could be achieved. In addition, the law must be narrowly tailored to achieve its goal. Only in the rarest of instances will a statute of racial or religious discriminatory purpose survive such a review. A faith-based registry certainly calls for strict scrutiny.

The present facts do not indicate what compelling state interest is at work here. We can assume that future detention of those registered is the governmental interest. EO 666 does not make clear what the compelling interest is. If future detention "just in case" is the interest, then tautologically the EO fails. If the interest is compelling, the detention should be immediate. If the registry is an ace up the sleeve for the federal government for a "just in case" scenario, then the interest is hardly compelling, so far as compelling implies immediate. With no stated purpose in the facts, the analysis of "Necessary" is handicapped. This provision of EO 666 is likely unconstitutional.

Korematsu

Let us not forget. Although not provided in the fact pattern, this type of faith-based registry might survive review if a compelling state interest could be articulated in a manner that affirmed national defense or domestic security. This provision of EO 666 is no more far-fetched than the circumstances of Korematsu. In that case, the very real (or at least perceived) threat of domestic espionage in a world engulfed by war was enough to inter thousands of American citizens. EO 666, with the "right" language, could theoretically survive review.

Executive Order 666 would likely have a better chance if it proceeded to detain Muslim-

Americans right from the start, rather than "prepare" for such an eventuality. In this way, it would fail review due to its lack of imminence.

END OF EXAM

good analysis

- All E.P. questions should also assess impact on the suspect class for facial discrimination - it is not part of the test, but the purpose of all the tests - how does the registry make the person feel - like an equal citizen or something less? Stigma?

3)

a. Are the two lawsuits by BT Oil and the American Fracker's Association Justiciable?

Case or Controversy

In order to determine whether the lawsuit from B.T. Oil and the American Fracker's Association is justiciable we must first consider the plaintiffs have a valid case or controversy. According to the U.S. Constitution, the Judiciary has powers to adjudicate any case or controversy. If there is no case or controversy involved, than the plaintiffs are requesting from the courts an advisory opinion, and advisory opionins are prohibited. In this case, BT Oil is requesting a declaratory judgement that the California Anti-Fracking Act (CAFA) violates the U.S. Constitution. Therefore, they may be requesting an advisory opinion, and if sotheir case is not justiciable. However, assuming that the plaintiffs do bring acase or controvery to the court, for example a claim that the CAFA law causes them an economic harm, then the case may go forward.



Standing

In order for the case to be brought, the plaintiffs must have standing to bring the case. In order for a plaintiff to have standing to bring the suit, there must first be an injury, that injury must be fairly traceable to the defendant's actions, and their injury must be redressable. In this case, BT Oil as a plaintiff must allege an actual or imminent injury. SInce the law does not go into effect until January of next year, there is not yet an injury, but they may claim that their injury is imminent Therefore, the case may not go forward unless the question of ripeness is addressed. Assuming that the case is ripe, and that BT Oil is fracking in California, and shutting down fracking operations in California will cause them an injury - this injury would be fairly traceable the enactment of the law, and judgement in their favor stricking down the law would redress their injury. Therefore BT Oil has standing to bring the Case.



The American Frackers Association is an organization of Fracking executives. In order for an organization to have standing, they may bring a case as a 3rd party only if one of their members would otherwise have standing (actual or imminent injury, fairly traceable to the defendant's actions, that is redressable) and the case must be one which is related to the purpose of the organization, and the members are not requesting money damages. In this case, the American Frackers Association would have standing to bring the suit because the individual members could bring suits individually as fracking executives, the

purpose of their organization is presumably to promote fracking which is the subject of the suit, and the the relief requested is not money damages

Execs must have personal injury!

Ripeness

In order for a case to be brought in court, the case must be ripe, meaning it must be ready for adjudication. Normally, a case cannot go forward unless an injury has already occurred. However, in the circumstance that the case is 1) ready for adjudication and 2) there is potential for great harm to the plaintiff by waiting for the law to go into effect and for the plaintiff to violate the law, the case may proceed before the plaintiff has violated the law and encountered the harm. This appears to be a case which is ripe for adjudication because the California legislature enacted as part of the law a 1 year period to safely shut down operations, and if BT Oil wants to continue to operate they must adjudicate this before the law goes into effect.

b. Discuss the constitutionality of the California Anti-Fracking Act under both the Dormant Commerce Clause and the Privileges & Immunities Clause

Dormant Commerce Clause

Congress has the authority under the Commerce Clause of the U.S. Constitution to regulate interstate commerce. When a State takes action to legislate or regulate where the U.S. Congress has not yet acted then the negative or dormant commerce clause applies. The state action must be assessed to determine whether it places an undue burden on interstate commerce. One way of determining that is by considering whether the State law discriminates against out-of-state citizens. Laws that on their face discriminate against out-of-staters may be considered facially discriminatory. Other laws may be written with the intentional purpose of favoring in-state citizens or discriminating against out-of-state citizens, those laws are said to have a discriminatory purpose. Other laws may be facially neutral, and have no discriminatory purpose, but may have the effect of discriminating against out-of-state citizens.

✓

In this case the CAFA law bans all natural resource extraction in California from fracking. Therefore, it is not facially discriminatory against out-of-state parties. The purpose of the law is to protect California's water supplies, which is a non-discriminatory purpose. Its effect is also non-discriminatory - it bans fracking completely and does not discriminate against those within or without the state - It effects all fracking companies equally.

excellent

When laws are found to be non-discriminatory, they are presumed to be constitutional unless they pass a rational basis standard of judicial review, and are subject to a balancing test of weighing the state's interest in enacting the law versus the undue burden placed on interstate commerce. In order to pass a rational basis standard of review the law must be rationally related to a legitimate government interest. In this case, the law which bans fracking is rationally related to a legitimate government purpose of protecting water supplies. Banning fracking does create a burden on interstate commerce, but the state would argue that the protecting the drinking water of its citizens from contamination far outweighs the burden placed on interstate commerce.

excellent

The Privileges and Immunities Clause

The Privileges and Immunities clause provides that all citizens of the United States enjoy the privileges and immunities of U.S. Citizenship, and no state may make a law which abridges their privileges or immunities as citizens. In order to bring an action under the Privileges and Immunities clause the plaintiff must be a U.S. citizen (not a corporation) and the State law in question must violate their fundamental rights, or their ability to earn a livelihood. In this case, BT Oil is a corporation and does not have standing to bring a suit under the Privileges and Immunities clause. However, the American Frackers Association does have 3rd party standing to bring a lawsuit on behalf of its members, who are fracking company executives - and a fracking company executive who is a U.S. Citizen could claim that this law violates their fundamental right to earn a living, by depriving them of their ability to earn a livelihood through fracking in California.

excellent

P&I must discriminate!

END OF EXAM