

MONTEREY COLLEGE OF LAW

CONSTITUTIONAL LAW

Midterm Examination

Fall 2017

Prof. M. Cohen

INSTRUCTIONS:

There are three (3) questions in this examination.

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

Professor's answer outline is not available.

Question One

Responding to the tragic rise in mass shootings across the United States, the U.S. Congress funded a Congressional Research Service (CRS) Study to examine any correlations between the increased shootings and the number of guns in the nation. The CRS Study concluded that the number of mass shootings, occurring every 52 hours somewhere in the country, statistically correlated directly to number of guns manufactured, sold and distributed in America, compared with other countries.

The U.S. Senate, accordingly, initiated hearings to study the question in more depth. The Senate Committee responsible compiled evidence in public hearings conducted over a period exceeding a year. The record from these hearings conclusively linked America's gun deaths to the unique number of guns and availability of guns in the United States.

Based on this record, Congress passed the Gun Control Act of 2017, which:

- i. Established quotas and limits for the manufacture and production of guns in the United States;
- ii. Established "tariffs" setting minimum prices for purchases and sales of all guns to the public in the United States;
- iii. Prohibited imports of guns into the United States; and
- iv. Banned all sales of guns in the United States, except through federal government owned and operated Gun Control Stores, established by Congress for this purpose in every State and U.S. Territory.

The Gun Control Act does not regulate any person's right to own any type of gun, and therefore does not raise any Second Amendment questions.

Is the Gun Control Act a lawful exercise of legislative power under the United States Constitution?

Question Two

The new President, frustrated at every turn of domestic policy by the United States Congress and the United States Courts, found comfort in his self-proclaimed freedom to conduct the nation's foreign relations. To that end, the President, without any Congressional funding to build a physical wall along the Mexico border, decided he would build an economic wall.

First, the President entered Executive Order 100 rescinding the North American Free Trade Agreement (NAFTA), a treaty that had established free trade between the United States, Mexico and Canada.

Second, the President entered Executive Order 200 prohibiting all imports from Mexico into the United States, and prohibiting all exports from the United States to Mexico.

Because NAFTA had created a single economic zone for production, distribution and sale of products throughout North America, nearly every U.S. manufacturer owned production facilities in Mexico or Canada. The free trade agreement, moreover, had substantially reduced consumer prices in the United States, due to lower labor costs in Mexico and lower raw material costs in Canada.

Congress, therefore, experienced immediate, intense outcry from American businesses, economists and policy advisors resulting from the President's Executive Orders. The leaders from both political parties in the U.S. Congress gathered in a joint press conference in the United States Capitol and uniformly condemned the President's actions.

- a. Are Executive Orders 100 and 200 a lawful exercise of presidential power under the United States Constitution?***
- b. What actions, if any, can Congress take to restore free trade with Mexico?***

Question Three

The Winchester Rifle Company brings a lawsuit in federal court seeking a declaratory judgment that the Gun Control Act from Question One is unconstitutional.

U.S. Senator Loco from the State of California brings an action in federal court in her official capacity as a member of the United States Congress seeking declaratory judgment that Executive Orders 100 and 200 from Question Two are unconstitutional.

- a. Does the federal court have judicial power to hear the Winchester Rifle Company lawsuit?***
- b. Does the federal court have judicial power to hear Senator Loco's lawsuit?***

85

Good discussion + analysis.

1)

ConLaw

Q1

Article I of the US Constitution gives Congress the power to make laws, as long as those laws are Constitutional. As elected representatives, the individual members of both the House and the Senate represent the will of the people. Throughout US History, all three branches have had to wrestle with dilemmas, emergencies, changes in technology, economic crises, wars, to name a few. When these moments arise, solving the problem must be measured or balanced against the critical need to respect the structure and limits of the Constitution which in its turn exists to, the best it's able, to protect individual liberties. Here, an unprecedented National crisis has arisen - shooting every other day and a half - mass shootings. As Supreme Court Justices have written, no matter how harrowing the times, the WAY the critical crisis is solved matters. This analysis builds on that foundation.

Gun Control Act (GCA)

There are 17 enumerated powers granting Congress the authority to act in these areas, and to make necessary and proper laws to enforce them under the Necessary and Proper Clause (NPC).

Commerce Clause (CC)

✓ Congress has plenary powers to regulate channels, and things in interstate commerce, and economic activity that substantially affects Interstate Commerce (I/C). Intrastate activity that in the aggregate substantially affect IC may also be regulated. Congress may also regulate foreign trade.

GCA provision 1 establishes quotas and limits on manufacturing. Under the CC, congress has power to regulate things that move in IC. The SCOTUS (Supreme Court of the United States) upheld laws passed by Congress regulating wages and working conditions in mines and factories even though the "things" not been made yet. IN these cases, during the New Deal era, SCOTUS held that manufacturing and mining raw material substantially impacted IC. Here, the GCA limits manufacture and production. The plenary power of Congress to regulate IC does not state that Congress has to allow for a booming economy, or has to regulate to make sure that Companies are profitable, or that there are plenty of things (here, guns), but rather to "regulate." The purpose does not have to be economic. Similarly, Congress has passed laws limiting how much wheat a person can grow (Filburn), even for personal consumption, because too much wheat destabilized the market. furthermore, if the guns are manufactured in the US, there would likely be components from at least two states - it is hard to imagine every single component being manufactured in the state the gun was made in. Therefore, if Congress can regulate the production of guns under CC

good discussion

Here, the guns may or may not be sold in IC - they likely are b/c the facts state they are made, sold and distributed in America. The number of guns there are available in any one state will have an affect on IC. A challenger may argue that if the US puts minimum prices on guns, how can the number of guns affect the market - here, however there is no maximum price - it is in Congress intent to lower the number of guns, and to have the price be higher - the number of guns will go down, and the market would therefore likely

good

drive the price up, something that would support Congresses scheme or goal, which is to reduce mass shootings by making guns less available. ✓

Congress made findings that the numbers of guns MANUFACTURED in the US are directly correlated to the number of mass shooting; therefore there is a nexus between selling guns (economic activity) and the purpose for the legislation - to eliminate mass shootings. ✓

Provision ii.

The "tarrif" sets price on items or things in IC. This is regulation, and discussed above, Congress can regulate things in IC. By setting the price, Congress can up the price of the guns, making them harder to get access to, and thereby reducing the number of guns SOLD - Congress made findings that the numbers of guns SOLD in the US are directly correlated to the number of mass shooting; therefore there is a nexus between selling guns (economic activity) and the purpose for the legislation. ✓
good

Provision iii

Congress, under the CC has power to regulate trade with other nations. Because Congresses intent is so clear, and there are Congressional Findings that support the reason for banning the inimport of guns into the US, Congress may prohibit the imports. **Those who do not want the GCA could argue that this will affect foreign relations, which is the province of the President, and is thereofre intruding on another branch of Gov't - however, Congress here is regulating trade - no different that banning DDT from being imported, or chemicals that have other purposes but are generally used to make meth.**

10th Am. Limitation.

The 10th Am. states that the powers not granted to the states nor prohibited to the states in the Constitution are retained by the states and to the people. Because States and the Federal Gov't are equal sovereigns (although the Federal Gov't is the FIRST among equals!), zones of pwr, typically called police powers are left to the states to make and enforce laws for the general welfare, morals, health, and safety of state citizens and residents and persons in the jurisdiction. For this reason, the federal gov't cannot compel a state to regulate or administer a Federal Regulatory Scheme (NY v. US and Printz, respectively). If the Federal Gov't were coopting the States political process and officials to implement this scheme, there would be a clear 10th am. violation.

Provision iv. banned all sales of guns except by federal gun stores. This will necessarily shut down state licensed gun stores. Congress is telling the states that they do not have permission to regulate the health or safety (as it pertains to gun sales) of the states citizens. This may be seen as overreaching by the Federal Gov't. Justice Marshall discussed the 10th Am. when deciding whether Maryland could tax a Federal Bank. Marshall reminded the states that they gave up their complete sovereignty by ratifying the Constitution, and that when it comes to a choice between the sovereignty of the state or the federal gov't, the federal gov't wins; However, the Federal Banking System did not make state banks illegal. This provision is likely an overreach into State's Zone of Authority, because it takes away all power to sell guns in the states by anyone other than federally owned stores.

Power to Tax

To raise revenue, Congress may levy taxes. The power to tax is HUGE. The problem here is that the price setting is called a "tariff" rather than a tax. While this may seem a stretch, SCOTUS has found that a penalty can be construed as a tax. In Sebellius, what

Congress called a penalty (for not purchasing insurance) was construed as and upheld under Congresses power to tax. Here, this provision may be upheld as a tax. In Sebellius, people who did not buy insurance will

GCA provision 2 - "tarrifs" could be construed by SCOTUS as a tax; although not paid as a tax per se directly to the Federal Gov't, the guns will be sold in Federal gun stores, so the money would get to the Federal Gov't that way!!! (levity).

NPC

The law must be reasonably related to an enumerated power in a way that does not violate the Constitution. Congress has passed an Act in order to **protect people withing the United States. Extensive finding have found that guns manufactures, sold, and distributed in the US correlate to the shootings, and that the number of guns CONCLUSIVELY and their AVAILABILITY are linked to the Shootings. Congress therefore has an adequate record, and the provisions fo the act have a nexus with the purpose of the legislation and the nexus is reasonable b/c it regulates the manufacture, sales, number (import) and distribution of the guns. Furthermore, banning import of guns meets this purpose, and is necessary and property under the Commerce Clause, Tax Clause, and to protect.**

The GCA i, ii, and iii are likley Constitutional, while iv would be limited by the 10th Am.

END OF EXAM

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Good paper!

Blue Book

NAME	XXXXXXXXXX	Q2B2
SUBJECT	Law Law	
INSTRUCTOR	Cohen	
EXAM SEAT NO	SECTION	M. Dream
DATE	GRADE	

10^{7/8} x 8^{1/4}

25 - 24 PAGE

a.

To determine if President Trump is within his
realm of Presidential Power we must look to the
Constitution & to case law.

Presidential Power

The Constitution sets out the powers of the President
in Article II. The President has the Power to:
Meet with / Receive foreign Executives;
Sign Treaties / Executive orders with foreign Exec;
He also has some Domestic Powers pertinent to
this question such as Appointment Power, &
Veto Powers. Finally he does have the power to
create Executive order for the Federal Agency
that he is Command & Chief over.

Executive Order 100

~~To cancel execute the NAFTA Treaty ^{the} President
would have the authority cancel~~

✓ The President would have the authority to cancel
the NAFTA Treaty with an executive order. Treaties
are within the Enumerated Power of the President,
& he - with the consent / approval of the Senate
has the exclusive Power to create Treaty - / or
Executive order with heads of foreign States

The Treaty is the Law of the Land unless it is followed by another Federal Law, or AS in this case is - CANCELLED (CARTER) good

Congress has no way to OVERTURN this via the Constitution / it - there is NO mechanism for this

As For Executive order 200, there is a lower zone of power.

The Presidential Power is Both Enumerated & Implied by the Constitution ~~and~~ depending on the situation. Dr (Constat) Seckman ~~discussed~~ articulated three areas the court still uses to define the Implied Powers. They are Expressed: when the President is exercising an expressed power (supra), a middle zone he called a "Twilight Zone" where the Presidential Power is NOT expressed in the Constitution, but he has attempted to solicit Congressional support / feedback. AND finally the "Lower ESS" where the power he is exercising is both NOT expressed NOR has he communicated with Congress.

HARRIS THE PRESIDENT ENACTED EXECUTIVE ORDER 200 WITHOUT ANY EXPRESSED POWER NOR DID HE COMMISSIONER TO CONGRESS. THE FACT THAT CONGRESS EXPRESSED AN IMPLICIT OUTCRY DETAILS THE TRAVEL THAT A TYRANNICAL PRESIDENT CAN WIELD. JACKSON WOULD DEFINE THIS ACTION AS BEING AT THE PRESIDENT'S COURTESY OF CONSTITUTIONAL POWER. ✓

CONGRESS HAS PLenary POWERS OVER INTERSTATE COMMERCE, ITS CHARITABLE & ESTABLISHMENTS, & ANYTHING THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE - BECAUSE OF THE SEPARATION OF POWERS & BECAUSE THE PRESIDENT HAS NO EXPRESSED POWER OVER COMMERCE & CONGRESS DOES, A COURT WOULD CERTAINLY HOLD EXECUTIVE ORDER 200 UNCONSTITUTIONAL. ✓

b

~~CONGRESS COULD SIMPLY ENACT A LAW TO ENFORCE THE ORDER & PREVENT COMMERCE.~~

~~CONGRESS COULD SIMPLY ENACT A LAW TO ENFORCE THE ORDER & PREVENT COMMERCE.~~

BECAUSE A FEDERAL LAW WILL PREEMPT AN EXECUTIVE ORDER - CONGRESS COULD SIMPLY

Write a pass ~~to~~ Legislation to override the
executive order. If the President refuse to sign
the order then if Congress stays in session for
10 day after presenting the bill - It would become
Law via a Pocket Veto. Congress would need
to stay in session or the Bill would die. If
the President Vetoed the bill then Congress ✓
could override the veto by a $\frac{2}{3}$ vote in both
houses.

President

ARE EXEC ORD. OK?

Congress has Plenary Power over

Internal Security matters

Presidential Powers — ^{Executive} Duplication —
Foreign Relations.

— ARE YOU & ZOU A
LAWFUL EXERCISE OF PRES P.?

P- $E - \frac{F}{E}$

T - Jackson 3

TRATTY — CAN CANCEL TRATTY
w/o APPROV

IS NATL A TRATTY?

Excellent
Paper

3)

The authority for judicial review is vested in Article 3 of the U.S. Constitution which gives the Judicial Branch the power to hear all cases and controversies. Additionally, Marbury v. Madison states that the Constitution is the law, and it is the province and duty of the judiciary to declare what the law is. This gives the Judicial Branch the power to hear federal cases and controversies. The Article 6 Supremacy Clause which states that Federal Law is Supreme over State Law gives the Judicial Branch the power to hear state cases and controversies. Congress cannot limit or expand the jurisdiction of the Supreme Court but can tell the lower courts what to decide, but not how to decide.

Excellent

In order for a federal court to hear a lawsuit, 5 Justiciability Doctrines must be met. These Doctrines include standing, ripeness, mootness, prohibition against advisory opinions, and prohibition against political questions. In order to have standing the plaintiff must have an injury that is personal, concrete and palpable and at least immediate and imminent. Additionally, the injury must be fairly traceable to the defendant's conduct and not too attenuated (causation). Finally, the injury must be redressable by the court or an outcome in the litigants favor must be likely to resolve the issue. 3rd party standing is generally not allowed unless there is a special relationship between the plaintiff and their representative or the plaintiff is unable/incapable of assert their own rights. In order for the court to hear the case it must be ripe for adjudication - this prevents premature litigation. If the plaintiff has not yet been injured yet the court will consider the hardship on the party(s) if they were not to go through with the case and the fitness for review (does the court have all the evidence needed to decide the case). The case must also not be moot - in other words, a live controversy must be present at all stages of the litigation. If the case has been resolved the court will dismiss the case as moot. However, the court may hear the case if the injury is of such short duration that it escapes review, the defendant has voluntarily stopped the conduct but could continue at any time, or if the named representative's claim in a class action has been resolved and the other class action

plaintiff's haven't been and they would like to continue. The court will not hear political questions which are questions committed to another branch of government or questions that are inherently incapable of judicial resolution. Finally, the court will not do advisory opinions because they are generally not ripe for consideration.

a. Winchester Rifle Company Lawsuit

Justiciability Doctrines (see supra)

Standing: Here, the injury Winchester Rifle Company (Winchester) is complaining of is the detrimental impact that the Gun Control Act (GCA) will have on their manufacture, production, and sale of guns. If the law is enacted, Winchester will likely be limited in the amount of guns they manufacture and produce since they are a major gun manufacturer and Congress' limitations will likely only be affecting the major gun manufacturers. Additionally, restrictions on sales of the guns may make it harder for Winchester to market their guns to the public. These are legitimate economic injuries that Winchester may suffer and they do seem to be immediate/imminent since the GCA was passed in 2017, meaning it will likely go into effect January 1, 2018 which is less than a month away - this is considered immediate/imminent. The injury is easily traceable to Congress since Congress passed the law and the entire public (including Winchester and the Court) would be aware of this. The issue would be redressable by the court since the court has the power to review the constitutionality of the other branches of government through *Marbury v. Madison*. Winchester therefore has standing however it must be determined if they have 3rd party standing. Here, Winchester will have standing as long as their CEOs have a personal injury. Here, the loss of sales will likely injure the CEOs of Winchester since their salary is directly related to the annual sales of the company. Winchester therefore has standing.

Ripeness: Here, Winchester is seeking a declaratory judgment, meaning they have not been injured yet and are seeking the judiciary to declare the law unconstitutional before it goes into effect. Normally, this is not considered ripe, however considering the hardship

good
on the parties and the fitness for review, it may be ripe for judicial consideration. If the court does not hear the case, Winchester will either abide by the law and suffer the detrimental economic outcome to their business or they will break the law and have to challenge it. In either case, Winchester will suffer economic hardship to some extent, if they abide by the law, they will likely lose business/money, and if they break it there will likely be penalties. In either case, Winchester will undergo some hardship and the courts do not like people or entities breaking the law for any reason. However, since the law has gone into effect yet, it is mere conjecture as to how exactly Winchester will be harmed and to what extent. This makes the fitness for review somewhat hazy. However, since Winchester is only seeking a declaratory judgment and not damages, the court will likely find the case fit for review and therefore ripe.

good
Mootness: Here, Winchester is seeking a declaratory judgment and has not been harmed yet so the case hasn't been and cannot be resolved. The case is therefore, not moot.

good
Political Questions: This is not a political question since it is the province and the duty of the judicial branch to interpret the law and review actions of the other branches of government and that is exactly what the federal court is being asked to do here. It is therefore capable of judicial resolution by the federal courts.

good
Advisory Opinions: Declaratory Judgments are similar to advisory opinions and although the federal court cannot hear advisory opinions they can make declaratory judgments such as this for organizations.

Conclusion: The federal court has the judicial power to hear the Winchester lawsuit.

b. Senator Loco's Lawsuit

Justiciability Doctrines (see supra)

Standing: Here, Senator Loco has no personal, concrete, palpable injury because the injury suffered would be higher prices, higher labor costs, and higher raw materials costs which would be suffered by the whole country. She is essentially bringing the case as a citizen which is not allowed, however, since she is bringing suit in her capacity as a

Injury: President usurping Legislative Power - E/O 200:

member of the U.S. Congress she may have standing if the injury is still traceable to defendant and capable of being redressed. In this case, the injury would be clearly traceable to the President since he issued the Executive Orders and the court could redress it because it has the power to review the decisions of other branches of the government through Marbury v. Madison. Senator Loco has standing in her official capacity but possibly also as someone asserting rights of someone else not capable of asserting their own rights (U.S. citizens could not have standing in this case but are indeed injured).

Ripeness: Here, no injury has yet occurred and it may not be awhile until the U.S. feels the effects of Executive Orders. However, if the court does not address the issue, the U.S. would suffer economically with higher prices, higher labor costs, and higher raw materials costs. This is a great hardship on the nation. The court has the evidence needed before it to go through with the case (they know the effect of not having the NAFTA treaty because at one point it didn't exist) so the case would likely be considered ripe for consideration by the federal court because they would have an idea of the harm suffered by the nation if the EOs were to remain in effect.

Mootness: Here, the issue has not yet been resolved so the case will not be dismissed as moot.

★ Political Question: Here, the case will likely fail because it is a political question since Congress has the power to revoke Executive Orders and would not need to go through the court to do this. In other words, the power to revoke the Executive Orders is already vested in Congress so the court will likely dismiss the case on this point because Congress is supposed to revoke Executive Orders.

Advisory Opinion: (see supra)

✓ Conclusion: This case does not satisfy the justiciability doctrines since it is a political question assigned to another branch of government. The federal court will likely dismiss the case and allow Congress to revoke the EOs.

excellent -
outline
more
analysis

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END OF EXAM