

## Con Law Sec 4

### Week 7 & 8

- I. Lecture on Exam preparation
  - a. Frustrating methodology: we aren't looking for certainty of meaning
    - i. Inductive and deductive reasoning
    - ii. Principles and rules
    - iii. A mix of history, precedent, policy, and ideology
    - iv. Back and forth between judicial restraint and activism.
  - b. There is no simple algorithm that will answer all interpretations of the constitution.  
Judges consider:
    - i. Text
    - ii. Structure
    - iii. Originalism
    - iv. History and tradition
    - v. Precedent and doctrine
    - vi. Embedded values, policy
  - c. What do you need to succeed?
    - i. Internalization of doctrine
      1. Knowledge of rules (and/or doctrine)
      2. Understanding how the rules are conventionally applied to particular situations
      3. Understanding how rules relate to one another
    - ii. Conventional legal imagination
      1. Key to issue spotting and ability to see connections between authorities and facts in complex settings.
      2. How to develop this skill?
        - a. Reading dissents
        - b. Conventional arguments first, and then use creativity.
        - c. Start by internalizing the doctrine
        - d. Repeated practice at identifying issues
        - e. A sense of the arguments that lawyers accept in this field
          - i. Relevant policy considerations
          - ii. Embedded values
          - iii. Countervailing considerations.
    - iii. Capacity for self-study and self-learning
      1. Acquisition of the skills for effective exam taking
        - a. Which are again, doctrinal internalization, and conventional legal imagination
      2. Requires significant individual effort.
      3. Ability to work effectively over long periods of time
      4. Ability to synthesize all material and information
        - a. Understand and synthesize all the material (cases, casebook comments, treatises, professor's comments): you need to know what the material means and how different materials relate to one another

- b. Sense of appropriate ways to articulate issues, rules, and rule applications
      - c. Ability to communicate your understanding to someone else.
    - d. What is the goal of studying for final exams?
      - i. Legal knowledge: internalize the doctrine (again)
      - ii. Develop your conventional legal imagination (again)
      - iii. How many times can he use those two buzz words in this lecture?
      - iv. Avoid the easy superficial approach (commercial outlines) and study like you mean it.
    - e. Pieces of the puzzle (of the outline)
      - i. Doctrinal statements
        - 1. Particular rules
        - 2. Broader doctrines
      - ii. Policy and values
        - 1. Establishing the rule of law
        - 2. Restraining undemocratic judiciary and protecting policy making role of Congress & President's executive authority
        - 3. Maintaining separation of powers & checks and balances
      - iii. a basic model for outlining
        - 1. topic (maybe a short introduction to the topic. Order of topics need not make logical sense so long as you understand it.
        - 2. )
          - a. doctrine 1
            - i. rationale
            - ii. examples
            - iii. critique/alternatives
            - iv. exceptions
              - 1. rationale, examples, etc.
          - b. doctrine two
        - 3. Once it is finished, cut it down and narrow as you study.
        - 4. Stating the doctrine
          - a. The black letter law
            - i. Could be a broad, general legal statement or a very narrow legal rule
            - ii. Don't be afraid to quote directly from a case or from an outside commentator if it helps you understand
            - iii. The key: an accurate and clear statement of the law you've learned.
        - 5. Rationale: Why is this the doctrine? What are the reasons?
        - 6. Critiques and alternative approaches (although there aren't really alternatives in constitutional law since there is only one court)
        - 7. The exception is its own rule, so follow the same procedure for the exceptions
    - f. Use hornbooks and law review articles, not commercial outlines
- II. Powers of Congress
  - a. Necessary and Proper Clause
    - i. McCulloch v. Maryland

1. Facts:
  - a. the federal gov't chartered a bank (same as creating a corporation). 80% privately owned, and 20% owned by the federal gov't. This was not the first bank of the United States, and it wasn't the first time that there was a controversy over the constitutionality of such a bank.
  - b. In 1818 there was a banking crises, which made the federal bank even more controversial. State chartered banks didn't like to compete and the farmers blamed the federal banks for the recession.
  - c. MD passes laws against the federal bank, charging banks taxes that are not state-chartered. The Nat'l bank did not pay the tax, and Maryland filed suit against the bank's in-state director.
2. Issues
  - a. Whether congress has the power to incorporate a bank,
  - b. And if yes, was Maryland's tax nonetheless constitutional?
3. Congress does have the power to charter banks
  - a. Historical argument: this topic has been debated by other minds, and passed a lot of scrutiny at various stages in its history...these factors ought not to be lightly disregarded. A lot of people have also relied on the constitutionality of this bank (80% privately owned) and there would be grave harm in just lightly throwing it away. But, this isn't enough to make it constitutional on its own. This is also an area where more deference is important (for example, issues that directly affect peoples rights, i.e. equal protection, should deserve less deference than something like chartering a bank).
  - b. Maryland argued that the states retained a residual power to nullify federal action, which includes the power to restrict whatever is done by an agency of the federal gov't (tax the bank). This is because the federal gov't only has whatever powers are delegated to it by the states..."you don't even have to reach the question of federal power because we have the power to control how you use it." Marshall's response: the power of the federal gov't comes from the people, and not the states, and by the people adopting the constitution they agreed to the enumerated powers which makes the law of the federal government supreme. Organizing by states (Art. 7, for one) is just a practical way of assuring ratification.
  - c. Maryland's best argument: the power to incorporate a bank is not enumerated, and that which is not enumerated is a power of the state (10<sup>th</sup> amendment). The opening paragraph of Art 1 also states "all legislative powers here in granted belong to Congress." Can be interpreted to mean that powers not herein granted do not belong to congress. Marshall finds no exclusion