

CONSTITUTIONAL LAW I
MIDTERM EXAMINATION
Fall 2022

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EXAM INSTRUCTIONS

You will have three hours to complete this exam. There are two essay questions to be answered in Questions 1 and 2; Question 3 consists of two short answer questions and 15 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

*****1*****

Question No. 1

After extensive hearings, the State X legislature passed the Protect Puppies Act, which bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. According to the legislative findings, pet stores across State X sell thousands of puppies each year from these so-called “puppy mills.” Puppy mills typically treat adult female dogs as breeding machines and their puppies as mere products to be shipped and sold. Many puppy mills have deplorable animal welfare records, which impacts the health of both the mother dogs and the puppies. Puppies bred in mills can also have health issues, which can lead to large veterinary bills and premature death. What’s also true is that there are no puppy mills based in State X. And while there is no federal law on point, the Federal Occupational Safety and Health Act does set workplace safety standards that apply to commercial breeding operations.

A pet store in State X that specializes in the sale of puppy mill puppies has brought suit in State X Superior Court seeking to block enforcement of the law. While that case was pending, a large-scale commercial breeder in State Y brought an action seeking declaratory and injunctive relief in Federal District Court in State X. Both the pet store and the commercial breeder have sued the Governor of State X.

1. Analyze the Constitutional issues present – including justiciability – with regard to the pet store’s case.
2. Analyze the Constitutional issues present – including justiciability – with regard to the civil action brought by the large-scale commercial breeder.

Question 2

Congress authorized federal funds for Colleges and Universities on condition that they enact and enforce a policy prohibiting all consideration of race in the application and admissions process. Sunstate University, a public university, enacted a policy complying with the funding condition and received federal funds.

Anna, an 18 year-old high school student living in Sunstate, applied for admission to Sunstate University. Her application included an essay in which she emphasized her African American heritage as a direct descendent of African enslaved people, and her community service as president of a national African American Youth organization working to eliminate racism. Barbara, a white high school student, also applied to Sunstate University and submitted an essay emphasizing her heritage as the third generation in her family to attend Sunstate University and her leadership of the political action committee of her church's youth group working for "Pro-life" issues. Both young women were first in their high school graduating class. The University refused to consider Anna's essay because of their federal funding requirement Policy prohibiting consideration of race, and rejected Anna's application; the University considered Barbara's essay and accepted her application giving her extra points after considering her family history and community service.

Anna filed a lawsuit against Sunstate University alleging violation of the 14th Amendment by discriminating against her based on her race.

1. Analyze the Constitutional issues in Anna's race discrimination case; how is the Court likely to rule on them and why? (Assume Anna has standing to sue on this issue).
2. Does Anna have standing to challenge the Constitutionality of the federal funding condition on which the University's policy on consideration of race was based? How is the Court likely to rule and why?

Question 3

Write a short answer to the questions A and B; Each question is worth 25 points.

- A. A Committee of the U.S. House of Representatives issued a subpoena to a former president of the United States to appear before the House committee in its investigation of evidence relating to an attempted insurrection at the U.S. capitol. The former President asserted an executive privilege and refused to comply with the Congressional subpoena. In a lawsuit by the former President to Quash the subpoena how is the court likely to analyze the issues and to rule on the motion?

- B. Owners bought a residence in the City with a plan to use it as a short term vacation rental unit. The City issued Owners a permit for use as short term rental property with a term of 5 years. Owners used the property as a short term rental unit. However, after 1 year the City Council passed an ordinance revoking all short term rental permits and prohibiting all short term rentals of less than 30 days in the City. The ordinance also authorized the City Building Official to enforce the ordinance and to enter upon any property suspected of being used as a short term rental by giving the owner 10 days prior notice. The Owners sued the city alleging that the ordinance effected an unconstitutional taking of their property without compensation. How is the Court likely to analyze the issues and rule in Owner's lawsuit?

- C. Please answer the 15 Multistate Bar Exam (MBE) questions posted in Examsoft.

Constitutional Law Midterm Exam 2022 Answer Outline

Question 1:

1. Pet store's action:

1. Ripeness and standing – has the law been enforced? If not, is it likely to be enforced? Or is this like *Poe v. Ullman*? If the law *has* been enforced, can the pet store demonstrate standing even though it has not yet been prosecuted? Can they show injury, causation, and redressability? And have they chosen the proper defendant?
1. Is this law preempted (definitely not express; probably not implied)
1. Dormant Commerce Clause analysis: is the law discriminatory? If so, does the state have a legitimate interest, and is there no other way to accomplish that interest? If it's not discriminatory, do the benefits to State X outweigh the burdens on interstate commerce?
1. Privileges and Immunity Clause analysis: plaintiff is not an out-of-state citizen; no applicability
1. Due Process analysis: Rational review – it's economic legislation so legitimate interest and rationally related. Can look to legislative findings for State's interests.

0. Puppy mill's action:

1. Ripeness and standing (see above);
2. Preemption (little more involved analysis since OSHA does apply to breeding operations; not express; not implied: no conflict in adhering to both the Protect Puppies Act and OSHA regs. No indication Congress intended to occupy the field).
3. DCC (see above)
4. P&I: is the owner of the puppy mill a citizen of State Y? Is he the plaintiff, or is it a corporation? If he's the plaintiff, does the law prevent him from enjoying a constitutional right or from accessing his livelihood? If so, does State X have a substantial interest and is there a substantial relationship between the law and that interest?
5. Due Process (see above)

Question 2:

I. Anna v. Sunstate University: Race Discrimination

- A. Intro: Policy Prohibiting University from considering Anna's racial heritage and community service while considering others discriminates against her based on her race in violation of the 14th Amendment
- B. What is the classification? Race
- C. What level of scrutiny applies? Strict: compelling state interest, narrowly tailored to the least restrictive alternative necessary to address that interest
- D. Does the University meet the requirements of Strict Scrutiny?

1. Compelling interest?

YES: state has a compelling interest in complying with condition required to receive essential federal funds for education programs, and in not discriminating in favor of any student based on race by giving extra credit denied to white students; or

NO: University's compliance with the unconstitutional funding condition is not a compelling interest, and in any case compliance is voluntary and funding should be declined since it requires the University to discriminate based on race; University had a compelling interest in achieving a diverse student body (per *Grutter v. Bollinger* and *Fisher v. U. Of Tx*) which cannot be met by refusing to consider race-related criteria thereby discriminating against African Americans in admissions.

2. Narrowly Tailored?

YES: State cannot comply with funding condition without enacting and enforcing its policy against all consideration of race, whether it is to benefit minorities or to their detriment, and University no other means are available for the University to meet its compelling interest in total nondiscrimination. Or

NO: The university's Policy and practice of not considering race-related heritage and service while considering other types of heritage and service is overbroad even to meet the nondiscrimination

criteria of the funding condition and results in violation of the State's duty under the Equal Protection clause.

- E. Conclusion: The court's likely ruling and why.
- II. Anna's Standing to challenge the Constitutionality of the Federal Funding Condition
 - A. Intro: The Court will likely find that Anna (has/does not have) standing to raise the challenge to the constitutionality of the funding condition.
 - B. Rule: Standing requires proof of Injury to plaintiff, Traceable to Government, and redressable by the court.
 - C. Injury: Direct? YES, application was rejected based on the policy; or NO University revised its Policy and voluntarily accepted federal funds so injury is not caused directly from the policy but rather by the University itself and Anna lacks standing.
 - D. Causation: YES injury was caused by coercing the University to accept the policy, etc. or NO University enacted the policy, not the federal government and only the University can have standing to challenge the funding condition, etc.
 - E. Conclusion: Court's likely ruling and why.

(Note: Federal Preemption is NOT an issue here because it is a funding condition and not a regulation; the issue in the challenge is whether or not the funding condition was coercive, citing *South Dakota v. Dole*, *Sibelius*)

Question 3 Short Answer outline

- A. Analyze *Trump v. Mazars* (2022 Supp. p. 83) criteria for Congressional Subpoena: Legislative purpose, Subpoena is no broader than necessary to achieve legislative purpose, Subpoena advances legislative purpose by nature of the evidence sought, and Asses the burdens on the President of complying with the subpoena.

- B. Analyze possessory taking under *Cedar Point Nursery v. Hassid* (temporary intermittent physical taking?); Analyze regulatory taking under Penn Central criteria: economic impact, Interference with investment-backed expectations, and character of the government's action. Also, *Lucas v. S. Carolina Coastal Council* is all economic use denied

- c. MBE Answers are not available.

1)

(1) Pet Store v. State X

Justiciability

In order for a case to be heard in Federal Court, there must be a case or controversy. Case and controversy are determined by a case meeting the requirements of the five justiciability doctrines: (1) standing, (2) ripeness, (3) mootness, (4) prohibition of advisory opinions, and (5) prohibition of political questions. For purposes of this question, standing will not be analyzed since the question states that Anna has standing to sue. Standing will be analyzed in the next question.

(a) Standing

For a plaintiff to have standing, they must maintain a personal interest in the dispute and three requirements must be met: (1) the plaintiff must show that they have suffered a harm or are likely to suffer an imminent harm (it cannot be hypothetical), (2) the harm must be reasonably traceable to the challenged law, and (3) the court must be able to fashion a remedy that will redress the asserted harm.

Here, the facts state that a pet store in State X that specialized in the sale of puppy mill puppies brought suit in State X. The pet store has standing because they have a personal interest in the dispute and will suffer a harm in their economic interests due to the passage of the Protect Puppies Act (Act). The pet store's harm is directly traceable to the Act and the court will be able to redress the asserted harm by deciding whether the Act violates the constitution.

As such, the pet store has standing in this case.

(b) Ripeness

For a case and controversy to be ripe, it must be definite and concrete, meaning that the controversy is sufficiently developed and it is unlikely that additional essential facts would be uncovered if hearing was delayed.

This case is also ripe because the controversy related to the Act is sufficiently developed and essential facts will not be uncovered.

(c) Mootness

A case and controversy must not be moot. For a case and controversy to be moot, events after filing must have occurred that resolve the injury.

This case is not moot because the facts do not state that the injury has been resolved.

(d) Prohibition of Political Question

Federal Courts will refuse to hear a case if they find that it presents a political question. Political questions are a subject matter that the courts deem to be inappropriate for judicial review because it should be left to the politically accountable branches of government.

This case does not involve a political question because it pertains to whether the Act violates the constitutional rights of the pet store.

(e) Prohibition of Advisory Opinions

Judicial opinions must have binding legal effect and federal courts are prohibited from issuing advisory opinions.

This decision in this case will not issue an advisory opinion because it pertains to a constitutional issue.

Preemption

The Constitution and the federal laws are the supreme laws of the land and therefore any state law that conflicts either directly or indirectly with a federal law will be displaced -- or preempted. Preemption may occur either expressly, by its very terms and languages, or impliedly. Implied preemption occurs directly when a federal law conflicts with a state law in such a way that it is physically impossible to comply with both; or indirectly if a federal law is meant to occupy the field, meaning the law is so pervasive it leaves no room for supplementary state law. Also, federal law may be preempted if the state law in some way obstructs or frustrates the purpose of Congress.

Here, the facts show that there is no federal law in regards to puppy mills. However, the facts do state that the Federal Occupation Safety and Health Act (FOSHA) sets workplace

safety standards that apply to commercial breeding operations. There may be implied preemption through FOSHA.

Commerce Clause

Congress has the power to regulate commerce among the several states. To determine if the commerce clause applies, the courts will consider factors articulated in U.S. v. Lopez: (1) channels, (2) instrumentalities, and (3) substantial effects on interstate commerce.

Here, the facts pertain to a statute that State X passed. It does not pertain to a federal statute.

As such, the Commerce Clause will not apply.

Contracts Clause

Article I, Section 10, of the Constitution states that no state shall . . . pass any . . . law impairing the obligation of contracts. A state may not interfere retroactively with presently enforceable contracts. To overcome, the government has to prove that there is a substantial interest and the law relates to the substantial government interest.

Here, the facts show that the Protect Puppies Act (Act) was passed by State X which bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. After certain extensive legislative findings, State X passed the Act to protect dogs and the deplorable conditions that they live in. By passing this Act, State X is directly interfering with the pet store's ability to enter into contracts to sell their puppies that came from puppy mills. The government will argue that they have a substantial interest which is to protect their dogs and puppies from being in deplorable conditions. Further, they will argue that they do not have puppy mills and that puppies coming from puppy mills are being brought from out-of-state. The pet store will argue that the government does not have a substantial interest because the Act pertains to puppies and it is directly affecting their economic interests of entering into contracts for the benefit of themselves and their business. State X will respond by stating that the legislature passed the Act and the legislature comprises of elected representatives to State X. Therefore, there is a direct interest by the people of State X to support the banning of in-state sale of puppies conceived and raised in large-scale commercial buildings.

As such, the court will hold for State X.

(2) Large-Scale Commercial Breeder v. State X.

Justiciability

In order for a case to be heard in Federal Court, there must be a case or controversy. Case and controversy are determined by a case meeting the requirements of the five justiciability doctrines: (1) standing, (2) ripeness, (3) mootness, (4) prohibition of advisory opinions, and (5) prohibition of political questions. For purposes of this question, standing will not be analyzed since the question states that Anna has standing to sue. Standing will be analyzed in the next question.

(a) Standing

For a plaintiff to have standing, they must maintain a personal interest in the dispute and three requirements must be met: (1) the plaintiff must show that they have suffered a harm or are likely to suffer an imminent harm (it cannot be hypothetical), (2) the harm must be reasonably traceable to the challenged law, and (3) the court must be able to fashion a remedy that will redress the asserted harm.

Here, the facts show that a large scale commercial breeder brought an actin seeking relief because of the Act. The breeder will be able to show that they will suffer a harm because their sales will take a hit as a result of the Act. Further, the harm to their business is directly traceable to the Act and the court will be able to fashion a remedy for the asserted harm if they rule in their favor.

(b) Ripeness

For a case and controversy to be ripe, it must be definite and concrete, meaning that the controversy is sufficiently developed and it is unlikely that additional essential facts would be uncovered if hearing was delayed.

This case is ripe because the controversy is definite -- it affects the commercial breeder and additional facts are not necessary to show that the commercial breeder was additionally affected by the Act.

(c) Mootness

A case and controversy must not be moot. For a case and controversy to be moot, events after filing must have occurred that resolve the injury.

This case is not moot as there has been no resolution to the breeder's injury.

(d) Prohibition of Political Question

Federal Courts will refuse to hear a case if they find that it presents a political question. Political questions are a subject matter that the courts deem to be inappropriate for judicial review because it should be left to the politically accountable branches of government.

This case does not pose a political question because it pertains to a constitutional right that is being infringed.

(e) Prohibition of Advisory Opinions

Judicial opinions must have binding legal effect and federal courts are prohibited from issuing advisory opinions.

This case will not provide an advisory opinion because it pertains to a constitutional right that is being infringed.

Dormant Commerce Clause

When Congress is silent in an area, states are given the power to regulate commerce as long as it does not discriminate or unduly burden interstate commerce. Laws that discriminate against interstate commerce are per se invalid if state law is facially discriminatory against interstate commerce or has an impermissible protectionist purpose or effect - laws that appear neutral but in fact favor local economic interest at the expense of out-of-state competitors. If the law is discriminatory, then the state must show that it has no other means of advancing a legitimate local purpose. If the law significantly burdens interstate commerce, the court will balance whether the benefits of the state's interest are outweighed by the burden on interstate commerce by looking at whether there are less restrictive alternatives and if there are conflicts with other states' regulations.

Here, the facts show that the Act bans the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. Although State X does not have puppy mills based in State X, there are still pet stores that specialize in the sale of puppy mill puppies. As such, the commercial breeder will be affected by the Act and the act may violate the dormant commerce clause. State X will argue that puppy mills treat adult female dogs as breeding machines and their puppies as mere products to be shipped and sold. Further, State X will argue that puppy mills have deplorable animal

welfare records, which impacts the health of both the mother dogs and the puppies. Therefore, State X will argue that there are no other means of advancing their legitimate purpose than to ban the in-state sale of puppies conceived and raised in large-scale commercial breeding operations. The commercial breeder in State Y may argue that there are less restrictive alternatives to the Act rather than banning the in-state sale of certain puppies. The court may state that the State's interest is to make sure that they are taking care of dogs and puppies in a "respectful" way and not just treating them as goods to be sold. The court may further hold that there are no breeding mills in State X and therefore State X's interest outweighs the burden on commerce, because there are no puppy mills in their state.

Commerce Clause

Congress has the power to regulate commerce among the several states. To determine if the commerce clause applies, the courts will consider factors articulated in *U.S. v. Lopez*: (1) channels, (2) instrumentalities, and (3) substantial effects on interstate commerce.

Here, the facts pertain to a statute that State X passed. It does not pertain to a federal statute.

As such, the Commerce Clause will not apply.

Conclusion: As such, the Court will hold for State X against the commercial breeder.

2)

Anna's racial discrimination case**Is Anna's case justiciable?**

While Anna has Standing, there must still be a live case or controversy, requiring the case to be ripe but not moot. Ripeness requires that the harm is imminent or has occurred. Mootness means that the case has not been resolved, unless the harm is capable of being repeated yet still evading review. Also there is no general taxpayer standing for how the government spends money unless the plaintiff is alleging a violation of the establishment clause.

Here the harm, not being admitted to Sunstate U. has already occurred so the claim is Ripe. Anna's injury/claim has not been resolved as was denied admission and is therefore not moot.

Does Anna have claim under the Equal Protection Clause?

The equal protection clause provides that similarly situated people of classifications cannot be discriminated against on the basis of immutable characteristics such as race or nationality. The standard of review of a particular claim depends on the level of scrutiny applied to that classification. Strict Scrutiny applies to highly suspect classifications such as race or nationality and requires the government to show a compelling state interest with not less restrictive means for accomplishing the ends. Intermediate scrutiny requires the government to show the the law is substantially related to an important government interest. Rational basis scrutiny applies to all other less suspect classifications and only requires the law is reasonably related to a legitimate government interest.

Anna has claimed that Sunstate U. discriminated against her based on her race, which is the highest level suspect classification and requires strict scrutiny. The government must show that there is a compelling state interest that cannot be met by a less restrictive means. Here, the governmental interest is in preventing discrimination, by prohibiting the use of race in college admissions. The prevention of racial discrimination would seem to be a compelling governmental interest. The issue than becomes whether there is a less restrictive means of preventing racial discrimination than to not allow race to be used in college admissions. To paraphrase a Supreme Court Justice, "there is no better way to stop racial discrimination than to stop discriminating based on race.

Does Anna have a 10th amendment claim?

The Constitution provides that all powers not granted to the United States by the constitution, nor prohibited to the states by it, are to be vested with the states or the people. The individual states typically have the power to regulate for the safety, health and welfare of citizens, and this would include education, which is traditionally handled by the individual states

Does Anna have standing to challenge the constitutionality of the federal funding conditions

Anna's Standing

To have standing the plaintiff must show Injury, Causation and Redressability. Injury requires that there be a concrete and particularized injury. Causation requires that the injury be traceable to the defendant and not some third party. Redressability means that the court must be capable of rectifying or remedying the harm. Also there is no general taxpayer standing for how the government spends money unless the plaintiff is alleging a violation of the establishment clause.

Anna's injury is that she was denied admission to Sunstate U. because Sunstate refused to consider Anna's essay to "comply" with the funding conditions. The source of the injury is not directly traceable to the funding conditions as the admission decision was made by Sunstate U. The University could certainly have evaluated her essay on its merits without considering her race in its admission decision by for example having essays graded and scored by on the merits of the individual essay and that score can then be passed blindly to admissions staff without consideration of the applicants race. The issue is redressable as the court could order the university to admit Anna. It is likely that Anna does not have standing because the injury is not traceable to the federal funding, but to Sunstate U.'s policies and rather absurd implementation of the conditions. Anna should sue Sunstate for failing to implement a admissions essay program that does not consider race, as admissions essay are often highly personal and there will be numerous clues to the race or national origin of many applicants contained therein.

Anna's Federal funding Condition Claim

Congress has broad power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. Congress can attach conditions to federal grants so long as the conditions meet the *Dole* Factors, the condition(s) must be for the general welfare, the conditions must be clearly explained, must be related to purpose of the funding, and cannot be "unduly coercive".

Here, Congress is authorized to spend for the general welfare, which would include education and higher education. Congress can also attach conditions to grants so long as the conditions meet the

requirements under *Dole*. The condition here is that race cannot be a consideration college admissions, the purpose of which is to prevent racial discrimination in admissions, which arguably is for the general welfare. The condition is clear, "that they enact and enforce a policy prohibiting all consideration of race in the application and admission process." Here we are not really given the purpose for the grant, so it is unclear if the conditions are related to the purpose of the funding, but arguably they are as the funding is for education and the conditions are to prevent discrimination in education. Finally the Conditions cannot be unduly coercive. Again we are not given any information as to the amount of the grant or how accepting or rejecting the condition would affect Sunstate U., but since state funds and/or tuition typically provide the majority of the funding for universities it seems likely that this grant is a relatively small portion of Sunstate U.'s funding and the condition would not be found to be unduly coercive.

The court would likely find the conditions meet the *Dole* factors the conditions on funding are constitutional.

3)

(A) Congress v. Former President of U.S.

Congressional Subpoena Power

The president is subject to both federal and state subpoenas (*Trump v. Vance*). The subpoena must be related to, and in furtherance of, a legitimate legislative responsibility (*Trump v. Mazars*). The test is (1) whether the asserted legislative interest warrants involving the President and his papers, (2) the subpoena is within the scope to support legislative objectives, (3) the evidence develops the legislative purpose, and (4) the burden placed on the president.

The facts show that a Committee of the U.S. House of Representatives issued a subpoena to a former president of the U.S to appear before the House Committee. Through *Vance* the president is subject to complying with federal and state subpoenas. The test to use is articulated through *Mazars*. Applying the test, the House Committee is investigating evidence related to the attempted insurrection at the U.S. capitol. The subpoena is within the scope to support their legislative objective of making sure that they investigate and prosecute all matters that relate to the attempted insurrection at the U.S. capitol. Further, the President's statements will help determine whether the former president was involved in regards to the attempted insurrection or may even clear the former President's name of wrongdoing or association. The former President may argue that the burden placed by the subpoena would be great but -- as a former president -- he is the chief law enforcement officer of our nation and should comply with all laws of our country.

As such, the court will dismiss the motion to quash the subpoena.

B. Takings Clause

The takings clause prevents the government from taking property without just compensation. Taking can be actual physical taking where the government physically appropriates all or part of a property or regulatory takings where the government regulation in some way diminishes the value of the property. In this case the city is not physically taking the property but they have passed an ordinance that diminishes the value of the property. Regulatory takings can be evaluated in a couple ways. Under the *Lucas* test there is not a taking unless the regulation has deprived the owner of all productive use, a test not met here. where there is a partial regulatory taking the court will look to the *Penn Central* balancing test, which includes balancing the nature and importance of the government interest, the owners good faith investment backed expectation, and the damages to the owner to allow the taking. Here the nature of the government interest is not particularly compelling like it would be if it implicated safety, health or welfare. Importantly, the Owners had a strong argument for a good-faith investment-backed expectation when they relied on the 5-year permit

issued by the city to sue the property as a short term rental. Typically short term rentals can make an owner more money which most likely is why they opted for short term versus the stability of a long term rental and have good claim for damages from the taking. Here, the government interest is not compelling, and Owners damages are distinct, but most importantly the city is violating their own 5-year permit in demolishing the owners' investment-backed expectation. The Owners will likely win this case and the court will find there has been a regulatory taking.

Also the city is asserting a right to enter the property which could be considered a per-se taking, as the court found in *Cedar Point Nursery*. Where the government asserts a right that violates the owners right to exclude, the taking is a per-se physical taking and the only question is how frequent the physical invasion is and how much is owed. The city could easily monitor any suspected properties without physically entering the property. Now the city will argue that this case is distinguished as the city is exercising its policing power in this case whereas in *Cedar Point* the physical taking was done by third parties and not a valid exercise of policing power. The court will likely find the difference dispositive and rule against the owners on this point, but they still win under their regulatory takings theory above.

END OF EXAM