

CONSTITUTIONAL LAW  
MIDTERM EXAMINATION  
FALL 2021

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EXAM INSTRUCTIONS

This is a three - hour 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.

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.

MONTEREY COLLEGE OF LAW

Welsh, Wagner, Zulfa, Schrier,  
Professors  
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Question No. 1

State X has recently enacted a statute prohibiting the sale of food to consumers in State X unless all workers directly involved in the processing, packing or other handling of food are subjected to mandatory periodic testing for use of illicit drugs. The statute requires a food worker whose test results are positive to be removed from such employment or be transferred to a different job. Testing is to be done by chemical analysis of a urine sample to determine if the subject employee has been using cocaine, heroin, or other drug the use of which is proscribed by the penal laws of State X.

Packco processes prepackaged meals for the commercial airline industry and specially packaged meals for elementary schools in its plant in State Y and markets them throughout the United States, including States X and Y. State Y law expressly prohibits drug testing as a condition of employment for workers in that state.

Packco and its respective association, Packing Workers' Association (PWA), an organization of food processing workers in State X, have each brought actions in the U.S. District Court against the State X Agency charged with enforcement of the State X drug testing statute, asserting that it violates rights guaranteed to them by the United States Constitution. The actions have been appropriately consolidated. The State X Agency has moved to dismiss both complaints on the merits. In opposition, the following arguments are made the Plaintiffs regarding the State X statute:

1. Packco contends that the State X statute violates the Commerce Clause.
2. Packco and PWA contend that the State X statute denies equal protection of the laws as it is seriously "underinclusive" in scope.

Analyze and explain how the Court should rule on each of these issues.

Your response must address the threshold requirements regarding case and controversy, justiciability and standing to be heard on the merits, as well as the parties' commerce clause and equal protection claims. Discuss.

\*\*\*\*\*2\*\*\*\*\*



Question No. 2

The United States Congress authorized funding for athletics programs in public Schools operated by the states on the condition that any schools receiving the funding maintain and enforce a policy of nondiscrimination against any student based on race, national origin, sex, sexual orientation, gender, or gender identity.

In response to an increasing number of transgender students enrolled in public schools, the State of Columbia enacted a statute requiring all students in the state's public schools to use or enter only the restrooms and locker rooms designated with the gender assigned to the students at birth as it appears on their state-issued birth certificates. Any student who uses or attempts to use facilities designated for the opposite gender will be subject to expulsion from public school.

Jordan is a transgender boy and star water polo player for his Columbia High School team. Jordan refused to use the girl's locker room or restrooms as required by the Columbia statute. Jordan's birth certificate designated him "female" at birth though he identifies as male. Jordan was expelled from school after he entered the boy's locker room to attend a team meeting.

As a result of the school's actions toward Jordan, the Federal Government denied funding to the state of Columbia for its schools' athletic programs.

1. What Equal Protection claims can Jordan make in a suit against the State of Columbia under the United States Constitution and how should the court rule? Assume that Jordan has standing and the Court will address the merits of Jordan's claims.
2. What claims can the state of Columbia make under the United States Constitution to challenge the denial of funding for its schools' athletic programs and how should the court rule? Assume that Columbia has standing and the Court will address the merits of its claims.



Question No. 3

Please write a short answer to questions A and B. Each question is worth 25 points.

A. State X requires applicants for a medical license to live within the state. A doctor who lives near the border with State X, but in a neighboring state, wishes to expand her practice into State X and applies for a State X medical license. Due to her residency, she is denied the license.

Analyze the constitutional issues present and state how a court is likely to rule.

B. The United States President ordered a drone strike in a foreign country which inadvertently killed an American citizen who resided there to attend college. Congress had not declared war against that country and did not specifically authorize the drone strikes. Congress began an investigation and issued a subpoena to the President to produce all documents related to the drone strike. The President refused to produce the documents.

Analyze the constitutional issues the President and Congress raise in an action to enforce the subpoena, and how is the court is likely to rule?

C. Please answer the 15 Multistate Bar Exam (MBE) questions in Exemplify. Read each question carefully and choose the best answer even though more than one answer may be "correct". Review your answers for accuracy before you finish.

PACKCO ISSUE OUTLINE / COMMENTS Con. Law 2021 Midterm  
Question 1

**INTERROGATORY #1**

**ANTICIPATED ISSUES/DISCUSSION: COMMERCE CLAUSE (BURDEN ON INTERSTATE COMMERCE ("DISCRIMINATION" ANALYSIS, LEGITIMATE STATE X CONCERNS) AND PREEMPTION/SUPERSESSION (LIKELY A "RAISE AND DISMISS" ISSUE AS THERE ARE NO FACTS THAT STRONGLY INDICATE THAT CONGRESS HAS INTENDED TO "PREEMPT THIS FIELD.")**

**DISCRIMINATORY IN NATURE? THE ACTION HERE CENTERS ON WHETHER THE STATUTE FURTHERS A LEGITIMATE GOV INTEREST AND WHETHER THERE ARE ANY LESS DISCRIMINATORY MEANS OF ACCOMPLISHING THE PROTECTION OF THAT INTEREST.**

**RESULT? LIKELY NOT DISCRIMINATORY AS IT APPLIES EQUALLY TO STATE COMPANIES AND EMPLOYEES AS WELL AS TO OUT-OF-STATE COMPANIES AND EMPLOYEES.**

**BURDEN ASSESSMENT**

**THE NEXT TEST IS WHETHER THE BURDENS ON INTERSTATE COMMERCE RESULTING FROM THE REGULATION OUTWEIGH THE BENEFITS TO STATE X. THE ANTICIPATED DISCUSSION SHOULD CENTER ON BALANCING THE STATE'S BENEFITS AGAINST THE BURDENS, LOOKING AT CONFLICTING STATUTES IN OTHER STATES AND LOOKING FOR LESS RESTRICTIVE ALTERNATIVES.**

**CONCLUSION RE ROG #1? IT IS LIKELY THAT THE COURT WOULD HOLD/FIND THAT THERE ARE LESS RESTRICTIVE ALTERNATIVES TO ACHIEVE ITS GOAL.**

**INTERROGATORY #2 (EQUAL PROTECTION)**

**IS THERE "STATE ACTION?" THERE IS OVERSIGHT BY "AGENCY" SO STATE ACTION IS MET.**

## **UNDERINCLUSIVE / RATIONAL BASIS (NO SUSPECT CLASS)**

### **Justiciability:**

PACKCO AND PWA WILL ASSERT THEY HAVE STANDING BASED ON INJURY TO PACKCO'S BUSINESS CAUSED BY SINGLING OUT FOOD SERVICE BUSINESSES AS A CLASS FOR DIFFERENT TREATMENT AND/OR 3<sup>RD</sup> PARTY STANDING TO REPRESENT ITS EMPLOYEES AND CUSTOMERS; PWA WILL ASSERT 3<sup>RD</sup> PARTY ASSOCIATION STANDING AS A UNION TO REPRESENT ITS MEMBERS INJURED BY THE STATUTE AND THAT INDIVIDUAL MEMBERS ARE NOT NECESSARY TO LITIGATE THE ISSUES, ETC. THE CAE IS RIPE SINCE STATUTE IS IN EFFECT NOW, IS NOT MOOT, AND THE COURT CAN REDRESS IT BY AN INJUNCTION AGAINST ENFORCEMENT.

### **EQUAL PROTECTION:**

PACKCO/PWA WILL THEN ARGUE THAT THE STATUTORY REQUIREMENT OF DRUG TESTING VIOLATES EQUAL PROTECTION IN THAT THE STATUTE IS UNDERINCLUSIVE BECAUSE IT ONLY MANDATES DRUG TESTING OF EMPLOYEES INVOLVED IN FOOD PROCESSING. THE BOP WOULD BE ON PACKCO AND PWA UNDER "RB" REVIEW TO PROVE THAT THE STATUTE IS UNCONSTITUTIONAL. STATE WILL ARGUE THE CLASSIFICATION IS DRUG USERS V. NON-USERS, AND IT IS RATIONAL TO FOCUS ON FOOD SERVICE BECAUSE STATE X HAS A STRONG HEALTH, SAFETY AND WELFARE CONCERN THAT WOULD WIN-OUT ON THESE FACTS.



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QUESTION 2 - OUTLINE ANSWER

II. Jordan v. State of Columbia

A. Justiciability: Facts state standing is established. [If addressed: Jordan's Standing: Injury? (expulsion from school), Traceable to Government? (state law requires discrimination + state action by school)? Redressable? (Court can issue injunction to reinstate to school and block enforcement of statute); Ripe?(injury of expulsion has occurred and controversy exists), Not Moot? (Controversy exists and is not resolved); Case is justiciable.]

B. Equal Protection:

1) Classification

Transgender students -Suspect? Heightened scrutiny?

2) Level of Scrutiny

Unclear from cases e.g. Romer v. Evans;

Apply rational basis, but with "bite"?

Animus against an unpopular group or bare desire to harm cannot

Meet rational basis test. Romer v. Evans; City of Cleburne v.

Cleburne Living Center;

or meets test? (Meets test if gov't can state "any plausible reason".

Railway Express Agency v. Fritz)

- 3) Or Intermediate Scrutiny if Classification based on sex? Substantially related to important gov't interest e.g. protecting students' welfare, privacy in school environment, non-disruption of education, etc.?

C. Likely Ruling by Supreme Court?

II. State of Columbia v. U.S.

A. Federal funding exceeds Congress' Tax and Spending Power. South Dakota v. Dole: 4 limitations

- 1) Funding Conditions must serve general welfare: Protects transgender students not general student population? Special rights? (or not?)
- 2) Funding conditions must be unambiguous and not coercive: details of required "policy" are unclear (or not?); Condition is coercive: must comply or forfeit funding so condition is more regulation than condition (or not?)
- 3) Related to federal interest: relates only to state's interest in schools and students' welfare, not federal and no national project. (Or is eliminating discrimination in athletics a federal project?) Congress lacks power to legislate for general welfare.
- 4) Cannot be barred by other constitutional provision: Condition is barred by 10<sup>th</sup> Amendment

B. 10<sup>th</sup> Amendment limits: Through Funding condition federal government "commandeers" states to carry out federal law (or not)? (*Printz v. U.S., N.Y.*)

*v. U.S.*) States are required to enact and enforce federal policy: violates 10<sup>th</sup> Amendment (or not?)

C. Funding Condition violates 10<sup>th</sup> Amendment state's exclusive rights  
10<sup>th</sup> Amendment reserves state's police power to legislate for health & welfare of residents. Act violates that power (why and why not?)

2) 10<sup>th</sup> Amendment reserves states' exclusive power to regulate intrastate schools (Why and Why not here?)

D. Likely Ruling of the Supreme Court?



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Question 3 Answer Outline

A. *Privileges and Immunities of Article IV; fundamental right; Based on Supreme Court of New Hampshire v. Piper (1985)*

1. Discrimination against out of state residents -- Article IV Privileges and Immunities clause.
2. Fundamental right -- practice of law.
3. Article IV P& I is not absolute bar: can discriminate if (1) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.
4. Court will likely not find a substantial reason for difference in treatment, nor a substantial relationship to a state objective warranting such treatment.

B. President will assert Executive Privilege. Privilege is not absolute. Nixon v. US;

Congress must meet Congressional subpoena criteria of Trump v. Mazars:

Legitimate legislative purpose: Congress purpose is to investigate unauthorized use of force by President violating statutory or Constitutional authorization ("lowest ebb" presidential power per Youngstown Sheet and Tube concurring opinion);

Subpoena must be no broader than necessary to achieve legislative purpose: Arguably overbroad (or not);

Subpoena must advance a valid legislative purpose by the nature of evidence offered;

Must assess the burden on the President (minimal or oppressive? interferes with duties?)

State how court will rule.

1)

### Justiciability

#### Article III Jurisdiction

Grant intro

Unlike state courts, federal courts organized under Article III are limited in their jurisdiction. In general, Article III courts may only hear cases that involve federal questions, e.g. constitutionality of a state statute or interpretation of federal laws, or cases involving parties of diverse citizenship. Additionally, the constitution requires that there be an active controversy between the parties at every stage of the proceeding, including on appeal. The case and controversy requirement has been held to prevent the federal judiciary from issuing advisory opinions. In addition, the federal court must also abstain from hearing cases regarding unsettled state laws or pending criminal proceedings. If the case presents a question for which there are no standards that can be applied for judicial resolution and/or the matter is within the scope of the legislative branch, the court may also refuse to hear it because it is better settled by the political process.

Packco and PWA contend that State X's statute violates the Commerce Clause of the US Constitution and the Equal Protection Clause of the Fourteenth Amendment, both well developed areas of law with settled guidance from the text of the constitution as well as many decades of case law. Therefore, their case properly presents a question of federal constitutional interpretation with clear judicial standards that can be applied. Packco and PWA are each affected negatively by State X's regulation and want it to be struck down; State X would presumably like its regulation to be upheld, so there is an active case and controversy between the parties.

suffical direct inj. / harm

#### Ripeness

There must be a concrete present injury--or imminent and real threat of injury--before a suit can be brought. If the challenged regulation has not yet been enforced and it is uncertain that it will be, the case is likely unripe and the federal court will not hear it. On the other hand, a plaintiff does not need to incur harm on purpose to ripen their suit. If they will face substantial hardship by provoking enforcement, they can seek declaratory relief first.

State X's law has been enacted but there are no facts explaining when it goes into effect. Whether or not the law has already been enforced against Packco and PWA, the plaintiffs will likely argue that because they are respectively a large company that sells packaged food internationally and an organization representing workers who are facing drug testing that impinges their fundamental rights to privacy and to earn a living, they would face serious hardship if they are forced to wait around and let the law be enforced against them before bringing suit. Packco likely needs to make significant changes to the way it does business, especially in the face of the law from State Y where its factory is located that prohibits drug testing workers, and the workers from State X each have an important personal interest in not being drug tested for illicit substances if they don't have to be. The consequences for the workers could be particularly unpredictable and draconian, since they presumably work for a variety of employers who may each take a different approach to either firing them or moving them to a different job based on the size of the workplace, etc. In addition, it is unclear whether State X would be allowed to criminally prosecute workers who tested positive for illegal substances under the scheme.

Even if the law has not yet been enforced, the controversy is ripe for adjudication because plaintiffs will face substantial hardship if they are forced to provoke enforcement. They are entitled to declaratory relief now regarding the constitutionality of State X's new law.

Mootness



✓ Mootness asks whether the controversy has already been resolved, in which case the claim should be dismissed unless the resolution was due to voluntary cessation--in which case it could be resumed by the defendant at will--or if it is a type of injury that is liable to repetition but evading review, e.g. pregnancy or voting.

Great point  
 Here, it is more likely that the claim is unripe than moot. However if mootness is raised, PWA has a particularly strong argument in that its members will be subjected to multiple violations of their privacy, one with every drug test. Therefore, even if an individual member of PWA had their case or controversy mooted, e.g. by quitting the food industry, the violation of rights would still be capable of repetition if the employee decided to return to the industry.

### Conclusion

The case is an appropriate one for the federal court because it presents a question regarding constitutionality of a state law for which there are established judicial standards. There is an active controversy between the parties and even if the law hasn't yet been enforced, the plaintiffs would face substantial hardship before they could provoke enforcement. Provided that the plaintiffs can assert standing, their case can be heard.

### Standing

✓ Standing is another aspect of justiciability that is evaluated as a threshold matter, generally based solely on the pleadings taking all allegations to be true. It is usually challenged in federal practice via a 12(b)(6) motion to dismiss, which operates similarly to a demurrer. To survive, the plaintiff must assert that (1) he has suffered a cognizable injury in fact, (2) there is a causal nexus with the challenged regulation or conduct, and (3) that a ruling in his favor would redress his complaint.

### Does Packco Have Standing?

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### *Injury*

An injury is sufficient to support standing if it is concrete and particularized to the plaintiff. It does not need to be physical or economic, but must damage a cognizable right under the US Constitution or federal law.

*good* Packco has a plant in State Y, which prohibits drug testing of employees. At that plant, Packco makes food that it distributes all around the country, including State X. If State X's regulation prohibiting sale of food made by workers who are NOT drug tested is upheld, Packco will either have to move its operations out of State Y or stop selling its products to residents of State X. Either option will cause significant disruption to Packco's business and likely result in a significant economic loss.

### *Causation*

Causation requires that the challenged regulation or conduct play a substantial role in causing the plaintiff's harm.

State X's new law is causing the present conflict. However, State X will argue that it is State Y's law prohibiting drug testing that Packco should be challenging. Regardless, ✓ because State X's new law has created the present dilemma, it is at least a substantial part of the cause.

### *Redressibility*

✓ An injury is redressible when a court ruling in the plaintiff's favor would entirely remove or at least significantly lessen its impact.

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If the court strikes down State X's new law, Packco will not be forced to reconfigure its business operations in State Y or change where it sells its products. Therefore, a ruling in Packco's favor would redress its grievance.

### *Conclusion*

Packco has a cognizable injury in the anticipated economic loss and disruption to its business that is directly caused, at least in part, by State X's new law. If the court strikes the law down, Packco's problems vanish. Therefore, Packco has standing to challenge State X's law.

### **Does PWA Have Standing?**

#### *Organization Standing*

✓ An organization has standing to bring a challenge in federal court to assert rights under the constitution or federal law when its individual members are affected to the extent that they would each have standing to sue, provided that the organization's purpose relates to the underlying reason for the suit and that individual members are not required to participate.

✓ PWA is an organization made up of food processing workers from State X. Any one of them could argue that they are equally injured by the new law, but it is unlikely that they would have the resources to bring a federal lawsuit on their own. PWA, presumably, was formed to help ensure the rights of food processing workers. The State X law in question affects the ability of such workers to pursue their procession, so it is very much within the scope of PWA's purpose. There are no facts to suggest that PWA is forcing individual members to participate in the lawsuit in any meaningful way.

#### *Injury*

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An injury is sufficient to support standing if it is concrete and particularized to the plaintiff. It does not need to be physical or economic, but must damage a cognizable right under the US Constitution or federal law.

PWA's members have important interests in pursuing their chosen profession and also fundamental privacy rights to protect. If State X's law is enforced, they may lose their jobs or be transferred to a less desirable part of their employer's operations. They will be subjected to invasive testing and might even be prosecuted criminally. Their injury is cognizable, even if it is only threatened.

### *Causation*

✓ Causation requires that the challenged regulation or conduct play a substantial role in causing the plaintiff's harm.

✓ State X's new law is the sole cause of PWA's members' anticipated injuries. If the law is not upheld, they will not be subject to drug testing or any of the unwanted consequences attendant on such testing.

### *Redressibility*

✓ An injury is redressible when a court ruling in the plaintiff's favor would entirely remove or at least significantly lessen its impact.

If the court rules in favor of PWA, its members will not be subjected to testing.

✓ Therefore, their claim can be redressed by the court.

### *Conclusion*

PWA is a membership organization that can assert standing on behalf of its members in this matter. The members are imminently threatened with enforcement of a regulation

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that could put their livelihood at risk and invade their privacy. The court's ruling in their favor would make their jobs more secure and ensure that they are not drug tested against their will. PWA has standing to bring a challenge to State X's new law.

### **Does State X's Statute Violate the Dormant Commerce Clause?**

#### **Dormant Commerce Clause**

While Congress has plenary power to regulate interstate commerce under the constitution and federal law therefore preempts state and local laws when they are in conflict, states may also regulate in local aspects of interstate commerce in areas where Congress is silent. If the state law is discriminatory or protectionist, the state must show it is substantially related an important noneconomic interest and there is no less restrictive means to achieve that interest. Otherwise, if the law is facially neutral, it will be upheld unless it unduly burdens interstate commerce. In that case, the state will likewise be given the opportunity to show that its interests outweigh the imposition on commerce.

#### ***Has the Federal Government Spoken?***

If Congress has legislated in the area, the state law will be preempted under the Supremacy Clause.

There are no facts here to suggest that there is any federal law regarding drug testing food packing employees. Therefore, preemption is not an issue. State X is free to govern in this area and will likely argue that protecting the quality of food is an important aspect of their general police power to ensure the health, safety, and welfare of their citizens.

#### ***Is the regulation discriminatory or protectionist?***

✓ If the regulation on its face discriminates against out of staters or preferences in staters, or if it was clearly motivated by no other reason than to protect in state economic interests, then it will be found discriminatory and struck down absent an important noneconomic interest that cannot be met in any other way.

/ State X will argue that it has an important interest to safeguard the quality of the food that its residents eat. Someone who is using drugs could easily make dangerous mistakes while packaging food and cause serious illness or death to the people who later eat that food.

F/A  
(+)  
Therefore, State X likely does have an important noneconomic interest in drug testing certain food employees. However, the plaintiffs will argue that there are other less burdensome ways that the same objective can be achieved. However, the more important argument is that because State X's law treats all workers and companies the same, it is not facially discriminatory. Nor is there any evidence of an economically protectionist motive for the law. Therefore, the analysis will focus on undue burden on interstate commerce.

*Does the regulation unduly burden interstate commerce?*

If a regulation that is otherwise neutral has the effect of burdening interstate commerce, it will be upheld unless that burden outweighs the state's interests.

✓ Here, State X has a neutral regulation that has the undesirable effect of burdening commerce with other states where drug testing is either not mandated or downright illegal. Packco's ability to do business in State X from its plant in State Y is in jeopardy, therefore the law burdens interstate commerce. The court will need to balance the burden and will likely want to see data about the number of times that drugged up employees caused food safety issues, etc. in order to evaluate the opposing claims. The court will also consider whether there is an alternative scheme that would be less restrictive.

**Conclusion**



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Whether the State X's neutral law unduly burdens interstate commerce will depend on the strength of its arguments regarding drug use and food safety and whether plaintiffs can suggest any viable alternatives to meet those goals.

### **Does State X's Statute Violate the Equal Protection Clause Due to Underinclusiveness?**

#### **Equal Protection**

✓ The Fourteenth Amendment guarantees the equal protection of the law to every person within the jurisdiction of a state. When certain classes of persons are treated differently than others under the law, the court applies different levels of scrutiny depending on the nature of the classification.

#### **Intentional Discrimination Against a Class**

✓ To be actionable, discrimination under the equal protection clause must be intentional. It may either be facial, that is the classification appears in the text of the law, or it may be a discriminatory application of a neutral law, or there may be a hidden discriminatory motive that appears, e.g. in the legislative history.

| State X's law operates on all workers who are directly involved in packaging and processing and handling food. This is a facial classification. In addition, the law operates particularly on drug users because it is attempting to prevent them from holding such employment. This creates a classification in its application. There may also be discriminatory motives present in the legislative history, e.g. statements that the law is attempting to get people who use drugs out of food production employment. The law does treat certain people, that is food employees and drug users, differently than others. Therefore analysis under equal protection is appropriate.

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**Standard of Review: Rational Basis**

When the classification is neither suspect (race, national origin, alienage) or quasi-suspect (gender, legitimacy), it will be subjected to rational basis review. The challenger must prove that the law bears no rational relationship to a legitimate government purpose. Even vastly over and underinclusive laws, that is, laws that either draw in more people than intended or exempt people who are similarly situated, are often upheld under rational basis review.

Because the classification in question here is based on nature of employment and use of drugs, it does not implicate any suspect or quasi-suspect categories. Therefore, rational basis will be the standard of review. The challenger bears the burden to show that the law is unconstitutional. State X will argue that protecting its citizens from adulterated food is a legitimate purpose under the police power and that disallowing people who are high on drugs from handling that food bears a rational relationship to food safety. H, S, W

**Conclusion**

Even though State X's law treats food employees and drug users differently than others, it is rationally related to an important government interest in food safety. The fact that the law does not affect everyone who is similarly situated is immaterial to its constitutionality under rational basis review because the government is allowed to address problems "one step at a time."

**END OF EXAM**

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ConLaw Wagner ID 234606

Q2

Congress's authority to act

1) Equal Protection

Equal Protection - Anytime a state treats similarly situated individuals differently there is the potential for an Equal Protection violation. Under the 14th amendment no state may deny any persons equal protection under the law. The Court's analysis is tied to the relevant threshold of scrutiny (1) rational basis, (2) intermediate scrutiny, or (3) strict scrutiny.

Threshold for Review- Level of Scrutiny for review of a claim that discrimination on the basis of being transgender violates equal protection. Courts are split on the level of scrutiny applied to a transgender claim under equal protection. Some circuits have held only rational basis applies, but some circuits and trends are looking to intermediate scrutiny similar to a classification on gender as the appropriate remedy.

The policy issue at stake is whether emerging areas of civil rights can be afforded heightened scrutiny to protect against discrimination *yes!*

A Penn State Law Review article suggest that intermediate scrutiny is justified when (1) the class (transgender) has suffered discrimination, (2) the classification has nothing to do with contributions to society or performance, (3) the class is politically powerless, and (4) the characteristic classified is immutable.



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Rational basis or intermediate scrutiny

Under Rational Basis review a law will be upheld if is rationally related to a legitimate government interest, and the burden is on the challenger. classifications related to economic rights are reviewed under the rational basis.

Under Intermediate Scrutiny a law will be upheld if it is substantially related to an important government interest. The burden is on the government. Intermediate review applies to quasi-suspect classes: gender and illegitimacy.

Columbia's argument The state of Colombia would argue that trans gender is not a quasi-protected class, and therefore the review defaults to rational basis. Courts are not settled and transgender is not immutable, it is merely a choice Jordan is making as a rebellious adolescent in identify as as a boy despite being born a girl. Columbia would go on to argue they have a legitimate interest in order in the school and not making the other boys uncomfortable in the bathroom. Under a rational basis review the government is given great deference. Jordan would need to argue that Columbia had no legitimate interest at all at stake. that there were no issues with the safety and comfort of other students. This is a much more difficult challenge for Jordan to overcome as the courts rarely strike down a law under rational basis review. Jordan may argue the statute is arbitrary and only enacted to punish him as the only star transgender public school sports figure. Columbia would argue Jordan is female because that is what the birth certificate says and you don't get to choose to change that. Columbia would also argue that because the federal law does not expressly list transgender amongst the classifications the law is simply not applicable.

Under a rational basis review Columbia would likely prevail.

Jordan's argument

✓  
Also creating safe environment for Jordan

based on animus

frankly  
citing  
seminal  
cases

FLA  
⊕

Jordan would argue for intermediate scrutiny as the appropriate standard for review. First to establish the standard Jordan would put the claim under the 4 part review proposed in the Penn State Law Review article. Here, (1) the class (transgender) has suffered discrimination, Jordan would argue that discrimination exists and is known throughout Columbia, the existence of the statute supports the claim. (2) the classification has nothing to do with contributions to society or performance, Here, Jordan will point to the fact that he is a star water polo player competing with other boys and succeeded despite his transgender status (3) the class is politically powerless, here, Jordan as a minor he is relatively powerless and the school has threatened expulsion if he enters the boys bathroom or locker room. (4) the characteristic classified is immutable; here, Jordan would bring in expert witnesses to show current gender theory commonly accepts that gender identification is immutable and remind that not so long ago society, inaccurately, believed sexual orientation was a choice. Jordan would close with the argument that Intermediate scrutiny is appropriate.

Additionally Jordan would look to gender ID as a component of the definition of 'sex' for the purpose of classification of a quasi-suspect class. And that requiring he use the girls bathroom and locker room is a form of stereotyping by gender that does not hold up to intermediate scrutiny.

good point

Because the law is facially discriminatory it is a *per se* violation of equal protection unless the government can overcome their burden.

Conclusion: Columbia's burden on Intermediate scrutiny- Columbia would argue the ban on use of the facilities is substantially related to an important government purpose.

Maintaining order in the schools. They would need to do more than point to a potential purpose they would need to show the ban is actually related to that purpose. They may try and bring parents as witnesses. But the burden would be high and the State of Columbia

fostering a good solid learning environ.

Case call

would likely lose an Equal protection challenge to the law if reviewed under intermediate scrutiny.

Note- Jordan could also bring a procedural due process claim because the facts do not indicate he was offered the opportunity to a hearing after the expulsion.

## 2) State of Columbia Claims

### Tax and Spend

U.S Congress has the power under Article I section 8 to tax and spend for the general welfare. Congress can also use funding to incentivize conduct as long as the conditions set are not coercive.

Coercive conditions on funding- in order to be legitimate conditions on funding they must be (1) related to the program or purpose, (2) the conditions must be unambiguous, and (3) not so great financially as to be coercive.

Here, Columbia would argue that there is not a sufficient nexus between funding for athletics nondiscrimination policies in schools, The US government would make a persuasive argument that nondiscrimination is essential to a healthy school environment and athletics are part of that environment. The US government would likely prevail in establishing the nexus.

Columbia would argue the conditions are ambiguous because the statute does not specifically reference transgender as a basis for nondiscrimination. The US government would argue, if it was interested in expanding equal protection in the modern era, that transgender is a subset of sex (see argument above). But Columbia has an argument here and the court may go either way.



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The federal statute appears to make all funding contingent, but this may not be fatal because nondiscrimination is such an overriding purpose tied to the funding.

This may be a close call but the Court may agree with Columbia that the condition is ambiguous as to transgender.

✓ Anti commandeering doctrine- Congress can not compel a state to regulate nor can it direct a state to enforce federal policy.

Here Columbia would argue that Congress cannot compel them to enforce a federal policy. But the argument will likely fail.

Conclusion:

If evaluated under intermediate scrutiny Jordan should prevail under equal protection.

Under tax and spend coercion- Columbia may prevail and the enforcement provision could be struck or the funding contingency could be struck. But under equal protection they could not maintain the expulsion or prevent Jordan for using the boys bathrooms and locker room going forward.

**END OF EXAM**

3)

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A. Does State X have the authority to require applicants for a medical license to live within the state?

Article 4, Section 2 provides that citizens of a state shall enjoy the privileges and immunities of citizens of the many states. States are not allowed to discriminate against out-of-state competition if it implicates a fundamental right or economic liberties. This triggers the Privileges and Immunities Clause and requires an analysis of state protectionism, whether a fundamental right or an economic interest has been implicated and whether the state is discriminatory to out-of-state competition. The residency requirement for obtaining a medical license is not facially discriminatory but does have a ✓ discriminatory impact on applicants from out-of-state. Courts will look to see if the requirement is important for a substantial state interest. The doctor from out-of-state is not deprived of a fundamental right but has been deprived of the ability to expand her practice into State X which limits her economic interests. State X will assert that its interest is to provide employment to its own citizens and to bolster the state economy, keep the medical licenses limited to residents of the state who will likely spend their earnings within the state.

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B. Does the President have the authority to order a drone strike in a foreign country and can the President claim executive privilege and or immunity in response to Congress' investigation and subpoena for documents?

The President's executive powers not expressly enumerated in the Constitution are evaluated under the Jacksonian Zones. If Congress express or impliedly authorizes the President, it is likely his action is valid. If Congress is silent as to the action, it is likely



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valid as long as it does not impede or usurp the powers of another branch of government. If the action of the President is in direct conflict with Congress, it may be found to violate his authority as expressed in the Constitution. From the facts provided, if Congress did not declare war, and did not authorize the drone strike, the President may have exceeded his authority by usurping the power of Congress.

Under the War Powers Resolution, Congress authorized the President to enter hostile territories upon 1) a declaration of war, 2) with statutory authority, and 3) if there has been an attack against the US. It does not appear that there was a declaration of war, any statutory authority or a hostile attack against the US. The President may not have been authorized to launch the drone strike.

The President has complete executive privilege and is not required to disclose documents except when it is direct conflict with another branch of government. In *US v. Nixon*, the Court required the President to comply with the subpoena for recordings because he was impeding with the judicial branch's ability to conduct a criminal hearing. Depending on the nature of the investigation, if it is determined that the President is impeded the power of another branch, he may not be able to assert executive privilege. ✓

The President has complete executive immunity for actions taken while acting as President. If Congress is intending to prosecute the President for inadvertently killing the American citizen residing in the foreign country to attend college, it is likely that the President will exercise executive immunity.

**END OF EXAM**