

CONSTITUTIONAL LAW
MIDTERM EXAMINATION
FALL 2020

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EXAM INSTRUCTIONS

This is a four - hour exam. There are two essay questions to be answered in Questions 1 and 2; Questions 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.

Question No. 1

In the aftermath of a virus pandemic in New York City, the U.S. President issued an Executive Order that all medical waste resulting from the pandemic must be examined by federal waste investigators employed by the U.S. Department of the Interior. The President further ordered the States to reimburse the U.S. Government for any additional costs incurred and for the salaries paid to the Federal Investigators assigned to facilities doing business in their state. Congress had recently failed to pass an identical Medical Waste bill by five votes.

The State of New York required all waste from New York City to be shipped to New Jersey for processing pursuant to an interstate compact. New Jersey law imposed a surcharge on the state of New York for “special handling” of processed waste which was to be collected and paid to New Jersey by the processing company. New Jersey also required that all employees processing waste in New Jersey be paid “a living wage” which was \$2.00 per hour higher than the Federal minimum wage and \$1.00 higher than the wages paid to the federal waste investigators assigned to facilities in New Jersey.

WasteCo, the largest processor of New York City Waste operating in New Jersey, was prosecuted in New Jersey State Court for failure to collect and pay the “surcharge” for “special handling” of the medical waste resulting from the New York pandemic, for refusing to allow Federal Waste Investigators to enter its facilities to inspect the medical waste, or to reimburse the U.S. Government for salaries of the Investigators at the “living wage” rate required by New Jersey Law. WasteCo had objected to the Executive Order on grounds that the Executive order was an unconstitutional federal executive mandate, and the “living Wage” law was preempted by federal wage and hour laws. The State of New York filed a separate lawsuit in federal court seeking an injunction to prohibit enforcement of the Executive Order by the United States, raising the same constitutional issues on its own behalf, and citing the 10th Amendment, the Supremacy Clause and the Commerce Clause.

Analyze the Constitutional issues WasteCo can raise in defense to the charges and the issues the State of New York can raise in its Federal injunction lawsuit; analyze the arguments the State and U.S. Attorneys General can make in response. For all issues, state how the U.S. Supreme Court should rule in each case and why.

Question No. 2

In response to the need for more control over the uniform transportation of goods, State A bought Thunder Express Lines (“TEL”). At the time of this purchase, TEL was the largest transportation company in State A, carrying 80% of its freight by rail and long-haul trucking. TEL’s transport rates are generally lower than other shippers. In signing the Act authorizing the purchase of TEL, the governor stated that it would ensure uniform and safe freight service for State A industry. The Act authorizing the purchase of TEL provided that manufacturers with factories in State A shall have first choice of space on all TEL carriers and that State A manufacturers who utilize TEL shall be given reduced insurance rates with their respective State A insurance companies.

Perry, a citizen of State B, which borders State A, grows and harvests oranges in State B for sale to State A. Before its purchase by State A, Perry exclusively used TEL for shipping oranges to his many State A customers. Perry has lost nearly all of his State A customers over the last 3 years because he cannot guarantee timely delivery of oranges because shipping space on TEL is so uncertain.

Juice-Up is a State C company and manufacturer of high-end mixers and fruit juice extraction equipment commonly used in stores like Jamba Juice and Smoothie Land. Juice-Up claims that as a result of Perry’s loss of State A customers and Juice-Up’s difficulty securing space on the TEL carriers, Juice-Up has also experienced a reduction in both sales and lease agreements with State A merchants.

Insurance Co is a State A insurance broker with open and active lines of insurance coverage with many State A merchants who utilize TEL. Perry, Juice-up and Insurance Co have now filed suit in Federal District Court in State A.

1. What claims can Perry make under the United States Constitution and how should the court rule? Your response must address all threshold requirements regarding case and controversy, justiciability and standing to be heard on the merits. Discuss.
2. What claims can Juice-Up make under the United States Constitution and how should the court rule? Your response must address all threshold requirements regarding case and controversy, justiciability and standing to be heard on the merits. Discuss.
3. What claims can Insurance Co make under the United States Constitution and how should the court rule? Discuss

Question No. 3

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

A. Based on reports from the 2016 presidential election that voters of African American descent and voters under 40 years of age suffered discrimination in exercising their rights to vote, Congress enacted a law pursuant to section 5 of the 14th Amendment to the U.S. Constitution requiring that all persons registering to vote in a presidential election identify their date of birth and race on their voter registration so that data can be gathered to monitor discrimination in voting. What Constitutional issues can be raised by a group of voters who were not permitted to vote in the 2020 election after refusing to identify their age and race? Analyze the Constitutional issues and state how the court is likely to rule on them and why.

B. A city zoning ordinance required a permit for any development in the designated "historic area." A developer who owned a large Victorian home in the historic area applied for a permit to convert the house into five rental units, promising investors a 25% return on their investment when the units are completed. The permit was denied on grounds that the development would change the historic character of the neighborhood. The developer sued, alleging that he was deprived of his property because it cannot be developed into rental units. Analyze the constitutional issues the Developer can raise and state how the court is likely to rule on them and why?

*****4*****

MBE SECTION

Please answer the 15 Multistate Bar Exam (MBE) questions in Exemplify. To select the answer which you believe is correct, click on that answer. Use the 'Next' and 'Previous' buttons to navigate between questions. 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.

Question 1

The legislature of State Z is engaged in debates on the question of regulating acupuncturists. A well-respected practitioner of this specialty became enraged during the heated debate and, in a spontaneous outburst, shouted from the balcony that all the legislators in favor of new extremely rigorous licensing requirements for acupuncturists are "pencil-necked, spineless jerks who could use a needle up their bums." The legislators promptly acted in a display of their power to adopt a rigorous licensing law, with a special provision revoking his license to practice as an acupuncturist.

When the acupuncturist challenges the revocation of his license, what is the most likely result?

- (A) This is an invalid action in violation of his privileges and immunities under Article IV, Section 2.
- (B) This is invalid, because it deprives him of the right to engage in interstate commerce.
- (C) This is a bill of attainder, and therefore invalid.
- (D) This is valid, because a license is only a privilege, and thus there is no right to procedural due process.

Question 2

In order to preserve and manage the number of fish in state offshore waters, a state legislature passed a law that required all persons who wished to fish in the state's territorial waters to obtain a fishing license. A resident commercial fishing license cost \$500, a nonresident commercial fishing license cost \$5,000, a resident recreational fishing license cost \$5, and a nonresident recreational fishing license cost \$25. Several nonresident commercial and recreational fishermen filed suit to enjoin the operation of the fishing license law, contending that the law violated the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

5

Assuming proper standing, how should the court rule?

- (A) In favor of all plaintiffs.
- (B) In favor of the nonresident commercial fishermen, but against the nonresident recreational fishermen.
- (C) In favor of the nonresident recreational fishermen, but against the nonresident commercial fishermen.
- (D) Against all plaintiffs.

Question 3

State X has a statute, enacted in 1923, that makes criminal "the utterance in any public place of any blasphemy or sacrilege." There have been only a few recorded prosecutions under the 1923 statute. In a speech delivered on a public sidewalk in state X, a citizen complained about local politicians and referred to her city's mayor as being "a goddamned idiot." Based on that speech, she was arrested and charged with violating the 1923 statute's proscriptions.

Which of the following constitutional defenses to this prosecution under the 1923 statute would be the LEAST likely to succeed?

- (A) This statute is vague and, therefore, violates the Fourteenth Amendment's Due Process Clause.
- (B) This statute is an establishment of religion and, therefore, violates the Fourteenth Amendment's Due Process Clause.
- (C) Application of this statute to the citizen denies her equal protection of the laws in violation of the Fourteenth Amendment.
- (D) Application of this statute to the citizen denies her freedom of speech in violation of the Fourteenth Amendment.

Question 4

On October 1, the U.S. Congress enacted a federal statute which, effective November 1, criminalizes the possession, manufacture, and/or dissemination of deadly bacterium (including, but not limited to, anthrax, smallpox, and botulin). On October 15, the FBI arrested a defendant on suspicion that he had mailed letters tainted with anthrax to various U.S. government officials. The defendant was kept in custody for seven days but was never charged or indicted for a specific criminal offense. On October 22, he was released from federal custody.

On December 29, FBI agents arrested the defendant and brought an indictment against him for violating the newly enacted statute. The indictment stemmed from charges that the defendant had mailed letters containing anthrax to two senators on October 10. Before trial, the defendant's attorney filed a motion to dismiss the indictment claiming his constitutional rights were violated.

6

Should the defendant's motion be granted?

- (A) Yes, because the defendant's due process rights were violated because federal authorities delayed filing the indictment for over two months after his initial arrest.
- (B) Yes, because the defendant is being indicted for offenses that occurred before the law went into effect; thus, there is an ex post facto violation.
- (C) No, because the defendant was not charged with violating the statute when he was first arrested.
- (D) No, because the alleged criminal acts occurred after Congress enacted the law.

Question 5

Recently, a privately owned and operated television company applied for a permit to provide cable television service to residents of a city. By a vote of 9 to 3, the city council approved the television company's application and granted a permit for a city franchise.

After this, a man subscribed to the television company, who then installed cable service at the man's home. For the next four months, the man promptly paid the monthly charge for the cable service. The man was then fired from his job, however, and failed to pay the cable bill for the next two months. Without notifying the man, the company subsequently removed its cable television lines to his home pursuant to the company's policy of terminating service to any customer who failed to pay their bill for two consecutive months. The man was unaware of this policy.

The man subsequently brought suit against the company in federal court seeking an order restoring his cable service. The man's suit was based solely on the ground that the television company's failure to grant the man a hearing before disconnecting his cable service violated his due process rights under the Fourteenth Amendment.

Who should the federal court rule in favor of?

- (A) The television company, because the ownership of a city franchise is not sufficient state action to make the franchisee subject to the Fourteenth Amendment.
- (B) The television company, because the ownership of a city franchise allows the franchisee to assert successfully the city's sovereign immunity under the Eleventh Amendment.
- (C) The man, because under the Fourteenth Amendment, a person may not be deprived of a valuable property right without notice or an opportunity for a hearing.
- (D) The man, because a business operating under a city franchise is effectively within the public interest, and, therefore, it is subject to constitutional requirements of procedural due process.

Question 6

Congress passed a law creating the Federal Pet Food Agency, which was empowered to oversee the safety and nutritional value of pet food sold in the United States. The statute authorized the agency to interpret regulations promulgated under existing laws. The statute also empowered the agency to issue "cease and desist" orders to pet food manufacturers who flagrantly or intentionally flouted the regulations promulgated by the agency. Violation of the cease and desist orders were made punishable by fine or imprisonment. Finally, the statute provided that the president would nominate five members to the agency, the Senate would nominate three members, and the Speaker of the House would nominate two members.

What is the strongest argument against the constitutionality of the statute?

- (A) Congress may not usurp the constitutional authority of the president to nominate officers to an agency with administrative powers.
- (B) The statute failed to state whether the members of the agency had to be confirmed by the Senate.
- (C) The statute failed to provide for a removal process for members of the agency.
- (D) The members of the agency were inferior officers, and, as such, Congress did not have the authority to delegate the appointment power to the president.

Question 7

Congress passed a bill empowering the Federal Bureau of Investigation to conduct surveillance on any person in America without a warrant. The statute also contained an appropriation for the purchase of additional surveillance equipment necessary to effectuate the purpose of the statute. The day after the passage of the bill, a taxpayer filed a complaint in district court, challenging the constitutionality of the statute. The complaint alleged that the statute violated the Fourth Amendment prohibition against unlawful searches. Within ten days of the passage of the bill, the President vetoed the bill, and Congress did not override the veto.

How should the district court rule on the taxpayer's complaint?

- (A) The district court should find the statute unconstitutional, because it violated the Fourth Amendment prohibition against unlawful searches without obtaining a warrant.
- (B) The district court should dismiss the complaint, because the taxpayer did not have standing.
- (C) The district court should dismiss the complaint, because the case was not ripe for adjudication.
- (D) The district court should dismiss the complaint, because the case was moot.

8

Question 8

A male student in a private school had long hair, which was permitted under the school's rules. However, when the administration at the school changed, the new administrator promulgated a rule that restricted the length of a male student's hair. The parents of the student sued to enjoin the school from enforcing its policy as to their son. The complaint included a prayer for attorney's fees. However, before the case could be heard in court, the student graduated. The school filed a motion to dismiss the case as moot.

How should the court rule on the motion to dismiss?

- (A) Motion granted, because the controversy was resolved by the graduation of the student.
- (B) Motion granted, because the graduation of the student removed any real threat of harm.
- (C) Motion denied, because the matter of attorney's fees was still at issue.
- (D) Motion denied, because the male student had third party standing to raise the rights of those similarly situated.

Question 9

On the last day of its legislative session for 2020, a state legislature enacted a statute, effective January 1, 2021. It provided that, because all-natural ingredients were more healthful than artificial ingredients, all movie theaters had to use real butter, rather than hydrogenated oils or powdered butter substitutes, on popcorn sold in the state's movie theaters. The governor signed the bill into law. On November 1, 2020, an association of movie theaters in the state filed a complaint in state court challenging the constitutionality of the newly enacted statute.

What is the state's best argument for dismissal of the complaint?

- (A) The statute is constitutional, because it is within the police power of a state to enact legislation for the health, welfare, and safety of its citizens.
- (B) The association did not have proper third-party standing.
- (C) The matter was not ripe for adjudication.
- (D) The complaint, in essence, asked for an advisory opinion, which state courts are not allowed to render.

9

Question 10

The United States has had troubled financial relations with a country in Asia. In order to facilitate an improved diplomatic relationship with this Asian country, the United States President entered into an executive agreement with the Asian country which forgave the country's outstanding debts with the United States. The President did this without the advice or consent of the Senate. The Senate is upset that it was not consulted regarding the cancellation of this debt.

Was it proper for the President to enter into the executive agreement?

- (A) No, because the executive agreement is a treaty.
- (B) No, because executive agreements require the participation of the Senate.
- (C) Yes, because the Senate has no authority over the conduct of international affairs.
- (D) Yes, because executive agreements do not require participation of the Senate.

Question 11

An executive order by the president is least likely to withstand constitutional scrutiny if issued under which of the following circumstances?

- (A) Following a report by the U.S. General Accounting Office that federal agencies are routinely leasing or purchasing SUVs with low gas mileage and substandard pollution control systems resulting in 20 percent higher maintenance costs, the executive order of the president mandates that all agencies lease or purchase from a list of approved vehicle types and manufacturers.
- (B) Following the crash of a foreign airline commercial jet in international waters off the U.S. coast, the executive order of the president commands the deployment of naval and coast guard vessels in the area to the crash site for a search and recovery mission as requested by foreign government officials.
- (C) On the basis of continuing disregard of international law by a foreign nation on which the United States has imposed sanctions for the last 15 years, the executive order of the president cancels a vaccination program Congress approved for the foreign nation at the time sanctions were imposed to reduce malaria deaths in the region.
- (D) On the basis of a terrorist threat communicated to the CIA, the executive order of the president commands that all U.S. embassies in the affected regions be evacuated indefinitely and the diplomats and their dependents return stateside to await developments.

Question 12

An increase in rabies among wild animals on both sides of the border has gotten to a point where United States and Mexican officials find it necessary to take government action. The United States and Mexico appoint a joint commission to determine what action the countries should take. The U.S. president signs an executive agreement authorizing the commission to promulgate regulations and to enforce and adjudicate the regulations against the United States and Mexico. The commission consists of four members, two appointed by each country's president.

The president's entry into an executive agreement with a foreign nation is

- (A) Unconstitutional absent approval by a two-thirds vote of the Senate.
- (B) Unconstitutional, because the agreement addresses environmental affairs, not international relations.
- (C) Constitutional under the president's plenary power to conduct international relations.
- (D) Constitutional under the president's unlimited power to make executive agreements.

Question 13

A shipping company owned a fleet of trucks of varying dimensions and weight capacities. The most lucrative portion of the company's business was transporting granite and marble slabs. For these jobs, the company used its largest vehicles, which were 52-foot semi-trailer trucks. To address a rising rate of traffic violations caused by large trucks, Congress passed a regulation that prescribed a maximum length of 48 feet for all freight trucks used in a commercial setting. When the shipping company was cited for violating the new regulation, it filed a federal action challenging the regulation's constitutionality.

Which of the following is the most likely disposition of the shipping company's lawsuit?

- (A) The company will prevail, because the regulation violates the Tenth Amendment.
- (B) The company will prevail, because the regulation violates the dormant Commerce Clause.
- (C) The company will lose, because the regulation governs a channel of interstate commerce.
- (D) The company will lose, because the regulation governs an instrumentality of interstate commerce.

Question 14

A city applied for and received \$5 million in federal funding for the construction of an artistic facility in the inner city. The funds were granted pursuant to a federal statute providing grants for artistic facilities within the inner city. An appropriate site was chosen for the facility, and the city council earmarked \$4 million for the project. At the same time, the council set aside \$1 million of the grant to enhance waterfront property for use by the general public by adding walkways, gardens, a small park, and a kiosk that sold water, umbrellas, and parasols. The funds from the kiosk are to be channeled back into the inner city artistic site. The artistic facility site was one mile inland from the waterfront property, which was accessible from the inner city by a system of subways and sidewalks. The council, in making its allocation of the federal funding, determined that its plan promoted the health and recreation of the general public. The federal government disputed the allocation of funds and succeeded in having the funds frozen after arguing in federal court that the council's plan was in violation of the terms of the grant. The city files a motion with the federal court seeking release of the funds so that the plan can be implemented as conceived by the council.

At the federal court hearing on the city's motion, what is the most likely result?

- (A) The city will not prevail, because the federal government has power to condition receipt of the funds on the recipient's conformance to federal regulations.
- (B) The city will not prevail, because the doctrine of state sovereignty is inapplicable to an action between a local governmental body and the federal government.
- (C) The city will prevail, because the city's plan for construction of artistic facilities substantially complies with the terms of the federal grant.
- (D) The city will prevail, because federal intervention in implementation of the city's artistic facilities plan violates state sovereignty.

Question 15

With consumer interest in health-related products creating a huge market in herbal drinks and tablets, Congress passed consumer protection legislation entitled the Herbal Health Aid Safety and Labeling Act requiring proper labeling of all products sold as herbal health aids. The Act also makes mislabeling of ingredients a crime punishable by up to five years in federal prison and requires stringent production methods to prevent the adulteration of ingredients. The regulations create a one percent tax on all herbal health products covered by the Act, to go to the Food and Drug Administration (FDA) for health-education programs for the general public.

A health-food and health-aid store operates solely within the state. The store owner is a member of a health-food and health-aid store trade association, which promotes education and legislation about nutrition, health, and homeopathic treatment of disease. The store owner challenges the tax on constitutional grounds.

12

In federal court, the store owner is most likely to

- (A) Not prevail, because the tax is within federal authority under the Supremacy Clause.
- (B) Not prevail, because the tax is within the congressional power to raise revenue.
- (C) Prevail, because the tax infringes the constitutional right of all consumers to privacy.
- (D) Prevail, because the tax affects intrastate commerce as well as interstate commerce in health-related consumer products.

13

Constitutional Law – Fall 2020 Midterm Exam QUESTION 1 – OUTLINE ANSWER

- United States v. Wasteco
 - Justiciability
 - Standing: Injury? (prosecution: risk of criminal penalties for violating unconstitutional law, but can Co. raise if state agrees?); Traceable to Gov't? (caused by Executive Order); Redressable? (by court Judgment)
 - Ripe: Case and controversy exists – prosecution
 - Not moot: still current controversy
 - Unconstitutional Executive Order
 - Beyond President's executive Powers per Article II : contrary to Congressional intent (Identical legislation failed) executive power is at "lowest ebb"
 - Congress has exclusive power to regulate interstate commerce and to tax
 - President cannot regulate disposal of waste interstate by executive order;
 - President has no power to impose tax for salaries of Inspectors
 - President cannot "commandeer" state to enforce federal laws (Printz, US v. NY) But: here New Jersey chose to comply with Ex. Order.
 - Note: Taking of property is not an issue: No possessory or regulatory taking of property by ordering access for inspectors.
 - New Jersey Laws are unconstitutional and unenforceable
 - Surcharge violates Dormant Commerce clause: not discriminatory on face but affects commerce (see below: Pike Balancing test),
 - New Jersey "living wage" law is preempted by federal wage law applying to federal investigators (see below)
 - Conclude: How will Supreme Court Rule and why?
- New York v. United States
 - Justiciability:
 - Standing: Injury? (must pay unconstitutional tax - reimbursement); Traceable to state? (caused by Executive Order, New Jersey Laws); Redressable? (Court injunction, money Judgment)
 - Ripe: Case and controversy exists re legitimacy of tax payment
 - Not Moot: still current controversy
 - Unconstitutional Executive Order (see above)
 - Even if New Jersey is willing to comply, New York objects to "commandeering" by President to enforce the Executive Order
 - Note: Impairment of Contract NOT an issue: Art. I section 10 applies only to states, not federal government
 - Preemption: Supremacy Clause Art. VI
 - Federal Law: Minimum wage and federal employees' salaries set by federal laws Is state law adding to or interfering with federal wage laws preempted?
 - Conflicts: can NY comply with both state and federal law? No: NY cannot comply with state living wage and also reimburse pay under federal law.

- Impede Federal objective? Possibly: Does state tax impede? (Federal objective is totally different from state's objective, not related if state pays more)
 - Federal law occupies the field? Probably not: "Field" is different, and many states have higher wage rate laws
 - Commerce Clause: Dormant CC Art. I Section 8
 - State Law imposing surcharge is Not Discriminatory on its face: treats in-state and out of state businesses alike by taxing all who have special processing
 - Does state law unduly burden commerce? Imposes tax on out of state businesses to fund handling only for state's business, discourages interstate commerce if businesses try to avoid tax etc. but: is this burden undue?
 - *Pike* Balancing test: does burden on commerce outweigh benefits to state of having reparations law fully funded?
 - Due Process Clause 14th Amendment
 - State's taxing power: Did of New Jersey exceed its power by special handling tax or Living Wage law? Apply rational basis test
 - Is taxing businesses based on how waste is processed rationally related to a legitimate state interest?
 - Is taxing out of state businesses to pay wage reimbursements to enforce (unconstitutional federal)law rationally related to a legitimate state interest?
- Conclusions: How will the Supreme Court Rule and why

Constitutional Law 2020 Midterm Exam Outline Answer Question 2 **ISSUE OUTLINE /**
ANTICIPATED DISCUSSION Question No. 2 — Con Law Midterm 2020

There are three potential aggrieved parties in this question; Perry (Rog #1), Juice-Up (Rog #2) and Insurance Co. (Rog # 3). There are some nuanced differences relative of Case & Controversy (specifically “Standing”) among the three plaintiffs/potential aggrieved parties.

Rog #1 (Perry’s Claims)

State A’s Purchase of TEL / Dormant Commerce Clause Implicated (DCC)?

Threshold Case & Controversy

Perry has suffered a direct injury in fact in the form of economic damages resulting from loss of customers. Here, Perry would meet the threshold requirement of **standing**. Perry’s claims of economic harm and business disruption would qualify as a **direct injury in fact**. Moreover, there is a **causal connection** between the impact of the State A Governor’s actions (the imposition of The Act) and Perry’s alleged harm. It would also appear that if the court were to intervene, the harm suffered would be **redressable**, meaning that the court could fashion a remedy (i.e., deem it violative). If Perry asserted challenges to the Act, the court would deem the matter to be **ripe**, as it appears to be a live or ongoing controversy or harm. Perry’s challenge or claim would not be deemed **moot**.

Perry would assert that State A’s Act is in violation of the DCC, the Privileges & Immunities Clause and the Contracts Clause.

The Commerce Clause; Article I Section 8 (Clause 3) allows Congress to “regulate commerce with foreign nations and among the several states, and with Indian Tribes,…”

State A may also regulate commerce so long as Congress has not regulated in the specific subject area. The facts do not state that Congress has occupied the field of transportation.

Students should find that State A may engage in this regulation. The action next turns on the issue or **discrimination (facial and/or neutral, yet discriminatory as applied)**. Here, the Act seems to favor State A manufacturers by giving them first choice (**the is preferential treatment**) of space on all TEL carriers.

The Act appears to have as its purpose, **protectionism-based motives**. The court would place the burden on State A to justify the purpose and basis of the Act. Students are expected to discuss **facial discrimination** first. As a State B citizen and company (logical inference), Perry will assert that the Act is facially discriminatory, as it favors State A to the detriment of State B. State would counter that the language of the Act does not specifically single-out State B as inferior or unworthy. Is the “first choice of space, …provision the **least restrictive means** of fostering State A’s alleged purpose (ensuring uniformity and safe freight service)? This is a point of contention and worthy of discussion (**analysis**).

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Is the Act facially neutral, yet discriminatory as applied? This would be the alternative discussion and form of discrimination. Standard and burden is **important government interest**.

Is State A acting as a "Market Participant?" What facts support this theory?

Privilege and Immunities Clause (Art. IV Section 2)

This overlaps with DCC. Perry's Fundamental Rights and Civil Liberties may have been violated.

Contracts Clause (Art. I Section 10)

A logical inference can be made that Perry has active/ongoing contracts and business agreements in place with State A businesses/residents. This raises the issue of **Government interference with Private Contracts**

Rog #2 (Juice-Co's Claims)

Juice-Co will assert the same claims as Perry. The twist here is Juice-Co's **standing and cognizable injury**. Juice-Co appears to be tacking-on and bootstrapping Perry's claimed harm. Has Juice-Co actually suffered a **direct injury in fact**? This may also raise a **ripeness issue**. Are Juice-Co's damages **speculative** in nature?

Rog #3 (Insurance Co's Claims)

The main issue here is **State A's interference with Contract / Prospective economic advantage**. The **Contracts Clause** is once again implicated. There is also a **mootness/ripeness** issue, as Insurance Co's claims may be deemed speculative.

Constitutional Law 2020 Midterm Exam Outline Answer Question 3

- A. Congress Power: Remedial Powers under 14th Amendment section 5 requires current data per *Shelby Count v. Holder*, and congruence and proportionality per *City of Boerne v. Flores*. Arguably neither is present here. Can Congress use remedial power to gather data? Is requirement for all to disclose age and race disproportionate to remedy unconstitutional acts? Equal Protection: 5th and 14th Amendments. Discrimination on face of legislation? Arguably yes, since race must be identified but statute applies to everyone and is not itself discriminatory. If discriminatory based on race, apply strict scrutiny (compelling interest, narrowly tailored); If discriminatory based on age, apply rational basis (rationally related to legitimate state interest); (Note: Fundamental right to vote and right to privacy are raised but not covered in first semester.)
- B. Taking: Regulatory, not possessory, taking through zoning is allowed as long as it does not deprive the owner of all beneficial use; diminished value is not a taking. (*Lucas*). Apply *Penn Central* test: Economic impairment, investment-backed expectations, character of government action. Apply *Nollan/Dolan* rough proportionality test: nexus between state interest and conditions imposed.
- C. MBE Questions: refer to Answers on form MBE

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1)

Westco

Dormant commerce clause

Does NJ surcharge violate the dormant commerce clause?

State and local laws will be found to be unconstitutional if they place an undue burden on interstate commerce. If congress has not enacted law regarding the subject a state or local govt may regulate local aspects of interstate commerce if the regulation 1) does not discriminate against out of state competition to benefit local economic interest, and 2) is not unduly burdensome.

If a regulation is found to be discriminatory against interstate commerce it is generally invalid unless it falls into one of 3 exceptions, 1) necessary to an important state interest, 2) the state is a market participant, 3) favors government performing a traditional government function.

NJ law discriminates against out of state waste .

Supremacy Clause

Does the New Jersey Law requiring employees processing waste be paid a living wage at \$2 higher than federal minimum wage violate the supremacy clause?

Federal law is supreme law of the land. Where there is conflict between state and federal law the Supremacy Clause states the federal law will preempt state law and state law must yield. Preemption is determined by examining Congress's intent. Federal law expressly provides that state may not adopt law concerning the subject matter of federal legislation. Even if federal law does not expressly prohibit state action a state law will be held impliedly preempted if it 1) actually conflict with federal requirements, or 2) prevent the achievement of federal objectives, or 3) Congress has preempted the entire field.

Westco will argue that the state minimum wage requirement directly conflict with the federal minimum wage. A valid act of Congress of federal regulation supersedes any state action that actually conflicts with federal rule by either commanding inconsistent conduct or forbidding conduct that the federal rule is designed to foster. In the present matter the federal minimum wage is meant to ensure that employees can earn a fair living, the new Jersey minimum wage law is not inconsistent with the Federal rule

New York v. U.S.

May New York bring an action in federal court to enjoin the executive order?

The authority for judicial review is vested in Article 3 of the Constitution which gives the Judicial branch the authority to hear all cases and controversies. In order for a federal court to hear a case the 5 justiciability doctrines must be met, standing, ripeness, mootness, abstention and prohibition of political question.

Does the President have the Executive Power to issue the Executive Order?

Article II section 3 of the Constitution stated that the president shall take care that the laws are faithfully executed and section 2 stated the President is the commander in Chief. The Executive Branch has only those powers which the Constitution grant to it either expressly or impliedly. When determining if the president has the inherent power to act the court must examine the three zones of executive authority as expressed in *Youngstown*. The president acts with maximum authority when the president acts with the express or implied authority of Congress and his acts are likely to be found to be valid, secondly the president acts with intermediate authority when he act when Congress is silent and his actions will be upheld as long as the act does not take over power of another branch or prevent another branch from action, and thirdly the lowest ebb when the president acts against the express will of Congress or the Constitution and his action are likely to be invalid.

The President's actions in executing the Executive Order appear to fall in the lowest ebb of authority. Congress had recently failed to pass an identical Medical Waste bill as that of the Executive Order. Congress made their stance known by rejecting the legislation related to medical

waters. By issuing the Executive Order the President is going against the express will of Congress.

The Court will find the Executive Order is Unconstitutional.

Does the Executive Order violate the 10th Amendment

The 10th Amendment limits the federal power by providing that any power not expressly granted to the federal government is reserved to the states. The states in their sovereignty cannot be forced to follow or enforce federal regulations, however they may not prevent the federal government from enforcing them.

The Executive order seeks to require all states to have their medical waste examined by the federal waste investigators. The Federal government is forcing the states to enforce the federal regulation related to medical waste, additionally the Executive order requires the states to reimburse the Federal government for the salaries paid to the waste investigators.

The federal government attempt to control state action with its spending power by conditioning the receipt of federal funds received by the state.

Does the executive order violate the Commerce Clause?

Article I section 8 of the constitution gives Congress the plenary power to regulate commerce with foreign nations, and among the several states and with Indian tribes. Congress may regulate the channels of interstate commerce, instrumentality and activities of commerce. Congress may regulate the activity of interstate commerce that itself or in combination with other activities has a substantial economic effect upon or effect on movement in interstate commerce.

The executive order is seeking to regulate an activity of interstate, the disposal of medical waste. Congress may regulate economic activity whether carried on in one state may if it has a substantial effect upon interstate commerce.

END OF EXAM

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PERRY

JUSTICIABILITY

The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have judicial power over all cases and controversy. In order for a federal court to hear a case, justiciability must be met. Justiciability is comprised of five elements: 1) Standing; 2) Ripeness; 3) Mootness; and 5) No political questions.

Personal Standing

Article III requires that a plaintiff must show: 1) An injury in fact 2) caused by the defendant that is 3) redressable by the court.

1. Injury: A plaintiff must allege and prove that Plaintiff has personally been injured or imminently will be injured.

Here, Perry has a concrete and specific injury, the loss of its sales and lease agreements.

2. Causation: Under the element of causation, the plaintiff must allege and prove a casual connection between the injury, traceable to the defendant's conduct.

Here, Perry's losses are directly traceable to the Act because they stem from Perry's limited access to TEL's transport services and is unable to sell his harvests of oranges to costumers in State.

3. Redressability: Under redressability, Plaintiff must allege and prove that a favorable court ruling is likely to remedy and redress the harm suffered.

Finally, if the Act is declared unconstitutional on any of the asserted grounds, there is no longer a requirement that TEL provide manufactures with factories in State first choice of space on all TEL carriers. Therefore, Perry's limited transportation capacity will once again increase and his sales to State will continue at full capacity. Thus, Perry's injury asserted will be solved.

The court will most likely find that Perry has standing to bring his claims.

Ripeness

A federal court will not consider a claim before it has fully developed. For a case to be ripe for litigation, the plaintiff must have experienced an actual injury or an imminent threat of actual injury. In addition, the court may grant pre-enforcement review of a statute or regulation by applying a two part test to analyze if both the fitness of the issue for judicial decision and hardship of the parties are present.

Here, Perry has already suffered injury as he has lost both sales and lease agreements with State A merchants and the issue and record is ready for judicial review.

Thus, the court will most likely find that the case is ripe.

Mootness

A live controversy must exist at all states of litigation, not merely when the complaint is filed. If the matter has already been resolved, the case will be dismissed as moot.

Here, a live controversy exists as Perry is still suffering an injury and the Act has not been overruled.

Thus, Perry's claim is not moot.

Political Questions

A federal court will not decide on a matter in controversy if the matter is a political question to be resolved by one or both of the two other branches of government.

There is no political question presented.

THE COMMERCE CAUSE (DORMANT COMMERCE CLAUSE)

Congress has the power to legislate in the area of interstate commerce. However, if Congress has not acted a state or local government may regulate local aspects of interstate commerce to protect the health, safety, and welfare of its citizens, unless the state or local laws discriminate against out-of-staters or place an undue burden on interstate commerce. The court will look to see if the state regulation discriminates facially (intentionally) against interstate commerce. If so, it is virtually per se invalid. If the state regulation does not discriminate intentionally against interstate commerce, it is given greater deference by the court. If a state regulation regulates evenhandedly to effectuate a

legitimate public interest, then the court will balance the state's interest against its burden on interstate commerce.

Here, State A signed an Act authorizing the purchase of TEL, which also provided that manufacturers with factories in State A shall have first choice of space on all TEL carriers and that State A manufacturers who utilize TEL shall be given reduced insurance rates with their respective State A insurance companies. The Act on its face does not appear to be discriminatory.

Even if State A's Act is not discriminatory, it can still violate the dormant commerce clause if the state Act places an undue burden on interstate commerce that outweighs the law intended to benefit. State A bought TEL and passed the Act in response to the need for more control over the uniform transportation. While a state's interest in controlling the uniform transportation of goods is a legitimate interest, it is purely economic. The courts have stated that a state may be interested in protecting its economy, but it may not do so by placing an undue burden on interstate commerce. State A's Act calls for preferential treatment of manufacturers with factories in State A. As a result, manufacturers and growers in other states have to compete for space on TEL carriers. TEL carriers is the largest transportation company in State A and carries 80% of its freight by rail and long-haul trucking. Perry, who exclusively used TEL for shipping oranges to his many State A customers, lost nearly all his State A customers because he cannot guarantee timely delivery of oranges because shipping space on TEL is so uncertain. Similar to Perry, other States will suffer similar injuries with customers in State A.

While the benefit of gaining control over the uniform transportation of goods is crucial to State A, the court will find that there are other less restrictive means available.

Therefore, Perry will be successful in its assertion that the State A Act violated the dormant commerce clause.

TENTH AMENDMENT

The 10th Amendment provides that any powers not delegated to the US, nor prohibited to the states, are reserved to the state or the people.

While State A may regulate interstate commerce, it may not interfere with interstate commerce.

10th Amendment does not apply.

CONTRACTS CLAUSE

Article 1, Section 10 of the Constitution forbids states from making laws impairing obligations of contracts. The Contracts Clause does not limit the ability of the government to regulate the terms of future contracts; it applies only if the state or local government is interfering with performance of already existing contracts. The clause applies to both private and public contracts.

The facts indicate that Perry has lost nearly all of his State A customers over the last three years. Perry will argue that he had existing Ks (either public or private) to sell his oranges in State A at the time the Act was passed, and his rights were substantially impaired by the Act due to the cost and burden of not securing shipping space. State A will argue that although the Act does allow manufacturers in State A to have first choice, the Act is necessary to gain control over the uniform transportation of goods. However, there are other alternatives to reaching the interest.

Perry is most likely to succeed under the Contracts Clause.

PRIVILEGES AND IMMUNITIES CLAUSE

Perry will also make a claim under the Privileges and Immunities Clause (PIC). The Privileges and Immunities Clause states that no state may discriminate against nonresidents with respect to privileges and immunities of citizens in the several states. If a state or local law discriminates against out of state residents concerning their fundamental rights without substantial justification, then it is a violation of the PIC.

Here, Perry will argue that the Act impairs his ability to do business in State A. Because State A limits the ability of other States to ship to State A customers, Perry is restricted in his abilities to earn a living and will continue to suffer economic harm.

The court may find Perry successful in his PIC claim.

JUICE UP

JUSTICIABILITY

The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have judicial power over all cases and controversy. In order for a federal court to hear a case, justiciability must be met. Justiciability is comprised of five elements: 1) Standing; 2) Ripeness; 3) Mootness; and 5) No political questions.

Personal Standing

Article III requires that a plaintiff must show: 1) An injury in fact 2) caused by the defendant that is 3) redressable by the court.

1. Injury: A plaintiff must allege and prove that Plaintiff has personally been injured or imminently will be injured.

Here, JUICE UP has a concrete and specific injury, the loss of its sales and lease agreements with State A merchants.

2. Causation: Under the element of causation, the plaintiff must allege and prove a casual connection between the injury, traceable to the defendant's conduct.

Here, Juice Up's losses are directly traceable to the Act because they stem from Perry's loss of State A customers and Juice Up's difficulty in securing space on the TEL Carriers, as well as a reduction in both sales and lease agreements.

3. Redressability: Under redressability, Plaintiff must allege and prove that a favorable court ruling is likely to remedy and redress the harm suffered.

Finally, if the Act is declared unconstitutional on any of the asserted grounds, there is no longer a requirement that TEL provide manufactures with factories in State first choice of space on all TEL carriers. Thus, Juice-Up's injury asserted will be solved.

The court will most likely find that Juice Up has standing to bring his claims.

Ripeness

A federal court will not consider a claim before it has fully developed. For a case to be ripe for litigation, the plaintiff must have experienced an actual injury or an imminent threat of actual injury. In addition, the court may grant pre-enforcement review of a statute or regulation by applying a two part test to analyze if both the fitness of the issue for judicial decision and hardship of the parties are present.

Here, Juice-Up has already suffered injury as he has lost both sales and lease agreements with State A merchants and the issue and record is ready for judicial review.

Thus, the court will most likely find that the case is ripe.

Mootness

A live controversy must exist at all states of litigation, not merely when the complaint is filed. If the matter has already been resolved, the case will be dismissed as moot.

Here, a live controversy exists as Juice Up is still suffering an injury and the Act has not been overruled.

Thus, Juice Up's claim is not moot.

Political Questions

A federal court will not decide on a matter in controversy if the matter is a political question to be resolved by one or both of the two other branches of government.

There is no political question presented.

THE COMMERCE CAUSE (DORMANT COMMERCE CLAUSE)

Congress has the power to legislate in the area of interstate commerce. However, if Congress has not acted a state or local government may regulate local aspects of interstate commerce to protect the health, safety, and welfare of its citizens, unless the state or local laws discriminate against out-of-staters or place an undue burden on interstate commerce. The court will look to see if the state regulation discriminates facially (intentionally) against interstate commerce. If so, it is virtually per se invalid. If the state regulation does not discriminate intentionally against interstate commerce, it is given greater deference by the court. If a state regulation regulates evenhandedly to effectuate a legitimate public interest, then the court will balance the state's interest against its burden on interstate commerce.

Here, State A signed an Act authorizing the purchase of TEL, which also provided that manufacturers with factories in State A shall have first choice of space on all TEL carriers and that State A manufactures who utilize TEL shall be given reduced insurance rates with their respective State A insurance companies. The Act on its face does not appear to be discriminatory.

Even if State A's Act is not discriminatory, it can still violate the dormant commerce clause if the state Act places an undue burden on interstate commerce that outweighs the law intended to benefit. State A bought TEL and passed the Act in response to the need for more control over the uniform transportation. While a state's interest in controlling the uniform transportation of goods is a legitimate interest, it is purely economic. The courts have stated that a state may be interested in

protecting its economy, but it may not do so by placing an undue burden on interstate commerce. State A's Act calls for preferential treatment of manufacturers with factories in State A. As a result, manufacturers and growers in other states have to compete for space on TEL carriers. TEL carriers is the largest transportation company in State A and carries 80% of its freight by rail and long-haul trucking. Perry, who exclusively used TEL for shipping oranges to his many State A customers, lost nearly all his State A customers because he cannot guarantee timely delivery of oranges because shipping space on TEL is so uncertain. Consequently, State A's Act affected interstate commerce as Juice Up a State C company and manufacturers of high-end mixers and fruit juice extraction equipment was also affected. Juice Up has also experienced a reduction in both sales and lease agreements with State A merchants.

While the benefit of gaining control over the uniform transportation of goods is crucial to State A, the court will find that there are other less restrictive means available.

Therefore, Juice Up will be successful in its assertion that the State A Act violated the dormant commerce clause.

TENTH AMENDMENT

The 10th Amendment provides that any powers not delegated to the US, nor prohibited to the states, are reserved to the state or the people.

While State A may regulate interstate commerce, it may not interfere with interstate commerce.

10th Amendment does not apply.

CONTRACTS CLAUSE

Article 1, Section 10 of the Constitution forbids states from making laws impairing obligations of contracts. The Contracts Clause does not limit the ability of the government to regulate the terms of future contracts; it applies only if the state or local government is interfering with performance of already existing contracts. The clause applies to both private and public contracts.

The facts indicate that Juice Up has also experienced a reduction in both sales and lease agreements with State A merchants. Juice UP will argue that he had existing Ks (either public or private) to sell equipment in State A when the Act was passed, and Juice Up's contracts were substantially impaired by the Act due to the cost and burden of not securing shipping space. State A

will argue that although the Act does allow manufacturers in State A to have first choice, the Act is necessary to gain control over the uniform transportation of goods. However, there are other alternatives to reaching the interest.

Juice Up is most likely to succeed under the Contracts Clause.

PRIVILEGES AND IMMUNITIES CLAUSE

Juice Up will also make a claim under the Privileges and Immunities Clause (PIC). The Privileges and Immunities Clause states that no state may discriminate against nonresidents with respect to privileges and immunities of citizens in the several states. If a state or local law discriminates against out of state residents concerning their fundamental rights without substantial justification, then it is a violation of the PIC. However, PIC protects US citizens, and corporations and aliens are not permitted to bring claims under PIC.

Here, Juice Up is a corporation and will not allowed to bring a PIC claim.

INSURANCE CO

JUSTICIABILITY

The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have judicial power over all cases and controversy. In order for a federal court to hear a case, justiciability must be met. Justiciability is comprised of five elements: 1) Standing; 2) Ripeness; 3) Mootness; and 5) No political questions.

Personal Standing

Article III requires that a plaintiff must show: 1) An injury in fact 2) caused by the defendant that is 3) redressable by the court.

1. Injury: A plaintiff must allege and prove that Plaintiff has personally been injured or imminently will be injured.
 2. Causation: Under the element of causation, the plaintiff must allege and prove a casual connection between the injury, traceable to the defendant's conduct.
 3. Redressability: Under redressability, Plaintiff must allege and prove that a favorable court ruling is likely to remedy and redress the harm suffered.
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Here, Insurance Co. is a State A insurance broker with open lines and active lines of insurance coverage with many State A merchants who utilize TEL. The Act allows for State A manufacturers who utilize TEL be given reduced insurance rates with their respective State A insurance companies. Insurance Co will allege that he has been injured because they have lost money as a result of offering reduced insurance rates. However, it is likely that as a result of the uniform transportation of goods in State A insurance Co has gotten more clientele. Regardless, the facts are silent as to whether Insurance Co. has suffered any injuries that can be redressed with the court.

As a result, the court may find that Insurance Co. has no standing to sue.

Ripeness

A federal court will not consider a claim before it has fully developed. For a case to be ripe for litigation, the plaintiff must have experienced an actual injury or an imminent threat of actual injury. In addition, the court may grant pre-enforcement review of a statute or regulation by applying a two part test to analyze if both the fitness of the issue for judicial decision and hardship of the parties are present.

Here, the facts are silent as to whether Insurance Co. has suffered any injuries and the case may not be ripe to bring suit.

Mootness

A live controversy must exist at all states of litigation, not merely when the complaint is filed. If the matter has already been resolved, the case will be dismissed as moot.

Here, the facts are silent as to whether a live controversy exists and Juice Ups case may be moot.

Political Questions

A federal court will not decide on a matter in controversy if the matter is a political question to be resolved by one or both of the two other branches of government.

There is no political question presented.

END OF EXAM

3)

A) VOTER ID LAW

EQUAL PROTECTION

The Equal Protection clause of the 14th amendment provides that no state shall deny any person within its borders the equal protection of the law. Government action that discriminates based on a suspect classification concerning a fundamental right must meet strict scrutiny. Non suspect and non fundamental right discrimination must meet the rational basis test. A law will be upheld under strict scrutiny if it is narrowly tailored and necessary to advance a compelling state interest. The law must not be overly broad, nor unduly inclusive.

Here, the law requires all individuals to provide their DOB and race on their voter registration, which suggests that the law is not discriminatory on its face. Which means, the plaintiffs may still bring an EPC claim if they can show that the facially voter ID law was discriminatory in its application and had a discriminatory motive. The government will argue that there was not discriminatory application and that, because they wanted to make sure that no discrimination occurred in voting, that the motive was not discriminatory either. However, the minority plaintiffs will argue that they were minorities that were denied the right to vote, suggesting a discriminatory application. Further, because Congress enacted the state law based on reports that African American and voters under 40 years of age suffered discrimination, that there was a discriminatory motive, even if it was to remedy discrimination. Strict scrutiny will apply to race, rational basis test will apply to age. Fighting discrimination in voting, is not only a legitimate government interest, it is a compelling one. Requiring voters to provide their DOB on their registration is rationally related to ensuring that they are not discriminated against based on their age. So the age based classification is valid. Because the race based classification is not narrowly tailored, it does not meet the strict scrutiny standard.

Thus, a court is likely to find discriminatory government action.

B) CITY ZONING ORDINANCE

EMINENT DOMAIN

Eminent domain is the government's power to take private property for public use in exchange for just compensation, which is defined as fair market value. This is applied to the federal government through the fifth amendment, and state and local governments through the 14th amendment.

Taking

A taking may be found if it does not meet the Penn Central balancing test. Court must analyze the nature of the government action, the level of diminution of the owner's property, and the property owner's reasonable investment-backed expectations.

Here, the developer is complainant that he can't turn his home into rental units, but there is still economic value in the home, as a bed and breakfast, or other uses, which suggests that the regulation has not prohibited his property from all economic use, which means that a total regulatory takings under *Lucas* does not apply. Under the *Penn Central* test, the city requires a permit for development in a historic area, for purposes of preserving the historic character of the neighborhood. The benefits of preserving a historic neighborhood is in furtherance of a public good. The regulation is substantially related to an important governmental purpose, preserving historical neighborhoods. Denial of the permit does not decrease the value of the current home, it only prevents the owner from realizing higher value if they were to be rental units. The owner's investment-backed expectations is low because it is only a 25% rate of return. These factors in balance do not reach to the level of a taking

Thus, not likely a taking.

Public Use

The requirement for public use is satisfied if the government acts under a reasonable belief that the taking will benefit the public. Very broad definition.

Purpose of the ordinance was to preserve the historic, which the city believed was enough of a public benefit to enact an ordinance to require permits for development in historical neighborhoods.

Thus, a court is likely to find that historical preservation a public use.

Just Compensation

If a taking for public use, the property owner is entitled to fair market value.

Here, because not taking, no need to pay the property owner fair market value. If the court did find a taking for public use, the city would need to pay the property owner the fair market value of his property, the loss to the owner.

Thus, if court found public use and takings, City must pay FMV.

END OF EXAM