

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.

*****1*****

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.

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.

QUESTION 1 - OUTLINE ANSWER

PACKCO ISSUE OUTLINE / COMMENTS

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 3RD PARTY STANDING TO REPRESENT ITS EMPLOYEES AND CUSTOMERS; PWA WILL ASSERT 3RD 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.

QUESTION 2 - OUTLINE ANSWER

II. Jordan v. State of Columbia

A. Justiciability: 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 10th Amendment

B. 10th 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 10th Amendment (or not?)

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

2) 10th 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)

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)

1. Packco vs. State X Agency for Dormant Commerce Clause and Commerce Clause

Justiciability

The courts have 5 conditions that they consider to determine whether a case may be heard in federal court. They are (1) standing, (2) ripeness, (3) mootness, (4) prohibition of advisory opinions, and (5) prohibition of political questions. The court may also consider three prudential issues: (1) Third party standing, (2) generalized grievances, and (3) zone of injury/interest

good issue

Standing

For Packco to have standing, the company must prove that it has (1) suffered actual or imminent injury, (2) the injury was caused by the challenged statute, and (3) a favorable court decision would likely redress that injury. The state X statute expressly "prohibits the sale of food to consumers in State X" if workers are not drug tested. Packco will assert that he has suffered economic harm and that the statute violates the Contracts Clause, as it interferes with private business contracts and his prevents him from his marketing of goods in State X. Packco will further assert that but for this State X statute, it would not have suffered economic harm, and that a court ruling in its favor would redress its injury and allow the company to operate it's business normally. The court will likely find that Packco has standing.

good rule statement

not injury

new issue

case shows direct cause,

Analyze Standing of PWA (3rd party Association Standing)
Ripeness

For a case or controversy to be ripe, it must be definite and concrete, meaning that the controversy is sufficiently developed and it is unlikely that additional essential facts would be uncovered if hearing was delayed. Here, since Packco alleges it has already suffered

actual injury, the court will likely find that the case is ripe. However, the facts are suspiciously silent to whether the State X Agency is actively enforcing the State X law. If the statute is not actually being enforced, then the court may find that Packco lacks standing and that the case is not ripe for adjudication. *(Probably an issue enforcement)*

Mootness

good
For a case or controversy to be moot, events after filing must have occurred that resolve the injury. Here, since Packco's injury appears to be still ongoing, the case is likely not moot.

Third Party Standing

Generally, third parties are not allowed to bring a suit in federal court. The exceptions to this rule is when there is (1) a close relationship, (2) association, or (3) when the plaintiff is unable to assert his rights. Here, although the State X statute directly affects food workers, it actually regulates their employers, so Packco is not considered a third party, even though it would probably qualify under a third party standing exception, regardless.

Analyze PWA Union/ASSOCIATION standing.

Dormant Commerce Clause

good issue spotting
The dormant commerce clause is triggered when a plaintiff asserts that a State law is discriminatory against non-citizens of the state. Here, Packco, a State Y company, asserts that State X law is unconstitutional for violation of the dormant commerce clause. The court will look to see if the law is (1) discriminatory on its face, (2) has discriminatory effects, and (3) whether it places an undue burden on interstate commerce.

good
The State X law only regulates drug testing of food workers, and is not on its face, discriminatory. However, the statute is in direct conflict with State Y law, so Packco will assert that the statute has discriminatory effects. Packco will claim there is an undue *good point*

burden on interstate commerce because, due to the State Y statute, all state Y food companies will be prohibited from marketing in State X. State X will argue that the statute does not place an undue burden on interstate commerce by asserting that it passes the Pike balancing test because State X has a important public interest and there is no less discriminatory alternative available. State X will further assert that the statute was not motivated by "protectionism" ideas, meaning that it wasn't intended to provide an unfair advantage to State X companies. State X will assert that this statute was intended only to regulate health, safety, and quality of food for their citizens. Packco will counter by saying that the State X does not have data to support that there was a State X food safety crisis or that their statute is necessary to improve the safety of pre-packed foods. Packco may offer a less discriminatory alternative such as requiring all packed food processors to meet a certain safety standard to be sold in State X.

TH
w/jw

Text:

Conclusion on DCC issue.

Commerce Clause

The commerce clause states that Congress has the power to regulate commerce among the states. To determine if the commerce clause applies, the courts will first consider the Lopez factors, which are (1) channels, (2) instrumentalities, and (3) substantial effects on interstate commerce. Here, since the statute expressly states that it seeks to regulate the "sale of food", this is considered a product or commodity that may trigger the commerce clause. To determine whether the State X statute has substantial effects on interstate commerce, the court will consider the following factors: (1) Economic activity, (2) Jurisdictional element, (3) congressional findings, and (4) attenuation... this whole analysis probably does not apply since this is a state law, not federal...

Good Print

Correct (except if there is a question whether regulation of food interstate is within Congress Commerce Power. (Not raised here))

2. Packco + PWA vs. State X for Equal Protection

Justiciability issues

Standing

Packco may not have standing to raise this issue because Packco is a company, and equal protection applies to people, not companies. PWA is a food worker's association, and will have valid third party standing by association.

Apply to (person)
Why? Analyze this. (Members have standing, independent to not necessary, etc.)

Privileges and Immunities

The Privileges and Immunities Clause states that a City or State cannot deny people equal protection under the law. The protected fundamental right to choice of employment is at issue. State X will argue that they have an important state interest of public health and that this law is necessary to achieve that goal. PWA will counter by saying that this law is too underinclusive. This refers to a law excessively restricts too many innocent parties. While underinclusiveness is not always unconstitutional, when it infringes on a worker's fundamental right to employment, the courts may find that a severely underinclusive statute may be unconstitutional.

Who is being discriminated against? (e.g. hair salon workers living in State X?)

Equal Protection Clause

The Equal Protection Clause also prohibits States from denying people equal protection under the law. The court will first look to classify the parties. Here, PWA will assert that the parties are foodworkers and non-foodworkers. The The State X statute is discriminatory on its face because it requires foodworkers to be "subjected to mandatory periodic testing" but not non-foodworkers. Because this is not a suspect class, the court will use the rational basis test to analyze whether there was a violation of the Equal Protection Clause. The rational basis test states that the statute must be rationally related to a legitimate government interest. The burden of proof is on the plaintiff to disprove this assumption. Here, State X will likely assert that preventing active drug users from processing, packing, or handling food is rationally related to a legitimate State X public

food workers vs non-foodworkers

Food testing a scrutiny

health interest, for example, improving the quality of school meals or airline meals. PWA will argue that State X lacks evidence to meet the "rationally related" standard. The court will likely rule in favor of State X.

because...
(Why is this correct?)

~ because?
(explain why)

Good job overall!

Your organization is good, following the "ask" of the question.

I suggest addressing Standing of both Plaintiffs under Justiciability at once.

Packer v. State X : DCC

You correctly identify the Dispute as issue and correctly apply the rules.

You also correctly point out that the layer & maximum analyses are not relevant since Congress has not acted.

Packer & PWA v. State X : Equal Protection

You correctly identify the classification & level of scrutiny (National basis)

If time permits, expand your analysis to show why the conclusion was reached, using facts and inferences.

2)

1. Jordan v. Columbia for Equal Protection Clause

good intro
good
good
good

The Equal Protection Clause of the 14th Amendment prohibits a State from denying a person equal protection of the law. Jordan will claim that Columbia's statute requiring gender assigned bathrooms discriminates against transgender people and therefore is unconstitutional. ^{State New Paragraph} The court will first classify the discrimination. The statute does not facially discriminate against transgenders. However, the statute does have discriminatory effects against transgenders, because Jordan would be forced to use the women's restroom. Jordan will also argue that the statute has discriminatory motive, as it was enacted "in response to an increasing number of transgender students enrolled in public schools". Next the court must determine the level of scrutiny to apply. Jordan will argue that since the law provides that gender be analyzed under intermediate scrutiny, that since this is a gender issue, it be analyzed there. However, Columbia will argue that transgender is a separate class, and therefore should be analyzed under the rational basis standard.

good
good
good
good

If the court uses intermediate scrutiny, the burden of proof is on Columbia to show that the statute was substantially related to an important government interest. Columbia will argue that the statute was intended to protect children from sexual harassment at school and that mandating gender specific bathrooms is substantially related to achieving that goal. Jordan will argue that the government lacks evidence to support the assertion that student safety is impacted by clothed transgender students attempting to entering a locker room. The court would likely rule in favor of Jordan because ? (State why)

good
good
good
good

If the court uses rational basis, the burden of proof is on Jordan to show that the statute was not rationally related to a legitimate government interest. Under this level of scrutiny, it may be hard to Jordan to disprove the state assertion that bathroom regulation by gender is rationally related to student safety. However, Jordan may request that the court

use a hybrid approach that takes into consideration the importance of transgender equality by analyzing evidence beyond that of the traditional approach. *Like what? be specific.*

good inclusion statement
In summary, Jordan's case is highly dependent on the court's choice of level of scrutiny, where he will likely prevail under intermediate scrutiny and lose under rational basis. *but Analyze which standard apply and why should the court conclude one way.*

2. State of Columbia v. US

Tax and Spend Clause

good intro issue stat.
Congress has the power to tax and spend to provide for the common defense or the general welfare. However, there are limitations on what type of conditions are allowed for receiving federal funding. Columbia questions whether the federal government has the authority to deny funding for public schools that do not enforce a policy of nondiscrimination that includes gender identity. The court will first consider the Dole test, which asks whether the withholding of federal funds is actually related to an important government interest. Here, the funding is for school programs, and the government interest is the promotion of nondiscriminatory policies of those schools. The court will likely find in favor of the federal government here. *because?* Next, the court will consider the Sibelius test, which asks whether the withholding of federal funds is too extreme that it is deemed coercive to the state. Here, since the funding is only limited to athletics programs for public schools, the court will likely find this not to be coercive.

10th Amendment

Columbia may also assert that State sovereignty should prevent the federal government from interfering with state law. If Columbia can prove that school policies are traditionally regulated by the states, then the federal government would lack a legitimate interest required for the condition for receiving federal funds. *because. violates another constitutional provision.*

good analysis

Secondly, Columbia may assert that when the federal funding condition requires that schools "maintain and enforce" a policy, that this is in violation of anti-commandeering limitations. NY v. US prohibits federal mandates on states to implement federal programs. Similarly, Printz prohibits federal mandates on state officials to carry out federal objectives. Columbia may assert a Printz violation because it requires state school officials to enforce a federal nondiscrimination policy. The government may counter by asserting that these conditions did not originate from a federal statute, but the constitution itself. The court will likely find that this is a Printz violation. *because? (explain)*

In summary, the court will likely rule in favor of Columbia on a 10th amendment analysis, but not under a tax and spend analysis. *Good, clear Conclusion Statement*

Your organization is excellent and you use facts well to support your analysis. You identify issues well and apply correct rules.

My suggestion: expand your analysis by explaining why the court will rule a certain way or why a party will argue a point. Go deeper into your analysis, and in your conclusion sentence use "because" and explain why more fully.

3)

A.

Privileges and Immunities Clause:

20
good
refin

A State action that requires the doctor to be a resident of that state in order to practice their violates that doctors constitutional rights. To restrict those who wish to practice medicine in State X to only those who reside in State X is discriminatory against those who like the doctor live on the border between the two states but does not reside in State X and does not provide the doctor of her due process of having her medical license judged fairly just because she resides out of state. To move to State X just to meet the residency requirement is unduly burdensome for the doctor and not necessary to further any legitimate government interest in the application process of medical licensing.

B.

Executive Privilege: The president is shielded from criminal and civil court proceedings when the issue arises out of his official executive duties.

Here, the President can argue that he was acting within his official capacity as the commander and chief of the armed forces and as the person solely responsible for foreign affairs. His approval of launching the drone strike that resulted in an American casualty was within the President's executive duty. The President can argue that the release of documents is a matter of national security and can put foreign affairs that are beyond the scope of Congress in harms way. The President can also argue that the burden of the subpoena is to great for the President at this time due to the ever changing landscape of foreign affairs and national security.

good
analysis

Congress can argue that the subpoena's should be upheld by the court because the President acted without Congressional approval and his power is at the lowest ebb. Congress can argue that because of the drone strike a US citizen is now dead at the hands of the president and it is Congress's duty to ensure that the President did not act out of turn by overstepping his powers and allowing an citizen's life to become a casualty knowingly. Congress can argue that the subpoena is not burdensome on the President because he simply has to authorize the release of the documents from the military archives. + Agree all criteria for Congressional Subpoena Troop v. Mazars
e.g. Congress legitimate purpose, no broader than necessary + burden on President

22

good
conclusion

The Court will likely rule that the President does not have to provide the documents to Congress because the burden on national security and the efforts of the President may be too burdensome.

END OF EXAM

Good job!