

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.

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.

I was not able to locate an answer outline for Question 1.

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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 10<sup>th</sup> Amendment

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

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

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

D. Likely Ruling of the Supreme Court?

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Question 3 Answer Outline

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

B. President will assert Executive Privilege. Privilege is not absolute. Nixon v. US;  
Congress must meet Congressional subpoena criteria of Trump v. Mazars:  
Legitimate legislative purpose: Congress purpose is to investigate unauthorized use of force by President violating statutory or Constitutional authorization ("lowest ebb" presidential power per Youngstown Sheet and Tube concurring opinion);  
Subpoena must be no broader than necessary to achieve legislative purpose: Arguably overbroad (or not);  
Subpoena must advance a valid legislative purpose by the nature of evidence offered;  
Must assess the burden on the President (minimal or oppressive? interferes with duties?)  
State how court will rule.



1)

## **Justiciability**

### **Whether Packco can file a complaint under the justiciability doctrine**

For a plaintiff to have standing, three requirements must first be met. First, the plaintiff must show that they have suffered a harm or are likely to suffer an imminent harm. Second, the harm must be reasonably traceable to the defendant, and third the court must be able fashion a remedy that will redress the asserted harm.

In this case, the facts do not indicate that the law of State X has caused any official harm to the Packco. Packco may attempt to argue that forcing them to drug test their workers would cause them to violate their duties under State Y's law which prohibit conditioning drug tests on employment. However, this argument comes up against two problems. First, State X's law does not require that an employee who tests positive for drug use be terminated from their job. It only places a limit on *which* jobs the worker can work. The fact that State X's law allows for Packco to transfer the worker to another position negates any claim that they will be forced to condition *employment* on the drug test. Any work that tests positive will could still remain employed which would not amount to a harm to Packco has they would be in compliance with the requirements of the law in State Y.

Secondly, having to fire an employee is not a harm that could be either (a) traceable to the law in State X or one that could be redressed by the court. As state above, Packco could choose to keep the employee on their payroll in another position, which avoids any such harm that would potentially come to Packco and having to let go of an employee is not a harm that a court could fashion a redressable remedy for even if they were to choose to fire them. The fact of the matter is employers routinely have to fire or let go of employees for a multitude of reasons and asking a court to keep them from having to do so would be outside of the scope of judicial authority.

Lastly, if a harm were to be caused by the law it would likely be suffered most acutely by the employee due to loss of wages and not Packco. Packco likely would be able to replace the work fairly easily and with minimal economic damage while the loss of income to the employee would be much more acute. However, a plaintiff cannot asserts the rights of a third-party when making their

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claim. Thus, Packco would not be able to assert any claims of harm to the employee because the employee would be a third-party to the action. The court would likely dismiss Packco's claim for lack of standing.

#### **Whether PWA has standing to file a claim**

Generally speaking, a plaintiff may not assert a claim on behalf a third party. However, there is an exception to third-party standing for an organization if a member of the organization has suffered a harm, but are not in position to litigate the harm themselves. Unfortunately for PWA, in this case it is unlikely that the court will find that Packco has suffered a redressable harm that can be traced back to the law of State X. Since Packco has not faced any specific harm as any potential harm to Packco would be speculative at best. PWA likely would not have organizational standing to bring the case.

#### **Whether the claims of Packco or PWA are ripe for adjudication**

Another requirement of justiciability is that ripeness. In order for a party to bring an action the court looks to see whether any claimed harmed has actually happened or that the harm is imminently likely to occur. Since no actual harm has been done to Packco yet and PWA would similarly not be able to assert any specific harm, the court will likely find that the case is not ripe. Packco and PWA may argue that the case is ripe because the law has been passed and signed and will go into effect, and thus the harm is sufficiently imminent to make the controversy ripe. However, as discussed above, the harm likely would assert is too speculative in nature. The law of State X does not require that Packco violate the law in State Y. The court would likely find that since the harm is not a guarantee, despite the law going into effect in State X, the case is not yet ripe for adjudication.

#### **Whether the claims of Packco or PWA are moot**

Mootness happens when a controversy has been resolved before the court has an opportunity to hear the case. Here, the controversy is still a live controversy because there are no facts that indicate that the law will not be going into effect as planned. Further, even if State X decided to voluntarily repeal their law, the case would still not be moot because the state government in State X could pass and implement the law again. In addition, mootness is not present because the controversy is not likely to be shorter than the time it would take to litigate the issue in court. So, the if the court were to reach the issue of mootness it would likely find that it is not moot.

The fourth principle of justiciability is the political question doctrine. Since this is not an issue between a legislature an executive agency, this issue would not be considered be the court.

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Ultimately, despite the case meeting the mootness requirement the court would likely find it justiciable for lack of standing and ripeness.

### **11th Amendment**

The 11th Amendment provides that state government cannot be sued by private citizens in federal or state court. There are only four exceptions to this grant of sovereign immunity. The first is a waiver of the immunity, the second is if a state official is being sued personally, the third is if Congress abrogates the immunity, and the fourth is indemnity. In this case, there is no indication that any of these have been met and thus Packco and PWA would be barred from bringing their case in federal court.

In the event that the Court did find that issue is justiciable it would then need to evaluate the claims made by Packco related to the commerce clause and the claims made by Packco and PW related to a violation of the Equal Protection Clause

### **Commerce Clause**

#### **Whether the Statute in State X violates the Commerce Clause**

The Commerce Clause states that the United States legislature has the authority to regulate commerce between the states, foreign nations, and Indian tribes. While this case does involve two different states, it does not arise out of any legislation passed by the United States legislature and therefore would not directly invoke the Commerce Clause.

#### **Whether the Statute in State X violates the Dormant Commerce Clause**

The dormant commerce clause is the doctrine that a state may not pass a law that would significantly burden interstate commerce. In addressing whether the dormant commerce clause applies the first question the court would address is whether the law is facially discriminatory against out of states. In this case, State X's statute is not facially discriminatory against out of states because the law applies equally to any state, including State X. The fact that law is not facially discriminatory against out of states explains why the issue claim would be addressed through the dormant commerce clause and that Privileges and Immunities clause would be inapplicable.

Despite the fact that the law does not discriminate against out of states, that would not prima facie defeat a claim that the statute violates the dormant commerce clause. A violation of the dormant commerce clause may still exist if the law causes an undue burden on interstate commerce. In

making a determination whether a law causes an undue burden on interstate commerce the court applies what is essentially a modified version of the strict scrutiny test.

This test puts the burden on State X to show that there is an important state interest and that the law in question is necessary to achieve that state interest, i.e., that the law is narrowly tailored. State X will likely argue that it has an important state interest and authority through the state sovereignty and the 10th Amendment to keep those who are actively using drugs from being involved out of the food processing. By requiring that workers be drug tested the state would argue they are protecting the health and safety of both consumers and of workers in the state. People actively using drugs may either mishandle the food due to intoxication or they may injure themselves or another while at work. While protecting the health and safety of workers and consumers is an important state interest, Packco would likely argue that the requiring of drug testing is not the only means by which this goal could be achieved. Furthermore, the fact that the workers would still be allowed to be on site, though potentially not directly handling food, undermines the claim that the law would be necessary for achieving the goal of preventing injury. The law applies only to people in the processing, packing, or handling of food. The term handling in this case is ambiguous and as such could allow for a worker who has tested positive to be transferred to where they load already boxed and processed food into trucks for transportation. That would therefore undermine the state's interest in preventing injuries due to intoxication.

In addition, the facts do not indicate that there is any verifiable evidence that drug testing these specific employees would further the state's goal, and thus whether the law is necessary to achieve that goal is not clear. The potential for other means of achieving the goal potentially exist. The court would likely find that the law would cause an undue burden on interstate commerce due to its unverified necessity and therefore violates the dormant commerce clause.

It is worth noting that an exception exists where Congress has expressly authorized a state to regulate in a manner consistent with the State X statute because by definition it would the commerce clause would no longer be dormant. However, the facts do not indicate that Congress has passed any law giving State X that authority.

## **Equal Protection**

### **Whether State X's statute violates the Equal Protection Clause**

The Equal Protection Clause of the 14th amendment provides that all citizens of the United States shall not be denied equal protection of the laws. There are three levels of scrutiny used when

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evaluating an equal protection claim. The highest level, reserved for claims of discrimination related to race, national origin, or non-marital children is strict scrutiny which requires the state to show that there is a compelling state interest and that the means of achieving that interest are the least restrictive possible. The second is intermediate scrutiny and requires that there is a substantial connection to an important state interest and applies to gender discrimination. The third level is the rational basis test which only requires that there be a legitimate government purpose and that a rational connection exists between the law and that purpose. The rational basis test requires the plaintiff to prove that no such connection exists or that there is no a legitimate state interest. The rational basis test applies to all other characteristic.

In this case, since there is no claim of discrimination based on race, national origin, non-marital children, or gender the court would apply the rational basis test. Given that the state does have a legitimate interest in protecting the health and safety of their citizens and there is at least a reasonable connection between drug testing food processor, handlers, and packagers the court would likely look at the State X's statute and find that there is no violation of the equal protection clause. Though Packco and PWA may argue that the connection between the law and the the interest is tenuous, the test only requires that it is reasonable. A court is unlikely to find that drugs tests are unreasonable in the context of protecting either workers from injury or consumers from mishandling of food.

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### **Equal Protection**

Under the equal protection clause a citizen may not be denied equal protection of the laws of the united states. When evaluating Equal Protection claims a court must first decided which level of scrutiny applies. For cases of race, national origin, or non-marital children the court applies the strict scrutiny standard which requires that a law be narrowly tailored and that there is a compelling government interest. For issues of gender the court applies an intermediate scrutiny test which requires that there be a substantial connection to an important government interest. For all other issues the court generally applies a rational basis test. However the court has recently moved though not explicitly more towards intermediate scrutiny for cases of sexual orientation too.

In this case, the court will have to first decide whether the issue is properly a gender issue or whether it is an issue of sexual orientation because this will determine whether the court applies and rational basis test or an intermediate scrutiny test. The court in making this determination will likely consider whether discrimination against a person who is transgender is truly gender discrimination or whether any potential discrimination is not actually related to gender. Some may argue that the word transgender is a misnomer and that the person's proper gender is the sex that they have been assigned at birth. If this is true, then in this case Jordan's issue would be fall under the rational basis test, and then court would need considered whether transgender issues are ones that are properly considered issues of sexual orientation or not.

Since the intermediate scrutiny test is more restrictive test and would give them a better chance of winning under their equal protection claim they will likely argue that gender is not a black and white issue that must only be determined the gender assigned at birth. In support of this argument, Jordan would likely point to the existence of body dismorphya as an accepted condition and the fact that there some people who are born as both male and female. If a person can be born both male and female, then the possibility of misgendering by parents exists and if a person can be misgendered then gender cannot only be a sexual orientation issue.

The court in reviewing this factors will likely determine that the case is a gender issue that the intermediate scrutiny applies. The court will be then have to evaluate whether there is a substantial connection to an important government interest. In this case, the school will likely argue that the state has a substantial interest in protecting the privacy of students and in making sure that all students feel comfortable. Especially in situations where the may potentially be seen without clothes such as a locker room or bathroom and that there is a substantial connection between this interest

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and requiring that a person follow their birth certificate because it is the only concrete way to determine a person's gender.

Jordan would likely argue that the state's interest may be legitimate but that it is not important enough to meet the threshold. While the state may have an interest in protecting others from feeling uncomfortable that does not, alone, raise the issue to one of such importance that the state can expel a student because of it. If the state were allowed to the personal comfort of students as an important interest that would have a chilling effect on many other activities that most certainly do not rise to the level of important government interest. For example, maybe some students are uncomfortable with girls wearing short shorts. Would the school then be able to claim a substantial connection to an important interest. The answer should be no.

Given that the burden on the government is higher than usual the court will likely find that the interest, while legitimate, is not important and that the Jordan's equal protection rights have been violated.

### **Spending Power**

Congress has spending power under article I. While Congress cannot be coercive with in their demands for federal funding, they can attach certain conditions for specific grants. In this case, the school will likely argue that the conditions applied are coercive because they require that the school take certain actions in order to receive federal funding. However, the government will likely contend that since they are only predicating grant money for athletics and not specifically for all of education that it is merely a condition and not coercive enough.

The court will likely agree with the United States and find that Congress acted within its authority

3)

### **Question A**

#### **Privileges and Immunities**

The privileges and immunities clause provides that no state shall deprive a citizen of another state the privileges and immunities afforded to their own citizens. In this case, the court will likely find that a residency requirement that does not allow a person to practice law in state is a violation of the the privileges and immunities clause because it treats out of state people differently than in states. In addition, the state is not a market participant and therefore cannot advantage its state due to that exception. Further, since this deals with a person's ability to earn a living it is more likely that the law would be found to be unconstitutional as that would be considered a fundamental right that the state must afford to all people. k

#### **Question**

#### **Congressional Powers**

Article I gives Congress the sole power to declare war. The power to declare war then cannot be asserted by the President of the United States. In the modern era, however, most courts have broadened the scope and understanding of the Executives power in relation to being commander in chief. Thus, many conflicts fought overseas and still authorized despite Congress not declaring war. This would not bar Congress from investigating the matter however as Congress does have the power to investigate and issue subpoenas.

#### **Executive Powers**

Though Congress has the power to declare war it is the President that is deemed Commander-in-Chief of the US Military. This has been a fundamental tension between Congress and the President which recently has seen a shift towards expanding the Presidents power to command troops without an express declaration of war. Furthermore, the President does have a strong, though not absolute, claim to Executive Privilege. While this claim is not one that is expressly found in the constitution courts have found that in order to maintain confidential relationships with their advisers and to receive unfiltered and unvarnished advice there should be an expectation that information will not simply be repeated. However, Executive Privilege is not absolute and there are limits. Generally, Presidents cannot assert executive privilege when the matter is one that is a criminal matter compared to a civil matter. In this case, the issue is one that is neither a criminal nor civil matter but

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rather a dispute between the executive and congress. Likely, if a court were to be asked to look at this question it would determine that it could not resolve the issue because it is a political question.

In this case, if the issue were to be moved outside of Congress and in to a court it would likely be a civil matter and the President would be able to assert executive privilege. If for some reason, however it were a criminal matter the President would have a harder time asserting this executive privilege.

Futher, presidents have executie immunity for actions taken when while in office. Since this was done in office, the president would like also be able to claim immunity. The presiendent has the power to command the armed forces and largely conduct foreign policy. Since the drone strike falls within this purview, his actions would likely be

**END OF EXAM**