Question 1 – Suit 1 – Alice

149 Word Count 3599

The first issue in Alice's lawsuit against Wyotana concerns the Privileges and Immunities Clause. First of all, she may not use the P&I clause of article 4 in the constitution because that P&I clause is concerned with how states treat out of state citizens, not how states treat their own citizens (Camden). Thus the next question for Alice against Wyotana (WY) is can she find relief from the P&I clause of the 14th amendment? The answer is probably not. The decision in the **Slaughter-House** cases effectively capped the use of the 14th P&I clause. That case listed a very short list of privileges that were protected for US citizens, which the court has subsequently treated it as a short list. Alice's injury of not being able to trap weasels does not fall within this short list. Alice should lose on P&I claim.

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The main issue in Alice's lawsuit against East Dakota (ED) is the Dormant Commerce Clause (DCC), and undue burden on interstate commerce. The main test for the DCC is the Pike balancing test – "**where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the local putative benefits. If a legitimate local interest is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact**"(Pike). The first trap door under Pike is the law facially discriminatory against out of state residents? The law here seems to be since 1) In state citizens get first crack at licenses,

and 2) no instate people will have to pay the 10,000 dollar fee, while all out of state people will have to pay the fee. Facially discriminatory laws have all been struck down with the exception of Maine v. Taylor. There the Court upheld the law because, there was a legitimate environmental purpose of banning the importation of out of state bait fish, because there was uncertainty there of the possible ecological effects, and also the purpose could not be effectuated in a less-discriminatory manner. The facts here clearly are not analogous. The discrimination here is based on saving ragweed, and not on environmental concerns, and also there were less discriminatory means available of allowing all to get a license without a 10,000 fee. Assuming the law was not facially discriminatory, the second part of the Pike test is there a legitimate local public interest. The state will argue and probably overcome this trap door since the interest is to save their ragweed and thus their economy. The third question is the effect on interstate commerce incidental? Here the burden is incidental since the law probably only effects a few surrounding states and weasel trapping is an incidental part of national commerce. Assuming the burden is incidental and this third trap door is overcome next is the balancing The state interest here is very strong, however, the burden on out of state trappers is large. The factor that tips the scales here in favor of Alice, is that the state could have easily used less drastic means to effectuate their purpose The purpose of saving the ragweed could have been done in a non-protectionist manner by allowing all trappers in and out of state to trap the weasel, and actually this would probably have been more effective in carrying out the state interest. In addition, if the statute was facially neutral, the subsidy to the ragweed farmer would be OK because it is unlike the tax subsidy in West Lynn Creamery because that subsidy went to the same class of people

(milk people) as were claiming discrimination, while this subsidy goes to the farmers not the trappers. Overall, the statute here loses on DCC grounds. The relevant inquiry here may be under **Brady**, since it could be argued that the fee is really a tax on out of state people in order to increase revenue to instate farmers. The court in Brady set forth following test for taxation cases – A state tax case will be upheld if 1) applied to an activity with a substantial nexus with the taxing state, 2) it is fairly apportioned, 3) Does not discriminate against interstate commerce, and 4) is fairly related to services provided by the state. The tax passes 1 and 4 easily, but under 2 it is not fairly apportioned, and under 3 is discriminatory, because it only charges 10,000 to out of state residents while charging no "tax" to in state residents. It would be hard to argue that 10,000 dollars is reasonable for the instate services.

The next issue here, is does the State have a Market Participant exception under the DCC? The Court in **Reeves** held that state protectionism is okay when the State acts not as a regulator in the market, but as a participant in the market. Here the State has given the licensing authority to EDRA which is a profit making corporation chartered by State Statute. Here the state could argue that EDRA is a market participant, because they are a profit making company. However, this case is very different from Reeves and other cases, in that EDRA is the only market participant, whereas in Reeves, the government was one of many participants in the cement market. The government here looks more like a regulator than a participant since EDRA controls the entire licensing market involving weasel trapping. The Court in **Wunnicke** said that the market should be viewed narrowly which here would be weasel trap licensing and thus there really is no market. Alice should win on DCC and Market Participant claim.

The last issue for Alice is does she have a valid claim against East Dakota under the Art IV P&I clause? If Alice can win on P&I clause, she doesn't have to worry about Market Participant exception because the P&I clause doesn't recognize it. The first inquiry under **Camden** is, is there a fundamental right at stake? Under P&I, fundamental rights are limited. Camden recognized that following an occupation or a trade is a fundamental right, while Baldwin said that Elk hunting by nonresidents was not. This situation falls somewhere in between. Alice is trapping to supplement her income (10%), and she is also doing it for recreational purposes. This is probably not a fundamental right since it only contributes a small amount to her income. Not only that, but it isn't really her occupation or trade, since she has another job. This looks more like recreation. Assuming this is a fundamental right, **Piper** set out the test of whether the law is invalid. First, what is the source of the evil (is there a substantial reason for the discrimination), and second does the source of evil bear a close relationship? Here the reason for the law is saving the ragweed, which seems to be substantial. The discrimination here is not very related to the source of evil. Discriminating here against out of state people actually lessens the amount of weasels trapped and therefore is not related. The Court in Piper concerning the relationship test basically said that if the legislature could have done it differently and better, and didn't, then the reasons were pretextual, and the statute therefore fails. Here there was a much better solution to the weasel problem and therefore this looks like pretext and looks like it fails the Piper test. Alice should lose on the P&I claim.

Question 1 Suit 2 – Dilbert

The first issue in this lawsuit is does the DCC invalidate the quarantine? Once again the Pike balancing test is the applicable test (as stated earlier). Here, the law is not facially discriminatory, because it applies to everyone regardless of who they are. An in state citizen returning to the state from vacation is also subject to the quarantine. There is also a legitimate local public interest in 1) protecting mental health of weasels and the fur/hat economy. The burden here may be more than incidental since trucking is a huge part of national commerce, and is effected not only if perishable, but also effects deadlines. However, assuming the burden is incidental, balancing has to be done. When it comes to balancing, the burden on interstate commerce is large (profits from trucks with perishable goods have serious problems, and lost time of people), while the interest is very important as well. It is hard to say here whether the burden is "clearly excessive," because the interest is important. However, Dilbert can counter with the argument that the disease has broken out in WY, not surrounding states, and therefore stopping vehicles coming from out of state does no good since they are probably bringing in healthy weasels. Dilbert can argue that this shows pretext, and that if the State really wanted to separate out diseased weasels, they would have had checkpoints within the state, not at the border for incoming vehicles. The real reason the state is stopping incoming vehicles is to take their weasels for 1) possible fur use in state, and 2) to protect them from being hunted in other states. **Kassel** found that when a legislature gives a pretextual reason the statute will probably be invalidated. The last question under the balancing is, were there less drastic means available? Even though there are other means available (checkpoints

in middle of state), they may not be less drastic since they would still entail same burden. The means here of checking incoming vehicles looks pretextual and therefore the law fails the Pike balancing test, and Dilbert wins.

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The second issue in this lawsuit is the "Takings" clause of the 5th amendment, which says that no private property may be taken for public use without just compensation. The first part of the Takings clause requires that the property be for "public use." The Court is extremely deferential to the legislatures determination of what constitutes public use (**Berman v. Barker**). Here the legislature may say that the "taking" of the truck and weasel is to protect the fur industry of the state and the mental health of the weasels. The more important issue here is, is this a taking at all? Dilbert can argue under the per se rule of **Lucas** which says that leaving no economical beneficial use is a per se taking, and that here the stop takes away all beneficial use of the cargo he is carrying and beneficial use of the weasels (there is an argument that the weasels are not private property since they were not captured.) Even though this may look more like a regulatory taking, Dilbert probably wins on the "taking" of the cargo under Lucas. Assuming this isn't a per se taking under Lucas, the Court in **Penn Central** set forth a balancing rule – Are the restrictions imposed substantially related to the promotion of the interest, while still affording some beneficial use? In Penn Central, the restriction on the historic site was related to promotion of general welfare. Here the restriction of keeping the truck and taking the weasels is not really related to the interest, which is the promotion of the mental health of in state weasels, and commercial use of the weasel (this is same argument that testing incoming weasels does no good since the disease is in state.) Also in Penn Central, the private owners still had beneficial use of

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the historic site. Here there is no beneficial use of a lost weasel (bounty back home), and ruined ragweed. Dilbert should win as to the ragweed, and lose with the weasels.

Dilbert may also raise a claim under Saenz in that this law impedes his right as a US citizen to travel from state to state. This is however a weak claim because the bar is only temporary.

Question 1 suit 3 – Wally

The first issue in this lawsuit is does Wally have standing. The cases and controversy clause requires 1) personal injury, 2) fairly traced to the action, and 3) likely to be redressed by a favorable decision. Here, Wally has suffered no personal injury, unless he can argue that he has an interest in observing the animals etc. This is a close argument. The injury of not being able to enjoy the existence of the weasel is traceable because the law allows the weasels to be killed. The action desired by the plaintiff will give redress by keeping the weasels alive for enjoyment etc .Even if this plaintiff passes constitutional standing issues, he may fail on prudential grounds. He has a generalized grievance. Tax cases are not given standing, because no standing is given for one who is merely one of a million of citizens interested in resolving this question. This case is similar to a tax case, since there are many people out there who love animals etc .Generalized grievances are barred on prudential grounds. Wally shouldn't have standing.

The next issue - does federal law preempt the state law? The test for preemption is 1) Did Congress have authority to regulate in the field, 2) Were the clear about

preemption, and 3) if they were not clear, is there implied preemption either through pervasive scheme, conflict with federal law (**Pac Gas**). Based on these facts the real issue as to preemption is, even if the state has not been entirely displaced from the regulated field, does it still conflict with the federal law as either impossibility, or as an obstacle to Congress' objectives. Here, you could argue that this does defeat national unity because if all states were allowed to regulate in this manner, then the scheme would be ruined, and so would Congress Objectives. An easier argument is that Congress had a purpose that previous endangered species thrive in abundance, and here the law of East Dakota frustrates that purpose by killing weasels. However, ED can argue that the law does not conflict because they are trying to ensure the abundance of the weasels by thinning the herd. There is federal preemption here.

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Question 2 Suit 1 – State v. Feds

The first issue in this lawsuit, is does Congress have authority to enact this law? Feds may argue that Congress has authority to enact section a/b under the Commerce Clause (CC). The Court in **Lopez** said that under the CC, Congress may regulate 1) use of channels of interstate commerce, 2) instrumentalities, and 3) articles that substantially effect interstate commerce. The argument here surrounds the third category of things substantially effecting interstate commerce. The first argument here for the state is that this looks more like a criminal statute because of the penalties attached much like in Lopez. However the feds can argue that this is not like Lopez because here the Congressional record shows that poverty among Native Americans is caused by

discrimination, and poverty of Native Americans, is a burden on interstate commerce whereas in Lopez there was no record showing that guns burdened interstate commerce. This case is probably more like **Morrison**, in that there is a congressional record. Once again though, the court in Morrison said that criminal statutes are accorded less deference. There the court did not buy the argument that violence against women substantially effected interstate commerce, and so the court here probably won't either. Also, there is no express jurisdictional element in this statute weakening its validity even further. It also could be argued that this statute involves areas traditionally regulated by the states. This case seems to fit somewhere in the current constricted reading by the Court of not wanting all barriers to Congressional authority under the commerce clause to disappear.

Congress may also argue that they have authority for section a under section 5 of the 14th amendment. Under section 5 of the 14th, Congress has power to effectuate section 1 of the 14th amendment. We don't really have enough information to discuss whether the Colleges are state actors (Public function, entanglement, nexus, and entwinement) (This universities is a state actors). Assuming state actors are involved, the test for section 5 is stated in **Boerne** – the measure taken by Congress must be congruent and proportional to the problem they are addressing. Here the feds could argue that it is congruent and proportional because there is a history of colleges with discriminatory mascots etc. Also, it was a widespread problem that needed a widespread remedy to fix However, the state can argue that this looks more like Kimel where that court struck down a law because it applied to states, and there was pattern of states evidencing past discrimination. Here there is no pattern of history of schools using the mascots etc... to

discriminate against Native Americans. And even more, some schools (this one) use the names as honor and is in effect anti-discrimination. The state may also argue here that the scope is too broad since there is no termination date, however, it doesn't apply at every government level, only specifically to schools. Also, under Boerne, this could be considered a pretext, which the court will use to strike down. I think the states argument as to congruence and proportionality is strong.

Congress may argue that they have authority to pass section c under the tax and spending clause. The test for Congressional authority to regulate through conditional spending is found in **Dole** – 1) must be in pursuit of general welfare, 2) must condition so unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences, (**Penhurst**) and 3) Funds have to be related to the federal interest, and 4) conditions may not violate an independent constitutional bar. The court is very deferential as to general welfare. The conditioning here also seems to be unambiguous. The state can argue as to the third condition that the education funding is not related to the provision on discrimination. However, the feds can argue that the elimination of discrimination will contribute to better education. The argument here of relation is not as strong as in Dole. (The constitutional bar of 4 is discussed later. One other argument here for the state is that in Dole the Court said that the condition should not be coercive and that there 5% of highway funds was not enough to be coercive. Here the state could argue that 35% of education funds is coercive, because it is such a substantial sum of money.

Congress may argue that they have power to pass section d under the takings clause. The Government may take private property for public use if they give just

compensation. Here, the government is ordering all hats, etc which discriminate against Native Americans to be destroyed. The Court is deferential as to public use, so there is probably a public use here of eliminating discrimination among Native Americans, and thus poverty among Native Americans which will help the national economy. However, this loses on regulatory takings grounds because this is both occupation of the clothing, and reduction of all commercial value of the clothing.

The next issue in this case is even though Congress may have this authority, are there any constitutional bars from their using it? The state can argue that the 10th amendment precludes the passage of the law. Section c applies only to states as states, and so falls under NY and Printz. NY says that Congress may not commandeer the legislative process of the state, by directly compelling them to enact and enforce a federal regulatory program, and Printz says that Congress may not commandeer state officials into effectuating the federal regulation. The policy is that states will have to bear the costs associated with enforcement, while feds can take credit for the enforcement without having to ask their constituents to pay for it. Here Congress is commandeering state legislative process as well as state officials by forcing the Superintendent of public instruction of each state to certify to the federal government that wearing of such insignia is punishable under the criminal law of the state. However, the feds can argue that this falls under O'Connor's concurrence of Printz concerning a ministerial provision. I think the feds have a stronger argument under ministerial provision than the state. There also may be other constitutional bars in the form of 1st amendment rights.

Question 2 Suit 1 – KIWI v. State

The issue here is the Contracts clause. First the state may argue that the Contracts Clause only applies when states are interfering with contracts, but not when the federal government is interfering The federal government here is effectively forcing the state to end the contract. Assuming that this is viewed more as the state canceling the contract than the feds, the test from **Kansas Power** is – 1) has the state law operated as a substantial impairment of a contractual relationship, 2) is there a significant and legitimate public purpose behind the regulation, and 3) is impairment based on reasonable conditions, and of appropriate character? Here, it is obviously a substantial impairment. There is however a significant public purpose which is to obey federal law. Courts are less deferential to states when states are trying to get out of their own contracts. Here KIWI has a strong argument under the Contracts Clause.

Lastly, it will be hard for KIWI to win money damages. They may get injunctive relief, but the 11th amendment and sovereign immunity preclude citizens of the states from suing states for damages.