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Exan) ill: 232
Course: Intro. to Con. Law
Professor Name: Bay
Exam Date: Thursday, December 09, 2004

QUESTION

Federal Constitutional Issues Presented

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Justiciable?

a.

Not all constitutional questions are suitable for adjudication, at a minimum, in order to hear a case, the Court insists that parties have a concrete interest in the outcome of the litigation, that the litigation comes neither too early nor too late in the life cycle of the dispute, and that the type of question is suitable for judicial resolution (these issues are explored under the doctrines of ripeness, mootness, and standing)

In this case, the justiciability of the suit is not really an issue-

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Schmokes was directly impacted by the federa1law

Federal Power to Enact CSA

a.

One of the flfSt issues in this case is to decide whether the Federal Government had the power to pass the CSA.

This is a two-step process in

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which one first asks, did Congress have the power to act as it did? And

secondly, whether there is some other constraint in the Constitution that

prevents Congress from acting as it did.

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b. FIRST QUESnON - this question looks at the various methods by which

Congress can pass federal laws through power granted to it in the

Constitution.

will deal with each of the relevant grants of power one at a

time.

i. **Commerce Clause**

I. Under Art. I, § 8,cl. 3, Congress has the power to regulate

commerce among the states. In order to detennine whether

the CSA was validly enacted under the Commerce Clause,

there are a number of different questions to answer: (1)

What is the activity? (2) What area of commerce is being

regulated?

2. In this case, Congress is trying to regulate the importation,

manufacture, distribution, and possession of marijuana

nationwide. There are three different areas of commerce

that Congress can regulate, (1) channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in commerce, and (3) articles that have a substantial relation or connection to interstate commerce.

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In this case, Congress is likely trying to regulate the third area of interstate commerce, although an argument can be made that because it is regulating the transportation of illegal substances that it may

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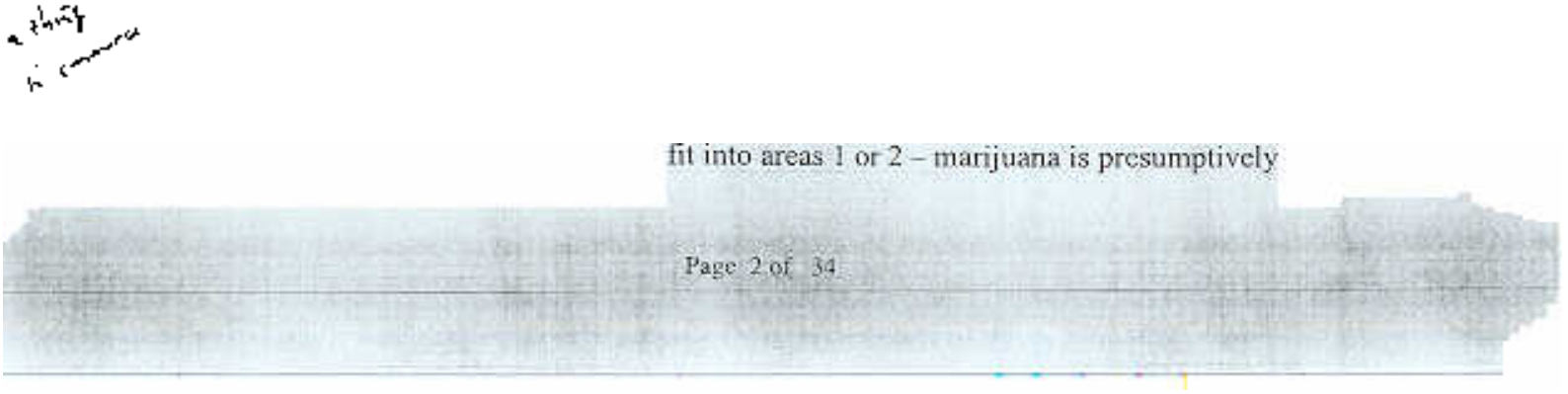

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b.

sold and distributed throughout the country. **If it** fits into one of these areas, it will be preswnptively valid under the Commerce Clause.

Because the activity likely fits under area 3, there

are additional questions to ask, namely, is this economic or non-economic regulation? If it is economic regulation, it will have a better chance of being found valid. In this case, the regulation on the sale of marijuana may be considered economic, but controlling possession and manufacture may not be. The growing of marijuana with the intent to distribute may also be considered a economic activity.

If this law is seen to be effecting an economic activity, it will likely be valid. Although Schrnokes' home growth and use of marijuana does not seem to touch on interstate commerce, Congress can consider

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the aggregate effect of her use on interstate commerce. This like Wickard in which a

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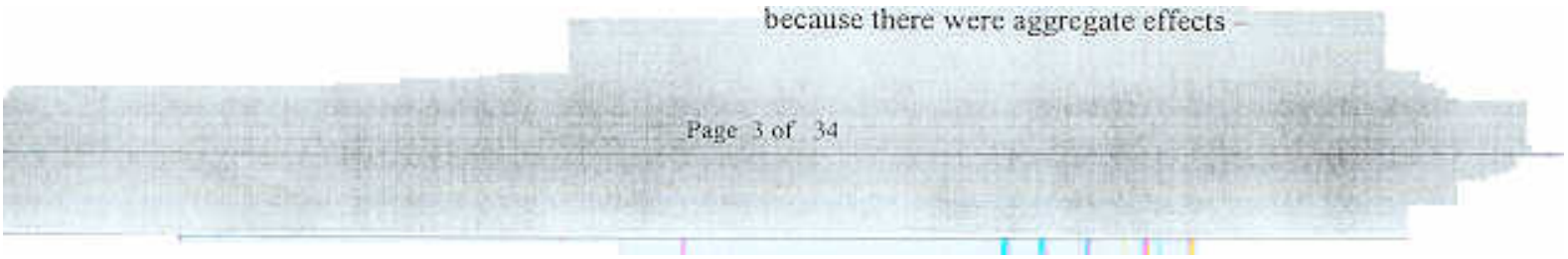
fanner grew wheat for his own use - the Court upheld a federal statute restricting this



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namely effects on the market that he was not participating in. But in this case, the concern for the market was not why Congress passed the law. so the aggregate effect argument is a little weak.

Additionally, the Court will look to congressional fmdings and is typically pretty deferential with respect to laws effecting commerce (rational basis). In this case, Congress did provide findings that the

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distribution and possession of controlled substances had an effect **on** interstate commerce. Although there are not a tremendous volume of findings, the Court will likely accept them.

If this law is deterDline to be non-economic,

it will likely not survive judicial review.

Such non-economic purposes have related to

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criminal statutes (as seen in WPEZ). The

CSA may be non-economic regulation

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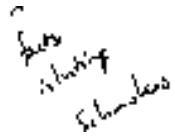
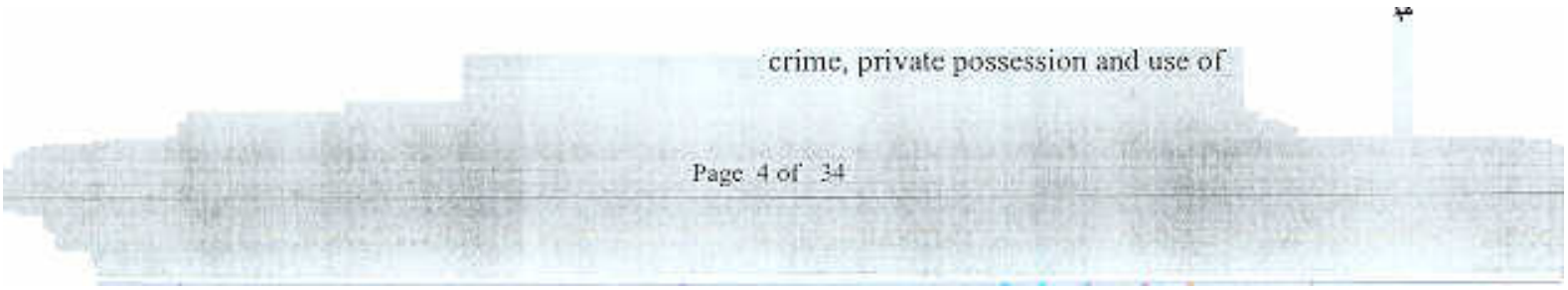
because it touches on things that are not

necessarily interstate commerce (such as





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marijuana, etc.). The aggregate effects

argument made above is categorically

rejected in the non-economic realm - and

additionally, it is important to note that the

Court usually finds such effects insufficient

in areas typically left to the states (e.g.

police power - which is implicated in this

case as states typically deal with the

regulation and criminalization of drugs).

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Further, if there is a jurisdictional element to

this statute, it might survive the Court's

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analysis. In this case, Congress stated that it

cannot distinguish between controlled

substances produced locally or nationally.

This provision provides no assurances that

only uses of controlled substances that touch

on interstate commerce are regulated, so

there is no jurisdictional element to save

this. Lastly, in tenns of congressional

findings, little deference will be given (if

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any). As noted in Morrison, this is because

Congress could make a multitude of findings

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c.

have a substantial effect on interstate

commerce. The findings must be express

and show a connection between the activity

and interstate commerce - the scant

congressional findings in this case actually

admit that it is impossible to distinguish

between local and interstate use.

ii. Because this law is likely non-economic regulation of interstate

commerce, it will probably be an invalid use of congressional

power under the Commerce Clause.

§ 5 of the 14th Amendment

1.

Under § 5 of the 14th Amendment, Congress has the power to enforce § 1 of the 14th Amendment through appropriate legislation. This ability to exercise its remedial or preventative power under § 5 must be judgedby the extent to which there is a congruence and

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proportionality between the injury to be prevented or remedied and the means adopted to that end.

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In order to detennine if the CSA was validly passed under this grant of congressional power. a number of questions must be answered: (1) what is the constitutional right at issue? (2) was there a pattern of state unconstitutional conduct? (3) was the congressional act an **appropriate** response?

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Under the first question, one must look to the findings and purposes (as well as legislative history, if there is any) of the CSA to determine what constitutional right is at issue. In this case, the CSA explicitly states that it was enacted to eradicate the use of marijuana throughout the U.S. due to its effects on pregnancy and therefore, women's rights.

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2. The next step is to determine if there was a pattern of state

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unconstitutional conduct. In this case, this is where this type of legislation will likely fail - Congress has providing no findings (except a general statement about marijuana's effect on pregnancy) that states are discriminating against

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women or pregnant women (or even what number of states allow the use of marijuana). This is similar to Boeme in

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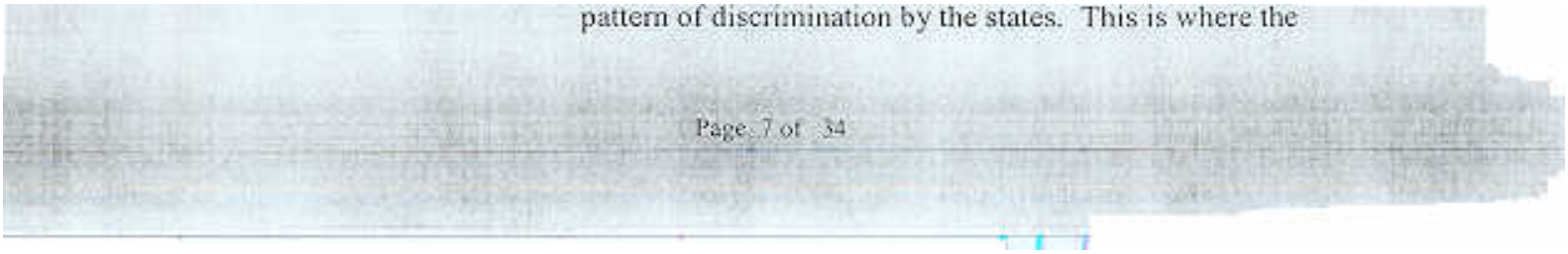
which Congress provided no findings of religious discrimination. Additionally, because gender requires intennediate scrutiny, any sort of state discrimination must be substantially related to a compelling state purpose. There may be an argument that even though some states may allow the use of marijuana, it is substantially related to a compelling state purpose of treating the ill and tenninally ill and is therefore valid discrimination by the states. Lastly, the CSA must be an appropriate response to the



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congruent and proportional element comes in - the prophylactic legislation must be congruent and proportional between the injury to be prevented or remedied and the means adopted to that end. In this case, the legislation will

likely fail under this step as well. The CSA is a broad act covering a whole ranges of uses of marijuana. Under this question, the legislation must be narrowly targeted to survive. The CSA could have survived if it targeted just

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public use of marijuana (as many state laws do concerning smoking), **but** this sweeping coverage (as seen also in Boeme), makes the legislation an invalid remedy.

iii. The CSA will likely fail under this exercise of congressional power, because it is too broad and Congress has not produced findings demonstrating a pattern of invidious discrimination by the states.

d. Tax & Spending Clause

i. Under the tax and spending clause, Congress has the authority to regulate states through conditional spending (see Art. I, § 8, cl.t). There is a four-part test to detennine if the CSA is a valid exercise of congressional power under the tax and spending clause (hereinafter T &8). This test is: (1) Is the exercise of spending

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power in pursuit of the general welfare? (2) Is the condition on the

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states' receipt of federal funds unarnbigpous? (3) Do the conditions

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on the federal grants have reasonable conditions relevant to federal interest in the project and to overall objectives? (4) Are there any other constitutional provisions that provide a bar to the grant of funds?

1.

Under the first step of this test, the Court is typically deferential to the judgment of Congress. In this case. the first finding of the CSA states that one of its purposes is to control substances that have a substantial and detrimental effect on the health and general welfare of the American people. This will probably be enough (in addition to the other findings which touch on the health concerns for pregnant women and unborn children) to meet this step of

the test.

2. Under the second step, the conditioning of federal funds must be unambiguous. In other words, states must be able

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to make their choice to accept or reject the grant knowingly and fully cognizant of the consequences. This is also

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known as the plain statement requirement as discussed in Pennhurst. The conditions on this grant (seen in § 5 of the CSA) are not entirely clear. There is no fixed percentage of funding and it is passed on the State's cost of its enforcement efforts - this raises the question, what is

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enforcement efforts? The State will likely not know

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exactly what it is supposed to do in terms of the enforcement, not unlike Pennhurst in which state officials had no clue what "right to treatment" really meant. Although. the cooperative law enforcement efforts are touched upon in § 4 of the CSA, which may be unambigious enough so that states know what they have to do. However, it does not seem explicit enough to meet this **step** of the test.

3. The third step requires that the conditions placed on the federal grants have reasonable conditions both in terms of the federal interest in the project and in tenns of the overall objectives. This is where another problem arises. Congress did not specify in the CSA how the federal funds

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are to be spent - except of course that the governor gets to certify where the money goes, based on priority needs. This provision does not ensure that the funds are spent in a manner that is related to Congress' goals and objectives in passing the CSA. Although most of the money in NM will

go to DWI programs (which may have a relation - driving

while under the influence of drugs is connected to the

regulation of controlled substances - an even stronger

connection than in Dole), this expenditure can change year

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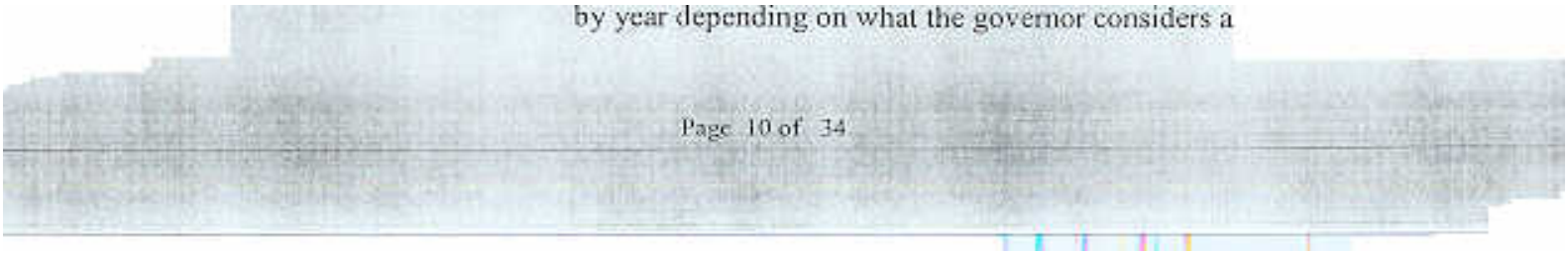

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priority need. The condition requiring local law

enforcement efforts is likely a between connection between

the grant and the overall objectives and may indeed save

the CSA under this step.

4. The final step is to determine if there are any other

constitutional bars to the grant *of* funds. This will be

discussed below.

ii. A final concern under the T &8 clause is whether the grant of funds

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is coercive. Since the grant is tied to law enforcement efforts

under the CSA, the states can really turn down the grant without

any real hanD to them fInancially, therefore it is probably not

coerCIve.

The CSA will likely fail under this exercise of congressional power

because the conditioning of grant money is ambigious and not

necessary tied to the objectives that Congress hopes to further by

the CSA.

3. SECOND QUESTION - Are there any other constraints on in the Constitutionl

preventing federal action?

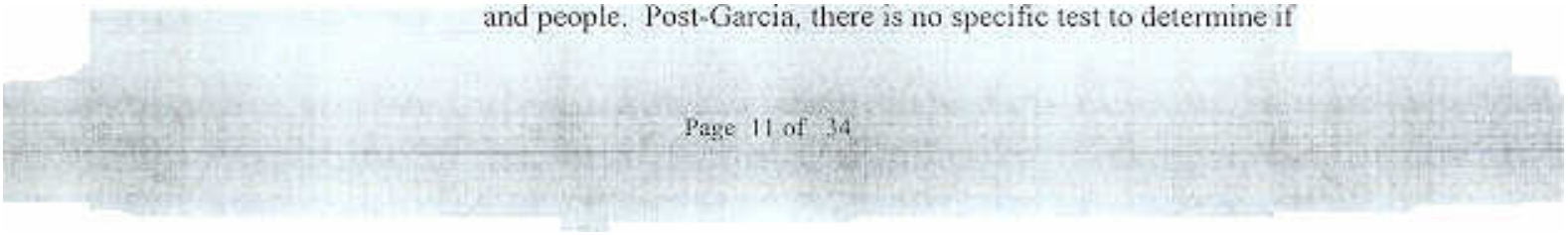
a.

Under this question, if there is some other constraint on congressional

power (namely, the loth Amendment), then the CSA will be invalid.

10th Amendment - under the 10th Amendment, powers which are

not delegated to the Federal Government are reserved to the States



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the 10th Amendment poses an internal and/or external constraint on

the exercise of specific Congressional powers that impose direct

burdens on state governments. The Court will decide if the lOth

Amendment bars the CSA on an ad-hoc basis, touching on two

areas: (1) general applicability. and (2) states as states.

1. The Court will first ask whether the CSA is a generally

applicable law. In other words, does the CSA apply to everyone or to just states? In this case, the CSA appears to apply to everyone, but there are elements to it (namely § 4) which apply solely to states, making it necessary to consider the second question.

2. Does the law affect states as states? Clearly, § 4 does and unless it is valid under the T &8 Clause, the 10th Amendment will likely be implicated in this case. One of the restrictions on laws that affect states as states is that Congress can't commandeer the legislative processes of States to enact and enforce a federal program (See New York) or state officials to effectuate federal regulations (See Printz). Although purely ministerial reporting requirements may be ok (See O'Connor's concurrence in

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Printz), any other sort of commandeering will not be ok and the act will violate the 10th Amendment. In this cage:-there

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is clearly some commandee~g going on. Section 4

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requires States to investigate and report all interdictions of **drugs scheduled under the** Act.

Although the reporting requirement may be ok, Congress cannot make state executive officers enforce federal regulations - this type of commandeering is not allowed. Additionally, § 4-5 may actually commandeer state legislatures as well because states may have to create programs by which to enact and enforce the CSA. Clearly, under the 10th Amendment, it is ok for Congress to regulate state activities, but it is not ok for Congress to control or influence the manner in which states regulate private parties (See Reno). The only way around this bar would be for Congress to either enact

legislation validly under the T&S Clause (which it did not

do in this case), or preempt the field entirely (discussed

below)

4. **Federal Preemption**

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a.

b.

Whenever the exercise of state power clashes with a valid **act** of Congress,

the force and effect of the Supremacy Clause (Art. VI, § 2), requires the

federal law **to preempt state** law.

In this case, there are clearly both a state law and a federal law which both

purportedly deal with the same issue. In order to detennine if the state law

actually clashes with the CSA, the Court must examine a number of

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issues: (1) Did Congress hav~ ~uthority to regulate in this field? (2) Was

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c.

Congress clear about the preemption? (3) If Congress was unclear, is there implied preemption?

There are two types of preemption, express preemption and implied preemption. Express preemption is found when by looking at the

language, structure and purpose of the federal law, it is clear that Congress meant to preempt state law on the subject. Implied preemption has three forms. Implied field preemption exists when the scheme of federal legislation is so pervasive that it is clearly preemptive. Implied conflict preemption exists where compliance with both federal and stae law would be impossible. Lastly, implied objective conflict preemption exists when state law interferes with the achievement of a federal objective.

d. In terms of the first question - whether or not Congress had the authority to regulate in this field is discussed in my earlier analysis of federal power.

e. Assuming that Congress did have the authority to regulate in this field, was Congress clear in preempting state law. In this case the answer is no. Nowhere in the CSA does Congress state expressly that it intended to preempt existing state law in this area. Although of course it can probably be implied by the scope of the legislation. Because the CSA touches on crime and medical issues (typically police powers of the states), the Court

will not fmd express preemption unless there was a clear and manifest purpose of Congress (See Pacific Gas). Because Congress did not expressly preempt state law, we must look to whether implied preemption

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f.

In tenDs of the final question, there may likely be implied preemption in this case. In tenns of implied field preemption, the scope of the CSA is certainly broad and covers nearly all possible uses of marijuana. It is likely that the Court could find implied field preemption - especially since the CSA speaks directly to MUA in tenus of medical uses of marijuana (which is exactly what MUA intends to provide for). In temlS of conflict preemption, it is clear that compliance with both the CSA and MUA would be impossible. Use of marijuana for medical purposes (as provided for in MUA) is a violation of the CSA. Lastly, objective conflict preemption probably also exists because the federal objectives of the CSA (eradication *of* marijuana) conflicts with the MUA's allowance *of* marijuana for medical purpose. Even though there is likely preemption in

this case (regardless of which type), however, there will only be preempt if the CSA is a valid exercise of federal power - if not, MU A stands and there is no preemption.

There is not **11** th Amendment issue in this case because Schmokes' suit is against the federal government.

QUESTION TWO

PART A

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1. Under Part A of Question Two, the federal constitutional problems raised by the New Mexico Medical Marijuana Protection Act must be addressed. There are a number of Constitutional provisions and doctrines which impose limitations on state power, I will address the applicable ones below,

a.

Dormant Commerce Clause (DCC)

i. The express grant of power to Congress to regulate commerce includes within it an implicit restraint on state power known as the DCC. The purpose behind judicial enforcement of this aspect of

the Commerce Clause is to combat state protectionism

(balkanization) and discrimination.

ii. In order to detem1ine if the DCC is a restraint on the MP A, the first

question to be address is whether the state law discriminates

against out-or-staters. In general, a state can discriminate against

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out-or-staters by (1) imposing embargo-like barriers. or (2)

providing benefits to residents while imposing costs on out-of-

staters. In this case, all marijuana that is going to be sold within

NM must be inspected and tested by the NM Department of

Agriculture. This is not a ban on importation of marijuana into

NM because all states are able to sell marijuana within NM,

providing that the marijuana passes inspection (which could raise

an argument that it is a potential bar). However, the MP A applies

to both New Mexicans and non-New Mexicans so it is not facially

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discriminatory. Although it maybe possible to argue that benefits

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111.

are provided to New Mexicans (in terms of the exceptions to the inspection requirement on certain kinds of marijuana grown in state, while no such exceptions apply to out-or-staters). In this manner, it may be possible to argue that the MPA is not facially discriminatory (but neutral), but the effects are discriminatory (both in tenDS of the exceptions provided to New Mexicans as noted above and the fact that other states cannot purchase marijuana from New Mexico under § 3). **add protectionism

Assuming that there is in fact no discrimination, the Court will

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apply the Pike Balancing Test to detennine if the state law is valid. Under this test, the Court balances a number of factors, including: (1) does the statute work evenhandedly to promote a legitimate local public interest? (2) Are the effects on interstate commerce only incidental? (3) Could that same local interest be promoted with a lesser impact on interstate commerce?

1. Applying Pike to this case, the MP A states that inferior

marijuana poses a substantial health risk. Clearly, one of the purposes in passing this Act is to protect the health of New Mexicans. However, when one examines § 1 (b), it is clear that New Mexico had other purposes for passing the MP A as well: the MP A also mentions that it does not want to be a haven for substance abusers or attract seriously **ill**

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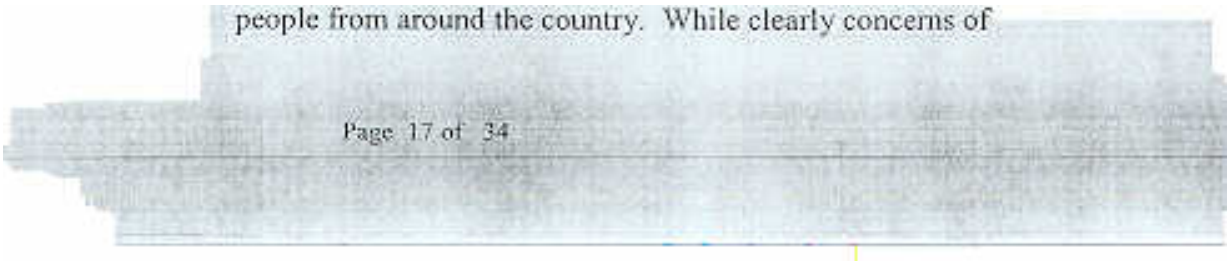

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any state, these purposes are obviously protectionist in nature and will suggest to the Court that the true interest in passing the MP A was not local medical concerns, but keeping others out of the state (this also goes to my argument above concerning whether the MP A is discriminatory).

This is a balancing test, however, and the Court will also consider what the effects of this law is on interstate commerce. There is probably little effect on

interstate commerce. Medical marijuana is presumptively a small market (as most states do not allow it) and controlling the use and growth of it within New Mexico is not likely to seriously effect interstate commerce (unless of course there is in fact a large market for this product). Finally, the Court will consider whether there is a less restrictive alternative to the conditions imposed by the MP A. Because concerns over pesticides and such is a partial basis for the MP A, New Mexico must use some restrictive measures on the quality of marijuana sold within the state. It seems unnecessary to restrict who can buy marijuana within the state or provide exceptions to only New Mexico farms certified by the Dept of Agriculture. Perhaps allowing

certification for everyone who meets the criteria and then

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allowing those groups to sell marijuana in the state and

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allowing anyone to buy marijuana in the state (meeting the criteria for medical uses) would be less restrictive (but **probably** not).

2. If there is discriminatio~ the Court asks two questions: (1) Does the statute serve an important local purpose? (2) Is there an absence of alternatives that discriminate less against local commerce? This is similar to the Pike Test, but it is important to not that statutes that are found to be discriminatory from the beginning are presumptively invalid, which means they must survive stricter scrutiny to remain valid under the DCC. Therefore, my analysis ties

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into what was stated under the Pike Test (above), with even less deference given by the Court. Although safety and health concerns are typically a central state issue under police powers, the court will not defer to these proffered reasons if it believes that such reasons are truly pretextual. In this case, the pretext isn't really a pretext - it is in fact explicitly stated in § l(b). This is similar to Kassel in

which the legislative history indicated that Iowa really

wanted to limit highway traffic rather than keep highways

safer through a restriction on the sizes of trucks allowed on

the highway. However, it is important to note that it is

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interstate commerce. In tel1I1S of less restrictive means,

there may not be any in terms of protecting the health of

New Mexicans who used medical marijuana, but in light of

the clearly protectionist objectives in keeping substance

abusers out of the state as well as the seriously ill, the law

will probably be invalid under the DCC (unless of course

NM gets congressional consent which would allow it to
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engage in conduct whihc would normally violate the

Commerce Clause - this must be unambigious and not in

violation of any other provision of the Constitution).

b. Privileges & Immunities Clauses

The MP A may also raises some privilege and immunities (P&I)

concerns under both Article IV and the 14th Amendment.

ii. **Article IV P&I**

1. Under Article IV, states cannot deny citizens of other states

the same privileges and immunities afforded its own

citizens. This issue will arise if the MPA is challenged by

an out-of-stater. The test is as follows: (1) Is there

discrimination? (2) Does it affect a fundamental right? (3)

The state is not barred from discriminating against non-

residents when (a) there is a substantial need for the

di fTerence in treatment, and (b) the discrimination bears a

substantial relationship to the state~sobjective.

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2. Whether or not there is discrimination will of course

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depend on who is bringing the claim against NM. Fanners may have a claim that NM's restrictions on the type of marijuana that comes into the state and refusal to provide exceptions to out-or-staters is discriminatory. Further, the bar on purchasing marijuana by out-of-staters could also be challenged by an individual.

The next step asks whether the discrimination affects a fundamental right. According to Supreme Court jurisprudence, fundamental rights include access to the

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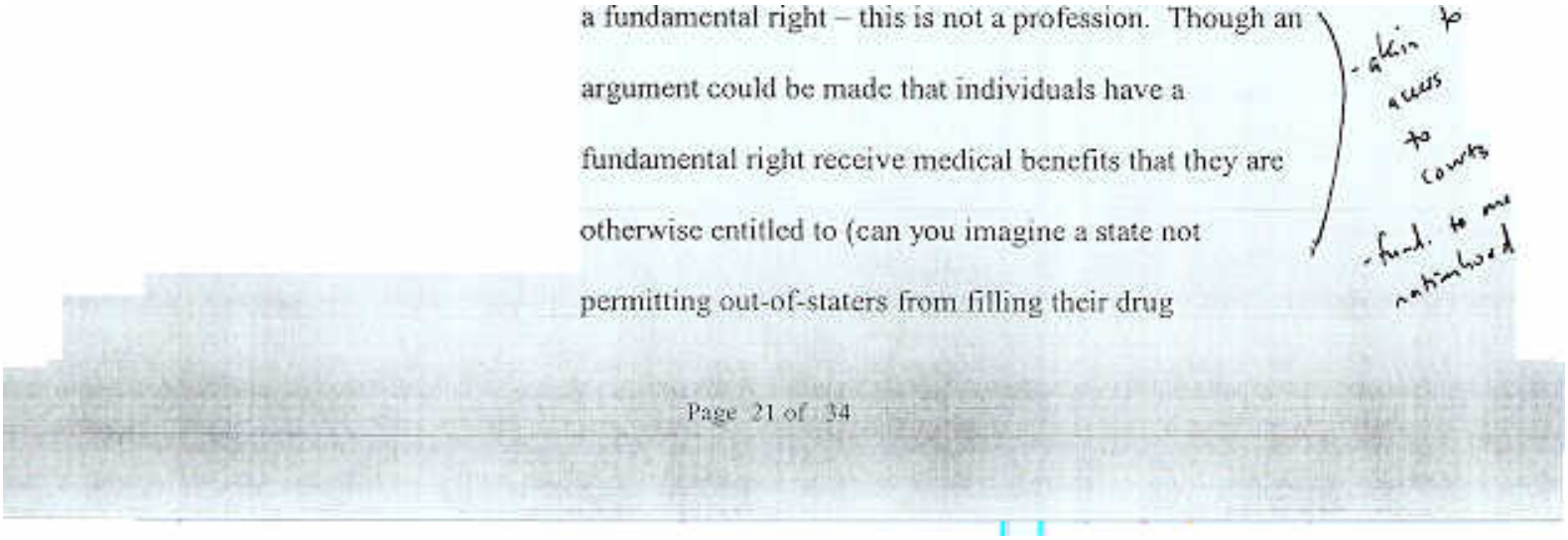
courts, disposition of privately held property, and pursuit of a common calling. The fact that exceptions to the MP A are allowed to New Mexican famls, but not to out-of-state famlers impinges upon their rights to pursue their profession within the state of New Mexico because they are

forced to jump through more hoops than residents are in selling marijuana within the state. The out-or-stater who wants to buy marijuana in New Mexico is likely not losing


a fundamental right – this is not a profession. Though an argument could be made that individuals have a fundamental right receive medical benefits that they are otherwise entitled to (can you imagine a state not permitting out-of-staters from filling their drug

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4.

prescriptions?) .;..;; though this argument will probably not fly.

New Mexico may discriminate against out-or-staters ifit can show a substantial need for the difference in treatment. In this case, there seems like little need to refuse to allow out-of-state farmers get the same exceptions as the New Mexican fanners (unless of course it is too difficult for the NM Dept of Agriculture to certify out of state farms in tenDS of cost and manpower). Clearly there is no substantial need to prevent an individual from purchasing

medical marijuana within NM ifhe or she is other eligible to (except of course, New Mexico's desire to keep certain groups of people out of the state). The Court must also consider whether there is a less restrictive alternative to New Mexico's discriminatory actions. In this case, NM can simply certify out of state fanners (if economically feasible) and let out of staters buy medical marijuana providing that they are otherwise eligible (this will prevent the onslaught of seriously ill individuals and drug users because it requires all individuals who purchase medical marijuana to be eligible under their states' laws - if they could get the drugs elsewhere. why come to NM?).

iii. P&I Clause of the 14th Amendment

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This clause protects the rights of national citizenship and will likely be implicated if a newly arrived resident to NM sues because he or she is unable to purchase medical marijuana under § 3(b). The relevant federal P&I in this case is the right to travel.

2. According to Saenz, the right to travel protects the right of a citizen of one state to enter and to leave another state, to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state.

3.

In this case, the right of a newly arrived resident to be treated like citizens of New Mexico is affected by the provision of the MP A which places requirements on the amount of time an individual must be present in the state before he or she may purchase marijuana. This could be

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analogized to Saenz in that a newly arrived resident to CA was preventing from receiving the full amount of welfare

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benefits provided to citizens of CA. On the other hand, the MP A provision has a short time limit (only 6 months) and allows for emergency exceptions to the restriction. This still treats newly arrived residents differently, but does not

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hann their health or welfare. Of co~, the federal P&f.:,

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clause is kind of a "slumbering giant", so it is unclear how

the Court will rule on this issue.

PARTB

1. **Part** B of Question Two requires an analysis of federal constitutional problems

raised by the Governor's proposed plan. I will address each problem one at a

time.

a.

Dormant Commerce Clause - Market Participant Exception

1.

See above for my generalized discussion of the DCC. In terms

of its application to this case, the Governor's plan will

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discriminate against out of staters in terms of sales of Abq

Gold. It will probably be in violation of the DCC. but NM can avoid this due to the market participant exception (MP) to the DCC.

ii. Under the MP exception, the Supreme Court has concluded that its usual role in rooting out state protectionism is unnecessary when the state acts not as a regulator of the free market, but rather, as a participant in it. To determine ifNM meets the exception in this case, the Court must decide first whether NM will be a market participant and importantly, what the market is.

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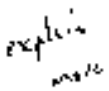
1

NM's joint venture will grow and sell a specialized **fonn of** marijuana. **It** is unclear whether its status as a joint-venturer in the agreement makes it less of a

market participant, but presumptively, NM will be involved in the growth and sale of Abq Gol~ making it a market participant (it will be important to note that if this is the only seller of marijuana within the state, in addition to state regulations on marijuana, NM may in fact be a regulator of the market rather than a participant.

2. The second issue is whether the regulations imposed by NM are inside or outside the market. The regulations in the plan restrict the sale of Abq Gold - this seems to be within the market. According to Reeves, it is permissible for the state as a market participant to sell to in-staters first, then to out-of-staters. Of course, if in fact NM is restricting access to a natural resource

(which it may well be - considering that Abq Gold is a rare type of marijuana that can only be grown at



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G!~ley Estat~hen its actions are impermissible

under the MP exception to the DCC.

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3. The use of subsidizes from the sale of Abq Gold should

4.

be ok as they are not combined with a discriminatory

tax'c

Additionally, even if the market participant exception is

met, the state's actions could still violate other clauses

of the Constitution (namely the P&I Clause, discussed

above)

b. Takings Clause

1.

There are two aspects ofNM's plan which may raise Takings

Clause issues: (1) the condemnation of Grassely Estates, and

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(2) the 60-month moratorium on all construction within a two-

mile radius of Grassely Estates. I will discuss both as I

proceed through my Takings Clause analysis

n. Under the 5th Amendment, private property cannot be taken for

public use without just compensation. To detennine if there is

a violation of the Takings Clause, the Court must examine the

following elements: (1) is there a taking? (2) is it private

property? (3) is it for public use? (4) is there just compensation.

iii. Is there a taking?

1

There are three types of takings (1) where the

government physically possesses private property, or an

identifiable portion of it, (2) where the government

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requires1he own~rofthe private property to allow

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others to use the property, and (3) where the

government regulates property for a proper public

purpose, but where the regulation burdens the economic

value of the property. In this case, the condemnation of

Grassely Estates implicates the first type of taking and

the 60-month moratorium implicates the third type of

taking.

a.

Grassely Estates - Takings where the gOy't

physically possesses private property.

i. In such instances, the Court **will** always

find a taking necessitating a payment of

compensation, so the condemnation is a

taking

b. **Moratorium - Takings where the government**

regulates property for a proper public purpose,

but where the regulation burdens the economic

value of the property

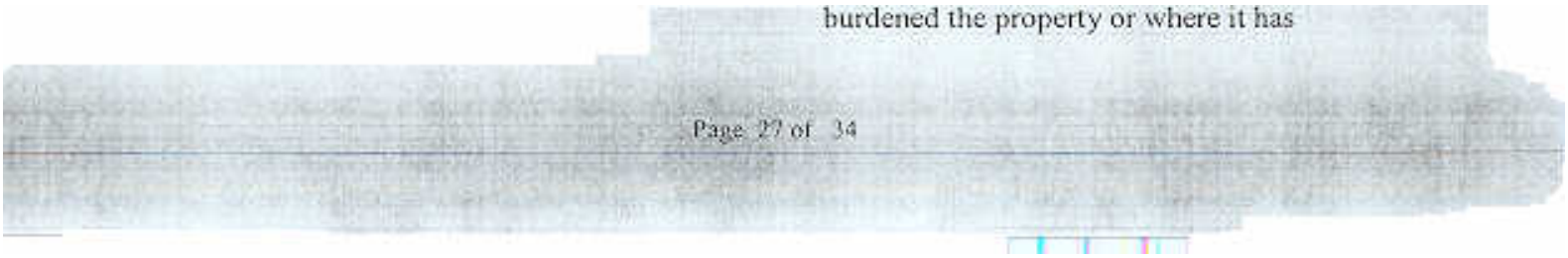
There are two different tests that can be

applied under this area, (1) **Penn** Central

and (2) Lucas. In order to detennine

which test to apply, the Court will look

to see **if the regulation has simply**



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deprived the property of all beneficial

use. According to Tahoe, a temporary

moratorium is not depriving land of all

economically beneficial use, so the Penn

Central Test should be applied. In this

test. the Court balances 3 factors (1) the

economic impact of the regulation, (2)

the amount of interference with investment-backed expectations, and (3) the character to of the government action. In this case, there will likely not be a taking based on these factors. The economic impact is temporary (although the dissent in Tahoe may claim otherwise). the investment-backed expectations will actually benefit because NM believes that the

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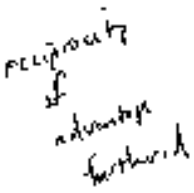

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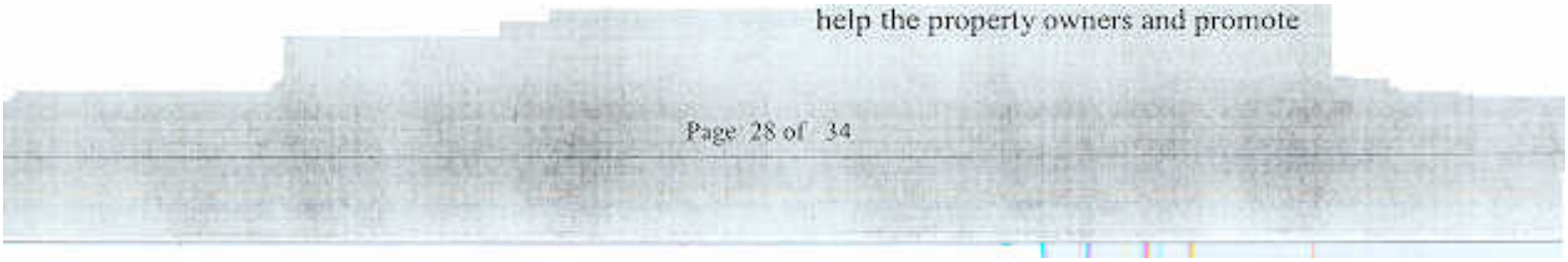
moratorium will allow the value of the property to include and taking a 60 month break won't seriously impede on the owners' expectations. Lastly, the character of the government action is to



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lV.

v.

the general welfare by allowing Abq

Gold to grow (which will eventually

help health/medicine).

Is it private property? In both cases the properties are private

property.

Is it for public use?

1

This element has been interpreted broadly, anything

that is rationally related to a conceivable public purpose

is good enough. In this case, the Grassely Estates

condemnation will serve to provide the opportunity for

the production of a beneficial foml of medicine

(marijuana), so that will likely be ok (though an

argument can be made that it is for the state's own

commercial interest - but that may benefit the public as

well). The moratorium also goes to this and should be

ok.

Is there just compensation?

I

This is a fact bound inquiry and is based on how much

the property owner loses, not how much the state gains.

In the Grassely Estates condemnation, the fair market

value is plenty to be considered just compensation. In

te11!1s of the moratorium, it will likely not be a taking,

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c. **State Action Doctrine**

i. The state action doctrine issue will arise if there is a suit

11.

regarding the validity or actions taken under the plan - because this joint-venture is actually run by a board of directors, an individual will have to assert that there is state action in order to make federal (14th Amendment) Constitutional claims against the entity (the claim will likely be that the hiring practices are discriminatory).

In order to detennine if there is state action, the Court does an ad hoc balancing, sifting through the facts and weighing circumstances of each case. There are two tests under this doctrine: (1) public function, and (2) entanglement.

Under the public function test, the court will find state action when the actor is perfonning a traditional and

vi'

exclusive public function. ill this case, running a board of directors is not a traditional or exclusive public function, so the board's conduct does not rise to state action.

1.

Under the entanglement test, the court will consider (1) whether the state has aff1m1atively facilitated the

conduct, and (2) whether there is a nexus between the

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government and the challenged conduct such that the

conduct can be fairly treated as that of the.st~jUel[

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a.

The coUrt will likely find state action under this

test. The state certainly has facilitated the

conduct - it has created the joint venture (it has

a contract with Hizer), it benefits from the

venture, and will profit from the discriminatory

practice. There is a symbiotic relationship

between the state and the joint venture (both in

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tenns of benefits and in tenns of governmental officials serving on the board). In temlS of a nexus, as noted above - there is a symbiotic relationship. This is likely a monopoly, so there must be a connection between the monopoly status and the challenged action (and there probably isn't in this case).

3. Lastly, the court can also apply an Entwinement Test (as noted in Brentwood), in which there is state action if there is pervasive entwinment of state officials in the structure of the private actor, either an entwinrnent with government policies or a governmental entwinment with the management and control of the private actor. Under this test, there is certainly state action, the board

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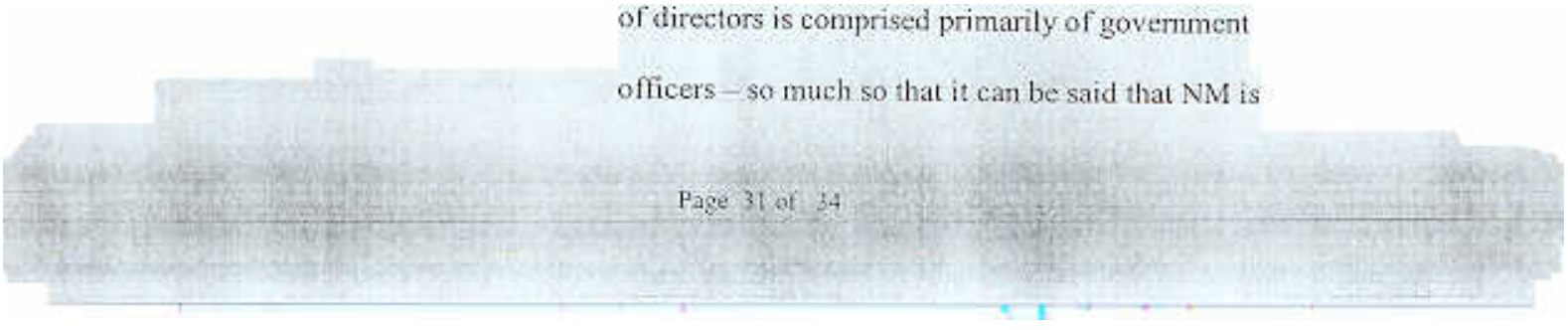

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d.

entwined with the structUre of the private actor by asserting authority over its management **and** control.

4. If the court does fmd state action (and it likely will), it must then consider whether the action violates Constitutional provisons against discrimination (14th **Amendment,** etc.).

Contracts Clause

Under Art. I, § 10, cl. 1, contractual feedom is entitled to explicit protection against abridgment by state governments. Under NM's plan, Hizer will have *to* cancel all preexisting contracts to deliver Hizer processed marijuana to other suppliers. To detennine if this is a violation of the Contracts Clause, the Court will apply the following test: (1) Is there a substantial impainnent of the contractual relationship? (2) If the state regulation constitutes a substantial irnpaimlent, is there a significant and legitimate public purpose for the law? (3) Is the law a reasonable way of achieving the ends?

ii. Under the first step of the test, the Court will examine the expectations of parties and whether the area in which the state acting is a highly regulated area. The severity of impairment in this area will increase the level of scrutiny.

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In this case, the other contracting parties lose their reasonably

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expectations based on ~eir c~tracts with Hizer.. Whether or

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not this is substantially severe will depend on whether these

other suppliers had a number of other contracts or whether their

contracts with Hizer were their own source of marijuana. If

these suppliers are completely destroyed (or at least severely

impacted) by the state's interference, the court may finds a

substantial impainnent.

iv. Assuming that this is a substantia] impairment, New Mexico

can justify it by naming a significant and legitimate public

purpose for the law.

This public purpose goes to a broad

generalized economic or social problem (see Blaisdell). This

guarantees that NM is exercising its police power (protecting

citizens), rather than providing a benefit to special interests.

This is a difficult issue because special interests are benefitting

from this interference (namely Hizer), but it is important to

note that the interference may also promote a important public

interest in providing medical treatment for seriously ill

individuals.

On the last step of the test, the Court must detennine if the

state's plan is a reasonable way of achieving the purposes

enumerated above. If the state is not a party to the contract,

deference will be given to economic and social legislation.

Whether or not this is a reasonable way of achieVing NM's

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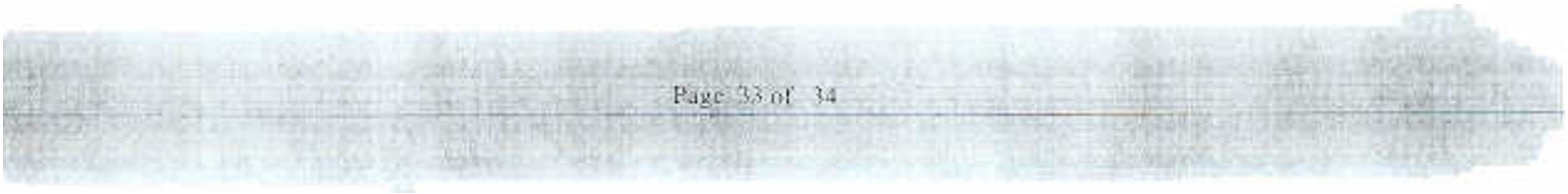

ends **will** depeI1don.the **amount** of marijuana tha)!.Hizer ~"

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planned on supplying to others (ifit was truly burdensome, it

might hamt the development of Abq Gold) and whether the

suppliers were so burdened by the interference that it was

unreasonable. Because important economic and social interests

are at stake, the court will probably hold that it is reasonable.

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Exam Start Date: 12-09-2004 Exam Start Time: 14:00:58 Exam End Date: 12-09-2004 Exam End Time: 17:28:48

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Exam/Paper No.

501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester **I,** 2004-2005

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Final Examination/Paper UNM Schoo] of Law Three Credits

Professors Bay,

lNSTRUCTIO~

December 9, 2004 lo30pm-5:30pm

1. This is a four hour exam; however, during the first half hour you may only read the examination and make notes on the examination document. You may not start writing (either in blue books or on your computer) until 2:00p. The exam consists of two highly general questions, which will have a number of sub-parts as you construct your answers. The two questions are weighted equally, and will be graded accordingly.

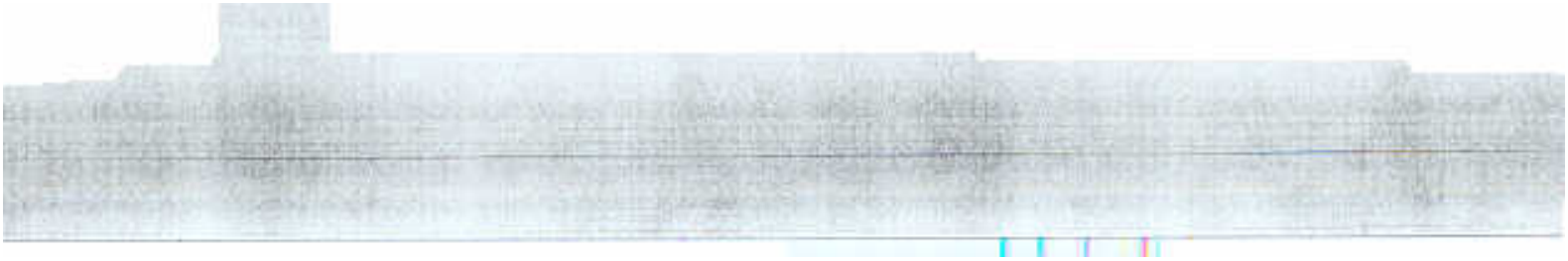
2. For those of you using blue books, please number your bluebooks in consecutive order; put your exam number and the name of this course on each bluebook; write on only one side of the page in ink and skip lines; and turn in both the bluebooks and the exam.

3. For those of you using computer, number the pages, put the name of the course and your exam number on each page, use a 12pt. (or larger) type face, and double space (but not triple space) your answer. This is automatic with Software.

4. This is a closed book exam, except that you may bring with you and consult your outline, and a copy of the constitution which you may annotate in any way you wish. Outlines, however, are limited to those you participated in producing. No commercial outlines are allowed, nor are you permitted to bring your course materials, or the slides from the web page!

5. The questions asked are somewhat open-ended. Although the issues are not necessarily hidden, they are not labeled for you. Thus, this exam requires both identification of the issues, and reasoned analysis of those issues.

[EXAMINATION BEGINS ON PAGE 2]



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501 Introduction to Constitutional Law Final Examination/Paper- Three Credits

Professors Bay, Browde and Valencia-Weber Semester I, 2004-2005

QUESTION 1 (50%)

Mary Jane Schmokes is a seriously ill resident of New Mexico who uses marijuana for ~~£~~ses o~ _the ~o~~~ation of her doctor. Such use is legal under the}New Mexico '~lCal Marijuana Use Act (MJlA)) passed by the state legislature in 2002. Schmok-e-;~"WS- her own medical marijuana, but because of her seriously debilitated condition she requires the assistance of others, to tend to her small crop. A cooperative and sympathetic neighbor voluntarily provides that assistance, harvesting the crop and providing it to Schmokes in the fonn, and dosage as directed by her doctor.

Schmokes has severe medical problems, including an inoperable brain tumor, seizure disorders, several chronic pain disorders, and life-threatening weight loss. Her doctor's affidavit asserts that Schmokes has tried all other legal alternative medications but they are ineffective or result in intolerable side effects. He further states, that the marijuana treatment substantially reduces her pain, increases her appetite, and provides a modicum of quality to her life--all of which would be lacking without it. With the treatment it is expected that she may live for some time. Without it, she is not likely to survive for very long.

Two months ago, Schmokes was visited by agents from a ~~~ve Dru~ Task *F*~ made up of State Police and the federal Drug Enforcement Agency {DEA),WnO, pursuant to the reportin re uirement under the federal Controlled~m(!. ~sAct C), and armed with a v warrant directing em 0 searc es 1 necessary to effectuate the reporting requirement and the seizure of scheduled drugs. After an amicable conversation with Schmokes, in which the agents explained that her growing and using marijuana was in violation of the CSA, th~ents seized and destroyed Qer ~ cannabis o!mts-

Fearing future such raids and the deprivation of her medicinal marijuana, Schmokes and her assistant, who sues anonymously as John Doe, have brought the instant action against ~!tomey General John Ashcroft and the A~nistrator of the 12M seeking declaratory and injunctive :re=fiet~ .t'lmntltts challenge the conStitutional validity oriiie CSA as applied to the possessing, obtaining, and using

cannabis for the medical use as recommended by a licensed physician pursuant to New Mexico's MUA.

The parties have stipulated to the facts (as outlined above, and as contained in the two relevant statutes). You are the law clerk to the federal judge in the case, and she has asked that you prepare a memorandum identifying all the federal constitutional issues which are presented, explaining how you think they should be resolved, and why. WRITE THE MEMORANDUM. (NB: do not waste your time writing a "statement of facts" section of the memo; rather use the facts in your analysis of the issues presented.)

The relevant portions of the federal CSA and the state MUA are as follows:

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501 Introduction to **Constitutional Law**
c, . .~ .~ :- .
Fmal ExarnmatIon/Paper- Three CredIts

r_rQf~s~~~_Bay,- Browde ~d y_alencia- W~Qer
___" Semester **1,2004-2005**

CONTROLLED SUBSTANCES ACT (CSA)

Section 1. Con2Iessional fmdings.

(1) The illegal importation, manufacture, distribution, and possessi°n,~~~ef.~~
controlled substances have a substantial and detrimental effect on th~lth and general "- welfare of the American people. - -

_\ (2) Local distribution and possession of controlled substances contribute to swelling the
L interstate traffic in such substances.
~o~~d substances manufactured and distributed intrastate cannot be differentiated
j,11 from controlled substances manufactured and distributed interstate. Thus, is it not feasible to
-1 .. distill ish in terms of controls, between controlled substances manufactured and distributed
__\) mterstate and controlled substances manu stri uted intrastate.
mFedeiaI ron-ttol of me ili1rasmte mciaents of the traffic in controlled SUDstanceS is essential to the effective control of the interstate incidents of such traffic.
;I (5) The use of marijuana, including the second hand Smoke from its use, has been medically linked to re anc - related medical co licatioDs, and therefore eradication of the use of
. marijuma throughout the Urnt tates, -ancrwithout exception, is necessary to protect the constitutional rights of all women.

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Section 2. Schedulin2 of Certain Drugs as Controlled Substances.

Marijuana is a Schedule I controlled substance because it is hereby found that:

(1) The substance has a high potential for abuse;
(2) The substance has no currently accepted medical use in treatment in the United States; and
(3) There is a lack of accepted safety standard for use of the drug or other substance under medical supervision.

~tion 3. **Prohibitions.**

It is unlawful to knowingly or intentionally to possess, manufacture, distribute, or dispense a Schedule I controlled substance.

Section 4. CooDerative Law Enforcement and R~orting.

State and Federal agencies involved in the "War on Drugs" are obliged to investigate and r~ the Administrator of the DEA, in whatever fonn they deem appropria~ intefei~"ls Otdrugs scheduled under this Act. --

Section 5--,- Q~ts **to** States.

Every State that complies with the provisions of Section 4 shall receive an annual grant from the

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s cost of its of its cooperative law enforcement efforts.

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DEA measured by the State' The funds
may be utilized by the State for any program which the Go~~~!;~~!~~ is the "~~tpIiQri!Y- ~ '4
need" of the State for the next fiscal year.) :::;~~ *'---'V V\J~ tI\fL.l.Jl--r?'~* NEW MEXICO'S MEDICAL MARUUANA USE ACT *(MUA)* ~ ~ r;

L~oy\I~..e:,,"*

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Section 1. ~oses

a. It is the policy of this State that the health and welfare of its citizens is best achieved when medical treatment decisions are left to the private doctor-patient relationship.

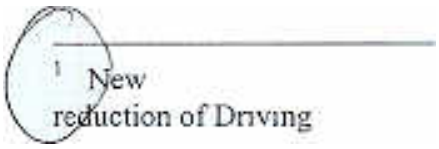
b. The Medical Marijuana Use Act is intended to:

1. Ensure that seriously ill New Mexicans have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has detemlined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, or any other illness for which marijuana provides relief;

2. Ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

Section 2. Exemption

A patient who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician, is exempt from those provisions of New Mexico law that make possession or cultivation of marijuana illegal.



Mexico is a complying state, and the Governor has certified the use of the funds for the .. While Intoxicated OCCUlTences in the state.

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QUESTION 2 (50%)

The district judge's fmal ruling in *SchmaUs v.-Ashcroft* engenders a renewed national debate about marijuana. That debate is taken up in Congress. After exhaustive hearings on the subject,- and intense pressure from a bi-partisan lobby group spearheaded by the Rev. Jerry Feelwell, Democrats on Progressive Education (DOPE), Republicans for Every Effort to Forge Equal Rights (REEFER), the Libertarian Party, and the ACLU, _~ongress overwhelmingly p~s~e~ Drug Refonn Act (DRA). That Act eliminates marijuana as a scheduled controlled substance, -removes att Ieriefa1 prom - oitions on the possession or use of mari'uan and expressl states:
States." -
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Part A of Question 2: (20%)

In the wake of Congress' action, New Mexico takes advantage of its position as a progressive leader in the field of medical uses of marijuana. The State retains its laws that criminalize the possession and sale of non-medical marijuana. Nevertheless, with respect to medical marijuana, the legislature enacts Medical Marijuana Protection Act (MP A), which states as follows:

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Section 1. PYm°se.

a. Inferior marijuana poses a substantial health risk to citizens of New Mexico who need to use marijuana for medical reasons. In some cases, contaminants, including toxic pesticides and herbicides, have been found on marijuana purchased in New Mexico.

b. New Mexico does not wish to become a haven for substance abusers. Nor does New Mexico wish to attract seriously ill people from throughout the United States because such people will impose great costs on our already over burdened health care system.

Section 2. Safety Standards

a. To insure that all Medical marijuana sold in New Mexico is cultivated in an organic manner without exposure to man-made fertilizers, pesticides, or herbicides, prior to sale the

marijuana must be sent to the NM Department of Agriculture, where it will be inspected and tested.

~ p. Subsection (a) does not apply to marijuana grown in New Mexico at farms pre-certified as organic by the NM Department of Agriculture, nor does subsection (a) apply to residents of New Mexico who cultivate three or fewer plants at anyone time strictly for private consumption based on a medical use authorized under the Medical Marijuana Use Act.

Section 3. Other Reguirements.

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~y individual who wishes to obtain medical marijuana inNew Mexico must:

a. Be a resident of New Mexico, and

b. Have been a resident of New Mexico for at least six months, unless the physician who issues the prescription to a resident certifies that an extreme medical necessity requires that the patient receive immediate access to marijuana.

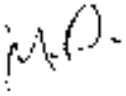
You are Counsel to the Governor, Paul Pott, and he very much favors this bill, but prior to signing it, he asked for your legal opinion **identifying any federal constitutional problems with this bill, and explaining in depth the nature of those problems. WRITE THE MEORANDUM.**

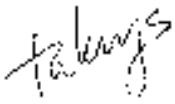
Part B of Question 2: (30%)

Our proactive Governor also sees great opportunity for economic development in the Medical Marijuana market. He is particularly intrigued by the recent report from scientists at New Mexico State University explaining that the best land and microclimate for growing medical marijuana is located in the Grassley Estates & Vineyard, in the North Valley of Albuquerque.

The report also concludes that a rare and delicate type of marijuana - dubbed .. Albuquerque Gold" by the press - can be grown there and nowhere else in the United States. .. Albuquerque Gold" requires minimal processing, and is the only marijuana with potent pain-killing attributes and none of the side effects of more conventional fonns of marijuana.

To develop the supply of "Albuquerque Gold," the Governor's staff has developed the following plan:





S.

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1. The State would ent~~~~~ ~~ture ~th phannaceutical giant, Hizer, forming a private corporation called ~~~~~~:--;>
2. The Sta~~ould condemn Grassl~Estates, paying the owner fair market value for

the land (e:VenlfiCou~ we know ~wner -wnr-object and fight the move). The State would-
then deed to the land to New Mexico-Hizer. For its part, Hizer will build a processing plant and marijuana fann on the land, which will be managed by New Mexico-Hizer. Hizer also understands that as a condition of the joint-venture arrangement, the State will require it to cancel all preexisting contracts it may have to deliver Hizer-processed marijuana to other suppliers. --

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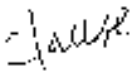

3. New Mexico-Hizer will be governed by a seven member Board of Directors--three appointed by the Governor, and three appointed by Hizer, and in honor of her courageous struggle, Mary Jane Schmoke (or her offspring) will be the seventh member of the Board.

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The Quality Control Officer of New Mexico-Hizer must be an employee of the New Mexico Department of Health.

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4. New Mexico-Hizer's by-laws require that all employees of the corporation be members of a racial or . . - . . (For purposes of this exam, there are no federal or stat es w .ch would preclude this).

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5. New Mexico-Hizer's by-laws restrict the sale of "Albuquerque Gold" to phannacies located in New Mexico, which must then be required to sell to New Mexicans on a preferential basis. Any remaining amounts may be sold to out-of-state phannacies on a first-come flfSt-served basis. The State and Hizer will split any profits, with the State's sh~~f the profits ~arked, of cours~~.l1iiher edu~.

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--. 6. Because of the sensitivity of "Albuquerque Gold" to exhaust fumes, the State must impose a ~~onth morat~Qum__~n all construction within a two-mile radius of Grassley Estates, t~sure that the- plan"iStake root This area includes residential neighborhoods, farms, vacant lots, and several strip malls. It is hoped that after that period the economic value of adjacent property will improve, because of its proximity to a highly successful and "clean" industry.

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As if you weren't busy enough, the Governor also wants a your legal opinion identifying any federal constitutional problems with this plan, and explaining in depth the nature of those problems. WRITE THE MEORANDUM.

(END OF HEAD TRIP. ~11"111.

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EXAMINATION!]