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Exam ID: 453
Course: Intro to Con Law
Professor Name: Bay
Exam Date: Friday, May 09, 2008

Question I

There is no contracts claim for Warbuck's or Romero because their contract did not exist when the law was made.

Takings

Warbuck's claim would be based on the Takings clause. States have the right to regulate property, but if the regulation goes too far, it becomes a taking. No government has the right to take property from a citizen without just compensation.

There are three ways to evaluate regulatory takings: Lucas rule, the Penn Central balancing test, and land use exaction.

His claim will not succeed under the more recent Lucas rule because Warbuck's has not lost all economically viable use of his property. The law is ambiguous as to whether he can regain his license to rent, but I presume not, however, he could sell the land, use it for his own dwelling, or put it to some other use. He also has the option to evict the Romeros, from whom he cannot take rent and he might be able to regain his license to rent once that was done.

Under the Penn Central balancing test, the economic impact will be evaluated against the reasonable expectations of the owner, and the reciprocity of advantage. In this case, his claim is also not likely to succeed. Losing the ability to rent one apartment

to people he was not allowed to rent to in the first place will not be considered so great an impact against the interests being furthered. Since the aim of the taking is to improve the welfare of all citizens, and improve urban blighting, this will benefit him as well.

Warbuck will want to argue that the area that his rental property is in, is not blighted and that evicting a married couple with two children who have lived in the US for over 8 years will not have any impact on the aims the law is intended to achieve. However, his claim is weak because not all the people this law impacts will be of such upstanding character. He will not be able to prove that the law is so inherently unfair to those who let to illegal immigrants.

what's the exaction?

Finally, he will probably be able to succeed under the land use exaction rule either. In this case, he would argue that the proportionality of the taking is not apportionate to the interest served. He will argue that loosing the license to rent this portion of land is too great a punishment for renting to a family whose children are US citizens. However, there is no evidence that he would not be able to regain that right once he had evicted them. Furthermore, even if he could not regain that right, the argument would be that it is appropriate to prevent lessors who lease to illegal immigrants from doing so. Since the idea of the legislation is to prevent housing of illegal immigrants, so that they will not come here and "blight" the community, revoking the licenses of those that do is a reasonable way to achieve that end. However, he would argue that the condition should serve the purpose. Preventing people from renting to illegal immigrants will not prevent the urban blight feared, but in fact, increase it. The result will not be to discourage illegal immigrants, but to create a homeless population

from it. This will drag down property values which will reduce the contributions to the education system and burden it even more. Furthermore, the homeless population will raise the burden on the health system. Additionally, illegal immigrants may be less likely to call attention to substandard housing, but illegal immigrants who do not have legal access to housing are even less likely to call attention to substandard housing and will likely create a slum lord situation that will further urban blight.

what about P&I of 14th A?

Privileges and Immunities

First, the law is blatantly discriminatory against other states. Unfortunately, the privileges and immunities clause applies only to citizens, which the adult Romeros are not. However, their children are citizens. Movement among the States is considered a fundamental right, and the Romeros would argue that their children are being denied the right to move among the States because their parents are being denied the ability to live in Arizona.

The law grants an exception to illegal immigrants of the State who have lived there for 12 months. The Romeros have lived in the country for more than twelve months, but the have been denied the ability to rent housing and live in Arizona. There is no evidence that illegal immigrants from out of State are the greater cause of the problem than those that have been in the State for 12 months, so there is no good reason for such a law.

However, I think the claim based on the privileges and immunities is too weak because the parents aren't citizens. Claiming that the children can't move among states because of their parent's lack of citizenship is too tenuous.

what about right to housing?

Dormant Commerce Clause

The law is facially discriminatory to other states. It grants an exception to illegal immigrants that is not granted to people who have lived in other states. The courts presume such discrimination is unconstitutional unless the State can show there is a legitimate state purpose and no less restrictive alternative.

The State purpose to protect from the results of harboring illegal immigrants seems legitimate. On the other hand, would banning the housing of illegal immigrants really reduce the problem of blighted neighborhoods? The Romeros will argue that preventing people from having legitimate housing will not prevent them from coming, but only make illegal immigrants a homeless population as well. That would increase crime, drag down property values, lower the contributions to educational systems, increase health costs and create greater blight than existed before.

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Additionally, there is no legitimate purpose to granting an exception for those who have spent more time in the State. There is no evidence that out-of-state immigrants are the greater cause of the problem. Except, perhaps to assume that in-staters have paid taxes or have proven themselves not to be as dangerous or the cause of blighting because

they have been in state for that long without being caught. This sounds like an illusory or pretextual claim. Furthermore, the purpose needs to be a local concern, not a national one. The interest is not a local concern because illegal immigration crosses all state lines. In fact, this legislation is the result of dissatisfaction with the national powers in handling illegal immigration – proving its national nature.

There are several less restrictive alternatives available. The State could remove the exception and treat all illegal immigrants the same. Or the State could grant the exception to all illegal immigrants who have lived in the US for more than 12 months.

Once the courts have weighed the facial discrimination against the legitimate state purpose and the less restrictive alternative, they will find that portion of the law is unconstitutional.

Pre-Emption

The Romeros and Warbucks may argue that the law is not valid because there is Federal pre-emption.

When there is no express Federal pre-emption, the court presumes against it.

However, pre-emption may also be implied when the Federal government occupies the field so completely that there is no room for the State to act. There are a "myriad" of law concerning illegal immigration that show pervasive Federal regulation of the field. This is an area of overwhelming national concern because the illegal

immigration exist within and crosses all state lines. However, in case of Federal pre-emption, the State law is somehow contrary to Federal law. There is almost no disharmony between the Federal and State law on immigration. However, there does seem to be some contrariness. The Federal law allows for only a fine for those who "harbor" illegal immigrants by hiring them, unless they can be shown to have a pattern of violations. The State law suspends the license of the renter, perhaps permanently, for a first offense. This may be disproportionate when compared with how the Federal law handles the situation.

The state will want to argue that the Federal government enticed them to pass a law against housing. First, they have indicated how serious a concern illegal immigration is, and secondly, they have failed to handle the problem themselves. Therefore, Congress has encouraged the States to handled the problem and thus, consented to their involvement in any such manner.

However, the argument should be made that the failure of bills to pass is not consent for States to act, but a decision that these were not appropriate action and response to illegal immigration. With so much national concern over illegal immigration, the Federal government has completely occupied the field so that a non-existent law is not enticement, but a conscious decision not to act. Therefore, the States have no place acting there themselves.

The housing ordinance is not an appropriate means to an end. It will not reduce the urban blight feared by Mapleton, but increase it. Furthermore, they have no right to deny housing to the citizen children of illegal immigrants. Finally, the state should not create an exception for their own illegal immigrants because that has no legitimate end. The field of illegal immigration is one that is so completely regulated by the Federal government, that laws are best left to their determination. Therefore, the law should be overturned, in its entirety as unconstitutional. If not, the portion that rescinds the license of a lessor, should be stricken as inequitable, as it is clearly not in keeping with Federal standards in the field. Also, the portion that creates an exception should be expanded to all States to prevent disunity in the nation.

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Question II (A)

Separation of Powers

DOW will first argue successfully that this is an inappropriate delegation of powers by the legislature to the executive.

The executive must be acting under an act of Congress, which the waiver law provides.

Since the branches are not hermetically sealed, Congress has the authority to delegate some powers to the executive branch, but there are some limitations. The law passed by Congress may not be Constitutional if it has inappropriately delegated power to another branch. It is permissible for Congress to delegate some power, provided that there are intelligible principles and specificity of standards. The standards may even leave some discretion in the hands of the executive, but there must be a principle upon which this discretion is based. The secretary has been given discretion that has no boundaries. He has the "sole discretion to ensure expeditious construction." The principle is that he ensure expeditious construction, but that creates only a broad authority with no counteracting limitation. There is no guideline as to what constitutes expeditious construction. His power is absolute. By the words "sole discretion," he can make a determination without any input or check on his decision. The only justification is that he believes that the law he has waived will "ensure expeditious construction." He determines the values that are "expeditious." One might argue that expeditious is not merely a matter of speed and cost, but of sustainability and assurance that the

construction will not permanently impair others. Even if it was a matter of speed and cost, it is not speedy or less costly if six months later the wall is torn down because it is unsustainable. Can it truly be less costly, if it destroys economic benefits to various people or permanently deprives the nation of a valuable species? However, there is no room in the delegation of authority for any person to make this argument.

Secondly, there are no procedural checks on the Secretary. All the branches of government have inherent checks, both within and without to prevent them from gaining too much power and ensure that people and States may seek redress against a wrongful act. However, by granting the Secretary the authority to waive any law that he solely considers to be an impediment, Congress has cut off any checks on his power. Even the Courts and Legislature could not determine that he made a wrong decision, because they have no discretion under the law. The only way to end his reign of power would be to revoke the law completely, through the Courts or the Legislature.

That is what the DOW would seek to do, so their claim would have Constitutional merit. The DOW seeks to overturn a law that has not the least Constitutional merit.

Even if the courts did not use the non-Delegation doctrine, the formalist doctrine would work as well. In this case, the law has granted law-making power to an executive authority. Laws are made by the legislature and passed by the executive. Once they have been passed, they can only be revoked by a new law made by the legislature and passed by the executive, or by judicial review. The Secretary bypasses the constitutional minimums of bicameralism and presentment because he can revoke a law on his own without it being evaluated by the branches of Congress or presented to the Chief

counter-argument? - limits include purpose of statute, limited scope (not subs w/it entire nat'l economy), & power is in hands of SN. official, not a private party

good

Executive. It might be argued that the waiver law met those minimums, so any action done under it has met those by default. This is insufficient. A law cannot waive those expectations, see line item veto. Additionally, the waiver prevents individual consideration. All laws, no matter what their purpose, how established, or the cost their overturning are equally weighable and unreviewed. The intention of bicameralism and presentment is not simply a check on law making, but an assurance that each law, including a law that overturns a previous law, will be fully evaluated and considered by some 500 delegates placed in office by the public. The waiver clearly avoids this Constitutional assurance.

Finally, the functionalist view would also find this unconstitutional. Other branches are impeded in law making because any law they make can be overturned by the Secretary. Their powers have been completely stripped. The waiver is unnecessary because there are devices in place that would allow the Secretary to overcome laws or take possession of property with just compensation, provided that he could prove the necessity. If the Secretary is truly confident in his choices, these checks should not unduly hinder him. He will argue that such processes take time, however, time is the most basic and essential check on the powers of all branches. Time is inherent in the ideas of bicameralism and presentment because it slows the process down enough to ensure that the government sufficiently evaluate decisions. Time is inherent in the doctrines of justiciability, such as mootness and ripeness. Time is inherent in Constitutional term of years that ensure that each delegate to our government is evaluated by his public at regular intervals. Since the Secretary is unelected, the checks on him

must act in different ways, but time is still an essential limit. Finally, the functionalist asks if there is a danger of future harm. This is a very concerning issue. Because there is no second look at the laws that the Secretary choses to waive, there are vast opportunities for harm. The harm does not even have to be intentional. However, most decisions are put before so many eyes: all the delegates to Congress, the President, public opinion, expert advisors. These all help to catch all the potential consequences and benefits of all actions. The Secretary has sole discretion, so it is on him alone to catch all those possibilities. This is impossible. He cannot and will not be able to consider them all and irreperable harm will be done.

10th Amendment

The Federal government does have the power to pre-empt local laws, but not through a generalized law. Passing a law that allowed the Federal government to abbrogate any law he thinks is obstructing his goal, would defeat the entire purpose of Federalism.

The law applies to States as States because it specifically creates a waiver for state laws. The Courts tend to view Federal pre-emption very narrowly, but this law is too broad to be limited in any way. Furthermore, the government is not specifically pre-empting the field of border security, it is pre-empting any law in any field that the Secretary thinks might interfere with his plan of border security. The law creates the ability to overcome State sovereigty without any consideration of what aspects of state

sovereignty are being over come. The State's powers to make and carry out laws are being destroyed by this law. There is no consistency or evaluative mechanism by which the States can determine what laws they can make that will not be destroyed by the Secretary.

There need to be standards by which the States can anticipate how the law will be used and what uses are unacceptable. At this point, there is no such guidance. The ability of the States to exercise their power is without any firm ground. The States cannot act in a Federalist government in such a manner.

Federalism is meant to create a distribution of power only slightly weighted on the side of the national government. That weight is only intended to promote unity and the vitality of the nation as a single entity. This law is not directed towards that end. It is so extreme that all but eliminates the concept of State sovereignty. No law can overcome the Constitutional mechanisms on which the country was created. Even more supreme than Federal pre-emption is the supremacy of the Constitution. Any law that violates its principles is in violation of the Constitution.

Even if the 10th Amendment was viewed as a mere truism, it reaffirms the Constitutional existence of Federalism. Therefore, a law that destroys or even severely hinders the existence of Federalism is unconstitutional.

The waiver law should be overturned as too broad to create federal pre-emption, a violation of the separation of powers, and a failure of the government mechanisms.

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Question II (B)

Taking

Murdoch has a claim under the Takings clause which prohibits the Federal (and State) government from taking private property from citizens without just compensation.

The first question to be asked is whether what is being taken is property. This is defined by the law of the State in which the property is located, regardless of whether it is the Federal government or the State government acting. Since the matter is of interference with the use of his land, this would no doubt be defined as real property under Texas law. We proceed under this assumption.

The next question is whether the property has been taken for public use. The answer is yes. The intention is to build a wall and patrol the borders to prevent drug smuggling, illegal immigration, and terrorism. Prevention of all these activities benefit all the citizens of the United States. Since control of the fence is by the government, there is not even an issue of whether a private party will be providing public use and benefit with it.

The next question is how the land has been taken. Since the fence is not actually on Murdoch's land, but only adjacent to it, there is no physical taking. There is no regulation that is directly affecting how he may use the land. He may use the land however he wishes. However, there is a regulation that is indirectly affecting the use of his land. The lights that have affected his production were mandated by the Secure

Fences Act. These lights are destroying economically viable use. For an area of ¼ by 10 miles, Murdoch is unable to grow the crop that provides his livelihood. So, the regulation has affected the viability of his primary use of the land. However, ALL economically viable use of his land has not been destroyed. First, I presume his land is much larger than ¼ by 10 miles. The rest of this land remains unaffected and he may still grow his crop there. However, this may mean that he is no longer the largest seller of his product. Secondly, there may still be ways to use the affected part of the land for some other crop. Perhaps, he would even be able to develop a valuable crop that requires 24 hour lighting, and the lighting would benefit rather than cost him. Therefore, Murdoch is unlikely to prevail under the Lucas rule.

This probably does not qualify under the Land Use Exaction doctrine either, since Murdoch is not being told what he must do with the land.

The Penn Central balancing test will be the successful argument for Murdoch. The first question will be what the economic impact is to him. Now his profit will probably be reduced, whether he finds an alternative use for the land or not. The level of economic impact will make a difference as to whether the government's action is considered a taking or not. If he has a way to use the land that is even more valuable, then this would probably not be considered a taking at all. Even if he does find another use for the land, that will also require investment: time and money will have to go into researching the best possible use of the land. He will also probably have to train himself in the production of a new crop. Producing more than one crop will also result in diminishing returns for both crops. It may not even be viable to produce a different crop

on such a small area. We will proceed under the assumption that the loss to Murdoch is significant.

Next, we ask what his reasonable investment expectations were. When he first bought the land, Murdoch had no idea that it could be used to produce the crop he does now, so he had no expectation that he would be able to do so. However, Murdoch has now put over 30 years investment into his property. He has developed a highly profitable business that is the largest in the country. He probably had no reason to expect after that time, that he would not be able to continue on for another 30 years. Certainly, the last 30 years of investment were not made under the assumption that his business would be affected by such a significant presence of border security. Especially, if there has been little to no security near his land in the past. On the other hand, perhaps he should have expected that there would be some border security because he bought land that was on the border. In the end, however, he had no reason, over the 30 years of his investment to think that the effect would be so drastic, so I think that his expectations would be reasonable.

reciprocity of advantage?

OK next par

Next we discuss the character of the government action. The more physical the presence, the more likely it is to be considered a taking. We have already mentioned above that it is not an actual, physical taking, however the presence is certainly physical. This is not a matter of a law that is affect how he may use the land, this is actual physical activity that has destroyed his the choice he made for a portion of the land. The lights are an actual presence on his land, as well. One person may not use his own property in such a way as it destroys the right of his neighbor to enjoy and use his own property. The

scope of this idea as applying to the government is in question. While the government might be able to chose how to use their land, if the effect on another is substantial, it should constitute a taking and be entitled to compensation.

Finally, we discuss what the reciprocity of advantage is. Border security is intended to benefit all people by preventing various illegal activities which endanger the entire population. This means that Murdoch will be benefited as well. Since his property is so close to the border, he may benefit more than more distant citizens. However, government action should not have an absolute pass. Just because Murdoch may derive some benefit from the use does not mean that it will not cause him hardship as well. He is still entitled to compensation for that loss.

So, Murdoch owns private property that has been taken, according to the Penn Central balancing test. The question is what compensation to him is just. This is measured by the loss to the owner, not the gain to the government. Therefore, the easiest evaluation would be to measure how much this will cost him in profits, offset by how much his costs are reduced and multiply that over his lifetime. However, perhaps there would be less expensive ways for the government to compensate him. If the government did (or paid for) the research into other ways to make use of the property, they might find an equally profitable use, and only have to pay that one time cost. Perhaps the lights could be swapped out for some kind of plant lighting that would create a new crop environment and both Murdoch and the government could benefit from them.

The most equitable solution would be for the government to pay for the cost of Murdoch turning his land to some new profitable use. That way the land could still be

used effectively, and not wasted, and the government would not have to pay for the lost business Murdoch will suffer over time.

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Question III (A)

Justiciability

There are limitations on what opinions the courts will hear. A declaratory judgment sounds like Utah is requesting an opinion on an issue that is not yet ripe. This is not an advisory opinion, because the Utah is not asking whether their law will be upheld. There is an actual dispute because Utah has chosen not to follow the law of the Federal government.

However, the issue may not be ripe because Utah has not suffered harm. The government has given the States time to bring their licenses to code before they go forward with their penalties. There may not even be a real threat of harm because it is not known yet how the government will act on noncompliance, because no one has failed to comply yet. The mere existence of the statute is not sufficient to create a threat. The defendants must actually act to cause harm so that the injury is not merely speculative. Without actual action by the government, the court lacks real facts which are needed for them to fairly evaluate the law and how it is acted upon.

It is very likely that the case will not be heard because it is not yet ripe.

However, if the court decided that the case was ripe, the issue is appropriate for the court to decide because it is not a political question. The Federal government will want to argue that Real ID is a necessary component of the war on terrorism and as such is a war power not to be heard by the court. However, since this is an action that will

affect how the State's operate, it is not a war power, but a law that is regulating State action, precisely the kind of issue that the Court is there to decide is constitutional.

However, Utah may not have standing to bring a claim. The Constitution requires injury in fact to the Plaintiffs. The government will argue that the State has the option to comply or not comply without consequence. The consequence will not be born by the State, but by its citizens. However, there is one consequence that will be born by the State: they will have to mark their IDs in some unique way that will single them out as "not official." Creating an all new ID that has some unique mark would cost the State. Whether the State's comply or not, there will be a cost to them. Additionally, they have been forbidden to issue driver's licenses to undocumented citizens, interfering with how they promote safety. The Constitution also requires causation and traceability. The injury the State wants to redress must be caused by the defendant. If the Court finds that there is a cost to noncompliance to the State, this can be traced directly to the defendant. Finally, the Court must be able to provide meaningful relief. The relief would be the declaration that the law is unconstitutional, which would end the cost it has on the State.

The prudential requirements may also invalidate Utah's standing. It may be seen that they are raising the rights of their citizens rather than their own rights. However, I think that the right that they are actually raising is state sovereignty which is their own right. The grievance would not be seen as too generalized because they are specifically addressing how this law violates the Constitution in Utah. Finally, the law Utah invokes is the supreme law of the land: the Constitution, which is of interest to all States and citizens. Their concern over Real ID falls within that zone.

parens patriae
Mass v. EPA

I think that Utah's claim of standing is weak because they cannot prove injury in fact. The cost of making unique IDs is probably too small because they will probably be making new IDs in the next few years anyway. They have not been penalized for violating the law, nor will they be penalized, and they have the choice not to comply.

Commerce Clause

The first question is whether Congress has the power to pass this law. Congress may regulate any activity that, individually or in the aggregate has a substantial effect on interstate commerce. But they may not regulate non-commercial activities, unless that regulation is an essential piece of a larger regulatory scheme.

This might be considered a channel of commerce being regulated because it is affecting how people may move among the states. I doubt even channel is this broadly interpreted.

This might be considered an instrumentality of commerce since it affects the ability to travel among the states and access federal locations, possibly even access to work. Again, unlikely to be that broad.

This maybe considered something with a substantial effect on interstate commerce. To determine how it affects commerce, we must decide if it is economic in nature or not. Economic activities are anything that affect the production, distribution, or consumption of commodities. Driver's licenses affect the ability to get to work, to verify your identification, often the ability to buy certain products. However, since all these

things can be done without driver's licenses, I doubt the court would interpret it so broadly. However, assuming they do, we have to determine if what they are trying to achieve with the licenses. The courts would give weight to congressional findings, however, this law lacks the necessary review to determine how they thought this would affect interstate commerce.

If no one had the national ID, what would happen economically. My bet is: not much. Many people work without valid identification. They move among the States with no, or fake ID. Not having it may, however, impair some legitimate State citizens from moving about freely or working because they cannot fly or get into Federal facilities. Perhaps it is unconstitutional for the Federal government to so substantially impair commerce. After all, the commerce clause was meant to smooth out the commercial interaction between States. Having a national ID that some State will refuse to invest in, will interfere with that result. If Congress chose to issue it's own ID, that would not be a problem, but this method will create barriers between the States, not lower them. Since the Federal government is aimed at achieving unity, this would be unacceptable.

The Courts use a rational basis analysis to evaluate whether Congress has used necessary and proper means to achieve an end. However, there is little evidence of Congressional intent and the purpose and goal does not appear to be economic. Even if there was such evidence, these do not appear to be reasonable means, since they will further disunity and place huge burdens on state governments.

Non economic activities are given greater judicial scrutiny. In this case, the aim of the ID appears to be to prevent illegal immigrants from moving about the country so freely, accessing Federal facilities, and making them easier to identify. Based on this, it appears IDs are a noncommercial activity. A noncommercial activity cannot be aggregated to create a commercial results, so the question becomes whether the activity being regulated is undermining a comprehensive regulatory scheme by Congress. The comprehensive scheme appears to be to promote safety by reducing illegal immigration. Safety and welfare is a concern that is traditionally left to the state, and Utah is claiming that the welfare and safety of their citizens will be undermined by this law. The courts will probably balance this claim against the claim by the government that safety will be increased for all.

Illegal immigration certainly appears to be a national concern, but it is really necessary that the nation take it over? The government will argue that if the States were effective in this area, they would not need this law, but illegal immigration crosses state lines and is so out of control that the federal government needs to do something, and they cannot do anything about illegal immigration if the States are issuing valid ID to illegal immigrants.

The State will point out that the government is not doing anything, they are making the States do all the work and bear all the costs, without even a grant to encourage their aims. Additionally, there is no jurisdictional hook. The IDs are not intended for people who only cross state lines, but for all citizens.

The courts will weigh the burdens and costs that this law places on the States and determine that the Federal government is overstepping its bounds. If States can be ordered to do the Federal government's job for them with no incentives, and the other option is unacceptable, then the Federal government will be able to make the States do whatever they want and there will be no point to Federalism.

10th Amendment

This clearly violates the 10th Amendment.

The law applies to the States as States. It says clearly that "States are required" to do certain actions even if they don't comply with creating the new IDs. Next, they are regulating a traditional government function because states have traditionally been left the authority to chose how they will distribute and mark their driver's licenses. Furthermore, the driver's license is one way in which Utah has used its police power to ensure the safety and welfare of its citizens.

Congress has the power to pre-empt a State activity entirely, but this law is clearly requiring the States to take on the burdens of carrying out an activity the State wants to have done. Nor have they provided a financial incentive for Utah to do this: creating a sort of contract with mutual gain and detriment. Instead Congress has mandated how the State structure its operations. Congress is trying to control the laws and spending power of the State, as well as mandating the use of their police power to control illegal

immigration. Those States that refuse to comply must still bear costs by creating unique IDs that will be recognized as "unofficial."

This is a classic example of Congress providing a State with a Hobson's choice. They may choose to comply, forcing costs on the State and dictating the use of their police powers and other resources, but if they don't, they will have to issue IDs to their citizens that will cut them off from the opportunities of other citizens. Two bad choices that the State must choose between.

NY v. US? like do this or sth (take title)?

It is unconstitutional for a State to take away the privileges and immunities of citizenship from out of Staters. Is it unconstitutional for a State to prevent it's own citizens from having those privileges and immunities? Not having official IDs will cut off their citizens from air travel and may affect their ability to travel among the States as more and more of the States adopt the "official" license. The incorporation doctrine suggests that States cannot do so, because they are violating constitutional rights. Is Congress inducing the State to act in an unconstitutional manner by either commandeering their legislative and executive branches or making them make "unique, unofficial IDs"?

The Courts have ruled that Congress cannot put these kinds of choices on States because there is no accountability. The citizens of the States will blame the States for taking the actions, whether it is the use of their resources or the abridgment of their rights, not the Federal government and the States will not be able to respond to their citizens as democracy demands. In such a situation, the Federal government needs to act directly and take responsibility for their actions.

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counter argument?

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Separation of Powers

The law passed by congressed fails the Constitutional requirement of bicameralism. The law was never evaluated or passed by the Senate. It was only seen by the House. To be constitutional, any law must go through both houses of Congress before being presented to the president who must pass or veto it in its entirety. Since this law fails bicameralism, it is unconstitutional and invalid. This standard exists to ensure that laws are not passed by just one branch, but that all Congressmen have a chance to evaluate the law and ensure it is the best. Otherwise, the law may be unfair or unreasonable, because the interests of only certain delegates are considered.

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Question III (B)

Dormant Commerce Clause

This law cannot fall under the privileges and immunities clause because it is a law on corporations. However, it may be seen as discriminatory against outside businesses. There is no facial discrimination because the law commands that no airlines will be permitted to serve alcohol within two hours of landing in Utah. However, it may have a discriminatory effect because the only airlines that land in Utah are incorporated out of state. Therefore, the only costs born are those born by out-of-staters. ✓

It may not seem that the law is protectionist for Utah businesses, but it could be that there is a business Utah is trying to protect. It may be that airline passengers are more likely to buy alcoholic beverages from Utah stores if they are not served on the plane prior to arriving. The intention of the law may be to promote safety by preventing people from arriving in Utah drunk, but the law may still act in a discriminatory manner.

Even so, the law may still be upheld as Constitutional. The Pike balancing test asks whether the state is trying to protect a legitimate local interest. Utah would claim that the interest being protected is safety by keeping people from traveling drunk. However, the Airlines will argue that this does not properly protect from drunken driving, and being drunk while in a plane or in a cab does not pose sufficient danger to allow for a discriminatory action. They would argue that the ends are not connected strongly enough with the means. The Airlines might also claim that traveling across state lines while

if law is discrim. in effect, what result? Pike test is not used if law is discrim.

drunk is a national concern, so it should be regulated by national law. Utah would argue that the issue they are protecting is not traveling across state lines, but traveling in Utah while intoxicated. The courts tend to defer to the State's about whether things are of local concern unless it is apparent that it is illusory or pretextual. Since Utah has fairly strict intoxication laws, it is unlikely that the courts would find the issue pretexual.

The next question in the test is whether the burden on interstate commerce is greater than the protected interest. People do not fly on Airlines to get drunk, they fly on planes to travel. Being served alcohol is a perk, a bonus, and the profit to the airline is also a bonus. In fact, there are several airlines that refuse to serve alcohol. The airlines that do still serve alcohol will not have to restructure their organizations in order to comply. If all the airlines that fly into Utah follow this rule, then other airlines will not be able to steal business from those that cannot. US Airways will still be able to sell alcohol during the rest of the flight and on all flights that do not land in Utah.

However, the courts do look more carefully at laws that affect commerce with foreign nations and there are foreign airlines that land in Utah. 5% percent of the airlines may not be significant to Utah, but the issue is whether the law is significant to those airlines. Again, I think the law will be viewed as affecting a perk, not the integral part of the business. Furthermore, foreign airlines have probably encountered similar restrictions in other countries. The loss of alcohol service in a small percentage of time: only 2 hours before entering this one state, is unlikely to have such a substantial effect on any business, foreign or domestic.

The last question asked is whether there are less restrictive means that may be employed by the State to achieve the same end. If the end is safety, then there could be stricter intoxication laws, stricter liquor sale laws, and a greater police presence on the streets. This twists back around to the question of the local interest. If Utah has very strict laws already, how much stricter do they need to get before they can start affecting beyond the State? Is it reasonable to ask that Utah wait until out-of-staters are on the road before they stop them? Utah wants to promote safety by keeping people from getting on the road in the first place. They don't want to wait until the danger is so close. There is almost always a less restrictive alternative, but this also must be balanced against the other issues. Just because there is an option does not mean that a minor impairment that has good benefits should be overturned.

The courts will uphold the law as a reasonable restriction to achieve a legitimate end.

However, if they did not, Utah would be unable to succeed under the other exceptions. Utah would not fall under the market participant doctrine even if it was acting in the market as an airport. It would be providing a service to the airlines: a place to land, transfer, and a location to go to. However, the State cannot regulate up or down the stream of commerce. It can regulate what is done in the airport, but not before the plane gets there.

Pre-Emption

US Airways will also want to argue that the State is pre-empting Congress. They will say that the Federal government has such complete control over air traffic that there is no room for State law to regulate it in any way. States cannot regulate when flights can land in their cities, nor can they regulate what beverages are served on flight. If this is an area of such great concern, then the Federal government should pass a law barring the serving of liquor two hours before they land.

The State will argue that there is no conflict with Federal law here. There is no situation in which both Federal and State law can be followed. Furthermore, courts define Federal regulation very narrowly. The State is not undermining the federal regulation. Federal regulation is concerned with air traffic, and the State has in no way affected when and how and where airplanes fly, they have only limited what they may serve in a very specific and limited manner. Additionally, the State is not acting within the scope of the federal regulation. Federal regulation is concerned with air traffic. State regulation is concerned with safety once people are on the ground and traveling around their State. Safety is also a state police power, so there is a presumption against pre-emption. Since the two regulations can be harmonized, there is no justication of the use of the supremacy clause.

Even if the court did think that the law was pre-empted by pervasive regulation, Utah would argue that Congress enticed them to pass the law. There has been a national push for greater safety on the streets by stricter alcohol laws, and the State will say that they are just trying to further that national concern. Since Congress encouraged them to

pass the law, Congress consented to the law, so the law has not been pre-empted by Congress.

Contracts Clause

US Airways may be able to argue that the law has interfered with their contracts. This will be unsuccessful.

There are probably several existing contracts at issue here. The first would be the contracts that the airlines have to fly into the airport. This may involved a contract with Utah to use their airspace. If so, there will be stricter scrutiny than if there is just a contract with private parties. US Airways may also have a sales contract with liquor companies that requires a quota.

There is probably not a substantial impairment of any contractual relationship because the airline can still fly into Utah, provided they meet this new condition. The condition does not change the essential nature of the contract, only adds a small expectation. US Airways may want to argue that it is not a small burden to them, but the perk, bonus issue returns. The courts will see this as an airplane contract, not a liquor contract. Furthermore, air travel is very heavily regulated, so the airlines must expect new laws to come up and disrupt their business. US Airways will argue that what they expect to be disrupted is air travel, not beverage service. However, the expected regulation changes would be far more disruptive than beverage service changes. If they can cope with regulation changes, they should be more than capable of coping with beverage changes.

The next question is whether the law serves a legitimate state purpose. This is discussed above. And whether control is reasonable justifiable (discussed above). This will be given more strict scrutiny if the State is in contract with US Airways, but again the burden weighed against the benefits is far to slight to consider overturning the law, even if the state is a party.

Exam/Paper No. 453

501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester II, 2007-2008

Examination
UNM School of Law
Three Credits

Professors Kovnat & Bay
May 9, 2008
1:30 pm – 5:00 pm

INSTRUCTIONS

Examination Format
Essay Answers

1. **Laptops**: Start the Securexam program entering your examination number, course name, professor's name, and date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. Use 12-point or larger type face and double space (but not triple space) your answer. DO NOT WRITE YOUR NAME ON YOUR EXAM ANSWER.

2. **Bluebooks**: Write in ink, on only one side of the page, and skip lines. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Be sure to number your bluebooks in consecutive order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen and close the bluebook immediately. If using a laptop, save and exit the program.

Go to the examination check-in table at the conclusion of the examination and fill out a receipt.

Professor's Instructions

1. This is a three-and-a-half-hour long examination; however, during the first half hour you may only read the examination and prepare an outline of your answer. You may not start writing (either in blue books or on your computer) until 2:00. The examination consists of three questions, two of which have two subparts. We suggest 45 minutes for Question I, 60 minutes for Question II, and 75 minutes for Question III. In general, the points will be allocated in proportion to the time suggested.

2. This is an open book examination, except that you may not use any commercial materials, including commercial outlines, hornbooks, or treatises. You may bring your casebook, class notes, the Constitution, and any outline you helped prepare.

QUESTION I (45 minutes)

In June 2007, Congress failed to enact the Comprehensive Immigration Reform Act that would have increased border enforcement, created a guest-worker program, revised visa requirements for immigrants, and provided a pathway for potential citizenship for the approximately 12 million persons who live in the United States without proper documentation. Left in place were a myriad of federal laws governing immigration and naturalization. These laws regulate who may enter the United States and specify the conditions and procedures required to permit those who legally enter to remain in the United States. Please assume that these laws are based on a valid exercise of Congress's authority to regulate naturalization and commerce.

Specifically, § 1324a of Title 8 of the U.S. Code provides that "[i]t is unlawful for a person to hire an alien knowing that the alien is unauthorized to have entered or remained in the United States." The law (1) establishes requirements and procedures for verifying the legal work status of an alien at the time of hire; (2) authorizes the Attorney-General of the U.S. to issue cease and desist orders to employers who fail to comply; (3) authorizes the imposition of civil penalties of not less than $250.00 and not more than $2000.00 for each violation; and (4) authorizes the imposition of criminal penalties for patterns and practices of knowing violations.

Many States and municipalities expressed frustration at Congress's 2007 failure to enact new tough measures against illegal immigration. Mapleton, Arizona was one such community. In the fall of 2007, after conducting hearings and making findings that undocumented aliens were burdening Mapleton's educational and health systems and that concentration of undocumented aliens contributed to urban blight, its City Council enacted a housing ordinance.

The ordinance was based on findings that the harboring of illegal aliens in dwelling units in the City and crime committed by illegal aliens harm the health, safety and welfare of Mapleton's legal residents. The City Council also found that illegal aliens are less likely to call the attention of the authorities to substandard housing and property maintenance thus contributing to blight. Accordingly, the law prohibits any owner of a dwelling unit in Mapleton from renting, leasing, or letting a dwelling unit without verifying that the lessee was authorized to enter the U.S. and is permitted to remain, unless the lessee had resided in Arizona for the past 12 months. Upon proof of violation, the owner's license to rent shall be rescinded with respect to the unlawfully rented dwelling unit, and the owner of such a dwelling unit is either required to evict the undocumented alien, or is precluded from collecting any rent or other thing of value from the undocumented alien.

Alonzo and Maria Romero entered the United States in 2000 without proper documentation. They lived in California until 2008 and had two children who were born in California. The family moved to Mapleton, Arizona, in January 2008 and rented a two-bedroom apartment from D.A. Warbucks. The Romeros and Warbucks signed a two-

year lease. Mapleton's licensing division received information that Warbucks had violated the housing ordinance. After a hearing in which evidence was produced of the Romeros' undocumented status, Warbucks' rental license was suspended and he was ordered to evict the Romero family. He refused on the grounds that the Romeros still had more than a year to go on their lease and that their small children were citizens of the U.S. Because he is precluded from collecting rent, he wishes to challenge the constitutionality of Mapleton's housing ordinance. Alonzo and Maria Romero wish to challenge the ordinance on behalf of their children. They all seek your advice. Evaluate the strengths and weaknesses of each of their constitutional claims. Please assume that the claims are justiciable. Explain how the claims should be resolved and why.

QUESTION II (60 minutes)

Another of the federal statutes that was left unaffected by Congress's failure to enact comprehensive immigration reform was the Secure Fences Act which authorizes the construction of a triple-layered fence across 700 miles of the U.S. Mexico border. This law directs the Secretary of the Department of Homeland Security (DHS), an executive branch agency, to take such actions as may be necessary to construct physical and electronic barriers to movements across the border. The Secretary is further directed to employ sufficient lighting in conjunction with the physical and electronic barriers as to enable border guards effectively to patrol the border. In 2005, Congress enacted and the President approved the REAL I.D. Act which provides, among other things, that:

> § 102(c) Waiver –
>
> (1) IN GENERAL – Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws, whether state or federal, that such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.

The stated purpose for both the Secure Fences Act and the REAL I.D. Act is to tighten the borders of the United States so as to protect the United States from the threats posed by drug smuggling, illegal immigration, and terrorism.

In April of 2008, the Secretary of DHS exercised the waiver provision contained in REAL I.D. His waiver covers 470 miles of the border from California to Texas. He waived "all federal, state or other laws, regulations and legal requirements deriving from or relating to the subject of" 30 laws, including the Endangered Species Act and the National Environmental Policy Act. His waiver includes all state and local laws dealing with environmental protection and water rights along the border. Construction of the triple-layered fence has already begun.

30 min

A. Defenders of Wildlife (DOW) is a membership organization devoted to protecting the environment, particularly endangered species and their habitat. The environmental organization has members who live in California, Arizona, New Mexico

and Texas. It wishes to challenge the Secretary's action under the waiver provision. Please assume that the claims are justiciable. Identify and discuss DOW's constitutional claims on the merits. Please explain how the claims should be resolved and why. (30 minutes).

30 min

B. In 1975, Murdoch bought a ranch in Arizona on the U.S.–Mexico border. After several years of experimentation, he found that the soil conditions were perfect for growing a rare species of hyacinths, a commercially valuable flower. He purchased sufficient water rights and invested in irrigation systems such that by 1985, he was the largest hyacinth grower in the United States. His business was extremely profitable. Unfortunately, the U.S. Border Patrol has detected numerous illegal border crossings on Murdoch's property. In late 2007, the Secretary of Homeland Security completed construction of the portion of the border fence abutting Murdoch's hyacinth ranch. Floodlights illuminate the fence 24 hours a day. They also illuminate a strip of Murdoch's ranch that measures ¼ mile by 10 miles. Hyacinths cannot grow in this strip of light. Murdoch sues the U.S for compensation. Please assume that his action is justiciable. Please identify and discuss all constitutional issues presented. How should Murdoch's claims be resolved and why? (For purposes of answering this question, please assume that there are devices available to sue the United States for damages despite sovereign immunity.) (30 minutes).

QUESTION III (75 minutes)

In 2005, the REAL I.D. Act was attached as a rider to a bill dealing with emergency appropriations for the Iraq war and Tsunami relief. At the last minute, it was inserted into the bill while the bill was being considered in conference by the House of Representatives. The Senate never discussed REAL I.D. specifically, and no Senate hearings were held on it prior to its passage.

Until its enactment as federal law, issuance of drivers' licenses was strictly a matter for regulation by the States. The REAL I.D. Act of 2005 changed the situation.

REAL I.D. establishes minimum national issuance standards for state-issued drivers' licenses that must be used for "official purposes," defined as including "accessing federal facilities, boarding federally regulated commercial aircraft, and entering nuclear power plants." The penalty for a State's non-compliance with REAL I.D. is borne by the State's citizens, who will be unable to access federal facilities, board federally regulated commercial aircraft, or enter nuclear power plants.

To issue a driver's license that complies with REAL I.D., the State must do the following things:

1. A State may not issue a driver's license unless it requires production of a document and verifies with its issuing agency, the issuance, validity and completeness of (a) a photo identification document or a non-photo document containing the individual's

full legal name and date of birth, (b) date of birth, (c) proof of a Social Security number (SSN) or verification of the individual's ineligibility for a SSN, and (d) name and address of the individual's principal residence.

2. States are required to verify an applicant's legal status in the United States before issuing a driver's license. With respect to non-citizens of the United States, a State may only issue a temporary driver's license with an expiration date equal to the period of time of the applicant's authorized stay in the United States. Undocumented individuals may not receive a driver's license.

3. States must adopt procedures and practices to (a) employ technology to capture digital images of identity source documents, (b) retain paper copies of source documents for a minimum of 7 years or images of source documents for a minimum of 10 years, (c) establish an effective procedure to confirm or verify a renewing applicant's information, (d) confirm with the Social Security Administration an SSN presented by a person and take appropriate action if a SSN is already registered to or associated with another person to whom any State has issued a driver's license or identification card.

4. REAL I.D. also requires States to maintain a motor vehicle database that contains all data printed on drivers' licenses. If a State elects to issue a driver's license that does not conform with the Act, it must use a unique design to alert officials that the document is not to be accepted for any "official purpose."

5. After 2011, a federal agency may not accept for any "official purpose," a driver's license issued by a State to any person, unless the State is meeting the requirements specified in the REAL I.D. Act. All States have been granted an extension until December 2008 to take measures to bring the State into compliance.

A. Utah's legislature has enacted a statute prohibiting its Director of Public Safety from taking any action to implement or plan for implementation of the REAL I.D. Act. In passing the law, the legislature found that REAL I.D. is both beyond the scope of Congress's regulatory powers and is inconsistent with the State's policy of protecting public safety, which is presently fostered by offering driver's licenses to undocumented individuals. Offering such licenses to undocumented individuals who can produce evidence of their identities by showing either a foreign passport or a valid driver's license issued in a foreign country increases the likelihood that such individuals will purchase insurance and thus be financially responsible in case of highway accidents.

Utah seeks a declaratory judgment that REAL ID is unconstitutional. Please identify and discuss all constitutional claims that Utah could raise. How should they be resolved and why? (50 minutes).

B. Utah has also enacted a statute prohibiting any airline that flies into a Utah airport from serving alcoholic beverages within two hours of landing in Utah. No national airline is either incorporated in Utah or lists Utah as its principal place of business. However, every national airline flies into and out of Salt Lake City, which is

also an International Airport. Only a small percentage of flights landing in Salt Lake City are international flights (approximately 5%). U.S. Airways, a domestic and international carrier, seeks to enjoin Utah's law on the grounds that it is unconstitutional. Please assume that the case is justiciable. Please identify and discuss all constitutional claims that U.S. Airways could raise. How should they be resolved and why? (25 minutes).