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Course: Constitutional Law
Professor Name: Shanor
Exam Date: Wednesday, May 03, 2006

Question 1

(1)

In looking at whether Gambrell (G) violated the Equal Protection (EP) clause of the 14th amendment by funding GLBT high, there is a series of steps that we need to analyze. Here the school was being opened only to G, L, B, and T teens, so it was a type of affirmative action. The court will apply a level of scrutiny to the analysis for affirmative action programs as it would to discrimination against that group.

First, we must look at whether there is a suspect classification involved or a fundamental interest. To decide this, there are a few ways of looking at it. Textually, there is no mention of gays in the constitution or specifically the 14th amendment. Therefore, looking at the textual approach, it would not be considered a suspect class. If we look at the history of the 14th amendment, it was fundamentally about protecting blacks. Even if you extended it as far as race, there is no traditional protection under that amendment for gays. Next, looking at stigma, we would need to find immutable and identifiable characteristics. Here, there seem to be differences between the students that are homosexual and heterosexual, at least according to the legislature. This is unlike looking at race discrimination where there is no difference, and more like gender discrimination where there are inherent differences between the genders. Finally, we could also use the Carolene products footnote which suggests looking at whether the group is a discrete and insular minority that would get stricter scrutiny. Here, we could see this as justification for applying strict scrutiny when gays are involved. However, Carolene products is not an "official" test, and hasn't been used as such. Furthermore,

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the court in *Romer v. Evans* didn't even refer to it. The court in *Romer v. Evans* in looking at gays applied a rational basis test with bite. This was something more than rational basis, but not strict. They did not specifically address which test they were using there b/c it wasn't even a rational statute. Looking at this analysis, this group of people is unlikely going to be seen as a suspect class for purposes of strict scrutiny, but we can still apply different tests regardless to see the outcome.

In terms of a fundamental interest, the court has not found education to be a fundamental interest. In *Plyler*, the court found it to be a quasi-fundamental right with regard to the children of illegal aliens. Here, the issue isn't as much about the right to education, but the right for students to feel good about themselves when they are okay. It appears that if there would be a strict scrutiny test applied, it would be on the basis of being a suspect class.

If we apply the rational basis test, then we must decide whether there was a legitimate state interest involved and a rational relationship between that interest and the means adopted. We might look more carefully if we use the rational basis with bite test that was hinted at in *Romer*. Here, the interest is that the gay students have a tough time in regular schools, they get harassed, and have a high rate of depression and suicide. This appears to be a legitimate interest. The method of coming up with separate schools also appears to be rationally related to the interest involved because it achieves its goals. It is not too broad, in that it does not drastically affect the educational system. The findings also suggest that there is an interest in exposure to morality related issues. Only under

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the rational basis test would this be an acceptable interest by the state. Therefore, the school appears to survive the rational basis test.

If we still look at the strict scrutiny test, there must be a compelling state interest and a means that are narrowly tailored to achieve that interest. Here, we would question whether the interests the state has are compelling. Here we need to question the interests much closer. Adapting Croson to this class (of gays), we need to see whether there are clear records of findings on how these students are really doing in school, we need to make sure that there is no rigid quota. We do not have very concrete data and facts on what the historical findings have been on the treatment that they have suffered while in school. We merely have some basic ideas. Also, the means might not be narrowly tailored enough because there could be other programs to take care of these feelings the students have while still attending regular schools. Furthermore, the exposure to morality can not be considered much of an interest when applying strict scrutiny. Also, in the Grutter case, they considered race to be a soft variable and thus no different than any other variables. You could argue that here sexuality is a similar factor, even though in that case, race was more of a suspect classification, and had the history of needing the extra bump in admissions. Without findings of the same sort for gays, this wouldn't fly as easily.

Furthermore, there is an issue over overinclusiveness and underinclusiveness. Because while having the segregated schools helps the gays in their depression and other issues, they are getting excellent educations and good facilities. Other students, while they might not have issues with regard to depression, etc., are not getting the quality of an

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education. Therefore, there might be students being included in the gay and lesbian schools who wouldn't have had problems elsewhere, and then also students who are not allowed to attend who are having their education hurt because of the poor resources. On

Another comparison that might be drawn, looking at the VMI case, which was in regard to gender discrimination, the key point might be that there are schools available for heterosexual students that they can attend. This might lessen the EP issue. This seems to be the reverse result of a gay marriage type situation, where a homosexual could claim that they have a right to marry, but the other side can argue that they have that right, just not whoever they want to marry. Here, the heterosexual students have the right to go to school, just not necessarily the school they want. Although, as mentioned just before, in this case, the school that Sally wants to attend is run down and has a lack of adequate materials.

It seems as though it is possible therefore that this could pass the strict scrutiny test, but because it is likely only needing rational basis, then it should not violate EP.

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(2)

In looking at Congress's power, we need to analyze their abilities under three different areas. First, I'll look at the commerce clause, second the spending clause, and third, the 14th amendment.

First in looking at the ability to regulate commerce, we must see whether the act is a valid exercise of Congress's authority to regulate commerce. We will answer this by questioning whether Congress violates the 10th amendment by regulating the states.

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Here, congress is not commandeering the state's legislative processes but rather affecting public school admissions. Therefore, this doesn't fall into the type of case as in NY v. US, where congress was effectively commandeering the state legislature by compelling them to enact and enforce a regulatory scheme. Here, there is no such requirement. Furthermore, Garcia doesn't apply in this case because the public schools are not being treated as any type of employer in this situation.

With regard to the Commerce clause, Congress has power under Article I, section, 8, cl 13 to regulate commerce with foreign nations, and among the several states, and with indian tribes. Here, the issue in question would be first, whether this statute is regulating interstate commerce. As under the older cases of Wickard and Heart of Atlanta, we see that we are looking at whether there is some sort of impact on commerce out of state. These cases were cleaned up by more modern cases that more put together a more detailed test. The case here doesn't look much like commerce, but we must analyze under the lopez framework. In looking at lopez, they set out a list of factors (six) to analyze in determining whether the regulation by congress had a substantial effect on interstate commerce.

First, they looked at whether this was a commercial activity or not. In Lopez, there was a regulation regarding having a gun in close proximity of the school. The court held that possession of guns was not a commercial activity. the dissenting opinion suggested that the connection to education might make it commercial, because the success that students have in school affects commerce. Here, congress is preventing the schools from using sexual orientation as a factor in admissions. You could say that this is

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in regards to children's education and if they have a better education they will enter the workforce and that affects commerce. However, as Thomas noted in his dissent in Gonzales, the court seems to be stretching too far away from "commerce" and closer to just "economics." If you made the argument that this statute was affecting 'commerce', it would open up to that argument. It doesn't seem likely that this statute has much to do with "commerce". One could argue that by not allowing the statute, and permitting states to segregate in such a way, it could create a slippery slope issue as was a concern in Lopez. There might be a push to do this with other areas that could get away with it that aren't under strict scrutiny.

Second, there must be legislative findings. Here, the act proclaims that not segregating the students will enhance the student's psychological health. We do not have much in the record to say whether there is a strong basis for these findings. They would be needed in order to support the argument. Furthermore, morality can be a basis only when using the rational basis test. Because we have found that this right would likely be scrutinized in that way, and not strict scrutiny that is not much of an issue.

Third, there needs to be a jurisdictional hook. This would suggest that there needs to be something that limits the regulation to something that is clearly interstate (i.e., in Lopez, there was no limit to guns for example that were bought in another state). Here, there doesn't seem to be any hook that makes this clearly an interstate case.

Fourth, there should be some limit to commerce clause b/c congress doesn't have a police power. Congress isn't really stepping in to tell the states what to legislate. But,

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if this act is allowed, it might be taking congress's interstate commerce powers a bit too far b/c of the not really tight fit.

Fifth, Lopez looked at criminal law being a state issue. Here, we would question whether education is something left for the states. The answer is basically yes, typically states are in charge of their educational systems, so congress would appear to be stepping over their bounds.

Last, this doesn't appear to be a national problem requiring coordination. True, many local and national leaders see this as a problem, but until there is widespread panic about the issue, it doesn't seem serious enough to take the powers away from the state. One final consideration is that in *US v. Morrison*, the court really only looked at two of the factors, suggesting that all 6 are not necessarily equal in weight. They were most concerned with whether it was a commercial activity and whether congress had appropriate limits. Here, however it seems, that congress would be overstepping their boundaries under the commerce clause.

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Next we must look at their power under the taxing and spending clause. The framework for this comes from *South Dakota v. Dole*. In that case, the court held that it was constitutional for congress to withhold spending on the condition that a state did something. They looked at a series of steps. First, it must be exercised in pursuit of the general welfare. Court often gives deference to congress on this matter. Here, this is being done for the purpose of enhancing the psychological health of children in schools and they claim that they need exposure to diverse views on morality of homosexuality.

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Because it applies in general to education, it seems to be general welfare, especially given the deference to the legislature. One could argue though that this is a matter of opinion on its actual affect on welfare, however this would seem to go more to the findings and whether there is a nexus

Second, the conditions must be stated unambiguously so states are able to make choices and be aware of the consequences. Here, it says that no federal school funding shall be provided to a school that employs sexual preferences as a factor in public schools. Here, it is pretty clear that if sexual preference is even considered, then there will be no federal funding. Therefore the second step is met.

Third, the condition must be reasonably related to federal interest in particular national projects or programs. This is the nexus requirement. This is the focus of the discussion in the Dole Case. The condition here is that the school doesn't use sexual preference if they want funding, and the federal interest is in regards to students education. Because the government believes that segregating on sexual preference affects the student's education there seems to be a nexus. However, this seems to require that there be very specific findings of the sort. If it is found that the condition would actually have no affect on the students' education then a nexus is much less likely.

Fourth, there must not be a prohibition by some other independent constitutional bar. In Dole, the court said that the 10th amendment wasn't a bar. Here, the states are acting similarly as in dole to dangle educational funds in the hopes that they will meet the condition. This does not seem to be a problem, as sexual preference doesn't appear in the

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constitution as was the case in Dole with alcohol also being an issue in the 21st amendment (although they found that wasn't a bar either)

Last, it must not be so coercive as to pass from pressure to compulsion. Here this doesn't seem to be a problem, because it is only federal funds at issue. We would need to know what kind of other funds that the schools would get. It is possible that they have enough state funds to make up for it, and that since they aren't being completely cut off it's not a big deal. In Dole it was only 5% of the total funds, so we would need to look at what percentage it was to make a final determination. In general, it is possible that congress, after looking at these factors, has the power within its taxing and spending powers to regulate this activity.

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We must further look at whether this act by congress has any violation of the 14th amendment. Here we are looking at the enforcement powers under section 5 of the 14th amendment. This clause states that congress shall have power to enforce, by appropriate legislation, the provisions of this article. This provision does not give congress power to regulate solely private conduct. Therefore, we first need to look at whether there is state action involved that congress is regulating. Here, the legislation is regulating the actions of public schools, who are acting out of the state's interests. Therefore, there is state action. Next, looking at the power to enforce the 14th amendment, the court through a series of cases has applied a number of factors to determine whether congressional legislation is valid. Under Katzenbach, the court said that congress could enforce section 1 of the amendment, but could not define or reinterpret. Then under City of Boerne, the

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court restricted Katzenbach and said that you can't ratchet rights up or down, and set out the requirement of congruence and proportionality. This was further looked at in the Garrett case.

Going through the factors, we must first look at 1) the scope of the constitutional right, 2) the history and findings by the legislature, and 3) the congruence and proportionality. First, looking at the scope of the right, the rights of the gay and lesbian people are not a protect right specifically or historically under the 14th amendment. with regard to sexual rights, there was some leeway in lawrence, and with regard to preventing discrimination there was something like a rational basis test used in romer. Past this, there is little historical protection as to core rights for gays and lesbians. However, in Tennessee v. lane, the court found that the right at stake was access to the courts. We could stretch that here, and say that the right in question is the right to an education that is burden free. However, again, education isn't really a fundamentally protected right, but at best a quasi fundamental right as provided in plyler. Therefore, as to core rights, this wouldn't pass the test very well. When there is a core protection, the history and findings might not be that important. Here there isn't as much of a core protection, so we will need more findings.

Second, looking at the history and findings, we would need clear evidence that there is a pattern of discrimination, and that the gay people are at a discrimination. It is unclear whether this has been met based on the facts given.

Third, we need to look at the congruence and proportionality of the means adopted as compared to the interests. As mentioned the means here can not be

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substantive but rather just remedial, enforcing, or corrective. Unlike in City of Boerne, congress is not telling the court what type of standard to use when judging the constitutionality of the legislation. It is not clearly enhancing or taking rights away, but rather creating legislation that would promote treating people equally. Therefore, it seems as though this is more corrective because it puts people on a level playing field and not substantive because congress isn't taking away anyone's right to education. However, one might argue that through this legislation, they are promoting the states to not allow schools that might have helped some learn better. Therefore, in that way it might be affecting substantive rights. Here, this legislation appears to be enforcing and not defining. We must look at whether the means are narrowly tailored to the ends. If they want students to get exposed to diverse views, they could provide funding that would teach classes on the topics, but this doesn't seem to be as much of an exposure as being in the same school. Furthermore, there doesn't seem to be much of an over or under inclusivity problem, because there would be no segregation, and all students would receive the same basic quality of education. There might be some gay students who would again not have as good of an environment, but on the other hand, the legislature believes that by segregating, it harms the educational environment, so the effects might be counteracted.

It appears as though congress might not have the power to enforce under the 14th amendment for the reason of core right protection and also the lack of findings. Although the means adopted appear to meet the test, overall, it would probably not work under the 14th amendment.

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Question 2

In looking at a substantive due process issue, we must first question whether there is a fundamental right. Then depending on how fundamental a right is, we will apply the appropriate test. Here, this is an abortion case, and the courts have used a different formulation. I will still walk through the complete analysis.

In determining whether a right is fundamental, we can look at three approaches. First, the textual argument. Here, we should look at the explicit provisions in the constitution. There is no specific provision in the constitution that mentions a right to an abortion explicitly. Griswold included a number of opinions with varying interpretations on the text. The court opinion used a penumbra approach to find zones of privacy in a number of the bill of rights amendments. Goldberg's concurrence points out the need to look to the 9th amendment, that there are rights reserved to the people that might not be included explicitly anywhere else. Harlan suggested looking to history to see whether the statute violates any basic violates. Here, therefore, we can say that a textual argument for privacy. The later abortion cases did not touch on privacy as much (i.e., Casey which focused on liberty). However, applying precedent, the court has addressed abortion explicitly in Roe, Casey, and Stenberg. We could also address a tradition based approach. This would suggest that abortions have been done in the past and that the nation has been following in that way. If we were to use this legislation, it might be considered to strongly impede on that tradition. The questions we look at for tradition are

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whether it is deeply rooted in the nations history and tradition (moore), whether it is implicit in the concept of ordered liberty (palko), or that no liberty or justice would exist if this were sacrificed. Here, arguments could be made that abortion has been going on for so long that it would impede liberty if it was taken away. However, the opposite side could argue that it was an artificially created right with no basis in tradition.

Furthermore, sides could point to other countries traditions and use that, although some might say that there is no place for that in our jurisprudence.

Because there is precedent focusing on abortion issues, we must primarily analyze in that framework. We see from the abortion cases, that the right to an abortion is not fundamental in that it is not absolute. There is limitations, and at some point in the pregnancy the interest that the state has in protecting the fetus surpasses the interest the mother has in her right to abortion.

Applying the undue burden test to this case, the state may not impose a substantial obstacle or undue burden on the women that seeks to obtain an abortion before viability. Here, like was done in Casey, we must therefore look at each specific provision and question whether there is an undue burden.

First, the medical professional may reveal the gender of the fetus to no one except the mother. This doesn't seem to be a burden on its own, because it is in line with the other provisions. Obviously, if the professional told someone else the gender, they could then tell the mother without having the mother sign the waiver. Therefore, assuming for a moment that the other provisions are valid, this doesn't seem to pose an undue burden

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on the mother. It also doesn't seem to be an issue that they can't tell the father for the same reasons as mentioned.

The second provision requiring an affidavit asserting that she won't get an abortion and that she understands it is a crime might be an undue burden. Here, there is a possibility that the woman might not really understand what she is signing. If there is someone who is too young, or of a low mental capacity this might be an issue. There could be potential issues of lying or other fraud that the woman could then claim she didn't know what she was signing, or the medical professional might have been wrong about the gender anyway.

Third, the disclosure by the medical professional to the state doesn't appear to be an undue burden on the woman. Fourth, preventing abortions without the waiver poses an undue burden in that the woman might have a reason that she needs to get an abortion. This by itself isn't enough justification, but if we take Casey to provide that a woman does have an interest in the right up to the point of viability, then she should be able to.

Fifth, there is a health exception, but there might be other compelling reasons for a woman to need an abortion, therefore this might place an undue burden on the woman. Here, we should address that in Casey, the court put hurdles on getting an abortion, but consent, notice, counseling and reporting type issues do not present an absolute bar to getting the abortion. The court distinguishes this from an excessively broad remedy in Stenberg, where the court said that the partial birth abortion ban was not valid because it imposed an undue burden on a woman's right to choose a specific procedure. Here, this

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provision seems to go even further and say that if they do one thing (sign the waiver), then it is an irrevocable decision and they may no longer get an abortion.

Sixth, the provision about prison time potentially could pose due process concerns if as stated, the woman doesn't really know what she was signing. The potential of prison time and the risk of that poses an undue burden on the mother. Here, it seems that this would lead someone to not find out the gender of the child so that they can keep open the possibility of still getting an abortion. Then you could further argue that not being able to find out the gender of the child would pose an undue burden. However, one could argue the other way and say that the woman doesn't have a right to find out the child, and not knowing the child is not an undue burden.

Here, it looks as though all together, the provisions may pose an undue burden. There might be reasons why a woman might not make the best decision in signing the waiver, furthermore, there are issues with feeling pressured not to get the gender, and also the possible penalty create an overly broad remedy that is more closely like Stenberg than in Casey. In Casey, it was easy to eliminate the one provision that was undue and remove it. Here, the provisions all fit together and seemingly come as a package. Therefore it would likely be struck down in the way Stenberg was. Furthermore, there could be other exceptions made that would have narrowed the statute. For example, they could have limited the time frame, or maybe included more exceptions for reasons why it could be done. As is, it is likely too broad to pass the undue burden test.

However, it is possible the court could back off from this framework and tighten up the restrictions. The state might have an interest in balancing the genders, and based

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on findings in other societies, having more men leads to more violence. However, one could argue that the law of other nations has little relevance and thus, what is found in other nations might not be applicable to ours.

In summary, Paula presents an example of someone who might not have been aware of the ramifications of her signing the affidavit. She now has reasons why she wants the abortion, but can't have it because she has already signed the affidavit. Since the fetus is not yet viable, you can argue that for her, the regulations present an undue burden for her because she has no choice but to have the baby or go to prison potentially. For Lori, she has not yet signed the affidavit, but she is put into the position of not being able to know the gender of her baby or take the risk that she won't have a need for an abortion later on. Being put in these situations is the example of the undue burden that this regulation has on the women.

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Question 3

The dormant commerce clause is merely an implicit provision in the constitution. It is implied negative judicial power to strike down state laws that interfere with interstate commerce. It is judicially created because congress gave the power to the court to hear such cases and take action because congress doesn't have the means, and also there was once a time when interstate commerce was more threatened. The grounding is therefore old and fairly established, albeit shaky.

The MCA will violate the Dormant Commerce clause only if it 1) regulates commerce and 2) discriminates against out of state business, or 3) unduly burdens

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interstate commerce [this third step not really used since kassel] The first step in looking at whether the statute in question violates the Dormant Commerce Clause (DCC) is to look at whether this is an issue of interstate commerce. In not allowing anyone to bring in seeds, trees, or seedlings into the state from anywhere else, this seems to have an interstate commerce effect. While on its face, the regulation appears to be about just trees, because these products can be cultivated, and used for a an oil that is very valuable and highly effective as an antibacterial and antifungal, there are strong interstate commerce effects. Many products are manufactured, advertised, and sold, so there appears to be a big effect on commerce.

If MCA is facially discriminatory against out of state business, then it is per se unconstitutional, unless florida has a strong state interest in doing so. The court looked at facial discrimination in Philadelphia v. NY. There, the court said that bringing trash into the state from out of state was facially discriminatory, the court struck down the statute because NJ didn't have a strong reason for the discrimination. Here, there are two parts that might be considered discriminatory 1) the importation, and 2) the cultivation.

Here, the statute says specifically that the trees can't be brought in from out of state. However, this doesn't necessarily harm out of state businesses any more than in state businesses because the money to be made in the industry is from cultivation and not necessarily from the import. However, it might be impossible for an out of state business to have any sort of involvement in the business of processing these trees if they are not able to bring them into the state. Again though, an in state company might be hurt by not being able to bring them in. We could say here, that even though it's not facially

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discriminatory on the basis of importation, there might still be discrimination. Here, unlike in the Carbone case, the court might not find a jurisdictional hook. Because it discriminates against in state businesses and out of state businesses equally it could be seen as facially neutral. In Carbone there was intra state discrimination and out of state discrimination. So there were some local people in Carbone that benefited. Here, everyone seems to be affected by the statute equally.

Furthermore, in looking at the cultivation process, there is facial discrimination in that it can only be done by Florida residents. The DCC is available to apply to individuals. Because only Florida residents are able to cultivate and harvest the plants, this discriminates against out of state businesses and individuals. Therefore, on this basis, the court would likely find the statute *per se* invalid, unless there was a valid reason for limiting to just Florida residents. Based on the findings shown, there is no evidence that there is a reason for it being available just to Florida residents other than to benefit their own economy at the expense of out of state residents and economies.

Although the court might find that there is discrimination on interstate commerce, I will still address whether there is a burden. This test hasn't much been used since *Kassell*, although O'Connor referenced it in her concurrence in *Carbone*. The court doesn't like to get into the weighing because they aren't really that good at it. However, I will analyze it nonetheless. When a statute is facially neutral, there is a stronger presumption in favor of its constitutionality. The court might then perform a balancing test to weigh the state's local interest against the act's effect on interstate commerce. Here, the local interest is in ecology. The tree is highly invasive, and difficult to

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eradicate. It threatens the ecology of the everglades by draining water, crowding out native plants and leads to excessive dangers of wildfires. Very clearly therefore, there are local interests involved in preventing the importation of more of these trees into the state. This can be contrasted with *Carbone* where the court did not find a purpose that justifies. However, we must balance these interests with the effects on interstate commerce. Here, only trees already in the state can be cultivated, and no more can be imported. There could be many people out there from other states whose livelihoods might be affected by this statute. Additionally, it is not clear from the finding whether it will be possible to eradicate what is there completely, and also if they are cultivating them, then its possible as well that any importation might still result in a net decrease in the trees. Furthermore, the interest in cultivating these plants on the economy and the results to the local economy can be considered as a countervailing interest. Here there are strong state interests that might outweigh the effects on interstate commerce. As we see in *Kassel* though, the state's interests must not be pretextual. It does seem as though the state must have an interest in ecology, because they would seemingly benefit in their economy by allowing the importation of more of these trees. However, this is likely irrelevant because there is discrimination on interstate commerce (as shown earlier)

Assuming that the regulation is invalid as a violation of the DCC, the state might fall into the market participant exception. Here, the state allows the cultivation and harvesting, and owns Florida Melaleuca Inc (FMI) which processes the trees. This would put it into the exception.

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However, we must look at whether there is an exception to the exception. As the court laid out in South Central Timber, if there is downstream regulation, then the market participation exception fails. In that case, the state was considered to have violated this exception because they were regulating what could be done with the product after it was bought by the consumer. In looking at this, we must question whether there is political motives that are separate from economics. Here, they can only be cultivated or harvested exclusively by citizens of the state of florida. Furthermore, FMI exclusively employs Florida citizens. However, the FL exclusivity is not really a downstream regulation that affects what can be done with the products. It doesn't have to do with what happens after the product is cultivated, so it likely does not meet this exception.

In summary, it appears as though there is discrimination on interstate commerce, but the state might meet the market participation through their involvement in the cultivation process. They furthermore don't seem to have any downstream regulations attached, therefore, this MCA might not violate DCC principles.

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