

Sample Answers – Spring 2009 Exam, QII (issue of the constitutionality of the PADOT regulations i. and ii. under the DCC)

Sample Answer 1:

Under the Dormant Commerce Clause (DCC), a state law or regulation that places an undue burden on interstate commerce (IC) is unconstitutional. Though there is no specific constitutional provision that so provides, the Supreme Court has long inferred this limitation on state power from the affirmative grant of power to Congress to regulate interstate commerce in Article I, §8, cl. 3.

If Congress has legislated, the question is whether the state law in question is pre-empted by the federal law. But if Congress has not legislated, the state or local law can be challenged as a violation of the DCC. Under the DCC, the Court first asks whether the particular state law is discriminatory. A discriminatory law is subject to a very strict test under which it is virtually per se invalid (*Pennsylvania v. New Jersey*). Laws that draw a line at the border are considered by the Court to be discriminatory. Laws that facially distinguish between in-state and out-of-state citizens, goods, or services are also considered discriminatory and are subject to the exacting test. Though the Court has occasionally found that a discriminatory law survives this strict scrutiny test (e.g. *Maine v. Taylor*), most discriminatory laws are invalid.

However, a law might be facially neutral as well as neutral in purpose and effect and still incidentally burden interstate commerce. Such laws are subject to a different balancing test, under which the Court balances the law's burden upon IC against the benefits advanced by the law. This approach is known as *Pike* balancing (*Pike v. Bruce Church*).

This law discriminates against IC and is therefore unconstitutional under the per se test.

Sample Answer 2:

This law may violate the DCC because it violates the *Pike* balancing test. The PADOT regulation allows a Pennsylvania resident to get a discounted rate on an ePenn pass. This incidentally burdens IC because it discourages non-PA residents from driving on this Interstate Highway that passes through PA, thus they have to either go around the state (e.g. *Kassel*) or pay more to drive through the state. As in *Kassel*, this is an undue burden on IC under the *Pike* test. The burden is significant, because many people from out of state presumably drive on the interstate highways and it is much more difficult to get from state to state on local roads. The benefit to PA is to save money for their citizens and perhaps, as in *Kassel*, to protect their roads from wear and tear. They also wish to raise money for the state and to retaliate against other states that differentially charge PA citizens for tolls. These are protectionist goals and thus the regulation fails *Pike* balancing.

Sample Answer 3:

These regulations charge more to out of staters than to PA residents. The regulations provide that PA residents who reside in counties through which I-80 passes do not pay any tolls, and residents of PA who register their vehicles in PA only pay half of what out-of-staters pay. Thus, they violate the DCC.

Sample Answer 4:

The question is whether this law discriminates against IC. Laws that discriminate against IC are subject to a virtually per se rule of invalidity, unless they satisfy a test akin to strict scrutiny. Therefore, if this law is facially discriminatory, it will likely be held unconstitutional. Furthermore, if the court finds that the law had a discriminatory purpose or has a discriminatory effect, it will also likely fail the test. However, if the court finds that the law only incidentally burdens IC, then it will be subject to a more flexible balancing test known as *Pike* balancing. Under this test, a court will balance the burden upon IC against the state interests supporting the law. If the court finds that PA's interests here outweigh the burden on IC, it will uphold the law.

Sample Answer 5:

Under the DCC, the threshold issue is whether the state law or regulation discriminates against IC. PADOT regulation i. provides for a 50% discount on the ePenn pass for PA residents. Regulation ii. further provides a 100% discount to certain PA residents who live in counties through which I-80 passes. These regulations discriminate on their face between in-state and out-of-state residents, because they charge less for the passes to residents. Thus, the laws are subject to a virtually per se rule of invalidity unless they fall within an exception under DCC doctrine (*Pennsylvania v. New Jersey*).

To survive strict scrutiny, the State must advance a compelling interest for the discriminatory regulations and must demonstrate a close means-ends fit between the regulations and that interest. The Governor noted the state interest in funding road improvements and transportation projects, but that interest is not tied to the discrimination against out-of-staters but only to the toll in general (*Granholm v. Heald*). With respect to the discriminatory regulations in particular, PADOT spokespersons stated that the purpose was to compensate I-80 neighbors for the noise and fumes from the road, to allow neighbors to use their "local" road without cost, and to give PA residents the same benefits that other states give their own residents. The third interest is protectionism pure and simple and will not support the regulations. The first two interests might possibly survive strict scrutiny: if a court were to accept the interests as compelling, it would be difficult to further them without discriminating. However, these interests are not comparable in weight to, e.g., the quarantine cases in which the threat to the state is dire and probably irreversible (e.g. *Maine v. Taylor*).

INSTRUCTIONS

Total time for exam: 3 hours and 32 minutes

This exam consists of **FIVE** parts. **All parts are open book: you may consult any printed or handwritten materials.** You may *not* bring into the examination room any electronic devices, including cell phones, blackberries, iPods, etc. You may turn on a laptop *only* if you are typing the exam, and only with secure-exam running. You may *not* use a laptop to consult your outline or notes.

The exam contains four questions, plus the “extra credit” question regarding the Thrower Symposium. *The suggested time for each question is as follows:*

- **Question I: 90 minutes**
- **Question II: 60 minutes**
- **Question III: 30 minutes**
- **Question IV: 30 minutes**
- **Extra Credit Question: 2 minutes**

for a total exam time of 212 minutes.

You should answer all parts of every question. If you believe that further facts are needed to answer any of the questions, please state in your answer what facts you would need or what assumptions you have made. In evaluating your answers, I will be looking especially for correct identification of issues, thorough analysis, facility with the Supreme Court precedent, and logical organization. Your answer should not be in outline form nor contain shorthand, abbreviations (except where clearly noted), slang, or bullet points.

For grading purposes, the weight of each question will correspond to the suggested time for answering it.

Please write your exam number on every page of your exam. Under no circumstances may you remove the exam from the room in which the exam is taken. If you fail to turn in all pages of the exam, you will not receive credit for the course.

“I acknowledge that in this, as in all other law school activities, I am bound by the Emory Law School Professional Conduct Code.”

Exam Number _____

GOOD LUCK!!!

QUESTION I

(suggested time: 90 minutes)

Following several highly publicized crimes by repeat sex offenders in several states, United States House and Senate committees held hearings on sex crime recidivism. The evidence presented to the committees included scientific studies showing that, if a man commits a sexual offense, the probability is very high that he will commit another sexual offense in the future. The evidence before the committees also included testimony by a geneticist at Emory University who stated that certain genetic markers located on the “Y” chromosome (present only in males) indicate a high likelihood of committing violent sex crimes. Some states have sex offender registries, which alert local police to potential dangers. However, sex offenders move frequently and often do not register in their new locations.

Representatives and Senators considered several possible responses. Proposals included mandatory chemical castration of sex offenders through the injection of certain chemicals and also mandatory surgical castration. Both chemical and surgical castration reduce a man’s urge to commit sexual offenses, though surgical castration results in a greater reduction. Chemical castration is temporary; surgical castration is permanent. Surgical castration also makes a man incapable of becoming a biological parent.

Members of Congress also debated whether female offenders should be subject to analogous chemical or surgical procedures. However, the sponsor of the bill, herself a victim of a sex offense, declared, “The reality is that the majority of sex offenders are men. Women are already burdened by childcare and helping to support families. We should not impose additional hassles on them without very good reason.” Following the hearings and debates, the following legislation was enacted into law:

SEX OFFENSE PREVENTION ACT (SOPA)

1. Findings:

- (a) Sex offenders present a grave threat to the safety and security of American families.
- (b) Sex offenses and the fear of sex offenses make people less willing to leave their homes and their offices to engage in business activity, serving as barriers to interstate travel and imposing large costs on the economy.
- (c) Male sex offenders have a very high rate of committing future sex crimes. Female sex offenders have a very low rate of recidivism.
- (d) Scientific studies have identified genetic markers that indicate a high likelihood that certain men will commit a sex offense. Surgical castration greatly reduces the chances that genetically predisposed men will commit sex offenses.
- (e) The incidence of sex crimes can be significantly reduced if police authorities are aware of the names and locations of sex offenders within their jurisdictions.
- (f) It is difficult for individual States to track Sex offenders, who often evade surveillance by moving between States and within a single State.

2. Therefore:

- (a) Definition: For purposes of this Act, “sex offender” means a man convicted under the law of any State for a crime that includes sexual contact with the victim. Such crimes include, but are not limited to, rape and child molestation.
- (b) State Sex Offender Registry Program
- (1) Each State shall establish a sex offender registry program, under which sex offenders are required to provide to the State their names, current addresses, and current employer and the employer’s address.
 - (2) Each State shall transmit sex offender information, including any updates it receives, to the United States Department of Justice, within 10 days of the State’s receiving the information.
- (c) Federal Crime of Failure to Register or Update
- (1) A sex offender must register with the State sex offender registry within 30 days of moving to a State.
 - (2) A sex offender must provide updated information to a State sex offender registry within 30 days of buying or renting a house, apartment, or other dwelling place in the State, or accepting new employment in the State.
 - (3) It shall be a federal crime, punishable by up to 10 years in prison, for a sex offender to violate the registration or updating requirements of (c)(1) and (c)(2).
- (d) Funding for Zero Strike Program
- (1) All States receiving federal health care funds shall establish a program
 - (i) to identify men genetically predisposed to commit sexual offenses, and
 - (ii) to castrate such men.
 - (2) If a State fails to implement subsection (d)(1) of this section, the State shall forfeit 10 per cent of the federal health care funds it otherwise would receive.

Questions:

- (A) Does Congress have the power to enact SOPA under the Commerce Clause?**
(B) Does Congress have the power to enact SOPA under the Spending Clause?
(C) Does SOPA violate the Equal Protection Clause?
(D) Does SOPA violate the Due Process Clause?

Note that, where appropriate, you should address the constitutionality of different sections of the statute separately (i.e. one section may be constitutional whereas another is not).

QUESTION II

(suggested time: 60 minutes)

Interstate 80 (I-80), a largely rural highway that runs through the center of the state of Pennsylvania, is part of the federal interstate highway system created by the Federal-Aid Highway Act of 1956. In 2006, Pennsylvania enacted the “ePenn Toll Act,” (the Toll Act), which created a tolling system on I-80. The system includes radio frequency identification, which allows vehicles with an “ePenn-pass” to drive through toll facilities at highway speed. Pursuant to the Toll Act, any individual is eligible to purchase an ePenn-pass. Drivers with an ePenn-pass receive a 10 percent discount over cash payment. Upon signing the Toll Act, Pennsylvania Governor Ed Rendell stated: “tolling on I-80 is absolutely necessary to fund road improvements and transportation projects for the citizens of Pennsylvania.” The Toll Act was approved by the Federal Highway Administration pursuant to federal legislation that authorizes the agency to permit state tolls on federal highways.

Approximately one year after passage and federal approval of the Toll Act, the Pennsylvania State Department of Transportation (PADOT), which administers the ePenn-pass system, published the following regulations:

PADOT RULES 537.600: EPENN-PASS RATES

Pennsylvania residents are hereby entitled to special ePenn-pass rates as follows:

- i. Pennsylvania residents who register a vehicle in Pennsylvania may purchase for such vehicle a *PA RESIDENT ePENN- PASS* at a discounted rate of 50% off the *REGULAR TOLL RATE* for use of I-80 within Pennsylvania.
- ii. Pennsylvania residents who register a vehicle in a county through which I-80 passes may register such vehicle for a *PA CONTIGUOUS COUNTY ePENN-PASS* for free use of I-80 within Pennsylvania.
- iii. To qualify for a *PA RESIDENT ePENN- PASS* or *PA CONTIGUOUS COUNTY ePENN-PASS* as described in regulations i and ii above, vehicles must have been registered at a Pennsylvania address for at least ninety (90) days prior to purchase or registration of such special ePenn-passes.

At a press conference announcing the new regulations, a PADOT spokesperson said: “Our local farmers are hurting; we felt it was appropriate to give folks a break who live right near the highway and who are subject to noise and fumes from the truck traffic. Plus it is really their local road, and they shouldn’t have to pay to use it like folks from out of town.” In response to a reporter’s question, the PADOT spokesperson further stated, “Of course we should give Pennsylvania residents reduced rates – all the other states are doing it!! If we have to pay more to drive on their roads, why shouldn’t they pay more to drive on ours?”

Discuss the constitutionality of the ePenn-pass system under the Dormant Commerce Clause and under Privileges and Immunities protections.

QUESTION III
(suggested time: 30 minutes)

Following the release of four Department of Justice legal memoranda which opined that various “enhanced interrogation” techniques were permissible under applicable domestic and international laws, the House and Senate began investigations into how these techniques, which were used to interrogate individuals thought to have information concerning al Qaeda, were approved. After hearing extensive testimony and reviewing many documents and emails, Congress passed the Torture Prosecution Act of 2009 to “undo the damage to America and its ideals” caused by harsh interrogations. The statute provides:

TORTURE PROSECUTION ACT OF 2009 (TPA 2009)

1. Findings:

- A. The Department of Justice “torture memos” embarrassed America in the eyes of the world and served as a recruitment tool for al Qaeda and other terrorist groups.
- B. These memos demonstrated a brazen disregard of United States treaty obligations and the domestic law of the United States.
- C. The current administration has criticized these memos and eliminated the enhanced interrogation techniques described in the memos.
- D. The current administration, however, has avoided prosecuting the individuals who produced and signed off on these memos.

2. Therefore:

- A. Congress directs the United States Attorney General to commence prosecutions of those responsible for providing erroneous legal advice justifying torturing prisoners captured in Afghanistan in the “War on Terror.”
- B. The Attorney General shall report to the Speaker of the House and the Majority Leader of the Senate on the status of each prosecution every three months.
- C. If the Speaker of the House and Majority Leader of the Senate certify to Congress that they are dissatisfied with the progress of such prosecutions, they may appoint a Special Prosecutor to proceed with prosecutions not being pursued by the Attorney General.
- D. A Special Prosecutor appointed pursuant to section 2(C) may be removed for good cause by a specially-designated panel of the D.C. Circuit Court of Appeals. One member of such panel shall be designated by the Speaker of the House; one member shall be designated by the Majority Leader of the Senate; and the third member shall be designated by the first two members.

One of the defendants has hired your firm to defend him against charges arising out of his role in drafting one of the “torture memos.” **Please write a memo to the senior partner in charge of the case addressing the constitutionality of TPA 2009 under separation of powers principles.**

QUESTION IV
(suggested time: 30 minutes)

The level of deference the Court shows Congress is often outcome-determinative in constitutional adjudication.

Discuss the above statement. In your discussion you are welcome to agree or disagree with the statement, so long as you support your assertions with specific arguments and with **at least three specific examples** from the course materials.

“EXTRA CREDIT” QUESTION
(suggested time: 2 minutes)

If you attended the required Thrower Symposium lecture on executive power, please write the following on your exam answer:

“I attended the required Thrower Symposium panel discussion on executive power.”

Do NOT put your name anywhere on your exam answer. *Remember that you are subject to the honor code* in answering this and all other questions on this exam.

END OF EXAM

HAVE A WONDERFUL SUMMER!!!