

MEMORANDUM

TO: Constitutional Law I Class

FROM: Mike Allen

DATE: May 2006

SUBJECT: Thoughts Concerning Final Examination

This memorandum provides some of my comments on possible answers to the final examination questions. Set out below are some thoughts about how I would have analyzed each of the questions. You can be sure that I have not included all possible responses. No doubt, many of you included analysis not set forth in this memo. You can be sure that you received appropriate credit if the analysis was correct. The same can be said of answers that differed from mine: if your position was well-supported and not foreclosed by relevant law you received appropriate credit. In addition, you were under time pressure when you took the examination. That reality means that I did not expect your answers to be of the same quality that I produced below. The purpose of this memo is merely to give you some general ideas about what I thought about the exam.

With that brief introduction, here are my general thoughts about the exam. I have not provided a discussion of the questions presented in part II. Those questions sought your views on certain open constitutional questions. Your answers were evaluated on how well you articulated and support the position you took on whichever question you elected to answer.

Question I.1

This question called on you to spot a number of potential constitutional issues concerning the Federal Medical Licensing and Safety Act (FMLSA or Act) and then to discuss those issues. Broadly speaking, I believe there were five issues to be discussed. I discuss each issue separately below.

Commerce Clause

One issue is whether Congress had the constitutional authority to enact the FMLSA. The only potential source of authority is Congress's power to regulate "commerce among the several States" under article I, section 8, clause 3.

In *Lopez*, the Court distilled previous doctrine and explained that Congress could regulate under the Commerce in one of three situations: (1) when it was regulating channels of interstate commerce; (2) when it was regulating instrumentalities of interstate commerce or people or things in interstate commerce; or (3) when Congress was regulating an intrastate activity that substantially affected interstate commerce. In this case, it is clear from section I.A of the Act

that Congress is purporting to regulate under the third prong articulated in *Lopez*.

Most recently in *Raich*, the Court explained that there are two ways in which one can assess whether a given federal statute is authorized under the Commerce Clause. The first of these approaches concentrates on the particular activity that Congress believes substantially affects interstate commerce. We termed this approach the “bottom up approach.” The second approach is premised on the existence of a complex regulatory scheme. We termed this the “top down approach.” An affirmative answer to either approach supports Congressional regulation. As the Court did in *Raich*, it is best to consider both approaches no matter what you conclude about the first one you addressed.

Bottom Up Approach

The first step in using this approach is to identify precisely the activity that Congress believes substantially affects interstate commerce. Congress was clear in its findings (section I.A) that “the provision of medical care in the United States” is the activity it believes substantially affects interstate commerce. Thus, that is the activity that you should have analyzed in your answer.

Under this approach, *Lopez* and *Raich* require that we classify the activity that Congress believes substantially affects interstate commerce are either economic or non-economic. In *Raich*, the Court held that “economic” meant the “production, distribution and consumption of a commodity.” You should have applied that definition to the provision of medical care.

In my view, one could have argued fairly persuasively on the “economic” issue in either direction. The key is that you explained to me that you understood the basic law and also laid out in a manner I could follow the logic that led you to your conclusion. Along the way you might also have considered whether the chain of inference leading between the provision of medical care and “pure” commercial matters was too attenuated (per *Lopez*) and whether the Congressional “findings” are of assistance here (see *Morrison*). Finally, you could have mentioned the concurrence of Justices Kennedy and O’Connor in *Lopez* to the effect that, all things being equal, regulations under the Commerce Clause are less likely to be upheld in areas of “traditional state regulation.” Medical licensing might be considered such an area.

Working on the assumption that you determined the activity to be economic (or assumed it to be for purposes of the exam) you should then have discussed the aggregation principle from *Wickard*. That principle allows Congress to aggregate repeated instances of the same economic activity in order to determine that a certain class of activity substantially affects interstate commerce.

Finally, you may have wished to mention the analysis from *McCulloch* concerning the necessary and proper clause. Under that analysis, Congress may use any means that are convenient or useful to reach a legitimate end, so long as those means are not prohibited in the Constitution or a mere pretext to accomplish something that Congress would not otherwise have

the power to do.

In this case, the means (i.e., requiring licensing of certain medical professionals) are useful to address the provision of medical care, even if they are not the most direct means available. However, there might be serious problems with the other prongs of the analysis. First, these means may very well be prohibited by the Constitution for the reasons discussed below (10th Amendment, Due Process and Equal Protection). In addition, there is some evidence here that Congress was really interested in making abortion more difficult in a way that it could not have done more directly. I would not have spent much time on this issue given other difficulties with the analysis thus far.

Top Down Approach

The second means by which to analyze the Commerce Clause issue is to consider the matter from the perspective of the Act in the context of any complex regulatory scheme that might exist in this area..

The first step in the analysis required you to determine whether there is, in fact, a complex regulatory scheme in play here. The only conceivable possibility is the regulatory scheme that has already been recognized by the Court to qualify as a “complex regulatory scheme”: the Controlled Substances Act. *See Raich*. The reason this scheme could be relevant is that it is cited by Congress in Section II.1 of the Act. Of course, you might also have legitimately concluded that there was not complex regulatory scheme at issue here. Again, the important thing is that you explained your reasoning.

After concluding (or assuming) that there was a complex regulatory scheme in place, the step in the analysis was to determine whether that scheme was regulating an economic market or some other economic enterprise. In this case, assume that the CSA was the scheme, the Court in *Raich* made clear that it was regulating an economic market (even when that market is illegal). Thus, there would be no issue here with this prong of the analysis.

The final issue is to determine if the complex regulatory scheme you identify would be undercut if the Act were removed from it. It seems quite unlikely to me that the CSA would be undermined if the Act were removed. To see this, I would have compared the consequences here from those at issue in *Raich*. In any event, the most important thing was that you explained your reasoning. If the scheme would be undercut, then the Commerce Clause (in conjunction with the necessary and proper clause) would support Congressional power to act. If the scheme would not be undercut, this analysis would not support Congressional authority in this instance.¹

¹By the way, you might also have noted that if the Act was deemed within Congressional power, any inconsistent state laws would have been preempted.

Tenth Amendment

As second issue you should have discussed concerned the Tenth Amendment. This issue could have been discussed as a separate one as I have presented it here or as part of the *McCulloch* analysis under the Commerce Clause.

The Supreme Court has distilled from the Tenth Amendment an anti-commandeering principle. See *New York v. United States* and *Printz*. Simply put, the Court has determined that Congress may not commandeer the states (at least the legislative and executive branches) into carrying out federal policy. So, for example, congress may not direct that a state legislature pass a certain law or compel state executive officials to carry out certain actions to enforce federal law.

In this case, McCoy may be able to argue that even if Congress otherwise had authority to enact the Act under the Commerce Clause, the Tenth Amendment anti-commandeering principle because Section II.3 of the Act requires the executive authority of each state to issue the abortion performance license. The case appears to be on all fours with *Printz* in which Congress attempted to commandeer state law enforcement officials to carry out the mandate of the Brady Bill. I believe that the Tenth Amendment challenge would have a high likelihood of success.

Procedural Due Process

The Due Process Clauses of the Fifth and the Fourteenth Amendments provide that no person shall be deprived of “life, liberty, or property, without due process of law.” The Fifth Amendment applies to the federal government while the Fourteenth is applicable to the states. These provisions have been interpreted to have both a procedural and a substantive component. Substantive due process issues are discussed below. This section of the memo deals with procedural due process concerns.

You should have recognized that McCoy had a potential procedural due process claim against the state based on the revocation of his medical license without the provision of any sort of hearing. The first step in a procedural due process analysis is to determine whether there is a life, liberty or property interest at stake. In this case, there is most likely a constitutionally protected property interest in terms of McCoy’s medical license.

The question of whether there is a property interest is one of federal law. See *Castle Rock*. However, that federal determination is heavily dependent on state law because state law may create the requisite “legitimate claim of entitlement” to the interest. *Roth*. In this case, the relevant state law provides that “a license to practice medicine in this state shall not be suspended or revoked without good cause.” Thus, as with public employment in *Loudermill*, the state has created a legitimate expectation in the continued possession of the medical license sufficient to establish McCoy’s property right.

Once there is a relevant interest at stake one must determine whether the procedures used are sufficient under the Constitution to protect that interest. In this case, McCoy would assert that the suspension of his license (at least as it went to abortion-related services) “effective immediately” and without the possibility of appeal was constitutionally defective as a matter of procedural due process.

One would judge this claim by using the three part test laid out in *Mathews v. Eldridge*. That test balances the following three factors:

1. the private interest at stake;
2. the governmental interest at stake; and
3. the risk of error in the challenged procedures and the incremental value of requested procedures in reducing the rate of error.

Here the private interests at state is important because it goes to a person’s livelihood. However, it is probably not as important as many property interests associated with professional licenses because McCoy may practice all forms of medicine except providing abortion-related services.

The government interest here is problematic to assess. We are concerned with the *state* interest here in suspended the license in this manner. The state certainly has an interest in cost reduction and efficiency. The state may also have an interest in complying with the mandate of federal law. Of course, that interest may be undercut by the premise underlying the Tenth Amendment analysis discussed above.

The final factor concerns the risk of error under current procedures and the reduction in that risk under the proposed procedures. In this case, it does not appear that there is much risk of error in the current procedure or that additional procedures would help. The reason is that the suspension is not based on individual factors related to Dr. McCoy. Instead, it is based on the federal law and is triggered by any doctor who performs abortions. Thus, it is difficult to see what is gained by greater procedures here.

In the end, it seems that a procedural due process challenge would not be successful.

Substantive Due Process

McCoy (who we have assumed to have – and would in fact have – standing would also challenge the Act under the substantive prong of the Due Process Clause. In particular, McCoy would focus his attack on potential defects in the law under the Supreme Court’s current jurisprudence concerning infringements on a woman’s right to obtain an abortion in certain situations.

I would have addressed the question as follows:²

- I would first have briefly identified the fact that in *Roe v. Wade* the Court interpreted “liberty” in the 14th Amendment to include a right of a woman to control her body at least in terms of a right to terminate a pregnancy at certain points in the process. The key issue in *Roe* centered on the point of viability, although some regulation was allowed as it related to the health of the mother beginning in the second trimester.
- The current standard for judging the constitutionality of abortion regulations such as the Act was set forth in *Casey*. In *Casey*,² the Court held that a government regulation of abortion in the pre-viability period of a pregnancy was to be judged by considering whether the regulation was an “undue burden” on the woman’s exercise of her right to control her own body as identified in *Roe*.
 - The Court defined an “undue burden” as a law that has the purpose or the effect of placing a substantial obstacle in the path of a woman seeking to exercise her *Roe* right. Thus, to judge the constitutionality of the Act one must address both prongs of the undue burden test: purpose and effect.
 - The Court also made clear in *Casey* that a law regulating abortion needed to take the health of the mother into account. The Act sufficiently does so in Section II.5.
- Next, I would have considered whether the Act’s purpose was to impose a substantial obstacle in the path of women seeking their rights to terminate a pregnancy in the pre-viability period.
 - It is inherently difficult to determine the “purpose” of a multi-member legislative body. Senator A clearly had as his purpose impeding abortions. If his purpose could be imputed to the entire body, there is little doubt that the Act would constitute an undue burden under *Casey*. However, it is almost certainly not enough that one legislator – even a bill’s sponsor – can infect the entire legislation under the *Casey* standard. Rather, it seems more likely that one would need to find that a dominant (or at least significant) purpose of the legislature as a whole was to place the obstacle in the path of women exercising their rights.
 - It is not likely that one would be able to do so in this case. It seems that the

²Please note that I have used an outline form. Unless you were running out of time, I would have expected you to use full paragraphs. I have used an outline simply as a convenient means by which to convey information.

bill was only able to pass when certain legislators primarily interested in focusing attention on sub-standard health care joined the cause.

- Moreover, the addition of section II.5 concerning the life and health of the mother also undercuts (to at least some degree) the purpose analysis here.
- You should have reached a conclusion on the purpose prong.
- The second step in the process is to consider whether the Act has the effect of creating a substantial obstacle in the path of women seeking to exercise their rights under *Roe*. The effect analysis is a more difficult question under the Act. You should have recognized that this analysis is a highly fact specific one.
 - There will certainly be some effect on women seeking abortions in the city in which Dr. McCoy practices. There will be nowhere in that city – or that state – to obtain an abortion, at least not until the state develops the training program.
 - Of course, it is possible that the women could seek and obtain an abortion by going to the closest abortion provider four hours away in a different state. You should have recognized that you need some more facts about that clinic. First, is it in one of the inner city areas covered by the Act? Second, if it is, what is the policy of that state in terms of complying with the federal Act. In other words, would that facility be available even if the women could make the trip. Your analysis might be different depending on your answers to these questions.
 - In any event, you should have discussed whether, in your view and under these circumstances, the effect on women would amount to a “substantial obstacle” to the exercise of the *Roe* right. In this regard, it might have been useful to compare the obstacle here with the various ones considered in *Casey*.

Equal Protection

McCoy could also raise a challenge to the Act using equal protection principles. While the Fifth Amendment does not contain an explicit reference to equal protection, the Court has held that the same equal protection principles articulated with respect to state action under the Fourteenth Amendment are present with respect to the federal government via the Fifth Amendment’s Due Process Clause. *See Bolling v. Sharpe*.

The first step under an equal protection analysis is to determine the appropriate standard of review. To do so one would need to determine the basis on which the Act classified. You would also have wanted to consider whether the Act infringed a “fundamental right.” Here, it

does not except to the extent considered above dealing with the right of a woman to seek an abortion at certain points in the pregnancy. That issue was considered under the *Casey* standard above.

In this case, there were three main ways in which one could consider the classification issue. One of them is on the face of the statute: inner city residents versus non-inner city residents. Another possibility would be focus on poverty as a classifying device. And, finally, one might be able to consider the Act as classifying based on race.³ I will discuss the racial possibility first and the return to other classifications briefly.

The Act is race neutral both on its face and in its application. However, based on the facts in the problem there is a strong racial effect of the law (i.e., the Act has a much more negative effect on African-Americans than on other racial groups). You should have discussed whether it was possible to say that the Act classifies on the basis of race. To do so you should have considered the matters we discussed concerning how one determines whether to treat a racially neutral statute applied in a racially neutral way but with a disproportionate racial impact under strict scrutiny. *See Washington v. Davis; Arlington Heights.*

The Supreme Court has determined that courts should look to a number of factors to make the determination concerning such a racially neutral law. All of the factors go essentially towards determining whether race was, in reality, a force behind enacting the law. In particular, the Court has indicated that one should consider: (1) the nature of the racial effect; (2) the impetus for enacting the law; (3) the relevant legislative history; and (4) the history of racial discrimination in the relevant geographical area.

Here, the nature of the racial effect is quite strong. Based on the statistics we are given, 5 times as many African-Americans will feel an impact of the statute than white citizens. The impetus for enacting the law does not appear to be a response to racial matters. As discussed above, Senator A seemed concerned with abortion while other supporters were interested in focusing attention on sub-standard health care in the United States. The relevant governmental unit is the United States. There are certainly elements of racial discrimination at the Federal level in the United States. However, in the last 50 years in particular the federal government has been quite active in addressing racial matters. Finally, there is some evidence in the specific legislative history that could suggest that there was at least some racial tinge present. Senator A's ambiguous comment about a double or triple benefit when told of the potential racial (and wealth) impact does raise a suspicious judicial eyebrow.

All in all, one could go either way as to whether the Act classifies using race. If it did,

³Although one might have also been tempted to discuss this statute as classifying based on gender, the Court has indicated in similar cases that such an approach is not proper. The reason is that the class of people seeking abortions is all female, the class of those people not seeking abortions is comprised of both men and women.

one would use strict scrutiny to evaluate the law. Under this standard, the state would need to prove that it had a compelling interest and that its means of regulating were narrowly tailored to serve that interest. If one did not see race as a factor here the law would be evaluated under rational basis scrutiny in which the challenger must show that the law at issue does not advance a legitimate government interest or that the means used to advance such a legitimate interest are not reasonable suited to achieve the interest.

If one were to use strict scrutiny, this law would likely fail. As to the first prong, one would need to determine whether ensuring the public health through the provision of quality medical care was a compelling state interest. The Court has not explicitly held that it is, but it seems likely that it would do so if presented with the opportunity. After all, in the modern world governments are thought of as a means of making the lives of citizens better. Think of national security protecting the safety of citizens while health care protects their health. Of course, one could oppose this view by noting that we are talking about the *federal* government that does not possess general police powers. In any event, you should have reached some conclusion about the nature of the government's interest.

The second step would be to consider whether the Act is narrowly tailored to serve the interest the government has identified as compelling. In this case, it seems fairly clear that it is not. There are any number of means by which the government could ensure the provision of quality medical care without implicitly classifying on race. For example, the Act could not be limited to inner cities, thus spreading its impact more widely (or as we might say being less under-inclusive). The bottom line is that the Act would likely fail strict scrutiny.

On the other hand, the Act would almost certainly pass muster under rational basis scrutiny. The protection of public health through quality medical care is most certainly a legitimate state interest. Moreover, when one uses rational basis scrutiny the government is given great latitude in the means selected to advance the interest. Thus, for example, the government is allowed to address problems one step at a time. Here, that would mean that the Act was constitutionally sound to start with one aspect of sub-standard medical care (either by geographic location or type of procedure).

Finally, I would have touched on the two non-race potential classifications: poverty and inner city versus non-inner city. Neither of these classifications are suspect or quasi-suspect classes. In addition, neither group has sufficient similarity to recognized suspect classes to warrant the use of heightened scrutiny. You might have considered in this regard the factors articulated in footnote 4 of *Carolene Products* or the matters discussed in the majority opinion in *City of Cleburne*. Thus, to the extent one considered the law as classifying on either of these bases,⁴ rational basis scrutiny would be applicable.

⁴Moreover, if one were to use poverty as a classifying device it would necessary to engage in an *Arlington Height* and *Washington v. Davis* analysis because the statute does not, on its face, classify on that basis.

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Question II.2

The second question specifically asked you to address a dormant commerce clause challenge to the Minnesota Environmental Responsibility Act (the “Act”). You should have limited your discussion to that issue.

Facial Discrimination

The first question to address is whether the statute at issue is discriminatory on its face. The answer to that inquiry is straightforward here. The Act is not facially discriminatory because all milk sold in the state needed to be sold in a non-plastic recyclable container no matter where the milk or the container originated.⁵

What to do with a non-facially discriminatory statute?

One would need to evaluate the Act under the general rubric of a neutral statute that has an impact on interstate commerce. Quite frankly, this case is close to the line in terms of whether one should consider the matter as only being an impact on interstate commerce or whether there is a discriminatory effect (or perhaps purpose). I believe the marginally better argument is that there is at least a sufficient hint of discriminatory effect such that one would use that line of analysis. The reason is that effect of the law is that a significant Minnesota industry is benefitted and non-Minnesota industries are harmed. But, I say again that it is a close call. Therefore, the best course would have been to evaluate the matter under both relevant views.

Impact Only

A law that has an impact (but not a discriminatory effect) on interstate commerce is evaluated under the *Pike* balancing approach. Under *Pike* balancing it is the challenger that has the burden of showing that the burdens on interstate commerce are clearly excessive to the local benefits. The law is presumed to be constitutional.

The benefits of the law center on environmental conservation. This is a legitimate local interest. Moreover, it seems that in its first year the law has served that purpose well. The amount of waste deposited in landfills has dropped and the amount of material recycled has

⁵In addition, there is no indication here that Minnesota was acting a market participant in connection with the passage of the Act. There is also no evidence of any relevant federal statute making discussion of preemption and/or consent unnecessary.

increased. Of course, we do not know if there is a causal connection between the Act and either of these things. Finally, unlike the situation in *Kassel* and *Southern Pacific*, there is no indication here that the state's asserted interest is undercut. Thus, I would rank the local benefits as high.⁶

The burdens on interstate commerce also appear to be significant here. The evidence Tom's Containers has introduced suggests that it has lost accounts worth \$1 million as a result of the law. It also appears that plastic manufacturers are also feeling the pinch as a result of the law. And this economic burden also seems to be reflected in the doubling of the portion of Minnesota timber industry devoted to the manufacture of paper used in milk cartons.

Thus, this is a situation in which you have a high local benefit and a high burden on interstate commerce. Since the test requires that the burden on interstate commerce be clearly excessive when compared to local benefits, I do not believe that the Act would be unconstitutional if one applied *Pike* balancing.

Discriminatory Effect

As described above, there is some evidence of a discriminatory effect on interstate commerce in this case. When there is such a discriminatory effect it is highly likely that the law at issue will be struck down. The Court has not, however, been consistent in explaining the standard to use. One articulation of the standard when there is a strong discriminatory effect is that a court should apply *Pike* balancing but start with the assumption that the law is unconstitutional unless the state establishes otherwise. *Hunt*. As described above in the impact only section, the result of traditional *Pike* balancing is a high burden and high benefit. It might be the case that if one applied the modified *Hunt* version the result would be different due to the shift in burden. This is an issue you should have discussed.

Another approach has been to apply the same standard one would use if the statute was discriminatory on its face. *Dean Milk*. Under this standard, you would need to presume that the statute was invalid and strike it down unless the state was able to establish (1) that it has a legitimate state interest that (2) could not be served by any less discriminatory means. The state clearly has a legitimate interest here in terms of safeguarding the environment. The issue would be in connection with the second portion of the test. There are many less discriminatory means that Minnesota could have used to advance its goals. For example, it could have established plastic recycling centers or provided means to collect plastic waste to later ship to out of state recycling centers.

The bottom line is that if the Act is considered under either of the discriminatory effects

⁶It would be inappropriate to count among the legitimate local benefits any increase in Minnesota industries. Such a benefit would be akin to economic protectionism.

tests it is likely to fail.⁷ In the end, you should have come to a conclusion on the motion.

⁷This would even be more true of one evaluated the Act in terms of a discriminatory purpose. There is some evidence of a discriminatory purpose here similar in some respect to what Justice Brennan discussed in his opinion in *Kassel*. There is some authority that when there is a discriminatory purpose the relevant law is *per se* invalid. *Hood*. In other words, under this approach the state cannot under any circumstances justify the discrimination. It is unclear whether this standard is still good law. It seems more appropriate for cases in which there is stronger evidence of discriminatory motives. But if one were to apply the test, the Act fails.