

Individual Rights Final Exam Grading Notation Key
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Issue

I1 = Correct issue statement

I2 = Incomplete issue statement

I3 = Incorrect issue statement

Rule

R1 = Correct statement of governing legal principles

R2 = Incomplete statement of same

R3 = Incorrect statement of same

Analysis

A1 = Correct factual analysis

A2 = Incomplete factual analysis

A3 = Incorrect factual analysis

Conclusion

C1 = Correct conclusion

C2 = Incomplete conclusion

C3 = Incorrect conclusion

Other Specific Notations:

D = Did not follow instructions provided on front of exam or as part of question (e.g., what rule to apply).

G = Good point or analysis.

ORG = Recommend better organization of issues and analysis, and/or not mixing together different issues within the same discussion.

Y = "Yes!" (as in "righto!")

2)

Here, state action b/c actor is Plaine -- astate--thus no barrier here under state action doctrine

✓

1) Was the transfer of 10 inspections from S to T a valid transfer of property under 5A takings clause?

5A F3

5A taking clause says that not shall private property be taken for public use w/ o just compensation > 4 express parts: 1) Taking--here, there is a possessory taking--the 10 inspection stations, thus this is a per se taking that requires compensation; 2) Property? Property defined by state law, thus here the property is the inspection stations..thus, have property; 4) Just compensation--here, 3 basic principles: look to owner's loss and not takers' gain, and measured by FMV > here, facts state that FMV provided for those businesses and properties. Thus, govt ok here: 3) Issue is whether this is a public use? Under Kelo decision, there is a broad interpretation of public use. Takings allow if for plausible, nonpretextual public purposes, subject to rational basis review. However, Kennedy's concurrence said that if any part of record suggest that what govt has really done has been for benefit of private party, then ratchet up level of review--to meaningful RB review. Here, S would allege that property is being transferred for private use in violation of takings clause--that this was going directly to T--and not allowed. Here, though normally used traditional RB, the level of review would likely be scrutinized a little higher--RB w/ teeth (Kennedy concurrence) b/c of the fact that she has college buddy and roommate, LL< who was the owner of T as well as the fact that they negotiated a higher inspection fee w/ T. Thus, analyze under RB w/ teeth. Under RB, must be a legit govt objective--the objective here, according to govt, was to get rid of S because they were passing people that they should fail--and concerned about traffic safety. . However, looking deeper into facts, ct would see that the contract contained no performance criteria--thus, under RB, though maybe some legit interest,

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C1/A2

this was not a relationship--they did not communicate to S at all about family examinations.

And really, look to hidden agenda of getting more money for state b.c of vehical inspection fees higher at T--as well as personal connection. Thus, under RB w/ teeth, govt action would fail and 5A takings violation would succeed

14

2) Was the govt action restrict Ss ability earn a living of engage in a profession, and thus violate Economic SDP under 14A?

S would assert that by taking away 10 station, ruined her ability to make living--vehicle inspection. Here, 14a says no state shall deprive any person of life liberty or property w/o DP of law. Post Lochner, courts have issued a 2 part approach to review economic legislation/action--under doormat RB review. When govt impinges upon econ interest, 1) action only has to have legit end of purposes. Ct takes govt at word here, even if stated purposes os not true purpose. Since Plaine would assert that they had 20 cars that passed when they should of failed out of 50, compares to 5 and 3 out of 50 at state inspection and at T, that they had an interest in traffic safety--that would be legit, n/w/s the connection to LL. 2) does action bear reasonable relationship to achieving stated end/purpose. The action of transferring to T, who has only had 5 out of 50 pass when should have failed, could be one way to achieve objection of traffic safety, even though way overinclusive (RB tolerates much over & under inclusivity), thus, law upheld

a)

under RB
9

OK

3) Was govt action impair an existing K?

K clause states that no state shall pass any law (or have any action) impairing the obligation of contracts. This only applies to state, not federal legislation & only applies to interfering w/

existing K right. Here, there is 3 part test to determine to what extent there can be an impairment of existing contractual obligations. Here, there was a K that was set to expire in 2020, and did not contain any express termination rights.

C) /
K2 /
A2

1) Is there a substantial impairment fo existing contractual obligation? Yes, here term as as this is only 2009, and contract was to run thru 2020, thus 11 years is substantial; 2) If substantial impairment, does impairment serve an important public purposes (b/c here, state is a party to the K). Important public purpose is higher level of judicial review than just legit public purposes. Plaine would assert traffic safety as important public purpose and likely this is important b/c don't want cars on the road that should have failed inspection; 3) If important purpose, then impairment must be both rx & necessary to achieve an important public purposes. Here, Plaine likely fails. Why? Well, not sure that T was that much better at inspection since random 50 car sample is not even that much, especially not considering type, age, condition of car. Also, not sure that transfer was necessary. Maybe instead of just shutting it down, State should have communicated to S regarding concerns about faulty examination before. Thus, likely not necessary-- and S could win on K clause claim

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4) Was the govt action violate Ss PDP rights under 14A?

Under 14A, S&L govt shall not deprive person of life, liberty, or property.

Here, the property interest would be the 10 inspection stations. Under PDP analysis, ct only applies to cognizable interests. 3 elements

A2 /
A2

1) Is there a cognizable liberty of property interest. For this property interest, S must have legit claim of entitlement, which must be grounded in some law, regulation, govt policy or practice.

G Here, S could say claim of entitlement was state contract thru 2020--and that there were no performance criteria and no express termination clauses. Thus, likely could find cognizable

property interest in the stations

2) if cognizable interest, must also have a compensable deprivation by govt. Must be intentional deprivation. Here, this could easily be proved b/c govt took away their stations. Though govt would argue that they gave them fair compensation, does not matter under this prong. There was an intentional deprivation of service stations--thru 2020.

3) Did govt give you fair procedures? Ideally, this means advance notice and meaningful opportunity to be heard (held before deprivation and before neutral decision/impartial maker). Here, the state did not communicate w/ S regarding concerns about facility examinations--rather announced effective immediately, that S's contracts were being terminated w/o express termination clause). Govt would argue that they don't need ideal procedures under Matthews 3 factor balancing test. 1) private interest will be affected--here, the right to inspect for 9 more years--this is significant for K/S b/c likely her livelihood; 2) risk of an erroneous deprivation of such interest through procedures used. Here, the govt did not even give S any warning. Maybe if they had given her warning, or maybe looked more closely at the vehicles being inspected, they could have been able to keep their stations there and maybe alleviated safety concerns. Should have given S an opportunity to respond as to why she allegedly passed 10 cars that should have failed.; 3) govt interest & fiscal admin/burden that additional or substantive procedures would entail. This would not be high, just giving S an opportunity to respond as well as maybe doing more than 50 car inspections. Though a bit higher burden, on balance, b/c of private interest that is being taken away--K/S would likely have a valid PDP claim

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Pat's claim vs. Plaintiffs (here, no state action issues b/c govt owned the smog inspection station)

Here, Pat would first assert that the law making vehicles manufactured in Taiwan come in from 8 to 10 was an illegitimate classification, and violation under 14A EP clause

Here, EP clause holds that no state shall deny to any person w/ in its JX the EP of the law. Law has to treat similarly situated people similarly. Two lines of cases--one that is applicable here is the classification lines. A statute or law may embody a classification on its face or may be neutral. If explicitly classified on its face, then ct will go ahead and review requisite level of scrutiny based on type of classification it is. However, here, govt would say this is a facially neutral law--that this applies to all cars in Taiwan--and govt would say that this has nothing to do with Gender. However, Pat must prove not only discriminatory intent but discriminatory purposes. Use the Arlington Heights decision to find whether discriminatory impact was intentional. First, Pat, in PF case, must only prove that discriminatory purposes has been a motivating factor (not THE motivating factor)--sensitive inquiry into circumstantial & direct evidence of intent may be available. P could likely show this that this is clear discrimination, and law is unexplainable other than on grounds against transgendered people. Here, if Pat could prove the conversation between Van and Dawn, which VAN said that they wanted those people to go to other inspection stations--then this could prove intent. Then burden of proof shift to govt to prove that same decision would have resulted even if impermissible purposes would not have been considered.

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Here, since the Cutie was the only motor vehicle being made in Taiwan, and CUTIE were being driven by the transgendered people, this was directly at the transgendered people--thus, likely could not prove anything else and would need to ratchet up the level of scrutiny.

C1 / A2

Next q--what level of scrutiny. Here, transgender situation have not been addressed by SC--though govt may assert this is similar to sexual orientation--and should only get RB w/ teeth review. Here, must look to City of Cleburne factors to determine category classification

A2

- 1) Immutability--here, this cuts against Pat claim since it was Pat choice to be turned into women from man. Thus, this would favor the classification being dealt with as non-suscept
- 2) Whether classification has anything to do about person's ability to contribute to society:

transgenders can function just like anyone else, so this cuts in favor of ratcheting up review

3) history of discrimination: Here, P had to admit that significant effort made by Plaine and country as a whole to prevent discrimination against transgender individuals since sex-change technology was first made available 20 years ago. Thus, similar to Cleburne, looking at modern standards, this cuts against ratcheting up review; Additionally, federal & P govt added such individuals to protected class under anti-discrimination acts (though not applied to govt EEs)

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4) political powerlessness: Here, such group has no history of bringing political power, thus under Carolene FN4, this would be area to ratchet up review

AZ

5th argument slippery slope would favor govt bc dont want to allow people who have sex change and people like them to continue to get suspect classification

On balance, close class...likely not suspect classification nor quasi-suspect, but likely treat as non-suspect class--but apply RB w/ teeth

G!

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CI/AZ

Here, the legit interest that govt says is that Taiwanese care were so sophisticated that needed more time. This could be considered legit, though not sure whether stated purpose is true

AZ

purpose. However, under RB w/ teeth analysis, similar to that applied in Romer, this would likely not be a rx relationship--to only allow between 8 and 10. Evidence that other technicians took more time dealing with souped up negated and muffler systems--thus this law would be under inclusive. And there is such a hint of invidious discrimination here--with the convo between V and D--that it really looks like this was done for discriminatory purposes--and this the action of limiting 8 to 10 would violate EP rights (also limited it to just Fridays--underinclusive)

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Pat would also have a 1a claim--that her expressive rights--both the flags and message that gender is a choice--were violated by action to limit vehicles manufactured between 8 and 10;

Here, free speech clause says congress shall make no law abridging freedom of speech. Courts have interpreted this beyond speaking to all forms of meaningful human expression (thus, here could include slogan of gender is choice as well as pink flags). basically, if trying to convey message, then it will be protected in some form. First, look at the speech. Here, the speech, according to Pat, this is a content based regulation, and it should apply SS. This is content based on subject matter restriction---restricting speech of gender. Though, Plaine would like to argue that this is just time, place, manner since gave them from 8 to 10 to apply their signs on Friday evenings, which would only apply intermediate scrutiny, here like Playboy when have mix of TPM and content based, treat as a content based regulation, subject to SS. However, before apply SS, must look to capacity that the govt is acting. Here, govt is acting as landowner where special rules apply--even fully protected speech if govt was solely sovereign, it when acting as landowner, gives more leeway to restrict such speech. Is this TPM? Here, P would argue that this is like sidewalks, and other public property which had been opened to expressive activities. However, likely vehicle inspection area is not a TPM. Likely not DPF here b/c govt had not made conscious policy decision to open up this forum. Thus, under Krishna analysis, process of exclusion, this is a NPF===and govt can restrict speech as long as regs are ex condireign nature of property for which

C2
A2

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1/1
a

it is dedication as that regs are viewpoint neutral. However, here, regs are likely not viewpoint neutral, b/c targeting one type of speech--gender as a choice. and Thus, would be struck down in 1

C1

Q2: WHAT JOB!

QUESTION TWO

Sniffy's Claims:

FD
Sniffy's economic rights have been infringed by the government action to terminate its contract.

This economic liberties include the right to learn a living and the right to contract.

Were S's SDP rights violated?

While the court struck down most economic legislation and government action during Locher, cases like Nebbia and Carolene Products cemented the "Doormat" approach to analyzing economic legislation for substantive due process rights. This means there need only be a legitimate purpose, real or hypothesized. In this case, the purpose for terminating the contract was that S had given too many passes at times that should have been fails. While it seems clear that this was not the real reason, given by the facts that Kay was friends with a competitor, she was getting more money from the new company, under SDP rational basis review the court must ¹³ accept the reason the government gives as true.

Tailoring. There must be a rational relationship between the action and the purpose. The purpose was to have a better company, a more accurate company, on the job, and her action was to replace S with someone who did a better job. That's what she did. Tailoring is fine.

The court has never invalidated action for SDP for econ rights since 1930, so it is unlikely Sniffy would win on this.

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Did the actions of MVD violate the contracts clause?

When the government is a party in the contract, as is the case here, the court applies the US Trust test to decide if the CC has been violated. First there must be a substantial impairment of an existing contractual right. The right here was existing and current because the contracts did not expire until 2020 and were currently in force. If an industry is highly regulated, there will be less of a substantial impairment on that company because they should have foreseen the action. The smog industry is probably one that is highly regulated. This may mean there was not substantial impairment. However, because the contract was completely taken away, this is probably substantial. Second, ask if that impairment serves an important public purpose? In this case, it was serving the police powers of the state by protecting the safety of the state by replacing this company with a safer one (less passes that should have been fails). Finally, is the impairment reasonable and necessary to achieve the public purpose? In this case, there were other alternatives, such as notifying S that they had failed these tests and giving them a chance to get better before terminating their contract all together. This probably wasn't necessary. Therefore, the CC is probably violated here.

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Was there a taking of S's interest in the contract?

To have a taking, there must be private property taken for public use without just compensation.

The private property in this case would be the 10 stations taken and the businesses. Under Kelo,

any public purpose is considered a public use. Therefore, taking the stations to give to someone else to use to do smog checks for the state as well is a public use. There was a taking because the

land was physically taken. This is a per se taking. However, the taking was compensated by the FMV of the businesses and properties that were taken. Under US v. Miller, it is the owner's loss and not the taker's gain that is calculated. Therefore the FMV (as stated in Powelson), is the best mark of just compensation. Because just compensation was paid, there was no Taking.) C3
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Were S's procedural due process rights violated? The property interest taken here was the businesses and property. There was an intentional deprivation because the state took the properties and gave them to another company. Was there fair process? No, the government never notified S that they were taking their property. It is possible that there could be a post deprivation hearing, but there doesn't seem to be evidence of it. The court looks at three factors in determining whether or not there was fair process: private int affected, risk of erroneous deprivation, burden of govt providing more than it did. This was S's entire business, so there was a big private int affected, not much risk of error in deprivation because they knew from their reports that they had given passes when they shouldn't, however, it wouldn't have been a burden for the govt to notify them before taking the property away. They made it effective immediately. Therefore, PDP has been violated here.

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Pat's Claims

EPC--Classification in V's station to limit appointments for Taiwanese cars

Is the government acting? Yes, Plaine owns V's station so V is a government actor.

2

What is the classification?

The EPC means that laws must treat people who are simliarly situated similarly. It doesn't

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mean you have to treat everyone the same, but the law must "apply equally" to all people that implicate the law. In this case, the policy of V did not expressly create a classification, but it did create a classification through disparate impact on transgendered individuals. In Washington v.

Davis the court held that disaparate impact alone is not enough to show an EPC issue, that a P must also show a discriminatory purpose by the government as well. This can be shown by three factors as laid out in Arlington Heights: a pattern of discrimination that results from the law, the historical background in which the law was adopted, and the statements or comments made by those who adopted the law. Here, V clearly made statements to his worker that he would rather the transgendered girls "go to another station" and then the next week adopted his new policy.

Also, there is a pattern of discrimination that results from the law because the cars from "Taiwan" are the Cutie cars, the only cars coming from Taiwan, and all the transgendered girls that come into the station are driving this car. The historical backdrop is shown by the adoption of the anti discrimination laws for transgendereds, which would not have been adopted had there not been a history of discrimination there. ^{AZ} Therefore, there is a discriminatory intent shown. ^{CI}

However, V can still escape EPC analysis if he can show the policy would have been passed anyway despite this discriminatory intent. It seems in this case that while there was a legitimate reason for the law that was not discriminatory, the law only came into play just after the discussion with his worker about transgendereds, and both of them deciding they wished they would go elsewhere. Therefore the EPC is invoked. ⁷) CI/AZ

In order to decide the level of review, we must decide whether the class is suspect, quasi suspect, or non suspect. Transgendereds are not a recognized class, so we must apply the Cleburne factors in order to determine the level of review. The factors laid out in Cleburne are (1) whether the characteristic is immutable, (2) past history of discrimination, (3) history of political

A2

powerlessness, and (4) whether giving this group a suspect classification would lead to a flood of litigation. Looking at (1), the transgendereds themselves seem to say that "Gender is a choice"

G

with their flag, insinuating that they chose to be transgendered, so therefore maybe the characteristic is not immutable. For (2), there does seem to be past discrimination, evidenced by

A2
C3

the passage of the anti discrimination laws. The same argument could go for (3). Giving this group suspect class may lead to more groups of people that dress or act differently to seeks

suspect class. Therefore, this is probably not a suspect class. We can look at the policy under

C2/A3

rational basis review. The court may also look at this under Quasi Suspect review because it is gender discrimination (the only ones affected by this are women. New women, but women.)

A2

A3
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Under rational basis review, there must be a legitimate interest and a reasonable relationship

between the law and the interest. The purported interest in this case to moving the repairs to 8-

10pm is to avoid delaying appointments for other customers because of the complexity of the

computers. However, the real reasons are what V and his co-worker stated, that they don't want

C2

the transgendereds coming in anymore, and because they have dance lessons at 8pm, passing the

law essentially did that. The MEANS analysis means that the interest must be reasonably related

to the law. There is under inclusiveness here because there are other cars that had souped up

engines that caused the same delays that the Cutie's did. However, these other cars only came a

G

few times a month, so the under inclusiveness is probably not substantial. Therefore, the policy

I2

will probably pass rational basis review and be upheld.

12

The court may also feel that Transgendered belong in a similar classification to sexual orientation, which has a rational basis with teeth review. In this case, the "teeth" would cause the purported purpose to be the REAL purpose. Therefore, since it seems that V's purported purpose of saving time is not his real purpose (which seems to be to keep transgendered out), just the addition of the "teeth" to the review of the policy would probably be enough to strike it down.

3

C1
A2

Freedom of Expression--to fly her flag? Govt owned property? Forum? Non-Public Forum...may limit speech (flying flag, conduct as speech) as long as its related to purpose of form (to do smog checks) and not viewpoint discrim.

4