



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are walking through a Constitutional Law MEE question. This is another in our series of podcasts talking about how to approach questions on the UBE bar exam. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life.

Lee Burgess: We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back. Today, we are walking through a Constitutional Law question from the MEE. This is another in our series of podcasts talking about how to approach questions on the UBE. And don't forget to subscribe to our podcast so you won't miss any upcoming essay discussions. Today's essay is as timely as it is challenging. It's about the bifurcation of power between state and federal in the American constitutional system, and it's in the context of marijuana legislation. This is a hot topic right now as more and more states legalize marijuana for medical or recreational use despite a federal prohibition.

Lee Burgess: Before we walk through today's question, we need to do a quick review of the law you'll want to know for this question. For constitutional law questions, many of the rules you apply come from important Supreme Court cases. Remember, you don't need to cite cases, but some people have an easier time remembering the rules in context. So just make sure you're studying the material (and all material) in a way that works best for you.

Lee Burgess: First, the Tenth Amendment of the United States Constitution restricts the power of the federal government, and reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This has been interpreted by the Supreme Court as restricting federal power as necessary for the states to retain a significant measure of sovereign authority. Further, "commandeering" of state officials is unconstitutional under the federalism principle of the Tenth Amendment.

Lee Burgess: Now, that's already a lot to take in, but we are going to need one more rule for our essay today. And it is this: Congress may condition the receipt or use of



federal funds on state compliance with federal statutory or administrative directives only when 1) the spending is for the general welfare (although the court should substantially defer to Congress in this regard); 2) the condition imposed by Congress must be imposed unambiguously; 3) the condition imposed must be related to the federal interest, in particular national projects or programs; 4) the condition imposed must not be to induce the States to engage in activities that would themselves be unconstitutional; and 5) the condition must not be so coercive as to pass the point at which pressure turns into compulsion.

Lee Burgess: That is more or less all of the law we need to know today. Now, it's quite a bit of law, and constitutional law is not easy to apply. So let's get started. We're going to move on to reading the bar exam question. This is a question from the [July 2018 bar exam](#). We're going to link to a web page where you can find this question in the show notes. Ready? Let's do it.

Lee Burgess: "In *Gonzales v. Raich*, 545 U.S. 1, from 2005, the Supreme Court held that Congress has the power under the Commerce Clause of Article I, Section 8, of the Constitution to prohibit the local cultivation and use of marijuana, even when applicable state law permits such cultivation, and even when the cultivation and use are entirely within state borders. At the time of that decision, at least nine states authorized the use of marijuana for medicinal reasons. Since the decision, medicinal use of marijuana has been approved in numerous other states, and some states have also begun to allow the recreational use of marijuana.

Lee Burgess: Concerned with the widespread disregard of federal law in states that have legalized marijuana use, Congress recently passed the Federal Drug Abuse Prevention Act. Sections 11 and 15 of that Act provide as follows:

Lee Burgess: Section 11. Any state law enforcement officer or agency that takes an individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense.

Lee Burgess: Section 15. No state government, state agency, or unit of local government within a state shall be eligible to receive any funding through the federal Justice



Assistance Grant program, unless the use of marijuana is a criminal act in that state.

Lee Burgess: The Justice Assistance Grant program has been in existence for many years. It is the primary program through which the federal government provides financial assistance for state law enforcement agencies. Last year, the federal government made approximately \$300 million in grants to state and local law enforcement agencies through this program. Congress has appropriated another \$300 million for such grants in the upcoming fiscal year.

Lee Burgess: State A has a population of about 4 million people. Its crime rate is below average. Last year, total spending by law enforcement agencies in State A was \$600 million, of which \$10 million came from federal grants under the Justice Assistance Grant program. State A recently adopted legislation decriminalizing the use of marijuana for all purposes by persons over the age of 21.

Lee Burgess: As applied to State A, number one, is Section 11 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain. And number two, is Section 15 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain."

Lee Burgess: Okay. Our two questions here have to do with the constitutional limits of federal power. A quick review of the hypo tells us that question one is about the federal government requiring a state to take a particular action, which we know is commandeering under the Tenth Amendment. The second question deals with the federal government withholding funds unless a state takes a particular action, which we know is also going to be a Tenth Amendment issue.

Lee Burgess: Now, having identified the questions and the applicable law, it's time to dissect the facts of the hypothetical and structure our analysis. So the first thing you must do is mark up your exam paper to assess what is legally significant about each fact in the fact pattern. We'll take the facts one at a time.

Lee Burgess: In *Gonzales v. Raich*, the Supreme Court held that Congress has the power under the Commerce Clause of Article I, Section 8, of the Constitution to prohibit the local cultivation and use of marijuana, even when applicable state law permits such cultivation, and even when the cultivation and use are entirely within state borders. So, this is pretty cool if you're a big Con Law person. The examiners are giving you a specific court case to focus on, which may help you orient yourself in the discussion. But don't get off-track though. The call of the question asked about whether certain federal statutes are a constitutional



exercise of federal power, which means that we're probably looking at the Tenth Amendment.

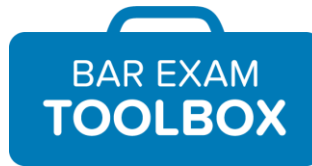
Lee Burgess: Next step, it said that at the time of that decision, at least nine states authorized the use of marijuana for medicinal reasons. Since that decision, medicinal use of marijuana has been approved in numerous other states, and some states have also begun to allow the recreational use of marijuana. This tells us that there are a number of states whose laws conflict with the federal law on this point.

Lee Burgess: Next, the facts say that concerned with the widespread disregard of federal law in states that have legalized marijuana use, Congress recently passed the Federal Drug Abuse Prevention Act. Now, this tells us that Congress expressly intended to override state legislation here.

Lee Burgess: Section 11. Any state law enforcement officer or agency that takes an individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense. Now, this is the provision that we're being asked to evaluate by the call of the first question. So read it very carefully. It is telling us that no matter what offense a subject is charged with, state law enforcement officers must investigate marijuana use by each suspect and report back monthly to the DEA. Now, that sounds like a ton of extra work.

Lee Burgess: Lee Burgess: Section 15 from the question says no state government, state agency or unit of local government within a state shall be eligible to receive any funding through the federal Justice Assistance Program, unless the use of marijuana is a criminal act in that state. This is a provision that we're being asked to evaluate by the call of the second question. It's pretty different than the first. So again, read it carefully. This isn't telling the state to do any additional work, but it is making certain funding conditional on the criminalization of marijuana. We know from our rules that Congress is allowed to make funding conditional, but we'll need to investigate further to figure out whether this is permissible.

Lee Burgess: Now, the facts then talk about that the Justice Assistance Grant program has been in existence for many years, and it is the primary program through which the federal government provides financial assistance for state law enforcement



agencies. Now, this tells us what the program is and what it funds. So that sounds pretty important.

Lee Burgess: Next, the facts tell us that last year, the federal government made approximately \$300 million in grants to state and local law enforcement agencies through this program. Congress has appropriated another \$300 million for such grants in the upcoming fiscal year. So, this is more information about the program at issue in Section 15. \$300 million is a lot of money that states are likely to really want to access.

Lee Burgess: State A has a population of about 4 million people. Its crime rate is below the average, and last year, total spending by law enforcement agencies in State A was \$600 million, of which \$10 million came from federal grants under the Justice Assistance Grant program. So this tells us exactly to what extent State A relies on the Justice Assistance Grant program. \$10 million sounds like a lot of money, but it's also a relatively small portion of State A's funding; though we're also told that their crime rate is below average.

Lee Burgess: State A recently adopted legislation decriminalizing the use of marijuana for all purposes by persons over the age of 21. This tells us that State A is in fact impacted by the laws in question, which means that we need to know whether or not they are valid.

Lee Burgess: Okay, so let's look at how to actually answer this question, now that we've gone through it fact by fact. You would want to start any outline or answer by breaking your paper into segments. Here, two segments – one for each question. So let's consider each section separately. Number one: First, as applied to State A, is Section 11 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain. We begin an answer to this question in the same way we would almost any essay answer, by stating the issue. Here, the question is pretty much all the issue statement we need. We might reformulate the question in order to shape the analysis – something like, "The issue is whether the federal government may require state law enforcement officers to investigate and/or enforce federal law." Reformulating the question as an issue statement in this case, might help you focus on the basics of what the law is doing here.

Lee Burgess: Having identified the issue, we then state the rule or the rules that are applicable. Here, we would lay out the rules that we will use in our analysis, beginning with the broadest rule and progressing to narrower and narrower rules. In this case, a solid rule section might read something like this: "The United States Constitution creates a system of dual sovereignty, under which



the states retain sovereignty while also falling under the federal government's authority. The Tenth Amendment reserves all powers not delegated to the federal government to the states or to the people. The Supreme Court has interpreted the Tenth Amendment as limiting the federal government's power to the extent necessary to protect state sovereignty. Congress may not require states to pass or enforce laws according to Congress's discretion and may not commandeer state officials."

Lee Burgess: Please note that the rule section begins by stating the broadest applicable rule and proceeds to the narrowest, most on-point rule that we will be analyzing. Building rule sections in this inverted pyramid structure makes it easier to demonstrate to graders that you know the law and that you understand the broader context in which the law operates. Additionally, it provides opportunities to work in key words and phrases that graders look for, like "federalism", "dual sovereignty", and "state sovereignty".

Lee Burgess: Alright, so let's do the analysis. The analysis section of a passing answer might read something like this: "Section 11 of the Federal Drug Abuse Prevention Act almost certainly violates the principles of federalism enshrined in the Constitution. The Act requires state officers, agents, and employees to investigate potential violations of federal law. The Act requires state agents not only to investigate, but also to report to federal agents if or when they discover violations of federal law, and it seeks to compel state actors to enforce federal laws. Each of these requirements violates the federalism principles of the Tenth Amendment as the Court has interpreted them to mean that the federal government may not commandeer state actors. Because Section 11 of the Act compels state officers to enforce federal law, it is likely an unconstitutional commandeering of state officials by the federal government."

Lee Burgess: That wasn't a terribly difficult analysis, because we happened to have a solid rule that was directly on-point. What is important in this analysis section is that a good answer will identify and call out the facts that are legally significant to determining whether Section 11 commandeers or compels state action. Alright, wasn't that lots of fun?

Lee Burgess: Alright, let's move on. Question two: Is Section 15 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain. Now, just like with question one, we begin with an issue statement. Here again, we can simply use the question as our issue statement, or we can reformulate to call out the issue presented by the statute – something like, "The issue is whether Congress can compel states to pass certain legislation using their spending power." Then we will lay out the rules that we will use. This question differs from the last



question in that this one involves a rule with many elements. Unfortunately, there's just no way around this. You have to learn the law.

Lee Burgess: Here, a solid first part of this answer might look like this: "The issue is whether Section 15 is constitutional in so far as it conditions the receipt of federal money to the state on the state's criminalization of marijuana. The Constitution's system of dual sovereignty, as expressed in the Tenth Amendment, generally prohibits the federal government from compelling state actions. However, the Supreme Court has held that the federal government, under its spending power, may condition a state's receipt of federal funding on a state's compliance with federal directives under certain circumstances. For such a conditional use of federal funds to be constitutional: 1) the spending must be for the general welfare; 2) the conditions imposed must be unambiguous; 3) the conditions must be related to the federal interest, in particular national projects or programs; 4) the condition imposed must not be used to induce the States to engage in activities that would themselves be unconstitutional; and 5) the condition must not be so coercive as to pass the point at which pressure turns into compulsion."

Lee Burgess: Now, that's a lot of law right there. If you can't memorize exactly these long multi-element laws, you should try to use whatever techniques work for you to memorize key words and phrases and be able to spit them out on exam day.

Lee Burgess: Alright, now we do the analysis. Let's skip through this analysis element by element, each time citing the facts that are significant in determining whether the element is met or not. Now first, the spending must be for the general welfare. Here, the congressional spending in question is funding for law enforcement. Law enforcement is usually considered a part of the general welfare, and the Court gives substantial deference to Congress in determining what is general welfare.

Lee Burgess: Second, the condition being imposed must be unambiguous. Here, the condition is that the state must criminalize marijuana in order to receive funding. That is clear and unambiguous. Third, the condition must relate to the federal interest, in particular national projects or programs. This condition pretty clearly relates to the federal interest in both law enforcement and in a nationally cohesive marijuana policy. Fourth, the condition imposed must not be to induce the states to engage in activities that would themselves be unconstitutional. Now, that is clearly met here, because criminalizing marijuana is not unconstitutional. The question even provides you with a case that establishes the constitutionality of marijuana prohibition.



Lee Burgess: So that leaves us with the fifth element, that a condition must not be so coercive as to pass the point at which the pressure turns into compulsion. Now, this is the crux of this analysis. Often in constitutional law and in other areas, an essay question will test a multi-element rule, and although it is important to address each element, there is one element that is going to get the most analysis, and that is simply because in a given set of facts, the rubber meets the road somewhere. In this case, it is this requirement that the condition not pass from pressure to compulsion.

Lee Burgess: A passing answer might include analysis that reads something like this: "The final question is whether the condition is so coercive that it passes the point at which pressure turns into compulsion and becomes an unconstitutional infringement on state sovereignty. The Court has not drawn a hard and fast line for when pressure becomes compulsion, and the Court will generally resolve this question by looking at the conditional funding in the context of the state's overall budget. In this case, State A stands to lose only \$10 million, which is less than 2% of its law enforcement spending for the year. Although \$10 million is certainly an incentive to the state, there is nothing in the facts to indicate that the state depends on this \$10 million or that the state's overall budget would be in danger without this part of the Justice Assistance Grant funding. For these reasons, it's likely that Section 15 is constitutional."

Lee Burgess: Okay, so what we did here was this: We read the fact pattern that identified the questions. We identified facts that might be legally significant. Then we organized our answer into two segments, one for each question. And those segments we organized by IRAC – Issue, Rule, Application, and Conclusion. We stated the rule or rules, and then we applied the rules to legally significant facts that we had already identified, and we reached reasonable conclusions.

Lee Burgess: Constitutional law essays like this can be very challenging. There's a lot of law to memorize and a lot of nuance in how the laws are applied. It takes a lot of devoted study and practice to apply constitutional law correctly and thoroughly, but the process is more or less the same each time – read carefully, correctly identify the issues and the applicable law, and then apply the law to facts while paying special attention to facts that are legally significant, and draw reasonable conclusions.

Lee Burgess: And with that, we are out of time. I want to take a second to remind you to check out our [blog](https://www.BarExamToolbox.com/blog) at BarExamToolbox.com, which is full of helpful tips to help you prepare and stay sane as you study for the bar exam. You can also find information on our website about our courses, tools, and one-on-one tutoring programs to help support you as you study for the UBE or California bar exam. If



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