

Keep Answer
w/ FINAL

**CONSTITUTIONAL LAW
FINAL EXAMINATION
Professors Malaguti and Winig**

Fall 2011 Semester

YOUR ENTIRE STUDENT ID NUMBER:

INSTRUCTIONS:

The instructions run onto the next page. You may read this page and then turn the page to finish reading the instructions. You are not to look beyond the second page of instructions until you are instructed to begin the exam.

YOU ARE NOT TO HAVE A CELL PHONE, OR ANY OTHER DEVICE THAT CAN TRANSMIT AND/OR RETAIN INFORMATION, ON YOUR PERSON DURING THIS EXAM. POSSESSION OF A CELL PHONE OR SUCH OTHER DEVICE SHALL BE TREATED, AND DEALT WITH, AS CHEATING.

Please take two (2) blue books. Please write "Scrap" on one of the blue books. Please write "Two" on the other blue book. Please write your student id number *on both* blue books as well as on this exam booklet.

Please do not identify yourself in any way other than by student id number. Please do not write any information in your blue book, scrap book, or this exam booklet that might reveal who you are.

This is a closed-book examination; other than writing implements, you are not to have any materials on your table or at your feet. Please place all books, knapsacks, briefcases, etc. at the side or front of the room.

Please do not use your own scrap paper. You may use the blue book labeled "Scrap" as scrap paper. Please turn in your scrap blue book with your exam blue book and this exam booklet. I will not accept any blue books after you have turned in your exam materials -- no exceptions.

This examination consists of two parts:

Part One – Directed Essays consists of a series fact patterns, each of which has a number of questions that follows and inquires about the law and analysis that applies to

the particular fact pattern. You are to read each fact pattern carefully and answer each question that follows. There are a total of 50 questions, and you are to answer them all.

The suggested time for Part One is two hours (120 minutes).

Please place your answers to Part One in the space provided in this exam book, not in the blue book. Please limit your answers to the lines provided below each question. We will not read beyond the lines provided under each question. Please make each answer readable in terms of neatness and the size of your handwriting. (We will not use a magnifying glass to read your answers.) Please answer the question responsively; don't provide information not asked for in the question. For example, if the question asks "Who wins?" please state the name of the person who wins; don't state why he or she wins. Please state your reasoning only if the question asks for it.

PLEASE NOTE THAT THE LINES GIVEN FOR YOUR ANSWER SOMETIMES RUN ONTO THE NEXT PAGE.

Part Two consists of one (1) essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages. (The front side of a sheet of paper is one page, and the back side is a second page; together the front and back consist of two pages.) The suggested time for Part Two is forty-five (45) minutes.

Please take note again that Part Two goes in a **separate** blue book, not on this exam booklet. Part One goes on this exam booklet, not in a blue book.

You have three and one-half (3 ½) hours to complete the exam.

Please make your answers legible. There is a bathroom book at the front of the room. Please sign out and in when you leave the room.

We will tell you when there are 15 minutes left, at which point *no one* may leave the room. We will also warn you when there are 5 minutes left and 1 minute left. When we call time, you are to bring up your exam and blue books *immediately*.

GOOD LUCK!

PART ONE

DIRECTED ESSAYS

SUGGESTED TIME: TWO HOURS (120 MINUTES)

PERCENTAGE OF EXAM POINTS: 75%

INSTRUCTIONS FOR PART ONE:

This part consists of a series of fact patterns, each of which has a number of questions that follows and inquires about the law and analysis that applies to the particular fact pattern. You are to read each fact pattern carefully and answer each question that follows. On one or two occasions, there may be questions that appear without a prior fact pattern. This year, there are a total of **40 questions**, and you are to answer them all.

Please place your answers in the space provided **in this exam book**, not in the blue book. Please limit your answers to the lines provided below each question. We will not read beyond the lines provided under each question. Please make each answer readable in terms of neatness and the size of your handwriting. (We will not use a magnifying glass to read your answers.) Please answer the question responsively; don't provide information not asked for in the question. For example, if the question asks "Who wins?" please state the name of the person who wins; don't state why he or she wins. Please state your reasoning only if the question asks for it.

Please work quickly but carefully through these questions. You will have enough time to answer all of the questions within the suggested time if you have adequately learned the law.

WE SUGGEST THAT YOU QUICKLY REVIEW EACH OF THE QUESTIONS FOLLOWING THE FACT PATTERN BEFORE ANSWERING ANY ONE OF THE QUESTIONS. THIS WILL PREVENT THE QUESTIONS FROM TAKING YOU BY SURPRISE AND REPETATIVE ANSWERS.

If you have not finished this Part of the exam when the suggested time is up, you should go onto the next part of the exam, and come back to finish it later.

The questions for Part One begin on the next page.

Questions 1 through 8 are based on the following fact pattern:

On October 16, 2002, President George W. Bush signed into law the Authorization for Use of Military Force Against Iraq Resolution of 2002 (the "AUMF"). The AUMF provided as follows:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to-

- (1) defend the national security of the United States against the continuing threat posed by Iraq; and
- (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

Acting pursuant to authority granted by the AUMF, President Bush commenced an invasion of Iraq on March 20, 2003. The United States continued to conduct military operations in Iraq until very recently, even though the Saddam Hussein regime had been overthrown and a constitutional government has been elected.

On May 13, 2010, a group of plaintiffs filed a complaint in federal court against President Barack Obama (President Bush's successor). They seek a declaratory judgment that, because President Bush ordered a strike against Iraq without an explicit declaration of war, his authorization violated Article I, Section 8 of the United States Constitution.

The plaintiffs were: the New Jersey Peace Action, a so-called "non-profit membership corporation" under state law, and individuals Paula Rogovin, Anna Berlinrout, and Joseph Wheeler. Rogovin and Berlinrout alleged that, as registered voters, they were "deprived of the opportunity to vote for or against [their] elected representatives based upon how they voted on the issue of going to war in Iraq..." Additionally, they claimed that "the fact that no Declaration of War against Iraq was ever brought to a vote in Congress... directly caus[ed] [them] to suffer emotional, physical and psychological injury," and that they maintained "great anger at the President's blatant violations of the Constitution." Finally, they both alleged the payment of an "opportunity cost" in terms of the time and resources expended to oppose the war, as well as "being compelled to pay tax dollars for an unconstitutional war."

Wheeler served in the United States Army from May 23, 2001 to January 5, 2004, and served in Iraq from March 2003 to November 2003. On January 5, 2004, he received an Honorable discharge "as a result of a 'physical condition not a disability.'" He is subject to recall to active duty until May 2009. Wheeler alleges injuries comprising the "emotional, psychological and physical affects arising from the ordeal of combat..." Finally, he claims to have "suffered injury by being compelled to obey orders that were unlawful because they were premised on the President's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War." He also claims the potential of future injury should the United States initiate another war "in Iran or elsewhere in the absence of a Congressional Declaration of War."

1. Please state and explain the three elements of constitutional standing.

Question 2 is on the next page.

7. In the space below, please describe the factors a court should employ in addressing a motion to dismiss under the political question doctrine.

8. In the space below, please apply each of those factors to the facts to determine whether the political question doctrine requires dismissal of the action.

Questions 9 through 11 are based on the following fact pattern:

A state constitution provides that in every criminal trial "the accused shall have the right to confront all witnesses against him face to face." A defendant was convicted in state court of child abuse based on testimony from a six-year-old child. The child testified while she was seated behind one-way glass, which allowed the defendant to see the child but did not allow the child to see the defendant. The defendant appealed to the state supreme court claiming that the inability of the witness to see the defendant while she testified violated both the United States Constitution and the state constitution.

Without addressing the federal constitutional issue, the state supreme court reversed the defendant's conviction and ordered a new trial. The state supreme court held that "the constitution of this state is clear, and it requires that while testifying in a criminal trial, a witness must be able to see the defendant." The state petitioned the United States Supreme Court for a writ of certiorari.

9. What justiciability doctrine suggests that the Supreme Court of the United States should not grant the writ of certiorari?

10. In the space below, please state and describe the requirements of the justiciability doctrine you raised in your last answer.

employer with a letter from her physician authorizing her immediate return to work. Lazarro's employer then told her that before returning to work she had to meet with her supervisors, and asked her to schedule an appointment. At this time, Lazarro expected to return to work on Thursday, May 21, before the expiration of the twelve week FMLA period. Instead, she was given a termination letter, dated May 21, 1998, and setting an effective termination date of May 29, 1998. The termination letter stated that Lazarro had exhausted her accumulated leave balances and that she was unable to meet the New Hampshire Retirement System's attendance requirements. The New Hampshire Retirement System offered no other explanation for the termination.

Lazarro sued for monetary damages in federal court, claiming that the state had violated the FMLA by terminating her employment before the expiration of the twelve week period of unpaid leave guaranteed under the FMLA. FMLA expressly grants a private right of action for damages to employees against "any employer, including a public agency." Lazarro also has alleged that the state terminated her on account of gender discrimination.

12. New Hampshire wants to moved to dismiss the case, claiming that it is immune from such suits. What specific type of immunity will New Hampshire raise?

Question 13 is on the next page.

Questions 15 through 18 are based on the following fact pattern:

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, which some have dubbed "Obamacare." The Act contains five essential components designed to improve access to the health care and health insurance markets, reduce the escalating costs of health care, and minimize cost-shifting. First, the Act builds upon the existing nationwide system of employer-based health insurance. It establishes tax incentives for small businesses to purchase health insurance for their employees, and requires certain large employers to offer health insurance to their employees. Second, the Act provides for the creation of state-operated "health benefit exchanges." These exchanges allow individuals and small businesses to leverage their collective buying power to obtain price-competitive health insurance. Third, the Act expands federal programs to assist the poor with obtaining health insurance. For eligible individuals who purchase insurance through an exchange, the Act offers federal tax credits for payment of health insurance premiums, and authorizes federal payments to help cover out-of-pocket expenses. The Act also expands eligibility for Medicaid. Fourth, the Act bars certain practices in the insurance industry that have prevented individuals from obtaining and maintaining health insurance. The guaranteed issue requirement bars insurance companies from denying coverage to individuals with preexisting conditions, and the community rating requirement prohibits insurance companies from charging higher rates to individuals based on their medical history. Finally, the Act's "Requirement to Maintain Minimum Essential Coverage," takes effect in 2014 and requires every "applicable individual" to obtain "minimum essential coverage" for each month. The Act directs the Secretary of Health and Human Services, in coordination with the Secretary of the Treasury, to define the required essential health benefits, which must include at least ten general categories of services. Applicable individuals who fail to obtain minimum essential coverage must include with their annual federal tax payment a "shared responsibility payment," which is a "penalty" calculated based on household income. The Act exempts from its penalty provision certain individuals, including those deemed to suffer a hardship with respect to their capability to obtain coverage.

A number of Congressional findings accompany the minimum coverage requirement. Congress determined that "the Federal Government has a significant role in regulating health insurance," and "[t]he requirement is an essential part of this larger regulation of economic activity." Congress found that

without the minimum coverage provision, other provisions in the Act, in particular the guaranteed issue and community rating requirements, would increase the incentives for individuals to "wait to purchase health insurance until they needed care." This would exacerbate the current problems in the markets for health care delivery and health insurance. Conversely, Congress found that "[b]y significantly reducing the number of the uninsured, the [minimum coverage] requirement, together with the other provisions of this Act, will lower health insurance premiums." Congress concluded that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."

A number of plaintiffs have sued to prevent the full implementation of the Act. The Supreme Court has granted certiorari and is scheduled to be decided in the current term.

15. As you know, no branch of the federal government can act without an express or inherent grant of power derived from the federal Constitution. Given the facts as stated, what grant of power is the government most likely going to articulate to sustain the charges under the Act?

16. What three factors will the court consider in determining whether Congress had the power to pass the Act?

A. _____

B. _____

C. _____

The Commission is to be composed of one member appointed by the President of the United States, two members appointed by the Speaker of the House of Representatives, and one member appointed by the Majority Leader of the Senate. Members of the judiciary are not eligible to serve on the Commission.

The Commission may investigate a judge's health or conduct on its own initiative or following a complaint "by a member of Congress or by any United States Citizen." Before the Commission can issue an order affecting a judge's tenure, it must hold a hearing. A judge who is subject to a Commission hearing must be given notice of the hearing and of the nature of the matters under inquiry. The judge is entitled to attend the hearing, be represented by counsel, present evidence on his or her own behalf, and confront and cross-examine witnesses. The concurrence of at least four Commission members is required for the Commission to make a determination for removal or retirement.

If the Commission makes a determination for removal or retirement, it must file an order in United States Court of Appeals for the District of Columbia. The Act provides that the judge who is the subject of the order may then petition that Court to review the order. After reviewing the proceedings, the Court of Appeals for the District of Columbia is ostensibly empowered to affirm, reverse, or remand the order to the Commission for further proceedings. The determinations of the Court of Appeals for the District of Columbia are final and conclusive; the Act specifically precludes review by the United States Supreme Court.

At a press conference today, President Gingrich stated that he intends to sign the bill when it arrives on his desk. He also stated that "if the Supreme Court would dare interfere with a law so strongly supported by the other two branches of our government as well as by the American people," he would "almost certainly see to it that the Capitol Police or U.S. Marshal Service will serve the recalcitrant justices with subpoenas forcing them to come down to Congress and explain their ridiculous positions. Furthermore, as I've said on many occasions, the idea of judicial supremacy is a myth. I'll put the lie to it. I'll ignore activist judicial decisions. We'll impeach judges who are too radical. And, if we have to, we'll even abolish certain courts that have a history of going too far."

19. Under our system of jurisprudence, what branch of government is the final arbiter of our Constitution?

20. Under our Constitution, how are "Article III" federal judges appointed?

21. Some might say that the appointment/removal scheme set forth in the Act would violate the doctrine of separation of power. Employing law you learned this semester, please address this claim in the space below. (In your answer, please confine yourself only to the issue of separation of power.)

Questions 23 and 24 are based on the following fact pattern:

In July of 2000, James DeWeese, a duly elected judge in the General Division of the Common Pleas Court in Richland County, Ohio, created and hung two posters in his courtroom, one of the Bill of Rights and one of the Ten Commandments. The American Civil Liberties Union (ACLU) brought an action against Judge DeWeese in the United States District Court for the Northern District of Ohio seeking a declaration that the Ten Commandments poster violated the Establishment Clause, and requesting an injunction preventing Judge DeWeese from continuing to hang the poster in his courtroom. Both the federal district court and the United States Court of Appeals for the Sixth Circuit ruled in favor of the ACLU, declaring the hanging of the poster in the courtroom unconstitutional and enjoining Judge DeWeese from continuing to display it in his courtroom.

But Judge DeWeese bided his time. In June 2006, the judge created a second poster which he hung in his courtroom containing the Ten Commandments, entitled "Philosophies of Law in Conflict." Immediately under the title on the poster are three numbered comments:

1. There is a conflict of legal and moral philosophies raging in the United States. That conflict is between moral relativism and moral absolutism. We are moving towards moral relativism.
2. All law is legislated morality. The only question is whose morality. Because morality is based on faith, there is no such thing as religious neutrality in law or morality.
3. Ultimately, there are only two views: Either God is the final authority, and we acknowledge His unchanging standards of behavior. Or man is the final authority, and standards of behavior change at the whim of individuals or societies. Here are examples.

Below these three comments are two columns covering the majority of the poster, one entitled "Moral Absolutes: The Ten Commandments," and the other entitled "Moral Relatives: Humanist Precepts." Under the "Moral Absolutes" column are listed the following:

I am the LORD your God ...

- I. You shall have no other gods before Me.
- II. You shall not make for yourself an idol.
- III. You shall not take the name of the LORD your God in vain.
- IV. Remember the Sabbath day, to keep it holy.
- V. Honor your father and your mother.
- VI. You shall not murder.
- VII. You shall not commit adultery.
- VIII. You shall not steal.
- IX. You shall not bear false witness against your neighbor.
- X. You shall not covet anything that is your neighbor's.

Under the second, "Moral Relatives," column, set up in opposition to the first, are listed seven statements:

- I. The universe is self-existent and not created. Man is a product of cosmic accidents, and there is nothing higher than man. (Humanist Manifesto I)
- II. Ethics depend on the person and the situation. Ethics need no religious or ideological justification. (Humanist Manifesto II)
- III. There is no absolute truth. What's true for you may not be true for me. (Humanist John Dewey)
- IV. The meaning of law evolves. "We are under a Constitution, but the Constitution is what the judges say it is." (U.S. Sup. Ct. Justice Chas. Hughes)

- V. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." (Planned Parenthood v. Casey)
- IV. Personal autonomy is a higher good than responsibility to your neighbor or obedience to fixed moral duties. (Humanist Manifesto II)
- VII. Quality-of-life decisions justify assisting the death of a fetus, defective infant, profoundly disabled or terminally ill person. (Princeton U. Prof. Peter Singer)

At the bottom of the poster, below the two columns, is a fourth comment by Judge DeWeese:

4. The cases passing through this courtroom demonstrate we are paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20th century. Our Founders saw the necessity of moral absolutes. President John Adams said, "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our Constitution was made for a moral and religious people. It is wholly inadequate for the government of any other." The Declaration of Independence acknowledges God as Creator, Lawgiver, "Supreme Judge of the World," and the One who providentially superintends the affairs of men. Ohio's Constitution acknowledges Almighty God as the source of our freedom. I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation. Judge James DeWeese.

Finally, in the lower right hand corner of the frame, readers are invited to obtain from the court receptionist a pamphlet further explaining Judge DeWeese's philosophy.

In 2008 Plaintiff filed a motion to show cause against Defendant, arguing that Defendant violated the district court's order enjoining the first poster by displaying this poster. The district court, however, found that as the two posters were not

identical, Defendant was not in contempt of the court's order to remove the previous poster. *ACLU v. DeWeese*, No. 08-2372, slip op. at 2 (N.D. Ohio Oct 8, 2009) (memorandum and order). The ACLU has returned to federal court, seeking a declaratory judgment that Judge DeWeese's display of the poster violated the First and Fourteenth Amendments of the United States Constitution and the Civil Rights Act of 1964, 42 U.S.C. § 1983. It also seeks a permanent injunction against continued display of the poster.

23. The court is now considering the merits of the case under the. Please state the three (3) standards/factors a federal court will apply in considering this the Establishment Clause claim the ACLU has raised.

- A. _____

- B. _____

- C. _____

Question 24 is on the next page.

The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. But crush videos rarely disclose the participants' identities, thus inhibiting prosecution of the underlying conduct.

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Robert J. Stevens ran a business named "Dogs of Velvet and Steel," with an associated Web site, that catered to selling videos depicting animal fighting. Among these videos were "Japan Pit Fights" and "Pick-A-Winna: A Pit Bull Documentary," which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960s and 1970s. A third video, "Catch Dogs and Country Living," depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig.

On the basis of these videos, Stevens was indicted on three counts of violating § 48. He has challenged the law as violative of his First Amendment free speech rights.

30. The making and dissemination of videos undeniably is the type of expressive conduct protected by the Free Speech Clause of the First Amendment. Was § 48's restriction of animal cruelty videos content-based or content-neutral? (Circle one.)

CONTENT-BASED

CONTENT-NEUTRAL

Question 31 is on the next page.

The World Professional Association for Transgender Health recommends a triadic therapeutic protocol for the treatment of GID, which includes: 1) hormone therapy; 2) a real-life experience ("RLE") by living full-time as a member of the new gender; and 3) sex reassignment surgeries.

Starting in 2005, Glenn began to take steps to transition from male to female under the supervision of health care providers. She underwent electrolysis to remove facial hair, began hormone therapy to make her body more feminine and suppress testosterone, and also began living as a woman outside of the workplace. In April 2006, Glenn underwent surgical procedures, including a brow lift, liposuction, and narrowing of her jaw line in order to appear more feminine.

In the Spring of 2006, Plaintiff began a therapist-client relationship with Dr. Erin Swenson, a licensed marriage and family therapist with a Ph.D. in psychological services. In 2006, During the course of therapy, Dr. Swenson recommended that it would be appropriate for Glenn to commence the real-life experience by living full-time as a woman. Dr. Swenson advised Glenn that the successful completion of real-life experience is a prerequisite to sex reassignment surgery; it provides the individual with psychological relief.

Glenn, then presenting as a man, had been working as an editor by the Georgia General Assembly's Office of Legislative Counsel (OLC) since October 2005. In order to be hired as an editor in the OLC, Glenn had to take a test on grammar, spelling, proofreading, and vocabulary. She did very well on the test and was recommended for the position by Beth Yinger, the senior editor. The OLC is responsible for drafting bills for legislators, code revision, and publication of the Georgia session laws. The staff of the OLC included approximately eleven attorneys, eight computer terminal operators, five editors, an office manager, an assistant office manager, and an administrative assistant. Sewell Brumby was the head of the OLC and the chief legal counsel for the Georgia legislature.

In 2006, Glenn informed her direct supervisor, Beth Yinger, that she was transgender and was in the process of becoming a woman. However, she was still presenting as a man. On October 31, 2006 (Halloween), Glenn came to work presenting as a woman for the first time. When Brumby saw her, he told her that her appearance was not appropriate and asked her to leave the office. Brumby stated that "it's unsettling to think of someone dressed in

women's clothing with male sexual organs inside that clothing," and that a male in women's clothing is "unnatural."

Following this incident, Brumby met with Yinger to discuss Glenn's appearance on Halloween 2006 and was informed by Yinger that Glenn intended to undergo a gender transition. Brumby took no adverse employment action against Glenn at that time, and in the months following Halloween 2006, Glenn came to work presenting as a man.

In the fall of 2007, Glenn informed Yinger that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name. She gave Yinger written materials about GID and photographs of herself presenting as a woman. Yinger notified Brumby of Plaintiff's intent and provided him with the written materials and photographs that Glenn had given her. Brumby subsequently informed Yinger that he was going to fire Glenn because she was transitioning from a man to a woman.

Before terminating Glenn, Brumby conducted legal research to determine the legality of firing her based upon her gender transition and also had another OLC attorney, Marie Story, do the same. He concluded that some authority indicated that terminating an employee for undergoing gender transition was illegal, but some authority indicated that such firings are permissible. Brumby also contacted a few legislators and employees of OLC to solicit their opinions on the matter. He spoke with Glenn Richardson, then Speaker of the Georgia House of Representatives. Speaker Richardson told Brumby that it should be Brumby's decision on how to handle the situation. Brumby also spoke with Lieutenant Governor Casey Cagle's Chief of Staff, Bradley Alexander, who shared the information with Lieutenant Governor Cagle. Brumby also asked Story and another OLC attorney what they and their fellow OLC employees would think about working with an individual undergoing a gender transition, but neither offered an opinion.

In their pre-termination conversation, Alexander asked Brumby if Glenn had any job performance issues or whether she was being let go for "the transgender reason." Brumby responded that the termination was not performance-based and was because of the gender transition. Yinger, Glenn's immediate supervisor, found Glenn's work product to be "about average" and did not think she should be fired.

On October 16, 2007, Brumby called Glenn to his office. Once Glenn arrived, Brumby asked her if she "had formed a fixed intention to [become] a woman." She answered that she had. Brumby then informed her that she was being terminated. Brumby told Glenn that the reasons for her termination were that Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable. Further, he stated that some legislators would view the transition as immoral and unnatural, and might lose confidence in the OLC if he did not fire her.

Glenn has sued Brumby and the OLC for discrimination.

35. Please *list/identify* the three classifications one must consider when assaying an equal protection claim. (Do not provide the standards of review at this time).

1. _____

2. _____

3. _____

Question 36 is on the next page.

36. Please state the legal standard of review for each of the classifications you listed in you answer to the prior question.

1. _____

2. _____

3. _____

37. What standard of review will apply in this case?

Question 38 is on the next page.

computer, and monitoring access to CCH's website. The IEMA specifically prohibits transmitting unsolicited e-mail advertisements that misrepresent the point of origin or contains false or misleading information in the subject line.

CCH contends that Martin's IEMA claim is preempted by the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"). The CAN-SPAM Act was enacted in response to the rise of unsolicited commercial e-mail. Citing the lack of success under the then-current conditions in which many states had attempted to regulate e-mail with different standards and requirements, Congress determined that a national standard for regulating unsolicited commercial e-mail was required. The relevant portion of the CAN-SPAM Act prohibits the transmission of a commercial electronic message by a person with actual or fairly implied knowledge that the subject heading would be likely to mislead a recipient about a material fact regarding the contents of the message. The Act does not provide a cause of action for private citizens; rather, only the FTC, various other federal agencies, a state attorney general on behalf of residents, or providers of Internet access services may bring lawsuits enforcing the CAN-SPAM Act.

The CAN-SPAM Act contains a preemption provision which provides:

This chapter supersedes any statute, regulation, or rule of a State * * * that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. . . . This chapter shall not be construed to preempt the applicability of: (A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or (B) other State laws to the extent that those laws are related to acts of fraud or computer crime."

CCH has brought a motion to dismiss Martin's complaint.

Question 39 is on the next page.

before obtaining an abortion. The law establishes civil and criminal penalties for persons who perform abortions other than as permitted. The law requires either written, informed consent from the minor and her parent; written, informed consent from the minor along with proof of her emancipation; a court order; or the presence of an urgent medical emergency. The law further provides that an abortion may be performed pursuant to the medical emergency provision only if the attending physician certifies the existence, in his medical judgment, of an emergency so urgent as to require performance of the abortion sooner than parental consent or a court order could be obtained. If an emergency abortion has been performed, the operating physician must provide immediate notice to the minor's parent. If immediate notice is not possible, the physician must take responsibility for the minor's postoperative care, diligently attempt to notify her parent, and eventually provide actual notice to her parent that the abortion was performed and why. Should the physician believe notification of a parent would endanger the minor, or if the minor is homeless or abandoned, he can discharge his duty by making a report to law enforcement to that effect.

The statute defines the term "medical emergency" as: "a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:

1. To prevent her death; or
2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.

The term "medical emergency" does not include:

1. Any physical condition that would be expected to occur in normal pregnancies of women of similar age, physical condition and gestation; or
2. Any condition that is predominantly psychological or psychiatric in nature.

A section of the statute specifies that a "minor may file a bypass petition in the county of her residence or in the one in which the abortion is to be performed. The minor may assert in her petition either that she is sufficiently mature to provide her own consent to the procedure or that, notwithstanding her lack of maturity, the procedure would be in her best interest. If the minor requests aid in completing the petition, Idaho must provide it, through a guardian ad litem (who must be an attorney) or through some other person."

Planned Parenthood of Idaho has challenged the statute as being unconstitutional. Please discuss the rights and liabilities of the parties.

END OF EXAM

**CONSTITUTIONAL LAW
FINAL EXAMINATION
Professors Malaguti and Winig**

Fall 2011 Semester

ANSWERS AND EXPLANATIONS

Please understand that these are "aspirational" answers. I have not assumed that any student is capable of including all this information under the stresses, time constraints and space constraints of an examination.

Please also understand that these answers are only guides. I also grade on the cogency, organization, and clarity of the student answers.

Questions 1 through 8 are based on the following fact pattern:

On October 16, 2002, President George W. Bush signed into law the Authorization for Use of Military Force Against Iraq Resolution of 2002 (the "AUMF"). The AUMF provided as follows:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to-

- (1) defend the national security of the United States against the continuing threat posed by Iraq; and
- (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

Acting pursuant to authority granted by the AUMF, President Bush commenced an invasion of Iraq on March 20, 2003. The United States continued to conduct military operations in Iraq until very recently, even though the Saddam Hussein regime had been overthrown and a constitutional government has been elected.

On May 13, 2010, a group of plaintiffs filed a complaint in federal court against President Barack Obama (President Bush's successor). They seek a declaratory judgment that, because President Bush ordered a strike against Iraq without an explicit declaration of war, his authorization violated Article I, Section 8 of the United States Constitution.

The plaintiffs were: the New Jersey Peace Action, a so-called "non-profit membership corporation" under state law, and individuals Paula Rogovin, Anna Berlinrout, and Joseph Wheeler. Rogovin and Berlinrout alleged that, as registered voters, they were "deprived of the opportunity to vote for or against [their] elected representatives based upon how they voted on the

issue of going to war in Iraq..." Additionally, they claimed that "the fact that no Declaration of War against Iraq was ever brought to a vote in Congress... directly caus[ed] [them] to suffer emotional, physical and psychological injury," and that they maintained "great anger at the President's blatant violations of the Constitution." Finally, they both alleged the payment of an "opportunity cost" in terms of the time and resources expended to oppose the war, as well as "being compelled to pay tax dollars for an unconstitutional war."

Wheeler served in the United States Army from May 23, 2001 to January 5, 2004, and served in Iraq from March 2003 to November 2003. On January 5, 2004, he received an Honorable discharge "as a result of a 'physical condition not a disability.'" He is subject to recall to active duty until May 2009. Wheeler alleges injuries comprising the "emotional, psychological and physical affects arising from the ordeal of combat..." Finally, he claims to have "suffered injury by being compelled to obey orders that were unlawful because they were premised on the President's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War." He also claims the potential of future injury should the United States initiate another war "in Iran or elsewhere in the absence of a Congressional Declaration of War."

1. Please state and explain the three elements of constitutional standing.

First, the plaintiff must show injury-in-fact: that s/he has suffered, or will suffer, actual or imminent injury to a legally protected interested which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, the plaintiff must show causation: the injury must be fairly traceable to the defendant's conduct. Third, the plaintiff must show redressibility: it must be likely (as opposed to merely speculative) that the injury will be redressed by a favorable decision of the court; that is, a favorable court decision will abate the plaintiff's injury or provide compensation for it. The plaintiff carries the burden of proving causation.

2. In the space below, please apply each of those elements to the facts to determine whether Rogovin and Berlinrout have constitutional standing to bring the suit.

Injury-in-Fact: The fact that Rogovin and Berlinrout might have suffered some "opportunity cost" in terms of a re-direction of resources does not constitute an injury sufficient to satisfy the Article III standing requirements because their claim is neither concrete nor particularized. The facts do not identify any specific economic harm they actually suffered. Nor is Rogovin's and Berlinrout's alleged emotional, physical and psychological injury, which they claim was caused by their disagreement and anger at the President's decision to go to war, an injury sufficient to establish standing. This again fails

woefully in satisfying the "concrete and particularized" requirement. Moreover, disagreement with government action or policy, however strongly felt, does not, in and of itself, constitute an "injury" which is cognizable in the federal courts and susceptible of remedy by the judicial branch. Finally, Rogovin's and Berlinrout's claim of deprivation of the opportunity to vote for or against their elected representatives on the issue of declaring war on Iraq fails to satisfy the "concrete and particular" standard. In fact, under such logic, all United States citizens were effectively deprived of the right to have their representatives cast a vote for or against declaring war on Iraq, and every voting United States citizen would have standing to sue. Standing to sue may not be predicated upon an interest held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share.

Causal Connection: Even if Congress had engaged in a full-fledged debate about the propriety of declaring war on Iraq, Rogovin and Berlinrout would not necessarily have had the opportunity to hear their representatives' views on the subject; not every one of the 535 Senators and Representatives participates in the every debate on every legislative topic. Thus, Rogovin and Berlinrout cannot claim that their inability to hear their representatives' views is "fairly traceable" to the lack of a declaration of war. Furthermore, the facts make no actual showing that Rogovin's and Berlinrout's expenditure (if they made such expenditures) is directly related to the invasion of Iraq.

Redressability: Here, even if the court were to grant Rogovin and Berlinrout the full relief they seek - a declaratory judgment that the order to invade Iraq was unconstitutional - none of their injuries would be redressed. Rogovin and Berlinrout would still lack the ability to cast a vote based upon their representatives' views on going to war with Iraq. And they still would not recover any tax monies paid or other resources already expended in opposing the war.

3. In the space below, please apply each of those elements to the facts to determine whether Wheeler has constitutional standing to bring the suit.

Injury-in-Fact: To the extent that Wheeler asserts any future injury stemming from the possibility of recall to active duty in the event of a war with Iran, that injury is not actual or imminent. No war on Iran has yet been declared. Any associated injury is, therefore, purely speculative and does not present an actual "case or controversy." Wheeler's alleged emotional and

physical injuries suffered in Iraq are more likely to constitute the injury-in-fact he needs to prove standing.

Causal Connection: To the extent that Wheeler asserts injury stemming from the possibility of recall to active duty in the event of a war with Iran, he can make no showing that any such recall would be related to the war in Iraq. This is speculative at best. Assuming arguendo that the court were to declare the Iraq war unconstitutional, Wheeler would have an easier time demonstrating a causal connection between his obedience of unlawful orders and the unconstitutional declaration of war, as well as between his injuries sustained in Iraq and the unconstitutional declaration of war.

Redressability: Even if the court were to grant Wheeler the full relief he seeks - a declaration of the unconstitutionality of the Iraq invasion - that remedy would not redress the fact that he obeyed allegedly unlawful orders. It would not compensate him for any emotional or physical injuries he may have suffered (he seeks no damages in the complaint). And any remedy a court could issue would have no bearing on some speculative future war the current (or some future) President might wage a war without proper Congressional approval.

4. What are the requirements for organizational standing?

As a general rule, an organizational plaintiff may not sue on behalf of its members; the members must sue on their own behalf. However, federal courts will permit the action to proceed upon organizational standing when: (1) the organization's members have standing themselves, (2) the suit relates to the organization's purpose, and (3) the members are not needed for adjudication.

5. In the space below, please apply each of those requirements to the facts to determine whether New Jersey Peace Action has organizational standing to bring the suit.

The facts do not give many details about the membership and purpose of New Jersey Peace Action. However, we can assume from the name of the entity that it is an anti-war organization, and that its membership is comprised of individuals who oppose war. It is therefore likely that the second and third requirements are met: (2) the suit relates to the organization's purpose, and (3) there appears to be no reason why the members must be included to properly adjudicate the suit. As explained in the last few answers, however, the first part of the test will not

be met because the organization's members do not have standing themselves.

6. The President has moved to dismiss the case on the ground that the action is not properly justiciable in the courts under the political question doctrine. In the space below, briefly describe the purpose of the political question doctrine.

In Marbury v. Madison, Chief Justice Marshall first articulated the political question doctrine, by holding that the Constitution invested in the President "certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." Thus, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." The purpose of the political question doctrine is to keep the judiciary, an inherently non-political branch of government, out of the business of making political decisions. Since Chief Justice Marshall's initial formulation of the political question doctrine, it has been broadened to preclude justiciability of allegations concerning challenges to the impeachment process, questions implicating the Guarantee Clause, and areas of foreign policy.

7. In the space below, please describe the factors a court should employ in addressing a motion to dismiss under the political question doctrine.

Justice Brennan articulated the factors in Baker v. Carr: "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

8. In the space below, please apply each of those factors to the facts to determine whether the political question doctrine requires dismissal of the action.

The facts implicate at least two of the Baker v. Carr factors: the textual commitment of the issue to a coordinate political

department and the lack of judicially discoverable standards for resolving it. First, the Constitution commits the entire foreign policy power of this country to the executive and legislative branches. Congress retains the power to declare war, U.S. Const., art. 1, § 8, cl. 11; to raise and support armies, cl. 12, and to "provide and maintain a navy," cl. 13, while the President is commander-in-chief of the armed forces. art. II, § 2, cl. 1. Given this textual commitment of "war powers" to the political branches, courts are reluctant to act in the absence of an actual dispute between Congress and the President. In the absence of any alleged dispute between the President and Congress over a military conflict, the court should not interfere. Even if this matter were not textually committed to the political branches, the Court is presented with no set of judicially manageable standards that would allow it to determine whether indeed the United States was, or is, at war. To resolve Plaintiffs' dispute, the Court would have to propound a rational list of factors analyzing whether the country is actually at war, or whether it is engaging in some form of hostilities short of war. Not only is Congress better-equipped to make that determination, but under *Baker v. Carr*, it is a determination that is inherently fraught with a lack of judicially applicable standards.

Questions 9 through 11 are based on the following fact pattern:

A state constitution provides that in every criminal trial "the accused shall have the right to confront all witnesses against him face to face." A defendant was convicted in state court of child abuse based on testimony from a six-year-old child. The child testified while she was seated behind one-way glass, which allowed the defendant to see the child but did not allow the child to see the defendant. The defendant appealed to the state supreme court claiming that the inability of the witness to see the defendant while she testified violated both the United States Constitution and the state constitution.

Without addressing the federal constitutional issue, the state supreme court reversed the defendant's conviction and ordered a new trial. The state supreme court held that "the constitution of this state is clear, and it requires that while testifying in a criminal trial, a witness must be able to see the defendant." The state petitioned the United States Supreme Court for a writ of certiorari.

9. What justiciability doctrine suggests that the Supreme Court of the United States should not grant the writ of certiorari?

Adequate and Independent State Grounds Abstention

10. In the space below, please state and describe the requirements of the justiciability doctrine you raised in your last answer.

Under our system of federalism, the Supreme Court's only power over appeals from state court decisions is to correct mistakes concerning federal law (not state law). State supreme courts are the final arbiters of state law. Thus, in respect of the doctrine of federalism, the U.S. Supreme Court employs adequate and independent state ground abstention to avoid hearing appeals decided entirely on state law. A state law ground is "adequate" if it fully sustains the result and does not itself violate a federal law, federal treaty, or the Constitution. A state law ground is "independent" if it is not based on the state court's understanding of the federal law.

Application of the doctrine can become difficult when a state court case is resolved on both state and federal law. If the same result would occur after a state court's federal law mistakes are corrected, then the Supreme Court will not hear the appeal despite the mistake of federal law.

11. In the space below, please apply each those requirements to the facts to determine whether the justiciability doctrine you raised requires denial of the petition for a writ of certiorari.

Here, the Supreme Court should deny certiorari because, even if the Supreme Court finds that the seating/shielding arrangement for the testifying child does not violate the confrontation clause of the federal Constitution, the state supreme court's decision would remain unchanged on independent state law grounds that do not conflict with the federal confrontation clause; a state constitution is permitted to provide greater individual rights than the federal Constitution, and that is what has occurred here.

Questions 12 through 14 are based on the following fact pattern:

Stephanie Lazarro was employed by the State of New Hampshire as a computer specialist for the New Hampshire Retirement System. In early 1998, she had heart bypass surgery. Because of her medical condition, following her surgery she requested and received leave under the federal Family and Medical Leave Act (FMLA), which leave began on March 6, 1998. Lazarro's physician provided the State with a certification which said that Lazarro's condition required her to be out of work for at least eight weeks, or until at least May 3, 1998. Apparently her employer understood that to mean she requested leave only until that day. When she did not return to work as of May 5, 1998, her employer inquired, and Lazarro explained that her physician had not yet cleared her to return to work. On May 8, 1998, the State wrote to Lazarro, informing her that her FMLA leave would expire as of May 29, 1998. Lazarro replied that she would not need any more time than that, and on May 18, 1998, she provided her employer with a letter from her physician authorizing her immediate return to work. Lazarro's employer then told her that before returning to work she had to meet with her supervisors, and asked her to

schedule an appointment. At this time, Lazarro expected to return to work on Thursday, May 21, before the expiration of the twelve week FMLA period. Instead, she was given a termination letter, dated May 21, 1998, and setting an effective termination date of May 29, 1998. The termination letter stated that Lazarro had exhausted her accumulated leave balances and that she was unable to meet the New Hampshire Retirement System's attendance requirements. The New Hampshire Retirement System offered no other explanation for the termination.

Lazarro sued for monetary damages in federal court, claiming that the state had violated the FMLA by terminating her employment before the expiration of the twelve week period of unpaid leave guaranteed under the FMLA. FMLA expressly grants a private right of action for damages to employees against "any employer, including a public agency." Lazarro also has alleged that the state terminated her on account of gender discrimination.

12. New Hampshire has moved to dismiss the case, claiming that it is immune from such suits. What specific type of immunity will New Hampshire raise?

Eleventh Amendment Immunity

13. What factors will the Court consider in deciding the state's and county's motion to dismiss?

The 11th Amendment bars suits by citizens of a state against their own state or another State, but there are exceptions: States may consent and waive their right not to be sued by a citizen (such consent must be unmistakably clear and will not be implied from silence or acquiescence); private citizens may sue state officials in their individual capacities (unless the suit names an individual but is seeking compensation directly out of the state treasury); if Congress has created such an action under § 5 of the 14th Amendment

The facts seem to implicate this last exception: a discrimination suit under § 5 of the 14th Amendment. For such a suit to be successful, however, Lazarro will have to demonstrate historical discrimination involving race, national origin, gender or a fundamental right.

14. In the space below, please apply those factors to the facts to determine whether the New Hampshire is indeed immune.

New Hampshire will prevail on the motion to dismiss because the suit is by a citizen of the state and the exception under § 5 of the 14th does not apply. The Supreme Court has specifically ruled that a disability discrimination case does not rise to the requisite level of historic discrimination as have cases involving race, national origin, gender or a fundamental right. Board of Trustees of the University of Alabama v. Garrett.

NOTE: A number of you argued that since Lazarro was a woman the court will consider her discrimination claim to be based on gender, which carries the enhanced "intermediate scrutiny" level of review (and meaning that the state would not prevail on its 11th Amendment argument). But not a single shred of evidence suggests that Lazarro was fired because of her gender; to the contrary the facts are clear she was fired because her disability prevented her from working. If a plaintiff could interject the issue of gender into any case merely because the plaintiff happens to be a woman or a man, then every case in the world brought by a human plaintiff would involve a claim of gender discrimination. Lazarro's case is based on disability discrimination (which is subject only to "rational basis" scrutiny); no colorable claim of gender discrimination can be made under these facts.

Questions 15 through 18 are based on the following fact pattern:

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, which some have dubbed "Obamacare." The Act contains five essential components designed to improve access to the health care and health insurance markets, reduce the escalating costs of health care, and minimize cost-shifting. First, the Act builds upon the existing nationwide system of employer-based health insurance. It establishes tax incentives for small businesses to purchase health insurance for their employees, and requires certain large employers to offer health insurance to their employees. Second, the Act provides for the creation of state-operated "health benefit exchanges." These exchanges allow individuals and small businesses to leverage their collective buying power to obtain price-competitive health insurance. Third, the Act expands federal programs to assist the poor with obtaining health insurance. For eligible individuals who purchase insurance through an exchange, the Act offers federal tax credits for payment of health insurance premiums, and authorizes federal payments to help cover out-of-pocket expenses. The Act also expands eligibility for Medicaid. Fourth, the Act bars certain practices in the insurance industry that have prevented individuals from obtaining and maintaining health insurance. The guaranteed issue requirement bars insurance companies from denying coverage to individuals with preexisting conditions, and the community rating requirement prohibits insurance companies from charging higher rates to individuals based on their medical history. Finally, the Act's "Requirement to Maintain Minimum Essential Coverage," takes effect in 2014 and requires every "applicable individual" to obtain "minimum essential coverage" for each month. The Act directs the Secretary of Health and Human Services, in coordination with the Secretary of the Treasury, to define the required essential health benefits, which must include at least ten general categories of services. Applicable individuals who fail to obtain minimum essential coverage must include with their annual federal tax payment a "shared responsibility payment," which is a "penalty" calculated based on household income. The Act exempts from its penalty provision certain individuals, including those deemed to suffer a hardship with respect to their capability to obtain coverage.

A number of Congressional findings accompany the minimum coverage requirement. Congress determined that "the Federal Government has a

significant role in regulating health insurance," and "[t]he requirement is an essential part of this larger regulation of economic activity." Congress found that without the minimum coverage provision, other provisions in the Act, in particular the guaranteed issue and community rating requirements, would increase the incentives for individuals to "wait to purchase health insurance until they needed care." This would exacerbate the current problems in the markets for health care delivery and health insurance. Conversely, Congress found that "[b]y significantly reducing the number of the uninsured, the [minimum coverage] requirement, together with the other provisions of this Act, will lower health insurance premiums." Congress concluded that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."

A number of plaintiffs have sued to prevent the full implementation of the Act. The Supreme Court has granted certiorari and is scheduled to be decided in the current term.

15. As you know, no branch of the federal government can act without an express or inherent grant of power derived from the federal Constitution. Given the facts as stated, what grant of power is the government most likely going to articulate to sustain the charges under the Act?

The answer receiving the most credit is the Congressional power under the Commerce Clause. This is for two reasons, the first of which is substantive: the Commerce Clause provides more affirmative power for Congress to act than does the taxing or spending power (especially with the "necessary and proper" clause properly tacked on). The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The second reason is procedural (indeed, commonsensical): the next question provides three factors to consider; the Commerce Clause requires consideration of three factors while the Tax and Spend Clause does not.

I will, however, give credit for the Tax and Spend Clause, although not as much. The tax incentives and "penalty" provisions of the Act support a Tax and Spend argument.

One final note on this partial credit for Tax and Spend: the bar examiners don't give any credit for the "second best" answer. Moreover, lawyers need to learn to lead with their best arguments. Although I'll give partial credit for a "second best" answer, I do admonish you to learn to find the "best" arguments, and lead with them.

16. What three factors will the court consider in determining whether Congress had the power to pass the Act?

Commerce Clause Argument

- A. Channels of commerce (anything to do with sale or exchange of goods in the interstate marketplace)
- B. Instrumentalities of commerce (the use of planes, trains, automobiles, roads, airways, railways, and water in commerce), and
- C. Activities substantially affecting interstate commerce (economic activity).

Tax and Spend Argument

- A. A tax must raise some revenue;
- B. The tax or spending program must be for the general welfare;
- C. If conditions are attached, they must be unambiguous and clear;
- D. There must be a relationship (nexus) between the condition and the federal interest in the program being funded;
- E. The exercise of the tax or spend power cannot violate another provision of the constitution.

17. In the space provided below, please make your best argument (using the factors you described above) that Congress possessed the authority to pass the Act.

Commerce Clause Argument

In our dual system of government, the federal government is limited to its enumerated powers, while all other powers are reserved to the states or to the people under the Tenth Amendment. States have authority under their general police powers to enact minimum coverage provisions similar to the one in the Affordable Care Act. However, the federal government has no police power and may enact such a law only if it is authorized by one of its enumerated powers. Recognizing that uniform federal regulation is necessary in some instances, the Commerce Clause of the Constitution grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has held that Congress has broad authority to regulate under the Commerce Clause. Indeed, from 1937 to 1994 the Supreme Court did

not invalidate a single law as unconstitutional for exceeding the scope of Congress's Commerce Power.

The strongest argument for Congressional authority here is that the Affordable Health Care Act regulates activities substantially affecting interstate commerce. Current Supreme Court jurisprudence reveals that Congress may use this category of its Commerce Power to regulate two related classes of activity. First, it has long been established that Congress may regulate economic activity, even if wholly intrastate, if it substantially affects interstate commerce. See Raich (the pot plants in the basement case) & Wickard (the wheat for local consumption case). Second, Congress may also regulate even non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity. Wickard v. Filburn provides a quintessential example of this second point. There, the Supreme Court upheld regulations limiting the amount of wheat that farmers could grow, even for non-commercial purposes. Even though producing and consuming homegrown wheat is non-economic intrastate activity, Congress could rationally conclude that the failure to regulate this class of activities would undercut its broader regulation of the interstate wheat market because individuals would be fulfilling their own demand for wheat rather than resorting to the market (which would thwart Congress's efforts to stabilize prices).

When one considers the Affordable Health Care Act as a whole, it becomes clear that Congress was concerned that individuals maintain minimum coverage not as an end in itself, but because of the economic implications on the broader health care market. Virtually everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring. Through the practice of self-insuring, individuals make an assessment of their own risk and to what extent they must set aside funds or arrange their affairs to compensate for probable future health care needs. Thus, set against the Affordable Health Care Act's broader statutory scheme, the minimum coverage provision reveals itself as a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring for the cost of these services. The minimum coverage provision regulates activity that is decidedly economic, and is well within the purview of the Commerce Clause.

18. In the space provided below, please make your best argument that Congress lacked the authority to pass the Act.

Despite the Supreme Court's broad interpretation of the

Commerce Power, it has emphasized in two recent cases that this power is subject to real limits. In United States v. Lopez and United States v. Morrison, the Court struck down single-subject criminal statutes as beyond Congress's power under the Commerce Clause.

The inquiry should start by considering the "economic nature of the regulated activity." Congress here attempts to regulate a class of individuals who have refrained from purchasing health insurance. The conduct being regulated is the decision not to enter the market for insurance. Plaintiffs have not bought or sold goods or services, nor have they manufactured, distributed, or consumed a commodity. Rather, they are strangers to the health insurance market. This readily differentiates the present case from Wickard and Raich. Certainly there is an interstate market for health insurance, but, unlike the plaintiffs in Wickard and Raich, plaintiffs here have not entered the market.

The government contends that virtually every American has or will participate in the market for health care services. The timing of the need for health care can be unpredictable and the costs substantial. By not purchasing insurance, individuals like the plaintiffs have made a decision to accept risk. In the government's view, plaintiffs' financial planning choices and position on risk are quintessentially economic in nature because they inevitably lead to cost-shifting when the uninsured obtain care they cannot afford. The government's justification for the mandate concerns a failure to pay for services obtained, not a failure to engage in economic activity. But this argument deftly switches the focus from the private, non-commercial nature of plaintiffs' conduct (the decision to be uninsured) to the perceived economic effects of their absence from the insurance market. Certainly, plaintiffs' conduct may be considered in the aggregate with the conduct of similarly-situated individuals; however, the Commerce Clause cannot be satisfied when economic activity is lacking in the first instance.

It is true that decisions not to purchase insurance are in some sense economic ones. They are choices about risk and finances. When viewed in the aggregate, these decisions have economic consequences. But Lopez and Morrison rejected a view of causation whereby the cost-shifting to society caused by violent conduct can satisfy the substantial effects test. And here, the government fails to show why a view of cost-shifting caused by risky conduct should fare any better. The problem with the government's line of reasoning is that it has no logical end point.

Here, several layers of inferences must materialize for the government's cost shifting reasoning to work, but the mandate waits for none of them. The mandate and its penalty are not conditioned on the failure to pay for health care services, or, for that matter, conditioned on the consumption of health care. Congress instead choose a more coercive and intrusive regulation. The proper object of Congress's power is interstate commerce, not private decisions to refrain from commerce. The ACA represents Congress's attempt to solve national problems in the health insurance market. That problems are felt nationwide does not mean that Congress can try to solve them in any fashion it pleases. Congress must choose from the limited powers granted to it by the Constitution.

Here, Congress's exercise of power intrudes on both the States and the people. It brings an end to state experimentation and overrides the expressed legislative will of several states that have guaranteed to their citizens the freedom to choose not to purchase health insurance. The mandate forces law-abiding individuals to purchase a product – a very expensive product, no less – and thereby invades the realm of an individual's financial planning decisions.

If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power?

Questions 19 through 22 are based on the following fact pattern:

Let's take a trip to the near future. Congress has just passed "the Judicial Responsibility and Accountability Act of 2104." The Act seeks to institute significant changes involving the federal judicial system of the United States. One of those changes is to create a "Judicial Accountability Commission" with the "power to retire or remove a magistrate or judge at any level of the federal Article I and Article III courts" and lists as grounds for removal: "conviction of a felony, willful misconduct in office, willful and persistent failure to perform judicial duties, a mental or physical disability that seriously interferes with the performance of judicial duties, or any other conduct that is prejudicial to the administration of justice, or brings the judicial office into disrepute."

The Commission is to be composed of one member appointed by the President of the United States, two members appointed by the Speaker of the House of Representatives, and one member appointed by the Majority Leader of the Senate. Members of the judiciary are not eligible to serve on the Commission.

The Commission may investigate a judge's health or conduct on its own initiative or following a complaint "by a member of Congress or by any United States Citizen." Before the Commission can issue an order affecting a judge's

tenure, it must hold a hearing. A judge who is subject to a Commission hearing must be given notice of the hearing and of the nature of the matters under inquiry. The judge is entitled to attend the hearing, be represented by counsel, present evidence on his or her own behalf, and confront and cross-examine witnesses. The concurrence of at least four Commission members is required for the Commission to make a determination for removal or retirement.

If the Commission makes a determination for removal or retirement, it must file an order in United States Court of Appeals for the District of Columbia. The Act provides that the judge who is the subject of the order may then petition that Court to review the order. After reviewing the proceedings, the Court of Appeals for the District of Columbia is ostensibly empowered to affirm, reverse, or remand the order to the Commission for further proceedings. The determinations of the Court of Appeals for the District of Columbia are final and conclusive; the Act specifically precludes review by the United States Supreme Court.

At a press conference today, President Gingrich stated that he intends to sign the bill when it arrives on his desk. He also stated that "if the Supreme Court would dare interfere with a law so strongly supported by the other two branches of our government as well as by the American people," he would "almost certainly see to it that the Capitol Police or U.S. Marshal Service will serve the recalcitrant justices with subpoenas forcing them to come down to Congress and explain their ridiculous positions. Furthermore, as I've said on many occasions, the idea of judicial supremacy is a myth. I'll put the lie to it. I'll ignore activist judicial decisions. We'll impeach judges who are too radical. And, if we have to, we'll even abolish certain courts that have a history of going too far."

19. Under our system of jurisprudence, what branch of government is the final arbiter of our Constitution?

The Judiciary

20. Under our Constitution, how are "Article III" federal judges appointed?

Under Article II, Section 2 of the Constitution, it is the President who appoints judges, "with the advice and consent of the Senate.

21. Some might say that the appointment/removal scheme set forth in the Act would violate the doctrine of separation of power. Employing law you learned this semester, please address this claim in the space below. (In your answer, please confine yourself only to the issue of separation of power.)

The Part of the Act Dealing with the Removal of Federal Judges

Article III, Section 1 of the Constitution states: "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Furthermore,

Article II, Section 4 of the Constitution states: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High crimes and Misdemeanors." Article I, Section 2 states: "The House of Representatives shall . . . have the sole power of impeachment." And, finally, Article I, Section 3 states: "The Senate shall have the sole power to try all impeachments. . . . And no person shall be convicted without the concurrence of two thirds of the members present. . . . Judgment in cases of impeachment shall not extend further than to removal from office. . . ."

Thus, the Constitution establishes life tenure for federal judges, who only can be removed prior to death or resignation after being charged by the House of Representatives, receiving a trial and conviction by a 2/3 super-majority vote in the Senate, and then only for commission of "Treason, Bribery, or other High crimes and Misdemeanors."

The Judicial Responsibility and Accountability Act violates the Constitution in that it: (1) allows for removal on grounds other than (and less serious than) "Treason, Bribery, or other High crimes and Misdemeanors;" (2) permits charges to be proffered "by a member of Congress or by any United States Citizen" rather than by the full House of Representatives (3) provides for judicial removals by a body other than the Senate (here, a politically-appointed commission); and (4) allows for the judicial review of removal decisions (which is not permitted in regard to impeachment under the Constitution).

Accordingly, the Act stands the separation of power doctrine on its head. Rather than the fate of federal judges being determined entirely by the full House of Representatives and full Senate, the Act delegates the power to a commission presumably operating as an arm of the executive branch, and empowers only three people - the President, Speaker of the House, and Majority Leader of the Senate - to determine the composition of the commission. This blurs Constitutional power on several fronts.

The Part of the Act Dealing with the Appointment of Commission Members

The Appointments Clause contained in Article II, Section 2 of the Constitution states that the President "shall have Power, . . . [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and

Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

If the commission members are considered "superior" officers, then the President has the sole authority to "nominate" them, and such members will take office if confirmed by the Senate. But if the commission members are deemed "inferior" officers, then Congress gets to decide whether the appointments belong to the President alone, such courts of law as Congress designates, or to the head of the department in which the commissioners will serve. In most cases, the departments will be a part of the executive branch. (Although here an argument can be made that the commission might be part of the judiciary and that the corresponding department head would be the Chief Justice of the Supreme Court).

But it does not matter here whether the commissioners are superior or inferior officers because the scheme unconstitutionally divides appointments between the President and only two members of the legislature (Speaker of the House, and Majority Leader of the Senate), with the two legislative members possessing 3/4 of the appointments. The separation of powers doctrine prohibits any branch of government from exercising power that is reserved to another branch of government; the legislature cannot exercise executive power and the executive cannot exercise legislative power. Neither the Speaker of the House nor the Majority Leader of the Senate is the President, a court of law or a department head. Accordingly, the scheme blurs Constitutional power and violates the separation of powers doctrine.

22. The Act provides several other grounds for constitutional challenge. Please introduce and address (with law and analysis) as many as you can in the space below.

It also could be argued that the Act:

1. gives the judicial branch an effective veto over what should properly be decided in the impeachment context by the House (in impeaching) and the Senate (in convicting).
2. deprives the United States Supreme Court of its proper appellate jurisdiction under Article III, Section 2 of the Constitution because the Act expressly precludes it from

appellate review of a decision of the District of Columbia Court of Appeals. On the other hand, Article III, Section 2 does limit the appellate jurisdiction of the Supreme Court by "such exceptions, and under such regulations as the Congress shall make." Unless it is determined that the Act destroys an "essential function" of the Supreme Court, such an argument is not likely to succeed.

Questions 23 and 24 are based on the following fact pattern:

In July of 2000, James DeWeese, a duly elected judge in the General Division of the Common Pleas Court in Richland County, Ohio, created and hung two posters in his courtroom, one of the Bill of Rights and one of the Ten Commandments. The American Civil Liberties Union (ACLU) brought an action against Judge DeWeese in the United States District Court for the Northern District of Ohio seeking a declaration that the Ten Commandments poster violated the Establishment Clause, and requesting an injunction preventing Judge DeWeese from continuing to hang the poster in his courtroom. Both the federal district court and the United States Court of Appeals for the Sixth Circuit ruled in favor of the ACLU, declaring the hanging of the poster in the courtroom unconstitutional and enjoining Judge DeWeese from continuing to display it in his courtroom.

But Judge DeWeese bided his time. In June 2006, the judge created a second poster which he hung in his courtroom containing the Ten Commandments, entitled "Philosophies of Law in Conflict." Immediately under the title on the poster are three numbered comments:

1. There is a conflict of legal and moral philosophies raging in the United States. That conflict is between moral relativism and moral absolutism. We are moving towards moral relativism.
2. All law is legislated morality. The only question is whose morality. Because morality is based on faith, there is no such thing as religious neutrality in law or morality.
3. Ultimately, there are only two views: Either God is the final authority, and we acknowledge His unchanging standards of behavior. Or man is the final authority, and standards of behavior change at the whim of individuals or societies. Here are examples.

Below these three comments are two columns covering the majority of the poster, one entitled "Moral Absolutes: The Ten Commandments," and the other entitled "Moral Relatives: Humanist Precepts." Under the "Moral Absolutes" column are listed the following:

I am the LORD your God ...

- I. You shall have no other gods before Me.
- II. You shall not make for yourself an idol.

- III. You shall not take the name of the LORD your God in vain.
- IV. Remember the Sabbath day, to keep it holy.
- V. Honor your father and your mother.
- VI. You shall not murder.
- VII. You shall not commit adultery.
- VIII. You shall not steal.
- IX. You shall not bear false witness against your neighbor.
- X. You shall not covet anything that is your neighbor's.

Under the second, "Moral Relatives," column, set up in opposition to the first, are listed seven statements:

- I. The universe is self-existent and not created. Man is a product of cosmic accidents, and there is nothing higher than man. (Humanist Manifesto I)
- II. Ethics depend on the person and the situation. Ethics need no religious or ideological justification. (Humanist Manifesto II)
- III. There is no absolute truth. What's true for you may not be true for me. (Humanist John Dewey)
- IV. The meaning of law evolves. "We are under a Constitution, but the Constitution is what the judges say it is." (U.S. Sup. Ct. Justice Chas. Hughes)
- V. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." (Planned Parenthood v. Casey)
- IV. Personal autonomy is a higher good than responsibility to your neighbor or obedience to fixed moral duties. (Humanist Manifesto II)
- VII. Quality-of-life decisions justify assisting the death of a fetus, defective infant, profoundly disabled or terminally ill person. (Princeton U. Prof. Peter Singer)

At the bottom of the poster, below the two columns, is a fourth comment by Judge DeWeese:

4. The cases passing through this courtroom demonstrate we are paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20th century. Our Founders saw the necessity of moral absolutes.

President John Adams said, "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our Constitution was made for a moral and religious people. It is wholly inadequate for the government of any other." The Declaration of Independence acknowledges God as Creator, Lawgiver, "Supreme Judge of the World," and the One who providentially superintends the affairs of men. Ohio's Constitution acknowledges Almighty God as the source of our freedom. I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation. Judge James DeWeese.

Finally, in the lower right hand corner of the frame, readers are invited to obtain from the court receptionist a pamphlet further explaining Judge DeWeese's philosophy.

In 2008 Plaintiff filed a motion to show cause against Defendant, arguing that Defendant violated the district court's order enjoining the first poster by displaying this poster. The district court, however, found that as the two posters were not identical, Defendant was not in contempt of the court's order to remove the previous poster. *ACLU v. DeWeese*, No. 08-2372, slip op. at 2 (N.D. Ohio Oct 8, 2009) (memorandum and order).

The ACLU has returned to federal court, seeking a declaratory judgment that Judge DeWeese's display of the poster violated the First and Fourteenth Amendments of the United States Constitution and the Civil Rights Act of 1964, 42 U.S.C. § 1983. It also seeks a permanent injunction against continued display of the poster.

23. The court is now considering the merits of the case under the Establishment Clause. Please state the three (3) standards/factors a federal court will apply in considering this the Establishment Clause claim the ACLU has raised.

The so-called "Lemon test:"

- A. Whether the challenged government action has a secular purpose;*
- B. Whether the action's primary effect neither advances nor inhibits religion; and*
- C. Whether the action fosters an excessive entanglement with religion*

24. In the space provided below, please apply these standards and explain whether Judge DeWesse's conduct is in violation of the Establishment Clause.

Whether the Challenged Action Has a Secular Purpose

It is questionable whether Judge DeWesse has even articulated a secular purpose. However, assuming for the sake of argument that he has, the history of his actions demonstrates that any

purported secular purpose is a sham. Judge DeWeese has not described a role for the Ten Commandments poster in his courtroom other than to admonish participants to look to the Commandments as a source of law. Moreover, Judge DeWeese 's history of Establishment Clause violation casts aspersions on his purportedly secular purpose in hanging the poster in his courtroom. His concern over society's "abandoning a moral absolutist legal philosophy," that support his decision to hang the poster are clearly based on his belief that our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments. This plainly constitutes a religious purpose in violation of Lemon's first prong.

Whether the Action's Primary Effect Neither Advances Nor Inhibits Religion

The question here is whether a reasonable observer acquainted with the text, history, and implementation of Judge DeWeese's display of the Ten Commandments in his courtroom would view it as a state endorsement of religion. The inquiry must be viewed under the totality of the circumstances surrounding the display, including the contents and the presentation of the display, because the effect of the government's use of religious symbolism depends on context. When secular and non-secular items are displayed together, one must consider whether the secular image detracts from the message of endorsement; or if rather, it specifically links religion and civil government. In contrast to the Ten Commandments displays in the McCreary and Van Orden cases, the poster in this case is not merely a display of the Ten Commandments in Defendant's courtroom. It sets forth overt religious messages and religious endorsements. It is a display of the Ten Commandments editorialized by a state judge exhorting a return to "moral absolutes" which he himself defines as the principles of the "God of the Bible." The poster is an explicit endorsement of religion by Defendant in contravention of the Establishment Clause.

Whether the Action Fosters an Excessive Entanglement with Religion

This prong of the test may be harder to satisfy. The kind of excessive entanglement of government and religion precluded by Lemon is characterized by "comprehensive, discriminating, and continuing state surveillance" of religious exercise. The display erected by Judge DeWesse does not require pervasive monitoring or other maintenance by public authorities. On the other hand, the display arguably does require continued and

repeated government involvement with religion because Judge DeWesse apparently makes reference to in with some degree of regularity. One might analogize it to forcing a student to say a prayer in school each day, which clearly does result in excessive entanglement.

Questions 25 through 29 are based on the following fact pattern:

The United States Congress enacted a federal statute providing that any state "may but need not require labeling to show the state or other geographic origin of citrus fruit that is imported into the receiving state." Pursuant to the federal statute, a state that produced large quantities of citrus fruit enacted a law requiring all citrus fruit imported into the state to be stamped with a two-letter postal abbreviation signifying the state of the fruit's origin. The law did not impose any such requirement for citrus fruit grown within the state. When it adopted the law, the state legislature declared that its purpose was to reduce the risks of infection of local citrus crops by itinerant diseases that have been found to attack citrus fruit.

A national association of citrus growers sued to have the state law declared unconstitutional. The association claims that the law is prohibited by the negative implications of the commerce clause of the Constitution.

25. In the space provided below, please state and describe the various standards of review that may be employed when confronting a dormant commerce clause issue.

First, read the statute or law (there must be a state statute or law to make the Dormant Commerce Clause relevant) to see whether it facially discriminates against out-of-staters. If the state law facially discriminates, apply the so-called "strict scrutiny" test and (almost always) strike it down as violating the dormant commerce clause. Under strict scrutiny, a dormant commerce clause violation can only be overcome by a showing that the state has no other means to advance a legitimate local purpose; this is indeed a very difficult task.

If the state law does not facially discriminate - i.e., it is facially neutral - inquire whether it nevertheless has a discriminatory effect on interstate commerce. If the state law is facially neutral, but has a discriminatory effect on interstate commerce, strike it down as violating the dormant commerce clause.

If the state law is not facially discriminatory, and has only "incidental" effects rather than discriminatory effects on interstate commerce, apply the so-called Pike v. Bruce Church, Inc. balancing test: balance the local benefits derived from the law against the burden it creates on interstate commerce. In applying Pike, consider "the nature of the local interest

involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities." Laws promoting exercises of traditional police power - health, safety, welfare, etc. - while only incidentally having an impact on interstate commerce will likely be upheld under Pike.

If your analysis determines a dormant commerce clause violation, check to see whether one of the two recognized exceptions applies:

- (A) The "market participant exception" occurs when the state acts like a business or customer, rather than a "market regulator."
- (B) Congress, the federal branch entrusted with regulation of commerce in the first place, has approved such state or local action.

26. Without, for the time being, raising any exceptions that might negate the state's liability, please state the standard of review that a court is likely to employ in considering the association's dormant commerce clause claim.

Strict scrutiny. The state law facially discriminates because it requires out-of-state, but not in-state, citrus producers to stamp the state of origin onto each citrus fruit entering the state.

27. Again without raising any exceptions that might negate the state's liability, in the space below please apply the proper standard and state whether the national association will prevail in overturning the citrus-labeling scheme.

Since the statute facially discriminates, we should apply the strict scrutiny standard and declare the statute to violate the dormant commerce clause.

28. Under which dormant commerce clause exception does the state have the best chance of avoiding liability? (Circle only one.)

MARKET PARTICIPANT

CONGRESSIONAL AUTHORIZATION

29. In the space provided below, please make your best argument that the state will prevail under the exception you chose above.

Congress specifically empowered states to "require labeling to show the state or other geographic origin of citrus fruit that is imported into the receiving state." Accordingly, the "Congressional authorization" exception appears to apply

directly.

Questions 30 through 34 are based on the following fact pattern:

Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct, including videos.

The legislative background of § 48 focused primarily on the interstate market for "crush videos." According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain."

The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. But crush videos rarely disclose the participants' identities, thus inhibiting prosecution of the underlying conduct.

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Robert J. Stevens ran a business named "Dogs of Velvet and Steel," with an associated Web site, that catered to selling videos depicting animal fighting. Among these videos were "Japan Pit Fights" and "Pick-A-Winna: A Pit Bull Documentary," which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960s and 1970s. A third video, "Catch Dogs and Country Living," depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig.

On the basis of these videos, Stevens was indicted on three counts of violating § 48. He has challenged the law as violative of his First Amendment free speech rights.

30. The making and dissemination of videos undeniably is the type of expressive conduct protected by the Free Speech Clause of the First Amendment. Was § 48's restriction of animal cruelty videos content-based or content-neutral? (Circle one.)

CONTENT-BASED

CONTENT-NEUTRAL

31. Please explain your reasoning in choosing your answer to the prior question.

As a general matter, the First Amendment prohibits government from restricting expression on the basis of its message, its ideas, its subject matter, or its content. Such a restriction is classified as a "content-based" law. If, however, a law regulates speech without regard to its subject matter, such a regulation is deemed "content-neutral." The law at issue here is clearly aimed at the content of the expression; specifically, whether the regulated depictions were of animal cruelty. This is undeniably a content-based law.

32. Based upon your answer to the prior question, what would be the standard of review a court would apply in our case?

Strict scrutiny: laws restricting content-based expressions are valid only if they are "narrowly tailored to serve a compelling state interest."

33. Please make your best argument that Stevens engaged in speech protected by the First Amendment and that the charges against him under § 48 should be dismissed.

Stevens is not charged with engaging in animal cruelty; he is charged with disseminating depictions of animal cruelty. Such conduct undeniably constitutes "speech" or "expression" that is protected under the First Amendment. As said the speech is content-based because the statute only punishes those who depict a particular subject matter of expression: depictions of animal cruelty. It does not, for example, ban depictions of human cruelty. Under strict scrutiny, the government will have to prove that the law is "narrowly tailored to serve a compelling state interest." This it cannot do. A law is not narrowly tailored (and is overly broad) if it restricts a significant amount of speech that fails to implicate the government interest at stake. Moreover, a law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.

First, this law likely restricts far more than that within the aim of the government: crush videos of animal cruelty. Here we must look at the precise definition of "animal cruelty:" a depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." The following conduct, although not intended to fall within the reach of the law, would nevertheless implicate the statute: A man is hunting for deer with his

friends during hunting season. Although all his friends possess proper hunting licenses, the man does not. The man without the license shoots and then guts a deer, all of which is captured on one of his friend's cell phone video cameras. The friend later sells the video to a web site dedicated to hunting. It and is aired of an example of how to properly track, shoot and gut a deer. The friend could be liable under the statute if he knew that the man lacked the requisite hunting license.

Additionally, the government could use methods of surveillance, infiltration and other law enforcement techniques to clean up the "crush" video industry which are far less invasive of free speech rights. This is a lazy law enforcement technique that trammels First Amendment rights.

34. Please make your best argument that Stevens's speech is not protected by the First Amendment and that the criminal case against him under § 48 should proceed.

Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech that would otherwise be prohibited. This includes obscenity, defamation, fraud, incitement, child pornography, and speech integral to criminal conduct. Depictions of animal cruelty should be added to that list. The prohibition of animal cruelty has a long history in American law; American laws have always provided broad protection for pets who, like children, have no effective means to protect themselves. When it comes to animal cruelty, courts should balance the value of the speech against its societal costs to determine whether the First Amendment even applies. Here, the societal costs of failing to protect animals runs high, while there is little to be gained from broadly protecting the right to profit from animal cruelty.

Questions 35 through 38 are based on the following fact pattern:

Vandiver Elizabeth Glenn was born a biological male. Since puberty, Glenn has had a deep persistent awareness that she is a woman. In early 2005, Glenn was diagnosed with gender identity disorder ("GID"). GID is a diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"). The diagnostic criteria for GID are: a strong and persistent cross-gender identification; persistent discomfort with one's sex or sense of inappropriateness in the gender role of that sex; no concurrent physical intersex condition; and resulting clinically significant distress or impairment in social, occupational, or other important areas of functioning. The DSM-IV notes that GID can be "distinguished from simple nonconformity to stereo-typical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests, and activities," and "represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness."

The World Professional Association for Transgender Health recommends a triadic therapeutic protocol for the treatment of GID, which includes: 1) hormone therapy; 2) a real-life experience ("RLE") by living full-time as a member of the new gender; and 3) sex reassignment surgeries.

Starting in 2005, Glenn began to take steps to transition from male to female under the supervision of health care providers. She underwent electrolysis to remove facial hair, began hormone therapy to make her body more feminine and suppress testosterone, and also began living as a woman outside of the workplace. In April 2006, Glenn underwent surgical procedures, including a brow lift, liposuction, and narrowing of her jaw line in order to appear more feminine.

In the Spring of 2006, Glenn began a therapist-client relationship with Dr. Erin Swenson, a licensed marriage and family therapist with a Ph.D. in psychological services. In 2006, during the course of therapy, Dr. Swenson recommended that it would be appropriate for Glenn to commence the real-life experience by living full-time as a woman. Dr. Swenson advised Glenn that the successful completion of real-life experience is a prerequisite to sex reassignment surgery; it provides the individual with psychological relief.

Glenn, then presenting as a man, had been working as an editor by the Georgia General Assembly's Office of Legislative Counsel (OLC) since October 2005. In order to be hired as an editor in the OLC, Glenn had to take a test on grammar, spelling, proofreading, and vocabulary. She did very well on the test and was recommended for the position by Beth Yinger, the senior editor. The OLC is responsible for drafting bills for legislators, code revision, and publication of the Georgia session laws. The staff of the OLC included approximately eleven attorneys, eight computer terminal operators, five editors, an office manager, an assistant office manager, and an administrative assistant. Sewell Brumby was the head of the OLC and the chief legal counsel for the Georgia legislature.

In 2006, Glenn informed her direct supervisor, Beth Yinger, that she was transgender and was in the process of becoming a woman. However, she was still presenting as a man. On October 31, 2006 (Halloween), Glenn came to work presenting as a woman for the first time. When Brumby saw her, he told her that her appearance was not appropriate and asked her to leave the office. Brumby stated that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and that a male in women's clothing is "unnatural."

Following this incident, Brumby met with Yinger to discuss Glenn's appearance on Halloween 2006 and was informed by Yinger that Glenn intended to undergo a gender transition. Brumby took no adverse employment action against Glenn at that time, and in the months following Halloween 2006, Glenn came to work presenting as a man.

In the fall of 2007, Glenn informed Yinger that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name. She gave Yinger written materials about GID and photographs of herself presenting as a woman. Yinger notified Brumby of Glenn's intent and provided him with the written materials and photographs that Glenn had given her. Brumby subsequently informed Yinger that he was going to fire Glenn because she was transitioning from a man to a woman.

Before terminating Glenn, Brumby conducted legal research to determine the legality of firing her based upon her gender transition and also had another OLC attorney, Marie Story, do the same. He concluded that some authority indicated that terminating an employee for undergoing gender transition was illegal, but some authority indicated that such firings are permissible. Brumby also contacted a few legislators and employees of OLC to solicit their opinions on the matter. He spoke with Glenn Richardson, then Speaker of the Georgia House of Representatives. Speaker Richardson told Brumby that it should be Brumby's decision on how to handle the situation. Brumby also spoke with Lieutenant Governor Casey Cagle's Chief of Staff, Bradley Alexander, who shared the information with Lieutenant Governor Cagle. Brumby also asked Story and another OLC attorney what they and their fellow OLC employees would think about working with an individual undergoing a gender transition, but neither offered an opinion.

In their pre-termination conversation, Alexander asked Brumby if Glenn had any job performance issues or whether she was being let go for "the transgender reason." Brumby responded that the termination was not performance-based and was because of the gender transition. Yinger, Glenn's immediate supervisor, found Glenn's work product to be "about average" and did not think she should be fired.

On October 16, 2007, Brumby called Glenn to his office. Once Glenn arrived, Brumby asked her if she "had formed a fixed intention to [become] a woman." She answered that she had. Brumby then informed her that she was being terminated. Brumby told Glenn that the reasons for her termination were that Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable. Further, he stated that some legislators would view the transition as immoral and unnatural, and might lose confidence in the OLC if he did not fire her.

Glenn has sued Brumby and the OLC for discrimination.

35. Please list/identify the three classifications one must consider when assaying an equal protection claim. (Do not provide the standards of review at this time).

1. *Strict Scrutiny (I'd also accept "compelling state interest," or the like)*
2. *Intermediate Scrutiny (I'd also accept "important government interest," or the like)*
3. *Rational basis (I'd also accept "deferential," or the like)*

36. Please state the legal standard of review for each of the classifications you listed in you answer to the prior question.

1. Strict Scrutiny: the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest. The government carries the burden of proof.

2. Intermediate scrutiny: the law is unconstitutional unless it is "substantially related" to an "important" government interest. The government carries the burden of proof.
 3. Rational-basis: the law is constitutional as long as it is "reasonably related" to a conceivable "legitimate" government interest. The plaintiff carries the burden of proof.
37. What standard of review will apply in this case?

I will take either rational basis (the Supreme Court has never declared that transgender orientation, or even sexual orientation, warrants review by heightened scrutiny) or intermediate scrutiny (one might argue that transgender discrimination is the functional equivalent of gender discrimination).

38. Please apply the standard of review to the facts to support your conclusion whether Brumby and the OLC deprived Glenn of equal protection of the law.

If You Argue that Glenn Will Prevail

An intermediate scrutiny argument will look something like this: Transgender discrimination is sex-based discrimination; the only difference is that the discrimination occurs because a person changes his/her sex. Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. The government's action is unconstitutional unless the government can prove that it was "substantially related" to an "important" government interest. Moreover, unlike a rational basis inquiry, the important government interest must be an actual one, not a "conceivable" one. Brumby he fired Glenn because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that Glenn would appear wearing women's clothing. He also was afraid of the disruption and moral outrage that might arise if he did not fire Glenn. These are hardly the type of "important" governmental interest that supports an act of gender discrimination.

A rational basis argument will look something like this: In Romer v. Evans, the Supreme Court reviewed a Colorado referendum law that prevented all levels of Colorado government from providing any protections or benefits to homosexuals. Although reviewing the law under the rational basis test, where the government normally wins, the Supreme Court determined that the law was mean spirited and "seem[ed] inexplicable by anything

but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." In City of Cleburn v. Cleburne Living Center, the Supreme Court considered a case of discrimination on the basis of intellectual handicap; a non-profit corporation sought to construct a group home for intellectual handicapped residents and was denied a permit. The Supreme Court once again took the unusual step of overturning governmental action under the rational basis test:

The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others, but why this difference warrants a density regulation that others need not observe is not at all apparent. . . . The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded. . . .

Like in Romer and Cleburne, The actions of Bumbry and the OLC, both state actors, were based entirely upon irrational prejudice and animus against transgender persons rather than on any rational justification. Glenn should prevail.

If You Argue that Glenn Will Lose

As with cases involving claimed discrimination on the basis of sexual orientation and handicap discrimination, alleged discrimination on the basis of gender orientation merits only rational basis scrutiny. Thus, Glenn has the burden of proving that there is no conceivable rational justification for the actions of Bumbry and the OLC. But they did act rationally. While Bumbry may have harbored irrational feelings about transgender persons, he did articulate rational justifications for the firing: uncomfortable co-workers, the avoidance of disruption, and a loss of confidence in the OLC. There are even additional concerns that could justify the firing, such as dealing with bathroom arrangements and the like.

NOTE: I personally do not like the argument that Glenn will lose because it still all seems to come down to prejudice. That said, I will give full credit if you argue this position cogently.

Questions 39 and 40 are based on the following fact pattern:

Nicholas Martin is an individual who occasionally assists people with tax preparation services. CCH sells a variety of tax preparation software, as well as legal treatises explaining how to comply with advertising and marketing laws. On December 29, 2009, CCH sent an unsolicited e-mail to

Martin with the subject line: "Buy now pay Feb. 15." The e-mail offered tax software with a deferred payment due on February 15, 2010. On January 7, 2010, CCH sent another unsolicited e-mail to Martin with the subject line: "Offer extended - Buy now pay Feb. 15." The e-mail again offered Martin the opportunity to purchase tax software with a deferred payment.

Martin has sued CCH under the Illinois Electronic Mail Act ("IEMA"). Martin asserts that CCH's e-mail solicitations were misrepresentations; rather than merely advertising a product, CCH, says Martin, engaged in "online behavioral advertising," "profiling," tracking online activities, placing cookies on his computer, and monitoring access to CCH's website. The IEMA specifically prohibits transmitting unsolicited e-mail advertisements that misrepresent the point of origin or contains false or misleading information in the subject line.

CCH contends that Martin's IEMA claim is preempted by the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"). The CAN-SPAM Act was enacted in response to the rise of unsolicited commercial e-mail. Citing the lack of success under the then-current conditions in which many states had attempted to regulate e-mail with different standards and requirements, Congress determined that a national standard for regulating unsolicited commercial e-mail was required. The relevant portion of the CAN-SPAM Act prohibits the transmission of a commercial electronic message by a person with actual or fairly implied knowledge that the subject heading would be likely to mislead a recipient about a material fact regarding the contents of the message. The Act does not provide a cause of action for private citizens; rather, only the FTC, various other federal agencies, a state attorney general on behalf of residents, or providers of Internet access services may bring lawsuits enforcing the CAN-SPAM Act.

The CAN-SPAM Act contains a preemption provision which provides:

This chapter supersedes any statute, regulation, or rule of a State * * * that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. . . . This chapter shall not be construed to preempt the applicability of: (A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or (B) other State laws to the extent that those laws are related to acts of fraud or computer crime."

CCH has brought a motion to dismiss Martin's complaint.

39. In the space below, please state and describe the different types of federal preemption.

Express Preemption: *This occurs when the Congressional Act, agency regulation or U.S. treaty clearly articulates the intent to supersede conflicting state law. Sometimes, however, even when the federal law contains an express preemption provision, the question remains whether the allegedly-conflicting state law or action is within the scope of the federal law.*

Field Preemption: Even absent an express preemption, "field preemption" occurs if a federal law presents a scheme of federal regulation so pervasive that Congress must have intended to occupy the entire field.

Conflict Preemption: "Conflict preemption" takes one of two forms: "impossibility" preemption or "obstacle" preemption:

- A. "Impossibility preemption" occurs when it is literally impossible to comply with both the state and federal laws at issue.
- B. "Obstacle preemption" occurs when a state law creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

40. In the space below, please apply the law of preemption to the facts to determine whether the IEMA is preempted by the federal act.

Particularly pertinent for present purposes is express preemption. When Congress has made its intent known through explicit statutory language, the courts' task is an easy one. The Congressional policy of the CAN-SPAM Act does not appear to differ much, if at all, from Illinois law. Since the two laws attack the same problem, and Congress has expressly preempted conflicting state laws, the Illinois law must yield. Moreover, the Illinois law does not fall into one of the specific preemption exemptions because it is specific to electronic mail and does not deal with criminal fraud or other computer crime (rather, it appears to be a consumer protection law).

END OF PART ONE