

Keep answers of exam

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

Fall 2006 Semester

YOUR ENTIRE SOCIAL SECURITY 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.

Please take three (3) blue books. Please write "Scrap" on one of the blue books. Please write "Two" and "Three" on each of the other two blue books. Please write your social security number *on all three* blue books as well as on this exam booklet.

Please do not identify yourself in any way other than by social security 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 three parts:

Part One – Directed Essays consists of 16 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.

Part Two consists of one (1) short 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 suggested time for Part Two is thirty (30 minutes).

Part Three consists of one (1) short essay question. Please put your answer in a blue book entitled "Part Three," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages. The suggested time for Part Three is thirty (30 minutes).

Please take note again that Parts Two and Three are to go in **separate** blue books. Do not put both parts in the same blue book.

Despite the fact that the suggested time for all three parts is three hours, we will give you three and one-half (3.5) hours to complete the exam. You may use the extra half hour however you like, if you choose to use it at all.

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.

You have three and one-half (3-1/2) hours to complete the exam. 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!

QUESTIONS

PART ONE

DIRECTED ESSAYS

SUGGESTED TIME: TWO HOURS (120 MINUTES)
PERCENTAGE OF EXAM POINTS: 70%

INSTRUCTIONS FOR PART ONE:

This part consists of 16 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. There are a total of 50 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.

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.

QUESTIONS:

Questions 1 through 5 are based on the following fact pattern:

Andrea Ogrey (Ogrey) recently filed a *pro se* complaint (one filed directly by the plaintiff without the aid of an attorney) against the State of Texas in federal district court alleging that Texas violated her constitutional rights by suspending her driver's license because she was unable to pay a \$260 a year surcharge, and thus maintain her required automobile insurance, as a result of two moving violation tickets in a 36-month period. Ogrey did pay the fines associated with the tickets, but claims she has been unable to maintain her automobile insurance because of the surcharge. Texas has refused to reinstate Ogrey's driver's license unless she reinstates her automobile insurance and agrees to submit herself to regular monitoring of her maintenance of automobile insurance for a period of two years. Ogrey argues that Texas has deprived her of liberty and/or property without due process of law and has discriminated against her on the basis of her economic status (indigence).

1. Texas is contemplating a motion to dismiss Ogrey's complaint for failure to state a claim upon which relief may be granted. What issue that we studied this semester should Texas raise in claiming that the court should dismiss the complaint without reaching the substance of her due process and discrimination claims?

2. Should Texas prevail in its attempt to have the complaint dismissed? (Please circle the correct answer.)

YES

NO

3. In the space provided below, please explain the reasoning of your answer to Question 2.

4. Would Texas's chances of prevailing on its motion to dismiss be enhanced or diminished if Ogrey's complaint had alleged that Texas engaged in disparate treatment against her on the basis of her race? (Please circle the correct answer.)

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DIMINISHED

The next question is on the following page.

5. In the space provided below, please explain the reasoning of your answer to Question 4.

Questions 6 and 7 are based on the following fact pattern:

Chatham County, in Georgia, owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River. On October 6, 2002, James Ludwig requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned and a portion of it fell onto Ludwig's boat. As a result, Ludwig suffered \$130,000 in damages. Ludwig submitted a claim for those damages to his insurer, which paid out in accordance with the terms of the insurance policy. The insurer then sought to recover its costs by filing suit in admiralty against Chatham County in the federal district court. Chatham County has moved to dismiss, claiming that it is immune under the Eleventh Amendment.

6. Should Chatham County's motion to dismiss be allowed? (Please circle the correct answer.)

YES

NO

7. In the space provided below, please explain the reasoning of your answer to Question 6.

The next question is on the following page.

Questions 8 and 9 are based on the following fact pattern:

Please consider and compare the following two situations involving the claim of executive privilege. One of the situations actually occurred; the other, although partially based on fact, is essentially fictional. For the purposes of this exam, however, you should treat it as if it actually occurred:

- A. While investigating whether any crimes occurred as a result of an extra-marital sexual affair between Bill Clinton, the President of the United States, and, Monica Lewinsky, an intern, Independent Counsel Kenneth Starr called some Secret Service Agents to testify before the grand jury. The questions asked of the agents required them to disclose their observations of the President and Ms. Lewinsky while in the White House at various times. The agents refused to testify, claiming executive privilege. Independent Counsel moved to compel the testimony of the Secret Service Agents, and Robert Rubin, Secretary of the Treasury (the cabinet officer who oversees the Secret Service), again invoked executive privilege.
- B. In 2002, President Bush issued an executive order authorizing the National Security Agency to track and intercept international telephone and/or email exchanges coming into, or going out of, the United States when it believed that one of the parties had direct or indirect ties with al Qaeda. The President has claimed executive authority to conduct the warrantless wiretaps as part of the war on terror, but some people claim that he violated the Federal Surveillance Act of 1978, and is criminally liable, for failing to eventually obtain court approval of the wiretaps. In 2003, Derwood Schmaltz was appointed as Independent Counsel under the Independent Counsel Reauthorization Act of 1994 and the Ethics in Government Act of 1978 to investigate whether “the President, or any of his cabinet members and sub-cabinet members violated the Federal Surveillance Act of 1978 or related federal laws.” Schmaltz subpoenaed all records of the President regarding the meetings that occurred with his cabinet members in the period prior to his authorization of the warrantless wiretaps. The President has refused to produce those documents under claim of executive privilege.

8. In which of the two above-stated situations would be President's claim of executive privilege be MORE LIKELY to be upheld? (Please circle the correct answer.)

A

B

The next question is on the following page.

9. In the space provided below, please explain the reasoning of your answer to Question 8.

Questions 10 and 11 are based on the following fact pattern:

On June 10, 2000, while attending Holy Cross Camp in Goshen, Massachusetts, Harold Brunault (Brunault) applied a liquid product manufactured by S.C. Johnson, Inc. (Johnson) to his legs, arms, and head for the purpose of attempting to repel mosquitoes. As a result of applying the product to his body, Brunault suffered severe skin irritation, chemical burns, internal organ damage, and was hospitalized for a lengthy period of time.

Johnson distributed the product with labeling approved by the United States Environmental Protection Agency (EPA) and the product is a registered pesticide product under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). FIFRA is a comprehensive regulatory statute governing the labeling, sale, and use of pesticides. The statute defines "labeling" broadly to include the pesticide's "label" and also "all other written, printed, or graphic matter ... accompanying the pesticide ... at any time." Every pesticide sold in the United States must be registered under FIFRA and distributed with product labeling approved by the Environmental Protection Agency (the EPA). Labeling must contain warnings, precautionary statements, and directions for use which are "adequate to protect health and the environment." Under FIFRA, the EPA determines what language appears on the labels of pesticide products, including the specific hazard warnings or other precautionary statements.

Brunault sued Johnson, alleging that Johnson failed to provide a warning that the product contained a skin irritant which would make a person aware that application to the skin is harmful. Finally, Brunault's complaint alleged that, although the product was not intended for personal use, its advertising, coloring, packaging, and labeling was similar to another Johnson product that was designed to be applied to human skin.

Johnson moved for summary judgment asserting that its labeling satisfied FIFRA's warning and precautionary requirements, and that Brunault's suit thus was preempted by federal law.

The next question is on the following page.

10. There are three types of preemption. Please list them.

11. Two of the three types of preemption you listed in your answer to Question 10 are classified as "implied" preemption. For each type, please state whether it applies to preempt Brunault's suit, and the reasons supporting your conclusion.

A. _____

B. _____

Go on to the next page.

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

On March 5, 1991, William Marley, a member of the Enterprise Fire Company, a volunteer fire company in the Borough of Hatboro, Pennsylvania, set fire to and destroyed plaintiff John D. Mark's automobile repair business. Enterprise is a private association of volunteers which has served the Borough of Hatboro since 1890. In its day-to-day operations, Enterprise essentially acts autonomously; it owns the fire station and the fire-fighting equipment, elects its own officers, prepares its own budget and maintains its own recruitment and training practices. However, on September 28, 1987, Enterprise signed an agreement with the Borough, agreeing to provide fire protection services to the Borough in return for the latter's imposition of a fire tax. The Borough insures Enterprise's equipment, and the fire tax funds Enterprise's operations and expenditures.

On December 23, 1992, Mark filed a complaint seeking to recover his losses against the Borough, several Borough officials, and Enterprise in the United States District Court for the Eastern District of Pennsylvania. His complaint alleged that Enterprise's and the Borough's failure to follow adequate policies to ensure that applicants to the fire department were screened sufficiently for tendencies towards arson caused the damage to his property. Mark claimed that this duty to screen is compelled constitutionally under the due process clause, and that the danger of volunteer firefighters committing arson is so grave and so obvious that the defendants' failure to follow such a policy evinced willful disregard for the rights of individuals with whom the firefighters came in contact. Mark further alleged that if Enterprise had a policy of psychologically screening applicants or of training its firemen to spot potential arsonists, it would have discovered that Marley was unfit to serve as a volunteer firefighter and it never would have admitted him into membership, so that Marley would not have started the fire. Mark claimed relief pursuant to the federal civil rights law – 42 U.S.C. § 1983 – and under state law.

12. Enterprise would like to seek to dismiss the case on summary judgment without reaching the merits of the constitutional claims. What would be Enterprise's best argument that Mark's case should be dismissed without reaching the merits of constitutional law?

The next question is on the following page.

13. List at least **two** of the four exceptions to the doctrine you listed in your answer to Question 12. (We are nevertheless providing space for all three exceptions.)

- A. _____

- B. _____

- C. _____

- D. _____

14. Please make your best argument that any one of these exceptions applies and makes Enterprise liable.

Go on to the next page.

Questions 15 through 17 are based on the following fact pattern:

Like many other States, Michigan regulates the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers. The three-tier scheme is preserved by a complex set of overlapping state and federal regulations. For example, both state and federal laws limit vertical integration between tiers. Michigan's three-tier system is, in broad terms, mandated only for sales from out-of-state wineries. While out-of-state wineries must sell to wholesalers who, in turn, sell to retailers, in-state wineries, can obtain a license to sell directly to consumers (without going through the wholesaler-retailer loop).

This substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business. From 1994 to 1999, consumer spending on direct wine shipments doubled, reaching \$500 million per year, or three percent of all wine sales. The expansion has been influenced by several related trends. First, the number of small wineries in the United States has significantly increased. At the same time, the wholesale market has consolidated. Between 1984 and 2002, the number of licensed wholesalers dropped from 1,600 to 600. The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel. Wine producers can sell their wine more cheaply when they do it directly to consumers than when they must go through the three-tier system.

A number of small wineries have challenged Michigan's scheme that allows in-state, but not out-of-state, wineries to sell directly to consumers.

15. What issue that we studied this semester presents the wineries' best argument that Michigan's scheme is unconstitutional?

16. Under the issue identified above, please state the standard of review that a court is likely to employ in considering the Michigan scheme.

The next question is on the following page.

17. In the space provided below, please state whether the wineries will prevail in overturning the Michigan scheme, and the reasons supporting your conclusion.

Questions 18 through 20 are based on the following fact pattern:

The City of Waukesha, Wisconsin (Waukesha), requires sellers of sexually explicit materials to obtain and annually renew adult business licenses. City News and Novelty, Inc. (City News), pursuant to a license first obtained in 1989, owned and operated an adult-oriented shop in downtown Waukesha. In November 1995, City News applied for a renewal of its license, then due to expire in two months. In December 1995, Waukesha's Common Council denied the application, finding that City News had violated Waukesha's ordinance by permitting minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths. Waukesha's refusal to renew City News's license was upheld in administrative proceedings and on judicial review in the state courts.

City News petitioned for certiorari to the United States Supreme Court, raising three issues of alleged judicial error: (1) the burden of persuasion had been improperly assigned to City News; (2) Waukesha's ordinance unconstitutionally accorded Waukesha officials unbridled discretion to vary punishments for ordinance violations; and (3) the constitutional requirement of prompt judicial review that must accompany an adult business licensing scheme requires a prompt judicial determination rather than simply a right to promptly file for judicial review. The Supreme Court granted certiorari on the third question only.

Two months after its certiorari petition, City News withdrew its renewal application and closed its business upon the Waukesha's grant of a license to another adult business with which City News felt it could not effectively compete. Waukesha would like to ask the Supreme Court to dismiss the case. City News desires that the case continue, and that a decision be made on the substantive constitutional issue on which certiorari was granted.

18. What ground should Waukesha raise in support of its motion to dismiss?

19. Please make City News's best argument that Waukesha should not prevail in getting the case dismissed.

20. Please state why City News will not prevail, and the case will be dismissed.

Go on to the next page.

Questions 21 through 26 are based on the following fact pattern:

On November 6, 2002, Davken, Inc. (Davken) entered an agreement to lease a building in the City of Daytona Beach Shores (City) for five years, with the option to extend the lease for five additional years. Davken planned to open a retail fireworks store at the location and the lease specifically provided that "Tenant shall be entitled to the sole use and possession of the Premises for the purposes of running and operating a retail Fireworks Store." At the time of execution of the lease, the subject property was zoned for retail use, which allowed the use contemplated under the lease. Davken obtained all permits necessary to the conduct of a fireworks store, and invested hundreds of thousands of dollars in capital improvements prior to opening for business in May 2003.

On June 25, 2003, the City Council passed Ordinance 2003-24, regulating the sale of fireworks in the City by, among other things: (1) compelling potential purchasers of fireworks to first obtain a certificate from the City Police Department allowing such purchase (available only during weekday business hours), and (2) requiring City vendors of fireworks to mail the fireworks to customers rather than presenting them a purchaser at the time of sale. The purpose of the new Ordinance was to quell citizen complaints about noise.

The new Ordinance effectively ruined Davken's business because fireworks could be obtained without any encumbrances simply by driving a few blocks to Daytona Beach, which, being a separate municipality, was outside the jurisdiction of Ordinance 2003-24. Davken now does not make enough money from the sale of fireworks to pay its rent, and is close to going out of business. In November 2003, Davken sought a "grandfathering variance" from the ordinance, but City denied it.

You should assume that, as a matter of law, a lease is considered to be just as much a real estate interest as a fee simple ownership. Furthermore, a lease is also considered contract law. Accordingly, both real estate law and contracts law applies to leases.

Davken is in the process of drafting a complaint alleging constitutional violations.

21. Considering that a lease is both an interest in real estate and a contract, which two substantive constitutional claims immediately come to mind as ones that Davken should consider placing in its complaint?

Constitutional Claim Relating to Real Estate: _____

Constitutional Claim Relating to Contracts: _____

The next question is on the following page.

22. First, let's focus on the constitutional claim relating to real estate. Please list the three applicable categories of this claim that we discussed this semester.

A. _____

B. _____

C. _____

23. Which one of those categories definitely does not apply to the facts of this question?

24. Of the other two, please make your best argument that the use of one of them involves a constitutional violation (you may choose to address either of the two remaining claims.)

The next question is on the following page.

25. Now, let's focus on the constitutional claim relating to contracts. What three steps will the court take in analyzing the constitutional issue involving contracts?

A. _____

B. _____

C. _____

26. In the space provided below, please state whether Davken will prevail in its argument, and the reasons supporting your conclusion.

Questions 27 through 29 are based on the following fact pattern:

18 U.S.C § 2251(a), an act of Congress, provides:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished ... if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Another Congressional statute, 18 U.S.C § 222A(a)(5(B) provides:

Any person who ... knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer ... shall be punished....

Alvin Smith was charged with violating one count of producing child pornography in violation of 18 U.S.C § 2251(a), and one count of possessing child pornography in violation of 18 U.S.C § 222A(a)(5(B). The physical evidence used against Smith was discovered pursuant to a search warrant executed at Smith's mother's home in Tampa, Florida. The target of the investigation was his brother, who lived at the residence and was suspected of involvement in drug trafficking. During the course of the search, a narcotics dog alerted the police to a lockbox, which was subsequently identified as Smith's. Upon opening the lockbox, the police found 1,768 photographs, many of which were sexually explicit, and a number of which appeared to be of "very, very young girls" having sex with an adult male later determined to be Smith.

Investigators eventually located a girl who appeared in several of the photographs. From the dates on the photos it was determined the girl was fourteen years old at the time the pictures were taken. The girl confirmed that the photos were of her and Smith.

At Smith's trial, the girl testified that, in November 1999, Smith approached her and her boyfriend and persuaded them to allow Smith to take pictures of her in her underwear for pay. After retrieving a camera and film, Smith reserved a hotel room into which only he and the girl entered. Smith convinced her to remove all of her clothes and proceeded to take sexually suggestive pictures, some of which were particularly graphic. When Smith was finished taking pictures, he left the girl and her boyfriend with money and the hotel room. During the trial, the Government introduced several pictures from the lockbox, including the photographs of the victim, sexually explicit and suggestive photographs of other females--some of whom appeared likely to be of age--in what appeared to be the same hotel room, and photographs of Smith alone. Additionally, the Government offered testimony of several of the officers involved in the search and subsequent investigation, as well as a recording of a phone conversation between Smith and his mother about the pictures in the lockbox.

The Government did not attempt to demonstrate that the images either traveled in interstate commerce themselves or were produced with the intent that they would travel in interstate commerce. Instead, the Government provided evidence that some of the photographs were printed on Kodak paper that the developer in Florida received from New York, and that some of the pictures were processed using equipment received from California and manufactured in Japan.

At the close of the Government's case, the defense moved for judgment of acquittal, arguing that there was insufficient evidence to establish jurisdiction under the federal statutes. The court denied the motion and sent the case to the jury which convicted Smith on both counts, specifically finding that the photographs were produced using film, photo paper, and equipment that had traveled between states and/or foreign countries.

27. Smith has appealed his conviction. Given the stated facts, and the topics we covered this semester, what should Smith claim to be the reversible error?

28. What three factors will the court consider in deciding whether Smith's argument will prevail?

A.

B.

C.

The next question is on the following page.

29. In the space provided below, please make your best argument that Smith will lose on appeal.

Questions 30 through 33 are based on the following fact pattern:

Adam Elend, Jeff Marks, and Joe Redner attempted to protest at a political rally attended by President Bush at the University of South Florida (USF) Sun Dome. Marks and Redner held up placards, while Elend videotaped the event and distributed copies of certain Supreme Court decisions pertaining to the First Amendment. Elend, Marks and Redner began their protesting efforts on a median adjacent to a parking lot on the USF campus, approximately 150 feet from the nearest Sun Dome entrance and 30 feet from event attendees who were waiting in line. Soon after the commencement of this activity, USF police officers told Elend, Marks and Redner that they would have to stand in the "First Amendment zone," an area estimated to be one quarter of a mile away from the Sun Dome. The "First Amendment zone" was enclosed within a metal fence patrolled by law enforcement personnel, some of whom were on horseback. Elend, Marks and Redner protested that others carrying placards and signs indicating support of President George Bush or Governor Jeb Bush were not asked to move to the "First Amendment zone."

Elend, Marks and Redner explained to USF officers their belief that the creation of such a zone unconstitutionally restricted their freedom of speech. At that point, they were approached by a purported agent of the Sun Dome who also requested they move to the "First Amendment zone." When Elend, Marks and Redner refused to relocate, Hillsborough County Sheriff's deputies arrived and threatened to arrest them for "trespass after warning." Elend, Marks and Redner remained adamant and refused to leave. After huddling and discussing the matter for several minutes, the Sheriff's deputies determined that no agent of the Sun Dome was present who had the requisite authority to provide a warning, as required by state trespass law, and Elend, Marks and Redner were allowed to continue their activities under the close watch of the Sheriff's deputies.

Invoking federal question jurisdiction, Elend, Marks and Redner commenced a lawsuit in the United States District Court. They named as defendants Sun Dome, Inc., the USF Board of Trustees, W. Ralph Basham as Director of the U.S. Secret Service, and Cal Henderson, the Sheriff of Hillsborough County in his official capacity. Elend, Marks and Redner sought declaratory relief for the allegedly unconstitutional "acts, practices, and customs" of defendants and an injunction against "any further constitutional violations." Elend, Marks and Redner vow to continue engaging in such protests in the future.

Recently, the United States Court of appeals for the 11th Circuit determined that Elend, Marks and Redner lacked both standing and ripeness to pursue their claim.

30. What are the three requirements for constitutional standing?

A. _____

B. _____

C. _____

The next question is on the following page.

31. In the space below, please explain why Elend, Marks and Redner lack constitutional standing.

32. In the space below, please briefly describe the requirements of ripeness.

The next question is on the following page.

33. In the space below, please explain why Elend’s, Marks’s and Redner’s action is not ripe.

Questions 34 through 39 are based on the following fact pattern:

In August 2002, Gregory Hampel and Edmund Swaya, a same-gender couple who reside in Washington State, adopted Baby V in proceedings conducted the Superior Court of King County, Washington. As part of the adoption proceedings, Hampel and Swaya agreed to bring Baby V back to Oklahoma to visit her birth family. Because Baby V was born in Oklahoma, Hampel and Swaya sought to obtain a supplementary birth certificate Baby V that identified both of them as Baby V’s parents. In July 2003, the Oklahoma Department of Health issued a replacement birth certificate for Baby V, identifying Hampel as her only parent. Hampel and Swaya contested the result, and the Oklahoma Commissioner of Health sought an opinion from the Oklahoma Attorney General. The Attorney General issued an opinion stating that the Full Faith and Credit Clause of the United States Constitution required full recognition of the out-of-state adoption order, and that the Department of Health should issue a birth certificate listing both Hampel and Swaya as Baby V’s parents. On April 6, 2004, the Oklahoma Department of Health issued a replacement birth certificate for Baby V which listed both Hampel and Swaya as parents. In response to the Attorney General’s opinion regarding Baby V’s adoption, and subsequent issuance of a replacement birth certificate to Hampel and Swaya, the Oklahoma State Legislature amended § 7502-1.4(A) of its adoption code by adding the italicized sentence at the end of that provision:

The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. *Except that, this state, any of its agencies, or any court of this state shall not*

recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

Since enactment of the Amendment, the Director of the Oklahoma Department of Health has specifically stated in press releases, and in comments made to newspaper, television and radio reporters, that he would initiate proceedings to take physical custody of Baby V from Hampel and Swaya if they were to bring her back to the state. Hampel and Swaya thus have not returned to Oklahoma and have failed to honor their agreement with Baby V's birth mother to bring Baby V to Oklahoma for visits with her extended family. Hampel and Swaya further assert that they would like to move to Oklahoma to allow Baby V to see her birth mother's family regularly, but are afraid to do so.

Hampel and Swaya, in their individual capacities and as legal representatives of Baby V, have commenced an action challenging the 2004 amendment in the federal district court. They allege that, because as a practical matter the only same-gender couples who adopt children are homosexual couples, the amendment discriminates on the basis of sexual orientation. They also allege that the Oklahoma amendment discriminates against non-marital/illegitimate children who were adopted by same-gender couples in other states. Their explanation is somewhat complex: (1) the vast majority of adopted children are non-marital/illegitimate, (2) children who are adopted by same-gender parents in other states are so adopted through no fault of their own, (3) children adopted in states that permit same-gender parents receive the benefit of two parents until they arrive in Oklahoma, (3) despite having two parents, Oklahoma adoption law now will recognize only one of the parents of each such adopted child, (4) Oklahoma law thus treats two-parent children as one-parent children, a status substantially similar to that of non-marital/illegitimate children, and (5) upon moving to Oklahoma, such children will be stripped of one parent and deprived of benefits that two-parent children have such as the right to recover for the wrongful death of one of the parents, the right to support from one of the parents if the parents split, and the right to inherit from one of the parents.

34. What provision of the Constitution governs the claims of discrimination raised by Hampel and Swaya?

35. What three categories or classifications must one consider when applying the constitutional provision identified in your answer to Question 34?

A. _____

B. _____

C. _____

36. First, let's focus on the claim of Hampel and Swaya that Oklahoma discriminated against them on the basis of their sexual orientation. Which one of the categories/classifications that you identified in your answer to the prior question applies to the facts presented?

37. What will the result be of applying the category/classification identified in your answer to Question 36? Explain your conclusion.

38. Now, let's focus on the claim that Oklahoma discriminated against Baby V. on the basis of her non-marital/illegitimacy status. Assuming that the court accepts that characterization of the classification, which one of the categories/classifications that you identified in your answer to Question 35 applies to the facts presented?

The next question is on the following page.

39. What will the result be of applying the category/classification identified in your answer to Question 38? Explain your conclusion.

Questions 40 through 42 are based on the following fact pattern:

By federal statute, Congress authorized the Federal Aviation Administration (FAA) to provide airport improvement grants to state, county and local governments. Specifically, Congress established the Airport and Airway Trust Fund from which the Secretary of Transportation may make project grants "[t]o maintain a safe and efficient nationwide system of public-use airports that meets the present and future needs of civil aeronautics."

In 1994, the Monkey Island Development Authority (MIDA) in Delaware County, Oklahoma applied for a grant from the FAA to acquire land for the Grand Lake Regional Airport (the Airport). The FAA approved MIDA's request for a grant of \$300,000, but required the County to sign the grant agreement as a sponsor before any funds would be disbursed, and also attached conditions to the grant. The grant conditions restricted alienability of any property purchased with the funding, as follows:

Neither the sponsor nor the authority will sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under the Airport and Airway Improvement Act of 1982 to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor and/or authority shall insert in the contract or document transferring or disposing of the sponsor's

interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.

If the land was no longer used for airport purposes, the grant agreements imposed the following condition on the sponsors:

For land purchased under a grant for airport development purposes (other than noise compatibility), it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary an amount equal to the United States' proportionate share of the fair market value of the land. That portion of the proceeds of such disposition which is proportionate to the United States' share of the cost of acquisition of such land will, (a) upon application to the Secretary, be reinvested in another eligible airport improvement project or projects approved by the Secretary at that airport or within the national airport system, or (b) be paid to the Secretary for deposit in the Trust Fund if no eligible project exists.

In the late 20th century and early 21st century, MIDA suffered several monetary judgments. Several creditors obtained executions on those judgments and moved to have the Airport sold to satisfy those judgments. The FAA intervened and challenged the proposed sale of the Airport on the ground that federal law restricted its alienability. The creditors have countered that Congress and the FAA lacked the constitutional authority to place restrictions the alienability of land in Delaware County, Oklahoma. As such, argue the creditors, the restraints on alienability are unenforceable.

40. If the FAA prevails on its contention of adequate constitutional authority, what will that constitutional authority be?

41. What three limitations apply to the Congress's power to condition the grant of funds on standards it imposes?

A. _____

B. _____

C. _____

42. In the space provided below, please make your best argument that those limitations have been satisfied.

Questions 43 through 45 are based on the following fact pattern:

In the summer of 1999, McCreary and Pulaski Counties, Kentucky (the Counties) put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. McCreary County erected the Commandments pursuant to an order of the county legislative body requiring that "the display be posted in 'a very high traffic area' of the courthouse." Pulaski County hung the Commandments in a ceremony presided over by the county's chief judge who called them "good rules to live by," and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. A pastor from a local church accompanied the chief judge at that ceremony. The pastor called the Commandments "a creed of ethics" and told the press that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In each county, the hallway display was "readily visible to ... county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, the American Civil Liberties Union of Kentucky (ACLU) sued the Counties in Federal District Court and sought a preliminary injunction against maintaining the displays, claiming that the displays violated one of the freedom of religion clauses contained in the First Amendment to the United States Constitution.

The next question is on the following page.

43. Which freedom of religion clause of the Constitution should the ACLU invoke in attempting to enjoin the display of the Ten Commandments?

44. The Supreme Court case of *Lemon v. Kurtzman* established a three-part test for use in determining whether a particular governmental action satisfies First Amendment religion strictures. Please state all three parts of that test.

A _____

B. _____

C. _____

45. In the space provided below, please make your best argument that the Counties have violated the First Amendment.

Questions 46 and 47 are based on the following fact pattern:

Robert O'Connor recently filed a complaint against the United States of America alleging that "[t]he War on Iraq which Congress by resolution gives authority to the President to wage war on Iraq is unconstitutional because waging war on Iraq is a subterfuge for the U.S. Government to wage war on its own citizens by releasing A.B.C. warfare on Americans and blaming it on Iraq." In his complaint, O'Connor asked the federal court "to declare the war on Iraq unconstitutional." He also sought an injunction requiring the United States to "cease and desist ... from waging war on Iraq."

46. The federal district court would like to dismiss the action without reaching the constitutional merits. Excluding standing and ripeness, what justiciability ground can it use to dispose of the case?

47. Please state at least two out of the four standards a federal court will apply in so deciding.

A. _____

B. _____

C. _____

D. _____

Question 48 is based on the following fact pattern:

In July 1993, Vincent Foster, Jr., deputy counsel to President Clinton, was found dead in Fort Marcy Park, located just outside Washington, D. C. The United States Park Police conducted the initial investigation and took color photographs of the death scene, including 10 pictures of Foster's body. The investigation concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion.

Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical. An associate counsel for Accuracy in Media (AIM), Favish applied under the federal Freedom of Information Act (FOIA) for Foster's death-scene photographs. After the National Park Service, which then maintained custody of the pictures, resisted disclosure, Favish filed suit on behalf of AIM in the District Court for the District of Columbia to compel production. The District Court granted summary judgment against AIM, which the Court of Appeals for the District of Columbia unanimously affirmed.

Still convinced that the Government's investigations were "grossly incomplete and untrustworthy," Favish another FOIA request in his own name, seeking, among other things, 11 pictures: 1 showing Foster's eyeglasses and 10 depicting various parts of Foster's body. Like the National Park Service, Kenneth Starr of the Office of Independent Counsel (OIC) refused the Favish's request on the ground that it interfered with the rights of Foster's surviving family.

Favish again sued to compel production, this time in the United States District Court for the Central District of California. As a preliminary matter, the District Court held that the decision of the Court of Appeals for the District of Columbia did not have collateral estoppel effect on Favish's California lawsuit brought in his personal capacity. With the exception of the picture showing Foster's eyeglasses, that court upheld OIC's claim of exemption. In doing so, the court relied on narrative descriptions of the withheld photographs without viewing the actual photographs. That narrative was not made available to Favish.

Favish has appealed the ruling of the federal district court.

48. In the space below, please make your best argument that Vincent Foster's surviving family members have a constitutional right to privacy, which they may employ to prevent public disclosure of the photographs.

Questions 49 and 50 are based on the following fact pattern:

In 1970, Congress enacted the federal Controlled Substances Act (CSA), with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic of controlled substances. The CSA creates a comprehensive regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of drugs. As part of its regulatory scheme, the CSA specifically deals with legal prescription drugs generally available by prescriptions issued by physicians.

The CSA delegates to the Attorney General the authority to add and delete specific drugs from the list of drugs regulated under the CSA. The CSA also prescribes an impeccably-detailed method by which the Attorney General can "deregister" a physician who abuses the prescription regimen. But, the CSA does not authorize the Attorney General to declare standards for legitimate or illegitimate medical practice and patient care.

The CSA unambiguously refuses to expressly preempt state law regulating controlled substances:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.

In 1994, Oregon voters enacted the Oregon Death With Dignity Act (ODWDA). The purpose of ODWDA was to enable terminally ill patients to commit self-administered suicide by prescription issued by a physician, as long as the physician does not participate beyond the issuance of the prescription. For Oregon residents to be eligible to request a prescription under ODWDA, they must receive a diagnosis from their attending physician that they have an incurable and irreversible disease that, within reasonable medical judgment, will cause death within six months. Attending physicians must also determine whether a patient has made a voluntary request, ensure a patient's choice is informed, and refer patients to counseling if they might be suffering from a psychological disorder or depression causing impaired judgment. A second "consulting" physician must examine the patient and the medical record and confirm the attending physician's conclusions. Physicians who dispense medication pursuant to ODWDA must also be registered with both the State's Board of Medical Examiners and the federal Drug Enforcement Administration (DEA). In 2004, 37 patients ended their lives by ingesting a lethal dose of medication prescribed under ODWDA. As said, Oregon physicians may dispense or issue a prescription for the requested drug used in a suicide, but may not administer it.

In 1997, some members of Congress, concerned about ODWDA, invited the Drug Enforcement Agency (DEA) to prosecute or revoke the CSA registration of Oregon physicians who assist suicide. They contended that because hastening a patient's death is not legitimate medical practice, prescribing controlled substances for that purpose violates the CSA. Attorney General Reno considered the matter and concluded that the DEA could not take the proposed action because the CSA did not authorize it to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." Legislation was then introduced to grant the explicit authority Attorney General Reno found lacking; but it failed to pass.

In 2001, John Ashcroft became Attorney General. On November 9, 2001, without consulting Oregon or anyone outside the Justice Department, the Attorney General issued an Interpretive Rule announcing his intent to restrict the use of controlled substances for physician-assisted suicide. That Interpretive Rule stated:

assisting suicide is not a “legitimate medical purpose” within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act. Such conduct by a physician registered to dispense controlled substances may “render his registration . . . inconsistent with the public interest and therefore subject to possible suspension or revocation under 21 U.S.C. 824(a)(4). The Attorney General’s conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted.

No one disputes that the Attorney General Ashcroft’s Interpretive Rule would preempt Oregon’s ODWDA regime in its entirety. The State of Oregon, joined by a physician, a pharmacist, and some terminally ill patients, all from Oregon, challenged the Interpretive Rule in federal court.

49. In the space provided below, please make your best argument that the Attorney General lacked the authority to regulate the practice of medicine, and that such power is better exercised by the individual states.

The next question is on the following page.

50. In the space provided below, please make your best argument that the Attorney General improperly exercised authority that Congress had not delegated to him.

PART TWO

ESSAY QUESTION

SUGGESTED TIME: THIRTY (30) MINUTES

PERCENTAGE OF EXAM POINTS: 15%

INSTRUCTIONS FOR PART TWO:

This part consists of one (1) short 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.

QUESTION:

As you may know, President Bush has revealed that shortly after the 9/11 attacks, he, with the approval of some Congressional leaders, authorized the National Security Agency to intercept calls made by people "with known links to Al Qaeda and related terrorist organizations." Democratic leaders in Congress acknowledge that they were informed of the President's decision to authorize the intercepts, but could not challenge it or discuss it publicly because of security concerns.

The Foreign Intelligence Surveillance Act, passed in response to the revelation that former President Nixon had used the FBI to spy on his political enemies, requires investigators to obtain a federal judicial before wiretapping U.S. citizens.

President Bush asserts that the intercepts are "critical to stopping potential terrorist attacks" and that his action in ordering the intercepts is "fully consistent with my constitutional responsibilities and authorities." Bush also explains that Congress' Joint Authorization for the Use of Military Force, passed overwhelmingly by Congress in the week following September 11, authorizes his use of the intercepts to protect the American people by thwarting potential terrorist attacks.

Please discuss the constitutional issues raised by this fact pattern.

PART TWO

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INSTRUCTIONS FOR PART TWO:

This part consists of one (1) short 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.

QUESTION:

The State of Obsequious has recently enacted a statute providing that no physician may perform an abortion unless the patient has signed an "informed consent" form stating that her attending physician advised her of: (1) the fact that she is pregnant, (2) the risks associated with the abortion procedure contemplated, and (3) the alternatives to abortion. In addition, the statute requires the attending physician to show the prospective abortion recipient a film depicting the precise medical procedure she will undergo, which film differs depending on the length of the pregnancy. The more advanced the pregnancy, the more difficult the procedure, and the more graphic the detail of the film. Planned Parenthood of Obsequious (PPO) filed a suit against the State of Obsequious in federal district court asking the judge to enjoin enforcement of the law on the grounds that it violates the Substantive Due Process clause of the United States Constitution.

Please discuss the constitutional issues raised by this fact pattern.

END OF EXAM

HAVE A HAPPY HOLIDAY!

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

Fall 2006 Semester

ANSWERS AND EXPLANATIONS FOR PART ONE

Questions 1 through 5 are based on the following fact pattern:

Andrea Ogrey (Ogrey) recently filed a *pro se* complaint (one filed directly by the plaintiff without the aid of an attorney) against the State of Texas in federal district court alleging that Texas violated her constitutional rights by suspending her driver's license because she was unable to pay a \$260 a year surcharge, and thus maintain her required automobile insurance, as a result of two moving violation tickets in a 36-month period. Ogrey did pay the fines associated with the tickets, but claims she has been unable to maintain her automobile insurance because of the surcharge. Texas has refused to reinstate Ogrey's driver's license unless she reinstates her automobile insurance and agrees to submit herself to regular monitoring of her maintenance of automobile insurance for a period of two years. Ogrey argues that Texas has deprived her of liberty and/or property without due process of law and has discriminated against her on the basis of her economic status (indegency).

1. Texas is contemplating a motion to dismiss Ogrey's complaint for failure to state a claim upon which relief may be granted. What issue that we studied this semester should Texas raise in claiming that the court should dismiss the complaint without reaching the substance of her due process and discrimination claims?

Eleventh Amendment Immunity

2. Should Texas prevail in its attempt to have the complaint dismissed? (Please circle the correct answer.)

YES

NO

3. In the space provided below, please explain the reasoning of your answer to Question 2.

The Eleventh Amendment confers immunity upon a state from a suit brought against it by a person or one of its citizens. Ogrey is a person and a citizen of Texas. None of the exceptions to Eleventh Amendment immunity seem to apply: (1) Texas has not unmistakably waived its right not to be sued by a citizen; (2) Ogrey is not suing Texas officials in their individual capacity; (3) There is no exception under § 5 of the 14th Amendment because the subject matter of Ogrey's suit is not one of heightened scrutiny historically invoking 14th Amendment intervention, such as racial or gender discrimination. Discrimination of the basis of

economic status does not call for heightened scrutiny. It thus appears that Texas is immune.

4. Would Texas's chances of prevailing on its motion to dismiss be enhanced or diminished if Ogrey's complaint had alleged that Texas engaged in disparate treatment against her on the basis of her race? (Please circle the correct answer.)

ENHANCED

DIMINISHED

5. In the space provided below, please explain the reasoning of your answer to Question 4.

Racial discrimination is one of the actions historically receiving heightened scrutiny under § 5 of the 14th Amendment. The exception listed as # 3 above would appear to apply.

Questions 6 and 7 are based on the following fact pattern:

Chatham County, in Georgia, owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River. On October 6, 2002, James Ludwig requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned and a portion of it fell onto Ludwig's boat. As a result, Ludwig suffered \$130,000 in damages. Ludwig submitted a claim for those damages to his insurer, which paid out in accordance with the terms of the insurance policy. The insurer then sought to recover its costs by filing suit in admiralty against Chatham County in the federal district court. Chatham County has moved to dismiss, claiming that it is immune under the Eleventh Amendment.

6. Should Chatham County's motion to dismiss be allowed? (Please circle the correct answer.)

YES

NO

7. In the space provided below, please explain the reasoning of your answer to Question 6.

Eleventh Amendment immunity applies to states, but not to political subdivisions of states such as counties and municipalities. Chatham County is thus not immune.

Questions 8 and 9 are based on the following fact pattern:

Please consider and compare the following two situations involving the claim of executive privilege. One of the situations actually occurred; the other, although partially based on fact, is essentially fictional. For the purposes of this exam, however, you should treat it as if it actually occurred:

- A. While investigating whether any crimes occurred as a result of an extra-marital sexual affair between Bill Clinton, the President of the United States, and, Monica Lewinsky, an intern, Independent Counsel Kenneth Starr called some Secret Service Agents to testify before the grand jury. The questions asked of the agents required them to disclose their

observations of the President and Ms. Lewinsky while in the White House at various times. The agents refused to testify, claiming executive privilege. Independent Counsel moved to compel the testimony of the Secret Service Agents, and Robert Rubin, Secretary of the Treasury (the cabinet officer who oversees the Secret Service), again invoked executive privilege.

- B. In 2002, President Bush issued an executive order authorizing the National Security Agency to track and intercept international telephone and/or email exchanges coming into, or going out of, the United States when it believed that one of the parties had direct or indirect ties with al Qaeda. The President has claimed executive authority to conduct the warrantless wiretaps as part of the war on terror, but some people claim that he violated the Federal Surveillance Act of 1978, and is criminally liable, for failing to eventually obtain court approval of the wiretaps. In 2003, Derwood Schmaltz was appointed as Independent Counsel under the Independent Counsel Reauthorization Act of 1994 and the Ethics in Government Act of 1978 to investigate whether "the President, or any of his cabinet members and sub-cabinet members violated the Federal Surveillance Act of 1978 or related federal laws." Schmaltz subpoenaed all records of the President regarding the meetings that occurred with his cabinet members in the period prior to his authorization of the warrantless wiretaps. The President has refused to produce those documents under claim of executive privilege.
8. In which of the two above-stated situations would be President's claim of executive privilege be MORE LIKELY to be upheld? (Please circle the correct answer.)

A

B

9. In the space provided below, please explain the reasoning of your answer to Question 8.

Either or both of the following would be correct:

- 1. *U.S. v. Nixon* instructs that a balancing test should be conducted (balance the undeniable need of confidentiality accompanying the executive process against the need for the evidence in a criminal investigation against the President). "National security" is the President's best card in tipping the balance, and it is much more likely that such a card can be successfully played in "B" than in "A."**
- 2. The evidence sought in "A" is more precisely identified than in "B." Since the Independent Counsel in "B" is really on a fishing expedition, it would be easier for the President's attorney to argue that the "precise identification" requirements articulated in *U.S. v. Nixon* and *Cheney v. U.S. District Court* can be satisfied.**

Questions 10 and 11 are based on the following fact pattern:

On June 10, 2000, while attending Holy Cross Camp in Goshen, Massachusetts, Harold Brunault (Brunault) applied a liquid product manufactured by S.C. Johnson, Inc. (Johnson) to his legs, arms, and head for the purpose of attempting to repel mosquitoes. As a result of applying

the product to his body, Brunault suffered severe skin irritation, chemical burns, internal organ damage, and was hospitalized for a lengthy period of time.

Johnson distributed the product with labeling approved by the United States Environmental Protection Agency (EPA) and the product is a registered pesticide product under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). FIFRA is a comprehensive regulatory statute governing the labeling, sale, and use of pesticides. The statute defines "labeling" broadly to include the pesticide's "label" and also "all other written, printed, or graphic matter ... accompanying the pesticide ... at any time." Every pesticide sold in the United States must be registered under FIFRA and distributed with product labeling approved by the Environmental Protection Agency (the EPA). Labeling must contain warnings, precautionary statements, and directions for use which are "adequate to protect health and the environment." Under FIFRA, the EPA determines what language appears on the labels of pesticide products, including the specific hazard warnings or other precautionary statements.

Brunault sued Johnson, alleging that Johnson failed to provide a warning that the product contained a skin irritant which would make a person aware that application to the skin is harmful. Finally, Brunault's complaint alleged that, although the product was not intended for personal use, its advertising, coloring, packaging, and labeling was similar to another Johnson product that was designed to be applied to human skin.

Johnson moved for summary judgment asserting that its labeling satisfied FIFRA's warning and precautionary requirements, and that Brunault's suit thus was preempted by federal law.

10. There are three types of preemption. Please list them.

**Express
Conflict
Field**

11. Two of the three types of preemption you listed in your answer to Question 10 are classified as "implied" preemption. For each type, please state whether it applies to preempt Brunault's suit, and the reasons supporting your conclusion.

- A. Conflict Preemption takes one of two forms: (1) where compliance with both the federal and state law is impossible, and (2) even though it is technically possible to comply with both the federal and state law, compliance with the state law would serve as an obstacle for the federal law to achieve its full purpose and objectives. It seems that both would apply. The facts state that Johnson complied with FIFRA; therefore, if Brunault were to prevail on his state-action claims, it would be impossible to comply with both federal and state law. Furthermore, even if there could be compliance with both, it appears that a state action verdict to the effect that the labeling was improper would serve as an obstacle of FIFRA to achieve its purpose of controlling labeling.**
- B. There is an excellent argument that Congress enacted FIFRA, "a comprehensive regulatory statute," with the purpose of creating an**

extensive and pervasive law intended to occupy the entire field of regulation of pesticides.

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

On March 5, 1991, William Marley, a member of the Enterprise Fire Company, a volunteer fire company in the Borough of Hatboro, Pennsylvania, set fire to and destroyed plaintiff John D. Mark's automobile repair business. Enterprise is a private association of volunteers which has served the Borough of Hatboro since 1890. In its day-to-day operations, Enterprise essentially acts autonomously; it owns the fire station and the fire-fighting equipment, elects its own officers, prepares its own budget and maintains its own recruitment and training practices. However, on September 28, 1987, Enterprise signed an agreement with the Borough, agreeing to provide fire protection services to the Borough in return for the latter's imposition of a fire tax. The Borough insures Enterprise's equipment, and the fire tax funds Enterprise's operations and expenditures.

On December 23, 1992, Mark filed a complaint seeking to recover his losses against the Borough, several Borough officials, and Enterprise in the United States District Court for the Eastern District of Pennsylvania. His complaint alleged that Enterprise's and the Borough's failure to follow adequate policies to ensure that applicants to the fire department were screened sufficiently for tendencies towards arson caused the damage to his property. Mark claimed that this duty to screen is compelled constitutionally under the due process clause, and that the danger of volunteer firefighters committing arson is so grave and so obvious that the defendants' failure to follow such a policy evinced willful disregard for the rights of individuals with whom the firefighters came in contact. Mark further alleged that if Enterprise had a policy of psychologically screening applicants or of training its firemen to spot potential arsonists, it would have discovered that Marley was unfit to serve as a volunteer firefighter and it never would have admitted him into membership, so that Marley would not have started the fire. Mark claimed relief pursuant to the federal civil rights law – 42 U.S.C. § 1983 – and under state law.

12. Enterprise would like to seek to dismiss the case on summary judgment without reaching the merits of the constitutional claims. What would be Enterprise's best argument that Mark's case should be dismissed without reaching the merits of constitutional law?

That, as a private actor who has not engaged in "state action," it is not liable for constitutional deprivations or violations.

13. List at least **two** of the four exceptions to the doctrine you listed in your answer to Question 12. (We are nevertheless providing space for all three exceptions.)

- (A) the private entity is engaged in a traditionally public function**
- (B) the otherwise private conduct is "entwined" with that of government**
- (C) the otherwise private conduct is encouraged or coerced by a government; and**
- (D) there is joint action between the government and the private actor in regard to the complained-of conduct.**

14. Please make your best argument that any one of these exceptions applies and makes Enterprise liable.

The signing of the agreement between the Borough and Enterprise, the collection of taxes used to support Enterprise and the fact that fire protection is historically provided exclusively by municipalities supports all four of the exceptions.

Questions 15 through 17 are based on the following fact pattern:

Like many other States, Michigan regulates the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers. The three-tier scheme is preserved by a complex set of overlapping state and federal regulations. For example, both state and federal laws limit vertical integration between tiers. Michigan's three-tier system is, in broad terms, mandated only for sales from out-of-state wineries. While out-of-state wineries must sell to wholesalers who, in turn, sell to retailers, in-state wineries, can obtain a license to sell directly to consumers (without going through the wholesaler-retailer loop).

This substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business. From 1994 to 1999, consumer spending on direct wine shipments doubled, reaching \$500 million per year, or three percent of all wine sales. The expansion has been influenced by several related trends. First, the number of small wineries in the United States has significantly increased. At the same time, the wholesale market has consolidated. Between 1984 and 2002, the number of licensed wholesalers dropped from 1,600 to 600. The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel. Wine producers can sell their wine more cheaply when they do it directly to consumers than when they must go through the three-tier system.

A number of small wineries have challenged Michigan's scheme that allows in-state, but not out-of-state, wineries to sell directly to consumers.

15. What issue that we studied this semester presents the wineries' best argument that Michigan's scheme is unconstitutional?

Dormant Commerce Clause (Negative Commerce Clause)

16. Under the issue identified above, please state the standard of review that a court is likely to employ in considering the Michigan scheme.

Strict Scrutiny

17. In the space provided below, please state whether the wineries will prevail in overturning the Michigan scheme, and the reasons supporting your conclusion.

The wineries should win. This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Systems Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 114 S. Ct. 1345. Laws such as those at issue contradict the principles underlying this rule by depriving citizens of their right to have access to other States' markets on equal terms. The Michigan system's discriminatory character is obvious. It allows in-state wineries to ship directly to consumers, subject only to a licensing requirement, but out-of-state wineries, even if licensed, must go through a wholesaler and retailer. The resulting price differential, plus the possible inability to secure a wholesaler for small shipments, can effectively bar small wineries from Michigan's market.

Questions 18 through 20 are based on the following fact pattern:

The City of Waukesha, Wisconsin (Waukesha), requires sellers of sexually explicit materials to obtain and annually renew adult business licenses. City News and Novelty, Inc. (City News), pursuant to a license first obtained in 1989, owned and operated an adult-oriented shop in downtown Waukesha. In November 1995, City News applied for a renewal of its license, then due to expire in two months. In December 1995, Waukesha's Common Council denied the application, finding that City News had violated Waukesha's ordinance by permitting minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths. Waukesha's refusal to renew City News's license was upheld in administrative proceedings and on judicial review in the state courts.

City News petitioned for certiorari to the United States Supreme Court, raising three issues of alleged judicial error: (1) the burden of persuasion had been improperly assigned to City News; (2) Waukesha's ordinance unconstitutionally accorded Waukesha officials unbridled discretion to vary punishments for ordinance violations; and (3) the constitutional requirement of prompt judicial review that must accompany an adult business licensing scheme requires a prompt judicial determination rather than simply a right to promptly file for judicial review. The Supreme Court granted certiorari on the third question only.

Two months after its certiorari petition, City News withdrew its renewal application and closed its business upon the Waukesha's grant of a license to another adult business with which City News felt it could not effectively compete. Waukesha would like to ask the Supreme Court to dismiss the case. City News desires that the case continue, and that a decision be made on the substantive constitutional issue on which certiorari was granted.

18. What ground should Waukesha raise in support of its motion to dismiss?

The fact that City News resigned its license and is no longer in business rendered its action moot.

19. Please make City News's best argument that Waukesha should not prevail in getting the case dismissed.

In most cases, "voluntary cessation" of the activity at issue does not render the judicial action moot because the party who voluntarily ceases the conduct at issue can just start it up again after the case is dismissed.

20. Please state why City News will not prevail, and the case will be dismissed.

City News is not capable of repeating conduct that caused the judicial action because it gave up its license and is no longer in business.

Questions 21 through 26 are based on the following fact pattern:

On November 6, 2002, Davken, Inc. (Davken) entered an agreement to lease a building in the City of Daytona Beach Shores (City) for five years, with the option to extend the lease for five additional years. Davken planned to open a retail fireworks store at the location and the lease specifically provided that "Tenant shall be entitled to the sole use and possession of the Premises for the purposes of running and operating a retail Fireworks Store." At the time of execution of the lease, the subject property was zoned for retail use, which allowed the use contemplated under the lease. Davken obtained all permits necessary to the conduct of a fireworks store, and invested hundreds of thousands of dollars in capital improvements prior to opening for business in May 2003.

On June 25, 2003, the City Council passed Ordinance 2003-24, regulating the sale of fireworks in the City by, among other things: (1) compelling potential purchasers of fireworks to first obtain a certificate from the City Police Department allowing such purchase (available only during weekday business hours), and (2) requiring City vendors of fireworks to mail the fireworks to customers rather than presenting them a purchaser at the time of sale. The purpose of the new Ordinance was to quell citizen complaints about noise.

The new Ordinance effectively ruined Davken's business because fireworks could be obtained without any encumbrances simply by driving a few blocks to Daytona Beach, which, being a separate municipality, was outside the jurisdiction of Ordinance 2003-24. Davken now does not make enough money from the sale of fireworks to pay its rent, and is close to going out of business. In November 2003, Davken sought a "grandfathering variance" from the ordinance, but City denied it.

You should assume that, as a matter of law, a lease is considered to be just as much a real estate interest as a fee simple ownership. Furthermore, a lease is also considered contract law. Accordingly, both real estate law and contracts law applies to leases.

Davken is in the process of drafting a complaint alleging constitutional violations.

21. Considering that a lease is both an interest in real estate and a contract, which two substantive constitutional claims immediately come to mind as ones that Davren should consider placing in its complaint?

Constitutional Claim Relating to Real Estate:

An unconstitutional taking of its property in violation of the Fifth Amendment.

Constitutional Claim Relating to Contracts:

Violation of the Contracts Clause, Art. I, § 10.

22. First, let's focus on the constitutional claim relating to real estate. Please list the three applicable categories of this claim that we discussed this semester.

- A. **Physical invasion or occupation**
- B. **Deprivation of all economically beneficial use**
- C. **Regulatory taking.**

23. Which one of those categories definitely does not apply to the facts of this question?

Physical invasion or occupation

24. Of the other two, please make your best argument that the use of one of them involves a constitutional violation (you may choose to address either of the two remaining claims.)

Either One:

Deprivation of all economically beneficial use: Davken's lease limited its only permissible use to that of selling fireworks. This use has been rendered nearly impossible by the ordinance because Davken can no longer conduct its business in a manner enabling it to stay in business. As a result, Devken has been deprived of all economically beneficial use. (Note: one might argue that there has not been a deprivation of all economically beneficial use because Davken can still sell fireworks in its store, albeit in an unprofitable fashion.)

Regulatory taking: Here, we must balance the governmental benefit of having the regulation in place against the burden on the property owner (considering his investment-backed expectations). The investment-backed expectations of Davken are substantial, and essentially come down to the availability to stay in business. For Davken's business interests, this is a matter of life and death. Conversely, while the City undeniably has an interest in protecting the peaceful enjoyment of its citizens, a little peace and quiet is not as substantial as the life-and-death effect on Devken. Further influencing the balance in favor of Devken is the fact that this Ordinance will be of very little benefit to the citizens' peace and quiet since fireworks users will merely just go a few blocks over to Daytona Beach to purchase their products, and will likely cause nearly as much, if not just as much, noise in City.

25. Now, let's focus on the constitutional claim relating to contracts. What three steps will the court take in analyzing the constitutional issue involving contracts?

This is set out in *Energy Reserves Group v. Kansas Power and Light Co.*, a case that we covered in class:

- A. Inquire whether the statute or ordinance in question in fact operates as a substantial impairment of existing contractual relationships.**
- B. Inquire whether the government has a significant and legitimate public purpose justifying the statute or ordinance.**
- C. Inquire whether the effect of the statute or ordinance on contracts is reasonable and appropriate given the public purpose behind the law.**

26. In the space provided below, please state whether Davken will prevail in its argument, and the reasons supporting your conclusion.

The conclusion doesn't matter. The student's answer will be mark correct if s/he addresses the above-referenced criteria in a rational manner. The student's answer will also be marked correct if s/he rationally describes how extremely difficult it is today to prevail against a government under a Contract Clause argument.

Questions 27 through 29 are based on the following fact pattern:

18 U.S.C § 2251(a), and act of Congress, provides:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished ... if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Another Congressional statute, 18 U.S.C § 222A(a)(5(B) provides:

Any person who ... knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer ... shall be punished....

Alvin Smith was charged with violating one count of producing child pornography in violation of 18 U.S.C § 2251(a), and one count of possessing child pornography in violation of 18 U.S.C §

222A(a)(5(B). The physical evidence used against Smith was discovered pursuant to a search warrant executed at Smith's mother's home in Tampa, Florida. The target of the investigation was his brother, who lived at the residence and was suspected of involvement in drug trafficking. During the course of the search, a narcotics dog alerted the police to a lockbox, which was subsequently identified as Smith's. Upon opening the lockbox, the police found 1,768 photographs, many of which were sexually explicit, and a number of which appeared to be of "very, very young girls" having sex with an adult male later determined to be Smith.

Investigators eventually located a girl who appeared in several of the photographs. From the dates on the photos it was determined the girl was fourteen years old at the time the pictures were taken. The girl confirmed that the photos were of her and Smith.

At Smith's trial, the girl testified that, in November 1999, Smith approached her and her boyfriend and persuaded them to allow Smith to take pictures of her in her underwear for pay. After retrieving a camera and film, Smith reserved a hotel room into which only he and the girl entered. Smith convinced her to remove all of her clothes and proceeded to take sexually suggestive pictures, some of which were particularly graphic. When Smith was finished taking pictures, he left the girl and her boyfriend with money and the hotel room. During the trial, the Government introduced several pictures from the lockbox, including the photographs of the victim, sexually explicit and suggestive photographs of other females--some of whom appeared likely to be of age--in what appeared to be the same hotel room, and photographs of Smith alone. Additionally, the Government offered testimony of several of the officers involved in the search and subsequent investigation, as well as a recording of a phone conversation between Smith and his mother about the pictures in the lockbox.

The Government did not attempt to demonstrate that the images either traveled in interstate commerce themselves or were produced with the intent that they would travel in interstate commerce. Instead, the Government provided evidence that some of the photographs were printed on Kodak paper that the developer in Florida received from New York, and that some of the pictures were processed using equipment received from California and manufactured in Japan.

At the close of the Government's case, the defense moved for judgment of acquittal, arguing that there was insufficient evidence to establish jurisdiction under the federal statutes. The court denied the motion and sent the case to the jury which convicted Smith on both counts, specifically finding that the photographs were produced using film, photo paper, and equipment that had traveled between states and/or foreign countries.

27. Smith has appealed his conviction. Given the stated facts, and the topics we covered this semester, what should Smith claim to be the reversible error?

Congress lacks authority under the Commerce Clause – Art. I, § 8 – to regulate pornography that is purely intrastate in nature.

28. What three factors will the court consider in deciding whether Smith's argument will prevail?

A. Channels of interstate commerce

- B. Instrumentalities of interstate commerce**
- C. Whether a matter substantially affects interstate commerce**

29. In the space provided below, please make your best argument that Smith will lose on appeal.

Here is an example of an explanation that would be marked correct:

Congress could rationally conclude that the cumulative effect of the conduct by Smith and his ilk would substantially affect interstate commerce. This is because, where Congress has attempted to regulate (or eliminate) an interstate market, such as pornography, unprescribed narcotics and the like, it is given substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic activity. Pornography begets pornography, and it is rational for Congress to conclude that its inability to regulate the intrastate incidence of child pornography would undermine its broader regulatory scheme designed to eliminate the market in its entirety, or that "the enforcement difficulties that attend distinguishing between purely intrastate and interstate child pornography would frustrate Congress's interest in completely eliminating the interstate market. It is well within Congress's authority to regulate directly the commercial activities constituting the interstate market for child pornography, and prohibiting the intrastate possession or manufacture of an article of commerce is a rational means of regulating commerce in that product.

Although perhaps not as strong, a rational argument employing either channels or instrumentalities could also succeed.

Questions 30 through 33 are based on the following fact pattern:

Adam Elend, Jeff Marks, and Joe Redner attempted to protest at a political rally attended by President Bush at the University of South Florida (USF) Sun Dome. Marks and Redner held up placards, while Elend videotaped the event and distributed copies of certain Supreme Court decisions pertaining to the First Amendment. Elend, Marks and Redner began their protesting efforts on a median adjacent to a parking lot on the USF campus, approximately 150 feet from the nearest Sun Dome entrance and 30 feet from event attendees who were waiting in line. Soon after the commencement of this activity, USF police officers told Elend, Marks and Redner that they would have to stand in the "First Amendment zone," an area estimated to be one quarter of a mile away from the Sun Dome. The "First Amendment zone" was enclosed within a metal fence patrolled by law enforcement personnel, some of whom were on horseback. Elend, Marks and Redner protested that others carrying placards and signs indicating support of

President George Bush or Governor Jeb Bush were not asked to move to the "First Amendment zone."

Elend, Marks and Redner explained to USF officers their belief that the creation of such a zone unconstitutionally restricted their freedom of speech. At that point, they were approached by a purported agent of the Sun Dome who also requested they move to the "First Amendment zone." When Elend, Marks and Redner refused to relocate, Hillsborough County Sheriff's deputies arrived and threatened to arrest them for "trespass after warning." Elend, Marks and Redner remained adamant and refused to leave. After huddling and discussing the matter for several minutes, the Sheriff's deputies determined that no agent of the Sun Dome was present who had the requisite authority to provide a warning, as required by state trespass law, and Elend, Marks and Redner were allowed to continue their activities under the close watch of the Sheriff's deputies.

Invoking federal question jurisdiction, Elend, Marks and Redner commenced a lawsuit in the United States District Court. They named as defendants Sun Dome, Inc., the USF Board of Trustees, W. Ralph Basham as Director of the U.S. Secret Service, and Cal Henderson, the Sheriff of Hillsborough County in his official capacity. Elend, Marks and Redner sought declaratory relief for the allegedly unconstitutional "acts, practices, and customs" of defendants and an injunction against "any further constitutional violations." Elend, Marks and Redner vow to continue engaging in such protests in the future.

Recently, the United States Court of appeals for the 11th Circuit determined that Elend, Marks and Redner lacked both standing and ripeness to pursue their claim.

30. What are the three requirements for constitutional standing?

- (A) The plaintiff must have suffered an injury in fact;
- (B) There must be a causal connection between the injury and the conduct complained of; and
- (C) It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

31. In the space below, please explain why Elend, Marks and Redner lack constitutional standing.

Addressing either of the following will suffice.

No Injury in Fact: A plaintiff is deemed to have suffered an injury in fact – "an invasion of a judicially cognizable interest"—when s/he demonstrates harm that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. The Plaintiffs' avowed intention to protest in a similar manner in the future is akin to the plaintiff in *Lujan* who declared, "I intend to go back to Sri Lanka [to observe endangered species]," but confessed that she had no current plans. The Supreme Court has held that "[s]uch 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not

support a finding of the 'actual or imminent' injury that our cases require." The entirely speculative nature of the "future protests" would render wholly advisory any prospective relief.

No Redressibility: The inchoate nature of the claim makes it impossible for a court to fashion an injunction prohibiting future conduct that accomplishes anything beyond abstractly commanding the defendants to obey the First Amendment. It is unknown what the specific circumstances of future Presidential events, and hence future protests, will be. Demanding that a party do nothing more specific than "obey the law" is impermissible. A court is unable to conduct an appropriate First Amendment analysis without knowing anything more than vague generalities about future protests.

32. In the space below, please briefly describe the requirements of ripeness.

The circumstances or status giving rise to the cause of action must have actually arisen; that is, there must be live controversy at the time the action is brought.

33. In the space below, please explain why Elend's, Marks's and Redner's action is not ripe.

Elend, Marks and Redner have not demonstrated an imminent threat of arrest or some other circumstance that would trigger a live controversy that would support a judicial action. Without specific and immediate plans for protests, their cause of action has not actually arisen.

Questions 34 through 39 are based on the following fact pattern:

In August 2002, Gregory Hampel and Edmund Swaya, a same-gender couple who reside in Washington State, adopted Baby V in proceedings conducted the Superior Court of King County, Washington. As part of the adoption proceedings, Hampel and Swaya agreed to bring Baby V back to Oklahoma to visit her birth family. Because Baby V was born in Oklahoma, Hampel and Swaya sought to obtain a supplementary birth certificate Baby V that identified both of them as Baby V's parents. In July 2003, the Oklahoma Department of Health issued a replacement birth certificate for Baby V, identifying Hampel as her only parent. Hampel and Swaya contested the result, and the Oklahoma Commissioner of Health sought an opinion from the Oklahoma Attorney General. The Attorney General issued an opinion stating that the Full Faith and Credit Clause of the United States Constitution required full recognition of the out-of-state adoption order, and that the Department of Health should issue a birth certificate listing both Hampel and Swaya as Baby V's parents. On April 6, 2004, the Oklahoma Department of Health issued a replacement birth certificate for Baby V which listed both Hampel and Swaya as parents. In response to the Attorney General's opinion regarding Baby V's adoption, and subsequent issuance of a replacement birth certificate to Hampel and Swaya, the Oklahoma State Legislature amended § 7502-1.4(A) of its adoption code by adding the italicized sentence at the end of that provision:

The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other

governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. *Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.*

Since enactment of the Amendment, the Director of the Oklahoma Department of Health has specifically stated in press releases, and in comments made to newspaper, television and radio reporters, that he would initiate proceedings to take physical custody of Baby V from Hampel and Swaya if they were to bring her back to the state. Hampel and Swaya thus have not returned to Oklahoma and have failed to honor their agreement with Baby V's birth mother to bring Baby V to Oklahoma for visits with her extended family. Hampel and Swaya further assert that they would like to move to Oklahoma to allow Baby V to see her birth mother's family regularly, but are afraid to do so.

Hampel and Swaya, in their individual capacities and as legal representatives of Baby V, have commenced an action challenging the 2004 amendment in the federal district court. They allege that, because as a practical matter the only same-gender couples who adopt children are homosexual couples, the amendment discriminates on the basis of sexual orientation. They also allege that the Oklahoma amendment discriminates against non-marital/illegitimate children who were adopted by same-gender couples in other states. Their explanation is somewhat complex: (1) the vast majority of adopted children are non-marital/illegitimate, (2) children who are adopted by same-gender parents in other states are so adopted through no fault of their own, (3) children adopted in states that permit same-gender parents receive the benefit of two parents until they arrive in Oklahoma, (3) despite having two parents, Oklahoma adoption law now will recognize only one of the parents of each such adopted child, (4) Oklahoma law thus treats two-parent children as one-parent children, a status substantially similar to that of non-marital/illegitimate children, and (5) upon moving to Oklahoma, such children will be stripped of one parent and deprived of benefits that two-parent children have such as the right to recover for the wrongful death of one of the parents, the right to support from one of the parents if the parents split, and the right to inherit from one of the parents.

34. What provision of the Constitution governs the claims of discrimination raised by Hampel and Swaya?

Equal Protection clause of the 14th Amendment

35. What three categories or classifications must one consider when applying the constitutional provision identified in your answer to Question 34?

A. Strict Scrutiny (We would also accept "compelling state interest," or the like)

B. Intermediate Scrutiny (We would also accept "important government interest," or the like)

C. Rational basis (We would also accept "deferential," or the like)

36. First, let's focus on the claim of Hampel and Swaya that Oklahoma discriminated against them on the basis of their sexual orientation. Which one of the categories/classifications that you identified in your answer to the prior question applies to the facts presented?

Rational basis (We would also accept "deferential," or the like)

37. What will the result be of applying the category/classification identified in your answer to Question 36? Explain your conclusion.

Under rational basis, it is extremely likely that Oklahoma will win. The burden of proof will rest with the plaintiffs to prove discrimination, and the court will accord Oklahoma great deference in accepting any "conceivable" rational justification of the law. Courts will even accept such explanations as administrative convenience in upholding statutes under rational basis review.

Note: we will also accept as a correct answer that the plaintiffs will win under an invocation of *Romer v. Evans*, which also involved a classification based on sexual orientation. There, although the Supreme Court employed a rational basis standard, it found that the "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

38. Now, let's focus on the claim that Oklahoma discriminated against Baby V. on the basis of her non-marital/illegitimacy status. Assuming that the court accepts that characterization of the classification, which one of the categories/classifications that you identified in your answer to Question 35 applies to the facts presented?

Intermediate Scrutiny (We would also accept "important government interest," or the like)

39. What will the result be of applying the category/classification identified in your answer to Question 38? Explain your conclusion.

Under intermediate scrutiny, it is likely that Baby V should win. The burden of proof is on Oklahoma to justify the statute with an actual (not conceivable") important state interest. The court will not apply a standard of deference. Oklahoma will likely assert that the purpose of the statute is to preserve traditional family values. But, that argument should fail that the effect of the statute is merely to convert two-parent, single-gender-parent families into one-parent, one-gender parent families.

Questions 40 through 42 are based on the following fact pattern:

By federal statute, Congress authorized the Federal Aviation Administration (FAA) to provide airport improvement grants to state, county and local governments. Specifically, Congress established the Airport and Airway Trust Fund from which the Secretary of Transportation may

make project grants "[t]o maintain a safe and efficient nationwide system of public-use airports that meets the present and future needs of civil aeronautics."

In 1994, the Monkey Island Development Authority (MIDA) in Delaware County, Oklahoma applied for a grant from the FAA to acquire land for the Grand Lake Regional Airport (the Airport). The FAA approved MIDA's request for a grant of \$300,000, but required the County to sign the grant agreement as a sponsor before any funds would be disbursed, and also attached conditions to the grant. The grant conditions restricted alienability of any property purchased with the funding, as follows:

Neither the sponsor nor the authority will sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under the Airport and Airway Improvement Act of 1982 to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor and/or authority shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.

If the land was no longer used for airport purposes, the grant agreements imposed the following condition on the sponsors:

For land purchased under a grant for airport development purposes (other than noise compatibility), it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary an amount equal to the United States' proportionate share of the fair market value of the land. That portion of the proceeds of such disposition which is proportionate to the United States' share of the cost of acquisition of such land will, (a) upon application to the Secretary, be reinvested in another eligible airport improvement project or projects approved by the Secretary at that airport or within the national airport system, or (b) be paid to the Secretary for deposit in the Trust Fund if no eligible project exists.

In the late 20th century and early 21st century, MIDA suffered several monetary judgments. Several creditors obtained executions on those judgments and moved to have the Airport sold to satisfy those judgments. The FAA intervened and challenged the proposed sale of the Airport on the ground that federal law restricted its alienability. The creditors have countered that Congress and the FAA lacked the constitutional authority to place restrictions the alienability of land in Delaware County, Oklahoma. As such, argue the creditors, the restraints on alienability are unenforceable.

40. If the FAA prevails on its contention of adequate constitutional authority, what will that constitutional authority be?

Tax and Spend (or just the spending power in this case)

41. What three limitations apply to the Congress's power to condition the grant of funds on standards it imposes?

They are set forth in *South Dakota v. Dole*:

- A. The power must be exercised in pursuit of "the general welfare"
- B. The condition must be stated unambiguously
- C. Any conditions in the federal grant must be related to the particular federal interest in the program at issue

42. In the space provided below, please make your best argument that those limitations have been satisfied.

The stated goal of the grant – “[t]o maintain a safe and efficient nationwide system of public-use airports that meets the present and future needs of civil aeronautics” – is undeniably in the pursuit of the general welfare. The restrictions of inalienability are clear and unambiguous. The condition of inalienability are related to the particular federal interest of safety and efficient maintenance of a nationwide system of airports because it helps control the qualifications of airport ownership and maintenance.

Questions 43 through 45 are based on the following fact pattern:

In the summer of 1999, McCreary and Pulaski Counties, Kentucky (the Counties) put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. McCreary County erected the Commandments pursuant to an order of the county legislative body requiring that "the display be posted in 'a very high traffic area' of the courthouse." Pulaski County hung the Commandments in a ceremony presided over by the county's chief judge who called them "good rules to live by," and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. A pastor from a local church accompanied the chief judge at that ceremony. The pastor called the Commandments "a creed of ethics" and told the press that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In each county, the hallway display was "readily visible to ... county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, the American Civil Liberties Union of Kentucky (ACLU) sued the Counties in Federal District Court and sought a preliminary injunction against maintaining the displays, claiming that the displays violated one of the freedom of religion clauses contained in the First Amendment to the United States Constitution.

43. Which freedom of religion clause of the Constitution should the ACLU invoke in attempting to enjoin the display of the Ten Commandments?

The Establishment Clause

44. The Supreme Court case of *Lemon v. Kurtzman* established a three-part test for use in determining whether a particular governmental action satisfies First Amendment religion strictures. Please state all three parts of that test.

- A. The law or act must have a secular legislative purpose;**
- B. Its principal or primary effect must be one that neither advances nor inhibits religion; and**
- C. The statute must not foster "an excessive government entanglement with religion."**

45. In the space provided below, please make your best argument that the Counties have violated the First Amendment.

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. It is relatively easy to find a predominantly religious purpose in a government's posting of the Ten Commandments given their prominence as an instrument of religion. Thus, the first two prongs of Lemon are violated: the posting of the Ten Commandments does not have a secular purpose and the posting advances religion. Finally, the posting of the Ten Commandments on government property in areas of high traffic, made for the obvious purpose of allowing as many people as possible to view them, is clear excessive government entanglement with religion.

Questions 46 and 47 are based on the following fact pattern:

Robert O'Connor recently filed a complaint against the United States of America alleging that "[t]he War on Iraq which Congress by resolution gives authority to the President to wage war on Iraq is unconstitutional because waging war on Iraq is a subterfuge for the U.S. Government to wage war on its own citizens by releasing A.B.C. warfare on Americans and blaming it on Iraq." In his complaint, O'Connor asked the federal court "to declare the war on Iraq unconstitutional." He also sought an injunction requiring the United States to "cease and desist ... from waging war on Iraq."

46. The federal district court would like to dismiss the action without reaching the constitutional merits. Excluding standing and ripeness, what justiciability ground can it use to dispose of the case?

Political Question Doctrine

47. Please state at least two out of the four standards a federal court will apply in so deciding.

- A. Is there a textually demonstrable constitutional commitment of the issue to a coordinate political department; or**

- B. Is there a lack of judicially discoverable and manageable standards for resolving it; or**
- C. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or**
- D. The potential of embarrassment from multifarious pronouncements by various departments on one question.**

Question 48 is based on the following fact pattern:

In July 1993, Vincent Foster, Jr., deputy counsel to President Clinton, was found dead in Fort Marcy Park, located just outside Washington, D. C. The United States Park Police conducted the initial investigation and took color photographs of the death scene, including 10 pictures of Foster's body. The investigation concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion.

Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical. An associate counsel for Accuracy in Media (AIM), Favish applied under the federal Freedom of Information Act (FOIA) for Foster's death-scene photographs. After the National Park Service, which then maintained custody of the pictures, resisted disclosure, Favish filed suit on behalf of AIM in the District Court for the District of Columbia to compel production. The District Court granted summary judgment against AIM, which the Court of Appeals for the District of Columbia unanimously affirmed.

Still convinced that the Government's investigations were "grossly incomplete and untrustworthy," Favish another FOIA request in his own name, seeking, among other things, 11 pictures: 1 showing Foster's eyeglasses and 10 depicting various parts of Foster's body. Like the National Park Service, Kenneth Starr of the Office of Independent Counsel (OIC) refused the Favish's request on the ground that it interfered with the rights of Foster's surviving family.

Favish again sued to compel production, this time in the United States District Court for the Central District of California. As a preliminary matter, the District Court held that the decision of the Court of Appeals for the District of Columbia did not have collateral estoppel effect on Favish's California lawsuit brought in his personal capacity. With the exception of the picture showing Foster's eyeglasses, that court upheld OIC's claim of exemption. In doing so, the court relied on narrative descriptions of the withheld photographs without viewing the actual photographs. That narrative was not made available to Favish.

Favish has appealed the ruling of the federal district court.

48. In the space below, please make your best argument that Vincent Foster's surviving family members have a constitutional right to privacy, which they may employ to prevent public disclosure of the photographs.

Although there is no right to privacy explicitly stated in the Constitution, *Griswold v. Connecticut* established a right of privacy drawn from the “penumbra” of the Bill of Rights. The Supreme Court has employed the “penumbra” mechanism to extend privacy expectations to contraception (both for married and unmarried persons), abortion, the right to withhold medical treatment, and the right to be free of governmental intrusion into the bedroom. There exists a well-established cultural tradition of acknowledging a family’s control over a deceased’s body and death images. The right of privacy should therefore extend to traditional rights of family members to direct and control disposition of a deceased’s body and to limit attempts to exploit pictures of the deceased’s remains for public purposes.

Questions 49 and 50 are based on the following fact pattern:

In 1970, Congress enacted the federal Controlled Substances Act (CSA), with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic of controlled substances. The CSA creates a comprehensive regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of drugs. As part of its regulatory scheme, the CSA specifically deals with legal prescription drugs generally available by prescriptions issued by physicians.

The CSA delegates to the Attorney General the authority to add and delete specific drugs from the list of drugs regulated under the CSA. The CSA also prescribes an impeccably-detailed method by which the Attorney General can “deregister” a physician who abuses the prescription regimen. But, the CSA does not authorize the Attorney General to declare standards for legitimate or illegitimate medical practice and patient care.

The CSA unambiguously refuses to expressly preempt state law regulating controlled substances:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.

In 1994, Oregon voters enacted the Oregon Death With Dignity Act (ODWDA). The purpose of ODWDA was to enable terminally ill patients to commit self-administered suicide by prescription issued by a physician, as long as the physician does not participate beyond the issuance of the prescription. For Oregon residents to be eligible to request a prescription under ODWDA, they must receive a diagnosis from their attending physician that they have an incurable and irreversible disease that, within reasonable medical judgment, will cause death within six months. Attending physicians must also determine whether a patient has made a voluntary request, ensure a patient’s choice is informed, and refer patients to counseling if they might be suffering from a psychological disorder or depression causing impaired judgment. A second “consulting” physician must examine the patient and the medical record and confirm the attending physician’s conclusions. Physicians who dispense medication pursuant to ODWDA must also be registered with both the State’s Board of Medical Examiners and the federal Drug

Enforcement Administration (DEA). In 2004, 37 patients ended their lives by ingesting a lethal dose of medication prescribed under ODWDA. As said, Oregon physicians may dispense or issue a prescription for the requested drug used in a suicide, but may not administer it.

In 1997, some members of Congress, concerned about ODWDA, invited the Drug Enforcement Agency (DEA) to prosecute or revoke the CSA registration of Oregon physicians who assist suicide. They contended that because hastening a patient's death is not legitimate medical practice, prescribing controlled substances for that purpose violates the CSA. Attorney General Reno considered the matter and concluded that the DEA could not take the proposed action because the CSA did not authorize it to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." Legislation was then introduced to grant the explicit authority Attorney General Reno found lacking; but it failed to pass.

In 2001, John Ashcroft became Attorney General. On November 9, 2001, without consulting Oregon or anyone outside the Justice Department, the Attorney General issued an Interpretive Rule announcing his intent to restrict the use of controlled substances for physician-assisted suicide. That Interpretive Rule stated:

assisting suicide is not a "legitimate medical purpose" within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act. Such conduct by a physician registered to dispense controlled substances may "render his registration . . . inconsistent with the public interest and therefore subject to possible suspension or revocation under 21 U.S.C. 824(a)(4). The Attorney General's conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted.

No one disputes that the Attorney General Ashcroft's Interpretive Rule would preempt Oregon's ODWDA regime in its entirety. The State of Oregon, joined by a physician, a pharmacist, and some terminally ill patients, all from Oregon, challenged the Interpretive Rule in federal court.

49. In the space provided below, please make your best argument that the Attorney General lacked the authority to regulate the practice of medicine, and that such power is better exercised by the individual states.

Historically, the practice of medicine has been regulated by individual states as a valid exercise of police power under the 10th Amendment. Although Congress, and perhaps through delegation the Attorney General, have authority under the Commerce Clause to regulate prescription drugs (undoubtedly involving interstate commerce), they have refrained from treading on the every day practice of medicine. The issue involved here – a determination whether to end the life of a terminally-sick patient – involves far more than the proper regulation of the prescription of drugs. It involves the actual practice of medicine which is mainly a matter between doctor and patient, as regulated by the states.

50. In the space provided below, please make your best argument that the Attorney General improperly exercised authority that Congress had not delegated to him.

Delegation of ministerial tasks, rule making and filling in the details of policies is permitted, but Congress is not permitted to determine the policy determinations to the executive branch. In implementing the Interpretive Rule at issue, the Attorney General actually created policy, which he was not permitted to do. His action should be stuck under the non-delegation doctrine.

CONSTITUTIONAL LAW
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PART 2 (FIRST ESSAY) GRADING STANDARDS

Executive Power Under Art. 2

- Foreign Affairs
- Commander-in-Chief
- Youngstown Steel
- President Required to Follow the Law

Legislative Power Under Art. 1

- Congressional Delegation

Separation of Powers Doctrine

- Political Question Doctrine
 - Standards

CONSTITUTIONAL LAW
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PART 3 (SECOND ESSAY) GRADING STANDARDS

Privacy – Fundamental Rights

- Penumbra

Roe v. Wade

- balancing rights of woman vs. state (protect potential life)
- sliding test as pregnancy advances
- viability

Casey – Undue Burden

Standing

- Third-party injury
- Special relationship