



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

Fall 2007 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.

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

This exam is a little bit shorter than last year's; there are 42 Directed Essay questions and one Essay question. You will have a total of three hours to complete the exam.

Please take two (2) blue books. Please write "Scrap" on one of the blue books. Please write "Two" on the other two blue book. Please write your social security number *on both* 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 two parts:

Part One – Directed Essays consists of 10 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 42 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) essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to six (6) single-spaced bluebook pages. The suggested time for Part Two is one hour (60 minutes).

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

You have three hours (180 minutes) to complete the exam.

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

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

GOOD LUCK!

QUESTIONS

PART ONE

DIRECTED ESSAYS

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

INSTRUCTIONS FOR PART ONE:

This part consists of 10 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 42 questions, and you are to answer them all.

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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:

In 1961, the city of St. Bernard, Ohio (the City) established, by Ordinance No. 4-1961, a no-cost enrollment in the City's health care program for qualified employees. In order to qualify for the program, employees had to have completed five years of service and be eligible to retire under one of two state pension programs: the state police and fire program, or the public employees' retirement system ("PERS"). From the inception, the City reimbursed PERS participants for the cost of premiums, while the state police and fire program had no premiums. These no-cost medical insurance coverage were hard-fought through sometimes-contentious negotiations.

In January 1985, the City learned that its insurance coverage overlapped with state pension medical insurance programs, and therefore that it could save approximately \$130,000.00, by repealing all overlapping coverage. The City therefore enacted an Ordinance authorizing the Auditor "to discontinue any medical coverage where there is coverage provided by the State of Ohio pension funds and systems."

In June 1985, the City passed Ordinance No. 24, 1985, noting in the preamble its previous action in terminating overlapping coverage, and directing the Mayor to execute a trust fund in accordance with Section 501(c)(9) of the Internal Revenue Code (the "C-9" Trust). The purpose of the fund, on its face, was to reimburse qualified City retirees for the cost of physical exams and prescription drugs not paid for by the state insurance plan. Some City employees, however, believed that the 1985 Ordinances were illegal extensions of retroactive benefits to already-retired employees. In 1985 the City also passed Ordinance 25, 1985, to ensure premium reimbursement for service department employees retiring under PERS.

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In 1992, the state police and fire-fighter health insurance changed such that retired police officers and firefighters had to start paying a premium, similar to that which service employees had been paying under the PERS system. The City passed Ordinance No. 49-1992, granting retroactive reimbursement to qualified city police and fire-fighter retirees who had retired prior to July 1, 1992.

In April 2003, the City Council requested the Law Director to investigate the legality of the retirement benefits provided to the retirees of the City. The Law Director concluded that he could find no statutory basis, express or implied, that would permit the City to expend public funds for either the C-9 Trust benefit or the premium reimbursement benefit. On May 5, 2003, the City informed the Trustees of the C-9 Trust Fund that the City would not issue further funds for the C-9 Trust benefit or the premium reimbursement benefit. No retiree was given any notice, any opportunity to respond or opportunity to offer any rebuttal.

A group of retirees who have lost their C-9 Trust benefits are drafting a complaint claiming that their vested benefits established under the collective bargaining contract have been unconstitutionally abrogated.

1. Leaving any procedural due process claims aside for the moment, which constitutional cause of action first comes to mind as one the plaintiffs should include in their complaint?

Go onto the next page for the next question.

2. What three steps will the court take in analyzing the constitutional of interference with the collective bargaining contracts?

A. _____

B. _____

C. _____

3. In the space provided below, please state whether the plaintiffs will prevail in their argument, and the reasons supporting your conclusion.

4. Now to the procedural due process cause of action. What analysis will you employ to determine whether the plaintiffs lost an "entitlement" and thus were due notice and a hearing before termination of the retirement benefits?

5. What analysis will you employ in determining how much process is due; that is, whether they are entitled to something close to the process of a full trial or something much less?

Questions 6 through 8 are based on the following fact pattern:

On November 5, 2001, Connecticut residents engaged in the lobstering trade, including Vivian Volovar, received a notice that the New York Department of Environmental Conservation ("NYDEC") had adopted emergency regulations, which took effect on November 5, 2001. The notice indicated that the emergency regulations creating the Fishers Island Special Management Area ("FISMA"), a special management area around Fishers Island, with restrictions on commercial lobstering operations.

The regulations that the Connecticut lobsterers found troublesome stated: ". . . any person commercially fishing lobster pots within FISMA must obtain a special permit to do so, and must not take lobsters from any other waters; . . ." According to the emergency regulations, this special requirement would be enforced as follows: ". . . requirement that all FISMA permit holders fish for lobster only in the FISMA area, and that they fish no more than 300 lobster pots or their current allocation, whichever is less -- enforceable as of December 15, 2001; . . ." The regulations also required that "all persons who currently fish pot gear within the boundaries of FISMA must either obtain the FISMA permit or remove their gear from the area by December

15, 2001. Persons who obtain FISMA permits must comply with all requirements of the emergency rule, including removing all gear set in other waters, by January 1, 2002." Finally, under these regulations, "in 2001, FISMA permits are available to any holder of a N.Y. State Resident or Non-Resident Commercial Lobster Permit[,] in 2002 and thereafter, FISMA permits will only be available to persons who held them during the preceding year." Therefore, unless Ms. Volovar and the other Connecticut lobsterers elected to obtain a FISMA permit, and thereby surrender their right to lobster in all other waters, by December 31, 2001, they would be forever barred from lobstering in the FISMA.

As stated in the regulations, the purpose of the FISMA was "to protect the reef's lobster population from degradation due to increased fishing pressure, and to maintain the balance that has historically existed among the commercial lobster fishery, the lobster population and the reef community."

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.

6. What issue that we studied this semester presents the Connecticut lobsterers' best argument that New York's scheme is unconstitutional?

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

8. In the space provided below, please state whether the Connecticut lobsterers will prevail in overturning the New York scheme, and the reasons supporting your conclusion.

Questions 9 through 15 are based on the following fact pattern:

The profession of psychology has been regulated in California since 1958, when the Legislature enacted the Psychology Certification Act, which "served only to protect the title 'psychologist,' " but did not define the practice of psychology. In 1967, the California Legislature enacted the Psychology Licensing Law, which "recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology." That law includes a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology."

The California Business and Professions Code defines a "psychologist" as a person so representing himself or herself "to the public by any title or description," including "psychoanalysis" and "psychoanalyst." The practice of psychology in California requires a license and is defined as rendering any psychological service to the public "for a fee." To qualify for a license to practice psychology in California, an applicant must possess a doctorate, or a degree deemed equivalent, in psychology or a related field such as education psychology. An applicant must have at least two years of supervised professional experience under the direction of a licensed psychologist. In addition, an applicant must pass the Board's examination, complete training in substance dependency, and fulfill course-work requirements in partner abuse and human sexuality. Any violation of the laws regulating psychologists can be punished as a misdemeanor.

Section 2529 of the Business and Professions Code, relating to research psychoanalysts, is the only part of the statute that specifically addresses the qualifications of psychoanalysts. Under § 2529, graduates of four, specific California psychoanalytic institutes, or institutes deemed equivalent, "may engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts...." Under the regulations, a "research psychoanalyst" may render psychoanalytic services for a fee for only a third (or less) of his or her professional time. If they register with the state, students and graduates also "may engage in psychoanalysis under supervision, provided" that they do not imply in any way that they are licensed to practice psychology. "Physicians and surgeons, psychologists, clinical social workers, and marriage, family and child counselors, licensed in this state" need not so register to engage in psychoanalysis.

The licensing laws do not prevent "qualified members of other recognized professional groups," including physicians, clinical social workers, family and child counselors, attorneys and ordained members of recognized clergy, from doing work of a psychological nature consistent with the laws governing their respective professions, provided that they do not hold themselves out to the public as psychologists or use terms that imply they are licensed to practice psychology.

A group of psychoanalysts challenged the constitutionality of the California licensing scheme in federal court, asserting that it prohibits them from practicing psychoanalysis in California. They contend that: (a) it is irrational to require professionals who already are trained in psychoanalysis to obtain additional training in order to qualify for a license; (b) the licensing arbitrarily exempts research psychoanalysts from its requirements; (c) the licensing scheme is unnecessary and ineffective; and (d) the licensing scheme is more stringent than similar schemes regulating other counseling professions.

9. Aside from equal protection, what constitutional claim, also arising from the 14th Amendment, will the psychoanalysts likely raise in asserting that the California scheme is unconstitutional?

10. What standard will the court apply in considering that claim?

11. In the space provided below, please state whether the psychoanalysts will prevail in this argument, and the reasons supporting your conclusion.

12. Now, on to the equal protection claim. What three categories or classifications must one consider when analyzing the equal protection clause?

A.

B.

C.

13. Which one applies here?

14. Who will bear the burden of proof in the case?

15. In the space provided below, please state whether the psychoanalysts will prevail in this argument, and the reasons supporting your conclusion.

Questions 16 through 21 are based on the following fact pattern:

Since 1977, Florida's adoption law has contained a codified prohibition on adoption by any "homosexual" person. For purposes of this statute, Florida courts have defined the term "homosexual" as being "limited to applicants who are known to engage in current, voluntary homosexual activity," thus drawing "a distinction between homosexual orientation and homosexual activity." During the past thirty years, several legislative bills have attempted to repeal the statute, but to date, no attempt to overturn the provision has succeeded.

A lesbian couple living in Florida, and seeking to challenge the provision, are working with an attorney to draft a complaint seeking a judicial renunciation of the law.

16. Aside from equal protection, what constitutional claim, also arising from the 14th Amendment, will the couple likely raise in asserting that the Florida adoption scheme is unconstitutional?

Go onto the next page for the next question.

17. What standard will the court apply in considering that claim?

18. In the space provided below, please state whether the couple will prevail in this argument, and the reasons supporting your conclusion.

19. Now on to the equal protection claim. Which classification applies to this claim that the Florida adoption scheme discriminates against homosexual couples looking to adopt?

20. Who will bear the burden of proof in the case?

21. In the space provided below, please state whether the couple will prevail in their discrimination argument, and the reasons supporting your conclusion.

Questions 22 through 24 are based on the following fact pattern:

The Coast Guard Court of Criminal Appeals is an intermediate court within the military justice system. It is one of four military Courts of Criminal Appeals; others exist for the Army, the Air Force, and the Navy-Marine Corps. The Coast Guard Court of Criminal Appeals hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces. Appellate military judges who are assigned to a Court of Criminal Appeals must be members of the bar, but may be commissioned officers or civilians. Currently, the Coast Guard Court of Criminal Appeals has had two civilian members. These judges were originally assigned to serve on the court by the General Counsel of the Department of Transportation, who is, ex officio, the Judge Advocate General of the Coast Guard. The Secretary of Transportation played no role in the appointments, and no hearings were held in Congress.

Anticipating problems with these appointments, the Chief Judge of the Coast Guard Court of Military Review sent a memorandum to the Chief Counsel of the Coast Guard requesting that the Secretary of Transportation, in his capacity as a department head, reappoint the judges so the court would be constitutionally valid beyond any doubt. On January 15, 1993, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own." The memorandum then listed the names of "those judges presently assigned and appointed by me," including the two civilian judges.

Several Coast Guard servicemen who were convicted in courts-martial have challenged their convictions on the ground that the two civilian judges hearing their cases were not properly appointed.

22. What steps are required in the Appointments Clause contained in the Constitution?

23. To what appointments does the Appointments Clause apply?

Go onto the next page for the next question.

24. In the space provided below, please apply these standards and state whether appointments were valid, as well as the reasons supporting your conclusion.

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

The 1990 census resulted in a 30-seat congressional delegation for Texas, an increase of 3 seats over the 27 representatives allotted to the State in the decade before. In 1991 the Texas Legislature drew new district lines. At the time, the Democratic Party controlled both houses in the state legislature, the governorship, and 19 of the State's 27 seats in Congress. Yet change appeared to be on the horizon. In the previous 30 years the Democratic Party's post-Peconstruction dominance over the Republican Party had eroded, and by 1990 the Republicans received 47% of the statewide vote, while the Democrats received 51%.

Faced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates. Using then-emerging computer technology to draw district lines with artful precision, the legislature enacted a plan later described as the "shrewdest gerrymander of the 1990s." The 1991 plan "carefully constructs democratic districts 'with incredibly convoluted lines' and packs 'heavily Republican' suburban areas into just a few districts." The plan was challenged in court to no avail.

The 1990's were years of continued growth for the Texas Republican Party, and by the end of the decade it was sweeping elections for statewide office. Nevertheless, despite carrying 59% of the vote in statewide elections in 2000, the Republicans only won 13 congressional seats to the Democrats' 17.

These events likely were not forgotten by either party when it came time to draw congressional districts in conformance with the 2000 census and to incorporate two additional seats for the Texas delegation. The Republican Party controlled the governorship and the State Senate; it did not yet control the State House of Representatives, however. As so constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the Constitution's one-person, one-vote requirement. A court had to intervene and created a congressional districting map known as Plan 1151C.

In 2003, Texas Republicans gained control of the State House of Representatives and, thus, both houses of the legislature. The Republicans in the legislature "set out to increase their representation in the congressional delegation." "There is little question but that the single-

minded purpose of the Texas Legislature in enacting [a new plan] was to gain partisan advantage." After a protracted partisan struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements, the legislature enacted a new congressional districting map in October 2003. It is called Plan 1374C. The 2004 congressional elections did not disappoint the plan's drafters. Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%.

Soon after Texas enacted Plan 1374C, Democratic operatives challenged it in court.

25. Should the challengers prevail under a claim that Plan 1374C discriminates against Democratic candidates and/or Democratic voters?

YES

NO

26. In the space provided below, please provide your reasoning.

27. The Governor of Texas desires to defend the action in part by claiming that the case is non-justiciable. What justiciability argument should he raise?

Go onto the next page for the next question.

28. Please state at least two out of the four standards a federal court will apply in considering this justiciability argument. (You don't need to fill in all four standards to be marked right, but it might make sense to do so in case you get some wrong.)

A _____

B. _____

C. _____

D. _____

29. In the space provided below, please apply these standards and state whether the action by the Democratic operatives is or is not justiciable.

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

In its January 10-16, 2003 issue, *The Boston Phoenix*, a weekly newspaper, published a "special report" authored by Kristen Lombardi. Written as an exercise in investigative journalism, the piece ran for nine pages under the title "Children at Risk." Its central thesis bemoaned what the reporter had determined to be an apparent trend in family courts: that when a mother accuses a father of child abuse in a child custody dispute, those courts, ill-equipped to handle such charges, often award full custody to the father. The article reviewed three scientific studies of custody-dispute outcomes and recounted the personal experiences of four families enmeshed in the system.

One such case history chronicled a custody clash between Sarah Fitzpatrick and Marc E. Mandel, who was, at the time, an assistant state's attorney in Maryland. That case history appeared under the subheading "Losing custody to a child molester." The story recounted the sordid battle waged by the couple over custody of their two minor children, A.R.M. and J.P.M. (pseudonymously referred to by Lombardi as "Amy" and "James"), and dwelt in some detail on Fitzpatrick's allegation that Mandel was a child molester. For example, it reported Fitzpatrick's suspicions about Mandel's relationship with J.P.M. and gave prominent play to a Baltimore County Department of Social Services (DSS) investigation into allegations that Mandel had abused his daughter from a previous marriage, A.N.M. In that regard, the article related that a "report conducted for the Baltimore County DSS determined that Mandel had assaulted" A.N.M. The article went on to state that despite the claims of abuse, a Maryland family court judge awarded Mandel full custody of A.R.M. and J.P.M. and denied Fitzpatrick any visitation rights, labeling her "a pathological liar, or a purposeful liar, or both."

After *The Phoenix* published the article in print and on the internet, Mandel began receiving negative work evaluations. He later left his post and became self-employed in the private practice of law.

Mandel is drafting a complaint for defamation against, *The Phoenix*, its various corporate personas, two of its editors and Lombardi to be filed in the United States District Court for the District of Massachusetts.

- 30. True or false, defamatory speech receives no protection under the First Amendment to the United States Constitution.

TRUE

FALSE

- 31. State the four categories for plaintiffs in defamation cases:

A. _____

B. _____

C. _____

D. _____

32. Which category would apply as to Mandel?

33. Considering the category of the plaintiff in this case, what must Mandel prove in order to prevail on his action for defamation?

Questions 34 through 37 are based on the following fact pattern:

Attorney Johnnie Cochran (you remember O.J., don't you?) brought a state-law defamation action against Ulysses Tory. The state trial court determined that Tory (with the help of others) had engaged in unlawful defamatory activity. It found, for example, that Tory, while claiming falsely that Cochran owed him money, had complained to the local bar association, had written Cochran threatening letters demanding \$10 million, had picketed Cochran's office holding up signs containing various insults and obscenities; and, with a group of associates, had pursued Cochran while chanting similar threats and insults. The court concluded that Tory's claim that Cochran owed him money was without foundation, that Tory engaged in a continuous pattern of libelous and slanderous activity, and that Tory had used false and defamatory speech to "coerce" Cochran into paying "amounts of money to which Tory was not entitled" as a "tribute" or a "premium" for "desisting" from this libelous and slanderous activity.

After the judgment was issued, Tory indicated publicly that he would continue to engage in this activity despite the judgment. Cochran requested an injunction prohibited Tory and his associates from "picketing," from "displaying signs, placards or other written or printed material," and from "orally uttering statements" about Cochran, and about Cochran's law firm in "any public forum."

34. Should the Court grant the injunction?

YES

NO

Go onto the next page for the next question.

35. Please give the legal reasoning for your answer.

36. Before the court could render a decision, Johnie Cochran died. What motion should Tory bring in an attempt to dispose of the case?

37. Give your reasoning as to why or why not Tory will prevail on that motion.

Questions 38 and 39 are based on the following fact pattern:

On December 16, 1993, the Republican Party of Virginia (Party) issued a call for a state convention to be held on June 3, 1994, to nominate the Republican candidate for United States Senator. The call invited all registered voters in Virginia to participate in local mass meetings, canvasses, or conventions to be conducted by officials of the Party. Any voter could be certified as a delegate to the state convention by a local political committee upon payment of a registration fee of \$35 or \$45 depending on the date of certification. Over 14,000 voters paid the fee and took part in the convention. In response to the call, Bartholomew, Enderson, and Morse sought to become delegates to the convention. As a registered voter in Virginia willing to declare his or her intent to support the Party's nominee, each was eligible to participate upon payment of the registration fee. Bartholomew and Enderson refused to pay the fee and did not

become delegates; Morse paid the fee with funds advanced by supporters of the eventual nominee.

On May 2, 1994, Bartholomew, Enderson, and Morse filed a complaint in the United States District Court for the Western District of Virginia alleging that the imposition of the registration fee violated the Federal Voting Rights Act , the Equal Protection Clause of the Fourteenth Amendment , and the Twenty-fourth Amendment to the Constitution. They sought an injunction preventing the Party from imposing the fee and ordering it to return the fee paid by Morse. Prior to the time the court could act, the 1994 convention was conducted.

38. What issue that we studied this semester should the Party raise in attempting to get the case dismissed?

39. In the space provided below, please state whether Michigan will prevail in its claim that the case should be dismissed without reaching the merits, and the reasons supporting your conclusion.

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

The federal Railroad Revitalization and Regulatory Reform Act of 1976 bars states from "assessing rail transportation property at a ratio that has a higher ratio to [the property's] true market value than the ratio between the assessed and true market value of other commercial and industrial property in the same taxing jurisdiction."

CSX Transportation, Inc. is a freight rail carrier with multiple routes across the state of Georgia. As such, it is subject to a Georgia tax on its real property in the state. Under Georgia law, most commercial and industrial property is valued locally by county boards. Public utilities such as railroads, however, are initially valued by the State Board of Equalization ("the Board"), which then certifies the proposed valuations to the county boards for adoption or alteration.

In 2001, the Board put CSX's tax liability at \$4.6 million. A year later, the state's appraiser used a different combination of methodologies to determine the market value of CSX's in-state property. The Board estimated CSX's 2002 market value at \$7.8 billion (a 47% increase from

the previous year), which brought the assessed value of CSX's Georgia property to \$6.5 million, about a 40% increase from the previous year.

CSX challenges the methodologies used by the Board to determine the true market value of CSX's in-state property. CSX asserts that the new methodologies grossly overestimated the market value of CSX's in-state rail property, while accurately valuing other commercial and industrial property in the state. CSX maintains that the state is assessing CSX's property at 55% of its true market value, while other commercial and industrial property in the state is being assessed at only 40% of its true market value. Georgia argues that its valuation methodologies should be free from federal interference so long as they are reasonable.

40. What constitutional principle that we studied this semester represents CSX's best argument?

41. What three factors will the court consider in making its decision?

A. _____

B. _____

C. _____

42. What associated constitutional principle represents Georgia's strongest argument?

END OF PART ONE

PART TWO

ONE ESSAY QUESTION

SUGGESTED TIME: ONE HOUR (60 MINUTES)
PERCENTAGE OF EXAM POINTS: 30%

INSTRUCTIONS FOR PART TWO:

This part consists of one (1) essay question. Please put your answer in a blue book entitled "Part Two," and not into this examination booklet. Please limit your answer to four (4) single-spaced bluebook pages.

QUESTION:

Congress passes a statute prohibiting late-term abortions. The statute says that, because of the government's fundamental interest in potential human life, there is no right to a so-called late-term abortion, even when the mother's health is at risk. Doctors who perform such procedures in violation of the statute may be found guilty of a Class II felony, and may have to serve up to 10 years in prison, pay a \$25,000 fine and face automatic revocation of their licenses.

Doctor Quack, who specializes in late-term abortions, has asked the court to determine whether the statute can constitutionally be applied to him.

- A. Considering all of the constitutional issues we have studied this semester, please discuss the arguments Dr. Quack will raise in support of his position, and all arguments the government will make. Be sure to discuss both procedural and substantive issues.
- B. Also, please see if the following variations on the statute change your analysis:
1. The preamble to the statute says it applies to all medical doctors who practice in interstate commerce.
 2. The preamble to the statute says that states do not have to comply, but that any state that chooses not to comply will receive a 25% reduction in Medicaid payments.
 3. State X decides not to comply with the statute, and sets up special clinics to perform late-term abortions. Only doctors who reside in State X, and are licensed by the State, will be able to use such facilities.
 4. Dr. Quack is able to show that the statute will disproportionately impact African American physicians like him, who practice in minority communities.

END OF EXAM

ENJOY YOUR HOLIDAY

Keep Answer
w/ exam

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

**Fall 2007 Semester
ANSWERS TO PART I**

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In 1986, the City and its employees completed their first collective bargaining agreements. Such agreements included negotiated terms for C-9 benefits. Subsequent agreements continued to do so, and those applicable to service employees included premium reimbursement.

In 1992, the state police and fire-fighter health insurance changed such that retired police officers and firefighters had to start paying a premium, similar to that which service employees had been paying under the PERS system. The City passed Ordinance No. 49-1992, granting retroactive reimbursement to qualified city police and fire-fighter retirees who had retired prior to July 1, 1992.

In April 2003, the City Council requested the Law Director to investigate the legality of the retirement benefits provided to the retirees of the City. The Law Director concluded that he could find no statutory basis, express or implied, that would permit the City to expend public funds for either the C-9 Trust benefit or the premium reimbursement benefit. On May 5, 2003, the City informed the Trustees of the C-9 Trust Fund that the City would not issue further funds for the C-9 Trust benefit or the premium reimbursement benefit. No retiree was given any notice, any opportunity to respond or opportunity to offer any rebuttal.

A group of retirees who have lost their C-9 Trust benefits are drafting a complaint claiming that their vested benefits established under the collective bargaining contract have been unconstitutionally abrogated.

1. Leaving any procedural due process claims aside for the moment, which constitutional cause of action first comes to mind as one the plaintiffs should include in their complaint?

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

2. What three steps will the court take in analyzing the constitutional of interference with the collective bargaining 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.**

3. In the space provided below, please state whether the plaintiffs will prevail in their 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.

In the actual case, the Court found a violation of the Contracts Clause and stated: "There is no question as far as the Court is concerned that a change in law impaired the class members' contractual rights. The Court further finds, in the light of all the facts articulated above, such impairment is substantial, and in violation of Article I, Section 10 of the United States Constitution. The Court further notes that such impairment was not reasonable and appropriate in the service of a legitimate and important public purpose."

4. Now to the procedural due process cause of action. What analysis will you employ to determine whether the plaintiffs lost an "entitlement" and thus were due notice and a hearing before termination of the retirement benefits?
- A. Look to the importance of this right to the person. Is it really important to the person?**
 - B. Is there a reasonable expectation of the continued receipt of the benefit?**
5. What analysis will you employ in determining how much process is due; that is, whether they are entitled to something close to the process of a full trial or something much less?

Once you have established the type of entitlement involved, the greater the right, the more required of the notice and hearing. The ultimate due process is a full-blown trial.

Questions 6 through 8 are based on the following fact pattern:

On November 5, 2001, Connecticut residents engaged in the lobstering trade, including Vivian Volovar, received a notice that the New York Department of Environmental Conservation ("NYDEC") had adopted emergency regulations, which took effect on November 5, 2001. The notice indicated that the emergency regulations creating the Fishers Island Special Management Area ("FISMA"), a special management area around Fishers Island, with restrictions on commercial lobstering operations.

The regulations that the Connecticut lobsterers found troublesome stated: ". . . any person commercially fishing lobster pots within FISMA must obtain a special permit to do so, and must not take lobsters from any other waters; . . ." According to the emergency regulations, this special requirement would be enforced as follows: ". . . requirement that all FISMA permit holders fish for lobster only in the FISMA area, and that they fish no more than 300 lobster pots or their current allocation, whichever is less -- enforceable as of December 15, 2001; . . ." The regulations also required that "all persons who currently fish pot gear within the boundaries of FISMA must either obtain the FISMA permit or remove their gear from the area by December 15, 2001. Persons who obtain FISMA permits must comply with all requirements of the emergency rule, including removing all gear set in other waters, by January 1, 2002." Finally, under these regulations, "in 2001, FISMA permits are available to any holder of a N.Y. State Resident or Non-Resident Commercial Lobster Permit[,] in 2002 and thereafter, FISMA permits will only be available to persons who held them during the preceding year." Therefore, unless Ms. Volovar and the other Connecticut lobsterers elected to obtain a FISMA permit, and thereby surrender their right to lobster in all other waters, by December 31, 2001, they would be forever barred from lobstering in the FISMA.

As stated in the regulations, the purpose of the FISMA was "to protect the reef's lobster population from degradation due to increased fishing pressure, and to maintain the balance that has historically existed among the commercial lobster fishery, the lobster population and the reef community."

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

6. What issue that we studied this semester presents the Connecticut lobsterers' best argument that New York's scheme is unconstitutional?

Dormant Commerce Clause (Negative Commerce Clause)

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

Pike Balancing Test: balance local benefits against burden on interstate commerce. This test is often applied to environmental laws.

8. In the space provided below, please state whether the Connecticut lobsterers will prevail in overturning the New York scheme, 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. In the actual case, the court said: "The extraterritorial provision affirmatively conditions a person's right to lobster in the FISMA upon his agreement to surrender his right to engage in the commercial lobster trade in the waters of any other State. Therefore, . . . the Court concludes that although the extraterritorial provision of the emergency regulations does not discriminate on its face, the effect of the provision is to impermissibly regulate the commercial lobster trade beyond the borders of New York State. In addition, not only does the extraterritorial provision establish a substantial disincentive to lobsterers who want to fish in the FISMA to engage in the commercial lobstering trade in interstate commerce, it affirmatively prohibits them from doing so. As such, this provision would appear to violate the Commerce Clause.

Questions 9 through 15 are based on the following fact pattern:

The profession of psychology has been regulated in California since 1958, when the Legislature enacted the Psychology Certification Act, which "served only to protect the title 'psychologist,'" but did not define the practice of psychology. In 1967, the California Legislature enacted the Psychology Licensing Law, which "recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology." That law includes a legislative finding that the "practice of psychology in California affects the public health, safety,

and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology."

The California Business and Professions Code defines a "psychologist" as a person so representing himself or herself "to the public by any title or description," including "psychoanalysis" and "psychoanalyst." The practice of psychology in California requires a license and is defined as rendering any psychological service to the public "for a fee." To qualify for a license to practice psychology in California, an applicant must possess a doctorate, or a degree deemed equivalent, in psychology or a related field such as education psychology. An applicant must have at least two years of supervised professional experience under the direction of a licensed psychologist. In addition, an applicant must pass the Board's examination, complete training in substance dependency, and fulfill course-work requirements in partner abuse and human sexuality. Any violation of the laws regulating psychologists can be punished as a misdemeanor.

Section 2529 of the Business and Professions Code, relating to research psychoanalysts, is the only part of the statute that specifically addresses the qualifications of psychoanalysts. Under § 2529, graduates of four, specific California psychoanalytic institutes, or institutes deemed equivalent, "may engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts...." Under the regulations, a "research psychoanalyst" may render psychoanalytic services for a fee for only a third (or less) of his or her professional time. If they register with the state, students and graduates also "may engage in psychoanalysis under supervision, provided" that they do not imply in any way that they are licensed to practice psychology. "Physicians and surgeons, psychologists, clinical social workers, and marriage, family and child counselors, licensed in this state" need not so register to engage in psychoanalysis.

The licensing laws do not prevent "qualified members of other recognized professional groups," including physicians, clinical social workers, family and child counselors, attorneys and ordained members of recognized clergy, from doing work of a psychological nature consistent with the laws governing their respective professions, provided that they do not hold themselves out to the public as psychologists or use terms that imply they are licensed to practice psychology.

A group of psychoanalysts challenged the constitutionality of the California licensing scheme in federal court, asserting that it prohibits them from practicing psychoanalysis in California. They contend that: (a) it is irrational to require professionals who already are trained in psychoanalysis to obtain additional training in order to qualify for a license; (b) the licensing arbitrarily exempts research psychoanalysts from its requirements; (c) the licensing scheme is unnecessary and ineffective; and (d) the licensing scheme is more stringent than similar schemes regulating other counseling professions.

9. Aside from equal protection, what constitutional claim, also arising from the 14th Amendment, will the psychoanalysts likely raise in asserting that the California scheme is unconstitutional?

Economic/substantive due process

10. What standard will the court apply in considering that claim?

Since no fundamental right is implicated, the standard is rational basis (any conceivable rational justification will suffice.

11. In the space provided below, please state whether the psychoanalysts will prevail in this argument, and the reasons supporting your conclusion.

The government (which is entitled to substantial deference) will prevail.

12. Now, on to the equal protection claim. What three categories or classifications must one consider when analyzing the equal protection clause?

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)

13. Which one applies here?

Rational basis

14. Who will bear the burden of proof in the case?

The plaintiffs.

15. In the space provided below, please state whether the psychoanalysts will prevail in this argument, and the reasons supporting your conclusion.

The psychoanalysts will loose. Here is what the actual court said: “Based on the health and welfare of its citizens, California certainly has a “conceivable rational basis” for regulating the licensing of psychologists, and therefore, psychoanalysts. . . . Regulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment.

Questions 16 through 21 are based on the following fact pattern:

Since 1977, Florida's adoption law has contained a codified prohibition on adoption by any "homosexual" person. For purposes of this statute, Florida courts have defined the term "homosexual" as being "limited to applicants who are known to engage in current, voluntary homosexual activity," thus drawing "a distinction between homosexual orientation and homosexual activity." During the past thirty years, several legislative bills have attempted to repeal the statute, but to date, no attempt to overturn the provision has succeeded.

A lesbian couple living in Florida, and seeking to challenge the provision, are working with an attorney to draft a complaint seeking a judicial renunciation of the law.

16. Aside from equal protection, what constitutional claim, also arising from the 14th Amendment, will the couple likely raise in asserting that the Florida adoption scheme is unconstitutional?

The interest of parents in the care, custody, and control of their children is a fundamental liberty interest.

There is no fundamental right to adopt, nor any fundamental right to be adopted.

17. What standard will the court apply in considering that claim?

If the court accepts this parent-child relationship as a fundamental right among non-biological parents and children, the standard will be strict scrutiny. Otherwise, it will be rational basis.

18. In the space provided below, please state whether the couple will prevail in this 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. In the actual case, the plaintiffs lost: “The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to

either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it."

19. Now on to the equal protection claim. Which classification applies to this claim that the Florida adoption scheme discriminates against homosexual couples looking to adopt?

Rational basis.

20. Who will bear the burden of proof in the case?

The plaintiffs.

21. In the space provided below, please state whether the couple will prevail in their discrimination argument, and the reasons supporting your conclusion.

They will likely lose unless the court imposes a standard similar to that in *Romer v. Evans*, which purported to be rational basis but really applied heightened scrutiny *sub silentio*.

Questions 22 through 24 are based on the following fact pattern:

The Coast Guard Court of Criminal Appeals is an intermediate court within the military justice system. It is one of four military Courts of Criminal Appeals; others exist for the Army, the Air Force, and the Navy-Marine Corps. The Coast Guard Court of Criminal Appeals hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces. Appellate military judges who are assigned to a Court of Criminal Appeals must be members of the bar, but may be commissioned officers or civilians. Currently, the Coast Guard Court of Criminal Appeals has had two civilian members. These judges were originally assigned to serve on the court by the General Counsel of the Department of Transportation, who is, *ex officio*, the Judge Advocate General of the Coast Guard. The Secretary of Transportation played no role in the appointments, and no hearings were held in Congress.

Anticipating problems with these appointments, the Chief Judge of the Coast Guard Court of Military Review sent a memorandum to the Chief Counsel of the Coast Guard requesting that the Secretary of Transportation, in his capacity as a department head, reappoint the judges so the court would be constitutionally valid beyond any doubt. On January 15, 1993, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own." The memorandum then listed the names of "those judges presently assigned and appointed by me," including the two civilian judges.

Several Coast Guard servicemen who were convicted in courts-martial have challenged their convictions on the ground that the two civilian judges hearing their cases were not properly appointed.

22. What steps are required in the Appointments Clause contained in the Constitution?

The president (executive) must obtain the advice and consent of the Senate.

23. To what appointments does the Appointments Clause apply?

Superior/principal governmental officers. The president is free to appoint inferior officers without Congressional participation.

24. In the space provided below, please apply these standards and state whether appointments were valid, as well as 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 actual case said: "Despite the importance of the responsibilities the judges in question bear, they are "inferior Officers" under the Clause. Generally speaking, 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the Senate's advice and consent. Supervision of the work of Coast Guard Court of Criminal Appeals judges is divided between the General Counsel of the Department of Transportation (who is subordinate to the Secretary) and the Court of Appeals for the Armed Forces. Significantly, these judges have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers, and hence they are inferior within the meaning of Article II."

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

The 1990 census resulted in a 30-seat congressional delegation for Texas, an increase of 3 seats over the 27 representatives allotted to the State in the decade before. In 1991 the Texas Legislature drew new district lines. At the time, the Democratic Party controlled both houses in the state legislature, the governorship, and 19 of the State's 27 seats in Congress. Yet change appeared to be on the horizon. In the previous 30 years the Democratic Party's post-Reconstruction dominance over the Republican Party had eroded, and by 1990 the Republicans received 47% of the statewide vote, while the Democrats received 51%.

Faced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates. Using then-emerging computer technology to draw district lines with artful precision, the legislature enacted a plan later described as the "shrewdest gerrymander of the 1990s." The 1991 plan "carefully constructs democratic districts 'with incredibly convoluted lines' and packs 'heavily Republican' suburban areas into just a few districts." The plan was challenged in court to no avail.

The 1990's were years of continued growth for the Texas Republican Party, and by the end of the decade it was sweeping elections for statewide office. Nevertheless, despite carrying 59% of the vote in statewide elections in 2000, the Republicans only won 13 congressional seats to the Democrats' 17.

These events likely were not forgotten by either party when it came time to draw congressional districts in conformance with the 2000 census and to incorporate two additional seats for the Texas delegation. The Republican Party controlled the governorship and the State Senate; it did not yet control the State House of Representatives, however. As so constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the Constitution's one-person, one-vote requirement. A court had to intervene and created a congressional districting map known as Plan 1151C.

In 2003, Texas Republicans gained control of the State House of Representatives and, thus, both houses of the legislature. The Republicans in the legislature "set out to increase their representation in the congressional delegation." "There is little question but that the single-minded purpose of the Texas Legislature in enacting [a new plan] was to gain partisan advantage." After a protracted partisan struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements, the legislature enacted a new congressional districting map in October 2003. It is called Plan 1374C. The 2004 congressional elections did not disappoint the plan's drafters. Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%.

Soon after Texas enacted Plan 1374C, Democratic operatives challenged it in court.

25. Should the challengers prevail under a claim that Plan 1374C discriminates against Democratic candidates and/or Democratic voters?

YES

NO

26. In the space provided below, please provide your reasoning.

An equal protection challenge would be subject to rational basis scrutiny because classification by political party is only on the basis social or economic concerns. The lines have to be drawn somewhere, and it is likely that the choices are supported by some conceivable rational explanations.

27. The Governor of Texas desires to defend the action in part by claiming that the case is non-justiciable. What justiciability argument should he raise?

Political question doctrine.

28. Please state at least two out of the four standards a federal court will apply in considering this justiciability argument. (You don't need to fill in all four standards to be marked right, but it might make sense to do so in case you get some wrong.)

- 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.**

29. In the space provided below, please apply these standards and state whether the action by the Democratic operatives is or is not justiciable.

The conduct of voting is textually committed to the political processes of the states by the Constitution. Moreover, as Justice Scalia has pointed out there likely is a lack of judicially manageable standards in determining the location of district lines, an inherently political act. Unless the drawing somehow involves race or another area of constitutional concern, the manner of line drawing should be left to the political process.

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

In its January 10-16, 2003 issue, *The Boston Phoenix*, a weekly newspaper, published a "special report" authored by Kristen Lombardi. Written as an exercise in investigative journalism, the piece ran for nine pages under the title "Children at Risk." Its central thesis bemoaned what the reporter had determined to be an apparent trend in family courts: that when a mother accuses a father of child abuse in a child custody dispute, those courts, ill-equipped to handle such charges, often award full custody to the father. The article reviewed three scientific studies of custody-dispute outcomes and recounted the personal experiences of four families enmeshed in the system.

One such case history chronicled a custody clash between Sarah Fitzpatrick and Marc E. Mandel, who was, at the time, an assistant state's attorney in Maryland. That case history appeared under the subheading "Losing custody to a child molester." The story recounted the sordid battle waged by the couple over custody of their two minor children, A.R.M. and J.P.M. (pseudonymously referred to by Lombardi as "Amy" and "James"), and dwelt in some detail on Fitzpatrick's allegation that Mandel was a child molester. For example, it reported Fitzpatrick's suspicions about Mandel's relationship with J.P.M. and gave prominent play to a Baltimore County Department of Social Services

(DSS) investigation into allegations that Mandel had abused his daughter from a previous marriage, A.N.M. In that regard, the article related that a "report conducted for the Baltimore County DSS determined that Mandel had assaulted" A.N.M. The article went on to state that despite the claims of abuse, a Maryland family court judge awarded Mandel full custody of A.R.M. and J.P.M. and denied Fitzpatrick any visitation rights, labeling her "a pathological liar, or a purposeful liar, or both."

After *The Phoenix* published the article in print and on the internet, Mandel began receiving negative work evaluations. He later left his post and became self-employed in the private practice of law.

Mandel is drafting a complaint for defamation against, *The Phoenix*, its various corporate personas, two of its editors and Lombardi to be filed in the United States District Court for the District of Massachusetts.

30. True or false, defamatory speech receives no protection under the First Amendment to the United States Constitution.

TRUE

FALSE

31. State the four categories for plaintiffs in defamation cases:

- A. The plaintiff is a public official or someone running for office**
- B. The plaintiff is a public figure (someone prominent in the community)**
- C. The plaintiff is a private figure, but the matter involved is of public concern (issues in which the public has a legitimate interest)**
- D. The plaintiff is a private figure and the matter involved is not of public concern.**

32. Which category would apply as to Mandel?

Public official

33. Considering the category of the plaintiff in this case, what must Mandel prove in order to prevail on his action for defamation?

The plaintiff must prove by clear and convincing evidence the falsity of the statements made as well as actual malice. Actual malice is that the defendant knew the statement was false or acted in reckless disregard of the truth.

Questions 34 through 37 are based on the following fact pattern:

Attorney Johnnie Cochran (you remember O.J., don't you?) brought a state-law defamation action against Ulysses Tory. The state trial court determined that Tory (with the help of others) had engaged in unlawful defamatory activity. It found, for example, that Tory, while claiming falsely that Cochran owed him money, had complained to the local bar association, had written Cochran threatening letters demanding \$10 million, had picketed Cochran's office holding up signs containing various insults and obscenities; and, with a group of associates, had pursued Cochran while chanting similar threats and insults. The court concluded that Tory's claim that Cochran owed him money was without foundation, that Tory engaged in a continuous pattern of libelous and slanderous activity, and that Tory had used false and defamatory speech to "coerce" Cochran into paying "amounts of money to which Tory was not entitled" as a "tribute" or a "premium" for "desisting" from this libelous and slanderous activity.

After the judgment was issued, Tory indicated publicly that he would continue to engage in this activity despite the judgment. Cochran requested an injunction prohibited Tory and his associates from "picketing," from "displaying signs, placards or other written or printed material," and from "orally uttering statements" about Cochran, and about

Cochran's law firm in "any public forum."

34. Should the Court grant the injunction?

YES

NO

35. Please give the legal reasoning for your answer.

The injunction, as sought, amounts to an overly broad prior restraint upon speech, lacking plausible justification.

36. Before the court could render a decision, Johnie Cochran died. What motion should Tory bring in an attempt to dispose of the case?

A motion to dismiss for mootness.

37. Give your reasoning as to why or why not Tory will prevail on that motion.

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 argument for dismissal would be that one cannot defame a dead person. Some states allow defamation suits to survive if the plaintiff was alive when it was filed.

Questions 38 and 39 are based on the following fact pattern:

On December 16, 1993, the Republican Party of Virginia (Party) issued a call for a state convention to be held on June 3, 1994, to nominate the Republican candidate for United States Senator. The call invited all registered voters in Virginia to participate in local mass meetings, canvasses, or conventions to be conducted by officials of the Party. Any voter could be certified as a delegate to the state convention by a local political committee upon payment of a registration fee of \$35 or \$45 depending on the date of certification. Over 14,000 voters paid the fee and took part in the convention. In response to the call, Bartholomew, Enderson, and Morse sought to become delegates to the convention. As a registered voter in Virginia willing to declare his or her intent to support the Party's nominee, each was eligible to participate upon payment of the registration fee. Bartholomew and Enderson refused to pay the fee and did not become delegates; Morse paid the fee with funds advanced by supporters of the eventual nominee.

On May 2, 1994, Bartholomew, Enderson, and Morse filed a complaint in the United States District Court for the Western District of Virginia alleging that the imposition of the registration fee violated the Federal Voting Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and the Twenty-fourth Amendment to the Constitution. They sought an injunction preventing the Party from imposing the fee and ordering it to return the fee paid by Morse. Prior to the time the court could act, the 1994 convention was conducted.

38. What issue that we studied this semester should the Party raise in attempting to get the case dismissed?

Mootness

39. In the space provided below, please state whether Michigan will prevail in its claim that the case should be dismissed without reaching the merits, and the reasons supporting your conclusion.

Michigan should lose. The controversy is not moot because it is "capable of repetition, yet evading review."

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

The federal Railroad Revitalization and Regulatory Reform Act of 1976 bars states from "assessing rail transportation property at a ratio that has a higher ratio to [the property's] true market value than the ratio between the assessed and true market value of other commercial and industrial property in the same taxing jurisdiction."

CSX Transportation, Inc. is a freight rail carrier with multiple routes across the state of Georgia. As such, it is subject to a Georgia tax on its real property in the state. Under Georgia law, most commercial and industrial property is valued locally by county boards. Public utilities such as railroads, however, are initially valued by the State Board of Equalization ("the Board"), which then certifies the proposed valuations to the county boards for adoption or alteration.

In 2001, the Board put CSX's tax liability at \$4.6 million. A year later, the state's appraiser used a different combination of methodologies to determine the market value of CSX's in-state property. The Board estimated CSX's 2002 market value at \$7.8 billion (a 47% increase from the previous year), which brought the assessed value of CSX's Georgia property to \$6.5 million, about a 40% increase from the previous year.

CSX challenges the methodologies used by the Board to determine the true market value of CSX's in-state property. CSX asserts that the new methodologies grossly overestimated the market value of CSX's in-state rail property, while accurately valuing other commercial and industrial property in the state. CSX maintains that the state is assessing CSX's property at 55% of its true market value, while other commercial and industrial property in the state is being assessed at only 40% of its true market value. Georgia argues that its valuation methodologies should be free from federal interference so long as they are reasonable.

40. What constitutional principle that we studied this semester represents CSX's best argument?

Commerce clause

41. What three factors will the court consider in making its decision?

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

42. What associated constitutional principle represents Georgia's strongest argument?

The 10th Amendment protects its right to assess state taxes.