CONSTITUTIONAL LAW
FINAL EXAMINATION

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Fall 2003 Semester

YOUR ENTIRE SOCIAL SECURITY NUMBER:

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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 four (4) blue books. Please write "Scrap" on one of the blue books. Please write "One," "Two," and "Three" on each of the other three blue books. Please write your social security number *on all four* blue books.

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 six essay questions of equal weight. The suggested time for each question is 30 minutes. Despite the fact that 6 times 30 minutes is three hours, I 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.

You are limited to five (5) pages for each answer. Please write on every line, and on both sides of each page. You can fit two answers into each blue book. Book "One" will therefore have your answers to Questions 1 and 2; Book "Two" will have your answers to Questions 3 and 4; and Book "Three" will have your answers to questions 5 and 6. Please follow this format even if you do not use all five pages per question, and can fit more than two questions into a book.

Please read each question carefully and make sure to apply all the *relevant* law pertaining to each question. Please keep in mind, however, that time is a factor; you should not

waste precious time on esoterica or minutiae. Please assume I know the facts, but nothing else. (In other words, don't needlessly restate the facts.)

Please make your answers legible. I cannot grade what I cannot read.

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

GOOD LUCK!

Questions One and Two Are Based On The Following Fact Pattern:

Fifteen years ago, Alison Alldone went into a coma following a horrific automobile accident in her home state of Alahambra. Since then, Alison has been in a nursing home, kept alive by a feeding tube. Although there is no medical evidence that she has ever regained consciousness, her mother insists that Alison recognizes her and often smiles at her. Five years ago Alison's husband, Howard, after several years of devotedly caring for his wife, suggested that the feeding tube be removed. Howard had reluctantly become convinced that there was no hope that his beloved Alison would regain consciousness, and said she had told him she did not want to be kept alive by artificial means. When the nursing home refused to remove the tube, Howard sued. In opposing Howard's action, the nursing home was joined by Alison's parents, who insisted that Alison would not have refused life sustaining medical treatment.

A lower court found for the nursing home, finding no clear and convincing evidence of Alison's wishes, but the Alahambra Supreme Court, the state's highest court, reversed, stating that Howard's testimony that Alison told him she would not want to be kept alive by artificial means was the only admissible evidence offered on the matter, and it constituted clear and convincing evidence of Alison's wishes. The Alahambra Supreme Court ordered the nursing home to remove the feeding tube, finding that Alison had a constitutional right to refuse life sustaining medical treatment. As a result of the Alahambra Supreme Court's decision, Alison's doctors removed her feeding tube.

Immediately following the Court's decision, the Alahambra State Legislature passed a statute providing both "emergency" and "future cases" provisions. The "emergency" provision authorized the Governor of the State of Alahambra to order reinsertion of Alison's feeding tube. Although that portion of the statute did not mention Alison Alldone by name, the timing provisions it contained make it undeniably clear that Alison's is the only case to which that portion of the statute can apply. The "emergency" provision of the statute also stated that the authority granted to the Governor to reinsert Allison's feeding tube was "a political question within the exclusive and unique jurisdiction of the legislature," and was therefore "not reviewable by the Alahambra Supreme Court or any subsidiary court." Jethro Hedge, the Governor of Alahambra, quickly ordered that Alison's feeding tube be reinserted, and the order has been carried out. Alison remains in a comatose state.

The "future cases" provision of the statute also authorized establishment of a "Coma Review Board" (CRB) to approve all future requests to remove feeding tubes from comatose patients. The statute provided that the CRB would be composed of seven members, with four selected by the Governor, with the advice and consent of the State Senate, and three selected by the Chairman of the Legislature's Health and Human Services Committee. The statute provided that, before making a decision to remove a feeding tube, the Commission must receive "reasonable evidence" of the desires of the comatose individual from a "reliable source." Finally, the statute provided that any person aggrieved by a decision of the CRB may seek to have the decision reconsidered

by a three person Review Board composed of "the Governor, the Chairman of the Health and Human Services Committee and a priest."

For the past seven years Howard has been involved in a romantic relationship with another woman, with whom he now has a two-year old child. The couple has been living together for three years, and would like to get married. Alahambra has a criminal statute prohibiting adultery.

Just like the federal government, the State of Alahambra has a tripartite form of government; the branches of government are legislative, executive and judicial. The allocation of powers provisions of the Alahambra Constitution are substantially similar to those of the United States Constitution, and the Alahambra Supreme Court has ruled on several occasions that Alahambra courts deciding questions involving allocation of state power under the Alahambra Constitution may rely on United States Supreme Court cases as precedent. On the other hand, the Alahambra Constitution does not expressly provide a right to individual privacy, and the Alahambra Supreme Court has never found a right to privacy under *state* law.

Howard would like to challenge the action of the Alahambra Legislature and Governor, but is also worried that Alison's parents may encourage the state to charge him with adultery.

Question One

In no more than five (5) pages, please discuss in detail whether the Alahambra Legislature and Governor's exercises of governmental power were proper under the constitutional tenets you learned this semester.

Please also address whether Howard and/or Allison have a right to seek immediate review to the United States Supreme Court. Finally, please address any possible procedural impediments that might affect the ability of Howard and/or Alison to exercise their constitutional rights.

Please do not address any of the individual constitutional rights of Howard and Alison since you will be asked to do that in the next question.

Question Two

In no more than five (5) pages, please discuss in detail the individual constitutional rights of Howard and Allison.

Question Three

In March 1997 Massachusetts Governor William Weld signed the Metropolitan Highway Systems bill authorizing the Massachusetts Transit Authority (MTA) to increase tolls at the Allston-Brighton (Interstate-90) and Route 128 (Interstate 95) toll plazas from $.50 to $1.00, and at the Ted Williams Tunnel and the Sumner Tunnel from $2.00 to $3.00. Both toll plazas are on what are considered to be "interstate" highways. The revenue from these toll increases would help finance Boston's Central Artery/Third Harbor Tunnel Project, commonly known as the "Big Dig." That project aims to bury stretches of Interstate-93 beneath the city and extend Interstate-90 to Logan International Airport. MTA is responsible for generating through tolls approximately $1.5 billion of the nearly $6 billion needed to complete work on the Interstate 90 segment.

The toll increase was scheduled to go into effect on January 1, 2002. In response to public opposition, MTA postponed the increase until July 1, 2002 and implemented a "Resident Only Discount Program," under which state residents who drove automobiles equipped with "FAST LANE" transponders would receive toll discounts of $.25 at the Allston-Brighton and Route 128 toll plazas and $.50 at the tunnels.

The FAST LANE system allows vehicles equipped with a transponder to pass through toll plazas without having to stop and pay. Participants must purchase a transponder from MTA for $27.50. The transponder is a small plastic device attached to the windshield. It signals the car's identity to an MTA facility, which automatically charges the toll to the driver's account. Drivers generally assign their account to their credit card which is billed $20 at the outset; thereafter, tolls are deducted until $10 remains, at which point an additional $10 is billed to replenish the account. Cars equipped with transponders used in other cities that -- like the E-Z Pass system -- are interoperable, may drive through FAST LANE toll gates without stopping, but do not receive discounts. (E-Z Pass is the equivalent electronic toll payment system used by the State of New York.) There is no federal legislation addressing the matter of tolls on interstate highways.

On July 4, 2002, Dick Doran drove through the Allston-Brighton and Route 128 toll plazas. Doran is a Vermont resident who did not have a transponder in his automobile, so he paid the full tolls. On July 5, 2002, Suzie Saunders drove through the same toll plazas. She is a New York resident who had an E-Z Pass, but not a FAST LANE, transponder. She therefore also paid the full tolls.

Doran and Saunders have filed a joint action in the Federal District Court for the District of Massachusetts alleging that MTA's discount system is unconstitutional. The matter is scheduled for a preliminary status conference in about 30 minutes before District Judge H. T. Roadjack, who has been assigned the case. So that he may conduct an intelligent and efficient conference, he has asked you, his able law clerk, to write a brief memorandum addressing any substantive and procedural issues that might be involved in the case. In no more than five (5) pages, please do so.

Question Four

The administration of President George W. Bush (the Bush Administration) believes that huge verdicts in personal injury cases line the pockets of greedy lawyers and a few lucky plaintiffs, while harming most consumers. The Bush Administration also posits that liberating American businesses from the fear of crushing liability would assist in jump-starting the economy and returning us to boom years of the 1990s. Whether you agree with the Bush Administration or not (your politics are not relevant), several Administration-supported "tort reform" measures currently wending their way through Congress are likely to raise constitutional concerns.

For the purposes of this question, please consider the "Common Sense Medical Malpractice Reform Act of 2003," currently pending in the House of Representatives. This bill would cap damages in medical malpractice cases for non-economic injury at $250,000. For example, if, as a result of a botched surgery, a patient becomes a quadriplegic, he or she could only recover a *total* of $250,000 to compensate for both pain and suffering and punitive damages. This would be true even if the jury returned a verdict for $1 million for pain and suffering and another $1 million in punitive damages as a result of the "conscious, flagrant indifference" of the physician. (The patient would nevertheless be able to recover his or her medical bills, lost job earnings and the cost of hiring someone to assist in the everyday tasks he or she can no longer perform.) If passed, the Common Sense Medical Malpractice Reform Act would expressly preempt state law to the extent state law is inconsistent, and would apply to *all* malpractice cases (against doctors and other health care providers) in both federal *and* state courts.

Assume for this question that Congress passed the "Common Sense Medical Malpractice Reform Act of 2003," and that President Bush signed it into law. Six months after the law took effect, the case of Ima Vick-Timm, a 32 year-old Maryland plaintiff suing in state court, went to trial. Ima claimed to have lost the use of her legs because her doctor damaged her spine while performing a relatively simple surgery in an intoxicated condition.

The doctor performing the surgery has been practicing medicine for 37 years, and is only licensed to practice in Maryland. He has never been licensed to practice in any other jurisdiction. Maryland state law allows damages in medical malpractice claims for pain and suffering without limitation. Maryland state law also permits punitive damages awards with no cap or limit.

The jury returned a verdict awarding Ima actual damages of $126,374, "pain and suffering" damages of $1.2 million, and punitive damages on account of the "conscious, flagrant indifference" of the physician in the amount of $5 million. Citing the Common Sense Medical Malpractice Reform Act of 2003, the trial judge left the actual damages verdict intact, but reduced the pain and suffering and punitive damages awards to a total of $250,000. This reduced Ima's total verdict from over $6.3 million to $376,374.

Ima has hired you to appeal the trial judge's action in reducing the jury verdict under the Common Sense Medical Malpractice Reform Act of 2003. She would like to argue that the Act is unconstitutional as applied to her.

In no more than five (5) pages, please discuss in detail whether the Act, as described, is a proper exercise of Congressional power.

Question Five

At the urging of innumerable constituents tired of telemarketers calling their homes in an effort to sell credit cards, long-distance telephone service, equity credit lines and the like, Congress passed a "do not call" statute, which enables consumers to register with the Federal Trade Commission to be placed on a "do not call" list. Three months after a consumer registers his or her phone number, commercial telemarketers are forbidden from calling the number. For a fee $25 per area code, with a maximum fee of $7,375, a telemarketer can receive a list of all the numbers on the no-call list. If a telemarketer makes an unauthorized call, the consumer can go back to the FTC's website, donotcall.gov, and file a complaint. The FTC is then supposed to prosecute the offending company; violations are punishable with fines up to $10,000.

The statute expressly does not apply to political organizations, charities, telephone surveyors, or companies with whom the consumer has an existing relationship. In other words, registered consumers can still get calls from political parties seeking contributions, public radio stations doing telethons, churches seeking donations for a new building, universities seeking donations from alumni, the American Red Cross seeking to attract blood donors, and the like.

For obvious reasons, the statute has the support of a huge number of Americans; we have registered over 50 million phone numbers since the program began in late June 2003. But the telemarketing industry views the "do not call" registry as economic death and a violation of its right to free speech.

In no more than five (5) pages, please discuss whether the telemarketing industry has a right to free speech in a commercial context, and whether the "do not call" law, as described, unconstitutionally infringes First Amendment rights.

Question Six

William H. Park was killed on November 2, 1978, in a job-related accident at his place of employment, the Draper Division of Rockwell International Corporation at Beebe River, Campton, New Hampshire. He was killed while performing maintenance on a Nicholson Ring Debarker, a machine used to remove bark from logs. While he was working on the machine, a photo-electric beam was broken, which caused a set of heavy rollers to descend upon him, crushing him to death. At the time of his death, Mr. Park was not married and had no children.

After 1959, a comprehensive New Hampshire worker's compensation statute imposed a conclusive presumption that made it very difficult for employees to sue their employers under the common law. In nearly all cases, it is now presumed that employees have chosen to be covered by the exclusive worker's compensation scheme rather than the common law.

In 1978, four months prior to the death of Mr. Park, the New Hampshire legislature amended the worker's compensation law. Under the new statutory scheme, the estates of employees who are fatally injured on the job, and who leave no dependents at the time of death, are entitled to receive only $1,200 in burial expenses. The estate and non-dependent relatives receive nothing beyond this sum even if reasonable funeral and burial expenses exceed $1,200. When the New Hampshire legislature adopted this amendment in 1978, it failed to provide any increase in benefits or quid pro quo in return for eliminating an employee's estate's right to sue. In all other wrongful death cases, the legislature has provided that the estate of a person who dies without dependents is entitled to receive up to $50,000.

Mr. Park's estate (and the non-dependent relatives it represents) is unhappy that it will receive only $1,200 on account of Mr. Park's death when it would have received $50,000 if he had died with a dependent wife and/or children. The estate would like to challenge such disparate treatment under the New Hampshire worker's compensation statute.

In no more than five (5) pages, please discuss whether such disparate treatment infringes any constitutional rights of Mr. Park's estate or non-dependent relatives.

END OF EXAM

HAVE A HAPPY HOLIDAY

Grading Sheet for Fall 2003 Exam

keep w/ Lung

This grading sheet is a guideline only. Students may get extra points for *relevant* issues not identified on the grading sheet. Students *do not* get credit for merely mentioning or cryptically addressing the stated issues, which must be discussed in a meaningful and intelligent fashion. Please also understand that it would be very difficult for a student to address all the issues included in this grading sheet, and that I take this into account when setting grades.

QUESTIONS ONE AND TWO

Question One

√√ **Separation of Powers**

- Legislative branch generally makes the laws (Art. I); Executive branch generally enforces the laws (Art. II); Judicial branch generally interprets the laws, consistent with the Constitution (Art. III)

- Specific acts of each branch:

  Executive: Nominate Supreme Court Justices. Commander-in-Chief. Makes treaties, Foreign Affairs,Execute and Implement Laws

  Legislative: Makes Laws. Lay & Collect Taxes, Defense, Military, Declares War, Common Welfare, Regulate Commerce

  Judiciary: Interprets federal laws, applies the Constitution

- In determining that Alison had no right to refuse medical treatment, the Alahambra legislature is engaging in "adjudication." This is the type of action is left for the courts under separation of powers doctrine.

- The legislature should formulate *general* policy. It should not rule on specific cases. Again, this is left for the Courts when they interpret applicable laws.

√√ **Right of Judiciary to Decide Constitutional Matters**

- *Marbury v. Madison* – The Supreme Court is the final arbiter in regard to Constitutional matters. Since the allocation of power between the branches of government is a matter addressed in the Constitution, the Supreme Court gets to decide.

- *Marbury v. Madison* also makes it clear that the Constitution is supreme; it trumps any inconsistent law.

- To the extent that the Alahambra Legislature's action violates federal Constitutional law, the Courts will abrogate it.

√√ **Right to Appeal State Court Decision to U.S. Supreme Court**

Federal Court Jurisdiction in General

- Justiciability: there must be an actual dispute affecting the parties' rights. The federal courts –including the Supreme Court—will not render "advisory" opinions. Seems satisfied here.

- Federal Question Jurisdiction: the right to refuse medical treatment involves substantive due process considerations under the Federal Constitution. The question about staffing the CRB with a priest raises separation of church and state/First Amendment issues. Thus, there are federal questions and concomitant federal court jurisdiction.

Supreme Court Jurisdiction Specifically

Original Jurisdiction – None are applicable here

- disputes between states

- proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties

- controversies between the United States and a State

- actions or proceedings by a State against the citizens of another State or against aliens

Appellate Jurisdiction

- Article III, Section 2: admiralty and maritime cases; United States as a party, actions between citizens of different states; actions between citizens of the same state claiming lands under grants of different states

- Congress has allowed the Supreme Court discretionary review over appellate cases

- Supreme Court Rule 10 provides guidelines for discretionary review:

    - Whenever there is a conflict between court of appeals
    - When a state court of last resort has decided a federal law incorrectly
    - When the lower federal courts decide a federal law incorrectly

- This case doesn't seem to fit into any of the categories. It will probably have to go to a federal trial court first, or back to the highest court of Alahambra, before the U.S. Supreme Court will take it.

√√ **Political Question Doctrine**

- A form of "abstention" that federal courts employ to maintain proper separation of powers between the three branches of government. The court determines that the issue is not properly subject to judicial resolution, but is properly resolved by the other branches of government. E.g., Congress, not the courts, should handle legislative matters

    - Three part test: Is there a textually demonstrable constitutional commitment of the issue to a coordinate branch of government? Do the words in the constitution say that this area is to be handled by congress or the executive?

    - Is there a lack of judicially discoverable and manageable standards to resolve the issue?

    - Would a judicial decision evince a lack of respect for a coordinate branch of government? Or, would it be power grabbing – is the judiciary trying to take power away from a coordinate branch of government?

- Here, the question of whether someone has a right to refuse medical treatment clearly invokes the constitutionally protected interest of liberty, and thus is properly before a court.

- In fact, *Marbury v. Madison* and a host of other cases make clear that it is the Alahambra legislature, not the courts, looking to grab power here.

√√ **Adequate and Independent State Grounds Abstention?**

- The doctrine is involved when the Supreme Court is reviewing the final judgments of state courts.

- The Supreme Court will abstain from deciding cases that can be decided on "adequate and independent state grounds." When invoking the adequate and independent state grounds doctrine, the Supreme Court is saying that its job is to deal with federal questions of law, not state questions of law.

- This is easy when the Supreme Court seeks to review state decisions based entirely on issues of state law; it will not touch the case.

- It gets tougher when the state court decision rested on both federal law and state law. In such cases, if the Supreme Court's opinion on the federal issues would not change the outcome of the case because the judgment rests on unreviewable state law, the Supreme Court will not review the federal issues in the case.

- Analysis to follow under the adequate and independent state grounds:

  - First, decide whether the state law grounds are "adequate": A state law ground is adequate if it fully sustains the result, it does not violate federal law, a federal treaty or the constitution itself.

    - Here, there appears to be no Alahambra state law on the right of privacy or the right to refuse medical treatment. It appears that resort must be had to applicable federal law (*Cruzan*) in such circumstances.

  - Second, decide whether the state law grounds are "independent": A state ground is independent if is it not based on state courts understanding of the federal law.

    - Here, the Alahambra Supreme Court's decision seems dependent, or at least intertwined, with federal notions of liberty interests and a constitutional right to refuse medical treatment.

- Thus, the Alahambra Supreme Court's decision seems to be neither adequate nor independent, and the Supreme Court would not abstain from hearing the case on the adequate and independent state grounds doctrine.

√√ **<u>Justiciability: Standing, Ripeness, Mootness?</u>**

- <u>Standing</u>: In order to have standing to challenge a law on constitutional grounds you must be able to demonstrate injury in fact. It cannot by hypothetical injury or speculative injury: it must be more than just an injury that an average citizen will suffer as a result of the statute.

  - Requirements of causation and redressibility

  - Concept of third-party standing: close relationship between Howard and Alison

  - Alison, or Howard on Alison's behalf as her guardian, clearly face injury in fact. The right to refuse medical treatment involves one's well-being and dignity. The Supreme Court also is clear that substantial individual liberty interests are involved.

  - It is questionable whether Howard has standing in his own capacity. The harm is to his wife, and he can avoid further injury in fact by obtaining a divorce. I would seriously question whether he has standing in his individual capacity to redress Alison's right to refuse medical treatment.

- <u>Ripeness</u>: There must be a live controversy at the time the action is brought. There cannot be any administrative or other impediments to litigation pending. You have to have finalized all your administrative appearances for your case to be ripe for review.

  - The statute itself seems to answer this question. It says under the "emergency" provisions that only the Governor is authorized to reinsert the feeding tube. And, the Governor has in fact acted to reinsert the feeding tube. Nothing more remains to be done under the law. Since, Alison remains in a comatose state, there exists a live controversy.

- <u>Mootness</u>: The circumstances or factual basis that support the litigation has ceased or ended. There is no longer a live controversy before the court.

  - Alison remains comatose: there continues to exist a live controversy. The case is not moot.

  - *Roe v. Wade* situation: repetitious nature and evading review

√√ **<u>Eleventh Amendment Immunity?</u>**

- The Eleventh Amendment makes states immune to suits claims for money damages asserting federal claims whether brought by residents of that state or by those of some other state.

- This immunity does not apply to injunctions against future actions.

- Congress and the states can nullify or abrogate Eleventh Amendment immunity for states under a specific federal or state statute. However, Congress and the states may do so only by making its intention unmistakably clear.

- The Fourteenth Amendment, however, enacted after the Eleventh Amendment and gave Congress specific authority in Section 5 to pass laws supporting the equal protection guarantee of the Fourteenth Amendment as long as Congress has specifically stated in the legislation an intent to abrogate immunity. There seems to be no act of Congress in play here.

- Here, since Alison and Howard appear to be suing for declaratory relief or an injunction – neither of which involves money damages – it appears that the 11th Amendment doesn't apply.

√√ **Composition of Coma Review Board – Religious "Entanglement"?**

- Problems under the "establishment" clause. The state cannot prefer one religious sect or denomination over another, and the state cannot prefer religion over absence of religion.

- Cases discriminating against religion or a sect of religion are generally subjected to strict scrutiny. Laws of general application that only incidentally burden religion are subjected to rational basis.

- (1) The statute must have secular purpose; (2) the statute must not have primary effect of advancing or inhibiting religion; (3) the statute's effect must not create excessive entanglement in light of the first two prongs.

- It's hard to argue that the legislation creating the CRB is one of general application that only incidentally burdens religion when it states that one of the members of the Board must be a priest. Since, this can reasonably be assumed to be a Roman Catholic or Episcopal priest, the state, at the least, is preferring religion over absence of religion, and likely is preferring one or two denominations over others.

- The inclusion of this provision also likely demonstrates that the statute has a primary effect of advancing religion, and requiring participation by a member of the clergy smacks of entanglement.

√√ **Delegation Doctrine**

- Delegation is essentially recognition that in some circumstances it is okay for one branch of government to assign its duties to another branch of government. So, for example, Congress could delegate some functions to the President.

- However, for this to happen, for Congress to be able to delegate power under this Delegation Doctrine Congress is required to set forth intelligible principles to which the delegee must conform. In other words, Congress is required to set forth intelligible principles that articulate the goals to be achieved. Congress can't give up its primary function of policy making, and must provide clear guidelines to the delegee to insure that this doesn't happen.

- The courts will give wide discretion on this and will allow incredibly broad principles to be articulated. There is not much requirement for specificity in delegation.

- If the delegee is merely filling in the gaps of a broad policy created by Congress, then this is okay.

√√ **Appointment Power – Executive Branch**

- The constitution allows the president/executive to make appointments. When it comes to superior officers the president has the right to appoint, but that right is subject to the advice and consent of Congress. When it comes to inferior officers the president has the ultimate right to appoint.

- An **inferior officer** is someone who answers to someone who is below the president. At least one step removed from the president. A **superior officer**, therefore, would have to answer directly to the president.

Question Two

√√ **Right to Die/Liberty Interests – *Cruzan***

- Constitutionally protected liberty interest in refusing unwanted medical treatment

- Balance liberty interests against relevant state interests

- State may require that wishes as to the withdrawal of life-sustaining medical treatment be proven by clear and convincing evidence

- State has legitimate interest in the protection and preservation of human life

- State not required to accept "substituted judgment" of close family members absent substantial proof that their views reflected views of patient

- The facts regarding when the CRB may deny a request to remove a feeding tube are vague. If the CRB is limited to denying such requests only when there is insufficient evidence of the desire of the comatose individual to refuse treatment, then the scheme probably doesn't violate *Cruzan*.

- But, if the CRB is given wide discretion to deny requests to remove feeding tubes, even when faced with substantial evidence that the request is in accord with the desires of the comatose individual, then the legislation would run afoul of *Cruzan*.

√√ **Howard's Adultery – Privacy**

- Many states still have criminal adultery statutes on the books.

- The recent case of *Lawrence v. Texas* calls into question whether such statutes – involving private relationships between individuals within the confines of their homes – run afoul of 14th Amendment liberty and privacy protections.

- According to *Lawrence*:

  - "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."

  - The Fourteenth Amendment accords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.

  - Neither the State nor a court should "define the meaning of the relationship or . . . set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."

- But valid arguments remain against extending this protection to adulterous relationships because they may: (1) subvert the long-established and recognized institution of marriage; (2) pose significant risk to the children of an existing marriage who might well face the divorce of their parents because of adulterous affairs; (3) create a greater risk of children born of such adulterous affairs out of wedlock; (4) cause further financial strain our economic and social institutions.

QUESTION THREE

√√√ **Concept of Federal Supremacy**

- Article VI, Section 2: "The constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

- This involves the states' power to regulate. As we know, all power not expressly provided in the constitution is reserved to the states under the Tenth Amendment. But there are further means by which the Constitution can limit the states rights to act under the Tenth Amendment.

- There are three channels to limit the states' right to act:

  1. Law of preemption

2. The Dormant Commerce Clause (sometimes called the "Negative Commerce Clause")

3. The privileges and immunities clause under Article IV, Section 2.

√ **Preemption**

- Preemption employs the Supremacy Clause to deal with what happens when federal action conflicts with state action. If there is a conflict between federal law and state law this preemption doctrine is going to apply.

- The major point of doing preemption analysis is to examine the intent of Congress: can we say that Congress expressly or impliedly intended that its federal law be exclusive

- There are two situations where preemption will apply:

0. Express Preemption: Where a federal law *expressly states that it is preempting all state and local law.*

   - look to the statute itself and to the Congressional Record (floor debates and the like)

0. Implied Preemption: Where we look at a federal statute, compare it to a state statute or state law, and then say that a proper reading of the federal law implies preemption of state law.

- There are two types of implied preemption:

0. Field preemption

   - when Congress creates an extensive and pervasive legislative scheme so that one can draw the inference that it has intended to leave no room for states to supplement it.

   - Examples of Field Preemption include federal bankruptcy laws and federal immigration laws

2. Conflict preemption

   - It takes two forms:

     1. Where compliance with both the federal and state law is impossible. You would violate the federal law by complying with the state law. There, of course, federal law will preempt the state law.

     2. Even though it is 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. In other words, the state law would serve as an impediment to the federal law fully achieving its purposes and objectives.

- Here, there is no type of preemption because the facts state: "There is no federal legislation addressing the matter of tolls on interstate highways."

√√√ **Dormant Commerce Clause**

- The Dormant Commerce involves the interplay between the power of Congress to regulate interstate commerce and the rights of the states under the Tenth Amendment to engage in acts not otherwise reserved to the federal government.

- Sometimes, in matters of interstate commerce, Congress does not pass a statute that can be said to preempt state action on the matter. Does that mean that the states are free to act without limitation? The answer, of course, is "no" because interstate commerce is conceptually a matter better handled on the federal level.

- The Dormant Commerce Clause essentially operates as a check on states that enter into the field of interstate commerce. The question becomes how much of a limit can the federal government and congress put on the states powers to act.

- States normally look to place their interests, and their citizens' interest, first. Sometimes this has an adverse effect on out-of-staters or on interstate commerce in general. That is where the dormant commerce clause comes in.

- What we are really saying here is that the Commerce Clause has two distinct functions:

  1. Affirmative functions, which authorize congressional action over interstate commerce
  0. Under the Dormant Commerce Clause, the principle is that even if congress fails to preempt or act in regard to interstate commerce the states cannot act in regard to interstate commerce if their actions place a burden on interstate commerce.

- In other words, even when congress fails to act expressly in regard to interstate commerce or when congress fails to preempt what the states are doing the states cannot act if they place an undue burden on interstate commerce.

- The theory here is the Dormant Commerce Clause or the Negative Commerce Clause because there is nothing in the Commerce Clause that says the states doesn't get to burden interstate commerce.

- Some examples of this question whether a state or local law discriminates against out of stators are: (1) When a state prevents out of state banks from owning investment businesses within state. (2) A state passes a law from preventing out of state dairies from selling milk at prices lower than in state dairies. (3) A state passes a law giving shorter statutes of limitations to out-of-staters than in staters.

- When we are talking about the Dormant Commerce Clause what we are looking for is essentially discrimination between out-of-staters than in-staters.

- Two-step analysis:

  1. Look at the state statute and determine whether it facially discriminates, or discriminates in effect.

     - If on the face of the statute, or if in the effect of the statute, it treats out-of-staters differently than in-staters, apply strict scrutiny: the state statute will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. When the statute amounts to simple economic protectionism, a per se rule of invalidity will apply.

  0. Sometimes a law is not discriminatory either facially or in effects but it still does have an impact on interstate commerce.

     - If a state regulation is not discriminatory on its face and only incidentally restricts the flow of interstate commerce, we do not do the strict scrutiny test where you just declare the statute to be invalid. Instead, we do a balancing test under *Pike v. Bruce Church, Inc.*: uphold the state regulation unless it is clearly excessive in relation to local benefits.

     - If a legitimate local purpose behind the statute is found, then it becomes a question of degree. Does the legitimate local purpose outweigh the burden is places on interstate commerce?

     - Example: Minnesota v. Clover Leaf Creamery. Minnesota was one of the first states to require recycled milk bottles and required that everyone who sold milk in the state of Minnesota to use recyclable bottles. The statute treated out-of-staters and in-staters the same, and under the balancing test balance the positive local effect on the environment against the burden on interstate commerce (out-of-state bottle manufacturers, which produce on a national level, are burdened by having to comply with a bottle bill unique to one state).

- Exceptions to the Dormant Commence Clause:

  - Congress approves the state or local action that would discriminate against out-of-staters.

  - When the state is a "market participant." This means that when the state itself is involved in the business it can then favor its own citizens over out-of-staters. Example: In *Reeves, Inc. v. Stake*, the state of South Dakota ran a cement company and was allowed to charge less to in state purchasers then to out of state purchasers because the state was a market participant under those circumstances.

  - However, in order to be a market participant, the state must participate in an economic activity that would exist even if the state were not a participant, e.g., operate a cement plant like in *Reeves*. When the economic activity would not exist but for the participation of the state, then the state is acting more as a "regulator" than as a "market participant."

- Here, following the analysis, it appears that the FASTLANE program is discriminatory on its face: it charges more to out-of-staters than in-staters.

- Apply strict scrutiny and strike it down unless the state can come up with a valid reason unrelated to economic protectionism of its citizens. This would likely be hard for the state to do.

- But, there may be an applicable exception to the dormant commerce clause. At first glance, it would appears that in setting up tolls and collecting money in a business-like fashion, the state, through the MTA, is a "market participant."

- However, one might argue that the economic activity of collecting tolls would not exist were it not for the participation of the state in the activity. Accordingly, the argument would follow that the state is acting more as a "regulator" here than as a "market participant."

- On the other hand, one might argue that there do exist "private" tolls over bridges and the like. Indeed, the history of the "turnpike" is premised on the existence of private tolls.

- Whether the student concludes that the state is or is not a "market participant," it would be wise to examine the situation under the privileges and immunities clause of Article IV.

√√√ **Privileges and Immunities Under Article IV, Section 2**

- "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

- In some circumstances, even when is a market participant, the state is not allowed to discriminate against out-of-staters under the Privileges and Immunities Clause unless it can show that its discriminatory action is "substantially related" to a "peculiar evil" caused by the out-of-staters. Generally, to meet this test the state must show that there are no less discriminatory alternatives that would adequately address the problem.

- Those circumstances upon which the privileges and immunities clause applies involve rights that are *fundamental* to national unity: certain liberty interests involved with interstate commerce and important economic interests (the right to earn a livelihood or practice a profession).

- Here, while Doran and Sanders have no real claim that the higher toll for out-of-staters meaningfully affects their right to earn a livelihood, they will likely claim that it interferes with their fundamental right of interstate travel.

- The recent Supreme Court case of *Saenz v. Roe* (1999) appears to create a substantial argument for at least considering that the privileges and immunities clause would bar such discrimination toll charges. Saenz says: "The 'right to travel' . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." More importantly, it further said: "The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been "conceived from the beginning to be *a necessary concomitant of the stronger Union the Constitution created.*" (Emphasis added.)

- But, the question still remains whether a mere 25-cent additional charge to out-of-state residents actually deters interstate travel. In a way, all forms of charges or economic regulation on interstate travel raise the cost and therefore deter interstate travel. But as Justice O'Connor observed in the *Soto-Lopez* case, "something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."

- Arguments probably can be made either way regarding the determination whether a mere 25-cent additional charge to out-of-state residents actually deters interstate travel.

√√√ **Substantive Due Process/Equal Protection – Fundamental Right to Travel**

- Although not expressly stated in the Constitution, the right to travel has long been considered a fundamental right.

- Strict scrutiny vs. rational basis.

- Students should employ the same analysis as that employed under privileges and immunities directly above. (In any event, you will receive credit only once for going through the analysis.)

√√√ **Standing**

- In order to have standing to challenge a law on constitutional grounds you must be able to demonstrate injury in fact. It cannot by hypothetical injury or speculative injury; it must be more than just an injury that an average citizen will suffer as a result of the statute.

  - Requirements of causation and redressibility

  - Here Doran and Sanders lost some money as a result of being out-of-staters, and presumably will lose more money when they travel through the state again. It appears that the standing requirements have been met.

√√√ **Eleventh Amendment Immunity?**

- The Eleventh Amendment makes states immune to suits claims for money damages asserting federal claims whether brought by residents of that state or by those of some other state.

- This immunity does not apply to injunctions against future actions.

- Congress and the states can nullify or abrogate Eleventh Amendment immunity for states under a specific federal or state statute. However, Congress and the states may do so only by making its intention unmistakably clear. There is no act of Congress involved here.

- Here, since Doran and Saunders appear to be suing for declaratory relief or an injunction – neither of which involves money damages – it appears that the 11th Amendment doesn't apply.

QUESTION FOUR

√√√ **Our Concept of Federalism – Power Sharing Between Congress and the States**

State Power Under the Constitution

- The Constitution specifically enumerates the powers the Congress has in Article I, but it doesn't really specifically address the powers of the states.

- Instead, the 10th Amendment states: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This state power is generally known as the police power: the power of a state or a political sub-division of a state to legislate in regard to the health, safety, welfare, morals, and esthetics of the people. It is important to remember that the police power is state power; there is no such thing as federal police power.

Legislative (Congressional) Power Under the Constitution

- The Constitution grants at least the following powers to Congress: taxing power, spending power, fiscal power (banks and money), powers involving citizenship, treaty power, the power of civil rights enforcement under the 13th, 14th and 15th Amendments, and implied powers under the "Necessary and Proper Clause."

- But the most extensive power, and the one that is employed most often, is the power to regulate domestic interstate commerce under the Commerce Clause: "*The Congress shall have power . . . To regulate commerce* with foreign nations, and *among the several states*, and with the Indian tribes. Art. I. Sec. 8 (emphasis added).

√√√ **Congress' Commerce Power**

- The interpretation of the Commerce Clause has changed over time.

  - Early in the days of the Republic, the Supreme Court under John Marshall articulated an expansive view of Congressional power under the Commerce Clause. *See Gibbons v. Ogden.* However, at that time there was very little federal regulation and most cases involved the interpretation of state regulation.

- In the early part of the 20th century, and up through the beginning of the "New Deal," the Supreme Court's interpretation of the Commerce Clause became much more formalistic and limiting of Congressional commerce power. E.g., *Schecter Poultry Corp. v. United States* and *Carter v. Carter Coal Co.* Congress could not pass laws that involved labor used to produce goods because such activity was entirely intrastate. It could pass laws involving transportation of goods beyond state lines (interstate), and long as such was not a pretext for regulating intrastate commerce.

- But, with the Great Depression and New Deal came a change in approach by the Supreme Court; desperate times deserve desperate measures, so to speak. There seemed to generate an implicit recognition that a national (rather than piecemeal/state-by-state) solution was needed for this national problem.

- *NLRB v. Jones & Laughlin Steel Corp., United States v. Darby*, etc. suggested that the Court would proceed on a case-by-case basis to determine if the activity Congress was regulating had a close and substantial relationship to commerce.

- *Darby* expanded Congress' ability to regulate through the Commerce Clause by endorsing a bootstrapping approach that linked the Commerce Clause and Necessary and Proper Clauses. Since Congress could under the Commerce Clause regulate the interstate movement of goods made using certain labor it could also regulate production of such goods wihin a state as a means reasonably adapted to achieve the permitted end. This was a much more expansive view.

- The *Darby* view prevailed through the Civil Rights era of the 1960s, during which time the Supreme Court upheld Congress' right to enforce the 1964 Civil Rights Act by means of the Commerce Clause, *e.g. Heart of Atlanta Hotel*. (Of course, it would have been much easier to use the 14th Amendment, but the Court was not quite ready to do so at that point.)

- In recent years, the Supreme Court's interpretation of the Commerce Clause has returned to a much more formalistic, limiting view, although not quite as parsimonious as that employed in the early part of the 19th Century. *See Lopez, Morrison, Printz*, etc.

- Today, the Supreme Court will recognize the exercise of Congressional commerce power only in three circumstances:

  - Instrumentalities of Commerce: Trains, Planes, and Automobiles, roads, the airways, railways, the waters. For example, if it gets put on a truck it is interstate commerce even if the truck does not cross state lines it is interstate commerce, because a truck is an instrumentality of commerce.

  - Channels of Commerce: Any activity that rationally can be characterized as constituting interstate commerce. Congress can regulate the terms and conditions on which goods or services are sold interstate and may restrict the types of goods that can be shipped interstate. This means any activity that involves the interstate market place (in economic terms). It includes the exchange of goods and transportation of goods. But, historically, the channels of commerce do not involve the production of goods.

  - Activities Having a Substantial Relationship to Commerce: This is nothing more than an exercise of the Necessary and Proper Clause. Under the Necessary and Proper Clause, even activities that are not considered to be interstate commerce are proper exercises of Congressional power under the Commerce Clause if they have a substantial relationship to commerce.

  - But this Supreme Court has made it clear that it is going to avoid the creative arguments that were used pre-*Lopez* such as "cost of crime" and "national productivity" arguments. If the argument is to creative the Supreme Court will not buy into that. It will have to involve an *economic activity* to come under the substantial relationship test. Possessing a gun and gender-motivated violence are *not* economic activities.

- Is a medical malpractice reform act a proper exercise of commerce power by Congress.

  - Clearly, Congress would have the right to enact measures dealing with the procedure of pursuing a tort case in the federal courts. For example, over the years it has changed the threshold requirements for diversity lawsuits in federal courts. But, traditionally, the states have done all the legislating and regulating of tort cases occurring in state courts. Moreover, this federal reform measure goes well beyond regulating the procedure of tort cases; it involves the substance of state tort cases.

  - Here, if we define the regulated activity as "malpractice lawsuits," then the malpractice reform statute is certainly an economic event, and therefore likely constitutional. It would be tempting to make that calculation and hold the Congressional exercise of power to be valid.

- But *Morrison* recognized that virtually every lawsuit involves economic activity – damages are awarded and attorneys are paid – and that focusing on the lawsuit itself would mean that Congress could regulate virtually every state lawsuit on virtually any subject. The Court chose, therefore, to focus on the activity giving rise to the lawsuit rather than the lawsuit itself. In *Morrison* the activity was gender-motivated violence; here the activity is the practice of medicine.

- So the question must become whether the practice (or malpractice) of medicine is an economic activity that is substantially related to interstate commerce.

- One might argue that the practice of medicine is not necessarily an economic activity. After all, even though doctors usually receive compensation for their medical services, they frequently perform medical services without charge.

- Others might argue that in the great majority of cases the practice of medicine involves economic activity, especially in the modern day version that involves health insurance as well as numerous Medicaid and Medicare regulations.

- But in *Lopez*, the Supreme Court expressed substantial concern about Congress becoming overly involved in matters that have historically been the sovereignty of the states. Similar concern could be expressed here since tort law has historically been within the province of the states rather than the federal government.

- It's a close call in any event.

√√√ **Preemption**

- Preemption employs the Supremacy Clause to deal with what happens when federal action conflicts with state action. If there is a conflict between federal law and state law this preemption doctrine is going to apply.

- The major point of doing preemption analysis is to examine the intent of Congress; can we say that Congress expressly or impliedly intended that its federal law be exclusive

- There are two situations where preemption will apply:

0. Express Preemption: Where a federal law *expressly states that it is preempting all state and local law.*

   - look to the statute itself and to the Congressional Record (floor debates and the like)

0. Implied Preemption: Where we look at a federal statute, compare it to a state statute or state law, and then say that a proper reading of the federal law implies preemption of state law.

- There are two types of implied preemption:

   0. Field preemption

      - when Congress creates an extensive and pervasive legislative scheme so that one can draw the inference that it has intended to leave no room for states to supplement it.

      - Examples of Field Preemption include federal bankruptcy laws and federal immigration laws

   2. Conflict preemption

      - It takes two forms:

         1. Where compliance with both the federal and state law is impossible. You would violate the federal law by complying with the state law. There, of course, federal law will preempt the state law.

         2. Even though it is 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.

In other words, the state law would serve as an impediment to the federal law fully achieving its purposes and objectives.

Here, the facts say that there is an express preemption of state law on the matter.

Question Five

√√√ **Right to Free Speech Under the First Amendment**

- Two big points in freedom of speech:

1. The *content-based v. content- neutral* question: a law that is content based violates the First Amendment unless there is sufficient governmental justification. The content of the speech is at the very core of the First Amendment. The content of the speech is where the ideas, the ideology of the speech is contained and this is the whole part of the speech we are trying to protect.

- We use *strict scrutiny* when examining content-based laws, content based restriction.

- When the law is content neutral we will examine it under an *intermediate level of scrutiny.*

- There are two ways a law can be content based:

0. The law restricts viewpoint; obviously content neutral law would be viewpoint neutral

2. The law restricts subject matter; obviously a law that is content neutral would be subject matter neutral

2. Vagueness and Overbreadth

- Vagueness: A restriction is vague when a reasonable person cannot tell what speech is prohibited and what speech is permitted. In other words, a restriction is unconstitutionally vague if a reasonable person cannot tell from the statute what speech is prohibited and what speech is protected.

- A law is unconstitutionally overbroad when it regulates substantially more speech than the constitution allows to be regulated. In other words if there is an area where the government is allowed to regulate speech -- i.e. obscenities, or fighting words -- but the law also regulates much more than that which is allowed to be regulated (e.g. political speech as well).

√√ **Commercial Speech**

- Commercial speech is salesmanship. It is not the robust exchange of ideas. But, commercial speech is now protected speech by the First Amendment, although not as much as political speech. It encourages competition and our free market economy.

- For commercial speech to be protected (*See Central Hudson*):

0. It must at least concern lawful activity and not be misleading. Gambling in Massachusetts is not protected because gambling is unlawful.
0. Whether the asserted governmental interest is substantial. If the government is going to regulate commercial speech it must have a substantial interest in doing so
0. Does the regulation advance the governmental interest asserted. There must be a causal connection between the substantial governmental interest and the regulation
0. It cannot be over-inclusive. Whether it is not more extensive than is necessary to serve that interest

- Time, place, and manner restrictions

- the restriction must be content neutral. You can't allow democrats greater access then you can allow republicans. Your restriction must deal with content neutral matters.

- the time, place, or manner restriction has to be narrowly tailored to serve a legitimate governmental interest.

- cannot be so restrictive as to foreclose all channels of communication.

- Here, "[p]reserving the sanctity of the home, the one retreat where men and women can repair to escape from the tribulations of their daily pursuits, is an important value." Although in public locations it is the responsibility of the individual to avoid speech that he does not wish to hear, in the home a man is entitled to close off the rest of the world. Individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom.

- Therefore, there is a substantial state interest in preventing deception and mistreatment of consumers. Accordingly, the interest in preventing abusive telemarketing practices is sufficiently substantial to justify a restriction on commercial speech if the restriction fulfills the other requirements of *Central Hudson*.

- Does the do not call list advance the governmental interest asserted.

    - Problem is that, by exempting charities and the like, the regulation isn't viewpoint neutral; it appears to bar commercial speech because of the message

    - This will be permitted if it advances the substantial governmental interest of protecting in-home privacy, and is not over-inclusive

Question Six

√√√ **Equal Protection Clause**

- The equal protection clause of the 14th Amendment deals with "classifications:" treating groups of people differently from each other.

- A mere classification, a mere different treatment of groups is not in of itself a violation of the Equal Protection Clause because this happens on a daily basis. Most of the time it is lawful and most of the time everybody does not have a problem with it. At the heart of equal protection analysis is the determination of which classifications are lawful and which classifications are unlawful.

- We need to distinguish between lawful and unlawful classifications, and it all comes down to what is the governmental justification for treating different groups of people differently. If it is an adequate justification it is okay, if it is not an adequate justification it is not okay.

- The analysis is as follows:

0. what type of classification is it

    - racial classifications and national origin classifications
    - classifications based on economic status or social status and everything else
    - gender based classifications, and classifications based on illegitimate children

0. what level of scrutiny applies

    - Strict scrutiny for: racial classifications and national origin classifications
    - Rational basis scrutiny for: classifications based on economic status or social status and everything else
    - Intermediate tier scrutiny for: gender based classifications, and classifications based on illegitimate children

0. does the governmental action satisfy the applicable level of scrutiny

    Rational Basis:

    - the lowest standard, the one under which the government is most likely to prevail.

    - the burden of proof is on the person challenging the governmental action, which is usually the plaintiff

    - There is a strong presumption in favor of the laws that are challenged under the Rational Basis Test. Courts are extremely deferential to the government when applying the Rational Basis Test There is a presumption of rationality that can only be overcome by a clear demonstration of arbitrariness, capriciousness, or irrationality.

- The law will be upheld if there is any conceivable legitimate purpose supporting it.

Strict Scrutiny:

- the highest standard: the one under which the government is most likely to lose.
- The government carries the burden of proof under the strict scrutiny test and it is a heavy burden.
- The government must demonstrate that the classification created by the law is necessary to achieve a compelling governmental interest.
- the government must show that the goal cannot be achieved through a less discriminatory alternative. So the law has to be narrowly tailored to achieve its purpose.

Intermediate Tier Scrutiny / Middle Tier Scrutiny:

- The government carries the burden of demonstrating the important governmental interest and demonstrating that the statute is substantially related to that important governmental interest.

- Here, there is no classification by race, national origin, gender or legitimacy. The classification distinguishes between those who die with spouses and/or children and those who do not.
- The level of scrutiny will most likely be rational basis.
- The government will likely justify the difference as being related to stimulating the economy by keeping down large payoffs under the workers' compensation scheme.
- The question is whether distinguishing between those who die with spouses and/or children and those who do not is rationally related to the achievement of this goal.