

Grading Guides for Past Examinations in Constitutional Law I

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This document contains copies of the grading guides that I used in grading final examinations in Constitutional Law I (Course No. 6214) given on the following dates:

December 16, 2019
December 15, 2016
April 20, 2015
December 15, 2014
April 22, 2014
April 23, 2013
April 24, 2012
April 20, 2010
April 22, 2008
April 27, 2006
April 28, 2005
May 6, 2003
May 5, 2000
May 4, 1999

I did not teach Constitutional Law I in any other years.

In accordance with the examination instructions, I grade answers based on how well they: (a) identify the governing constitutional doctrines; (b) apply these doctrines to the specific facts of the problems; (c) compare the facts of the problems to precedents considered in the course; and (d) provide other arguments, explanations, and examples as required by the questions.

Answers that do all of these things receive higher grades than those that have not. The most common mistakes usually are failing to discuss the application of legal rules to the facts of the problem and devoting too much attention to irrelevant legal doctrines at the expense of discussing more pertinent matters.

All of the problems contain facts quoted (with minor editing) from actual cases. You can look up these cases using the citations given in the examinations or the grading guides.

Grading Guide for the Final Examination in

Constitutional Law I

(Course No. 6214-22; 3 credits)

Professorial Lecturer Gregory E. Maggs

In accordance with the examination instructions, I evaluated the examination answers based on how well they: (1) identified the governing constitutional doctrines; (2) applied these doctrines to the specific facts of the problems; (3) compared the facts of the problems to precedents considered in the course; and (4) provided supporting arguments, explanations, and examples as appropriate. Each question was worth a maximum of 7 points, for a total of 21 points per problem and 105 points for the entire exam. In awarding points, I tried to be as flexible as possible and gave partial credit for answers that were not complete or entirely correct. Raw scores were translated into letter grades in accordance with the Law School's mandatory grading guidelines.

Everyone sees issues in different ways. This grading guide describes what the best answers typically said in response to the questions. Other answers also could receive credit appropriate to their merit. As in most years, the biggest problems were (1) stating principles of constitutional law but making little or no effort to apply these principles to the facts of the case; (2) expressing conclusions without addressing the applicable standards; and (3) failing to discuss relevant precedents that we studied in class. Other significant problems were making incorrect statements of law and wasting time discussing matters of very little or no relevance.

The edited excerpts quoted in the problems came from these cases: I. People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337 (D. Utah 2014); II. Perfect Puppy, Inc. v. City of E. Providence, 98 F. Supp.3d 408 (D.R.I. 2019); III. New York v. Mnuchin, 2019 WL 4805709 (S.D.N.Y.); IV. Center for Biological Diversity v. Zinke, 313 F. Supp. 3d 976 (D. Alaska 2018); V. Peltier v. Charter Day Sch., 384 F. Supp.3d 579 (E.D.N.C. 2019).

PROBLEM I.

(20 percent)

- A. How might PETPO support its arguments regarding the Commerce Clause and Necessary and Proper Clause and how might FWS respond?**

Affectation Doctrine (Effects Test). The best answers recognized that Congress is trying to regulate an intrastate activity (i.e., the taking of a species of prairie dog found in only one state). These answers further recognized that the Affectation Doctrine, which is derived from an interpretation of the Commerce Clause and Necessary and Proper Clause, allows Congress to regulate intrastate economic activities that in the aggregate substantially affect interstate commerce. Wickard v. Filburn; United States v. Lopez; Gonzalez v. Raich. These answers then discussed the application of this principle to this case, focusing on the difficult issues of (1) whether the regulated activity is economic and (2) whether and how the activity might affect interstate commerce. The best answers also discussed how PETPO and FWS might rely on or distinguish leading precedents such as Lopez, Wickard, and Raich.

B. How, if at all, might Congress protect the Utah prairie dog without relying on its Commerce power?

Direct Spending. The best answers recognized that the General Welfare Clause allows Congress to spend money on anything that in its discretion will promote the general welfare. United States v. Butler. These answers then provided and discussed specific examples of ways that Congress might spend money to protect the prairie dog (e.g., buying land to preserve its habitat).

Conditional Spending. The best answers also recognized that Congress may use conditional spending to induce states to pass laws that Congress wants the states to pass, provided that certain conditions are met. South Dakota v. Dole. These answers then provided and discussed specific examples of how Congress could use conditional spending to protect the prairie dog (e.g., withholding spending on related federal programs unless Utah passes laws protecting the prairie dogs).

Taxing Power. The best answers recognized that Congress can use tax laws to encourage or discourage activities (even intrastate activities) so long as the tax laws actually raise revenue. United States v. Kahriger; NFIB v. Sebelius. These answers then provided and discussed specific examples of tax laws that Congress might pass that would have the effect of protecting the Utah prairie dog (e.g., a tax on each prairie dog taken, a tax credit for each acre in which prairie dogs are not taken, etc.).

Treaty Power. The best answers discussed the Treaty Power, explaining how Missouri v. Holland appears to hold that Congress can pass laws implementing a treaty that addresses matters that are beyond Congress's enumerated legislative powers. These answers then provided and discussed specific examples of laws that Congress might pass to implement a treaty that protects the Utah prairie dog, much like Congress passed laws protecting migratory waterfowl to implement the treaty at issue in Missouri v. Holland.

C. To what extent, if at all, could Utah protect the Utah prairie dog in areas where the FWS rule does not protect it (i.e., on agricultural lands and in areas where prairie dogs create serious human safety hazards, etc.)?

States' plenary legislative power. The best answers recognized that states, unlike Congress, have plenary legislative power (i.e., states are not limited to legislating only on specific subjects), and how Utah might use this power to pass laws that protect the Utah prairie dog regardless of any connection to interstate commerce, etc.

Conflict preemption. The best answers recognized that state laws are preempted by federal laws if they establish incompatible standards or stand as an obstacle to federal goals. These answers then discussed whether the state laws that protect the prairie dogs in areas where federal law do not protect them establish incompatible standards or stand as an obstacle to federal goals. See Silkwood v. Kerr-McGee.

Field preemption. The best answers recognized that Congress may decide to preempt all state laws in a given field. These answers discussed how this principle is difficult to apply to the facts of this problem because the problem does not contain the words of the federal statute. Many of these answers, however, noted that protecting animals does not appear to be a field--such as nuclear power safety--for which Congress would think that it needed to be the sole regulator.

PROBLEM II.

(20 percent)

- A. **In support of its Dormant Commerce Clause challenge, Perfect Puppy argues: (1) "the ordinance allows an out-of-state merchant to continue to sell dogs and cats in the City, while City merchants cannot sell them within or outside of the City"; and (2) because Perfect Puppy "buys dogs exclusively from out-of-state breeders, prohibiting pet stores from selling cats and dogs has the effect of discriminating against out-of-state interests." What are the strengths and weaknesses of these arguments?**

Dormant Commerce Clause Doctrine (Discrimination Test). The best answers recognized that, in addition to other restrictions, the Dormant Commerce Clause Doctrine forbids states to treat interstate commerce differently from intrastate commerce, either intentionally or in practical effect, when there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests. Dean Milk v. City of Madison; Hughes v. Oklahoma.

First argument. The best answers suggested that a strength of the first argument is that interstate commerce is being treated differently from intrastate commerce for the reasons stated in the problem. But these answers also recognized that a considerable weakness of this argument is that the Dormant Commerce Clause serves to prevent protectionist local laws, and in this case the local law is the opposite of protectionist because it favors interstate commerce over intrastate commerce.

Second argument. The best answers suggested that a strength of the second argument is that the law may reduce the volume of interstate commerce because stores like Perfect Puppy will no

longer buy pets from out of state. But these answers also recognized that a weakness of this argument is that reducing purchases generally is not discrimination against interstate commerce.

B. What arguments might be made in support of and against Perfect Puppy's Contract Clause challenge?

Contract Clause. The best answers recognized that the Contract Clause prohibits the substantial impairment of existing contracts by state law unless the law is responding in a limited way to conditions similar to those in Home Building & Loan v. Blaisdell. These answers further recognized that in determining whether a law violates the Contracts Clause, courts consider various factors, including (1) whether the law is intended to deal with a broad, generalized economic or social problem; (2) whether the law operates in an area already subject to state regulation at the time the affected contractual obligations were undertaken; (3) whether the law effects simply a temporary alteration of contractual relationships; and (4) whether the law applies to everyone making the affected kinds of contracts or only a narrow group of persons. Allied Structural Steel v. Spannaus.

Arguments in support. The best answers suggested that the strongest arguments in support of Perfect Puppy's Contract Clause challenge are that the law substantially impaired a contract (i.e., Perfect Puppy's lease with its landlord) by prohibiting Perfect Puppy from doing the one activity that the lease allowed (i.e., selling puppies) and that the regulation was not necessary to serve a broad societal interest (such as alleviating the suffering during the Great Depression).

Arguments against. The best answers suggested the strongest argument against Perfect Puppy's Contract Clause challenge is that the law does not actually impair any contract because it does not increase or decrease either side's duties under the lease. The landlord still has to provide the same store, and Perfect Puppy still has to pay the same rent. The law merely regulates Perfect Puppy's business activities.

C. What arguments might be made for and against Perfect Puppy's Takings Clause challenge?

Regulatory takings. The best answers recognized the basic principle that the government may regulate private property "to a certain extent," but if a new regulation goes "too far," it is a taking. Pennsylvania Coal Co. v. Mahon.

Arguments for. The best answers suggested that Perfect Puppy's strongest argument in favor of its Takings Clause challenge is that the law goes too far because it renders its property interest in the leased premises useless given that the lease only allows Perfect Puppy to sell dogs. Although not specifically mentioned in the problem, some answers also inferred that Perfect Puppy may own puppies that it intended to sell, and the law deprive Perfect Puppy of the values of these puppies.

Arguments against. The best answers suggested that the City will liken this case to to Andrus v. Allard, arguing that the law only prohibits the sale of puppies while allowing Perfect Puppy to continue occupying the leasehold and enjoying any puppies it might own.

PROBLEM III.

(20 percent)

- A. The Government argues that the court lacks jurisdiction, explaining "this case demands a standardless inquiry barred by the political question doctrine" because "the States have suggested 'no clear, neutral standards or criteria for deciding when a given SALT deduction limit or cap passes constitutional muster.'" What arguments might the States make in response?**

Political Question Doctrine. The best answers recognized that a non-justiciable political question is an issue that the Constitution commits to a branch of the government other than the judiciary. The best answers further recognized that in determining whether an issue is a non-justiciable political question, courts consider whether the text of the Constitution directs Congress or the President to decide the issue, whether there are judicially manageable standards for resolving the issue, and other factors. Nixon v. United States. The best answers then discussed how the States should argue that the Constitution does not commit the determination of whether taxes or tax rates are constitutional to Congress, noting that courts regularly consider these constitutional issues, as seen in cases like United States v. Butler, United States v. Kahriger, and NFIB v. Sebelius.

- B. Might the Government argue that the court lacks jurisdiction on any other basis and, if so, how might the States respond?**

Lack of Standing. The best answers suggested that the Government may argue that the states lack standing. These answers recognized that to have standing under Article III, the plaintiff must properly allege: (1) that the plaintiff has suffered an injury in fact that is concrete and particularized; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is redressable by a favorable decision. Lujan v. Defenders of Wildlife. These answers then discussed whether these tests were met, focusing on whether the predicted harm to the real estate market, and consequential drop in real estate taxes that would be received, was concrete or merely speculative.

- C. If the court has jurisdiction, what arguments might the Government and the States make with respect to the constitutionality of the SALT cap?**

Taxation Power. The best answers recognized that the Government would argue that the taxation power is subject to only a few limitations (e.g., Congress cannot tax exports, taxes must originate in the house, direct taxes must be apportioned, etc.) but that otherwise the taxation power is plenary, which means that Congress can pass any kind of tax that it wants so long as it raises revenue. United States v. Kahriger. The best answers suggested that States probably argued that

the SALT cap "violates the federalism principles" because they cannot point to any specific constitutional provisions that would limit Congress. It appears that the states are concerned that the federal law effectively limits the discretion that states typically have enjoyed over setting real estate tax rates. The cap will certainly put pressure on states to lower their rates given that their citizens will not be able to deduct all state taxes they pay from their taxable federal income.

PROBLEM IV.

(20 percent)

- A. How is the procedure Congress used to disapprove the Refuges Rule in this case similar to and different from the "legislative veto" procedure Congress used in INS v. Chadha?**

Bicameral passage and presentment: The best answers discussed both similarities and differences. These answers recognized that the procedures were similar in that in both Chadha and the case in the problem, Congress first gave an agency discretion, the agency then took an action exercising that discretion, and Congress then attempted to undo the agency's action. These answers recognized that an important difference is that in this problem both Houses of Congress passed the resolution and the resolution was presented to the President. They then discussed how this procedure differed from INS v. Chadha in that the legislative veto procedure in that case allowed either house to overturn an agency's decisions by simply passing a resolution. They further explained that this difference was significant because the Supreme Court held that the procedure in Chadha was unconstitutional on grounds that any act having a legislative effect must be passed by both the House and Senate and then be presented to the President.

- B. The court says: "CBD cites INS v. Chadha as support for its assertion that for Congress to alter [FWS]'s authority [to issue future regulations], it must first have 'amended through bicameralism and presentment . . . any law which provided [FWS] the rulemaking authorities and mandates executed via the Refuges Rule.'" What arguments might be made in support of and against CBD's position?**

Issue. The best answers recognized that CBD's position is that Congress cannot simply nullify the Refuges Rule. Instead, CBD is arguing that if Congress does not like the Refuges Rule, Congress must amend the federal statute that gave the FWS authority to pass the Refuges Rule in the first place.

Arguments in Support of CBD's position. The best answers identified the strongest argument in support of CBD's position is that unless Congress amends the statute granting the FWS authority to pass the Refuges Rule, either the Rule remains authorized or the FWS has authority to pass the Rule again.

Arguments against CBD's position. The strongest counter argument is that Congress effectively did amend the statute authorizing the FWS to pass the Refuges Rule because Congress enacted a

new law--through a procedure that involved bicameral passage and presentment--saying that the FWS could not use its powers to pass the Refuges Law without further statutory authorization.

C. If President Trump had vetoed the Joint Resolution, what alternative measures might the House and Senate have taken to further their opposition to the Refuges Rule?

Alternative measures. The best answers provided and discussed concrete examples of the kinds of alternatives described on page 466 of the casebook. These include: (1) attempting to override the President's veto by a 2/3rds majority; (2) holding hearings to put pressure on FWS officials; and (3) threatening not to provide the same amount of funding for the FWS in the future unless the FWS changes the rule. These answers discussed the strengths and weaknesses of these alternatives.

PROBLEM V.

(20 percent)

A. If Congress wanted to address sex discrimination at charter schools like CDS, to what extent might it do so:

(1) using its power to enforce the Fourteenth Amendment; or

Fourteenth Amendment. The best answers recognized that section 5 of the Fourteenth Amendment grants Congress the power to enforce the prohibitions in section 1 of the Fourteenth Amendment. Civil Rights Cases.

State Action Doctrine. The best answers further recognized that the State Action doctrine says that ordinarily only state governments and government officials can violate the Fourteenth Amendment. Civil Rights Cases. These answers then discussed how charter schools might be viewed as private corporations (rather than state governmental entities) because they have corporate charters, etc.

Joint Participation Exception. The best answers next recognized that under the Joint Participation Exception, a private party might be deemed to be engaged in state action if the private party has a close and interdependent financial relationship with the government, Burton v. Wilmington Parking Authority, or exercises powers under a statute or other law in circumstances making it fair to say that the private party is a state actor, Lugar v. Edmondson Oil Co.; Edmonson Leesville Concrete Co. The answers then discussed how the Joint Participation Exception might apply to the charter schools because the state provides funding and has some control over the school's policies.

(2) using its powers to regulate commerce, to tax, or to spend money?

Commerce Power/Affectation Doctrine. The best answers first discussed how the Affectation Doctrine allows Congress to regulate some discrimination that affects interstate commerce. Heart of Atlanta Motel v. United States; Katzenbach v. McClung. They then discussed how the Supreme Court held in United States v. Lopez that Congress could not regulate bringing guns to school because bringing guns to school is not an economic activity that substantially affects interstate commerce. Finally, they discussed whether Lopez compels the conclusion that Congress cannot regulate sex discrimination with respect to student uniforms in schools. Many of these answers suggested that the states arguments about the effects on education sound similar to the "piling of inference on inference" that the Court rejected in Lopez.

Intergovernmental Immunity. The best answers recognized that principles of intergovernmental immunity do not permit Congress to pass laws that apply only to state governments but that Congress can pass generally applicable laws under the Commerce Clause that regulate state governments in addition to regulating everyone else. Garcia v. San Antonio Metro. Transit Authority. Accordingly, even if charter schools are viewed as state entities (see above), Congress could regulate them only through generally applicable anti-discrimination laws passed under the Commerce Clause.

Spending Power. The best answers recognized that Congress can spend money on anything that promotes the general welfare, United States v. Butler, and that Congress generally can use conditional spending to induce states to regulate activities that Congress wants the states to regulate, South Dakota v. Dole. These answers then discussed how Congress might offer to provide charter schools with money on the condition that they eliminate policies that discriminate on the basis of sex.

Taxing Power. The best answers recognized that Congress can use taxation to regulate activities so long as the taxation actually raises revenue. United States v. Kahriger; NFIB v. Sebelius. They then discussed possible ways that Congress might use tax laws to discourage discriminatory school uniform policies, provided and discussed detailed examples of possible laws, and discussed whether such laws would actually raise revenue.

B. Could Congress itself charter and fund, and then regulate, schools operated by private corporations?

Necessary and Proper Clause. The best answers recognized that the Supreme Court held in McCulloch v. Maryland that the Necessary and Proper Clause gives Congress the implied power to charter banks. They then discussed whether, by analogy, Congress could also charter schools. Many noted that Congress chartered The George Washington University. A key difficulty in these discussions was identifying the express powers for which chartering schools was necessary and proper.

Spending Power. The best answers then discussed whether Congress could fund schools that it chartered. These answers recognized that Congress can spend money on anything that in its judgment promotes the general welfare. United States v. Butler; Helvering v. Davis.

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Constitutional Law I

(Course No. 6214-22; 3 credits)

Professor Gregory E. Maggs

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Everyone sees issues in different ways. This grading guide describes what the best answers typically said in response to the questions. Other answers also could receive credit appropriate to their merit. As in most years, the biggest problems were (1) stating principles of constitutional law but making little or no effort to apply these principles to the facts of the case; (2) expressing conclusions without addressing the applicable standards; and (3) failing to discuss relevant precedents that we studied in class. Other significant problems were making incorrect statements of law and wasting time discussing matters of very little or no relevance. Several students received a deduction in points because they wrote answers that contained more than 4500 words in violation of the examination instructions (which were posted and emailed to every student prior to the exam).

The edited excerpts quoted in the problems came from these cases: I. Zogenix, Inc. v. Baker, 2015 WL 1206354 (D. Mass.); II. Bloch v. Executive Office of the President, 164 F. Supp.3d 841 (E.D. Va. 2016); III. United States v. Knowles, 2016 WL 3365373 (D.D.C.); IV. Edelhertz v. City of Middletown, 2013 WL 4038605 (S.D.N.Y.); and V. Stefanoni v. Darien Little League, Inc., 101 F. Supp.3d 160 (D. Conn. 2015).

PROBLEM I.

A. What legal standards govern Zogenix's arguments and under what circumstances might those arguments succeed?

Preemption. The best answers recognized that Zogenix is arguing that the Food, Drug, and Cosmetic Act preempts Massachusetts regulations and then identified and discussed the standards for express preemption, field preemption, conflict preemption of state laws that impose standards that are incompatible with federal law, and conflict preemption of state laws posing an obstacle to federal objectives. These answers suggested that, based on the facts in the problem, Zogenix was most likely to succeed by arguing that the hstate regulations pose an obstacle to the objectives of the Food, Drug and Cosmetics Act. They pointed out that the regulations have effectively banned the sale of a drug that federal law has approved for sale.

Note: Some answers also considered other possible grounds for challenging the state regulations, such as the Dormant Commerce Clause Doctrine. But these answers were not really responsive to the question unless they somehow specifically linked these other grounds to Zogenix's arguments.

B. How might sovereign immunity limit Zogenix in pursuing remedies against Massachusetts and state health officials?

State Sovereign Immunity (Massachusetts). The best answers explained that, even when state governments are subject to federal laws (as in Garcia v. San Antonio Metro. Trans. Authority), they are immune from federal or state judicial review of their compliance with the federal laws without their consent. Alden v. Maine. They then explained that this rule would prevent Zogenix from obtaining remedies from Massachusetts unless Massachusetts consents.

States Sovereign Immunity (state health officials). The best answers also explained that courts may enjoin state officials to follow federal law prospectively. Alden v. Maine (citing Ex Parte Young). They then discussed the kind of injunction that Zogenix might seek against the state health officials.

C. If the state regulations are invalidated, could Congress enact legislation imposing the same restrictions on Zohydro?

Commerce Clause. The best answers suggested that Congress might enact similar legislation under the Commerce Clause, identified the rules for what Congress may regulate under the Commerce Clause, and then specifically compared this problem to Gonzales v. Raich, which upheld federal regulation of marijuana.

Note: Some answers also considered whether federal legislation enacted under the Commerce Clause might be a regulatory taking. But the Takings Clause would not bar such federal legislation; instead, it merely would require Congress to pay compensation.

PROBLEM II.

- A. **Section 1211(b) says: "The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. . . . The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." To what extent could Congress amend § 1211(b) to increase or decrease the grounds for which the President may remove the Special Counsel?**

Restrictions on Removal. The best answers explained that the Supreme Court established in Morrison v. Olson that Congress cannot impose restrictions on the removal of executive officials if those restrictions would "unduly trammel on executive authority." These questions then considered whether it would unduly trammel on executive authority for Congress to increase the grounds listed in § 1211(b) for removal (e.g., by adding one or more grounds like "incapacity," etc.) or to decrease them (e.g. by removing one or more grounds like "inefficiency"). In addressing these points, the answers compared the case to Morrison.

Principal vs. Inferior Officers. The best answers explained that one important factor in deciding whether the removal restrictions would unduly trammel on executive authority is whether the Special Counsel is a principal officer ("officer of the United States") or an inferior officer. These answers then identified and discussed the application of the factors cited in Morrison for deciding whether an officer is a principal or inferior officer.

Note: The question does not ask whether Congress can give itself a role in removal of the Special Counsel.

- B. **In his lawsuit, Bloch presented a "legal theory that his removal [was] for less than adequate cause [and therefore] violates the constitutional separation of powers."**

1. **What jurisdictional obstacles might Bloch face in attempting to present this theory in federal court?**

Standing. The best answers identified lack of standing as a jurisdictional obstacle that Bloch might face. These answers identified and discussed the requirements for standing. Lujan v. Defenders of Wildlife. They then considered whether the allegedly unconstitutional removal standards injured Bloch given that he was not removed but instead resigned and whether a court could grant him relief at this point.

Mootness. The best answers also identified mootness as a possible obstacle that Bloch might face. These answers identified and discussed the doctrine of mootness. United States Parole Comm'n v. Geraghty. They then considered whether the issue that Bloch raises is now moot because he was not removed and no longer faces removal.

Note: Some answers suggested that the issue of whether the removal standards are constitutional would be a political question. But this conclusion seems inconsistent with decisions like Morrison v. Olson in which the Supreme Court ruled on the constitutionality of removal standards.

2. If in fact there was no cause to remove Bloch, would his removal violate the separation of powers?

Separation of Powers vs. Violation of a Federal Statute. The best answers considered whether Bloch's claim (i.e., that his removal without proper cause violates the separation of powers) confuses a violation of the law with a usurpation of legislative power. They suggested that even if the President improperly removed Bloch, the President would not be purporting to legislate as in separation of powers cases like Clinton v. City of New York.

PROBLEM III.

A. The Defendants argue that "Congress lacked the power to criminalize criminal activity with no nexus to the United States." How might the government respond?

Commerce Clause. The best answers considered whether Congress could enact the legislation under the Commerce Clause. These answers identified the rules for what Congress may regulate under the Commerce Clause and what kinds of regulations it might impose. These answers then specifically considered whether Congress can regulate activities on airplanes registered in the United States on grounds that the airplanes are "instrumentalities" of foreign commerce even if the regulated activities otherwise have no nexus to the United States. These answers also specifically compared the problem to Gibbons v. Ogden, a case in which Congress regulated the navigation of ships on the ocean.

Note: Some answers exclusively discussed Congress's power under the Affection Doctrine, but that doctrine typically applies to intrastate activities. Other answers, citing Missouri v. Holland, plausibly suggested that Congress might have passed the law as a means of carrying out treaty obligations (although the problem mentions no such treaties).

B. Could Congress amend § 959(d) to allow the President to establish by proclamation the areas outside of the territorial jurisdiction of the United States that § 959(c) reaches?

Non-Delegation Doctrine. The best answers recognized that the hypothetical posed by this question resembles United States v. Curtiss-Wright Export and identified and discussed how its conclusions about the non-delegation doctrine and the President's extra-constitutional powers over foreign affairs might apply to the facts of this problem.

C. Could a state enact a law that criminalizes the same conduct as § 959(c) and that applies both throughout the territorial jurisdiction of the United States and abroad?

State Legislative Power. The best answers first recognized that the states typically have general legislative power and therefore can legislate on any subject unless prohibited by the Constitution. Amend. 10.

Dormant Commerce Clause--Uniform National Standard. The best answers then considered whether the state law might violate the uniform national standard test under the Dormant Commerce Clause doctrine as a state law that attempts to regulate commerce outside of its borders. These answers specifically compared the problem to Cooley. (Note: Some answers suggested that states cannot regulate foreign commerce at all. But in Cooley v. Board of Wardens, the Court upheld a state law that regulated all ships entering the port of Philadelphia, which would include those coming from foreign countries.)

Field Preemption. The best answers also suggested that § 959(c) would preempt a state criminal law that criminalized the same conduct if this were a rare case in which Congress intended the federal law to occupy the entire field. Cf. Silkwood v. Kerr-McGee.

PROBLEM IV.

A. Edelhertz argues that the amendment violates Article IV because it "discriminates against nonresident managing agents of multiple dwellings . . . without a substantial reason." How might Middleton respond?

Privileges and Immunities Clause. The best answers described the elements identified by the Supreme Court for a violation of Article IV's Privileges and Immunities Clause and discussed what Edelherz and Middleton might say about each of these elements as they apply to the Amendment. These answers also compared the problem to Baldwin v. Fish & Game and the examples discussed in class.

Standing. The best answers also suggested that Middleton might respond that Edelhertz lacks standing to assert a violation of Article IV. These answers also identified and discussed the requirements of standing and questioned whether Edelhertz, as New York resident, could assert that the statute unlawfully discriminated against citizens of another state. These answers specifically compared this case to Baldwin v. Fish and Game, in which a Montana hunting guide challenged a Montana law under Article IV.

B. Under what circumstances, if any, would the amendment violate the Dormant Commerce Clause doctrine?

Dormant Commerce Clause Doctrine (Discrimination Test). The best answers explained how a state law may violate the discrimination test and then applied the test to the facts of the problem. These answers specifically considered two issues. The first was whether this was really a question of treating "interstate commerce" different from intrastate commerce. On this issue, the answers compared the facts to those of Hughes v. Oklahoma and Camps Newfound v. Town of Harrison. The second was whether the state's interest in the different treatment was legitimate. On this issue, the answers compared the facts to the Hughes, Camps Newfound, and Dean Milk v. City of Madison.

- C. **Suppose Middleton had heard complaints about Edelhertz's conduct and had passed the amendment specifically so that Edelhertz would lose his job. Would the amendment violate the Contract Clause or the prohibition against bills of attainder?**

Contracts Clause. The best answers identified what the Contracts Clause prohibits and discussed the application of that prohibition to the facts of the problem. These answers specifically compared the facts to those in Home Building & Loan v. Blaisdell and Allied Structural Steel v. Spannaus.

Bill of Attainder. The best answers identified what the Contracts Clause prohibits and discussed the application of that prohibition to the facts of the problem. These answers specifically compared the facts to those in Nixon v. United States and the precedents that Nixon cited.

PROBLEM V.

- A. **Other than by denying Mr. Stefanoni's factual allegations, how might the defendants respond to Mr. Stefanoni's § 1985 claim?**

State Action Doctrine. The best answers suggested that the defendants might respond to Mr. Stefanoni's claim by asserting that under the State Action Doctrine they could not have violated the Fourteenth Amendment because they are private parties and not state actors. These answers described the State Action and explained how it would apply to the facts of this case.

Joint Participation Exception. The best answers next considered what the defendants might say about the "joint participation" exception to the state action doctrine. These answers described the test for the exception and carefully discussed the relationship between the Little League and the city. Some answers also considered whether other state action doctrine exceptions might apply, but quickly dismissed this possibility.

- B. **Could Congress use its powers in Article I, section 8 to pass a law prohibiting the kind of conduct that Mr. Stefanoni alleges?**

Commerce Power (Affectation Doctrine). The best answers first identified the conduct that Mr. Stefanoni alleges, namely, that the Little League banned him from coaching and demoted his son to a lower level team because Mr. Stefanoni wanted to build affordable housing. These answers then considered whether Congress could use its power under the Commerce Clause to enact legislation that would prohibit such actions by the Little League. These answers described the Affectation Doctrine, applied it to the facts, and compared the case to United States v. Lopez and other Affectation Doctrine precedents. Finally, the best answers gave specific suggestions of exactly what such a federal law might say.

Notes: (1) Some answers discussed whether Congress could use its powers to address discrimination in housing. But this problem asked whether Congress could address the kind of conduct that Mr. Stefanoni alleges. (2) Some answers suggested that Congress might use its taxation and spending power to influence the behavior of Little Leagues. But the question was whether Congress could prohibit the alleged conduct. (3) Some answers also asked whether Congress could use its powers under the 14th Amendment to address the conduct. But this question asked whether Congress could pass the law using its powers in Art. I, § 8.

C. What jurisdictional obstacles might Mr. Stefanoni face if he brings his § 1985 claim in federal court?

Standing. The best answers identified lack of standing as a potential jurisdictional issue that Mr. Stefanoni might face in federal court. These answers identified and discussed the requirements for standing. Lujan v. Defenders of Wildlife. They then considered whether Mr. Stefanoni could satisfy these requirements. One key issue was whether Mr. Stefanoni (as opposed to his son) had suffered an injury by his son's demotion. Another key issue was whether the injury that Mr. Stefanoni suffered could be remedied by a favorable decision. These answers noted that, if he is a volunteer coach, he may not have suffered money damages. And if the baseball season is over, then it might be too late for an injunction.

Grading Guide for Final Examination in
Constitutional Law I

(Course No. 6214-13; 3 credits)

Professor Gregory E. Maggs

In accordance with the examination instructions, I evaluated the examination answers based on how well they: (1) identified the governing constitutional doctrines; (2) applied these doctrines to the specific facts of the problems; (3) compared the facts of the problems to precedents considered in the course; and (4) provided supporting arguments, explanations, and examples as appropriate. Everyone sees issues in different ways. In grading the answers, I tried to be as flexible as possible and gave partial credit for answers that were not exactly correct. Several students received a deduction in points because they wrote answers that contained more than 4500 words in violation of the examination instructions.

The edited excerpts quoted in the problems came from these cases: I. Nat'l Ass'n for the Advancement of Multijurisdictional Practice (NAAMJP) v. Castille, 2014 WL 6988595 (E.D. Pa.); II. Jotunbane v. Sedillo, 2010 WL 1781922 (D.N.M.); III. Common Cause v. Biden, 909 F. Supp. 2d 92 (D.D.C. 2012), aff'd on other grounds, 748 F.3d 1280 (D.C. Cir. 2014); IV. Republic of the Marshall Islands v. United States, 2015 WL 457861 (N.D. Cal.); and V. Phillips v. Quality Terminal Servs., 855 F. Supp. 2d 764 (N.D. Ill. 2012).

PROBLEM I.

A. Do the facts, as stated, establish that Mr. Riviere and NAAMJP have standing to challenge the constitutionality of Rule 204? If not, what else would they need for standing?

Standing. The best answers identified and applied the requirements of standing announced in Lujan v. Defenders of Wildlife and compared the facts of this problem to that case. Key issues were (1) whether it was enough that Riviere had alleged that he would apply for admission to the Pennsylvania bar by motion or whether he actually needed to apply; (2) whether Riviere had to allege that his application would meet all the other requirements for approval besides those in Rule 204; and (3) whether NAAMJP itself could have standing given that Rule 204 only applies

to members of the bar and not advocacy groups like NAAMJP. The most common mistakes were not addressing separately the standing of Mr. Riviere and NAAMJP and not specifying in detail (e.g., with an example) what else Mr. Riviere and NAAMJP would need for standing if they did not have standing.

B. Mr. Riviere and NAAMJP challenged Rule 204 under the Dormant Commerce Clause Doctrine and the Privileges and Immunities Clause. What arguments might be made for and against such challenges? Are there other plausible grounds for challenging the constitutionality of Rule 204?

Dormant Commerce Clause Doctrine. In addressing the Dormant Commerce Clause doctrine, most answers started by recognizing that Rule 204 might implicate interstate commerce because the practice of law is an economic activity that often concerns more than one state. Gibbons v. Ogden. These answers primarily focused on whether Rule 204 violated either the Discrimination or Excessive Burden tests as described in Dean Milk v. City of Madison and South Pacific v. Arizona. Most answers found describing the actual discrimination or burden quite challenging. Some answers also considered whether the Rule 204 might violate the Uniform National Standard test, but most of these answers easily distinguished this case from Wabash Railway v. Illinois.

Privileges & Immunities Clause. The best answers recognized immediately that Rule 204 could not violate the Privileges and Immunities Clause because the Rule does not discriminate on the basis of citizenship. Instead, the rule discriminates on the basis of where an applicant for admission by motion is a member of the bar. (The problem does not even say whether Mr. Riviere is a citizen of Pennsylvania or some other state.) In addition, most answers also pointed out that the Privileges and Immunities Clause applies only to citizens and therefore does not protect an organization like NAAMJP. Because the Privileges and Immunities Clause does not apply, it was unnecessary and unproductive to address all of its elements.

Alternative Grounds. The question asks whether there might be other plausible grounds for challenging Rule 204. But other constitutional grounds for challenging Rule 204 are difficult to identify. Credit was given for any reasonable suggestions. Some answers argued that federal preemption would be a possibility to investigate but observed that the facts in the problem do not mention any federal statute that conflicts with Rule 204 or that occupies the field of bar admissions.

C. Could Congress, by statute, preempt Rule 204 and require Pennsylvania bar officials to adopt and implement rules that would allow Mr. Riviere to be admitted by motion?

Analysis of the question: This compound question asks both (1) whether Congress could preempt Rule 204 and (2) whether Congress could require Pennsylvania bar officials to adopt and implement rules that would allow Mr. Riviere to be admitted by motion. Addressing both issues was essential.

Preemption: The best answers started by observing that Congress can preempt a state law, such as Rule 204, either by enacting a conflicting federal statute or by occupying the field. Silkwood v. Kerr-McKee. They then addressed the issue of whether Congress had the power to enact such a statute (see below).

Commerce Power: Most answers argued in the abstract that Congress can regulate the practice of law (or at least some aspects of it) under the Commerce Clause because practicing law is interstate commerce or an economic activity that substantially affects interstate commerce. See Gibbons v. Ogden, Darby v. United States, etc. But very few answers specified what a federal law, passed under the Commerce Clause, would have to say in order to preempt Rule 204. This was a crucial omission because without knowing what the law would say, it would be difficult to determine whether the law would preempt Rule 204 and whether it would violate principles of intergovernmental immunity (discussed below).

Intergovernmental immunity: The best answers also recognized that, even if Congress can regulate the practice of law under the Commerce Clause and therefore can preempt Rule 204, Congress cannot require bar officials to adopt rules or to implement federal programs. See New York v. United States, United States v. Printz. Accordingly, these answers questioned whether Congress could direct Pennsylvania officials either to change the language of Rule 204 or to handle motions for admission under a federal statute.

PROBLEM II.

A. What arguments might justify Smith v. Allen's statement regarding the federal Spending Power?

Background: The facts of the problem say that Smith v. Allen held that "Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting in his or her individual capacity, to private liability for monetary damages."

Spending power and Necessary & Proper Clause. The best answers started by pointing out that while the Spending Power gives Congress broad discretion to spend money to promote the general welfare, see Butler, subjecting persons to liability is not "spending money." These answers then considered where the power to subject persons to liability might come from. Most of these answers reasoned that the power to create liability might come from the Necessary and Proper Clause as it supports the Spending Power. The Necessary and Proper Clause allows Congress to pass laws "plainly adapted" to achieving the kind of spending that Congress wants. McCulloch v. Maryland. For example, Congress presumably could subject the recipients of federally provided funds to liability if the recipients did not use the funds in the manner that Congress directed because this would be necessary and proper for ensuring that the spending promoted the general welfare. But the best answers suggested that Smith v. Allen's holding might be justified because it would be a considerable stretch to say that it was also necessary and proper for carrying out the Spending Power for Congress to subject non-recipients of federal

money to liability. (Many answers went astray by talking about matters not directly raised by the problem. For instance, it is certainly true that, if certain conditions are met, Congress can use conditional spending to induce states to pass legislation. South Dakota v. Dole; NFIB v. Sebelius. But this question was not about inducing any states to pass any laws; it was instead about whether Congress can impose liability on non-recipients of federal funds.)

B. What arguments might the parties make about whether Congress could enact the RLUIPA sections using its Commerce Power?

Commerce Power. The best answers identified what Congress can regulate under the Commerce Clause and then discussed whether religious freedom was such an issue. They then compared this case to leading precedents, like Darby, Wickard, Heart of Atlanta, Katzenbach, Lopez, Raich, and NFIB. Key issues included (1) an explanation of how religion freedom in prisons theoretically might affect interstate commerce; (2) whether the presence of a jurisdictional hook in the statute conclusively made the statute constitutional; and (3) whether the possibly non-economic nature of religious activity prevented Congress from regulating it. Most answer cited what the Supreme Court said in Lopez on related issues.

Intergovernmental Immunity. The best answers further recognized that, even if Congress has some power to mandate freedom to engage in religious practices under the Commerce Clause, Congress may regulate state employees (like prison guards) only through generally applicable laws. Garcia v. San Antonio Metro. This restriction on Congress's power would be problematic if Congress only sought to regulate state prisons.

C. Could Congress use its Commerce or Spending Power to provide Jotunbane a cause of action and claim for damages against the state government employing the prison officials?

Analysis of the question. The actual statute imposed liability on prison guards. This question asks about whether Congress can create a cause of action against the state that employs the guards. Some answers went astray because they did not see this distinction.

Sovereign immunity. The best answers started by noting Alden v. Maine's holding that States have sovereign immunity based on "fundamental postulates implicit in the constitutional design" and that this sovereign immunity protects them from lawsuits absent their consent. Some of these answers suggested that Congress might have obtained consent by offering money to the states to help fund their prisons. But absent consent, Congress could not subject the states to liability. (Some answers correctly observed that Congress may abrogate state sovereign immunity under § 5 of the Fourteenth Amendment, but this question asks only about whether Congress could use its Commerce and Spending Power to impose liability on a state.)

PROBLEM III.

A. What obstacles are the Plaintiffs likely to face in seeking judicial review of their claims?

Political Question Doctrine. The best answers discussed whether the Political Question Doctrine might prevent the Plaintiffs from obtaining judicial review of their claims. These answers noted that article I, § 5, clause 2 allows the Senate to "determine the Rules of its Proceedings." These answers considered the likely assertion that this provision commits the question of the constitutionality of Senate rules to the Senate, just as the Constitution commits the manner of trying impeachments to the Senate. See Nixon v. United States.

Standing. The best answers also considered whether the Plaintiffs had standing to challenge Rule XXII. Key issues were: (1) whether the Plaintiffs had suffered a cognizable injury by not having the Senate pass one or more laws; (2) whether the plaintiffs could show that the Senate would have passed any bill in the absence of Rule XXII; and (3) whether a court could remedy the injury by ruling on the constitutionality of Rule XXII.

B. What arguments might the Plaintiffs make with respect to the cited constitutional provisions and what arguments might the defendants make in response?

Presentment Clause. The Plaintiffs will argue that the Presentment Clause contemplates that bills that have the support of the majority of the House and the majority of the Senate will be presented to the President. They will assert that Rule XXII contradicts this principle because it prevents bills that have the majority support of the Senate, but not 60 votes, from being voted on and then presented to the President. The defendants will respond that Rule XXII does not contradict this principle because any bill that receives a majority of votes on the merits will be presented to the President. Instead, the rule merely prevents the Senate from closing debate so that a vote can be taken. Once debate is cut off, a majority vote is all that is necessary for approval of a bill.

Power of the Vice President. The Plaintiffs will argue that article I, § 3, cl. 4 contemplates that the Senate will decide matters by a majority vote and that the Vice President shall break ties. They will assert that Rule XXII undermines this principle by preventing votes on any matter unless 60 senators favor a vote. The defendants will respond, again, that the Vice President still retains the power to break ties and that Rule XXII concerns only when debate shall be cut off. Once debate is cut off, the Vice President can still break ties.

Advice and Consent Clause. The Plaintiffs will argue that article II, § 2, cl. 2 contemplates the President can appoint ambassadors, judges, and other principal officers of the United States so long as a majority of the Senate consents. They will assert that Rule XXII contravenes this provision by effectively requiring the votes of 60 senators. Again, the defendants will argue that Rule XXII concerns only when debate will be cut off. Once debate is cut off, a majority vote is all that is necessary for approval. (Some answers talked about the Senate's approval of treaties, which requires a 2/3 vote but that was not at issue in this problem which focused only on bills and nominations.)

C. As an alternative to this litigation, how might the House of Representatives, the President, or others seek to counter the effects of Rule XXII?

Analysis of the Question. The plurality in Goldwater v. Carter mentioned that the political branches have various means of protecting their constitutional and political interests without resorting to litigation. This question sought suggestions for what the President and House might do besides litigating.

Carrots and Sticks. The best answers suggested that the House and the President, as a matter of politics, might use a combination of "carrots and sticks" to persuade the Senate either to repeal Rule XXII or to muster the 60 votes necessary to approve legislation and appointments. In a nutshell, the House and the President might offer to approve bills that the Senate wants to pass if the Senate acts favorably and threaten to oppose bills that the Senate wants if the Senate acts unfavorably.

Executive Action. Other excellent answers noted that the President enjoys a wide degree of discretion in enforcing federal law, and that the President might use that discretion to obtain some of what would be otherwise achieved by legislation. For example, some answers noted that President Obama's recent actions with respect to the immigration were in fact achieving some of what the Dream Act would have accomplished.

Political Pressure. Many fine answers also noted that the Senate is responsible to the voters and that the House and President could attempt to influence public sentiment in a variety of ways. For example, they might pass resolutions, hold hearings, or engage in other forms of public criticism of Rule XXII and its effects.

Common mistakes: Many answers suggested, in a variety of forms, that the President and the House might attempt to pass laws without the Senate's involvement. Some even suggested that the House or President might repeal Rule XXII. But these answers did not explain how such actions without the participation of the Senate would be constitutional. Other answers suggested that the House and President should undertake more litigation but did not fully explain how additional litigation would be an alternative to the current litigation.

PROBLEM IV.

A. Do the federal courts have power to interpret the Treaty and decide whether the United States is in breach?

Article III Federal Question Jurisdiction. The best answers recognized that the federal courts, in general, have the power to interpret treaties and to determine whether a party is in breach. These answers cited article III, § 2, cl. 1, which expressly says that the "judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made." An example of a case in which a party made a claim that the United States had breached a treaty was

Whitney v. Robinson (concluding that no breach had occurred because the treaty had been repealed by statute).

Political Question Doctrine. But even if the courts have jurisdiction to interpret treaties in general, the political question doctrine may prevent them from deciding whether the United States is in breach of this particular treaty. The treaty requires the United States "to negotiate in good faith" with other countries. The Constitution commits negotiation of international agreements solely to the President when it gives the President the power to "make" treaties in article II, § 2, cl. 2. The government may argue that how the President makes treaties is a political question just as how the Senate tries impeachments is a political issue. See Nixon v. United States.

Standing. The best answers also suggested that the courts might lack power to decide whether the United States is in breach because the Republic of the Marshall Islands lacks standing. The Republic of the Marshall Islands might allege that its injury is being deprived of what the United States promised in the treaty--i.e., the benefit of the United States' negotiating in good faith with other nations. But the United States may respond that this injury is too speculative or that it cannot be remedied by a court (see below). (In the actual case, the district court rules that the Republic of the Marshall Islands lacked standing, but it is a difficult issue.)

B. What arguments might the defendants make with respect to the constitutionality of the requested injunction?

Analysis of the Question. Many answers asserted that the relationship of question B to question A was ambiguous. They pointed out that Question A asked whether the court had power to interpret the treaty and decide whether the United States was in breach, while Question B asked whether the court could issue the requested injunction. Answers explained that if the court lacks jurisdiction, then it logically could not issue the injunction. Most answers dealt with this ambiguity by noting the arguments addressed in question A would also apply to question B and then addressed separate objections to the injunction. In grading questions A and B, I endeavored to give students a fair total number of points for their combined answers.

Separation of Powers. The United States might argue that an injunction requiring the President to conduct discussions with foreign nations in a particular manner violates the separation of powers. The best answers observed that the Supreme Court said in Curtiss-Wright that the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations." Accordingly, a court-supervised injunction arguably would interfere with the President's sole role. In addition, excellent answers also noted that the President has an absolute privilege to keep communications of a diplomatic nature secret, United States v. Nixon, and a court therefore could not assess whether the President was negotiating in good faith without violating the privilege. Answers also addressed, in various forms, the political question issue identified above.

C. How, if at all, could Congress address Plaintiff's concerns?

Analysis of the Question: The Plaintiff's primary concern is that the United States is not negotiating in good faith with other nations to eradicate nuclear weapons. Congress could address the Plaintiff's concerns by taking actions that would encourage such negotiations.

Powers of Congress. The best answers recognized that, while only the President can execute the treaty and negotiate with other nations, Congress has numerous ways to address the Plaintiff's concerns. Some possible, concrete examples include: (1) Congress could facilitate the President's compliance with the treaty by authorizing the spending of money necessary for international negotiations between the United States and other nuclear powers; (2) Congress could appropriate money for foreign aid that could be used to induce foreign nations to negotiate favorably with the United States; (3) Congress could call the Secretary of State and other government officials to testify before Congress about what they are doing to implement the treaty, with the hope that having to testify will put pressure on them to comply with the treaty; (4) Congress could refuse to pass legislation that the President desires unless the President takes steps to implement the treaty; and (5) the Senate could refuse to consent to appointments of the President's choices of secretary of state and various ambassadors unless they would commit to support the treaty.

Most common mistakes: (1) A number of answers suggested that Congress could enact legislation that would supercede the treaty in accordance with Whitney v. Robinson. Although this is true, these answers did not explain what the new legislation would say or how abrogating the treaty would address the Plaintiff's concerns. In fact, abrogating the treaty would seem to do the opposite. (2) Other answers said that Congress could pass legislation that was necessary and proper for implementing the treaty under Missouri v. Holland, but then did not give concrete examples of what the legislation might say or explain how it might address the Plaintiff's concerns. (3) Some answers suggested that Congress could pass laws banning the United States from possessing or developing nuclear weapons, but these answers often did not explain how unilaterally disarming the United States would address the plaintiff's desire for international disarmament.

PROBLEM V.

A. What arguments should the parties make about whether QTS had a duty to provide due process before terminating Plaintiff?

State Action Doctrine and Joint Participation Exception. The best answers asserted that QTS would argue that it had no duty to provide due process because it is a private company and the State Action Doctrine says that the Fifth and Fourteenth Amendments apply only to governments and government officials. Civil Rights Cases. These answers asserted that Plaintiff would need to argue that QTS could be deemed a state actor under the joint participation exception to the state action doctrine. Burton, Edmonson, etc. A key issue was whether QTS was exercising a power given to it by the government or instead was merely following a regulation. On this point, some answers suggested an important question would be whether QTS could ask job applications

to undergo drug testing even if drug testing was not required by the federal statute. If QTS would have had this power, then it would not be exercising a power granted by the federal law.

B. To what extent could Illinois law require employers to provide the re-testing procedures requested by Plaintiff?

General Legislative Power. The best answers began by observing that states have general legislative power and can legislate on any subject, including drug testing procedures, unless limited by the Constitution. U.S. Const. amend. 10.

Preemption. The best answers then discussed the possibility that the federal law requiring drug testing might preempt the state law either because of a conflict (e.g., if the federal law mandates one and only one test) or if the federal law occupies the field. Although further analysis would depend on the text of the federal and state statutes, many answers asserted that the federal government might have good reason to object to a state law that would nullify the consequences of the initial federally mandated drug test by requiring a retesting procedure.

Contract Clause, Dormant Commerce Clause, etc. Many answers also discussed other possible objections to the state law. Some suggested that the state law might violate the contract clause if it interfered with existing contracts. Allied Structural Steel. Other answers suggested that a highly burdensome retesting procedure might violate the Dormant Commerce Clause Doctrine. Southern Pacific.

C. Why does the federal government have power to mandate drug testing of employees who provide lift services to railroads?

Commerce Clause: Nearly all answers correctly stated that Congress has plenary power to regulate the "channels and instrumentalities" of interstate commerce. Gibbons v. Ogden. Most answers also argued that Congress could regulate railroad lift services under the Affection Doctrine because the serves are an intrastate economic activity that, in the aggregate, might affect interstate commerce. Darby, Wickard, etc.

Grading Guide for Final Examination In

CONSTITUTIONAL LAW I

(Course No. 6214-22; 3 credits)

In accordance with the examination instructions, I graded your answers based on how well they: (1) identified the governing constitutional doctrines; (2) applied these doctrines to the specific facts of the problems; (3) compared the facts of the problems to precedents considered in the course; and (4) provided supporting arguments, explanations, and examples as appropriate. This memorandum outlines the content of superior answers. In reading this memorandum, however, please understand that in many cases other possible answers could receive full or partial credit.

Each of the five problems on the examination contained three questions, and each question was worth 7 points, for a total of 105 points. The high score was 97. The median score was 73.

PROBLEM I.

A. Might the Regulation be challenged as an uncompensated taking of property or as being unconstitutional on any other grounds?

Uncompensated Taking. The best answers quickly dismissed the possibility that there was a physical taking because California has not taken possession of the trucks or allowed others to do so. These answers then addressed regulatory takings, beginning with the fundamental principle that a regulation is a taking only if it "goes too far." Pennsylvania Coal v. Mahon. In considering whether the Regulation went too far, the best answers compared the Regulation to the laws at issue in Andrus v. Allard and Lucas v. South Carolina Coastal Commission and focused on the various factors identified in those cases and discussed in class (e.g., investment-backed expectations, etc.).

Dormant Commerce Clause Doctrine. The best answers also considered whether the Regulation might be unconstitutional under the Dormant Commerce Clause on grounds that it imposes an excessive burden on interstate commerce. These answers carefully compared the case to South Carolina v. Barnwell and Southern Pacific v. Arizona. Some answers also discussed the discrimination test and the uniform national standard test, but most of these answers quickly argued that the Regulation passes those tests because it applies equally to in-state and out-of-state

trucks, cf. Dean Milk v. City of Madison, and does not attempt to regulate anything outside of California's borders, cf. Wabash Railway v. Illinois.

B. What obstacles might limit judicial review of the constitutionality of the Regulation in federal court and how should OOIDA and its members best address them?

Standing. The best answers addressed the possibility that OOIDA might lack standing. After describing the Lujan test, these answers explained that OOIDA may not have suffered any injury if OOIDA merely represents independent truckers and does not itself own any trucks that the Regulation might affect. These answers said that if OOIDA does not own trucks, it should address this situation by having one or more of its individual members who do own trucks bring the lawsuit.

Sovereign immunity. The best answers observed that the problem describes the dispute as being between OOIDA and its members on one side and the state of California on the other side. These answers then explained that a federal court cannot exercise jurisdiction over California because of its sovereign immunity, citing the rules discussed in Alden v. Maine. These answers suggested that the plaintiffs should not sue California but instead should sue a California official seeking to enjoin the official from enforcing the Regulation.

C. What kind of legislative assistance might California and OOIDA seek from Congress to protect their respective interests?

California. California's interest is to reduce emissions from diesel trucks. California might ask Congress to assist it in furthering this interest by using the federal Commerce Power to enact legislation regulating diesel trucks in the way California wants them to be regulated, thus eliminating any Dormant Commerce Clause issue. Congress has power to regulate trucks because they are instrumentalities of interstate commerce. Gibbons v. Ogden. Even if Congress does not pass legislation regulating trucks, Congress could pass legislation authorizing California to regulate trucks without being constrained by the Dormant Commerce Clause Doctrine. Prudential Life Insurance v. Virginia.

Assistance OOIDA might seek. OOIDA's interest is to be free from the expense of the California Regulation. OOIDA could ask Congress to use its Commerce Power to pass legislation preempting the California legislation. Gibbons v. Ogden. OOIDA could also ask Congress to pass legislation using its spending power to subsidize compliance with the California regulation. Charles C. Seward Machine v. Davis; Helvering v. Davis.

PROBLEM II.

A. Which precedents should Roque rely on and how should the government attempt to distinguish them, and which precedents should the government rely on and how should Roque attempt to distinguish them?

Roque. Roque should rely on United States v. Lopez, arguing that Lopez established that the federal government cannot prohibit the mere possession of an article of commerce. He will assert that § 2315 is very similar to the Gun Free School Zones (GFSZ) Act. Just as the government cannot regulate mere possession of a gun, it also cannot regulate mere possession of stolen goods. But the government might respond that Lopez is distinguishable because the GFSZ Act did not have a jurisdictional element linking it to interstate commerce. Section 2315 in contrast applies only to stolen goods that have crossed a state boundary. (Some answers suggested that Roque would rely on Carter v. Carter Coal, but that case was expressly overruled in United States v. Darby.)

Government. The government should rely on cases like Wickard v. Filburn and Raich v. Gonzalez, arguing that those cases upheld federal legislation regulating intrastate activities (e.g., growing grain and possessing marijuana) on grounds that in the aggregate they might affect interstate commerce. The government will assert that allowing possession of stolen goods that have crossed state lines may affect the interstate commerce in such goods. Roque might seek to distinguish those cases by arguing that the activities at issue were more economic in nature than merely possessing goods.

B. How might Congress have addressed the problem of stolen goods other than with its power under the Commerce Clause?

Taxation Power. The best answers suggested that Congress might regulate stolen goods by placing a tax on the goods and requiring anyone who receives them to register and pay the tax, very much like the Bookie Tax at issue in Kahriger v. United States. A potential advantage to use the Taxation Power is that Congress can regulate matters not reachable under the Commerce Clause. NFIB v. Sebelius. (Note: Some excellent answers questioned whether a tax on stolen goods transported from one state to another would violate the prohibition on taxing exports from a state. Art. I, § 9, cl. 5.)

Spending Power. The best answers also suggested and described a number of specific ways that Congress might use its spending power to address the problem of stolen goods. For example, Congress could offer money to states (or threaten to withhold money from states) in order to induce states to pass laws addressing stolen goods. South Dakota v. Dole.

C. In a case in which the stolen goods had crossed a United States boundary, might the government have any additional arguments to make in support of § 2315?

Treaty Power. If the United States has a valid treaty with a foreign nation concerning stolen goods, it would have power to enact any laws necessary and proper to enforce the treaty. Missouri v. Holland.

Extra-constitutional power over foreign affairs. The government might argue that, in addition to its commerce powers, it also has extra-constitutional powers over matters of foreign affairs under the theory discussed in United States v. Curtiss-Wright. Accordingly, even if Congress could not

address the mere possession of domestic stolen goods, it might be able to address possession of stolen goods that had crossed an international boundary as a matter of foreign affairs.

Power to regulate foreign commerce. The Commerce Clause gives Congress not only the power to regulate commerce among the several states but also foreign commerce. Art. I, § 8, cl. 3.

Power to tax imports. Congress has plenary power to impose duties on imports, which would include imported stolen goods. Art. I, § 8, cl. 1.

PROBLEM III.

A. How might the defendants attempt to support their arguments with precedent, and how might the government respond?

Defendants' First Argument. Defendants' first argument is that "the prosecution is a federal attempt to coerce state authorities into enforcing the federal Controlled Substances Act." In support of this argument, defendants might cite United States v. Printz, which held that the federal government cannot require state officials to enforce federal laws. But the government might respond that it is not requiring Oregon to enforce any laws; on the contrary, the federal government is enforcing its own law.

Defendants' Second Argument. Defendants' second argument is that "the prosecution is a federal attempt to discourage the State of Washington from legalizing the possession of marijuana for medical purposes." This argument sounds like the argument from New York v. United States, where the federal government unconstitutionally attempted to force New York to create a low-level radioactive waste facility. The government might respond in two ways. First, it might argue that in reality this case simply involves federal preemption, and it is undisputed that federal law can prohibit what state law allows. Second, although the federal government may not require a state to legislate, Congress has not done that in this case; Congress has not attempted to induce or coerce Washington State to pass any legislation.

B. How do the defendants' arguments differ from Angel Raich's arguments in Gonzalez v. Raich?

Commerce Clause vs. Intergovernmental Immunity. In Gonzalez v. Raich, Angel Raich argued that Congress lacked power under the Commerce Clause to address local possession of marijuana. The defendants' argument in this case is about whether rules respecting intergovernmental immunity prevent the federal government from dragooning state officials or coercing states not to pass legislation (see the previous question).

C. To what extent, if any, would the constitutional analysis change if the defendants had been hired by Washington State to serve as the sole producers of marijuana for use by patients under the MUCA?

Generally Applicable Federal Laws. The best answers recognized that this change of facts would mean that the federal government was not merely regulating production of marijuana but was regulating state employees in their production of marijuana. These answers, however, correctly asserted that the federal government can require state governments to follow generally applicable federal laws. Garcia v. San Antonio Metro. Transit Auth.

PROBLEM IV.

A. How might the parties argue this case is similar to or different from Morrison v. Olson and Bowsher v. Synar?

Mulvaney's arguments. Mulvaney will attempt to distinguish this case from Morrison, arguing that the SEC commissioners are more insulated from executive control than the independent counsel was. For example, Mulvaney might assert that the officers who can decide whether to remove the SEC commissioners for cause are not "subject to the President's direct control." In contrast, in Morrison v. Olson, the Attorney General could decide to remove the independent counsel for cause, and the Attorney General was subject to the direct control of the President. Mulvaney will liken this case to Bowsher, perhaps arguing that the statute at issue here also gives executive power to someone whom the President realistically cannot remove.

SEC's arguments. The SEC will liken this case to Morrison, arguing that removal restrictions do not violate the separation of powers because they do not "unduly trammel" on executive authority. It might assert that the removal restrictions are acceptable given that the SEC are inferior officers with limited jurisdiction (a point Mulvaney of course will contest). The SEC will attempt to distinguish this case from Bowsher on grounds that an authority within the executive branch can remove SEC Commissioners and that Congress cannot play a role in the removal of SEC Commissioners other than by impeachment.

B. Why might Congress have felt it important to limit the President's power to remove SEC Commissioners and what alternative measures might Congress have considered in order to advance its interests?

Limiting Removal Power. Congress might have wanted (1) to give the SEC discretion in enforcing legislation, which is common in the modern administrative state, see INS v. Chadha, and (2) wanted the SEC to exercise that discretion independently of the President in order to reduce the influence of politics, cf. Morrison v. Olson. Congress may have worried that, without some degree of independence, Wall Street interests (e.g., large corporations, investment banks, stock brokers, etc.) would use their political influence on the President, who in turn would attempt to coerce SEC Commissioners by explicitly or implicitly threatening to remove them.

Alternatives. As discussed in class in connection with the INS v. Chadha case, Congress's alternatives might have been (1) to give less discretion the SEC commissioners, thus making politics less relevant; (2) to exercise oversight over the SEC by summoning SEC commissioners

to testify about their decisions with the hope that public scrutiny would limit political influence; or (3) to dissuade the SEC from making politicized decisions by threatening to pass legislation changing how they operate or withholding funds.

C. If Congress disagreed with the SEC's handling of this matter, what actions could Congress take to aid Mulvaney?

Persuasion. Congress could attempt to persuade the SEC to change its decision regarding Mulvaney by applying pressure. This pressure might include requiring the agency head to testify about the SEC's action, threatening to change the legislation governing the SEC for the future, or threatening to reduce the SEC's budget.

Legislative Relief. Congress might aid Mulvaney by passing legislation using its commerce or spending powers. This legislation might eliminate Mulvaney's liability or provide compensation to Mulvaney.

PROBLEM V.

A. Does Congress have power to enact a statute providing a remedy for violations of due process?

Power to Enforce the 14th Amendment. As the Civil Rights Cases explain, § 5 of the 14th Amendment empowers Congress to enforce the prohibition in § 1 of the 14th Amendment. Section 1 prohibits any state from denying any person due process of law. Accordingly, Congress has power under § 5 to enact a statute providing a remedy for violations of due process. An example of federal legislation passed under § 5 of the 14th Amendment is 42 U.S.C. § 1983, which is quoted and described at Syllabus Appendix A-13. We saw examples of 42 U.S.C. § 1983 in Lugar v. Edmondson Oil Co. [p. 1292], Edmonson v. Leesville Concrete [p. 1297], NCAA v. Tarkanian [p. 1300], and Dennis v. Sparks [p. 1305].

B. What arguments should the landlords raise in response to Plaintiffs' due process claim and how should Plaintiffs reply?

State Action Doctrine. The landlords should argue that, under the State Action Doctrine, they cannot violate the 14th Amendment's guarantee of Due Process because they are not private parties and the Due Process Clause limits only state actors. Civil Rights Cases.

State Action Doctrine Exception. The Plaintiffs might respond that an exception to the State Action Doctrine applies. For example, they might argue that the Landlords and Deputy Cuddeford acted jointly in evicting them. On this point, the best answers discussed various ways of interpreting the Deputy's statements.

C. What arguments should Deputy Cuddeford make in response to Plaintiffs' due process claim and how should Plaintiffs reply?

Deputy Cuddeford: Deputy Cuddeford presumably will argue that, even though he is a state actor, he did not violate due process. For example, he might argue that he did not evict the Plaintiffs or participate in their eviction. Instead, he might assert that he merely tried to keep the piece after they were evicted.

Plaintiffs: The Plaintiffs will respond that he jointly participated in the eviction and is responsible for the landlords' actions. The Plaintiffs may liken the case to Edmonson v. Leesville Concrete, in which the state was responsible for upholding a private party's discriminatory use of a peremptory challenge.

Grading Guide for Final Examination In

CONSTITUTIONAL LAW I

(Course No. 6214-13; 3 credits)

Each problem in the examination included three questions, and each question was worth six points. In accordance with the examination instructions, I graded your answers to the questions based on how well they: (1) identified the governing constitutional doctrines; (2) applied these doctrines to the specific facts of the problems; (3) compared the facts of the problems to precedents considered in the course; and (4) provided supporting arguments, explanations, and examples as appropriate. An intelligent and thorough discussion of these matters based on what we discussed in class was more important than a specific conclusion. A summary of the principal constitutional doctrines covered in the course appears in the Syllabus Appendix. This guide will refer to them without repeating all of the applicable rules and their elements.

The edited excerpts in the problems came from the following cases: I. Janes v. Triborough Bridge and Tunnel Authority, 977 F. Supp.2d 320 (S.D.N.Y. 2013); II. Kirkwood Florist, Inc. v. Hi-Float, Inc., 812 F. Supp.2d 1000 (E.D. Mo. 2011); III. Eric M. Berman, P.C. v. City of New York, 895 F. Supp.2d 453(E.D.N.Y. 2012); IV. Rangel v. Boehner, 2013 WL 6487502 (D.D.C.); V. Murphree v. Tides Condominium At Sweetwater, 2014 WL 1293863 (M.D. Fla.).

PROBLEM I.

- A. Would it be correct to conclude that the tolls charged to Janes were constitutional because New York residents who did not live on Staten Island also had to pay the higher rates?**

Analysis of the Question. The best answers recognized that the conclusion would be correct if the tolls are constitutional for the reason stated. They further recognized that the conclusion would be incorrect if (1) the tolls are unconstitutional or (2) the tolls are constitutional but for a different reason from the one stated. These answers then considered the constitutionality of the tolls under the Privileges and Immunities Clause and the Dormant Commerce Clause Doctrine.

Privileges and Immunities Clause. The best answers recognized that the tolls potentially implicate the Privileges and Immunities clause because they treat people differently based on their

residence. Addressing key elements of the Privileges and Immunities Clause rules, these answers considered: (1) whether charging lower rates to residents of Staten Island amounts to discrimination against citizens of other states even if some New York residents were charged higher rates (perhaps comparing this case to Dean Milk v. Madison); and (2) whether this would be the kind of discrimination that would be likely to jeopardize interstate harmony (perhaps comparing this case to Baldwin v. Fish & Game).

Dormant Commerce Clause Doctrine. The best answers recognized that the tolls also potentially implicate the Dormant Commerce Clause doctrine because major bridges are channels of interstate commerce. Addressing key elements of the Dormant Commerce Clause doctrine, these answers considered whether the difference in tolls is discrimination against interstate commerce as opposed to discrimination against citizens of other states (perhaps comparing this problem to Hughes v. Oklahoma and Camps Newfound v. Town of Harrison).

B. Suppose Janes called her representative in Congress to complain about the different toll rates. Would it be accurate for the representative to tell her, "This is a state government matter; there is nothing Congress can do about it"?

Analysis of the Question. The best answers recognized that the statement would be accurate if Congress could do "nothing" about the tolls, and would be inaccurate if Congress had the power to address the tolls, either directly or indirectly. These answers then considered Congress's Commerce, Spending, and Tax powers.

Commerce Power. The best answers considered whether Congress might address the bridge tolls using its power to regulate the channels of interstate commerce. They provided hypothetical examples (e.g., a uniform federal toll charge) and considered whether such federal regulation would preempt the state regulation and compared this case to precedent (like Gibbons v. Ogden).

Spending Power. The best answers considered whether Congress could use its conditional spending power to induce New York to eliminate the disparate treatment in the tolls. They also provided hypothetical examples (e.g., conditional highway/bridge funding) and compared this case to precedent (like Dole v. South Dakota).

Taxing Power. The best answers considered whether Congress could use its taxing power to induce the state to eliminate the disparate treatment. Some answers suggested the federal government might threaten to tax residents of Staten Island for using the bridge if the state did not equalize the tolls for everyone.

C. May New York constitutionally impose tolls on federal government vehicles, such as Postal Service trucks, when they cross the Verrazano Bridge?

Federal Immunity. Most answers recognized that states generally cannot tax instrumentalities of the federal government. McCulloch v. Maryland (immunity issue). The best answers then addressed the question of whether charging a toll for using a bridge is the same as imposing a

"tax" or is instead more like assessing a fee for the use of state property (i.e., the bridge). Some good answers even suggested that state sovereignty might prevent the federal government from "commandeering" state property without paying for it (comparing this case to United States v. Printz).

PROBLEM II.

A. What might Hi-Float say in support of its arguments about the Appointments and Take Care clauses, and how might Kirkwood Florist respond?

Appointments Clause. Most answers recognized that the President has the sole power to appoint principal officers of the United States. Art. II, sec. II, cl. 2; Morrison v. Olson. The best answers then considered possible arguments about whether a relator, who is not appointed by the President but who has authority to enforce a federal statute for the benefit of the United States, is a principal officer of the United States.

Take Care Clause. Most answers recognized that the Constitution requires the President to "take Care that the Laws be faithfully executed." Art. II, sec. 3; Youngstown Sheet & Tube v. Sawyer. The best answers then considered possible arguments, on both sides, about whether allowing a relator to bring lawsuits prevents the President from taking care that laws are faithfully executed.

B. How might Kirkwood Florist distinguish § 292(b) from the unconstitutional statute in Muskraat v. United States, 219 U.S. 346 (1911)?

Advisory Opinions. Muskraat held that Congress may not overcome the prohibition on advisory opinions by declaring the United States to be a party in a lawsuit in which it does not truly have an adverse interest. The best answers then suggested ways that Kirkwood Florist might distinguish § 292(b) from the statute at issue in Muskraat. They recognized that a relator may enforce the statute "even though a relator may suffer no injury himself," but then considered whether the relator would still have an interest given that the relator would recover half of the penalty.

C. How might Kirkwood Florist respond to an argument that Congress lacked power to enact § 292(a)'s prohibition on falsely marking products?

Patent Power and Necessary & Proper Clause. The best answers recognized that Congress has the power to grant patents, Art. I, § 8, cl. 8, and considered whether § 292(a), which prohibits falsely marking products protected by patents, might be legislation that is "necessary and proper" for carrying out that constitutional power.

Commerce Power, Affection Doctrine. Some answers also recognized that under the Commerce Clause and Affection Doctrine, Congress has the power to regulate economic matters that, in the aggregate, may substantially affect interstate commerce. United States v. Darby; Wickard v. Filburn. They then considered whether falsely marking products as protected by patents is a subject that, in the aggregate, might affect interstate commerce.

PROBLEM III.

A. What arguments might the Plaintiffs make in support of their Commerce Clause challenge to Local Law 15, and what counter arguments might they face?

Dormant Commerce Clause Doctrine. Addressing all the elements of the principal three Dormant Commerce Clause Doctrine tests, the best answers considered whether the plaintiff might argue that Local Law 15 improperly (1) discriminates against interstate commerce, Dean Milk v. Madison; (2) imposes an excessive burden on interstate commerce, Southern Pacific v. Arizona; or (3) attempts to regulate a matter which should be regulated, if at all, by a uniform national standard, Wabash, St. L. & P. Ry. Co. v. Illinois. These answers suggested that, among other things, it would be helpful to know how difficult, expensive, and time-consuming obtaining a license is.

B. What additional factual information might be helpful to evaluate Plaintiffs' contractual impairment challenge to Local Law 15?

Contract Clause. Focusing on the elements of the test that the Supreme Court has develop for analyzing Contract Clause claims, the best answers suggested that it would be helpful to have additional factual information about (1) whether Local Law 15 applies to existing contracts; (2) whether Local Law 15 substantially impairs contracts or just imposes procedural requirements for enforcing them (e.g., applying for a license); (3) whether Local Law 15 was a law enacted in response to broad, generalized economic or social problems; and (4) whether New York already regulated the affected contractual obligations. Home Building & Loan v. Blaisdell; Allied Structural Steel v. Spannaus.

C. The Federal Debt Collection Practices Act requires debt collectors to obtain state licenses but does not require debt buyers to obtain state licenses. Does this federal statute help or hinder Plaintiffs in challenging Local Law 15?

Analysis of the Question. The best answers recognized that the Federal Debt Collection Practices Act (FDPCA) would help the Plaintiffs in challenging Local Law 15 if this federal law preempted the state law. These answers, accordingly, considered the possibility of conflict and field preemption (discussed below). The best answers also recognized that the FDPCA could hinder Plaintiffs in challenging the Local Law 15 if the federal law authorized New York to take actions that otherwise would violate the Dormant Commerce Clause Doctrine (a doctrine which applies only when Congress has not acted).

Conflict Preemption. The best answers considered whether the FDPCA actually conflicts with Local Law 15, recognizing that a conflict may exist if the federal and state law establish incompatible requirements or the state law stands as an obstacle to federal goals. Silkwood v. Kerr-McGee. They observed that the federal and state laws did not set incompatible standards because the federal law did not prohibit debt buyers from obtaining state licenses; the federal law just did not require debt buyers to obtain state licenses.

Field Preemption. The best answers considered whether Congress might have intended the FDCPA to occupy the field of debt buying, which seems unlikely given that most contract law is state law.

PROBLEM IV.

A. Why might it be uncertain whether Plaintiff has standing to challenge the censure proceedings and seek an injunction?

Standing. Addressing the elements required for standing, see Lujan v. Defenders of Wildlife, the best answers considered (1) whether the plaintiff had suffered an "injury in fact" by being censured and having the censure recorded; (2) whether this injury was "fairly traceable" to the challenged conduct, namely, the ex parte communications by staffers; and (3) whether the injury would be redressable by a favorable judicial decision, such as an injunction along the lines the plaintiff has requested. These answers considered various possible arguments with respect to each of these elements, such as whether the causal chain between the alleged violation and the injury was too attenuating to satisfy the fairly traceable requirement.

B. How might Defendants support their political question argument, and what counter arguments might they face?

Political Question Doctrine. Addressing the elements of the political question doctrine, see Nixon v. United States, the best answers considered (1) whether the Constitution commits the passing of House censure resolutions to the House; (2) whether there are judicially manageable standards for deciding when the House has properly adopted a censure resolution; and (3) whether other factors weigh against a judicial decision of the issue. These answers cited art. I, § 5 cl. 2 ("Each House may determine the Rules of its Proceedings [and] . . . punish its Members for disorderly Behaviour."), and compared it to the provision at issue in Nixon v. United States.

C. If Plaintiff had been subjected to a Joint resolution imposing a fine on him for the misconduct, instead of a House Resolution censuring him, how might the constitutional issues presented be different?

Analysis of the Question. As discussed in connection with United States v. Curtiss-Wright and Bowsher v. Synar, a joint resolution is a law because it is a resolution passed by both houses of Congress and signed by the President (or passed over the President's veto). The best answers therefore recognized that the question here is whether there would be different constitutional issues if the plaintiff were challenging a law imposing a fine rather than a House resolution imposing a censure.

Bill of Attainder. Addressing the elements of the prohibition against bills of attainder, see Nixon v. Admin. of General Services, the best answers considered (1) whether a fine would fall within the historical meaning of legislative punishment; (2) whether a fine would further non-punitive

legislative purposes; and (3) whether the legislative record evinces an intent to punish. These answers compared to the law to the statute at issue in the Nixon case.

PROBLEM V.

A. What arguments might the parties make about whether Congress had power to enact the Act?

Commerce Power/Affectation Doctrine. The best answers, perhaps recognizing that the act does not involve spending or taxation, considered whether Congress could enact the law under its Commerce Power. These answers considered the elements of the Affectation doctrine. United States v. Darby. Most also compared this problem to United States v. Lopez and NFIB v. Sebelius, both of which held Congress lack powered under the Commerce Clause to enact particular legislation.

B. What arguments might the Condominium Association make for why it could not violate Murphree's right to free speech and how might Murphree respond to these arguments?

State Action Doctrine. The best answers suggested that the Condominium Association would cite the State Action Doctrine which says that, in general, the Constitution limits only the action of government agents and not private parties (like a condominium association). The Civil Rights Cases.

Public Function Exception. The best answers suggested that Murphree might cite the public function doctrine, explaining how he might liken his case to Marsh v. Alabama and distinguish it from NLRB v. Hudgens.

C. If Congress amended the Act to apply to common areas, what constitutional rights might the Condominium Association assert?

Physical Taking. The best answers considered whether the law might constitute a physical taking by requiring the Condominium Association to submit to a complete or partial physical occupation of the property (i.e., requiring it to allow flags in common areas). Loretto v. Teleprompter Manhattan; Yee v. City of Escondido.

Regulatory Taking. Some answers also considered whether the law "goes too far" in regulating the Condominium Association's property and thus constitutes a regulatory taking. Andrus v. Allard.

Grading Guide for Final Examination in
CONSTITUTIONAL LAW I

(Course No. 6214-13; 3 credits)

Professor Gregory E. Maggs

How Answers Were Scored

In accordance with the examination instructions, answers earned points depending on how well they: (a) identified the governing constitutional doctrines; (b) applied these doctrines to the specific facts of the problems; (c) compared the facts of the problems to precedents considered in the course; and (d) provided other arguments, explanations, and examples as required by the questions. Some questions had multiple parts and raised multiple issues. The best answers thoroughly addressed all aspects of the questions thoroughly. The most common mistakes were failing identify the applicable legal rules or principles, failing to discuss the application of these legal rules and principles to the facts of the problem, and devoting too much attention to irrelevant legal doctrines at the expense of discussing more pertinent matters.

Answer Formatting Issues

The instructions also required answers to be written in essay form using complete sentences and proper paragraphs. These requirements are typical of most law school examinations and writing assignments. They are also typical of the bar examination. Answers that did not comply with these requirements lost points.

The instructions also required everyone to indent the first line of each paragraph and include a blank line between paragraphs. Some answers did not comply with this requirement and were accordingly difficult to read.

Please note that the five problems in the examination were designated by roman numerals (i.e., I, II, III, IV, V), and the three questions within each problem were designated by capital letters (i.e., A, B, C, D, E). Many answers invented alternative designations for the problems and questions (e.g., 1, 2, 3, ...), and others did not provide any designation. This was often confusing.

Source of the Problems

The edited excerpts in the problems came from the following cases: I. Chinatown Neighborhood Ass'n v. Brown, 2013 WL 60919 (N.D. Cal.); II. National Collegiate Athletic Ass'n v. Christie, 2013 WL 772679 (D.N.J.); III. In re Black Farmers Discrimination Litigation, 856 F. Supp.2d 1 (D.D.C. 2011); IV. Peterson v. Islamic Republic of Iran, 2013 WL 1155576 (S.D.N.Y.); and V. Bowman v. International Business Machines Corp., 2012 WL 5285919 (S.D. Ind.).

PROBLEM I.

- A. If the plaintiffs sued California officials in federal court to enjoin enforcement of the Shark Fin Law, should the court dismiss the case based on lack of standing or some other jurisdictional defect?**

Standing. Discussion of whether the plaintiffs have standing. Points to address included (1) how the plaintiffs are engaged in cultural practices involving the use of shark fins and in business practices involving the buying and selling of shark fins in interstate commerce; (2) how the Shark Fin Law would appear to prohibit these cultural and business practices because it makes possessing and trading shark fins unlawful; (3) how any plaintiff who currently possesses or is currently engaged in trading shark fins (e.g., any plaintiff who has a contract to buy or sell shark fins that has not yet been performed) has suffered an injury in fact, traceable to law, that could be remedied by a declaration that the law is unconstitutional; and (4) how any plaintiff who merely wants to possess or trade shark fins in the future may or may not have suffered an injury that is "concrete and particularized, and actual or imminent." Lujan v. Defenders of Wildlife.

Other Jurisdictional Defects. Apart from issues concerning the plaintiffs' standing, the facts do not clearly suggest any other specific jurisdictional problems, such as lack of subject matter jurisdiction, etc.

- B. How might the plaintiffs' stated argument and assertion be relevant to possible constitutional challenges to the Shark Fin Law? What counter arguments might be made in response?**

Note: The plaintiffs' stated argument is that the law "does not and cannot accomplish its goals." The plaintiffs' "assertion" is that the practice of shark finning in U.S. waters is already illegal under federal law."

Dormant Commerce Clause Doctrine (Excessive Burden). Discussion of how the plaintiff's stated argument might be relevant to a challenge to the Shark Fin law based on the Dormant Commerce Clause Doctrine. Points to address included (1) how the Shark Fin Law may impose a burden on interstate commerce by preventing, among other things, the bringing of shark fins into or through California (where their possession is unlawful); (2) how preservation of sharks may be a legitimate state interest, Hughes v. Oklahoma; (3) how it matters under the Dormant Commerce Clause Doctrine whether a state law actually furthers a legitimate state interest, Southern Pacific

v. Arizona; and (4) how the Shark Fin Law actually may not accomplish its objective of conserving sharks.

Contract Clause. Discussion of how the plaintiff's stated argument might be relevant to a challenge to the Shark Fin law based on the Contract Clause. Important points to address included: (a) how the Shark Fin law, by banning trade, may impair existing contracts to buy or sell shark fins; and (2) how a state's interest in impairing contracts (e.g., whether the law is or is not intended to deal with a broad, generalized economic or social problem) is relevant under the standards set forth in Home Building & Loan v. Blaisdell and Allied Structural Steel v. Spannaus (1978).

Takings Clause. Discussion of whether the plaintiff's stated argument might be relevant to a challenge to the Shark Fin law based on the Takings Clause. Important points to discuss included (a) whether the Shark Fin Law "takes" shark fins from those in possession of them by making the possession unlawful, especially in comparison to the laws at issue in Andrus v. Allard and Lucas v. S.C. Coastal Council, which regulated use of property but did not prevent possession; (b) how takings must be for a "public purpose," Kelo v. City of New London; and (c) whether a law that does not accomplish its objectives can achieve a public purpose.

Preemption. Discussion of how federal law might preempt the California Shark Fin law. Important points to address included (1) how federal law does not conflict with the state Shark Fin Law because federal law prohibits shark finning while the Shark Fin Law prohibits possession and sale of shark fins, but (2) how federal law still might preempt the state law if the federal law was meant to occupy the field of shark finning. Silkwood v. Kerr McGee.

C. Would Congress have power to enact a federal law prohibiting all shark fin trade and possession? If so, would the United States have to pay for losses caused by the Federal law?

Commerce Clause. Discussion of whether Congress would have power to prohibit all shark fin trade and possession under the Commerce Clause. Important points to discuss included (1) how Congress can regulate intrastate economic activities that, in the aggregate, substantially affect interstate commerce, Wickard v. Filburn; (2) how possession and sale of shark fins may affect the interstate market for shark fins; and (3) how a federal law prohibiting shark fin trade and possession would be similar to the federal law banning possession and use of marijuana that was upheld in Gonzales v. Raich.

Takings Clause. Discussion of whether the federal law would violate the Takings Clause (see above).

PROBLEM II.

A. How might the defendants support their stated arguments? What counter arguments might be made in response?

Discrimination Argument. Discussion of the argument that Congress cannot ban sports wagering in New Jersey while allowing it in states that had preexisting sports wagering laws. Important points to discuss included (1) how Congress can regulate intrastate economic activities that, in the aggregate, substantially affect interstate commerce, Wickard v. Filburn; (2) whether gambling on sports is such an activity; (3) how Congress's power to regulate the subjects of the Commerce Clause is plenary, Gibbons v. Ogden; and (4) whether this plenary power requires Congress to treat commerce in all states equally.

State Sovereignty. Discussion of arguments that PASPA is either an improper negative command prohibiting New Jersey from enacting any law legalizing or licensing sports betting and/or an affirmative command requiring New Jersey to maintain State laws criminalizing sports betting. Important points to address included: (1) how federal law can preempt state law, but cannot require states to legislate, New York v. United States; and (2) whether PASPA actually requires the states to do anything or merely preempts any state laws that would authorize gambling, Silkwood v. Kerr-McGee.

B. Is the vocal support of New Jersey's Senators or New Jersey's decision during the one-year window not to legalize wagering on sports relevant to the constitutionality of PASPA?

Support of New Jersey's Senators. Discussion of whether the support of New Jersey's senators is relevant to the constitutionality of PASPA. Important points to discuss included (1) how support of a state's representatives did not affect the constitutionality of the federal law that was at issue in New York v. United States; (2) how saying a law is constitutional because a Senator supported it would be contrary to the principles of judicial review in Marbury v. Madison; and (3) how the "Political Safeguards of Federalism" theory adopted in Garcia v. San Antonio does not mean that individual Senators determine what is constitutional and what is not.

NJ's Previous Decision Not to Legalize Wagering. Discussion of whether New Jersey's previous decision not to legalize wagering when it had the chance somehow waived the state's right to challenge the constitutionality of PASPA. Important points to discuss included how, by way of comparison, it did not matter in New York v. United States that New York "was a willing participant" in setting up the federal scheme that New York later challenged.

C. In the absence of any federal statute on point, could New Jersey outlaw wagering on sports events occurring within New Jersey but not outside New Jersey (or vice versa)?

Note: The actual examination question did not include the word "not." Most answers identified this error and assumed that the word was missing. Allowance was made for anyone who appeared confused by this mistake.

Dormant Commerce Clause. Discussion of whether a New Jersey law prohibiting wagering on sports events inside or outside of New Jersey would violate the Dormant Commerce Clause Doctrine's prohibitions on state laws that discriminate against interstate commerce or state laws that attempt to legislate in areas in which, if they are to be regulated at all, must be regulated by a uniform national standard. Important points to address included: (1) whether or in what circumstances wagering on sports is interstate commerce, cf. United States v. Kahriger; (2) whether the New Jersey law would discriminate against interstate commerce by treating sports events in New Jersey differently from sports events outside New Jersey, Dean Milk v. Madison; (3) whether New Jersey would have a legitimate state interest (e.g., preventing corruption in sports) that cannot be achieved by non-discriminatory means, Dean Milk v. Madison; and (4) whether it would be permissible for New Jersey to regulate bets made outside of New Jersey when such bets might also be regulated by some other state, Wabash, St. L. & P. Ry. Co. v. Illinois.

PROBLEM III.

A. How should the court assess the objectors' separation of powers objection?

Separation of Powers. Discussion of whether the Claims Resolution Act violates the separation of powers because it attempts to coerce the class members and the court into accepting the settlement. Important points to address included (1) whether the law "unduly trammels on executive authority" (perhaps by interfering with the USDA's litigation position?), Morrison v. Olson; or (2) whether the law improperly interferes with judicial powers (perhaps by attempting to coerce the court to approve the settlement?).

B. If the court rejects the settlement, how could Congress coerce or induce the USDA to change its negotiating posture so that an acceptable settlement could be reached?

Agency Discretion. Discussion of ways Congress can constitutionally control agency discretion, such as (1) holding oversight hearings; (2) threatening to reduce future budgets; and (3) amending the laws under which the Court is acting. See Textbook, pp. 403-404.

C. Could Congress simply compensate the plaintiffs without conditioning payment on their agreement to a settlement? If so, does imposing the condition of a settlement affect the Claims Resolution Act's constitutionality?

Unconditional Spending. Discussion of whether Congress could compensate the plaintiffs without conditioning payment on a settlement. Important points to discuss included: (1) how Congress can spend money to promote the general welfare unrelated to any enumerated power, United States v. Butler; and (2) how courts generally will defer to Congress's determination of which expenditures promote the general welfare, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment," Helvering v. Davis.

Conditional Spending. Discussion of whether Congress may be limited in placing conditions on spending that is otherwise permissible. Important points to discuss included: (1) whether the

factors identified in South Dakota v. Dole would apply to conditions imposed on private plaintiffs as opposed to states; and (2) how these factors might apply.

PROBLEM IV.

A. How should plaintiffs respond to defendants' arguments?

Article III. Discussion of plaintiffs' responses to defendants' argument that § 8772 is an invalid legislative act of adjudication that violates Article III. Important points to discuss included whether the statute actually specifies the outcome of adjudication or instead merely says which assets may be seized to satisfy a judgment.

Bill of Attainder. Discussion of plaintiffs' responses to defendants' argument that § 8772 is a Bill of Attainder. Important points to discuss included: (1) whether the challenged statute falls within the historical meaning of legislative punishment (i.e., confiscation of property); (2) whether the statute furthers non-punitive legislative purposes (i.e., compensation of victims); and (3) whether the legislative record evinces an intent to punish (not clear on these facts). Nixon v. Admin. of General Services.

Takings. Discussion of plaintiffs' responses to defendants' argument that § 8772 would amount to an unconstitutional taking. Important points to discuss included (1) whose property was affected, the plaintiffs or their clients; and (2) whether seizure of property pursuant to a judgment is a taking.

B. Under what circumstances might it help defendants to argue that § 8772 violates an international treaty?

Treaties. Discussion of the relationship of treaties to legislation. An important point is that if the treaty became effective after § 8772 was enacted, the treaty would control. Whitney v. Robertson.

C. In the event of a military conflict with Iran, under what circumstances could the President seize control of a corporation like Clearstream Banking?

Presidential Authority. Discussion of the President's authority to seize control of a corporation. Important points to discuss included: (1) what the Supreme Court said in Youngstown Sheet & Tube v. Sawyer about the President's power as commander in chief to seize control of a corporation; (2) how the answer might depend on whether legislation (a) authorized the seizure (and the President followed the statutory procedures), (b) was silent on whether the President could seize the property; or (c) prohibited the seizure; and (3) whether the seizure might be characterized as occurring in a theater of war and why that might matter.

PROBLEM V.

A. Under what circumstances would IBM be liable on Anderson's claim?

State Action Doctrine. Discussion of the state action doctrine and how it says that, ordinarily, only state actors, and not private corporations like IBM, can violate the 14th Amendment. Civil Rights Cases.

Joint Participation Exception. Discussion of the joint participation exception to the state action doctrine. Important points to address included (1) how this was a "mirror image" case, NCAA v. Tarkanian; (2) whether IBM and the states jointly participated in cutting Anderson's benefit such that IBM could be fairly said to be a state actor, Lugar v. Edmondson Oil Co., Edmonson Leesville Concrete Co.

Due Process. Discussion of how IBM could only be liable if Anderson in fact had a valid Due Process claim based on the denial of benefits. Note: Because we did not study the substance of the Due Process clause, it was sufficient just to recognize the issue.

B. If Anderson chose to reside in another state, could Indiana deny her future benefits solely because she no longer lives in Indiana?

Privileges and Immunities Clause. Discussion of whether denying health benefits to a citizen of another state would violate the Privileges and Immunities Clause. Important points to address were (1) whether this problem concerned discrimination against citizens of another state; (2) whether the discrimination might jeopardize interstate harmony; and (3) whether the discrimination is necessary to promote a substantial state interest. Baldwin v. Fish & Game.

C. Could Congress require each healthy person to pay a fixed sum of money annually to raise federal funds for subsidizing Medicaid programs in each state?

Taxation power. Discussion of how Congress has plenary taxation power. Important points to address included how the Supreme Court upheld a similar law under the taxation power in Sebelius v. NFIB.

Apportionment Requirement for Capitation and other Direct Taxes. Discussion of whether such a tax would be a direct tax that requires apportionment. Important points included (1) how this tax sounds like a capitation; and (2) whether it would be apportioned if everyone paid the same amount because states with equal populations would pay the same amount of money. Sebelius v. NFIB.

Grading Guide for Final Examination in

CONSTITUTIONAL LAW I

(Course No. 6214-13; 3 credits)

Professor Gregory E. Maggs

In accordance with the examination instructions, I graded all answers based on how well they: (a) identified the governing constitutional doctrines; (b) applied these doctrines to the specific facts of the problems; (c) compared the facts of the problems to precedents considered in the course; and (d) provided other arguments, explanations, and examples as required by the questions. The most common mistakes were failing to discuss the application of legal rules to the facts of the problem and devoting too much attention to irrelevant legal doctrines at the expense of discussing more pertinent matters. The edited excerpts in the problems came from the following cases: I. In re Old Carco LLC, 2012 WL 893614 (S.D.N.Y.2012); II. Lakeside Roofing Co. v. Nixon, 2012 WL 709276 (E.D. Mo. 2012); III. United States v. Martinez, 599 F. Supp.2d 784 (W.D.Tex.2009); IV. Gordon v. Holder, 2011 WL 6018814 (D.D.C. 2011); V. Donn v. A.W. Chesterton Co., 2012 WL 288500 (E.D. Pa. 2012). Each question within a problem was worth a maximum of 8 points. Partial credit was awarded for incorrect or incomplete answers.

PROBLEM I.

A. How should the court evaluate Kentucky's jurisdictional arguments?

Standing. Discussion of whether the plaintiffs have standing to challenge the amendments to the Kentucky motor vehicle dealers law.

Ripeness. Discussion of whether the plaintiffs' challenges to the amendments to the Kentucky motor vehicle dealer laws are ripe for review.

[Guidance on both issues: Good discussions of these two issues identified the rules on standing and ripeness, addressed the application of these rules to the facts of the problem, and also compared the facts to precedents we have seen (e.g., Lujan v. Defender's of Wildlife, O'Shea v. Littleton, and Justice Powell's concurrence in the judgment in Goldwater v. Carter). Important points included (1) Kentucky's likely argument that the plaintiffs have not suffered an injury and that the case is not ripe because the Kentucky Motor Vehicles Commission has not been asked to

issue a license; and (2) the plaintiffs' likely response that the Kentucky Law already has injured them because the law has had a negative impact on New Chrysler's ability to attract dealers on competitive terms.]

B. If the court has jurisdiction, how should it evaluate the plaintiffs' arguments against the Kentucky amendments?

Preemption. Discussion of whether the Bankruptcy Code or the Bankruptcy Court's orders preempt the amendments to the Kentucky law.

[Guidance: Good discussions identified the requirements for field and conflict preemption, addressed whether these requirements would be met on the facts of the problem, and compared this case to precedent (e.g., Silkwood v. Kerr-McGee). Important points included: (1) Kentucky's likely argument that there is no field preemption because Congress surely did not want to preempt the entire field of car dealership contracts and licensing; (2) Kentucky's likely argument that there is no conflict preemption because the amendments do not prevent New Chrysler from rejecting previous contracts with old dealers (the law merely says that Chrysler has to present the old dealers with the opportunity to enter into new contracts with new dealers); (3) the plaintiffs' likely response that even if the amendments do not actually conflict with the Bankruptcy Code or the orders of the bankruptcy court, they stand as an obstacle to the accomplishment of their goals: the bankruptcy court said that New Chrysler could reject its contracts with previous dealers so that New Chrysler could enter into new contracts but the amendments to the Kentucky law may require New Chrysler to resume the old contracts if it wants to sell cars.]

Contract Clause. Discussion of whether the Kentucky law violates the Contract Clause.

[Guidance: Good discussions identified the rules on when state laws violate the Contract Clause, applied these rules to the facts of the problem, and compared this case to precedent (e.g., Home Building & Loan v. Blaisdell, Allied Structural Steel v. Spannaus). Important points included: (1) Kentucky's likely argument that the law addresses only new dealer agreements; (2) the plaintiffs' likely argument that the law effectively extends pre-existing contracts; (3) Kentucky's likely argument that the law does not substantially impair contracts because it only requires making offers on the same terms to former dealers; and (3) the parties' arguments about whether the legislature is responding in a limited way to general economic conditions.]

C. If the court strikes down the Kentucky amendments, could Congress use any of its powers to aid the rejected dealers?

Commerce, Spending, Taxation, Bankruptcy and Other Powers. Discussion of whether Congress could use its Commerce, Spending, Taxation, Bankruptcy, or other powers to aid the rejected dealers.

[Guidance: Good answers identified the rules regarding powers that Congress might use; gave very specific examples of laws that Congress might pass to aid the rejected dealers (e.g., a federal law identical to the Kentucky law); explained why the specific suggested laws would be constitutional; and compared the laws to precedents. Weaker answers merely said things like "Yes. Congress could use its Commerce Power" without explaining how and why. Note that this is not a question about how Congress might attempt to preempt the Kentucky Law or to motivate Kentucky to repeal the law.]

PROBLEM II.

Note: The first sentence of the quoted excerpt says: "Plaintiffs are nine individual residents of Illinois who seek work as journeymen roofers and three corporations who seek to employ the individual defendants and bid on public works projects in Missouri." The court in this case probably meant to say "individual plaintiffs" instead of "individual defendants."

A. In what ways must the claims of the individual plaintiffs be different from those of the corporate plaintiffs?

Individual Plaintiffs' Claims vs. Corporate Plaintiffs' Claims. Discussion of how the individual plaintiffs might challenge the law under both the Privileges and Immunities Clause and the Dormant Commerce Clause Doctrine, while the corporate plaintiffs could challenge the law under only the Dormant Commerce Clause Doctrine

[Guidance: Good discussions (1) addressed the elements of both Privilege and Immunities Clause claims and Dormant Commerce Clause claims; (2) described how the Missouri law arguably gives rise to both kinds of claims by discriminating both against citizens of other states and against interstate commerce; and (3) explained that only citizens have claims under the Privilege and Immunities Clause (e.g., Baldwin v. Fish & Game Commission, while both individuals and corporations can assert claims under the Dormant Commerce Clause Doctrine (e.g., Dean Milk v. City of Madison, and Hughes v. Oklahoma).

B. Does the fact that Missouri was reacting to discriminatory laws of other states strengthen or weaken arguments that the Missouri law is unconstitutional?

Substantial or Legitimate State Interest. Discussion of how the Privilege and Immunities Clause and the Dormant Commerce Clause Doctrine may permit discrimination to further a "substantial" or "legitimate" state interest and of whether a state might have such an interest in reacting to discriminatory laws of other states.

[Guidance: Good discussions identified the kinds of interests previously recognized as being proper and improper (e.g., health, safety, environmental conservation, etc., but not protectionism); and considered arguments about whether reacting to discriminatory laws of other states should be seen a substantial/legitimate state interest.]

Jeopardization of Interstate Harmony. Discussion of how the Privilege and Immunities Clause generally prohibits only discrimination that is likely to jeopardize interstate harmony and of arguments about whether discrimination in reaction to the discriminatory laws of other states would be likely to have that effect.

[Good discussions identified the kinds of discrimination that have been found likely to jeopardize interstate harmony (e.g., discrimination in terms of employment but not discrimination in terms of hunting licenses) and considered arguments about how to characterize Missouri's law.]

C. Why might the facts in the third paragraph of the excerpt be relevant to the constitutional analysis?

Necessity of Discrimination. Discussion of how both the Dormant Commerce Clause Doctrine and the Privileges and Immunities Clause permit discrimination that is "necessary" to further a state's legitimate interest and consideration of whether discriminating against individuals and corporations from Illinois is necessary to promote Missouri's interests if Illinois has ceased to discriminate against Missouri residents.

PROBLEM III.

A. How should the court evaluate the Defendant's Commerce Clause claim?

Commerce Clause & Necessary and Proper Clause. Discussion of whether Congress has the power to enact § 2423 under the Commerce Clause and the Necessary and Proper Clause.

[Guidance: Good discussions identified the rules on what Congress can regulate under the Commerce Clause and Necessary and Proper Clause, addressed the application of these rules to the facts of the problem, and also compared the facts to the facts of precedents we have seen (e.g., United States v. Lopez; Gonzales v. Raich; Gibbons v. Ogden, etc.). Important points included: (1) the defendant's argument that Congress cannot "punish[] an action that may be entirely legal in the host country"; (2) the defendant's argument that the alleged conduct in this case, kidnaping and sexual assault, is "at best loosely connected to a channel of commerce"; (3) the government's likely response that travel is itself a form of interstate commerce and that Congress's power to regulate interstate commerce is

plenary; (4) the government's likely response that this law is necessary and proper for implementing the treaty; (5) the government's argument that this law is necessary and proper for combating child sex trade (which would be similar to the argument in Raich that banning homegrown marijuana is necessary and proper for stamping out the interstate market in marijuana); (6) the government's argument that this case is distinguishable from Lopez because it has a jurisdictional hook, etc.; and (7) arguments of both parties about whether it should matter that this case involves foreign commerce instead of interstate commerce.]

B. Could a multilateral treaty give Congress additional power to enact § 2423? Would Congress have less power if the United States had joined a treaty in which it agreed not to exercise extraterritorial jurisdiction over such offenses?

Additional Power. Discussion of whether entering into treaties can give Congress additional power to enact a law.

[Guidance: Important points to discuss include: (1) the defendant's likely argument that under the 10th Amendment, Congress only has the powers delegated by the Constitution, and treaties therefore cannot grant additional power; and (2) the government's possible response that the Necessary and Proper clause allows it to enact laws for carrying out validly adopted treaties. (There is a case on this point in our book, Missouri v. Holland, but we did not cover it in class).

Less Power. Discussion of whether entering into treaties can give Congress less power.

[Guidance: An important point to discuss is the argument that because Congress has the power by statute to repeal treaties, Whitney v. Robinson, treaties cannot reduce Congress's powers.]

C. Might Congress and the President have power to enact § 2423 apart from the Commerce Power or Treaty Power?

Powers of Congress. Consideration of whether any powers, apart from the Commerce and Treaty powers, might allow Congress to enact § 2423.

[Guidance: Good discussions identified the reach of other powers that we discussed in class (e.g., the taxing and spending powers); considered whether these powers are broad enough to reach the conduct at issue; and addressed whether these powers would support § 2423 as it is currently written or whether the statute might need to be rewritten (and how). Some excellent answers also considered arguments about other powers listed in art. I, § 8 (e.g., power to punish offenses under the law of nations).]

Extra-Constitutional Powers. Discussion of the theory that Congress and the President might have extra-constitutional power to make something a crime overseas based on the theory of Curtiss-Wright v. United States.

[Guidance: Good answers identified the elements of the doctrine of extra-constitutional powers, consider the application of the doctrine to the facts of the case, and compared this case to Curtiss-Wright. An important point was the government's possible argument that just as Congress and the President were able to criminalize selling weapons to foreign nations in Curtiss-Wright in a manner that would not have been permitted if a situation involving only domestic affairs, so too might Congress be able to criminalize the conduct at issue in this case even if it would not be allowed in absence of extra-constitutional powers.]

PROBLEM IV.

A. What arguments should Gordon make in support of his Tenth Amendment claim and how should they be evaluated?

State Sovereignty. Discussion of how Congress cannot regulate state governments except through generally applicable laws, cannot compel states to legislate, and cannot compel states to administer federal programs. Garcia v. San Antonio Metro. Transit Authority; New York v. United States; Printz v. United States.

[Guidance: Good discussions identified the rules regarding state sovereignty under the 10th amendment, applied the rules to the facts of this problem, and compared the facts to precedents we have seen (e.g., Garcia v. San Antonio Metro. Transit, New York v. United States, and Printz v. United States). Important points included: (1) Gordon's argument that the PACT Act "commandeers states by requiring them to collect taxes from delivery sellers before a product can be shipped and thereby forc[es] them to implement a taxation scheme that is different from the ones the states previously had"; and (2) the government's argument that Congress is not requiring the states to pass or change any law and practice--it is instead saying only that, unless the taxes are collected in advance, private parties like Gordon cannot ship cigarettes.]

B. Does Gordon have a valid takings or Contracts Clause claim?

Takings Clause. Discussion of whether Gordon has a valid claim under the takings clause for the taking of his property without just compensation.

[Guidance: Good discussions identified the applicable legal standards relating to physical and regulatory takings, applied these standards to the facts of the case, and compared the facts to precedents we have seen (e.g., Andrus v. Allard). Important points include: (1) Gordon's argument that his salary had been taken and that he

cannot profitably run his business; (2) the government's likely response that there has been no physical taking because his property has not been confiscated or occupied; and (3) the government's likely response that there has been no regulatory taking because the law has not deprived Gordon of all of the value of his property, even if it has made it impossible for him to continue his former business.]

Contract Clause. Discussion of whether Gordon has a valid claim under the Contract Clause, art. I, § 10, cl. 1. Home Building & Loan v. Blaisdell, Allied Structural Steel v. Spannaus.

[Guidance: Good discussions identified the elements of the Contract Clause and pointed out that the PACT Act is a federal law and that the Contract Clause applies only to state laws.]

C. Could a state create an exemption to its normal tax laws such that neither Gordon nor his customers has to pay tax?

State Legislative Authority. Discussion of states' general legislative authority and concurrent power to impose taxes, absent federal preemption.

Preemption: Discussion of whether the PACT Act would preempt any state law that attempted to create an exception to a state's normal laws requiring Gordon or his customers to pay tax.

[Guidance: Good discussions identified the requirements for field and conflict preemption, addressed whether these requirements would be met on the facts the problem, and compared this case to precedent (e.g., Silkwood v. Kerr-McGee). Important points included: (1) the argument that a state exception to its normal tax laws would not literally conflict with the PACT Act because the Act refers to "applicable state and local taxes" and an exception would make state and local taxes inapplicable and therefore not within the Act; (2) the argument that a state exception to its normal tax laws would be invalid because it would stand as an obstacle to the principal goal of the federal Act, which is to discourage interstate shipment of cigarettes. On the second point, before passage of the PACT Act, the likely incentive for people to order cigarettes from dealers like Gordon was that Gordon did not collect taxes (i.e., Gordon emphasizes this on his web page) and many buyers unlawfully would not pay the applicable state taxes on them after receiving them. By requiring the applicable taxes to be paid in advance, the incentive for interstate shipment diminishes.]

State Sovereignty: Discussion of how Congress cannot compel states to legislate. New York v. United States.

[Guidance: Good discussions explained that a state cannot be compelled to legislate, compared this case to precedent (e.g., New York v. United States), and considered whether preventing a state from creating an exception to its tax laws would be the same as or different from requiring them to legislate.]

PROBLEM V.

A. What authority might the defendants cite in support of their constitutional arguments and how should a court evaluate these arguments?

Field Preemption. Discussion of whether federal law preempts the entire field of Navy submarine design.

[Guidance: Good discussions addressed the general points of preemption as discussed above (no need to repeat what was previously said). An important point was the defendants' argument that federal regulation of national defense is pervasive and leaves no room for state law.]

Political Question Doctrine. Discussion of whether the political question doctrine deprives courts of subject matter jurisdiction over state tort claims challenging the design of submarines.

[Guidance: Good discussions identified the elements of the political question doctrine, discussed the application of those elements to the facts of the problem, and compared this case to precedent (i.e., Nixon v. United States). Important points included the defendants' argument that the federal government exercises plenary authority over the utilization of materials necessary for national defense.]

B. In what sense does this case concern separation of powers?

Separation of Powers. Discussion of how this case may concern the separation of powers.

[Guidance: Good discussions defined the concept of separation of powers, provided examples from constitutional doctrines we have considered (e.g., doctrine involved in INS v. Chadha, Clinton v. City of New York, Bowsher v. Synar, Morrison v. Olson), and considered whether this case involved separation of power concerns especially in the area of national defense.]

C. If Donn had sued the defendants not merely for violations of state law but also violations of the Constitution, what additional obstacles might he have faced?

State Action Doctrine/Joint Participation Exception. Discussion of whether the private corporations that are the defendants could fairly be said to be state actors, perhaps because they jointly participated with the government in making the submarines.

[Guidance: Good discussions identified the elements of the state action doctrine and especially the joint participation exception, considered how those elements applied to the facts of the problem, and compared this case to precedent (e.g., Burton v. Wilmington Parking Authority). An important point was the argument that the Navy and the defendants jointly participated in the procurement of these submarines.]

Constitutional Violation. Discussion of how it would be necessary not only for the private corporations to be deemed state actors but also for them to have violated some constitutional provision by using asbestos.

[Guidance: Good discussions recognized that identifying a violation of the Constitution would be a major obstacle. Most accidental torts, even if committed by the government, probably do not rise to the level of being a constitutional violation.]

FINAL EXAM GIVEN APRIL 20, 2010

The edited excerpts in the problems came from the following cases:

- I. HRPT Properties Trust v. Lingle, 676 F. Supp.2d 1036 (D. Hawaii 2009)
- II. Roth v. President and Bd. of Trustees of Ohio University, 2010 WL 785349 (S.D. Ohio)
- III. United States v. Wakefield, 2009 WL 335597 (W.D. La.)
- IV. Leu v. International Boundary Com'n, 523 F. Supp.2d 1199 (W.D. Wash. 2007)
- V. Gilbert v. Loftin, 2010 WL 552127 (S.D. Ill.)

PROBLEM I.

A. What arguments might the lessees make in response to each of HRPT's allegations?

Note: The key provision in Act 189 requires appraisers to take into account a commercial tenant's "intensity of use" of the leased property in setting future rents. The provision appear to mean that, if a commercial tenant's business drops off (i.e., its use of the leased property becomes less intensive), the appraisers might lower the rent or at least not raise it as much. HRPT, as a landlord, understandably does not like the provision.

Contracts Clause. Discussion of possible arguments that, even though Act 189 may lower future rents it does not violates the Contracts Clause. Suggestions (1) that Act 189 is not a substantial impairment of the leases but instead merely a "clarification" of a vague terms; (2) that Act 189 might have been passed in response to an economic crisis (e.g., possibly the recession of 2008 which may have reduced the "intensity of use" by the commercial tenants); and (3) that Act 189 "operate[s] in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken" because leases are typically regulated in some way by the state. Home Building & Loan v. Blaisdell; Allied Structural Steel v. Spannaus,

Takings Clause. Discussion of possible arguments that Act 189 does not violates the Takings Clause. Suggestion of arguments (1) that rent control measures are not physical takings, Yee v. Escondido; and (2) that rent control measures are not regulatory takings because they still allow many uses of property and therefore do not go "too far," Andrus v. Allard.

Bill of Attainder. Discussion of arguments that Act 189 does not violate the prohibition on Bills of Attainder. Suggestions (1) that Act 189's requirement that the appraisers take certain factors into account does not impose one of the traditional types of punishments barred by the prohibition against Bills of Attainder; (2) that there is no intent to punish the HRPT but instead merely a desire to address the concerns of the commercial tenants; (3) that the law furthers non-punitive objectives, namely, helping tenants whose businesses

are not doing well; and (4) that a law is not a bill of attainder merely because it affects just one corporation. Nixon v. Admin. Gen. Services.

B. Given the considerable debate on the issue, could the Hawaii Legislature have obtained a judicial determination of Act 189's constitutionality before enacting it?

Case or Controversy Requirement for Federal Jurisdiction: Discussion of the case or controversy requirement in Art. III for federal court jurisdiction. Muskrat v. United States. Explanation of why the Hawaii Legislature does not have an adverse interest to any party.

State court jurisdiction: Discussion of how some state courts, unlike federal courts, may grant advisory opinions. (Note that Hawai'i may be one of these states. See Sierra Club v. Dep't of Transp., 167 P.3d 292, 312 (Hawaii 2007) ("the courts of Hawaii are not subject to a 'cases or controversies' limitation like that imposed upon the federal judiciary by Article III, [Section] 2 of the United States Constitution").

Ripeness. Discussion of whether a case would be ripe for review before the Act was adopted and before any lease was reviewed by appraisers under the new standard. Goldwater v. Carter (Powell, J., concurring in judgment, addressing the requirement of ripeness).

C. How, if at all, could Congress enact a law that would prevent enforcement of Act 189?

Supremacy Clause: Discussion of how, under the Supremacy Clause, a law validly passed by Congress might preempt any conflicting state law. Silkwood v. Kerr-McGee.

Commerce Clause: Discussion of whether Congress can regulate commercial leases under its Commerce Power. United States v. Darby, Wickard v. Filburn, etc. Example of a statute that Congress might pass.

PROBLEM II

A. Does the Contract of Admission or § 3337.14 violate the dormant Commerce Clause, the Privileges and Immunities Clause, or any other constitutional limitation?

Dormant Commerce Clause Doctrine. Discussion of whether § 3337.14 violates the Dormant Commerce Clause Doctrine. Consideration of (1) whether a uniform national standard is needed to prevent conflicting state laws (which seems highly unlikely given that no other state will attempt to regulate admission contracts with OUCOM), Cooley v. Board of Wardens; Wabash, St. L. & P. Ry. v. Illinois; (2) whether § 3337.14 discriminates against interstate commerce (which it perhaps does by making it more

expensive for OUCOM graduates to market their medical skills out-of-state that in-state), Dean Milk v. City of Madison; Hughes v. Oklahoma; or (3) whether § 3337.14 imposes an excessive burden on interstate commerce, Southern Pacific v. Arizona.

Privileges and Immunities. Discussion of whether § 3337.4 violates the Privileges and Immunities clause. Baldwin v. Fish & Game Commission. Consideration of (1) whether § 3337.4 discriminates against out of state residents or citizens (which it apparently does); (2) whether the discrimination might jeopardize interstate harmony (which it probably would not given that state universities long have treated out-of-state citizens differently, see Rosenstock, p. 342); and (3) whether the discrimination is necessary to promote a substantial state interest (such as using Ohio taxpayer funds to pay only for doctors who practice in Ohio).

Contract Made by a State vs. Legislation Passed by a State. Discussion of whether a contract entered into by a state, as opposed to state law like § 3337.14, can violate either the Dormant Commerce Clause Doctrine or the Privileges and Immunities Clause.

B. If OUCOM were a private institution, would the Contract of Admission and § 3337.14 raise no constitutional issues?

State Action Doctrine. Discussion of how private action ordinarily does not violate the Constitution because the Constitution generally regulates only state (i.e., governmental) action. Civil Rights Cases, etc.

Public Function Exception. Discussion of whether an exception to the state action doctrine, like the Public Function Exception, would apply to a private university. Marsh v. Alabama; Greenya v. George Washington Univ. (p. 1368).

C. Could Congress use any of its powers to aid non-Ohio residents who want to attend OUCOM but who do not wish to remain in Ohio after graduation?

Spending Power. Discussion of whether Congress could use its spending power to aid non-Ohio residents. Suggestions that Congress might use its spending power to make tuition grants directly to students because Congress can spend money on anything that would promote the general welfare and because courts defer to Congress on what is the general welfare. United States v. Butler, Charles C. Seward Machine v. Davis, Helvering v. Davis. Suggestion that Congress might give money to Ohio on the condition that it does not require non-Ohio residents to remain in Ohio after graduation. South Dakota v. Dole.

Commerce Power, Preemption, and Intergovernmental Immunity. Discussion of (1) whether Congress could regulate medical schools on grounds that in the aggregate they have a substantial effect on interstate commerce, Wickard v. Filburn, etc.; (2) how federal law would preempt state law, Silkwood v. Kerr-McGee; and (3) how the State of Ohio

would be immune from any regulation that was not generally applicable to all universities, and not just state universities, Garcia v. San Antonio Metro.

Taxing Power and Intergovernmental Immunity. Discussion of the general immunity of state instrumentalities from federal taxation.

PROBLEM III

A. What arguments might D.W. make in support of his constitutional claims and how should they be evaluated?

Commerce Clause. Discussion of Congress's power under the Commerce Clause. United States v. Lopez, etc. Consideration of how D.W. might make some of the arguments that the Court accepted in Lopez, namely, that the statute does not regulate an economic activity and that any suggestion that failing to register would substantially affect interstate commerce would require the piling of inference upon inference.

10th Amendment. Discussion of meaning of the 10th Amendment. McCulloch v. Maryland; New York v. United States. Consideration of D.W.'s argument that under the 10th Amendment, if the Constitution does not delegate express or implied power to Congress to regulate an activity, Congress cannot regulate it.

B. Could Congress accomplish the goals of SORNA without using federal commerce or spending powers?

Taxation Power. Discussion of Congress's taxation power, including the principle that Congress may use taxes to regulate something that it cannot otherwise regulate using the commerce power, provided that tax legislation actually raises revenue. United States v. Kahriger. Suggestion that Congress might impose a tax on an offender who does not register and a criminal penalty on an offender who does not pay the tax.

C. Under what circumstances could a state refuse to maintain a registry of sex offenders who reside in the state?

State Sovereignty. Discussion of principles of state sovereignty. Suggestion of arguments that state sovereignty might prevent Congress from either (1) requiring state legislatures to create a registry of sex offenders, New York v. United States; or (2) requiring state officials to maintain a federal registry, Printz v. United States.

Spending Power. Discussion of Congress's spending power. Suggestion of how Congress could use conditional spending to induce states to maintain a registry (such as by withholding money if they do not, as this Act does), subject to the specific requirements listed in South Dakota v. Dole.

PROBLEM IV.

A. What constitutional claims might Shirley-Ann and Herbert Leu make and what remedies might they seek?

No Power to Regulate Property. Discussion of the Leus' possible claim that the International Boundary Commission does not have power to regulate the Leus' private property. Observation that the Constitution does not confer this power (or any power) on any international commissions. Argument that a treaty cannot confer this power on the International Boundary Commission because executive power cannot be given to officials whom the President cannot remove. Bowsher v. Synar.

Takings. Discussion of whether the requirement of a 20-foot boundary vista constitutes a physical taking, United States v. Causby, or a regulatory taking, Lucas v. South Carolina. Suggestion that the answer would depend on whether the Leus must tolerate an actual invasion of the property reserved for the vista and what the Leus can still do with the property. Discussion also of the remedy the Leus could seek if this is a taking (e.g., just compensation but not an injunction).

B. How might the President respond to Mr. Schornack's arguments?

Extra-Constitutional Powers. Discussion of whether the President has extra-constitutional powers over foreign affairs matters. United States v. Curtiss-Wright. Suggestion of the possible response that extra-constitutional powers would allow the President to remove and reappoint members of IBC.

Separation of Powers. Discussion of separation of powers principles. Bowsher v. Synar, etc. Suggestion of the possible response that it would violate these principles to deny the President the ability to fire Mr. Schornack because Mr. Schornack exercises executive authority.

Executive Power Concerning Treaties. Discussion of the unsettled law regarding the President's power with respect to treaties. Goldwater v. Carter. Suggestion of the possible response that, if the President has implied power to rescind a treaty, he also has the lesser power to remove and replace a commissioner on a bilateral commission created by the treaty.

C. What obstacles might the parties face in obtaining judicially enforced remedies in this case?

Political question doctrine: Discussion of whether the President's decision to remove a member of the bilateral commission is a political question. Goldwater v. Carter.

Article III Jurisdiction. Discussion of whether an Article III court would have jurisdiction to impose a remedy on an international commission created by the United States and Canada.

PROBLEM V.

A. Apart from arguing that the care was adequate, what defenses might Dr. Beck assert and how should they be evaluated?

State Action Doctrine. Discussion of how the Constitution, including the Eighth Amendment, generally imposes limitations only on the government and not on private parties, Dr. Beck. Civil Rights Cases.

Joint Participation Exception. Discussion of whether the joint participation exception to the state action doctrine would apply, given the close economic relationship between Dr. Beck and the county hospital. Burton v. Wilmington Parking Authority.

B. Suppose that Congress wants to prevent similar incidents in the future.

1. Could Congress directly regulate how state-funded hospitals treat prison inmates?

Commerce Clause & Intergovernmental Immunity. Discussion of how Congress may regulate medical care because it is an economic activity that has a substantial effect on interstate commerce, but that any regulation of instrumentalities of the state government must be generally applicable to both state and non-state entities. Garcia v. San Antonio Metro. Transit Authority.

2. Could Congress induce these hospitals to improve care of inmates without regulating the care directly?

Spending Power. Discussion of how Congress could spend money directly on inmate care, Helvering v. Davis, or could give money to state hospitals on the condition that they improve hospital care for inmates, Dole v. South Dakota.

Taxing Power and Intergovernmental Immunity. Discussion of how Congress cannot tax instrumentalities of a state government, such as a county hospital.

Threatening preemption. Discussion of how Congress might threaten to regulate medical care of inmates directly, preempting state standards, unless states improve their current standards. Cf. New York v. United States (discussing this possibility).

FINAL EXAM GIVEN APRIL 22, 2008

The edited excerpts in the problems came from the following cases:

- I. City of Los Angeles v. County of Kern, 509 F. Supp.2d 865 (C.D. Cal. 2007)
- II. United States v. Detwiler, 338 F. Supp.2d 1166 (D. Or. 2004)
- III. Taylor v. Sebelius, 350 F. Supp.2d 888 (D. Kan. 2004)
- IV. Fisher v. Halliburton, Inc., 454 F. Supp.2d 637 (S.D. Tex. 2006)
- V. Ciacciarella v. Bronko, 534 F. Supp.2d 276 (D. Conn. 2008)

PROBLEM I

- A. Why might the EPA's regulation of biosolids and Kern County's shipment of its own materials be relevant in determining whether Measure E is unconstitutional?**

Supremacy Clause (Preemption). Discussion of whether the EPA's regulation of biosolids might be relevant because the regulations--depending on what they say--might preempt Measure E. Silkwood v. Kerr-McGee; Gibbons v. Ogden (and Syl. App. C, pt. 2).

[Guidance: A good discussion might explain that the federal regulations could preempt the state law either through conflict preemption or field preemption and give illustrations (e.g., there would be a conflict if the EPA regulations authorized using biosolids as fertilizer and field preemption if the EPA regulations were meant to exclusively regulate biosolids or fertilizer).]

Dormant Commerce Clause Doctrine (Excessive Burden). Discussion of how Regulation E would violate the Dormant Commerce Clause doctrine if it imposes a burden on interstate commerce that is excessive in comparison to legitimate state interest and what the federal regulations and Kern County's shipment of biosolids for use of fertilizers may indicate about the legitimacy of the state interest. South Carolina Department of Transportation v. Barnwell Brothers; Southern Pacific v. Arizona.

[Guidance: A good discussion might question whether Kern County has a legitimate health or environmental justification for banning the use of biosolids as fertilizer if the EPA considers them safe and effective and Kern County itself sells them for that use.]

Notes: (1) There is no discrimination against interstate commerce. The regulation prohibits all application of biosolids, regardless of where the biosolids come from. (2) Regulation E does not impair contracts to buy or sell biosolids; it merely prohibits applying them as fertilizer within the county.

B. If Measure E is unconstitutional, in what ways could Congress assist Kern County in its opposition to the local use of biosolids from Los Angeles?

Commerce Clause. Discussion of whether Congress could use its Commerce power to assist Kern County, such as by passing a law that would directly ban the application of biosolids as fertilizer in Kern County (and possibly elsewhere). United States v. Darby; United States v. Lopez.

[Guidance: A good discussion might consider (1) that the application of fertilizer to farmland is an economic activity; that in the aggregate it substantially affects interstate commerce by increasing the total crops grown; and (3) that Congress can regulate interstate commerce in any way.]

Spending Power. Discussion of whether Congress could use its spending power to assist Kern County, such as by paying farmers in Kern County not to apply biosolids as fertilizer (much as Congress pays farmers not to grow crops). United States v. Butler.

[Guidance: This problem does not ask how Congress could induce the state of California to pass a law. On the contrary, it asks what Congress can do if the state law that already has been passed is unconstitutional. The standard in Dole v. South Dakota which regulates Congress's use of conditional spending to persuade states to pass laws therefore is not applicable.]

Taxation Power. Discussion of whether Congress could use its taxation power to assist Kern County, such as by imposing a tax on farmers who apply biosolids as fertilizer in Kern County, in an effort to discourage the practice. United States v. Kahriger.

C. Must Kern County compensate the plaintiffs and the owners of farmland in Kern County who wish to apply biosolids?

Takings. Discussion of whether Regulation E, which bans the use of biosolids as fertilizer on farm land in Kern County, amounts to either a physical taking (i.e., a confiscation or physical occupation of its property) or a regulatory taking (i.e., a regulation on the use of property that "goes too far") of either the biosolids or the farm land. Yee v. City of Escondido; United States v. Causby; Andrus v. Allard; Boraas v. Belle Terre; Lucas v. South Carolina.

[Guidance: A good discussion might point out that Regulation E does not confiscate or invade anyone's property, and that it bans only one use of biosolids (i.e., their use as fertilizer) and only one type of fertilizer on farmland (i.e., biosolids), while allowing the owners of biosolids and farmland to use them in other ways.]

PROBLEM II

A. The court held that the Feeney Amendment violates the separation of powers "by aggrandizing the Executive Branch while diminishing the Judicial Branch." What reasoning might support this legal and factual conclusion?

Separation of Powers. Discussion of the reasoning that might support the conclusions that the Feeney Amendment (1) aggrandizes the Executive Branch; (2) diminishes the Judicial Branch; and (3) thereby violates the separation of powers. Morrison v. Olson; Bowsher v. Synar; Clinton v. New York.

[Guidance: A good discussion would address all three of the listed elements. It might recognize that, traditionally, the Judicial Branch rather than the Executive Branch determines criminal sentences (i.e., it is the judge rather than the prosecutor who decides how long someone will go to jail); that the Feeney Amendment inverts this usual arrangement, at least to some extent, by giving the Executive Branch control of the Sentencing Commission, which sets general sentencing guidelines for judges to follow; and that judges might feel this incursion unduly trammels on their authority. In other words, it allows the executive branch to control policy decisions that traditionally have been made in the judicial branch.]

B. How does the Constitution address possible concerns that might arise from the "reprehensible" requirement of reporting downward departures from the guidelines?

Tenure of Federal Judges. Discussion of (1) how federal judges have life tenure, see Art. III, § 1, (2) unless they are removed by the formal process of impeachment by the House and trial and conviction by the Senate of high crimes and misdemeanors, see Art. I, §§ 2 & 3, and (3) how this protection should reduce concerns that judges might have about outside criticism of their decisions. Art. III, § 1; Nixon v. United States (discussing life tenure as a guarantee of judicial independence)

[Guidance: A good discussion might explain: (1) that judges might find the reporting requirement to be "reprehensible" because it singles out judges for obloquy when they grant light sentences; (2) that the reporting requirement as a consequence might cause timid judges to issue harsher sentences than they actually consider just, in order to avoid criticism; but (3) that the Constitution actually insulates judges from outside pressure by giving them life tenure and making them removable only by the cumbersome process of impeachment.]

C. If Congress wants to control sentencing discretion in federal criminal cases, what other options does it have?

Legislative Power. Discussion of how Congress could use its legislative power to amend federal criminal statutes (which it already has enacted under its various Article I powers) to limit the permissible range of sentences.

[Guidance: A good discussion might recognize that if Congress has the power to enact federal criminal statutes that give judges discretion in sentencing (e.g. discretion to impose a sentence of, say, 0-10 years), Congress can control that discretion in various ways, such as by imposing mandatory minimum sentences or other binding restrictions. Amending criminal statutes to limit discretion would be much more direct than attempting to stack a commission that merely promulgates guidelines from which judges evidently may depart.]

PROBLEM III

A. On what grounds might Taylor argue that imposing the parole supervision fees on him is unconstitutional?

Bill of Attainder. Discussion of whether the newly enacted Kansas law would constitute a bill of attainder if requiring parolees to pay fees for their supervision is an impermissible form of legislative punishment. Art. I, § 10, cl. 1; Nixon v. Admin. of General Services.

[Guidance: A good discussion might compare the facts of this case to precedent and also consider (1) whether fees (which might be likened to fines) are a traditional form of punishment; (2) whether the fees further non-punitive legislative purposes (like paying the costs of supervision); and (3) whether Charles Simmons's remarks suggest a legislative intent to punish.]

B. May Kansas charge lower supervision fees to parolees who are less likely to flee the state, such as long-term Kansas residents?

Privilege and Immunities. Discussion of whether charging long-term Kansas residents lower fees than short-term residents violates the Privileges and Immunities Clause's prohibition of discrimination against out of state residents that might jeopardize interstate harmony, unless the discrimination is necessary to promote a substantial state interest. Hicklin v. Orbeck; Baldwin v. Fish & Game.

[Guidance: A good discussion might address (1) why imposing lower fees on long-term residents would in effect treat citizens of other states differently (i.e., because they are by definition not long term residents); (2) whether this discrimination is likely to jeopardize interstate harmony (i.e., would any other state really care that Kansas charges out of state citizens \$50 a month in parole fees while charging its long term residents a little less); and (3) whether lower fees really might be justified if long-term Kansas residents are less likely to flee.]

C. Could Congress regulate the parole supervision fees imposed by KDOC?

Legislative Power. Discussion of whether Congress would have the power under the Commerce Clause (or some other clause) to address parole supervision fees. United States v. Darby; United States v. Lopez

State Immunity. Discussion of how state governmental agencies, like the KDOC, are immune from federal commerce regulations that do not apply equally to non-governmental entities. Garcia v. San Antonio Metro. Transit Authority (1985).

[Guidance: A good discussion might recognize that, unlike a minimum wage law that would apply equally to private businesses and state governments, a law restricting parole supervision fees would apply only to the state government.]

PROBLEM IV

A. How might the defendants support their jurisdictional argument?

Political Question Doctrine. Discussion of the grounds upon which the defendants might argue that the correctness of tactical military decisions (including the decisions of private contractors under the control of the Army) is a non-justiciable political question. Nixon v. United States.

[Guidance: A good discussion might address: (1) how the text of the Constitution commits tactical military decisions to the executive branch by making the President the Commander-in-Chief (and does not commit these decisions to the courts); and (2) how courts may lack manageable standards for judging military decisions because these decisions are necessarily discretionary and dependent on confidential information. The discussion further might address how private contractors' decisions might be equated with military decisions if they are "interwoven" with Army decisions. Cf. Burton v. Wilmington Parking Authority.]

B. In addition to the jurisdictional argument, what arguments might the defendants make under the Supremacy Clause?

Supremacy Clause. Discussion of (1) how under the Supremacy Clause federal laws concerning contractors--depending on what they say--might preempt state law claims (such as tort claims) against the contractors, Silkwood v. Kerr-McGee; and (2) how under the Supremacy Clause the federal government and its instrumentalities are immune from state law claims, see McCulloch v. Maryland.

C. If Congress is concerned about how the Army is using contractors in Iraq, how might Congress control the Army's discretion? What kinds of actions may Congress not take?

Spending Power. Discussion of how Congress can regulate the use of contractors by placing conditions on funds that Congress authorizes to pay for contractors. Cf. United States v. Butler.

Separation of Powers. Discussion of how the President must follow constitutional acts of Congress, see Youngstown v. Sawyer, but how Congress cannot enact laws that unduly trammel upon the President's executive power (perhaps including his power as commander in chief), see Morrison v. Olsen.

[Guidance: A good discussion might recognize that the President, not Congress, is the commander in chief of the armed forces, and that Congress might trammel on the President's authority by attempting to regulate tactical military decisions.]

PROBLEM V.

A. How might Ms. Ciacciarella respond to Messrs. Greene and DelGobbo's arguments?

State Action Doctrine (Joint Participation Exception). Discussion of how Ms. Ciacciarella might respond to Messrs. Greene and DelGobbo's first contention that "they are not state actors" by arguing that they should be deemed to be state actors because of their conspiracy with a governmental unit (i.e., the mayor's office). NCAA v. Tarkanian; Dennis v. Sparks.

State Action Doctrine (Joint Participation Exception). Discussion of how Ms. Ciacciarella might respond to Messrs. Greene and DelGobbo's second argument that "Ms. Ciacciarella is not a public employee" by arguing that her employer, Mr. Zehnder, may be deemed a state actor because his role as part-time town counsel gives him a close and interdependent financial relationship with the city government. Burton v. Wilmington Parking Authority.

[Guidance: A good discussion would recognize that Mrs. Ciacciarella has two problems with her constitutional claim that her firing violated the First Amendment, namely: (1) she was not a government employee, and (2) she was fired at the request of some people who were not employees of the government that fired her. She needs to use state action doctrine exceptions to overcome both of these problems.]

Note that 42 U.S.C. § 1983 is described in the syllabus appendix.

B. What constitutional claims and defenses might Mr. Zehnder raise?

First Amendment. Discussion of how Mr. Zehnder might raise a First Amendment claim against the mayor's office, arguing that the mayor's office violated his freedom of

speech/association by threatening to terminate his employment as town counsel unless he fired an employee whose views differed from those of the mayor.

State Action Doctrine. Discussion of how Mr. Zehnder might raise the state action doctrine as a defense to Ms. Ciacciarella's First Amendment claim, arguing that the First Amendment places limits only on governments and government officials and that he is merely a private employer. Civil Rights Cases.

C. Could Congress use its commerce power to protect persons in the position of Ms. Ciacciarella from being discharged from their employment?

Commerce Power. Discussion of how Congress may use its commerce power to regulate conditions of employment, see United States v. Darby, and forms of employment discrimination, Heart of Atlanta Motel v. United States; Katzenbach v. McClung.

Intergovernmental Immunity. Discussion of how State governments and governmental agencies are immune from federal commerce regulations that do not apply equally to non-governmental entities. Garcia v. San Antonio Metro. Transit Authority.

[Guidance. A good discussion might attempt to give an example of a hypothetical statute that Congress could pass that would protect Mrs. Ciacciarella (such as a statute that would bar any employer whose activities affect interstate commerce from discharging an employee based on her political activities). Note that Mrs. Ciacciarella brought her action under § 1983, a statute discussed in Syllabus Appendix F, part 1, which was passed under the authority of § 5 of the 14th Amendment, not the Commerce Clause.]

FINAL EXAM GIVEN APRIL 27, 2006

The edited excerpts in the problems came from the following cases:

- I. Town of Southhold v. Town of East Hampton, 406 F. Supp.2d 227 (E.D.N.Y. 2005)
- II. Judicial Watch, Inc. v. U.S. Senate, 340 F. Supp.2d 26 (D.D.C. 2004)
- III. Hsiung v. City and County of Honolulu, 378 F. Supp.2d 1258 (D. Hawaii 2005)
- IV. City of New York v. Beretta U.S.A. Corp., 401 F. Supp.2d 244 (E.D.N.Y. 2005)
- V. Morton v. The Salvation Army, 2005 WL 2234003 (S.D.N.Y.)

PROBLEM I.

A. Is the Ferry Law constitutional?

Dormant Commerce Clause Doctrine (Excessive Burden). Discussion of whether the Ferry Law imposes a burden on interstate commerce that is excessive in relation to the state's legitimate local interests. South Carolina Department of Transportation v. Barnwell Brothers; Southern Pacific v. Arizona.

[Guidance: A good discussion might address the burden on interstate commerce (i.e., the burden of eliminating ferry service between East Hampton, New York, and other states), the state's interest (i.e., reduction of cars), and whether the burden is "excessive" based on precedents that we have seen. The extent of the burden depends on what alternatives exist. The problem indicates that the only road to East Hampton has only two lanes and it is congested. The problem does not indicate whether there are bridges or other ports by which cars can access this congested road.]

Dormant Commerce Clause Doctrine (Discrimination). Discussion of whether the state law discriminates against interstate commerce or has a disparate impact on interstate commerce, when there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests, Dean Milk v. City of Madison; Hughes v. Oklahoma.

[Guidance: A good discussion might observe that the Ferry Law does not discriminate against interstate ferry service on its face, but then consider whether it has a disparate impact like the law in Dean Milk. Again, the problem does not indicate whether there are other means for people to bring cars from other states, such as bridges or other ports. If there are no other means, that would indicate that there is a disparate impact on interstate commerce.

Notes:

(1) Although the Councilwoman recommended a moratorium on "bringing cars into town" the actual law generally bans all docking and use of terminal facilities.

(2) The problem mentions the issuance of "agency approvals" but does not say whether they are state or federal agency approvals. The Dormant Commerce Clause doctrine does not prevent the federal government from imposing burdens on interstate commerce.

- B. Suppose CSF obtained a license, issued under an Act of Congress, "to perform coastal ferry service." Would this license affect the application of the Ferry Law to CSF?**

Supremacy Clause (Preemption). Discussion of whether the Act of Congress under which the license was granted would preempt the Ferry Law. Silkwood v. Kerr-McGee; Gibbons v. Ogden (and Syl. App. C, pt. 2).

[Guidance: A good discussion might observe that preemption could occur if the Ferry law conflicted with the federal licensing law or if the federal licensing law might be seen as occupying the field of ferry service. Preemption would not occur if Congress simply required a federal license as a minimum requirement, but allowed states to impose additional restrictions. The discussion also might recall that, in Gibbons v. Ogden, the Supreme Court concluded that a very similar federal coasting license preempted a different New York law that restricted ferry service between New Jersey and New York.]

- C. When two neighboring towns challenged the Ferry Law, the court ruled that the towns would have to "show that their alleged injury (1) was caused by the Ferry Law, or (2) would likely be redressed by a favorable decision." Why is this showing a requirement and how might the towns make it?**

Case or Controversy. Discussion of how Art. III, § 2 limits the subject matter jurisdiction of federal courts to "cases" and "controversies." Muskrat v. United States.

[Guidance: A good discussion would address the question of how the neighboring towns would have, in the words of Muskrat, an "interest adverse" to South Hampton. The Ferry law may have injured the towns, perhaps by diverting traffic to them or by imposing a burden on person seeking to reach these towns, and requiring the town to allow ferries to dock might remedy these injuries.]

Note: The problem does not say whether the challenge is being brought in federal court.

PROBLEM II.

- A. Should the court dismiss Judicial Watch's lawsuit without reaching the merits?**

Political Question. Discussion of whether the constitutionality of Senate Rules V and XXII is a political question to be resolved by a political branch (such as the Senate itself) rather than the courts, especially given that art. I, § 5, cl. 2 specifies that "[e]ach house may determine the Rules of its Proceedings" Nixon v. United States; Goldwater v. Carter (plurality opinion)

[Guidance: A good discussion would compare this question to the issues in Nixon and Goldwater.]

Case or Controversy. Discussion of whether a case or controversy exists that the federal courts. Art. III, § 2; Muskrat v. United States.

[Guidance: A good discussion might point out that Judicial Watch complains of a concrete injury, namely, substantial delay in matters that it has pending before the federal courts but that it is unclear whether declaring the Senate Rules unconstitutional would provide a remedy for that injury.]

Ripeness. Discuss of whether any case or controversy is yet "ripe" for review. Goldwater v. Carter (Powell, J., concurring).

[Guidance: A good discussion might ask whether any branch has challenged the Senate's position by "formal action" -- in the words of Justice Powell -- and what that action might be.]

Note: The problem does not identify the court in which the Judicial Watch brought the lawsuit. So little can be said about whether the court would have subject matter jurisdiction.

B. Are Senate Rules V and XXII an "unconstitutional exercise of legislative authority?"

Appointments Clause. Discussion of whether a supermajority voting requirement violates the Appointments Clause, art. II, sec. 2, cl. 2, which gives the President power to appoint Officers of the United States (a term which includes judges) with "the Advice and Consent of the Senate." Cf. Morrison v. Olson (discussing the Appointments Clause).

[Guidance: A good discussion might observe that (1) the Appointments Clause does not specify how the Senate must give its advice and consent and thus that Senate Rules V and XXII do not conflict with the text of that clause, but (2) that enhanced consent requirements at least as a practical matter dilute the President's power over appointments.]

House/Senate Rules Clause. Discussion of whether Senate Rules V and XXII are constitutional in light of art. I, sec. 5, cl. 2, a provision which says that "[e]ach house may

determine the Rules of its Proceedings...." (Justice White discussed this clause in his concurrence in judgment in Nixon v. United.)

[Guidance: A good discussion might address the Justice White's reasoning in Nixon v. United States that the Senate is permitted to make rules under this clause so long as they are compatible with the rest of the Constitution.]

Note: Whether Senate Rules V and XII is are constitutional is a separate issues from whether a challenge to their constitutionality would be justiciable.

C. If the courts do not issue the requested order, could the President, the House of Representatives, or the state legislatures take any actions to impel the Senate to vote on the nominees?

Notes: (1) The word "impel" means to urge to action through moral or other pressure. (2) The examination instructions indicate that good answers will provide "explanations" and "examples" as required by the problems.

Presidential Powers. Discussion of whether the President has any powers that might be used to pressure the Senate to vote on the nominees. Cf. Goldwater v. Carter.

[Guidance: A good discussion might observe that the President does not have formal legal powers over the Senate but that he has many informal political powers. For example, the President can make speeches, strike political compromises (perhaps by making some nominations that the Senate favors), threaten to veto legislation the Senate wants to pass, make recess appointments, etc. The plurality in Goldwater v. Carter, in footnote 1, discussed similar ways in which Congress can influence the President.]

Powers of the House of Representatives. Discussion of whether the House of Representatives has any powers that it can use to put to pressure on the Senate to vote on the nominees.

[Guidance: A good discussion similarly might address the House's lack of formal legal power over the Senate and its informal political powers (e.g., the powers to hold hearings, pass resolutions, withhold consent from legislation that the Senate wants to pass, etc.).]

State Powers. Discussion of whether the states have any powers that they can use to put pressure on the Senate to vote on the nominees. Cf. U.S. Term Limits v. Thornton; McCulloch v. Maryland.

[Guidance: A good discussion similarly might address the states' lack of formal legal powers over the Senate (or for that matter over any part of Congress or the federal government).]

PROBLEM III.

- A. The City argued that it is absolved from any liability to Plaintiffs because "a state government may not contract away 'an essential attribute of its sovereignty.'" Is this argument valid?**

Contracts Clause. Discussion of whether the City can impair the obligation of its contract with the Plaintiffs (i.e., its obligation to convey the condominium units to the Plaintiffs), without liability, on grounds that "a state government may not contract away 'an essential attribute of its sovereignty.'" Home Building & Loan v. Blaisdell; Allied Structural Steel v. Spannus.

[Guidance: A good discussion would recognize that the quoted language is a paraphrase of the Supreme Court's famous reasoning in Home Building & Loan v. Blaisdell. In that case, the Court said that the Contracts Clause does not impose an absolute prohibition on state modifications of contractual obligations because "the reservation of essential attributes of sovereign power is ... read into contracts as a postulate of the legal order." The discussion then might address whether the "essential attributes of sovereign power" include the power not condemn property despite previously contracting to do so. It also might compare the facts of Home Building & Loan and Allied Structural Steel to the facts of this problem.]

Note: Honolulu might have other arguments for why it faces no liability. For example, if the city no longer can exercise the right of eminent domain (see Question C below) because conditions have changed, the City might have a contract defense of impracticability. But the question addresses only the argument that Honolulu's essential attributes of sovereignty permit it to avoid liability.

- B. Instead of condemning the complex and transferring the units to the Plaintiffs, could Honolulu simply require the Kamehameha Schools to allow the Plaintiffs to occupy the units indefinitely at the current rate of rent?**

Takings Clause (Physical Taking). Discussion of whether rent control and indefinite tenancy constitutes a physical taking of private property for which just compensation must be paid. Yee v. City of Escondido.

[Guidance: A good discussion might address the similarities and differences between this hypothetical circumstance and Yee (e.g., both involve rent control and

eviction restrictions, but the landlord in Yee specifically had the right to stop using the property for rental purposes.]

Takings Clause (Regulatory Taking). Discussion of whether rent control and indefinite tenancy constitutes a physical taking of private property for which just compensation must be paid. Lucas v South Carolina Coastal Commission; Andrus v. Allard. Cf. Yee v. City of Escondido; Village of Belle Terre v. Boraas.

Note: There would be no 5th Amendment takings problem if (1) the law served a public purpose and (2) the state paid just compensation. But the question suggests that the owners would receive only the current rate of rent, rather than what is necessarily just compensation. Thus, the law is valid only if it is not a physical or regulatory taking.

C. If Honolulu had not passed City Council Bill 04-53, could Kamehameha Schools have blocked the condemnation of the complex on constitutional grounds?

Takings Clause (Public Purpose). Discussion of the circumstances under which the "public purpose" limitation in the Fifth Amendment would prevent the taking of property. Kelo v. New London.

[Guidance: A good discussion might observe that, although the Supreme Court has taken a very broad view of what a public purpose is, the City Council specifically found in Bill 04-53 that the taking the property would not advance a public purpose.]

Note: If a taking of property serves a public purpose, a property owner cannot block condemnation merely because the government has not paid just compensation; the property owner's remedy instead is to seek just compensation.

PROBLEM IV.

A. Before Congress enacted the PLCAA, the defendants sought dismissal of this lawsuit on grounds that "the practical and inevitable effect of the City's suit [would be] to regulate commerce beyond the borders of New York City and State." Would this "effect" be unconstitutional?

Dormant Commerce Clause Doctrine (Preliminary Issue). Discussion of the preliminary issue of whether the Dormant Commerce Clause doctrine places any limit on state common law principles as opposed to state legislation and administrative regulations.

[Guidance: The Supreme Court has not resolved this legal question. A good answer might observe that this case differs from Cooley v. Board of Wardens, South Carolina v. Barnwell Bros., Southern Pacific v. Arizona, and other cases in the syllabus because the defendants in this case are claiming that a state common law doctrine (i.e., the tort of nuisance) is unconstitutional rather than state statute. But regardless of its sources, a legal burden on interstate commerce is still a burden.]

Dormant Commerce Clause Doctrine (Uniform National Standard). Discussion of whether state liability for the tort of nuisance would violate the dormant commerce clause because handgun merchandising is a subject for which national uniformity is necessary. Cooley v. Board of Wardens.

[Guidance: A good discussion would consider whether a uniform national standard is necessary to prevent conflicting regulations from applying to handgun merchandising campaigns. The discussion in particular might consider whether handgun merchandising is a local activity (like piloting boats) that each state may regulate without interfering with the regulation of other states.]

Dormant Commerce Clause Doctrine (Uniform National Standard). Discussion of whether state liability for the tort of nuisance would impose a burden on interstate commerce that is excessive in relation to legitimate local interests. South Carolina v. Barnwell Bros., Southern Pacific v. Arizona.

[Guidance: A good discussion would identify the burden on interstate commerce (e.g., a limitation on nationwide merchandising campaigns), the state's interest (e.g., promoting safety), and whether the burden is excessive.]

B. Is the PLCAA constitutional as applied to state and federal lawsuits pending at the time of its enactment?

Commerce Clause. Discussion of whether handgun merchandising is interstate commerce or at least an intrastate economic activity that affects interstate commerce such that Congress may regulate it under the commerce power. United States v. Darby; United States v. Lopez.

Necessary and Proper Clause. Discussion of whether requiring dismissal of pending lawsuits is a necessary and proper means of carrying out federal commerce regulation of handgun merchandising. McCulloch v. Maryland.

Federal Court Jurisdiction. Discussion of whether Congress can remove federal court jurisdiction over pending and future federal cases. Ex parte McCardle.

Supremacy Clause. Discussion of whether a federal law requiring dismissal of state court actions would preempt state laws that provide for state court jurisdiction. Silkwood v. Kerr-McGee.

C. Could Congress immunize gun manufacturers and sellers from state tort liability by some method other than by requiring the dismissal of lawsuits against them?

Commerce Clause. Discussion of whether, and if so how, Congress could pass a law directly immunizing gun makers from state tort liability. Cf. Silkwood v. Kerr-McGee (limiting state tort liability in the nuclear industry).

[Guidance: A good answer might offer an illustration of a law that Congress might pass, such as: "No manufacturer of guns sold in interstate commerce shall have any liability arising from the merchandising of its guns."]

Supremacy Clause. Discussion of the extent to which a federal law immunizing gun makers from liability arising out of the merchandising of guns would preempt a state law purporting to impose tort liability. Silkwood v. Kerr-McGee

PROBLEM V.

A. Does Morton's constitutional freedom of religion limit the policies that the Salvation Army may follow at the Syracuse ARC?

State Action Doctrine. Discussion of how the Constitution generally does not limit the actions of private parties, like the Salvation Army. Civil Rights Cases.

State Action Doctrine Exceptions (Traditional Public Function). Discussion of whether the ARC might fit within the "public function" exception to the state action doctrine. Marsh v. Alabama; Hudgens v. NLRB.

[Guidance: A good discussion might consider whether the ARC is more like the company town in Marsh or more like the shopping mall in Hudgens.]

State Action Doctrine Exception (Joint Participation). Discussion of the ARC might fit within the "joint participation" exception to the state action doctrine. Flagg Brothers, Inc. v. Brooks; Lugar v. Edmondson Oil Co.; Edmondson v. Leesville Concrete Co.

[Guidance: A good discussion might consider factors that would make it fair or not fair to say that the ARC is a state actor, including its role in the criminal justice system, the judicial order in the case, the lack of state funding, etc.]

B. Suppose that Congress wants to prevent incidents of religion-based hostility in probation programs for state prisoners.

1. Could Congress regulate the conditions of these programs directly?

Commerce Power. Discussion of whether the prison probation programs are interstate commerce or intrastate economic activity that might have a substantial effect on interstate commerce such that Congress may regulate it under its commerce power. United States v. Darby.

[Guidance: A good discussion might specify how the drug programs affect interstate commerce, such as by reducing the demand for drugs if they are successful. Cf. Raich v. Gonzales.]

Intergovernmental Immunity. Discussion of whether state entities involved in the programs (such as state prison systems) would be immune from federal commerce regulation if the regulation did not apply equally to non-governmental entities. Garcia v. San Antonio Metro. Transit Authority.

14th Amendment. Discussion of whether Congress could use its power under section 5 of the 14th amendment to enforce the amendment's equal protection and due process provisions. Cf. Civil Rights Cases.

2. Could Congress induce states to prohibit religion-based hostility in the programs without regulating the programs directly?

Conditional Spending. Discussion of whether and, if so, how Congress could use its conditional spending power to induce the states to pass law prohibit religion-based hostility in state probation programs. South Dakota v. Dole.

[Guidance: A good answer might give a specific example of a conditional spending law that Congress could enact: "Any state that prohibits religious-based hostility in its probation programs will receive \$10 million " or "Any state that does not prohibit religious-based hostility in its probation programs will lose 5% of federal funds given to the state's correction funds."]

Note: Congress could also threaten preemption without actually passing any laws.

FINAL EXAM GIVEN APRIL 28, 2005

The edited excerpts in the problems came from the following cases:

- I. Piazza's Seafood World v. Odom, 2004 WL 2998575 (E.D. La.).
- II. Kucinich v. Bush, 236 F. Supp.2d 1 (D.D.C. 2002).
- III. Simpson v. Denardo, 2004 WL 1737444 (D. Conn.).
- IV. Ameritech Corp. v. McCann, 2005 WL 832065 C.A.7 (Wis.).
- V. Garcia v. Wyeth-Ayerst Labs. 265 F. Supp.2d 825 (E.D. Mich. 2003).

Question I.A. was worth 15 points; question I.B. was worth 5 points; all the rest of the questions were worth 10 points.

PROBLEM I.

(20 percent)

- A. **What constitutional claims might Piazza and businesses that have purchased Piazza's catfish make in court?**

Dormant Commerce Clause Doctrine (Discrimination). Discussion of whether § 4617 treats interstate commerce differently from intrastate commerce and whether there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests. Dean Milk v. City of Madison; Hughes v. Oklahoma.

[Guidance: A good discussion might identify the discrimination (i.e., catfish raised in Louisiana can be sold as "Cajun" and as "catfish" while imported catfish cannot); the state's possible interest (e.g., preventing consumer confusion) and the legitimacy of this interest (e.g., whether any harm is caused by confusion about the origin of fish if the fish are identical); and any nondiscriminatory alternatives (e.g., simply requiring imported fish to be labeled and sold as "imported").]

Dormant Commerce Clause Doctrine (Excessive Burden). Discussion of whether § 4617 imposes a burden on interstate commerce that is excessive in relation to legitimate local interests. South Carolina Department of Transportation v. Barnwell Brothers; Southern Pacific v. Arizona.

[Guidance: A good discussion might address the burden on interstate commerce (e.g., the burden on businesses of using different labels and trade names depending on whether the catfish is being sold in Louisiana), the state's interest and its legitimacy (see above), and whether the burden is "excessive" based on precedents that we have seen.]

Regulatory Taking. Discussion of whether § 4617 "goes too far" in regulating private property and thus constitutes a regulatory taking for which compensation must be paid. Andrus v. Allard; Boraas v. Belle Terre.

[Guidance: A good discussion might identify the property being regulated (e.g., (1) the fish that Piazza and the restaurants have on hand and now cannot sell in Louisiana; and (2) Piazza's trademarks), the extent to which the regulations deprive the owner of the property of its use and of investment backed expectations (e.g., whether the fish could still be sold in other states or could be sold in Louisiana if it was not described as "Cajun" or "catfish"), and whether the regulation goes too far in light of cases that we have seen.]

Note: The problem does not identify any specific way in which existing contractual rights are impaired or contractual duties are expanded.

B. If Piazza could show that Louisiana passed § 4617 at the urging of local competitors to retaliate against Piazza for underpricing them, would Piazza have any additional claims?

Bill of Attainder. Discussion of whether § 4617 would constitute a bill of attainder if this showing indicated an intent to impose a legislative punishment. Nixon v. Admin. of General Services.

[Guidance: A good discussion might address (1) whether the challenged statute falls within the historical meaning of legislative punishment (i.e., whether it is death, banishment, disqualification from employment, etc.); (2) whether the statute furthers nonpunitive legislative purposes (e.g., preventing consumer confusion perhaps); and (3) whether the legislative record evinces an intent to punish (e.g., whether retaliation is the same as punishment), and whether a law is a bill of attainder merely because it imposes burdens on only one person.]

Note: The problem does not specify whether Piazza is an individual or a company, but it probably does not matter. Lower courts have held that corporations are protected from Bills of Attainder. The Supreme Court has not yet addressed the issue.

C. If Piazza lobbies for legislative assistance, how might the federal government offer to help?

Preemption. Discussion of whether Congress could preempt § 4617 by passing a federal law or could induce Louisiana to repeal the law by threatening preemption. Silkwood v. Kerr-McGee.

[Guidance: A good discussion might specify in detail what kind of law Congress would pass (e.g., a law saying "all catfish of any origin that are sold in interstate commerce may be sold under the names 'catfish' and 'Cajun'"), and analyze whether Congress would have the power to pass such a law (e.g., under the Commerce Clause).]

Conditional Spending. Discussion of whether Congress conditionally could withhold spending on a program to induce Louisiana to repeal § 4617. South Dakota v. Dole.

[Guidance: A good discussion might specify how Congress might conditionally withhold spending (i.e., a law saying "no state will receive federal assistance in maintaining its fisheries unless") and whether the conditional spending would further the general welfare, would not violate any other constitutional limitations, would not amount to compulsion, etc.]

PROBLEM II.

(20 percent)

A. If members of Congress wished to challenge the treaty's termination in federal court, what obstacles would they face?

President's Powers. Discussion of whether the President has the power, either express or implied, to rescind a treaty. United States v. Curtiss-Wright; Goldwater v. Carter.

[Guidance: A good discussion might observe that the Constitution is silent about the rescission of treaties but that the President may have implied powers over foreign affairs.]

Political Question Doctrine. Discussion of whether the political question doctrine prevents courts from reviewing a President's termination of a treaty. Nixon v. United States, Goldwater v. Carter.

[Guidance: A good discussion might compare the facts of this case to Goldwater v. Carter and might address the disagreement in the plurality and dissenting opinions about whether the President's power to rescind a treaty unilaterally is a political question.]

Lack of Ripeness (or other ground for saying there is no case or controversy). Discussion of whether lack of ripeness would prevent a court from considering a challenges before Congress has acted. Goldwater v. Carter (concurrency).

[Guidance: A good discussion might address the points about ripeness made in Justice Powell's opinion in Goldwater v. Carter.]

B. Could Congress enact legislation effectively preventing the President from terminating the treaty?

Faithful Execution of the Laws. Discussion of how the President must obey constitutional legislation. Youngstown Sheet & Tube v. Sawyer.

[Guidance: A good discussion would specify what kind of law Congress might enact if it had enough votes to overcome the President's veto (e.g., "The President will adhere to the provision of the ABM treaty") and whether Congress has the power to pass this law (e.g., as a regulation of the Armed Forces).

Separation of Powers. Discussion of whether any legislation specifically prohibiting the President from rescinding a treaty would violate the separation of powers by attempting to take some of the President's constitutional powers. Morrison v. Olson.

[Guidance: A good discussion might address the extent to which Congress might burden the President's power to rescind treaties (assuming he has that power) and compare the issue to others considered in the course.]

C. To what extent may the President now make expenditures to deploy anti-ballistic missile systems?

Spending Power. Discussion of whether spending would be constitutional if Congress has authorized the spending. United States v. Butler; Helvering v. Davis; Buckley v. Valeo.

[Guidance: A good discussion might address how spending might further the "General Welfare" (e.g., by promoting national security) and the deference given to Congress in deciding how to spend money.]

President's Powers as Commander in Chief. Discussion of whether spending would be constitutional, even if Congress had not authorized the spending, based on the President's constitutional role as Commander in Chief. Youngstown Sheet & Tube v. Sawyer.

[Guidance: A good discussion might compare the facts of this case to the facts of Youngstown Sheet & Tube v. Sawyer.]

PROBLEM III.

(20 percent)

A. To what extent could the federal courts consider statutory and constitutional challenges to the construction of the Memorial and to Public Law No. 107-11?

Judicial Review. Discussion of how the federal courts can exercise judicial review but only when they have jurisdiction. Marbury v. Madison.

[Guidance: A good discussion might observe that Sections 1 and 3 of Public Law No. 107-11 attempt to limit judicial review in two different ways. Section 1 attempts to make Public Law No. 107-11 supreme over all other provisions of law, in this way eliminating any basis for judicial review. Section 3 attempts to deprive courts of jurisdiction, so that they cannot exercise judicial review.]

Power of Congress. Discussion of whether Congress has the power to enact Section 1, which supercedes any other provision of law that might have restricted the building of the Memorial.

[Guidance: A good discussion might identify how other provisions of law might restrict building the memorial (e.g., environmental laws), might address Congress's plenary power to regulate the District of Columbia under art. I, § 8, cl. 17 (a provision briefly addressed in the Civil Rights Cases), and thus might supercede other federal laws, and might explain how constitutional federal laws preempt state laws under the Supremacy Clause.]

Limitations on Jurisdiction. Discussion of whether Congress has the power to enact Section 2, which would remove jurisdiction of courts to review challenges to Public Law No. 107-11. Marbury v. Madison; Ex Parte McCordle.

[Guidance: A good discussion would specify that Article III does not permit Congress to remove the Supreme Court's original jurisdiction (but would note that original jurisdiction would be unlikely here because no ambassadors or states are involved). In addition, a good discussion would specify how Article III may permit Congress to create exceptions to the Supreme Court's appellate jurisdiction (e.g., at least to the extent that was done in McCordle), and eliminate jurisdiction in lower federal courts altogether.]

B. Suppose the President was thinking about ordering the agencies involved not to build the Memorial. What legal advice should he have received?

Faithful Execution of the Laws. Discussion of the President's obligation to execute the laws faithfully. Youngstown Sheet & Tube v. Sawyer.

Impeachment. Discussion of whether Congress might impeach the President for directing subordinates to violate the law (or might take other lawful steps to pressure the President to comply).

[Guidance: A good answer might discuss the kinds of pressures that Congress legally can assert short of impeachment, like holding hearings, threatening to reduce budgets, and so forth.]

C. If the President had directed the federal agencies involved not to build the Memorial, could Congress simply have paid an independent contractor to do the work?

Spending Power. Discussion of whether Congress could pay for the Memorial using its power to spend money to promote the general welfare. United States v. Butler; Helvering v. Davis; Buckley v. Valeo.

Separation of Powers. Discussion of whether having the construction of the Memorial done by someone who is not under the control of the President would violate the separation of powers. Bowsher v. Synar.

[Guidance: A good discussion might consider whether the independent contractor (or Congress) would be exercising an executive function by building the Memorial, especially because the Memorial was to have been built by federal agencies, with a comparison to the facts of Bowsher v. Synar and other separation of power cases.]

PROBLEM IV.

(20 percent)

A. Can Congress, through § 2706, require Wisconsin law enforcement agencies to pay for the subpoenaed reports?

Commerce Power. Discussion of whether Congress has power under the Commerce Clause to regulate payment for the production of records by local telephone services. United States v. Darby; Wickard v. Filburn.

Intergovernmental Immunity. Discussion of whether § 2706 violates the principle of government immunity which says that Congress can regulate state governments and their instrumentalities only through generally applicable laws. Garcia v. San Antonio Metro. Transit Authority.

[Guidance: A good discussion might address the question whether § 2706 is a generally applicable law (i.e., whether it applies to everyone or just governmental entities) and whether it is a regulation of a state government or instead a regulation of what a telephone company may charge for the production of records.]

B. Absent the federal statute, could Wisconsin require Ameritech to provide the subpoenaed reports without charge?

State Legislative Power. Discussion of whether a state has the power to require a business to provide reports to the police.

[Guidance: A good discussion might address the principle that states have plenary legislative power and thus may pass almost any kind of law in the absence of federal preemption or other federal constitutional limitations.]

Takings. Discussion of whether a state law requiring Ameritech to use its computer system and personnel to produce reports, without compensation, amounts to either a physical taking (i.e., a confiscation or physical occupation of its property) or regulatory taking (i.e., a regulation on the use of property that "goes too far"), for which compensation must be paid.. Yee v. City of Escondido; United States v. Causby; Andrus v. Allard; Boraas v. Belle Terre.

[Guidance: A good discussion might identify the property that Ameritech might claim was being taken (e.g., the reports or the computer time), and exactly why Ameritech might think that it was being confiscated or overly regulated.]

C. If the police violate due process in obtaining subpoenas, might compensation of the kind contemplated by § 2706 increase Ameritech's exposure to liability?

State Action Doctrine. Discussion of how the state action doctrine generally says that only state and federal governments can violate the Constitution, not private corporations. Civil Rights Cases.

[Guidance: A good discussion might explain that, under this principle, unless some exception applies, Ameritech generally could not face liability for violating due process.]

Joint Participation Exception (Financial Relations/Mirror Image). Discussion of the exception to the state action doctrine that arises when a private party has a close and interdependent financial relationship with a governmental entity, Burton v. Wilmington Parking Authority, and discussion of how a private party might be responsible for the wrongful actions of a governmental entity, NCAA v. Tarkanian.

[Guidance: A good discussion might address the nature of the interdependent financial relationship (e.g., how the phone company is compensated for producing records, but does not appear to make a profit), and compare that relationship to cases considered in the course.]

PROBLEM V.

(20 percent)

A. What constitutional challenges might Garcia make to § 600.2946(5)?

Preemption. Discussion of whether the federal legislation on the drug approval process might preempt § 600.2946(5) either because § 600.2946 conflicts with federal legislation (or presents an obstacle to federal goals) or because Congress intended to occupy the entire field which § 600.2946 is in. Gibbons v. Ogden; Silkwood v. Kerr-McKee.

[Guidance: The problem does not quote any federal legislation. But a good discussion might address (1) how § 600.2946 might conflict with the relevant federal law or its goals (e.g., there would be a conflict if federal law said that drug approval was not intended to immunize drug manufacturers from liability); and (2) why Congress might not want its approval process to result in exempting manufacturers from liability (e.g., Congress might worry that the FDA would act too cautiously if approval for sales also eliminating liability for anything that goes wrong with the drug.)

B. Could Congress require Michigan to provide a tort remedy for injuries caused by drugs even if the FDA had approved them?

Intergovernmental Immunity. Discussion of whether such a requirement would violate the principle that the federal government may not require a state to pass legislation or administer a federal program. New York v. United States.

[Guidance: A good discussion might address whether Congress's telling a state not to create an exception to tort liability (as was done in § 600.2946) is the same thing as requiring the state to pass legislation.]

C. If Congress wanted to involve the states in the drug evaluation process, could it by statute make FDA drug approval conditional on the express consent of the states in which the drug is to be sold?

Separation of Powers. Discussion of whether Congress may give a state veto power over a federal administrative agency's decision to approve a drug. INS v. Chadha.

[Guidance: This case resembles INS v. Chadha but there are important differences. A good discussion would address these differences in depth.]

FINAL EXAM GIVEN MAY 6, 2003

The edited excerpts in the problems came from the following cases: (1) American Trucking Associations, Inc. v. Whitman, 136 F. Supp.2d 343 (D.N.J. 2001); (2) Michigan Dept. of State v. United States, 166 F. Supp.2d 1228 (W.D. Mich. 2001); (3) Stillman v. Department of Defense, 209 F. Supp.2d 185 (D.D.C. 2002); (4) Khodara Environmental, Inc. ex rel. Eagle Environmental, L.P. v. Beckman, 91 F. Supp.2d 827 (W.D. Pa. 1999); (5) Demarest v. Athol/Orange Community Television, Inc., 188 F. Supp.2d 82 (D. Mass. 2002).

PROBLEM I.

A. What constitutional challenges might be brought against the Emergency Regulations and how should they be evaluated?

Dormant Commerce Clause Doctrine. Discussion of whether the Emergency Regulations impose a burden on interstate commerce -- namely, trucking across the state -- that is excessive in relation to legitimate local interests in safety. South Carolina Department of Transportation v. Barnwell Brothers; Southern Pacific v. Arizona.

Dormant Commerce Clause Doctrine. Discussion of whether the Emergency Regulations treat interstate commerce differently from intrastate commerce and whether there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests. Dean Milk v. City of Madison; Hughes v. Oklahoma.

B. If the Emergency Regulations are upheld as constitutional, what options would Congress have (and not have) if Congress opposed the Regulations and wanted them to be eliminated?

Intergovernmental Immunity. Discussion of whether Congress can compel the New Jersey to repeal the regulations. New York v. United States.

Spending Power. Discussion of whether Congress can use its spending power to induce New Jersey to repeal the regulations, such as by conditionally withholding some highway funds. South Dakota v. Dole.

Preemption. Discussion of how Congress may threaten to preempt the Emergency Regulations with federal laws regulating interstate traffic if New Jersey does not repeal them.

C. What effect, if any, might the existence of federal safety standards governing the size and construction of Restricted Vehicles have on the Emergency Regulations?

Conflict Preemption. Discussion of how the state law would be preempted if it actually conflicted with the federal standards or inhibits their goals, and whether that was likely. Silkwood v. Kerr-McGee.

Field Preemption. Discussion of whether, if Congress intended to occupy the field with respect to the safety of the Restricted Vehicles, the federal regulations would preempt the state law, and whether that was likely. Gibbons v. Ogden; Silkwood v. Kerr-McKee.

PROBLEM II.

A. To what extent might the existence (or non-existence) of federal legislation affect the President's ability to order the CIA to follow his system for safeguarding information?

Faithful Execution of the Laws. Discussion of how the President and the CIA must obey any federal legislation that Congress may have enacted regarding national security information. Youngstown Sheet & Tube v. Sawyer.

Non-Delegation Doctrine. Discussion of how Congress may grant the President greater discretion to set standards in international matters, and whether safeguarding national security information is an international matter. United States v. Curtiss-Wright.

Constitutional Powers. Discussion of whether, in the absence of any federal legislation on point, the President has any express or implied constitutional powers, such as the implied powers associated with being Chief Executive, that would permit the President to order an executive agency like the CIA to withhold national security information.

B. May the President, by executive order, prevent a federal court from reviewing the CIA's determination that Mr. Zaid cannot have access to the classified information?

Federal Court Jurisdiction. Discussion of how federal courts have whatever jurisdiction is granted directly by Article III or passed by Congress in accordance with Article III; Marbury v. Madison, Ex Parte McCordle; and how the President has not power to subtract from that jurisdiction.

Political Question Doctrine. Discussion of whether the CIA's determination of national security are political questions that courts may not review. Nixon v. United States.

Executive Privilege. Discussion of the extent to which the President might use executive privilege to keep from the courts any parts of the book that discuss confidential communications with the President. United States v. Nixon.

C. If Congress distrusts the CIA's determinations in cases like this one, what options would Congress have (and not have) for addressing the situation?

Faithful Execution of the Laws. Discussion of how Congress could set standards the CIA, as part of the executive branch, would have to follow. Youngstown Sheet & Tube v. Sawyer.

Separation of Powers. Discussion of how Congress could not enact legislation reserving for itself the right to discharge the CIA officials (other than by impeachment), Bowsher v. Synar, or the

right to veto the CIA's decisions, United States v. Chada. But it perhaps it could create an independent investigator appointed by the courts to review situations like this. Cf. Morrison v. Olson.

Congressional Influence. Discussion of how Congress could pressure the CIA into making different determinations by holding hearings, threatening to withhold funds, etc.

PROBLEM III.

A. Is section 1220 unconstitutional if Congress enacted it specifically to shut down the Happy Landings Landfill after local voters complained about receiving trash from New York?

Commerce Power. Discussion of how Congress's power to regulate commerce is plenary (meaning that Congress can regulate commerce in any way) and whether Congress can use its commerce power to address interstate shipment of trash and aviation. Gibbons v. Ogden.

Bill of Attainder. Discussion of why the law is not a bill merely because it singles out the landfill, and whether the conceivably could be characterized as a bill of attainder for other reasons. Nixon v. Administrator of General Services.

B. Must Congress compensate Eagle and Leatherwood if Congress enacted section 1220 so that aircraft could fly over their land without hitting birds attracted by landfill trash?

Regulatory Taking. Discussion of whether section 1220, by prohibiting use of the property as a landfill, "goes too far" and thus constitutes a regulatory taking (and discussion of whether the use, if it attracts birds, is a nuisance). Andrus v. Allard; Boraas v. Belle Terre.

Taking by Physical Invasion. Discussion of whether the regulation constitutes a taking by physical invasion if it serves to allow planes to fly so low over the ground that they do not hit birds. United States v. Causby.

Case of Controversy. Discussion of whether a case or controversy has arisen if the FAA administrator has not yet stated in writing that landfills cannot be built. Muskrat v. United States.

C. Could Pennsylvania prohibit landfills in the state from receiving trash from New York?

Dormant Commerce Clause. Discussion of whether barring the receipt of trash from out of state discriminates against interstate commerce and whether there is a reasonable, non-discriminatory alternative method of furthering the state's legitimate interests. Dean Milk v. City of Madison, Hughes v. Oklahoma.

PROBLEM IV.

A. Does the Constitution require OTV to respect Demarest's First Amendment Free Speech rights?

State Action Doctrine. Discussion of how the state action doctrine says that usually only state and federal governments can violate the Constitution, not private corporations. Civil Rights Cases.

Joint Participation Exception. Discussion of whether OTV's close relationship to the Town of Athol makes it fair to say OTV is a state actor. Burton v. Wilmington Parking Authority.

Public Function Doctrine. Discussion of whether a community cable television channel serves a traditional public function and therefore should be characterized as a state actor. Marsh v. Alabama, Hudgens v. NLRB.

B. Putting aside any First Amendment concerns, may Athol or OTV limit the right to place programming on OTV only to residents of Athol and organizations based in Athol?

Privilege and Immunities (residents) Discussion of whether restricting access to residents violates the Privileges and Immunities Clause's prohibition on discriminating against out of state residents that might jeopardize interstate harmony, unless the discrimination is necessary to promote a substantial state interest. Hicklin v. Orbeck, Baldwin v. Fish & Game.

Privileges and Immunities (organizations). Discussion of how the Privileges and Immunities Clause protects only individuals and not organizations.

Dormant Commerce Clause Doctrine. Discussion of whether the access restriction treats interstate commerce differently from intrastate commerce and whether there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests. Dean Milk v. City of Madison; Hughes v. Oklahoma.

C. Could Athol, by passing an ordinance, rescind the requirements in its agreement with Time Warner?

Contracts Clause. Discussion whether an ordinance rescinding the requirements (i.e., the requirements of creating community access channel as a condition to acquiring a license), would impair anyone's rights under a contract or increase their obligations, as opposed to merely relieving them of their obligations. Home Building & Loan v. Blaisdell, Allied Structural Steel v. Spannaus.

PROBLEM V.

A. May Congress require states to record the social security numbers of applicants for state driver's licenses as a means of improving child support collection?

State Intergovernmental Immunity. Discussion of whether Congress has the power to require state officials to administer a federal law. New York v. United States; United States v. Printz.

B. How, if at all, could Congress use its Commerce and Taxation Powers to impel individuals to obey child support orders?

Affectation Doctrine. Discussion of whether, and if so how, Congress could address child support orders under a theory that nonpayment of child support in the aggregate substantially affects interstate commerce. United States v. Lopez.

Penalty Doctrine/Objective Constitutionalality Doctrine. Discussion of whether, and if so how, Congress could use its taxation powers (especially if it cannot use its commerce power) to address the non-payment of child support. United States v. Butler; United States v. Kahriger.

C. What limitations, if any, would Congress face in using its Spending Power to aid needy families directly?

Spending Power. Discussion of whether the General Welfare Clause would limit giving of federal money directly to needy families. United States v. Butler, Buckley v. Valeo, Helvering v. Davis.

FINAL EXAM GIVEN MAY 5, 2000

PROBLEM I. (Greyhound Buses)

A. In the absence of the federal statute, could New Orleans enforce its law against the Greyhound drivers?

Dormant Commerce Clause Doctrine. Discussion of whether the New Orleans Code imposes an excessive burden on interstate commerce in comparison to legitimate local interests. South Carolina v. Barnwell; Southern Pacific v. Arizona.

B. Is the federal statute constitutional and how does it affect the drivers' rights?

Commerce Clause. Discussion of whether Congress has the power to regulate intrastate charter bus service under the Commerce Clause. Gibbons v. Ogden; United States v. Darby, Wickard v. Filburn; Heart of Atlanta Motel v. United States; Katzenbach v. McClung; United States v. Lopez.

Preemption. Discussion of whether the federal statute preempts the New Orleans Code. Gibbons v. Ogden; Silkwood v. Kerr-McGee.

C. Instead of enacting the federal statute, could Congress have impelled New Orleans to repeal its law?

Conditional Spending. Discussion of whether Congress could induce New Orleans not to enact such laws by conditioning receipt of federal highway funds. South Dakota v. Dole.

Threatened Preemption. Discussion of whether Congress could have threatened to preempt the local code (with a federal statute of the kind that it ultimately did enact) unless the locality repealed it. Cf. New York v. United States

State Sovereignty. Discussion of whether Congress could require New Orleans to repeal the state law without violating its state sovereignty. New York v. United States.

PROBLEM II. (Deportation)

A. May Congress by enacting § 440(d) in effect reverse the Immigration Judge's decision to grant Navas a waiver?

Legislative Veto. Discussion of whether passage of § 440(d) violated the prohibition against legislative vetoes. INS v. Chada

Bill of Attainder. Discussion of whether § 440(d) constitutes a bill of attainder. Nixon v. Admin. of General Services.

B. If Congress had not enacted § 440(d), could it have prevented Navas from obtaining a waiver by stripping the courts of jurisdiction to consider his application?

Exceptions to Federal court jurisdiction. Discussion of whether Congress may deprive federal courts of jurisdiction to hear particular classes of cases. Ex parte McCordle.

C. If the Attorney General had refused to apply § 440(d) to Navas, what recourse might Congress have?

Faithful Execution of the Laws. Discussion of the Executive Branch's obligation to execute the laws faithfully, and whether Congress might impeach the Attorney General for not executing it.

Hearings, Withdrawal of Funding, Etc. Discussion of tactics that Congress can use to compel or persuade the Executive Branch to follow federal law. Cf. INS v. Chada (White, J., dissenting)

PROBLEM III. (Non-Resident Laborers)

A. What claims, if any, might A.L. Blades & Sons assert?

Privileges and Immunities Clause. Discussion of whether Act 1935-414 and § 107.26 violate the Privilege and Immunities Clause by requiring firms to discriminate against non-residents. Hicklin v. Orbeck; Baldwin v. Fish & Game.

Dormant Commerce Clause Doctrine. Discussion of whether Act 1935-414 violates the Dormant Commerce Clause Doctrine by imposing an excessive burden on interstate commerce (in particular, the hiring of laborers). South Carolina v. Barnwell; Southern Pacific v. Arizona.

B. Suppose that A.L. Blades & Sons had refused to hire Elliot and Barnes in order to comply with Act 1935-414.

1 To what extent could A.L. Blades & Sons challenge Act 1935-414 or § 107.26?

Case or Controversy Requirement. Discussion of whether a case or controversy would exist such that A.L. Blades & Sons might challenge the act in federal court and whether state courts might have different rules. Muskrat v. United States.

2 What claims would Elliot and Barnes have?

State Action Doctrine. Discussion of whether the two men might claim that A.L. Blades & Sons violated the Privileges and Immunities Clause, even though the company is a private entity. Civil Rights Cases; Burton v. Wilmington Parking Authority.

PROBLEM IV. (NAFTA)

A. How is what Congress and the President did here different from the ordinary process of making and ratifying treaties?

Treaty Clause. Discussion of how the President ordinarily makes treaties and the Senate ratifies them by a two-thirds vote, thus giving the treaty the force of law, without a separate implementation act.

B. What should the United States argue to justify the actions of the President and Congress?

President's Foreign Affairs Power. Discussion of whether the President could negotiate NAFTA pursuant to his implied powers over foreign affairs. United States v. Curtiss-Wright Export.

Congress's Commerce/Tariff Powers. Discussion of whether Congress could implement NAFTA pursuant to its power over foreign commerce and power to impose duties.

C. How should a federal court adjudicate the labor unions' contention that the Implementation Act is unconstitutional?

Political Question Doctrine. Discussion of whether the political question doctrine prevents the courts from deciding whether Congress and President should have adopted NAFTA like a traditional treaty. Nixon v. United States; Goldwater v. Carter.

PROBLEM V. (Bribery)

A. Could Massachusetts charge with McCormack with violation of a similar state bribery statute?

State Legislative Power. Discussion of how states have general legislative power as opposed to the limited powers that Congress has.

Preemption. Discussion of whether the federal statute would preempt the state statute. Silkwood v. Kerr-McGee.

B. Why might Congress want to a federal law on this subject?

Discussion of how Congress might not trust states to enforce a law prohibiting bribery of state officials, how it might have an interest in bribery if it provides subsidies to state governments, etc.

C. May the United States apply § 666 to McCormack?

Commerce Power. Discussion of whether Congress has power to pass § 666 under the Commerce Clause. Gibbons v. Ogden; United States v. Darby, Wickard v. Filburn; Heart of Atlanta Motel v. United States; Katzenbach v. McClung; United States v. Lopez.

Note: The bribe does not have to be more than \$5000. The statute prohibits giving "anything of value" as a bribe, so long as the matter involved is for more than \$5000.

Spending Power. Discussion of whether Congress has power to pass § 666 under the Spending Power. United States v. Butler.

FINAL EXAM GIVEN MAY 4, 1999

PROBLEM I. Telephone Regulation

A. What challenges might be brought against 47 U.S.C. § 254(f), and how should a federal court resolve them?

Commerce Power. Discussion of whether Congress has power to regulate "intrastate" telephone communications under its commerce or other powers. United States v. Darby, Wickard v. Filburn.

State Sovereignty. Discussion of whether Congress is forcing a state to regulate in violation of state sovereignty by telling the state to determine the manner of contribution. New York v. United States.

B. What challenges might be brought against the CPUC's end-user surcharges and how should a federal court resolve them?

Preemption. Discussion of whether the state regulation is preempted because it conflicts with § 254(f)'s direction that states make carriers rather than customers contribute. Silkwood v. Kerr-McGee.

Dormant Commerce Clause Doctrine. Discussion of whether the state regulation violates the Dormant Commerce Clause by imposing an excessive burden on interstate commerce, not authorized by Congress. South Carolina Department of Transportation v. Barnwell Brothers, Southern Pacific v. Arizona.

Contracts Clause. Discussion of whether the state regulation impairs the customers' contracts. Home Building & Loan v. Blaisdell, Allied Structural Steel v. Spannaus.

C. Could Congress have imposed end-user surcharges on all telephone customers directly and then used the revenue to subsidize rural telephone service?

Taxation. Discussion of Congress's power to tax under the Taxation Clause or the Commerce and Necessary and Proper Clauses. United States v. Butler

Spending. Discussion of whether Congress could spend money, under the General Welfare Clause, even though the expenditure would benefit some more than others. Buckley v. Valeo.

PROBLEM II. Garbage Hauling Contracts

A. What challenges might be brought against Local Law 42? How should a federal court resolve them? Does it matter how many customers have canceled their service contracts?

Contracts Clause. Discussion of whether law 42 violates the contracts clause by interfering with the contracts between garbage haulers and their customers. Home Building & Loan v. Blaisdell, Allied Structural Steel v. Spannaus.

Takings Clause. Discussion of whether law 42 constitutes a regulatory taking of the hauler's property. Lucas v. South Carolina, Andrus v. Allard.

Bill of Attainder. Discussion of whether law 42 violates the Bill of Attainder clause as a legislative measure designed to punish perpetrators of organized crime. Nixon v. Administrator of General Services.

Dormant Commerce Clause Doctrine. Discussion of whether law 42 violates the Dormant Commerce Clause Doctrine by burdening interstate commerce. South Carolina v. Barnwell Bros., Southern Pacific v. Arizona.

Case or Controversy. Discussion of whether this case would present a case or controversy if no customers have yet canceled their service contracts. Muskrat v. United States.

B. When reviewing waiver requests, could the Commission hold local companies to a lower standard than national companies?

Dormant Commerce Clause Doctrine. Discussion of whether holding local companies to a lower standard would violate the Dormant Commerce Clause Doctrine by discriminating against interstate commerce. Dean Milk v. City of Madison, Hughes v. Oklahoma.

Privileges and Immunities. Discussion of whether holding local companies (which are not citizens) to a lower standard would violate the Privileges and Immunities Clause. Hicklin v. Orbeck, Baldwin v. Fish & Game Commission.

C. How, if at all, could Congress impel New York to address the influence of organized crime in other local businesses?

Conditional Spending. Discussion of whether Congress conditionally could withhold spending on a program to induce compliance. South Dakota v. Dole.

Preemption. Discussion of whether Congress could threaten to preempt state law with federal law unless the law met federal standards. New York v. United States.

State Sovereignty. Discussion of whether Congress could mandate that New York pass certain laws. New York v. United States.

PROBLEM III. Missile Defenses

A. Is the Secretary of Defense obliged to meet the development deadlines and spending requirements? How might Congress seek to compel compliance or respond to non-compliance?

Faithful Execution of the Laws. Discussion of whether failure to meet the deadlines and spending requirements would violate the obligation of the President and his subordinates faithfully to execute the law. Youngstown Sheet & Tube v. Sawyer, United States v. Nixon.

Congressional Pressure. Discussion of whether Congress could induce compliance by pressuring the executive branch with hearings, threats to reduce future funding, and so forth. Cf. INS v. Chada (especially the dissent).

Impeachment. Discussion of whether failure to comply with the law would constitute an impeachable offense justifying removal from office. Cf. Nixon v. United States.

Injunction. Discussion of whether members of Congress, or someone else at their urging, might seek a court order enjoining compliance. (This case, in fact, presents an example of such an effort.)

B. The Secretary of Defense argued that the political question doctrine bars "judicial review of this matter" because it "would insert the court into a political tug-of-war ... regarding the particulars of highly controversial strategies for two national defense systems." Is this correct?

Political Question Doctrine. Discussion of whether the Secretary of Defense has made a proper argument under the political question doctrine. (Note that the issue here is not what type of missile defense system the nation should have, but whether the executive has complied with the law.) Nixon v. United States, Goldwater v. Carter.

C. To what extent could Congress pass legislation giving control over missile defense systems to someone who is independent of the President and Secretary of Defense?

Separation of Powers. Discussion of whether giving control over missile defense systems to someone who is independent of the President and Secretary of Defense would violate the separation of powers. (Note: Congress could not give control to a person who was "independent" to the extent that means no one in the executive branch could remove him. Bowsher v. Synar. Congress, however, could impose restrictions on the executive branch's power to fire the person --

such as a requirement of good cause -- so long as it did not unduly trammel on executive authority. Morrison v. Olson.)

PROBLEM IV. Liquor License

A. What challenges might be brought against the Act and the referendum, and how should a federal court resolve them?

Bill of Attainder. Discussion of whether the Act and referendum are bills of attainder in view of the legislator's comment about the Act's purpose and the narrow focus of the referendum. Nixon v. Administrator of General Services.

Takings. Discussion of whether the deprivation of the liquor license is a taking of either the license or the Amphitheatre. Village of Belle Terre v. Boraas, Lucas v. South Carolina, Andrus v. Allard.

Dormant Commerce Clause Doctrine. Discussion of whether the regulation violates the Dormant Commerce Clause Doctrine or whether the 21st Amendment gives states this power. Cf. South Dakota v. Dole.

B. How, if at all, could Congress endeavor to restore N & N's permission to serve liquor at the Amphitheatre?

Conditional Spending. Discussion of whether Congress could threaten to withhold spending on projects that have a related federal interest unless Illinois allows liquor sales. South Dakota v. Dole.

Direct Regulation. Discussion of whether Congress directly could regulate liquor sales at the Amphitheatre under its Commerce Power notwithstanding the 21st Amendment. Cf. South Dakota v. Dole.

Taxation / State Immunity. Discussion of whether Congress could pressure the states to permit alcohol sales using taxes or could require them to pass laws. New York v. United States.

C. If the federal government purchased the Amphitheatre from N & N, could it sell alcohol there?

Federal Immunity. Discussion of whether the federal government would be immune from state attempts to bar alcohol sales notwithstanding the 21st Amendment. McCulloch v. Maryland, South Dakota v. Dole.

PROBLEM V. Football Player

A. Indorato sued Patton for violating his "constitutional right to bodily integrity" under the 14th Amendment. Could Patton have violated this right, if it exists?

State Action Requirement. Discussion of the requirement of state action for violation of the 14th Amendment in view of Patton's private status. The Civil Rights Cases, NCAA v. Tarkanian.

Joint Participation Exception. Discussion of whether the joint participation exception to the state action doctrine applies in view of the mutual benefits between Patton and Cheyney. (See below for the question of whether Cheyney is a state actor.) Burton v. Wilmington Parking Authority, NCAA v. Tarkanian.

Public Function Exception. Discussion of whether the public function exception applies to college football teams. Marsh v. Alabama, Hudgens v. NLRB.

B. Why might Indorato prefer to bring a constitutional claim against Patton (if he has one) over a state claim?

Possible Advantages. Discussion of possible advantages of a constitutional claim over a state law tort claim. (This question did not have a specific answer. Possible advantages cited in answers included: federal court jurisdiction, no state law immunity, attorney's fees, preemption of state law, state responsibility for damages, publicity value, federal jury and judge not biased in favor of local school, etc. It is not clear that any of these advantage would help much.)

C. Was Patton entitled to due process before his expulsion? Could the NCAA, which sets collegiate athletic standards, have violated due process under any circumstances?

State Action Requirement. Discussion of the state action requirement in view of the facts suggesting that Cheyney receives state funding and so forth. Cf. The Civil Rights Cases.

Joint Participation / Mirror Image Exceptions. Discussion of whether the joint participation or mirror image exceptions could apply in any circumstances. NCAA v. Tarkanian.