

MEMORANDUM

TO: Professor Allen's Constitutional Law Class
Fall Semester 2003

FROM: Mike Allen

DATE: December 2003

SUBJECT: Final Examination

This memorandum provides some of my thoughts on possible answers to the final examination questions. I have attached as Exhibit A a copy of the examination and as Exhibit B a copy of my grading grid for the exam. Set out below are some thoughts about how I would have analyzed each of the questions. You can be sure that I have not included all possible responses. No doubt, many of you included analysis not set forth in this memo. You can be sure that you received appropriate credit if the analysis was correct. In addition, you were under time pressure when you took the examination. That reality means that I did not expect your answers to be of the same quality that I produced below. The purpose of this memo is merely to give you some general ideas about what I thought about the exam.

With that brief introduction, here are my general thoughts about the exam:

Question #1

This question is focused on a single issue: the legality of the Iowa Abortion Reflection Act of 2003¹ (the "Act") under only the Due Process Clause of the United States Constitution. If you discussed anything else beyond a Due Process Clause challenge you wasted precious time. In addition, the question stated that you were the judge charged with deciding the constitutional issue. Therefore, you should have come down on one side or the other of the question and explained your reasons for doing so.

I would have addressed the question as follows:

- I would first have briefly identified the fact that in Roe v. Wade the Court interpreted "liberty" in the 14th Amendment to include a right of a woman to control her body at least in terms of a right to terminate a pregnancy at certain points in the process. The key issue in Roe centered on the point of viability, although some state regulation was allowed as it related to the health of the mother beginning in the second trimester.
- The current standard for judging the constitutionality of abortion regulations such as the Act was set forth in Casey. In Casey, the Court held that a state regulation

¹ You should know that this is a fictional enactment.

of abortion in the pre-viability period of a pregnancy was to be judged by considering whether the regulation was an “undue burden” on the woman’s exercise of her right to control her own body as identified in Roe.

- The Court defined an “undue burden” as a law that has the purpose or the effect of placing a substantial obstacle in the path of a woman seeking to exercise her Roe right. Thus, to judge the constitutionality of the Act one must address both prongs of the undue burden test: purpose and effect.
 - The Court also made clear in Casey that a law regulating abortion needed to take the health of the mother into account. The Act sufficiently does so in Paragraph 3, which suspends the Act’s requirements when a doctor in good faith believes speed is essential. A similar provision was acceptable to the Court in Casey.
- Next, I would have considered whether the Act’s purpose was to impose a substantial obstacle in the path of women seeking their rights to terminate a pregnancy in the pre-viability period.
 - There is no doubt that a purpose of the Iowa law was to make abortions less likely. The issue is that the legislature also professed another purpose, simply to make women contemplating an abortion to consider seriously their decision. Casey recognized encouraging contemplation as a legitimate goal of a legislature in the abortion field. There is evidence to support the contention that encouraging contemplation was at least an important purpose in passing the Act.:
 - The title of the Act reflects a purpose to encourage contemplation.
 - The legislature stated that contemplation was the purpose of the Act.
 - In addition, the legislature specifically stated that it was not trying to thwart the exercise of any right determined to exist under the United States Constitution.
 - Therefore, it seems that the legislature had at least two purposes here. In this type of situation, Casey suggests that a law’s purpose is not to create a substantial obstacle in the exercise of abortion rights unless that is the sole or at least dominant purpose. In this case, I do not believe the evidence is sufficient to determine that the sole or dominant purpose of the Iowa legislature was to create a substantial obstacle to the exercise of the rights identified in Roe.

- You should have made sure to come to a conclusion concerning the purpose analysis.
- The second step in the process is to consider whether the Act has the effect of creating a substantial obstacle in the path of women seeking to exercise their rights under Roe. The effect analysis is a more difficult question under the Act.
- The issue here would be to consider how the requirements of this Act compare to those in Casey itself.
 - One effect of the Act is to cause women seeking an abortion to wait 24 hours before having an abortion. The reason is that she must have the test at least 24 hours before the procedure is performed.
 - There is no doubt that the 24 hour waiting period is a burden on the exercise of the right.
 - This feature of the Act will not, however, be considered a “substantial obstacle” because it is the same effect that the Court rejected as being substantial in Casey.
 - Leaving aside the type of procedure used, which will be discussed below, the nature of the information provided 24 hours in advance of the procedure probably does not rise to the level of a substantial obstacle.
 - The information (an ultrasound of the fetus) could be disturbing to a woman seeking an abortion. However, it is not necessarily clear that the information would be more disturbing than the information provided under the statute in Casey. Therefore, the type of information at stake probably does not make this law an “undue burden.”
 - There is a difference between the 24 hour period in Casey and the one specified in the Act. The type of procedure at issue here may make a significant constitutional difference.
 - First, Casey is not all that helpful in terms of analyzing this procedure. The issue in Casey concerned only the provision of information as a means to encourage contemplation. In this case, the device used to encourage contemplation is itself a medical procedure. Therefore, we need to engage in

additional analysis.

- The Act requires that a woman undergo an additional medical procedure in order to obtain an abortion. It is true that the procedure is not invasive and does not subject either the woman or the fetus to a risk of harm. In addition, the examination is of a short duration, 15 minutes. Nevertheless, the procedure does require that a medical instrument be placed on the woman's stomach.
- One could debate the significance of this additional medical procedure. You should have come to a conclusion concerning whether the additional procedure constituted a substantial obstacle to the exercise of the right. It is a close call, but I would probably say that it does constitute a substantial obstacle and thus an "undue burden."
- You should have made sure to provide a brief conclusion.

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Question #2

This question focused on whether the Grand Canyon Helicopter Act² (the "Act") is unconstitutional under dormant commerce clause principles that have been implied to exist under the United States Constitution. Once again, if you discussed any other issue you wasted time on the exam. In addition, the question stated that you were the judge asked to decide the constitutional issue. Therefore, you should have come down on one side or the other of the question and explained your reasons for doing so.

I would have addressed the issue as follows:

- I would first have provided the general standards under which a judge would address the dormant commerce clause challenge.
- A regulation challenged under the dormant commerce that is facially discriminatory with respect to interstate commerce will be presumed to be void and analyzed under strict scrutiny. Philadelphia v. New Jersey. In other words, the regulation will be deemed void and will be struck down unless the State can prove that it has a legitimate local reason for acting as it has done and that there are no less discriminatory means to do so. This

² This Act is also fictional.

regulation is not facially discriminatory because it applies to all helicopters providing service in the Grand Canyon regardless of the State from which they came.

- Therefore, the regulation will be evaluated under the principles set forth for facially neutral statutes.
 - By the way, the facts ask you to assume that Congress has not acted in any respect concerning the issue dealt with by the Act. As a result, neither Congressional consent nor preemption is at issue in this question.
- If we assume that the Act is facially neutral and we put aside for the moment any possibility that there is an improper motive to discriminate against interstate commerce, we would analyze the statute under the following standard: we assume that the statute is constitutional and the burden is on the challenger (here Utah Chopper) to demonstrate that the local benefits of the law are substantially outweighed by the burdens on interstate commerce.
 - The burden on interstate commerce in this situation is substantial. According to the facts, it appears that the cost to retrofit the non-Arizona helicopters will be “several million dollars.” Economic impact of neutral regulations are a common way in which to measure the burden on interstate commerce.
 - In terms of the local benefit, the state indicated that its goal was to increase the safety of flying on a helicopter in the Grand Canyon. This is certainly a legitimate goal. The potential issue in this case is that there does not appear to be any reason to believe that the safety of the passengers is materially increased as a result of the Act’s requirements.
 - However, the situation here is different than in some other cases we have studied in which the safety justification is rejected because the overall effect of the law is the reduction of safety. E.g., Southern Pacific. Here there does not appear to be any overall reduction in safety as a result of the action of the legislature.
 - The result of this analysis is that we have a high burden in interstate commerce. The local benefit is more difficult to judge because while safety may not be increased much, it is not harmed. Therefore, it may be that the regulation would be upheld under a purely neutral analysis (although it is a close call). But there is more going on here.

- The next step in the analysis should be to discuss the Act as a facially neutral law in which there is some evidence of an improper (i.e., discriminatory) motive.
 - The first step is to determine whether there is any evidence of an improper motive in this case. There is such evidence:
 - As an initial matter, there is evidence that Arizona has a motive to protect the tourism industry at the Canyon. First, Arizona itself has an economic interest in providing helicopter tours. Second, Arizona companies have been losing ground to companies from Utah and Nevada over the past several years.
 - In addition, the regulation is designed in such a way that it will only have an effect on the non-Arizona companies. Under the facts, at this moment at least, it is only those companies that will have to incur an additional cost in terms of retrofitting the helicopters with manual fire suppression systems. Thus, much as in Hunt, there is a strong discriminatory effect caused by the Act.
 - Thus, you should probably have concluded that there was evidence of an improper motive.
 - Once you conclude there is evidence of an improper purpose you should have realized that the Court will be more suspicious of the Act. The exact manner in which a Court will analyze the issue is not all that clear. For example, it may be that the Court will apply strict scrutiny or will shift the burden to the State to justify the law. What is clear, however, is that it is unlikely that the Court will void a law in which it suspects a discriminatory motive.
 - Thereafter, you should have made sure to come to a conclusion.
- Finally, you may have wanted to at least raise the possibility that Arizona would attempt to justify the law under a market participant argument due to its role as a entity providing helicopter service in the Canyon. You should have rejected this assertion out of hand because the market participant exception only allows a State to act in the market and not act as a regulator beyond its sphere. Therefore, there would be no market participant argument in this case.

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Question #3

This question was more far-reaching than the other two. As discussed below, this question called on you to survey the various matters we discussed in this class and consider which of them could conceivably lead to the invalidation of the Federal New Home Construction Protection Act³ (the “Act”). I would have addressed the question as follows:

Will and Jack’s First Inquiry

- Jack and Will’s first inquiry required you to discuss preemption of state laws by federal law.
 - Article VI, Section 2 of the United States Constitution is referred as the Supremacy Clause. Under this clause, validly enacted federal law will trump, or preempt, any state law to the contrary.
 - There are several ways in which a Congressional enactment could be found to preempt state law. At the heart of every type of preemption analysis is the intent of Congress. In this case, we need not consider the issue very deeply. The Act states on its face that it intends to remove states from regulating what constitutes a marriage. Therefore, this is a case of express preemption.
 - Thus, in this case, if the Act is enacted validly by Congress, a point discussed below, the Rhode Island law at issue in the question will be preempted by the Act.

Constitutional Attacks on the Act

- In terms of constitutional challenges to the Act, there are essentially two means of attack. The first concerns the *power* of Congress to legislate in this area. The second area concerns issues of *individual liberty* that may be implicated by the Act. I would address each of these general areas separately.
- In terms of Congressional *power*, the issue is whether Congress could enact this measure under the constitutional grant of the power “[to] regulate Commerce . . . among the several States . . .” Article I, Section 8, Cl. 3. There is no other conceivable basis for the exercise of the power to enact this measure based on these facts.
 - The first step in a Commerce Clause analysis is to consider the basis on which Congress has purported to act. In other words, has Congress purported to act by regulating a channel of interstate commerce, an instrumentality of interstate commerce, a person or thing in interstate commerce, or an activity that

³ Keeping with the pattern, this Act is also fictional.

“substantially affects” interstate commerce. In this case, it is clear under the language of the Act that Congress has purported to regulate under its power to address those matters that “substantially affect” interstate commerce.

- The second part of the analysis concerns what level of review the court will use to judge whether Congress has acted within an enumerated power.
 - The basic level of review is rationality review in which a court will be highly deferential to judgments by Congress concerning the scope of federal power to legislate. The court will use rationality review to judge Congressional action concerning a channel of interstate commerce, an instrumentality of interstate commerce, or a person or thing in interstate commerce. The court will also use rationality review to evaluate a Congressional regulation under the “substantially affecting” prong so long as the activity which Congress is regulating is “economic.” Lopez.
 - If Congress regulates a non-economic activity purportedly because it substantially affects interstate commerce, it is unlikely that the regulation will be upheld. Lopez and Morrison are not entirely clear as to whether there is a bright-line rule that a non-economic activity can never substantially affect interstate commerce or whether it simply is very difficult for such an activity to do so. The two things that are certain is that (1) it will be difficult to sustain such a statute and (2) the Court takes a less deferential approach to Congressional judgment.
 - In this case, the key issue is whether Congress has regulated concerning an economic activity. There are two ways in which to view the issue.
 - The first approach to the problem is that Congress is not regulating an economic activity at all. In this view, what is being regulated is marriage. While there are certainly economic attributes associated with it, the institution of marriage is a non-economic activity. As such, the court will, at a minimum take a harder look at the basis for Congressional action. It would likely be the case that seen in this light, along with Lopez and Morrison as guides, Congress would not be allowed to regulate in this area because a court would hold it to be beyond Congress’s enumerated powers.
 - This conclusion would be reinforced by using the concurrence in Lopez of Justices Kennedy and

O'Connor. They indicated that another important factor in the Commerce Clause analysis is whether the activity is one that is traditionally regulated by the states. Marriage is certainly such a traditional area.

- Another way to look at the question is that the activity being regulated is new home construction. Seen in this way, then the activity is economic activity. In addition, the economic activity may be aggregated per Wickard so as to support the Congressional conclusion that the area may be regulated as one which substantially affects interstate commerce. The court would use rational basis as the standard if it analyzed the case in this regard.
 - Note that it is also possible to argue that there are too many links in the inferential chain much as the Court found to exist in the Morrison case. If seen in this way, the regulation would not likely be supported under the Commerce Clause authority.
- You should come to a conclusion on this area of the case.
- The third step of the process is to consider whether the means utilized by Congress to regulate the activity at issue are appropriate. The standard to judge this question comes from McCulloch v. Maryland. In McCulloch the Court held that the necessary and proper clause in the Constitution (Article I, Section 8, clause 18) allows Congress to use any means that are convenient to reach legitimate ends so long as the means are not used as a pretext to engage in some other, improper activity.
 - In this case, if you looked at marriage as the end, then there would no separate analysis required here. You will have already determined that the ends are inappropriate. Because the ends and the means are the same in this case, there is not additional analysis required.
 - On the other hand, if you looked at new home construction as the end, then the regulation of marriage would be the means. In this case, there would be nothing in the Constitution that would prohibit those means, with the possible exception of some individual rights issues discussed below. Leaving those individual rights issues aside, there would be no “means” problem.

- There would, however, quite possibly be a problem with Congress using the Interstate Commerce power as a mere pretext to do something that should be in the hands of the states under our system. The Court has not utilized the pretext “out” from McCulloch much in the past. There is a strong argument one should discuss on this ground for this question.
- At the end of the question, you should come to a conclusion about the scope of the Commerce Clause power in this question.
- There are also serious concerns with the Act concerning *individual liberty* issues. Although there is a fair amount of overlap in terms of analysis, the liberty issues can be considered under principles of both Due Process and Equal Protection. As a technical matter, the constitutional provision at issue is the Due Process Clause of the 5th Amendment, which binds the federal government. The Court has ruled that the 5th Amendment’s Due Process Clause includes both Due Process principles and those associated with Equal Protection under the 14th Amendment.
 - A major issue at the beginning of the 5th Amendment analysis is to determine the appropriate level of scrutiny that the Court should apply in reviewing this action of Congress.
 - Under Due Process considerations, the analysis focuses on whether there is a “fundamental” right at issue. If there is, the Court will apply strict scrutiny under which the law will be presumed to be invalid unless the government proves that it has a compelling interest in enacting the law and the means used are narrowly tailored to serve the compelling interest. If there is no fundamental rights at issue, then the court will employ rational basis review under which the law will be presumed to be valid unless the challenger can show either that the governmental end is not legitimate or that the means used are not rationally related to that end.
 - Under Equal Protection analysis, the issue turns on the nature of the classification used in the law. If the classification involves a suspect class or a fundamental right, then strict scrutiny is appropriate. If the classification involves a quasi-suspect class, intermediate scrutiny is used. Under intermediate scrutiny, the law is presumed invalid unless the government can prove that it has an actual important purpose and that the means used are substantially related to serving that end.
 - Based on these overall considerations, you may have wanted to structure your answer to consider the various ways in which heightened scrutiny could be employed.

- Perhaps the best way in which to begin is to consider the Act under the terms of minimal scrutiny. That is, assume for the moment that there is no fundamental right at stake and that there is no classification based on a suspect or quasi-suspect class. As the law stands now, this assumption is correct in terms of the consideration of classifications based on sexual orientation. As discussed below, marriage can be considered a fundamental right.
- Under minimal scrutiny the issue is whether the government has a legitimate end and the means chosen to reach that end are rationally related to doing so.
 - In terms of the ends, you would want to discuss some the following things in order to reach your conclusion. What follows is by no means a necessary or comprehensive list of topics. It is merely a list of some points I thought worthy of discussion:
 - The government may rely on any justification for the Act that is consistent with the statutory language. Thus, the statute may be sustained based on justifications that were not actually in the minds of those passing the statute. Fritz.
 - It is likely here that the government will assert an interest in preserving the institution of marriage as it has traditionally existed – as a union between a man and a woman. You should have discussed whether you would consider this goal a legitimate one under the Constitution.
 - You would want to discuss whether the use of a religious or moral reason for the law is a problem. Justice O’Connor said in Lawrence that imposing morality was not a legitimate government interest. On the other hand, she also said that there was something different about marriage.
 - You should also have discussed the language in Lawrence (both in the majority and the O’Connor concurrence) and in Romer and Moreno that a bare desire to harm a particular group of people can never be a legitimate reason for the government to act. How would that issue fit in here?
 - Would the presence of the possibility of a desire to harm lead the court to discount possible legitimate reasons to act such as the protection of marriage as an institution? This seemed to happen in City of Cleburne.

- In any event, you should have come to a conclusion on whether you believe, based on the relevant law, the Act would be invalidated under minimal rational basis scrutiny.
- You should also have at least mentioned the means analysis. In my view, if the end is legitimate the means here are certainly rationally related to achieving the end.
- Another issue to consider is whether the restriction on the ability to marry is sufficient to trigger strict scrutiny under either Due Process or Equal Protection. As a technical matter, the Court apparently has treated restrictions on marriage as an element of Equal Protection analysis. The difference between equal protection and due process in this context is more a matter of form over substance, especially when dealing in the area of the 5th Amendment. In this case, it would seem that we will apply the heightened form of scrutiny used to evaluate restrictions on marriage.
 - The test for restrictions on marriage rights is whether the restriction at issue constitutes a “direct and substantial interference” by the government with the personal decision to marry. If it is, then we will apply strict scrutiny.
 - In this case, there is no question whether or not it is a direct. The statute on its face purports to restrict the right to marry.
 - For the same reason, there is no question that the restriction here is substantial. The statute purports to eliminate the ability to marry.
 - Thus, the law should be subject to strict scrutiny.
 - In applying strict scrutiny, you would need to address both the purported governmental interest as well as the “fit” between the means used and that interest.
 - In terms of the compelling interest, you would need to consider whether the protection of marriage as it has traditionally been defined in society is a sufficiently important interest to burden entry into that institution. You should be able to take some of your discussion in the rational basis area and apply it here. Once again, it was less important to me how you came out in the analysis than it was for you to show the steps you took to address the question.
 - In terms of narrow tailoring, it strikes me that if the interest is deemed compelling, there would likely not be a narrow tailoring problem. You should, nevertheless, be sure to have addressed the question.
- Finally, you would have wanted to consider whether there was an additional way to get to

strict (or perhaps intermediate) scrutiny as the way to analyze the Act. In other words, you would have wanted to consider whether sexual orientation should be considered as a suspect or quasi-suspect classification. Note that this argument was not foreclosed by either Romer or Lawrence because in both these cases the Court ruled that the law at issue fell under minimal scrutiny. Thus, there was no reason for the Court to consider whether classifications based on sexual orientation should be subjected to heightened scrutiny.

- In order to make the assessment about whether sexual orientation classifications should be subjected to heightened scrutiny, you should consider at least three factors:
 - Whether sexual orientation is an immutable trait;
 - Whether people have historically been subjected to discrimination based on sexual orientation; and
 - Whether people are shut out of the political process based on their sexual orientation.
- It was less important how you came out on these issues than the fact that you discussed them. You may also have tried to compare the reasons for heightened scrutiny in race and gender-based classifications in order to determine whether some form of heightened scrutiny would be important for sexual orientation-based classifications.
- Finally, you would want to refer to your earlier discussions concerning the result of using heightened to evaluate the Act. There was no need for you to repeat the analysis.

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I hope these thoughts have been useful to you. I would be happy to answer any questions that you might have.