

MEMORANDUM

TO: Constitutional Law I Class

FROM: Mike Allen

DATE: May 2005

SUBJECT: Thoughts Concerning Final Examination Answer

This memorandum provides some of my comments on possible answers to the final examination questions. 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. The same can be said of answers that differed from mine: if your position was well-supported and not foreclosed by relevant law you received appropriate credit. 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 was an issue spotting question. The first step was to identify the possible constitutional issues we discussed during the semester that could be implicated. There are four such issues: (1) the Privileges and Immunities Clause of Article IV; (2) procedural due process under Amendment XIV; (3) substantive due process under Amendment XIV; and (4) equal protection under Amendment XIV.¹

Privileges and Immunities Clause

The Privileges and Immunities Clause provides that: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. Art. IV, Sec. 2, cl.1. At its heart the P&I Clause is designed to protect and promote the interest in interstate harmony in a federal union. The Clause is not one that creates positive rights. Rather, as to certain rights it is an equalizer in that it provides that states shall not treat their own citizens differently than citizens of other states, at least not without a very good reason.

¹There is not realistic argument that the Act is unconstitutional under the dormant commerce clause. The fact is that the subject of the act is not “commerce” and, therefore, there would be dormant commerce clause issue meriting discussion.

The first step in the P&I analysis is to determine whether there is discrimination as to a “fundamental” right for purpose of the Clause. There are three fundamental rights under the P&I Clause: the right to seek work; the right to own and dispose of property and the right of access to courts. There is an argument that the Act discriminates with respect to the third of these fundamental rights, the right of access to courts.

Section III of the Act provides that the clerk of the circuit court must reject a filing – in other words, turn a party out of court – if subsection II(3) of the Act has not been complied with. Subsection II(3) in turn provides that in order for a living will be valid with respect to the withdrawal of nutrition and hydration it must have been notarized by the clerk of the court in the Florida county in which the person lived. That means by implication that the now-incompetent person had to have been a Florida resident when he or she made the written living will. Thus, read together these statutory provisions discriminate between Florida residents and non-Florida residents with respect to access to courts. And in the question this is precisely what happens: Sue as the guardian of Don, both New York State citizens, is denied access to the court in a way that a Floridian would not have been.²

Identifying that there is discrimination as to a fundamental right is only a part of the analysis. After coming to that conclusion you must address whether that discrimination is justified. The test is that such discrimination is justified if the State can demonstrate that there is “substantial reason” for the difference in treatment. This requirement has been interpreted to consider three factors:

- the specific connection between the state goal and the discriminatory practice, something like a causation requirement (i.e., that the non-citizens “constitute a peculiar source of the evil to which the statute is aimed”);
- that there is a substantial relationship between the discriminatory practice and the problem the State identifies, something like a remediation question; and
- the lack of any less discriminatory workable alternatives to address the problem.

In this case, it does not seem likely that the state would be able to carry its burden to justify the discrimination against non-Floridians. The first step for you to take in order to apply the test is to identify the problem that the state is trying to address through the Act. The Act itself defines the problem as the mistaken withholding of nutrition and hydration from

² It would be possible to argue that there is no discrimination here because the Floridian without a living will is treated in essentially the same way as a non-Floridian with or without a living will. While this is a plausible argument it does not seem particularly strong. The unavoidable fact is that a non-Florida citizen has imposed on him or her a burden in terms of court access that a Floridian would not face. It is true that the Floridian may also being deprived of a right, but that issue is better dealt with under Equal Protection or Due Process principles.

incompetent people. There is no indication that there is any causal relationship between non-Floridians and the problem identified by the state. The problem would exist – and exist in roughly the same magnitude – whether non-Floridians came to the state or not. Moreover, there is no indication that the discrimination is likely to solve the problem. Finally, there are numerous less discriminatory things the state could have done to address its concerns. For example, it simply could have enacted the Act without section III. Thus, the state will likely not be able to carry its burden of justifying the discrimination against non-Floridians.

The effect of a P&I ruling would be remove from the statute the discrimination against non-Floridians, section III and subsection II(3). However, the remainder of the statute would remain in force. Thus, Sue and Don are only partially to benefit under a P&I challenge.

Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that no person shall be deprived of “life, liberty, or property, without due process of law.” This provision has been interpreted to have both a procedural and a substantive component. Substantive due process issues are discussed below. This section of the memo deals with procedural due process concerns.

The first step in a procedural due process analysis is to determine whether there is a life, liberty or property interest at stake. In this case there is certainly an interest at stake. It would be possible to discuss the “life” interest in the sense that the interest in life might very well include an interest in no longer living. However, one would not need to address this novel question because there is a liberty interest at stake. A liberty interest is defined as a matter of federal constitutional law. Cruzan could be cited for the proposition that there likely is a liberty interest – whether “fundamental” or not – in making medical treatment decisions including the withdrawal of nutrition and hydration. In addition, Cruzan can cited for the proposition that an incompetent person holds the same constitutional rights as does a competent person. Thus, there is a relevant interest at stake here.

Once there is a relevant interest at stake one must determine whether the procedures used are sufficient under the Constitution to protect that interest. In this case, Sue (and Don) could argue that the provision of the Act precluding any judicial review (i.e., sections II(3) and III) should fall under the procedural branch of due process.

One would judge this claim by using the three part test laid out in Matthews v. Eldridge. That test balances the following three factors:

- the private interest at stake;
- the governmental interest at stake; and

- the risk of error in the challenged procedures and the incremental value of requested procedures in reducing the rate of error.

One should then have applied the test. The private interest here is significant. It has to do with the control of one's body, something that the common law and other constitutional cases have considered to be quite important. The government interest is also important – the prevention of the wrongful withdrawal of life sustaining treatment. Thus, the analysis really comes down to the final factor. It seems in this case that the risk of error in the Act's procedures is high because a case can never even be filed. The new procedures would reduce that rate because, at the very least, a case can get through the doors of the courthouse.

In the end, it seems that a procedural due process challenge would be successful. But it would not be of great help to Sue and Done because the basic statutory framework would remain.³

Substantive Due Process and Equal Protection

The best challenges to the Act would come under substantive due process and/or equal protection. *See* U.S. Const. amend. XIV. There is a great deal of overlap between these two doctrines, so I would have discussed them together at least in part. It was worth noting at some point the difference between the two grounds in terms of the effect on legislative action. If the Act were struck down on equal protection grounds, it might be possible for the government to enact the same substantive regulation but to do so on a broader basis. On the other hand, a ruling on substantive due process grounds would make any government regulation in the area far more difficult.

Equal Protection

The Appropriate Standard of Review

The first step under an equal protection analysis was to determine the appropriate standard of review. To do so one would need to determine the basis on which the Act classified. You would also have wanted to consider whether the Act infringed a "fundamental right."

Incompetency

On its face, the Act appears to classify based on competency: competent persons are treated one way (they are not subjected to any special requirements) and incompetent persons are

³One could also have attempted to challenge the basic statutory framework (i.e., the requirement that one must have a living will) under procedural due process. It is much better handled under substantive due process since the restriction in the Act is a legislative judgment that really does not address procedure as such.

treated another way (they must satisfy a number of requirements).⁴ You should have recognized that if the Act was determined to classify based on competent/incompetent it would be likely that one would judge its constitutionality under the rational basis standard of review.⁵ Incompetency certainly does not rise to the level of a suspect class such as race. In other words, incompetency is not something that represents a discreet and insular minority. It is simply not like race an ethnicity.

In addition one would not have been successful arguing that incompetent people should be considered a quasi-suspect class.⁶ The best argument against a heightened standard of review based on incompetency is Cleburne in which the Supreme Court rejected finding the mentally retarded a quasi-suspect class. The same arguments made against finding incompetent people a suspect class are applicable here, in particular the fact that the group is not homogenous. Thus, the applicable standard of review here is rational basis review.⁷

Race

It is also possible that the Act could be said to classify on the basis of race. The Act is race neutral both on its face and in its application. However, based on the facts in the problem there is a strong racial effect of the law (i.e., the Act has a much more negative effect on African-Americans). You should have discussed whether it was possible to say that the Act classifies on the basis of race. To do so you should have considered the matters we discussed concerning how one determines whether to treat a racially neutral statute applied in a racially neutral way but with a disproportionate racial impact under strict scrutiny. See Washington v. Davis; Arlington Heights.

The Supreme Court has determined that courts should look to a number of factors to make the determination concerning such a racially neutral law. All of the factors go essentially towards determining whether race was, in reality, a force behind enacting the law. In particular,

⁴One could also talk about the difference in treatment between Floridians and non-Floridians. There really was no reason to discuss this issue here, however, given the discussion concerning the P&I Clause.

⁵Under the rational basis standard of review the challenger must prove that the state has no legitimate interest or that the state's means of achieving that interest are not reasonably related to achieving its interest.

⁶If a regulation classifies based on a quasi-suspect class the state must show that the classification serves an important government interest and that the means used are substantially related to serving that interest.

⁷The same would have been true if you analyzed the issue in terms of age, wealth or education.

the Court has indicated that one should consider: (1) the nature of the racial effect; (2) the impetus for enacting the law; (3) the relevant legislative history; and (4) the history of racial discrimination in the relevant geographical area.

In this case, the reason the Act came into being was dissatisfaction with what occurred in the Terri Schiavo case. There was nothing racial about that case, thus cutting against the application of strict scrutiny. There is a history of racial discrimination in Florida, but it seems that the connection between the past discrimination and this government action is weak. The racial impact here is strong, but it is outweighed by the fact that other groups such as the young (i.e. those under 30) have an even greater negative effect under the law. Moreover, the fourfold difference in effect on racial groups is quite similar to the statistical disparity at issue in Davis. Finally, there is little in the legislative history to show a racial bias. There is only a stray comment by one senator at a committee hearing that could be construed as racial in any respect (i.e. “those people” are not my constituents). Given the absence of other racially tinged legislative history combined with the other relevant factors, it is not likely that strict scrutiny would be applied to the Act on the basis of suspect classifications.

Fundamental Right

Another means by which to achieve a more stringent level of review is if the Act regulate concerning a “fundamental right.” If it does, the appropriate standard of review is strict scrutiny. I discuss the fundamental right issue below in connection with the substantive due process analysis.

Application of the Standard of Review

Rational Basis Scrutiny

As discussed above, at least with respect to classifications based on race or incompetency, the court would apply the rational basis standard of review. The first step under that standard is to address whether the state has a legitimate interest at stake (technically, it is the challenger’s burden to demonstrate that the state does not have a legitimate interest). Under rational basis scrutiny the state can assert any interest that is consistent with the language of the statute; it does not need to be the actual interest of the legislature at the time the law was passed. Fritz. In this case the state’s interest in the protection of life and the protection of the vulnerable from exploitation are certainly legitimate interests. *See* Cruzan; Glucksberg.

The next step is to determine whether what the state has done (i.e. the means used to legislate) is rationally related to achieving the legitimate state interest. It is in this case. It is true that the state has chosen to legislate by using a broad brush – it has drawn a bright line based on a written living will authenticated when a person is competent. This is no doubt a line that will

cause some people to lose out on an ability to effectuate their true wishes.⁸ But a legislature can regulate matters one step at a time. The over-inclusiveness of this classification is not so great as to make the classification device irrational.

Thus, the Act would likely pass rational basis scrutiny.

Strict Scrutiny

Should the court use strict scrutiny – most likely because of the presence of a fundamental right as discussed below – the state would need to prove that it had a compelling interest and that its means of regulating were narrowly tailored to serve that interest. The state would likely fail in this case. In terms of the compelling interest, it is likely that the state would have such an interest in terms of the protection of life or the prevention of exploitation of a vulnerable population. This is the actual purpose of the legislation as seen on the face of the Act. Recall that under strict scrutiny it is the actual purpose of the legislation that matters.

The problem would seem to be with respect to the narrow tailoring prong of the analysis. One could argue this issue in both directions. It seems to me, however, that there are more nuanced things the state could have done to protect life or prevent exploitation of a vulnerable group without sweeping so broadly – either racially or with respect to a fundamental right. For example, the state could have raised the burden of proof for oral declarations so that it was possible for a person to have their wishes carried out but the standard of proof was high enough to reduce the risk of error. That being said, it is possible to argue in favor of the narrow tailoring of this regulation.

In the end, you should have come to a conclusion concerning whether the Act would likely fail under strict scrutiny.

Substantive Due Process

The final issue to have discussed here was a claim based on substantive due process. Under substantive due process analysis one first must determine whether the challenged government action infringes a “fundamental right.” This is a difficult issue in this case. In Cruzan, the United States Supreme Court only assumed that a person had a fundamental liberty interest in withdrawing/withholding nutrition and hydration. It also only assumed that whatever rights in this respect a competent person possessed, the incompetent person had the same rights. You would have needed to address these issues and come to a conclusion.

In my view the stronger argument is that there is a fundamental liberty interest in withholding or withdrawing nutrition and hydration. First, as a matter of history and tradition

⁸I have assumed that the provisions of the Act discriminating against non-Floridians have been struck down under either the P&I Clause or procedural due process principles.

(which is important in this analysis, *see* Griswold, Roe, Glucksberg) men and woman have been able to control what medical treatment they received. The same is true for food and water. Indeed, there has been a movement away from the criminalization of suicide supporting the position that society views this question as one for the individual.

In addition, precedent strongly supports the fundamental nature of this right. At their core, Griswold, Roe, Casey, and Lawrence are all about the control of intimate details about one's body. It is difficult to conceive of a more personal detail than whether to nourish the body. Moreover, the concurring opinions of Justice O'Connor in both Cruzan and Glucksberg demonstrate that she and several other justices joining in those opinions did more than assume that the right at issue was fundamental.

Having concluded the right was fundamental you needed to determine that it was infringed.⁹ It is in the sense that a person without a written living will cannot have nutrition and hydration withheld even if that was their clearly expressed wish.

The issue then becomes whether the state can establish that it has a compelling interest that the Act serves in a narrowly tailored manner. In terms of the compelling interest it seems clear that, as discussed above, the state has such an interest in terms of preserving life and protecting the vulnerable. The case then turns on whether the Act is narrowly tailored to serve that interest. This is again a difficult question. As I described above, you should have explained your reasoning and come to a conclusion.

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Question 2A

This question called on you to decide only one issue: whether the FMMLRA is unconstitutional because Congress lacked the power to enact it under the Commerce Clause. If you discussed any other issue you wasted valuable time.

Basis of Congressional Action

The first step in the Commerce Clause analysis is to determine on what basis Congress purported to regulate under the Commerce Clause. There are three options based on the Lopez description of the law: regulation of (1) channels of interstate commerce; (2) instrumentalities of or people or things in interstate commerce; or (3) activities that substantially affect interstate commerce. In this case, the FMMLRA makes clear that Congress was legislating on the third basis.

⁹Even if you had concluded that the right was not fundamental you would have had to determine whether it was infringed. Thereafter you would have had to judge the Act under rational basis scrutiny.

Judicial Review of Congressional Action

The next step in the analysis is for the court to judicially review the Congressional judgment. When Congress has regulated on the basis of an activity substantially affecting interstate commerce, the first order of business is to define the activity that Congress believed had the substantial effect on interstate commerce. In this case, the FMMLRA itself defines the activity as “the filing of frivolous medical malpractice lawsuits” making this question much easier.

The issue then becomes whether the relevant activity (i.e. the filing of the lawsuits) is an economic or non-economic activity. Lopez. Under Lopez at the very least Congress would have a broader range of authority to legislate with respect to economic activities. In this case it is likely that a court would conclude that the activity identified by Congress is an economic one. First, Congress made specific findings about the economic impact of the activity. While the Court is not bound by these findings, they are persuasive. Moreover, while one of the findings might be seen as reflecting the type of inferential reasoning rejected in Lopez other findings are much more direct (e.g., the \$500 million cost per year). Second, the entire purpose of a medical malpractice lawsuit is the exchange of money, the classic economic activity.

Once one determines that the activity is economic in nature two other principles come into play that support Congressional action. First, Congress is allowed to aggregate the effects of all medical malpractice lawsuits in order to determine whether there is a substantial affect on interstate commerce. *See Wickard*. Second, Congress is allowed to regulate entirely intrastate activities in order to protect interstate activities. Shreveport Rate Cases.

The only strong argument against the conclusion that Congress was rational in its determination that these lawsuits have a substantial affect on interstate commerce is the fact that regulating medical malpractice cases is a traditional state activity. As Justices Kennedy and O’Connor noted in their concurrence in Lopez, when an activity is one that is traditionally regulated at the state level a court should be cautious in judging Congressional action. While this is true, the issue is probably not significant here. First, it is not entirely true that the regulation of medical malpractice is a state activity alone. These types can be brought in the federal court under diversity jurisdiction and thus would implicate federal regulation of litigation conduct. Second, the direct economic effects are quite strong here.

Thus, Congress was rational to have concluded that the identified lawsuits, in the aggregate, have a substantial impact on interstate commerce.

McCulloch Means Analysis

The final step in the Commerce Clause analysis is to determine whether the means used by Congress are appropriate. This issue raises questions under the Necessary and Proper Clause. The end Congress is seeking to achieve here is the regulation of frivolous medical malpractice

lawsuits. It has sought to do so by using the means of applying a specific procedural rule in state court actions. Thus, the issue here is to judge the appropriateness of those means.

The *McCulloch* test is in three steps. First, one asks whether the means used are “convenient” or “useful” to reaching the ends. In this case they are: it is rational to believe that the imposition of litigation sanctions will decrease the filing of baseless lawsuits.

Second, the means used must not be prohibited by the Constitution. There clearly is nothing in the Constitution that says that Congress cannot regulate state court procedures, at least not in so many words. However, there is an argument that such regulation runs afoul of the Tenth Amendment. The Court has ruled that the Tenth Amendment precluded Congressional regulation under the Commerce Clause when it amounts to a commandeering of the state legislature, New York v. United States, or state executive. United States v. Printz. Here the issue would be whether directing state courts to impose sanctions is the same type of thing as what was rejected in New York and Printz. While one could make this argument it is unlikely to be successful. There is case law rejecting Tenth Amendment challenges to requiring state courts to hear federal cases. Testa. One could argue that so long as what Congress does otherwise fits within the Commerce Clause and that it merely requires courts to act as courts there is no 10th Amendment problem. Of course, if you made a strong argument in the other direction I would have taken that into account.

The final step in the analysis to determine whether what Congress has done is a pretext for some inappropriate action. The Court has never used the pretext prong of the analysis but it is still there. Here it is tempting to say that the pretext is that Congress is really trying to regulate malpractice. The problem with this argument is twofold. First, Congress makes no bones that it is doing just that; it is just regulating in a less direct manner. Second, it is likely that, if it wanted to, Congress could directly regulate many types of medical malpractice cases directly under the Commerce Clause. Therefore, there is no pretext here.

In conclusion, it is highly likely that the FMMLRA would be upheld under a Commerce Clause challenge.

Question 2B

This question concerned only a challenge to the FAA under dormant commerce clause principles. If you discussed anything else you wasted valuable time. You also should not have spent any time discussing either the market participant exception or Congressional consent/preemption. The facts make clear that the Hospital is a private entity. Also, the call of the question makes clear that there is no Congressional consent or preemption at issue.

Facial Discrimination

The first question to address is whether the statute at issue is discriminatory on its face.

In this instance, the answer to this question is not self-evident. The better position is that the statute is neutral on its face because it does not distinguish between Florida and non-Florida entities. The reason it is a somewhat difficult issue concerns the reference in paragraph 1 of the FAA to the “Florida Department of Health.” It is possible to argue that this reference is tantamount to saying you must buy a product in Florida. But it is not clear if that information is on the face of the statute. After all, the Florida Department of Health only issued its judgment that its jurisdiction was limited to Florida after the FAA was enacted.

If you were to find the statute discriminatory on its face you would need to presume that the statute was invalid and strike it down unless the state was able to establish (1) that it has a legitimate state interest that (2) could not be served by any less discriminatory means. Here the health and safety of patients in hospitals is clearly a legitimate state interest. The problem concerns the second prong of the analysis. The facts make clear that Florida could have protected patients by doing less discriminatory things, such as requiring purchasing machines with certain demonstrated safety records. Indeed, this approach would have been both less discriminatory and more likely to increase safety on these facts.

The bottom line is that if this statute were considered under this form of heightened scrutiny it would fail.

Facially Neutral Statute

Assuming that the FAA is facially non-discriminatory there are two ways in which one might go about the analysis. The first approach would be to consider the statute as neutral with only an impact on interstate commerce. This way of looking at the statute, however, is clearly not as good as the second approach: to consider the statute as neutral with a discriminatory effect or purpose. You would have done better if your analysis focused on the discriminatory effect or purpose prong since there is strong evidence of both present in the fact pattern.

Discriminatory Effect/Purpose

There is definitely evidence in this case of at the very least a strong discriminatory effect of the regulation on interstate commerce. The effect of the FAA, when combined with the Department of Health’s jurisdiction, is that covered medical facilities in Florida only purchase the relevant equipment from companies with Florida operations. This type of strongly discriminatory effect could also lead to the conclusion that there was a discriminatory (i.e. economically protectionist) purpose behind the FAA.

When there is such a discriminatory effect or purpose it is highly likely that the law at issue will be struck down. The Court has not, however, been consistent in explaining the standard to use. One articulation of the standard when there is a strong discriminatory effect is that a court should apply Pike balancing but start with the assumption that the law is unconstitutional unless the state establishes otherwise. Hunt.

Under traditional Pike balancing one assumes that the statute is valid and it will be struck down only if the challenger can establish that the burden on interstate commerce is clearly excessive to the local benefits. Under Hunt the presumption of constitutionality is reversed and it is the state that has the burden to show otherwise. The best way in which to approach Pike balancing (both under Hunt and in its more traditional application) is to separately consider the local benefits and the burdens on interstate commerce. Then one can compare these two factors.

In terms of benefits, the state asserts an interest in protecting the health of its citizens. That certainly is a legitimate goal. The problem is that the regulation does not appear to do a particularly good job of advancing that goal. Based on the facts we have, it is unlikely that the regulation advances safety because there does not appear to be a strong connection between the inspection requirement and any safety problems with the devices. In fact, there is some evidence that the units that are subject to inspection are more likely to cause a problem. Thus, on balance the local benefits of the FAA are low.

Turning now to the burdens on interstate commerce, it would appear that those burdens are high. In order to comply with the regulation a non-Florida company must invest substantial resources (here it would be \$500,000) in order to comply. The investment of those resources is enough to stop at least some interstate commerce from entering Florida.

One would then need to compare low local benefits with a high burden on interstate commerce. As in Southern Pacific most regulations with these features will be struck down under dormant commerce clause principles. At the very least one can say with some certainty that the state would not likely be able to carry its burden here.

Another approach has been to apply the same standard one would use if the statute was discriminatory on its face. Dean Milk. As described above, the FAA would fail this level of review.

Finally, there is some authority that when there is a discriminatory purpose the relevant law is *per se* invalid. Hood. In other words, under this approach the state cannot under any circumstances justify the discrimination. It is unclear whether this standard is still good law. In any event, it seems more appropriate for cases in which there is stronger evidence of discriminatory motives. But if one were to apply the test, the FAA would certainly fail since it fails several less stringent tests.

Pike Balancing

If one were to assume that there is some impact on interstate commerce but no discriminatory effect or purpose, one would apply traditional Pike balancing. As described above, under traditional Pike balancing it is the challenger that has the burden of showing that the burdens on interstate commerce are clearly excessive to the local benefits. Based on the analysis above showing a low local benefit and a high burden on interstate commerce, it seems to me that

the challenger would succeed its burden. It would, however, (at least in theory) be a closer call than the Hunt balancing discussed above.