FINAL EXAMINATION **SPRING SEMESTER 2005**
CONSTITUTIONAL LAW I (LAW-1195-02) **PROFESSOR ALLEN**

STETSON UNIVERSITY COLLEGE OF LAW
Gulfport, Florida

GENERAL INSTRUCTIONS

I DIRECT THE ATTENTION OF ALL STUDENTS TO THE FOLLOWING:

1. The answers and the pledge are to be identified by examination number only.

2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination.

3. This examination ends at the expiration of the time allotted, or when the examination is turned in, whichever comes first.

4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the manner indicated by the instructor.

5. From the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to this examination until grades have been turned into the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professional Responsibility.

TIME FOR EXAMINATION: FOUR HOURS

SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You may use the textbook and supplement for the course, your notes, any handouts distributed in class, and outline(s) you prepared either alone or in conjunction with others. You may not use any of my old exams or answers or any commercial outlines or materials (other than the textbook).

2. This examination consists of seven (7) pages. You should check now that you have all pages.

3. This examination consists of two (2) questions for which essay answers are required. The second question has two distinct sub-parts. You may answer either question 1 or question 2 first. In other words, it is not necessary that you begin with the first question. **YOU MUST ANSWER BOTH QUESTIONS INCLUDING BOTH PARTS OF**

QUESTION 2.

4. The point values and suggested times for each question are as follows:

Question #1: 60 Points – Suggested Time: 2 hours and 20 minutes

Question #2:

2A. 25 Points – Suggested Time: 1 hour

2B. 15 Points – Suggested Time: 40 minutes

GOOD LUCK AND HAVE A WONDERFUL BREAK

PLEASE TURN THE PAGE TO BEGIN WHENEVER YOU ARE READY

Question #1 (60 points; suggested time: 2 hours and 20 minutes)

In the wake of the chaos surrounding the death of Terri Schaivo, the Florida Legislature passed the "Preservation of Life Act of 2005" (the "Act"). The Act provides in relevant part as follows:

I. The Legislature has concluded that the risk of loss of innocent life through the wrongful withholding of nutrition and hydration by guardians or other legal representatives of an incompetent person is a serious matter in Florida. This Act seeks to address the problem of the withdrawal of nutrition and hydration from incompetent persons in situations in which there is substantial doubt about the wishes of the incompetent person.

II. No incompetent person may be deprived of nutrition or hydration in the State of Florida *unless* the following conditions are satisfied:

1. The guardian or other legal representative of the person must have applied for an order to withhold nutrition or hydration from a judge of the circuit court of the State of Florida in the county in which the incompetent person then resides;

2. No judge shall grant a request under paragraph II(1) unless the incompetent person, while competent, has executed a written "living will" in the form prescribed by the Florida Statutes; and

3. No judge shall grant a request under paragraph II(1) unless the incompetent person has, while competent, presented such living will for notarization by the Clerk of Court of the circuit court in the Florida county in which the incompetent person then resided and signed an affidavit attesting to the authenticity of the living will.

III. No Florida Court may entertain in any respect a request for the withdrawal of nutrition or hydration from any incompetent person if the condition of subsection II(3) is not satisfied. Should such a request be filed, the Clerk of Court shall reject the filing and return any applicable filing fee.

IV. This Act shall take effect immediately upon becoming a law and shall apply to all matters commenced or sought to be commenced after it becomes effective.

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There was fierce debate over the Act when it was pending in the Florida Legislature. Opponents of the Act pointed out that requiring a written living will would have

disproportionately negative effects on certain segments of society such as the poor, young and uneducated. One of the major organizations opposing the Act was the Florida chapter of the NAACP. The NAACP presented statistics showing that African-Americans were far less likely to have a living will than were white citizens. In fact, while about 30% of white Floridians had living wills only about 8% of African-American Floridians had living wills.[1] In addition, the NAACP produced studies showing that if the Act should pass, African-Americans would be far less likely than whites, statistically speaking, to make a written living will in response to the statute. The NAACP argued that to pass the Act in the face of such a disproportionately negative impact on the minority community would be unconscionable.

The NAACP's statistics were presented at a public hearing of the Florida Senate committee with jurisdiction over the Act. When confronted with these statistics one Senator said that he didn't care because "those people" aren't my constituents. There was also a presentation concerning the impact of the Act on people under 30. People in this group were even less likely than African-Americans to have a living will. Another Senator on the committee said that she was troubled by the figures for both the young and African-Americans but was more concerned with avoiding "another Schiavo situation." She suggested a strong push to educate members of the community, such as African-Americans, who were statistically less likely to prepare written living wills. The Committee approved the Act which was then enacted into law and signed by Governor Bush. The Legislature did not, however, include any funds for an educational or public relations campaign to promote written living wills in any community.

A few months after the Act became law Don Patton, his wife Sue and some other family members traveled to Florida for a vacation at Disney World in Orlando. Don and Sue were life long residents of Syracuse, New York. Don, who was African-American, was 75 years old and Sue was 70. They were both healthy but prudent. They each had a written living will as provided under relevant New York State law. They were so prepared that they even traveled with the living wills.

The Patton family was having a wonderful time at Disney World. That all came to an end, however, when Don suffered a massive stroke. He was rushed to a hospital in Orange County, Florida. Sue was devastated when the doctors told her that Don would never recover. While he was able to breathe on his own, brain scans showed that his higher level brain was no longer functioning due to the effects of the stroke. He was, the doctors said, in a persistent vegetative state from which he would never recover.

Sue hired a local Orlando lawyer, had Don declared incompetent under Florida law, and was appointed Don's legal guardian. She and her family then looked at Don's New York State living will. By this time, Don had begun receiving nutrition and hydration through a feeding tube. Don was clear in his living will that should he be diagnosed as in a persistent vegetative state and should he not recover within three months he wanted all life-prolonging procedures,

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[1]These statistics are presented solely for the purposes of this exam.

including the provision of nutrition and hydration, to be discontinued.

About four months after his stroke and the diagnosis of the persistent vegetative state, Sue decided to stop treating Don. The hospital explained that relevant Florida law now required a court order before nutrition and hydration could be withdrawn. Sue, as Don's guardian, then filed a request with the circuit court in Orange County to withdraw Don's feeding tube pursuant to the request in his New York State living will.

Sue never got her day in court because her filing was rejected by the clerk of court. The clerk explained that Section III of the Act required that Sue's petition be rejected out of hand. The hospital then explained that without a court order, it was unable to remove Don's feeding tube. Don remains alive and on the feeding tube at this time.

You are a lawyer assisting Sue's attorney. You are planning to file a lawsuit challenging the constitutionality of the Act. The attorney has asked you to prepare a memorandum discussing <u>all possible challenges to the Act, or any portion thereof, under the United States Constitution</u>. You should be sure to set forth your ultimate conclusions as to whether the various possible grounds you identify are likely to be successful. You should assume that Sue has standing to challenge the Act. You should not address any issues under the Constitution of the State of Florida.

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Question 2 (40 total points; total suggested time: 1 hour and 40 minutes)

Florida Private Hospital, Inc. (the "Hospital") is a private, not-for-profit full service medical facility located in St. Petersburg, Florida. In June 2005 Ann Brown was admitted to the Hospital for surgery to remove a portion of her liver. As part of the surgery Ann needed to receive general anesthesia. In other words, she would be put to sleep for the operation.

The surgery did not go as planned. Ann had a negative reaction to one of the drugs used to control her blood pressure. The result of the reaction was that her recovery period was significantly longer than anticipated and she experienced significantly more pain. She did eventually recover and is fine now.

Ann consulted a lawyer and filed a lawsuit in a Florida state court. She alleged two counts in her complaint. Count I was for basic medical malpractice concerning the blood pressure medication. Count II was for a violation of the Florida Anesthesia Act (the "FAA"). The FAA was enacted by the Florida Legislature in 2004 and provides as follows in relevant part:

1. All covered medical facilities in Florida[2] shall use only anesthesia equipment that

[2]You should assume that the Hospital is a "covered medical facility in Florida".

has been manufactured in a facility issued a permit by the Florida Department of Health.

2. A patient at a covered medical facility that fails to comply with the requirements of Paragraph 1 above shall have a private right of action to enforce this Act.

3. Damages to a patient bringing an action under Paragraph 2 above shall be presumed. Such patient shall be entitled to recover the greater of actual damages or statutory damages of $75,000.

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There is no question that the Hospital was in violation of the FAA. It had considered obtaining anesthesia equipment that complied with the FAA, but there was a problem. The Florida Department of Health had taken the position after the FAA's enactment that it only has jurisdiction to inspect manufacturing facilities and issue permits *in Florida*. There were two such facilities, one in Miami and one in Jacksonville. But both of these facilities charged a much higher price than other plants around the country. In addition, the Hospital determined that the equipment produced at these facilities had no better safety records than those produced at other plants outside Florida. Indeed, in one study the safety records of the Florida plants were somewhat worse than non-Florida facilities.

So, the Hospital finally decided to buy its anesthesia equipment from a plant in Texas. Before doing so the Hospital asked the Texas company whether it could set up some facility in Florida at which inspections by the Florida Department of Health could take place. After considering the request the Texas company said that to do so would cost about $500,000 and thus would make its products uncompetitive with the Florida producers.

There is one other thing you need to know about this case. The United States Congress has enacted the "Frivolous Medical Malpractice Lawsuit Reduction Act" (the "FMMLRA"). The FMMLRA was in force at all relevant times. It provides in relevant part as follows:

1. Congress has determined that the filing of frivolous medical malpractice lawsuits has a substantial negative effect on interstate commerce. Such lawsuits increase the premiums for medical care providers in the estimated amount of $500,000,000 per year. In addition, such lawsuits decrease the number of persons willing to enter the medical field, thereby reducing the need for companies in interstate commerce to supply good to medical professionals.

2. In any civil action based on a claim of medical malpractice filed in a State court in the United States, the State court shall apply Rule 11 of the Federal Rules of Civil

Procedure[3] in order to sanction the filing of frivolous lawsuits.

Ann's lawyer was not happy with FMMLRA. Under the statute, Federal Rule 11 would apply to Ann's case. While he did not believe that Ann's suit was frivolous, he knew it was not the strongest claim in the world. He did not like the prospect of litigating the case under the threat of a potential sanctions.

You are the state judge assigned to Ann's case. The following two motions have been filed. Rule on <u>each</u> motion, explaining your rulings. Be as comprehensive as you can within the bounds of the question:

A. Ann has filed a motion seeking to have the FMMLRA declared unconstitutional under the United States Constitution. Her sole ground is that Congress lacked the authority under the Commerce Clause to enact this statute. (25 points; suggested time: 1 hour)

B. The Hospital has filed a motion seeking to have Count II dismissed on the ground that the FAA is unconstitutional under the United States Constitution. The Hospital's sole ground is that the FAA is a violation of dormant commerce clause principles. For purposes of this question you should assume that there is no relevant Congressional statute that would preempt any relevant state law or any Congressional statute consenting to any otherwise improper discrimination. (15 points; suggested time: 40 minutes)

ON MY HONOR, I HAVE NEITHER GIVEN NOR RECEIVED AID ON THIS EXAMINATION.

EXAM NO. _____

END OF EXAMINATION

HAVE A WONDERFUL SUMMER BREAK!

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[3]As you probably recall from your Civil Procedure class, Rule 11 provides for the imposition of various sanctions if a lawsuit is filed for an improper purpose or without sufficient factual or legal bases. Not all states have a similar rule of procedure.