

**STETSON UNIVERSITY COLLEGE OF LAW  
Gulfport, Florida**

**GENERAL INSTRUCTIONS**

**THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING  
INSTRUCTIONS:**

1. The answers and the pledge are to be identified by examination number only. **DO NOT WRITE YOUR NAME ON ANY BLUEBOOKS OR ANYWHERE ON THE EXAMINATION; USE YOUR EXAMINATION NUMBER INSTEAD.**
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination as posted on the Bulletin Board.
3. This examination ends at the expiration of the time indicated, 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 method indicated by the instructor.
5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

**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 and supplement).
2. This examination consists of **EIGHT (8)** pages. You should check now that you have all pages.
3. This examination consists of two (2) parts. In Part I there are two (2) questions for which

**FINAL EXAMINATION  
CONSTITUTIONAL LAW I (LAW-1195-02)**

**PROFESSOR ALLEN  
SPRING SEMESTER 2006**

essay answers are required. The questions in this part set forth fact patterns in which certain constitutional issues are implicated. You will need to apply the various doctrines we discussed this semester in order to answer the questions posed. **YOU MUST ANSWER BOTH QUESTIONS IN PART I.**

4. There are two (2) questions in Part II of the examination. **YOU SHOULD ONLY ANSWER ONE OF THE TWO QUESTIONS. YOU CAN CHOOSE WHICHEVER QUESTION YOU PREFER TO ANSWER.** The questions in Part II are not based on fact patterns. Rather, they seek your views on contested matters in constitutional law. An example of such a question is: “Some commentators say that the Supreme Court’s Dormant Commerce Clause doctrine is hopelessly confused. Do you agree? Be sure to support your views.”

5. The point values and suggested times for each part of the exam are as follows:

Part I:

Question #1: Points: seventy (70) – Suggested Time: 2 hours and 50 minutes

Question #2: Points: fifteen (15) – Suggested Time: 35 minutes

Part II: Points: fifteen (15) – Suggested Time: 35 minutes

**GOOD LUCK AND HAVE A WONDERFUL BREAK**

**PLEASE TURN THE PAGE TO BEGIN WHENEVER YOU ARE READY**

**PART I: THERE ARE TWO QUESTIONS IN THIS PART OF THE  
EXAMINATION. YOU MUST ANSWER BOTH QUESTIONS.**

**Question #1**

**(Seventy (70) Points; Suggested Time: two hours and fifty minutes)**

Assume that in 2006, the United States Congress passes and the President signs the Federal Medical Licensing and Safety Act (“FMLSA” or the “Act”). The Act’s provisions as relevant for this examination are as follows:

**Federal Medical Licensing and Safety Act**

**I. Congressional Findings**

- A. Congress concludes that the provision of medical care in the United States has a significant impact on interstate commerce. In particular, medical facilities providing care purchase equipment from states other than that in which the facilities are located. In addition, patients travel between and among states seeking medical care.
- B. The population of the United States is at risk from sub-standard medical care due to a patchwork nature of regulations concerning the licensing of medical professionals. Of particular concern to Congress is the licensing of medical professionals engaged in the provision of medical care associated with abortions.
- C. Moreover, Congress is particularly concerned based on its investigations that the problems that it has identified concerning the provision of medical care with respect to abortions are most prevalent in terms of abortions provided in heavily urban locations such as so-called inner cities.
- D. Accordingly, Congress has enacted this Act to address the concerns it has identified.

**II. Specific Provisions**

- 1. All drugs used in a medical procedure in which a fetus is aborted are hereby determined to be Schedule II drugs under the Controlled Substances Act.<sup>1</sup>

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<sup>1</sup>Note: as explained in *Gonzales v. Raich*, the Controlled Substances Act (“CSA”) was enacted in 1970 as part of the federal government’s efforts “to conquer drug abuse and to control

2. All medical doctors seeking to perform a procedure in which a fetus is to be aborted in a medical facility located in one of the top 50 urban centers (i.e., major cities) in the United States may not prescribe drugs used in said procedure unless they obtain an “abortion performance license.”
3. The executive authority (i.e., the Governor or his or her designee) of each state shall be responsible for the issuance of an abortion performance license. Such license shall not be issued until a medical doctor who wishes to perform an abortion has successfully completed a training course of no less than twenty weeks that discusses the use of the Schedule II drugs at issue, the risks associated with abortions as well as means by which to counsel those persons seeking abortions as to alternatives to the procedure. The executive authority of each state shall be responsible for developing the training course discussed in this section.
4. All medical doctors located in the specified urban areas who are currently licensed to practice medicine such that they would otherwise lawfully be able to perform abortions shall have their licenses suspended upon passage of this Act. They shall not be able to perform abortions unless and until they successfully complete the training course described above and, thereafter, are awarded an abortion performance license.
5. Notwithstanding any of the foregoing, any medical doctor currently licensed to practice medicine such that they would be allowed to perform an abortion may perform the procedure if the doctor certifies that the procedure is, in his or her judgment, necessary to preserve the life or health of the pregnant woman.
6. This Act shall take effect upon its endorsement (i.e., signing) by the President of the United States.

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The debates leading up to the passage of the FMLSA were fierce to say the least. The Act was originally introduced (without section II.5) by Senator A often associated with causes championed by conservative religious groups. In fact, Senator A had been recently elected in a

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the legitimate and illegitimate traffic in controlled substances.” Under the CSA, drugs are classified by placing them in one of five “schedules.” Schedule I drugs are those for which Congress (or the appropriate executive official) have determined that there are no appropriate medical uses. Schedule II drugs have appropriate medical uses but are tightly controlled (i.e., through the use of prescriptions).

campaign in which his slogan was “Elect Me; Stop Abortion.” His speech on the floor of the Senate upon introducing the Act began with the words: “Mr. President,<sup>2</sup> I rise today to introduce [the Act], an action I hope that will be the beginning of the end of a barbaric practice in this great country.”

There certainly was some support for the rhetoric of Senator A, but there were other voices in the debate over the legislation as well. For example, several members of the House of Representatives as well as several Senators were concerned about sub-standard health care. They saw the Act’s structure as a means to focus attention on this often neglected issue. So, they held a number of hearings in which abortion was only a side-issue; the main focus was health care and how it could be improved.

There was also strong opposition to the Act. Some Members of Congress objected to the Act on the ground that it was nothing less than an attempt to reverse, at least for some time and for some people, the Supreme Court’s decision in *Roe v. Wade*. Other Members noted a separate reason to oppose the law. They pointed out that the focus on urban areas meant that, as a practical matter, the act would have much greater impact on poor people and people of color, particularly African-Americans. Indeed, these Members introduced as part of the record of the debate over the Act studies showing that five times more African Americans than white citizens would feel an impact under the Act. In addition, 80% of the Act’s impact would be felt by persons whose income was less than \$30,000 per year.

There were varying reactions to these statistics. For example, Senator A stated that the statistics “showed that we may have a double or even triple blessing here.” He would not further explain his statement. Other members, particularly those concerned about health care, were concerned about the statistics. They suggested that a second law be passed authorizing a study to evaluate the impact of the Act on the two groups in question. This “study law” has not been passed.

The Act eventually passed both the House and the Senate. However, in order to secure enough votes to pass (particularly those Members concerned about healthcare), Section II.5 was added to the Act. The President signed the bill the day it passed Congress. It is now effective.

Dr. Leonard McCoy is a medical doctor practicing in one of the urban areas covered by the FMLSA. He is engaged in a practice that includes the provision of abortion services. He is fully licensed to practice medicine in his state. The state’s law provides that “a license to practice medicine in this state shall not be suspended or revoked without good cause.” You should assume that the state in which Dr. McCoy practices does not have another facility that performs

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<sup>2</sup>The Vice President of the United States serves as the President of the Senate.

abortions. The closest facility that performs the procedure is in another state about 4 hours drive away from the inner city area where Dr. McCoy's facility is located.

After passage of the Act, Dr. McCoy received in the mail a letter informing him that "effective immediately" his license to practice medicine no longer included within its terms permission to perform an abortion (other than when he determined it was medically necessary to safeguard the life or health of the pregnant woman). In order to perform abortions Dr. McCoy was required to obtain an abortion performance licence. Such license, he was told, would be available after a training course was prepared, which was said to be "soon, but not within the next 60 days." The letter ended by noting that the restriction on his medical license was "final and not appealable."

**Dr. McCoy has come to see you, a lawyer licensed to practice law in his state. He has serious concerns about the Act and the way he has been treated by his state. He would like you to prepare a memorandum outlining all possible challenges to the Act under the United States Constitution. In your memo, you should not address any constitutional challenges concerning vagueness. You should also assume that Dr. McCoy would have standing to raise any constitutional challenge you identify. Make sure in your memorandum that you discuss the likely success of any constitutional challenges you identify.**

**Question #2**

**(Fifteen (15) Points; Suggested Time: thirty-five minutes)**

Minnesota has a large timber processing industry. The processing of timber yields a number of different products, including among other things, the paper products used to produce cartons for orange juice and milk. About 2% of the Wisconsin timber industry's output is such paper.

Minnesota is also a state in which environmentalism is highly prized. In this mode, Minnesota recently enacted the Environmental Responsibility Act. That Act provided, in relevant part, that all milk sold in the state needed to be in "non-plastic containers that are capable of being recycled." The stated purpose of the legislation (on its face) was to prevent the continued filling up of the state's landfills. The principal proponents behind the Act were local and national environmental groups.

Of course, the Minnesota timber industry was happy because paper (along with glass) may be used as containers for milk and may be recycled. On the other hand, the one plastic manufacturer in Minnesota was not happy at all about the outcome. That manufacturer did not make milk containers or even sell plastic to companies who did. Nevertheless, anything that is bad for plastic is bad for a company working with plastic.

Tom's Plastic Containers, Inc. ("Tom's Containers") is a corporation that is incorporated and has its principal place of business in Illinois. As a result of the passage of the Minnesota law, it has already lost 10 accounts (worth about \$1 million annually) from milk producers selling products in Minnesota. Those entities have switched to using paper cartons. Tom's Containers has learned that three other plastic container companies have had similar experience. To its knowledge, all the milk producers have switched to paper cartons; no one has switched to glass ones. It seems glass is too expensive for economical use.

Meanwhile, in the one year period between the enactment of the law and the lawsuit Tom's Containers brought (discussed below), the amount of waste deposited in Minnesota landfills has dropped by 1%.. The recycling business has increased by 3%. The percentage output of the timber industry in Minnesota devoted to container paper has increased from 2% to 4%.

**Tom's Containers filed a lawsuit in which it claimed that the Minnesota statute was unconstitutional under Dormant Commerce Clause principles. You are the judge to whom the case has been assigned. Based on the facts set forth above, please write an opinion substantively addressing the constitutional claim asserted by Tom's Containers. You should assume that (1) Tom's Containers has standing to assert its claim; (2) there is no federal statute on point; and (3) there are no material facts in dispute necessitating a trial. Be sure to fully explain your ruling.**

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**PLEASE TURN THE PAGE FOR PART II**

**PART II: THERE ARE TWO QUESTIONS IN THIS PART OF THE EXAMINATION. *ANSWER ONLY ONE OF THE QUESTIONS.* YOU MAY CHOOSE TO ANSWER EITHER QUESTION A **OR** QUESTION B.**

(Part II is worth fifteen (15) points. The Suggested time for this part is thirty-five (35) minutes)

**Question A**

In *Youngstown Sheet & Tube Co. v. Sawyer* (the “Steel Seizure Case”) Justice Jackson set out in his concurrence a formula for addressing whether executive action violated principles of separation of powers. That formula was adopted by a majority of the Court in *Dames & Moore v. Regan*. Some have suggested that the Jackson formulation is no longer workable as a means of evaluating Presidential action, especially now that we are in an “age of terrorism.” Do you agree or disagree with this suggestion. Make sure that you explain your position.

**Question B**

In *Grutter v. Bollinger*, the Supreme Court upheld the use of race in law school admissions, at least under the program used by the law school at the University of Michigan. In *Gratz v. Bollinger*, the Supreme Court struck down the use of race in the form used by the undergraduate institutions at the University of Michigan. However, in both of these cases the Court took the position that “diversity” was a compelling state interest in the context of undergraduate and graduate education. Is the use of race in decisions concerning admission or assignment of students in grades K-12 in public school systems a compelling state interest under *Grutter/Gratz*, *Bakke*, or otherwise? (You should assume that such use would be narrowly tailored under the *Grutter* and *Gratz* principles). Make sure you explain your position.

**END OF EXAMINATION**

**CONGRATULATIONS ON FINISHING THE FIRST YEAR**

**ENJOY YOUR SUMMER BREAK**

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