

## MEMORANDUM

To: Spring 2010 Constitutional Law Class  
From: Professor Virelli  
Date: February 14, 2011  
Re: Sample Answer and Comments for the Final Exam

Below please find a sample answer for the Spring 2010 final exam. Since you were not permitted to remove it from the test room, I am also providing a copy of the exam itself.

This sample is an actual student answer and thus is not meant as a model (i.e. perfect) answer, but instead as an actual example of a successful exam answer (as you will see, unedited). I hope it will be helpful in identifying your strengths and weaknesses on this exam in particular and in exam-taking in general. I have not included any information pertaining to Part II, as that section was designed primarily to measure your ability to take and defend a position.

In addition to the sample, I have included some general comments for each question based on the exams as a whole. These are not meant to be exhaustive, but should help to fill in some gaps in the sample answer. The fact that a particular point is not mentioned in the sample or my comments does not mean that a student including that information in their answer did not receive credit for it; where answers included information that was relevant and instructive in responding to the question, credit was awarded accordingly. Finally, as I explained earlier, you are welcome to schedule a meeting with me to discuss your exam, but I strongly encourage you to review this material prior to scheduling such a meeting.

### QUESTION 1

#### Comments for Question 1:

Question 1.A involved an issue of individual standing. Most students identified the injury-causation-redressability elements of constitutional standing, but many omitted any discussion whatsoever of prudential standing considerations. More importantly, many students failed to explore the details of the injury element in light of the facts of the case. In order to meet constitutional standing requirements, an injury must be actual or

imminent, and concrete and particularized. There was no actual injury, as Jack had not yet passed away and thus had not actually been denied access to cryogenic freezing services, but a significant question remained as to whether the injury was imminent, as Jack was neither dead nor apparently near death.

Question 1.B asked about the viability of § 3 of the statute under the Dormant Commerce Clause. Successful answers identified that the statutory provision was facially discriminatory against out-of-state preparation facilities, and that although the statute may have been directed at a compelling state interest in promoting safety and efficacy by excluding out-of-state preparers from the freezing facility in Fennario, the statute is almost certainly not the least restrictive means of achieving that interest, as licensing or other requirements could address the state's concerns without discriminating on the basis of state citizenship. Finally, the issue of whether Fennario may avail itself of the market participant exception depends on whether the state is a participant or a regulator in the relevant market. Fennario is likely a participant in the freezing market, and therefore permitted to regulate so as to benefit itself in that market, but is likely not a participant in the preparation market, and thus will run into constitutional difficulties in regulating that market in a discriminatory way.

**Sample Answer to Question 1:**

1)

A. The sole issue here is whether Jack Straw has standing as an individual to bring his suit challenging the third section of the FFA, the section that bars citizens of other states from the cryogenic freezing services at the FSH. Standing is a doctrine of justiciability that is a self-imposed limit on the Court's power to hear cases. The doctrine narrows the "case or controversy" limit of Art III. To have Constitutional standing, one must first have an injury that is both concrete and particularized as well as actual or imminent, as opposed to conjectural or hypothetical. Here, Jack Straw has drafted a will that requested his remains be frozen at the hospital. A will is testamentary and a contract interest, so a law that deprives him of his right certainly seems to be an injury that is concrete and particularized towards impeding his right to the type of post-mortem services he desires.

The passage of the law also makes this injury imminent, since Jack's death would trigger the injury. On the other hand, one could argue that this is in fact a speculative or hypothetical injury since Jack might wait into the future and the law at hand might change, as it in fact does on page six. Furthermore, Jack is a 30 year old in good health and might be so far away from his actual demise that the injury is not imminent. Comparing this case to the harm in FOE, this situation is more analagous to the person who drives by the lake who desires and commits to use it rather than the person who had "someday intentions" to visit an environmental sight half-way around the world; it is more similar to the prior scenario because there is no possible way to use an after-death service until death occurs--which can be at any time even for the young and hearty 1L-- and the most commitment towards that goal possible is to have a will that makes this intention clear. The second requirement for standing is causation. Here, there is clearly causation between the law's passage and the injury to Jack's testamentary wishes; the law specifically bars citizens of other states from using the Fennario State Hospital's services. The last issue in Constitutional standing is redressability. Here, the repeal of the law would redress the greivance, since its repeal would allow Jack's wishes to be realized. The Court is therefore likely to provide relief through judicial review, injunctive relief, or damages that would redress Jack's injury. Since no issue of prudential standing implicated here, Jack has standing to sue on his own behalf

B. The sole issue here is whether the second section of the FFA violates the Dormant Commerce Clause. The Dormant Commerce Clause--which sprung full formed like so many other things from the head of Chief Justice Marshall-- affects state laws that might implicate the Federal Commerce power. The first question under the Dormant Commerce Clause is whether Congress has taken some action that might override or preempt State action under the Supremacy Clause; any validly enacted federal law will trump any state law to the contrary. Here, there does not seem to be any Congressional problem. The second question to address is whether the statute at issue is discriminatory against interstate commerce (in the sense that the law operates as a tariff or trade barrier against out-of-state competitors or consumers). Here, it seems that the statute's second section is facially discriminatory towards interstate commerce, since it states that cryogenic

freezing “shall only be performed at preparation centers within the State of Fennario” and “Bodies prepared...outside of Fennario are not eligible to receive cryogenic freezing services at the Hospital.” Therefore, as odd as it may be to think of bodies as commercial products, the body preparation services of Terrapin are being discriminated against while the Fennario State preparation services are not.

Since this statute looks facially discriminatory, strict scrutiny is applied and the government must show a compelling state interest that is narrowly tailored, which means that there are no less restrictive means that can be implemented. Here, the government seems to have a series of strong and probably compelling government interests: protecting the bodily integrity of the deceased, respecting their personal wishes, and their basic human dignity. At least the first of these interests would probably be considered deeply rooted in our common law (via torts) and the interests of the dead are (usually) respected and revered by our society. The problem will be the narrowly tailored/least restrictive means analysis. There is no reason why the interest of bodily integrity would be undermined by discriminating against out of state industry. There are no findings that Terrapin is providing lackluster service or compromising any scientific quality. The government could also accept prepared bodies from other states if they met certain standards established by the government, which would be a less restrictive means. Therefore, this statute would fail strict scrutiny.

Nevertheless, this statute still might survive under the market participant exception to the Dormant Commerce Clause. The market participant exception to the dormant commerce clause applies when a state run business, like the state-owned hospital in this case, acts as a participant in the marketplace rather than a regulator. When the government is acting more like a business than a regulator of third parties, it is more likely to be considered a regulator. *Wunikke* is the leading case in this regard; unlike in *Wunikke*, the discrimination here is not a downstream regulation, but instead discrimination as to the acceptance of a “product” of its state-run hospital. This in essence seems more like *Alexandria Scrap*, in which the State is regulating the market as a purchaser of a product, rather than as a seller regulating third parties that there is no business connection with. Because the State is only regulating the type of product it is accepting, it might fall within

the market participant exception to the Dormant Commerce Clause and escape unscathed. This would not make it immune to a challenge on Privileges and Immunities grounds, however, which is what I would recommend Mr. Shaw pursue, since, as made clear in *Camden* that the market participant exception does not apply to a P&I challenge, although Shaw could not sue as a corporate entity, only an individual.

If the Court was to find that the statute was not facially discriminatory, by reading the provision to say that it does not discriminate between the *citizens* of the respective states by focusing on which people have access to the cryogenic service, but instead merely the preparation processes, then the *United Haulers* balancing test would be the appropriate analysis. Under this approach, the Court would balance the burden on interstate commerce against the benefits to the state. Here, the burden on interstate commerce seems immense, since it is effectively barring the practice of a highly lucrative and booming new business development (at a time when this country needs booming business, though maybe not so morbid in orientation.) The benefits to the state would be high as well, since keeping this business in state spurs their economy and allows them to ensure high science and safety standards with regards to the cryogenic process. Because this is a new and potentially dangerous process, Fenario will argue that its police power of protecting the health and safety of its citizens is implicated, and this might tip the balance in favor of them under the balancing test. On the other hand, this scenario looks like protectionism against a foreign service provider, the central evil feared by the Founders and central to the Commerce power. This might be a close question, but since liberty cannot thrive in a jurisprudence of doubt, I would find against Fennario.

## QUESTION 2

### Comments for Question 2:

The two rights implicated by question 2 are Bobby and Althea's rights under the Substantive Due Process ("SDP") and Equal Protection ("EP") clauses of the Fourteenth Amendment. The SDP analysis depends primarily on whether the right to be cryogenically frozen is fundamental. The best answers analogized Bobby's case to the

facts of Cruzan (right to refuse medical treatment) and Glucksberg (right to assisted suicide). Among other relevant facts in the fact pattern, the fact that cryogenic freezing is an affirmative act, rather than a refusal of services, and that there is little or no history or tradition of the practice in America, likely counsel in favor of concluding that the right to cryogenic preservation is more analogous to the right to assisted suicide in Glucksberg, and thus that it is not fundamental. Because the right to cryogenic freezing is not fundamental, rational basis, rather than strict scrutiny, review is appropriate for the DDA. Most students did a reasonable job of applying the appropriate standard of review based on their conclusion about whether the right is fundamental. A secondary issue under the SDP part of this question is whether there is a fundamental right to freeze a pet, the answer to which is almost certainly no, thereby again triggering rational basis review of the DDA with regard to Bobby and Althea's interest in freezing Cassidy the dog.

The EP analysis has two distinct parts. The first is based on whether the DDA has a discriminatory impact on men, due to the fact that 80% of the people affected by the prohibition on freezing contained in the DDA are male. Most students identified the discriminatory impact on men based on the 80% statistic in the fact pattern, but few used all of the relevant facts in answering the second question in the analysis, namely whether the legislature intended to create that impact. There is evidence on both sides in the record, from mention of narcissistic men wanting to be immortal to references to socioeconomic and moral objections to cryogenic freezing. The best answers treated each of these facts and weighed them against each other to try and discern legislative intent regarding the treatment of men under the DDA. If a discriminatory effect and intent were found, then the DDA is treated as creating a classification on the basis of gender, and intermediate scrutiny is required. If no discriminatory effect or intent existed, then the DDA is reviewed on rational basis grounds. The second part identifies facial discrimination against dog owners, as dogs are the only pets that are prohibited from being frozen under the DDA. Since dog owners are not a suspect class, rational basis review applies. Too many students said that dogs were being discriminated against; animals do not have rights under the equal protection clause, and thus any answer indicating otherwise was a non-starter.

**Sample Answer to Question 2:**

2)

This question asks what claims Althea has against Fennario under the Fourteenth Amendment. The Fourteenth Amendment has three main components: the privileges and immunities clause, the due process clause (interpreted to have both a procedural and substantive component), and the equal protection clause. The P&I clause was butchered in the 19th century by *The Slaughterhouse Cases* and therefore means nothing when divorced from the right to travel. Since there is no right to travel here, P&I is not an issue. All of these clauses also center around people and citizens, so there is no argument that Cassidy can invoke the Amendment's protection, despite the noble sentiment that "man's best friend deserves the same respect in death as man himself."

Bobby will have a substantive due process argument. The first step in any substantive due process analysis is to determine whether there is a fundamental right involved. A fundamental right is a right that is deeply rooted in the history and tradition of our Nation. *Moore*. Here, the right being denied is the cryogenic freezing process is either a life or a liberty interest; the interest can be framed in terms of maintaining life, but the strongest argument would be for considering this process a liberty interest. Classifying the right will be an important task. Bobby will want to classify the right as "the right of privacy to make end of life funeral decisions." The funeral decision is deeply rooted in the history and tradition of the Nation, and the wishes of the decedent with respect to burial or cremation is honored as one so important that mishandling a body after death invokes the wrath of tort and emotional/punitive damages. The right to die cases suggest that there is a fundamental right for a cognizant person to deny or accept medical treatment, and Bobby might argue that as a cognizant person he has the right to request a post-mortem treatment and burial. *Glucksburg* does not seem on point since the specific right denied in that case was the "right to be killed with the assistance of another," here the scenario is the right to be processed so that one might potentially live--in other words kept preserved with the assistance of another. Furthermore, the many cases branching

from the penumbras of privacy to marital decision making about family in *Griswold*, the ultimate choice of personal autonomy supported by *Roe* and *Casey*, and the marital rights case *Zablocki* all suggest that traditional family decisions are the root of fundamental rights. End of life decisions about funeral procedures could fall into this category.

On the other hand, this right could be considered an economic right of contract a la *Lochner* since the right could be described as the right to contract for post-funereal services. This reading is supported by the disparity between rich and poor evinced in the “postmortem caste system” comment of the legislature, suggesting that the right is driven by economic forces, and perhaps even Faustian narcissism, rather than by family values. The other factor is the newness and novelty of the cryogenic freezing process itself; while burial proceedings have certainly been deeply rooted in our nation’s history and tradition, cryogenic freezing has been on the fringes (see Walt Disney and Ted Williams.) On balance, this looks more like an economic right than a substantive right because of the more direct line of reasoning to arrive at an economic right.

If the Court were to find a fundamental right to the decision concerning post-mortem bodily preparation, this statute would face strict scrutiny. Strict scrutiny puts the burden on the State to show that the statute serves a compelling government interest and that the means used are narrowly tailored to serve that interest. Here, the closest thing to a compelling government interest is the interest in preventing the creation of a postmortem caste system that disadvantages the poor at the expense of the rich when it comes to health. This is a tenuous interest at best, considering that the Court (especially when the bench is conservative) might be skeptical of the argument that purports to

If the Court were to find that the right is not fundamental, the statute would have to pass rational basis scrutiny. Rational basis scrutiny puts the burden on the state to show that the statute serves a legitimate government purpose and that the means used are rationally related to serving that interest. This legitimate government purpose cannot be solely based on morality under *Lawrence* even when subjected to rational basis scrutiny, so the third supporter with the heavy crowd support stating that cryogenic freezing just isn’t natural” is speaking an irrelevant truism (unless we enter an ice age, in which case it

would not necessarily be a truism.) Thus the question is whether the creation of a postmortem caste system that disadvantages the poor at the expense of the wealthy is a good enough basis rationally related to the law. Here, it seems that this would be a government interest in attempting to treat its citizens equitably with regards to money and not exploit the poor (*West Coast Hotel*). Therefore, it would likely survive rational basis scrutiny.

Bobby and Althea will have an equal protection argument as well, though the due process argument would probably be more efficacious for their cause. The first step under an equal protection analysis is to determine the appropriate standard of review. To do so requires a determination of whether the Act targets a suspect or quasi-suspect class and whether it infringes upon a “fundamental right. Here, there is no facial discrimination of a suspect class; the statute applies to the freezing of all humans in Fennario. Nevertheless, there is evidence that there is discrimination that disproportionately affects males rather than females, since 80% of the people who would have been chosen would have been male. Gender is a quasi-suspect class.

Because this is a facially neutral statute that potentially discriminates to a suspect class, the analysis involves a *Washington v. Davis* approach that sounds the depths of both effect and purpose in order to determine what level of scrutiny--in this case either rational or intermediate-- the statute should receive. The effect here might not be pronounced enough to invoke *Yick Wo* like results. Here, 80% is in actuality the proportion of men turned away from the process, and this seems like it might be high enough but there needs to be a purpose behind it. *Arlington Heights* makes it clear that impact is not determinative and “rarely can it be said that a legislature or administrative body operating under a broad madate made a decision motivated solely by a single concern, or even that a particular purpose was the dominant or primary one.” Here, it seems like the primary purpose was not the comment by the second supporter that said “Women are not nearly as self-centered and narcissistic as men” but rather the immorality that received more hand clapping, or perhaps all of the rationales given. This comment evinces a discriminatory purpose pretty clearly, but the level of purpose throughout the legislature does not seem high enough to reach *Yick Wo* levels of unabashed, 19th century

discriminatory purpose (although some level slightly below that is probably the threshold.)

If the court decides on using intermediate scrutiny, or intermediate plus with the “exceedingly persuasive” language added by Justice Ginsberg, this statute would likely pass. Intermediate scrutiny requires an important government interest and a means substantially related to that interest. The interest in preventing the postmortem case system is probably high enough to be considered important due to the economic dynamics involved. The statute might not be substantially tailored to the government interest.

### **QUESTION 3**

#### **Comments for Question 3:**

Part A of this question deals with whether the SSS is outside the bounds of congressional power under the Commerce Clause, and alternatively, whether it is an unconstitutional commandeering of state power under the 10<sup>th</sup> Amendment. The Commerce Clause question requires an analysis of whether the regulated activity is economic and/or local in nature. Since only the “use” of scooters is being regulated, and the use of these scooters has never been found to occur across state lines, the far better answer is that the SSS regulates local, non-economic activity. In that case, the question is whether there is an aggregate effect from the use of scooters that still has a sufficient impact on interstate commerce to support federal regulation. The congressional findings support some economic connection by referring to increased health care costs and lost time in school, but these are likely to be treated as too tenuous after Morrison, especially since the health and safety of children is almost certainly a matter of the state’s traditional police power. The 10<sup>th</sup> Amendment question required you to analogize the reporting requirements of the SSS to the statute in Printz requiring local law enforcement to facilitate background checks on gun owners. Most students made this connection at least in part.

Part B asked you first to analyze the spending power issue associated with the SSS's inducement to states to ban scooter use in exchange for funding for public parks. The four factors from Dole governed this analysis, with the most controversial issue being whether the parks money was sufficiently related to scooter safety to satisfy the third Dole factor. Because only parks money was at stake, it was difficult to describe the SSS as coercive in a way that would change the straightforward analysis under Dole. The second issue in Part B was whether the President's Executive Order Pi was a permissible exercise of Presidential authority. This was also a relatively straightforward analysis, requiring students to use the Youngstown framework to discuss whether Order Pi existed within a framework of congressional indifference, inertia, or acquiescence. Better answers acknowledged that the "zone of twilight" analysis was most relevant, as Congress had not made sufficient statements either way to make clear whether Order Pi was consistent with congressional intent under the SSS.

**Sample Answer to Question 3:**

3)

This question involves an issue of Congressional Power, and whether Congress has the power to pass the SSS. The only potential source of authority for the SSS is Congress' power to regulate "commerce among the several States" under Article I, Section 8, Clause 3 of the Constitution. This power is augmented on the edges by the necessary and proper clause as described under *McCulloch*, since "it is a constitution we are expounding" and therefore it must be read to empower the federal government to perform its enumerated powers. Nevertheless, in *Lopez*, the Court explained that Congress could regulate under the Commerce Clause in one of three situations: when it was regulating channels of interstate commerce, when it was regulating instrumentalities of interstate commerce or people or things in interstate commerce, or when Congress was regulating an intrastate activity that substantially affected interstate commerce. Here, the use of a scooter is clearly not a channel of interstate commerce, like a road. Nor is it likely that the scooter is an instrumentality of interstate commerce, like a truck carrying goods, especially in light of the finding that no jet-propelled scooter has ever been used in

interstate travel because they are not designed to travel long (and hence interstate) distances. Therefore, the only way Congress can use its commerce power is through the substantially affecting interstate commerce prong of the analysis.

*Lopez*, *Morrison* and *Raich* all emphasize that the first distinction in the substantially affecting interstate commerce analysis is between economic and non-economic activity. For an activity to be economic, the Court suggested in *Raich* that economic meant at least “production, distribution and consumption of a commodity.” To fall under the economic branch of the analysis, the activity might also be one related to a larger comprehensive economic regulatory scheme, though this does not apply here. Non-economic activity is exemplified by *Lopez* and *Morrison*. In *Lopez*, possession of a gun near a school was not considered economic activity (though purchasing one clearly would be). In *Morrison*, violence against women was not considered economic. Here, a jet-propelled scooter, in and of itself, would seem to be an economic commodity. However, the appropriate analogy is probably to *Lopez*, where mere *possession* of a gun (which is clearly a purchased commodity) was not considered an economic activity. Possession, as criminal law makes clear, is clearly different from use, but the distinction between economic and non-economic activity seems to involve around the purchase and sale of goods rather than the potential possession or use. On the other hand, a jet-propelled scooter is certainly a commodity, and use of that commodity might be considered more active than mere possession. Nevertheless, the current court would likely find this a non-economic product.

If the court finds the product non-economic, the next question is whether the product is isolated in its use or can be local or aggregated under the *Wickard* principle, since (as mentioned before) the product is not in interstate use and the statute (importantly) does not have a jurisdictional element potentially limiting its scope. Here, it does seem likely that the effects are potentially subject to aggregation, since the product is in all fifty states and injuries to minors resulting from the scooters have occurred in every market. Nevertheless, because this is a non-economic activity, the Court will view the statute in what amounts to de novo review, giving very little deference to Congress’ findings. This will likely be fatal to this statute for a number of reasons. First, the findings by Congress

in this case ask for an inferential chain of events from health care costs and educational loss that leads to diminished educational and career opportunities that affect interstate commerce. This chain of inferences causation was dismissed by the *Morrison* court despite thousands of pages of findings of the connection between domestic violence and interstate commerce, and would likely be disregarded here. Second, there is no jurisdictional element in this statute narrowing its scope. Third, Congress here is trying to regulate “public health and safety,” which is a traditional state regulation and therefore, although this is not a definitive factor in the test, is likely to put a thumb on the scale in favor of striking the statute. The interest in public health and safety is the very interest disregarded in *Morrison*, at least in the sense of letting the States use their police powers to address the issue.

Finally, clause 3 of the statute would face Tenth Amendment challenge. In *New York and Printz*, the Court determined that Congress may not commandeer the states (at least the legislative and executive branches) into carrying out federal policy. Congress, for example, may not direct that a state legislature pass a law, acting as puppetmaster and thereby undermining republican accountability, nor may they compel state executive officials to carry out specific law enforcement actions. Clause 3 is almost on all fours with *Printz*, since it requires state law enforcement officers to immediately report the violation to federal law enforcement authorities. The counter-argument would be from the perspective of Justice Stevens’ dissent in *Printz*, analogizing this case more to an amber alert scenario than a coopting of state executive authority. This would likely be a close call in this case and highly sensitive to the Justice writing the opinion, but because the Federal government is using the state law enforcement officers time and effort to report violations as in *Printz*, it is in danger of a Tenth Amendment challenge.

B. This question first involves an issue under the tax and spend power and then moves into a conflict between the Executive and Legislative branches.

As described above, this addition to the law will probably fail under the Commerce Power since none of the underlying features of the analysis. The tax and spend power as described in *Dole* can be used even when Congress does not have the authority to do so

under its other enumerated powers, in this case the Commerce Clause. Nevertheless, the tax and spend power must be in pursuit of the general welfare; the conditioning of state funds must be done unambiguously so as to let the States knowingly choose and predict the consequences of their participation; the grants might be illegitimate if they are unrelated to the federal interest; and no independent constitutional bar exists.

Here, the tax and spend power seems to clearly be in the general welfare. Congress has identified health and safety as a concern, and the court defers to this judgment in this analysis (in sharp contrast to its treatment of Congressional opinion under the Commerce Clause.) Next, the condition seems to be unambiguous and overt. It is clear that federal funds for the development of parks and recreation facilities in the States is conditioned upon passing a statutory ban on the use of jet-propelled scooters by citizens. The third factor is more dubious. The connection between funds for public parks and recreation facilities with the ban of jet-propelled scooters might be a big leap akin to highway funds for a lack of drunk driving that might hurt safety. Very little about banning jet-propelled scooters will improve public parks and recreation facilities. It is possible that if the scooters are used in public parks and recreational facilities, then the danger to public health and safety would increase in those venues, and therefore to encourage the improvement of the parks and recreational facilities the ban would be rationally related. More facts on how many scooters are used in these venues would probably help, but it seems that the provision is rationally related under the *Dole* standard, though O'Connor might disagree. Finally, no independent Constitutional bar seems to impede this provision. Therefore, Congress probably has the power to enact this provision under the tax and spend power, and the state of Fennario certainly has the power to enact a statute on health and safety, since it falls squarely within its police powers.

The President's Executive Order requires immediate closure of every jet-propelled scooter factory in every State that has accepted federal parks and recreation funds. Article II describes the power of the Executive, but it does so in enigmatic and abbreviated language so that the Amendment itself provides remarkably little guidance. The one thing that is clear is that he ensures that domestic laws will be "faithfully executed" and does not make law. The Executive Power in the domestic sphere, as a result, has been

described more thoroughly by Justice Jackson in his concurrence to *Youngstown* (an approach explicitly adopted by the Court in *Dames & Moore* through the pen of Jackson's former clerk, Chief Justice Rehnquist.) This tripartite scheme states that when the President acts pursuant to the express and implied authorization of Congress his power is at its maximum; that when the President acts in absence of congressional grant or denial of authority, he acts in a zone of twilight; and that when he acts against Congressional disapproval, his power is at its lowest ebb. Here, Congress has not explicitly spoken about the factories that make scooters in the states that ban their use, but rather made it clear that it wants the scooters banned from the marketplace as a whole. This probably puts the President's actions within the first category of the scheme, putting his powers at a maximum. Nevertheless, there could be an argument made (persuasively I think) that here Congress only authorized regulation, not the shutting down of businesses. After all, these businesses could ship their scooters out of state to the states that did not accept the money, and thus closing down these companies is outside of the Congressional mandate provided by the tax and spend power. As a result, Congress had the authority to pass the law, but the Executive lacks the authority to essentially legislate beyond where Congress was willing (or even *can* go) by requiring the immediate closure of factories in the States accepting the funds.