SUPPLEMENTARY MATERIALS
ON CONSTITUTIONAL LAW

(available at http://law.missouri.edu/abrams/)

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FALL SEMESTER 2006
I. Introduction

1) What is the difference between the federal Constitution and a statute?

2) How many constitutions has the United States had in the past 200-plus years?

3) How many amendments to the federal Constitution deal directly with speech issues?

4) In 1936, the Court decided the *Ashwander v. TVA*, 297 U.S. 288 (1936), which included a famous concurrence by Justice Louis D. Brandeis. The gist of the concurrence was that courts should avoid constitutional decisionmaking by deciding cases on sub-constitutional grounds (i.e., statutory and rules grounds) wherever possible. What do you think Justice Brandeis was driving at?

5) One hundred people attend a political rally here in Columbia. One speaker stands up and says that Missouri is a terrible place to live, and that Missourians are un-American. The other 99 people are enraged and they call the police. Does the First Amendment permit the police to arrest the solitary speaker for the incendiary remarks? If not, why not? Don’t we live in a democracy in which majority rules?

6) Where does the Constitution confer authority to ignore the will of present majorities? Why did the Founders create an enduring anti-majoritarian document?

7) What does “due process of law,” found in the Fifth and Fourteenth amendments, mean to you? Would Congress or state legislatures normally write statutes using a similar term without further definition? What if the legislature were writing a criminal statute?

8) Now that you have read the Constitution, what do you think the Framers at the Constitutional Convention considered to be the primary purposes of the document?

II. *Marbury v. Madison* (p. 24)

1) Assume you were a delegate to the Constitutional Convention and the state conventions called to ratify the Bill of Rights. The Constitution will create a governmental structure, and it will protect individual rights. You also want to assure that the government will actually heed constitutional commands so that the new documents will not simply be pieces of paper. How might constitutional mandates be enforced by (and against) the three federal branches of government?

2) How often do you think the President would find unconstitutional an act he has taken, or that Congress would find unconstitutional an act it has taken?
3) Can you make an argument for or against vesting review authority in the executive or legislative branches, or in some combination of them?

4) What does “judicial review” mean to you?

5) Where in the Constitution did the Framers create the power of judicial review as we understand it today?

6) William Marbury filed suit in the Supreme Court directly, and not in some lower court from which the Supreme Court might later have heard the appeal. How could Marbury ever have expected to get away with asking the Supreme Court to act as a trial court?

7) How did Chief Justice John Marshall, a Federalist, ever get away with this decision setting forth the power of judicial review? How did he avoid getting impeached and removed from office by the Senate (which was in the hands of the Democratic-Republicans – President Thomas Jefferson’s party – by the time of the Marbury decision)? How did Marshall avoid a constitutional confrontation in which President Jefferson would simply have ignored the decision?

8) According to Chief Justice Marshall’s opinion in Marbury:
   a) Did Marbury have a right to the commission he sought?
   b) Did the law afford Marbury a remedy?
   c) Was mandamus the right remedy, and could the Supreme Court grant it?

III. Ex Parte McCordle (p. 37)

1) On May 17, 2005, the Pledge Protection Act of 2005 was introduced in the U.S. House of Representatives. The bill, which had 173 co-sponsors, provided that “no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation.” If this bill passes both houses of Congress and is signed by the President, would it be constitutional?

2) Most bills to strip lower federal court jurisdiction (or to limit the lower federal courts’ remedial authority) have never passed Congress and become law. Why?

3) Today the federal courts are a three-tiered system. The federal district courts are the general jurisdiction trial courts; the courts of appeals are the intermediate appellate courts; and the Supreme Court is the court of last resort. Under Article III, which of these court(s) must exist, and which ones may Congress, in its discretion, choose whether to create?
4) Does Article III grant Congress any control over the Supreme Court’s jurisdiction?

5) Does Article III impose express restrictions on congressional authority to limit the jurisdiction of the Supreme Court of the lower federal courts? Do any constitutional provisions outside Article III arguably restrict Congress’ jurisdictionstripping authority?

6) Assume Congress enacts a statute that (a) permits the Supreme Court to review lower court decisions concerning school desegregation, but (b) prohibits the Court from imposing busing as a remedy, and (c) prohibits the federal courts from hearing evidence from minority children allegedly hurt by the present school system. Would the statute be constitutional? What constitutional doctrine might support the argument that Congress may not dictate the rule of decision and may not limit the evidence the courts may consider?

7) What policy arguments can be stated for and against congressional removal of federal court jurisdiction?

8) The 1996 Immigration Reform Act removes federal court jurisdiction to review Immigration and Naturalization Service (INS) orders deporting aliens found to have committed one or more of the serious crimes enumerated in the act. Assume the INS issues an order deporting an alien for committing an enumerated crime. The deportee challenges the constitutionality of the Act’s jurisdictionstripping provision, and seeks a stay of the deportation order pending appeal. In light of the statute stripping federal court jurisdiction, do the federal courts have jurisdiction to determine the provision’s constitutionality? Can you cite a Supreme Court decision that stands for the proposition that the Court has jurisdiction to determine the constitutionality of a congressional effort to strip federal court jurisdiction?

9) Recalling your 1L courses, what authority does Congress have to limit the subject matter jurisdiction granted to the federal courts by Article III? Why does congressional authority under Article III § 1 raise so much more controversy than congressional authority under Article III § 2?

10) If abortion, school prayer or anti-Miranda advocates wish to overcome a Supreme Court constitutional holding without pushing for jurisdictionstripping legislation, how else might they seek to achieve their goal?

IV. Martin v. Hunter’s Lessee (p. 45)

1) Once Marbury established judicial review, why did the Court have to discuss judicial review again in Martin?

2) Why does separation of powers raise different issues than federalism?

3) What is Martin’s holding? How did Justice Joseph Story reach this holding?
4) Justice Oliver Wendell Holmes once wrote: “I do not think the United States would come to an end if the Supreme Court lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” Why do you think he considered Supreme Court review of state laws more important than its review of federal laws?

V. Adequate and Independent State Grounds (p. 48)

1) In 2003, the Supreme Judicial Court of Massachusetts decided Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). Goodridge upheld, 4-3, the right of same-sex couples to marry in the state. “We declare,” said the majority, “that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts constitution.”

The decision has evoked both praise and protest, and it has led several states (including Missouri) to pass legislation or constitutional amendments that would deny recognition of same-sex marriages performed in Massachusetts. Efforts are underway to amend the Massachusetts state constitution to prohibit same-sex marriages in that state. The state of Massachusetts, however, never appealed Goodridge to the U.S. Supreme Court. How come?

2) What are the constitutional underpinnings of the adequate-and-independent state ground doctrine?

3) When is a state ground adequate and independent to support a state court judgment, thus barring U.S. Supreme Court review? In which of these circumstances may the Supreme Court review the final state court decision?:

(a) The state supreme court strikes down a state statute on the ground that it violates both the state constitution and the federal Constitution.

(b) In state court, the plaintiff asserts that a state statute violates both the state constitution and the federal constitution. The state supreme court does not reach the federal constitutional question because it holds that the state statute violates the state constitution.

(c) In state court, the plaintiff asserts that a state statute violates both the state constitution and the federal Constitution. The state supreme court does not reach the state constitutional question because it holds that the state statute violates the federal Constitution.

(d) The state supreme court holds that a state statute is valid under the state constitution and valid under the federal Constitution.
(e) The state supreme court holds that a state statute violates the free speech guarantees of both the First Amendment and the state constitution. What if the state supreme court holds that the state constitution’s free speech guarantee means exactly what the First Amendment guarantee means?

(f) The state supreme court invalidates a state law as contrary to the federal Constitution.

(g) A state statute creates a tort action for damages the plaintiff suffers for violation of a federal safety statute. The state trial court enters final judgment on a jury verdict for the plaintiff, and the state supreme court affirms the judgment.

(h) The state legislature enacts a statute retroactively changing public employees’ pension rights. A public employee sues, claiming that the statute violates the Fifth Amendment’s Takings Clause (“nor shall private property be taken for public use, without just compensation”). The state supreme court holds for the state on the ground that under state law, the public employee had no property right in the pension.

(i) In the state trial court, the plaintiff raises only a state constitutional claim. On appeal before the state supreme court, the plaintiff tries to raise a federal constitutional claim for the first time. The state supreme court refuses to hear the federal constitutional claim under the settled state procedural rule that an appellate court ordinarily will not hear a claim the appellant failed to preserve in the trial court.

(j) The plaintiff claims that a state statute violates the state constitution, and raises no federal constitutional claim. The state courts hold that the statute violates the state constitution.

**JUSTICIABILITY**

I. Advisory Opinions (p. 59)

1) You are law clerk to a federal district judge, who has asked you to review the pleadings in *Smith v. Jones*, a newly filed case assigned to your judge. Plaintiff Smith seeks a declaratory judgment that a state statute forbidding distribution of anonymous literature in a political campaign violates the First Amendment speech clause. The plaintiff was arrested for distributing such literature opposing his Congress member’s position on the war in Iraq. The prosecuting attorney dropped the criminal charges before trial when the Congress member removed his name from the ballot because the governor named him to a trial court judgeship. May the court hear the case? If not, what should the district court do?

2) If the federal court concludes that a decision would constitute an advisory opinion, may the court hear and decide the case anyway if both sides consent to waive any objection?
3) What are the constitutional bases of the federal advisory opinion doctrine? What prudential considerations might underlie the ban on advisory opinions in the federal courts?

4) Several states have constitutional provisions permitting their state courts to issue advisory opinions at the request of the governor or legislature. Most states (including Missouri) have constitutional provisions permitting their state courts to give advisory opinions at the request of federal courts and highest state courts in litigated cases. What prudential considerations might argue in favor of advisory opinions in these circumstances?

5) What are the differences between a legislative act and a judicial act?

6) When a federal court opinion contains dictum, is the dictum an advisory opinion? As a constitutional matter? As a prudential matter?

II. Warth v. Seldin (p. 62)

1) Assume a federal statute provides that “a deceased worker’s surviving spouse shall receive survivors benefits” when the worker dies in a job-related accident on federal property. Construction worker John Smith dies when a crane crushes him at a worksite during his regular shift. Smith is unmarried, but his companion Jan Jones files suit in federal court to recover the survivor’s benefits. Does Jan have standing to sue?

2) If you wanted to raise a threshold challenge the plaintiff’s standing in federal court, how would you do it?

3) Assume the plaintiff would lack constitutional standing to maintain an action. May the court hear and decide the case anyway if both sides consent to waive any objection to standing?

4) If the defendant does not object to the plaintiff’s standing, may the court raise the standing issue on its own motion and dismiss the case if it decides the plaintiff lacks standing? Can you cite a decision to support your answer?

5) Can the Court’s conferral of standing in United States v. SCRAP (p. 72) be harmonized with the Court’s denial of standing in Warth?

6) What purposes are served by limiting standing to sue in the federal courts? What purposes are disserved?

7) Where a court dismisses the plaintiff’s suit on standing grounds, might some other justiciability doctrine also support the same result?

8) If the Warth dissenters are right that the Court denied standing because it wanted to avoid a decision on the merits, why didn’t the Court just deny certiorari?
9) Did the Warth v. Seldin defendants challenge the various plaintiffs’ “statutory standing” under 42 U.S.C. § 1983, the statute under which they sued?

10) To survive a motion to dismiss for lack of constitutional standing, must the Warth plaintiffs prove injury + causation + redressability?

11) Once the Court shut the door on these plaintiffs in Warth, can you think of any other person who could challenge the constitutionality of this zoning ordinance in federal court?

12) What qualifies as an “injury in fact”? Must it be economic injury, or might other types of injury suffice?

13) Can you think of any reason why the Article III standard for standing might be lower in cases raising only statutory claims than in cases raising constitutional claims?

III. Craig v. Boren (p. 74)

1) What are the prudential reasons for the general rule against conferring standing to assert the constitutional claims of third parties who are not before the court? If a third party has an interest in a case and wants to be heard, what might the third party do?

2) Assume Congress enacts a statute granting a class of plaintiffs standing to sue for injury allegedly suffered by third parties who are not named parties in the action. Would the statute’s conferral of standing be constitutional? What would the plaintiffs have to allege to establish standing?

3) Did Whitener, the “saloonkeeper,” establish standing under Article III?

4) Could the trial court have held that the state waived any objection to Whitener’s standing?

IV. Lujan v. Defenders of Wildlife (p. 76)

1) Warth stated that to have standing, the plaintiff must allege more than a “generalized grievance” widely shared by “all or a large class of citizens.” Assume Congress enacts a statute forbidding any person from attending any house of worship. The statute would affect millions of Americans. Does the “generalized grievance” standard mean that no person would have standing to challenge the statute in federal court as a violation of the First Amendment Free Exercise Clause, which guarantees freedom of worship?

2) In 1937, a citizen filed suit to have Justice Hugo L. Black’s appointment to Supreme Court declared unconstitutional. The citizen claimed that the appointment violated the Emoluments Clause (Article I § 6) because as a Senator, Black had recently voted to increase the Justices’ retirement benefits. Did the citizen have Article III standing?
3) In *Frothingham v. Mellon* (p. 75), do you think Mrs. Frothingham was really complaining about paying high taxes? What do you think she was really complaining about? What do you think the Court was concerned about in *Frothingham*?

4) Assume that in its upcoming session, Congress enacts a statute that, like the Shepard-Towner Maternity Act of 1921, provides federal funding for states that create programs to improve the health and well-being of mothers and newborn children. A taxpayer files suit challenging the new statute’s constitutionality. The government moves to dismiss the complaint for lack of standing. Regardless of the merits of the constitutional challenge, how should the court rule on standing? Is *Frothingham* still good law?

5) *Lujan* involved “citizen standing.” Why is citizen standing different from “taxpayer standing,” the issue in *Frothingham* and *Flast*?

6) If you wished to argue that Congress should have a voice in determining who may have standing to challenge the constitutionality of a congressional statute, what would your argument be? Are there any limitations on Congress’ power to confer standing?

7) What if in 2025, Congress enacts a statute fixing the President’s term of office at fifteen years. The statute would clearly violate Article II § 1, cl. 1, but the President gladly signs the statute into law. Under *Lujan*, would any citizen have standing to challenge the statute in federal court?

V. *Raines v. Byrd* (p. 81)

1) Assume a New York state statute requires local public school districts to loan textbooks free of charge to all students in grades seven through twelve, including students who attend private religious schools. The state commissioner of education, who has taken an oath to uphold the Constitution, believes that this statute violates the First Amendment Establishment Clause. He sues to invalidate the statute, claiming imminent injury because he must choose between violating the oath and taking a step -- refusal to comply with the statute -- that he says would likely bring his expulsion from office. After *Raines*, would the commissioner have standing to challenge the statute?

2) In *Raines*, Congress wanted a quick decision on the constitutionality of the line-item veto. How can you tell?

3) Which requirement of constitutional standing is at issue in *Raines*? Injury, causation or redressability?

VI. *DeFunis v. Odegaard* (p. 89)

1) Recall *Craig v. Boren* (p. 74). Assume that saloonkeeper Whitener sought only an injunction to enjoin the state from prohibiting future sales of alcoholic beverages to 18-20-
year-old males. After Whitener files suit challenging the statute, the state moves to dismiss for lack of standing on the ground that a favorable decision would not necessarily redress her grievance because the state legislature could simply amend the statute and raise the drinking age to 21 for everyone. Should the trial court dismiss for lack of standing?

2) Assume that after Whitener files her complaint in *Boren* but before the trial court decides the case, the legislature does indeed amend the statute raising the minimum drinking age to 21 for everyone. Is there any other ground for dismissing her injunctive action? What if Whitener sought damage relief alleging loss of business (in addition to or instead of injunctive relief)? Do your answers suggest any precautions plaintiffs must take in much constitutional “test case litigation”?

3) From what you can tell from the Court’s per curiam opinion in *DeFunis*, did the defendant move to dismiss for mootness? How could the Court dismiss for mootness if no party had requested dismissal?

6) On March 3, 1970, a pregnant woman named Norma McCorvey and her doctor filed suit in federal district court seeking to enjoin enforcement of the Texas statute that prohibited abortion except when a woman’s life was at stake. The case, which became known as *Roe v. Wade*, was not decided by the Supreme Court until 1973, when Ms. McCorvey was obviously no longer pregnant. (She did not have an abortion, but put the child up for adoption.) Why did the Supreme Court not dismiss her injunctive claims as moot in 1973? Why was McCorvey’s case different from De Funis’ on the mootness point?

VII. Ripeness (p. 92)

What factors should a court examine in determining whether to find a case ripe for initial decision or appellate review?

VIII. *Powell v. McCormack* (p. 104) and *Nixon v. United States* (p. 107)

1) A few years ago, a citizen sued several defendants (the United States, the President of the United States, and various government officials), challenging the constitutionality of the Iraq war. The plaintiff asked the district court to declare the war unconstitutional and to enjoin the defendants from waging it. As the district judge, how would you have decided the case?

2) What policies does the political question doctrine serve? What can be said against application of the political question doctrine where the plaintiffs raise otherwise justiciable claims?

3) In *Nixon*, how many Justices concluded that impeachment matters are always nonjusticiable political questions? How many Justices concluded that impeachment matters may be justiciable, at least sometimes?
SELECTIVE INCORPORATION

I. *Barron v. Mayor and City Council of Baltimore* (p. 471)
   1) What was John Barron’s legal hurdle in the Supreme Court?
   2) Was *Barron* correctly decided under prevailing constitutional doctrine?

II. *Slaughter-House Cases* (p. 474)
   1) What were the independent butchers’ claims, and how did the five-Justice majority resolve them? In reaching the outcome, did Justice Miller do any judicial sleight-of-hand?
   2) Now that the First Amendment Free Speech Clause, for example, applies to the states through the Fourteenth Amendment, does the Missouri constitution’s free speech clause serve any purpose?
   3) Assume that without raising a First Amendment claim, the plaintiff alleges that the Missouri constitution’s free speech clause protects the plaintiff’s conduct. The Missouri Supreme Court agrees and rules for the plaintiff on state constitutional grounds. Now that the First Amendment is binding on the states through Fourteenth Amendment due process, may the defendant appeal to the U.S. Supreme Court on First Amendment grounds?
   4) In the mid 20th century, incorporation became important in the civil rights movement. Why?

III. *Palko v. Connecticut* (p. 490)
   1) What claims did Frank Palko (Palka) raise in the Supreme Court?
   2) When the state supreme court held that Palko’s sentence comported with the state constitution, why wasn’t that the end of the matter?
   3) According to Justice Cardozo (writing for the 8-Justice majority), what is the test for determining which Bill of Rights provisions are incorporated into Fourteenth Amendment due process and which ones are not?
   4) Suppose that on the day after the Court handed down *Palko*, a defendant challenges his state conviction on the ground that the police procured key evidence against him in a warrantless search that violated the Fourth Amendment Search and Seizure Clause. The threshold question before the state court is whether the Fourth Amendment applies to the states through the Fourteenth. Does *Palko* yield a clear answer?

IV. *Adamson v. California* (p. 493) and *Duncan v. Louisiana* (p. 499)
1) What is the dispute between Justices Frankfurter and Black in *Adamson*?

2) In *Duncan*, what was the majority’s approach and viewpoint? What was the Black-Douglas approach and viewpoint? What was Harlan’s approach and viewpoint?

**SUBSTANTIVE DUE PROCESS**

I. **Introduction**

Assume John Jones owns a bar here in Columbia, the Tiger Tavern. Jones stations a bouncer at the front door to check identifications of patrons who look like they may be underage, but it is widely suspected that the bouncers are instructed to look the other way and let underage patrons slip in. The State Department of Liquor Control does a “sting” operation, and cites Tiger Tavern for serving underage kids. The Department serves notice that it will bring an administrative proceeding seeking to suspend Tiger Tavern’s liquor license for six months. Assume the agency’s published regulations provide for written notice of the charges, immediate suspension, and a prompt oral hearing before an administrative law judge following suspension. Assume further that the administrative law judge calendars the hearing for five months after the suspension begins. Tiger Tavern files suit, seeking an injunction enjoining the agency from suspending the liquor license pending the hearing. What constitutional claim should Tiger Tavern raise?

II. **Lochner v. New York** (p. 516)

1) According to the state, why was the maximum-hours legislation constitutional?

2) According to the Court majority, why was the maximum-hours legislation unconstitutional?

3) Did Joseph Lochner claim that the state legislature employed constitutionally insufficient procedures when it considered whether to enact the legislation (e.g., that the legislature refused to hold public hearings or receive any input Mr. Lochner might have wanted to provide)?

4) *Lochner* had two dissents, one by Justice John Marshall Harlan and the other by Justice Holmes. Which one would have given courts more authority to strike down economic regulation on substantive due process grounds, and which one would have given less? Put another way, why did Holmes not join Harlan’s dissent?

5) According to Justice Harlan, when did liberty of contract trump the state’s police power?

6) What did Justice Holmes mean by “dominant opinion”? Which branch of government enunciates the “dominant opinion”?
7) What did Justice Holmes mean by “traditions of our people and our law”?

III. Nebbia v. New York (p. 523)

Why is Nebbia in the book?

IV. United States v. Carolene Products Co. (p. 526)

1) According to Carolene Products Co., what constitutional provisions did the challenged legislation violate? Why did the company not allege a substantive due process violation?

2) According to the Court, what is the test for determining the constitutionality of economic regulatory legislation? Do you think this test requires searching review of the legislation’s constitutionality, or deferential review? How deferential? Where the Court finds an appropriate basis for economic regulatory legislation, must that basis be the actual basis the legislators had in mind when they passed the challenged legislation?

3) When courts apply the rational basis test, should they credit only the actual basis on which Congress acted? Or should courts consider any bases the government proffers in litigation, plus any bases the court can think up?

4) Justice Frankfurter once wrote that “A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine.” Kovacs v. Cooper, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring). Why do you think Justice Harlan Fiske Stone chose to employ a footnote here? How many of the Justices sitting on this case joined the footnote? Was footnote 4 holding or dictum?

5) Once the Court upheld the Filled Milk Act in this otherwise nondescript case, why did Justice Stone feel the need for footnote 4?

6) In Lochner’s heyday, how much deference did the Court give to state and federal legislation? After Carolene Products, how much deference does the Court give to state and federal legislation?

V. Griswold v. Connecticut (p. 584)

1) What justifications did the various Justices provide for a constitutional right to privacy? Why do you think Justice William O. Douglas disavowed Lochner? Without Lochner, where did Justice Douglas find constitutional authority for striking down the Connecticut statute?

2) According to Justice Douglas, why does this case involve a “fundamental” right of privacy worthy of constitutional protection?

3) Assume that before Griswold, the Court had embraced complete incorporation of the
Bill of Rights into Fourteenth Amendment due process. Would complete incorporation have made Justice Douglas’ job any easier?

4) How would Justice Arthur J. Goldberg determine which rights are “retained by the people”?

5) Was there an alternative constitutional ground for *Griswold*, one that likely would not have encountered as much controversy then or since?

VI. *Roe v. Wade* (p. 621)

1) *Griswold* found penumbras emanating from specific Bill of Rights provisions. What was the Court’s constitutional basis for *Roe*?

2) When a plaintiff raises a substantive due process challenge to state action, what level(s) of scrutiny does the Court apply? (Consider the *Carolene Products* rationale.)

3) What level of scrutiny does the Court apply here to test the constitutionality of the abortion statutes under substantive due process? According to *Roe*, (a) what fundamental rights of the pregnant woman are at stake?, (b) what are the state’s interests in regulating abortion?, (c) does the unborn child have Fourteenth Amendment rights?

4) Assume the Court had held that a fetus is a person under the Fourteenth Amendment. What might states have had to do?

5) Was Chief Justice Warren Burger good at predicting the future?

6) In 1986, the Missouri legislature enacted § 1.205 RSMo, which provided in part: “The life of each human being begins at conception . . . . [T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.”

Under *Roe*, is this Missouri statute constitutional in all its applications, some of its applications, or none of its applications? Could Missouri cite this legislation to enact a statute prohibiting all abortions? If a 20-1/2-year-old is arrested for underage drinking in Columbia, could he invoke this statute to say that he is really over 21 under Missouri law?

VII. *Planned Parenthood v. Casey* (p. 633)

1) Did *Roe* survive *Casey*?
2) According to Casey, where in the Constitution does the right to an abortion come from?

3) Where do the votes for rejecting Roe’s trimester analysis come from?

4) What does Casey’s “undue burden” test do to the strict scrutiny test enunciated in Roe? How many votes did the “undue burden” test get? Under that test, which of Pennsylvania’s abortion restrictions survive and which ones fall?

5) What does the Court say about whether Fourteenth Amendment liberty interests are confined to interests intended by the framers of that amendment? What do the dissenters say?

VIII. Washington v. Glucksberg (p. 676)

1) Why did Court decide this case under substantive due process and not equal protection?

2) According to the majority, what Fourteenth Amendment liberty interest did the plaintiff physicians seek to invoke?

3) Why didn’t the trial court dismiss the physicians for lack of constitutional standing?

4) The majority says that it begins “as we do in all due process cases,” by looking at the nation’s history, legal traditions and practices. Can you cite any decisions in which the Court did not look at these traditions?

5) In Michael H, Justice Scalia’s footnote 6 said that the Court must state the liberty interest at its “most specific level of abstraction.” Did Glucksberg do that?

6) What level of scrutiny does the Court apply to the challenged Washington statute?

7) Assume New Mexico enacts a statute forbidding physician-assisted suicide under all circumstances. John Smith, suffering from a terminal disease, alleges that the statute violates his due process liberty interests because a team of physicians has found him fully competent to make the decision to die. The federal district court has calendared a hearing on his claim. Under Glucksberg, can Smith prevail?

8) In Glucksberg, did the plaintiffs mount (and did the Court decide) a facial challenge or an as-applied challenge? Were the three deceased individual plaintiffs competent or incompetent?

IX. Lawrence v. Texas (p. 664)

1) Other than substantive due process, did the Court have any other potential basis for
2) Justice O’Connor advanced equal protection. What would have been the defendants’ equal protection claim? What was the practical difference here between an equal protection decision and a substantive due process decision?

3) Did the majority state the Fourteenth Amendment liberty interest at stake in its “narrowest level of abstraction” (Scalia’s Michael H. footnote)? Did the majority “carefully describe” that liberty interest (Glucksberg)? If you wanted to state Mr. Lawrence’s dispositive liberty interest in its narrowest level of abstraction, what would you say?

4) Did the majority engage in the sort of historical analysis that Glucksberg engaged in?

5) Did Lawrence say anything about whether constitutional rights may be based only on the framers’ intent (originalism), or about whether we have a “living constitution” that permits judges to apply the due process clauses in accordance with contemporary mores?

6) Assuming fundamental rights are grounded in history and tradition, did Lawrence involve a fundamental right at all, according to the majority?

7) What level of scrutiny did the Lawrence majority apply?

8) When the majority says that moral choices are not a legitimate state interest, and thus do not establish even a rational basis for legislation, what does the majority mean? After Lawrence, may the state constitutionally maintain statutes criminalizing murder, which, after all, are based at least partly on the notion that murder is immoral?

**EQUAL PROTECTION (ECONOMIC REGULATION AND SUSPECT CLASSES)**

I. Introduction

1) Assume two statutes: (a) Statute # 1 – “No woman may serve on a jury,” (b) Statute # 2 – “All police officers to be at six feet tall and weigh at least 160 pounds.” Which of these statutes would be vulnerable to equal protection attack for gender discrimination?

2) The city council enacts this ordinance: “No position whose salary is paid with city funds shall be held by a person with blond hair.” Public employment does not implicate a fundamental right, and hair color does not create a suspect classification. Could the city council get away with this?
3) Assume a state statute sets the minimum driving age at sixteen. A 14-year-old says he can handle himself behind the wheel, and he files suit claiming that the statute violates equal protection. Does the statute classify people? If you were the state’s lawyer seeking to uphold the statute, what government purposes support the statute? Is the statute underinclusive, overinclusive, or both? Should the court strike down the statute for violating equal protection?

II. Railway Express Agency v. New York (p. 697)

1) What level of scrutiny does the Court apply to this city regulation?

2) According to the city’s lawyer on oral argument in Supreme Court, what legitimate state purpose did this regulation serve? Did the city have a rational basis for this regulation? Was the regulation overinclusive or underinclusive?

III. Suspect classifications (p. 721)

Assume the city council enacts this regulation: “It shall be unlawful for any person to sleep on a bench in a public park from 7:00 pm to 7:00 am.” Does this statute discriminate? Why shouldn’t proof of disparate impact based on race establish an equal protection violation, without proof that the state action was motivated by a discriminatory purpose? What might be the policy reasons for requiring the plaintiff to prove discriminatory purpose? Does requiring proof of discriminatory motive raise any practical problems? Does requiring proof of discriminatory motive really mean that government may discriminate, as long as it is careful about what it does?

Should the court readily accept the state’s race-neutral explanation for action that has a discriminatory effect based on race? What if the director of a city park, explaining why he assigned one softball field to white players and the other field to black players, says, “I just think the park looks better that way.” Should the court find a racially discriminatory motive?

IV. Gender classifications (p. 766)

1) Assume a statute says that “No person may serve as a serve as a juror unless he a male over 18 years of age.” Men and women are indisputably different as a matter of biology and nature. The Equal Protection Clause commands that government accord similar treatment to people who are similarly situated; the Clause permits government to accord dissimilar treatment to persons who are dissimilar. Why, then, should a gender classification such as the one created by the jury statute implicate equal protection?

2) Did the framers of the Fourteenth Amendment intend equal protection to reach gender discrimination?

3) Assume an Alabama statute provides that the divorce court may award a woman
alimony from her ex-husband in an appropriate case, but that a man may never receive alimony from his ex-wife. Does this statute constitute gender discrimination that implicates the Equal Protection Clause? Does it matter that the statute advantages women and disadvantages men?

V. Nguyen v. INS (p. 792)

1) When government classifies people, equal protection asks whether the two or more groups are sufficiently different in terms of the government purpose. In Nguyen, the Court rejects an equal protection challenge to a statute that treats some men and women (i.e., some fathers and mothers) differently. Is this outcome consistent with this test?

2) According to the Nguyen majority, what important government interests were at stake in this case?

3) According to the majority, did the means Congress chose to further its important government interest “substantially relate” to achievement of that interest? What does “substantially relate” mean to you? If deportee Tuan Anh Nguyen can show that Congress had other alternatives to the statutory scheme it ultimately enacted, can the means Congress chose nonetheless “substantially relate” to the ends sought?

4) According to the dissent, why does the INS statute fail to satisfy the Court’s intermediate scrutiny test? Do the dissenters say that the majority changes that test for gender discrimination cases, or do they take issue with the majority’s application of the test in this case? Do the dissenters take issue with the majority’s application of the “important state interest” prong? Do the dissenters take issue with the majority’s application of the “substantial relation” prong?

5) Assume Justice Sandra Day O’Connor is right that the Court is too deferential in this intermediate scrutiny case. What factors, which would likely be absent in most future gender discrimination cases, might help explain any such deference?

6) Tuan Anh Nguyen was born in Vietnam in 1969. What if the boy had been born in Texas to a citizen father and a non-citizen mother? What if he had been born in Texas and neither parent was a U.S. citizen? What if he had been born in Texas and both parents were undocumented aliens, and thus deportable themselves? What if neither parent was a U.S. citizen and he had been born in the Dallas airport during a 10-minute stopover on an international flight, the only time he has ever been in the United States?

VI. City of Cleburne v. Cleburne Living Center (p. 918)

1) What classification did the City of Cleburne create?

2) Now that the plaintiffs have won their lawsuit here, may the City of Cleburne ever
deny a special use permit to maintain a group home for mentally disabled persons? May any other city in America ever deny mentally disabled persons such a permit?

3) The Supreme Court has now invalidated the City of Cleburne’s permit requirement insofar as it applies to this group home for the mentally disabled. Could the city now pass a new ordinance requiring a special use permit for all persons who wished to establish multiple dwellings for any reason? Could the city constitutionally apply the ordinance to persons who wanted to maintain group homes for the mentally disabled? Could the city constitutionally apply the ordinance to the Cleburne Living Center, the same people who wanted to maintain this particular group home for the mentally disabled?

4) The next time a city denies a special use permit for persons who want to operate a group home for the mentally disabled, what level of scrutiny will a court use to decide an equal protection challenge to that denial?

5) The Fifth Circuit found mental disability to be a “quasi-suspect” classification, but the Court rejected the court of appeals’ rationale. What does “quasi-suspect classification” mean?

6) According to the Court, what level of scrutiny applied in this case?

7) Did the Court really apply the rational basis test here? When you read Parts I and II of Justice Byron White’s majority opinion, what appears odd immediately about the case’s outcome?

8) Assume you were a law clerk to Justice White. If you were writing the draft opinion, would you cite a decision like Railway Express Agency or Williamson v. Lee Optical (pp. 697-99), which were also rational-basis decisions?

9) As applied to the mentally disabled in light of the evident public purpose for the ordinance, was the ordinance underinclusive? Was the ordinance overinclusive? If you were representing the city, what would you say the purpose of this ordinance was?

10) The Court was unanimous for the result. What is the core issue that divides the majority and concurring Justices Marshall, Brennan and Blackmun?

11) What justifications did the majority give for using rational basis scrutiny, rather than heightened scrutiny, to test classifications involving the mentally disabled?

VII. Wealth Classifications (p. 935)

1) If you wanted to criticize the Court’s failure to make poverty a suspect classification, what would you say, based on your understanding of the Carolene Products footnote? If you wanted to support the Court’s approach on that basis, what would you say?

2) What might be the ramifications if the Court held that poverty was a suspect
classification, or that people have a fundamental right to subsistence?

VIII. *Grutter v. Bollinger* (p. 876) and *Gratz v. Bollinger* (p. 898)

1) What level of scrutiny did the Court say applied in these cases?

2) As a general matter, how do we know when a government interest is “compelling”?

3) In general, what kinds of factors do courts examine to determine whether a government interest is “compelling” (or “important” or “rational,” in appropriate cases)?

4) According to *Grutter* and *Gratz*, what compelling state interest can justify an affirmative action program in the higher education admissions process?

5) What if the Court had held that affirmative action programs in higher education are justified as a means to remedy past discrimination? As a practical matter, might that holding produce different results than a holding that producing diversity is the justification?

6) In *Grutter*, was the University of Michigan law school’s admissions policy justified by the compelling state interest in producing a diverse student body? According to the majority? According to Justice Clarence Thomas?

7) Because a diverse student body remains a compelling state interest according to the majorities in both cases, why the different results in *Grutter* and *Gratz*?

8) What level of scrutiny would Justices Antonin Scalia and Thomas apply to race-based admissions policies in higher education?

9) Why the different result in *Gratz* (the undergraduate decision) on the “narrow tailoring issue”?

10) Assume that California voters pass a referendum prohibiting consideration of race in public college and university admissions. The prohibition thus becomes part of state law. After *Grutter* and *Gratz*, may the state prohibit such consideration?

IX. *Graham v. Richardson* (p. 901)

[Lecture]

**EQUAL PROTECTION (FUNDAMENTAL RIGHTS); PRIVILEGES OR IMMUNITIES OF THE FOURTEENTH AMENDMENT**

I. Introduction
In recent years, the Court has been loathe to recognize new fundamental rights. What do you think explains this reluctance?

II.  

*Zablocki v. Redhail* (p. 936 [597])

1) Assume it is 2012 and the Supreme Court has just granted certiorari in a case that challenges the federal constitutionality of state bans on same-sex marriage, including bans in state constitutions (such as Missouri’s). What is the nature of the constitutional challenge likely to be, and what level of scrutiny would the Court apply?

2) Roger Redhail sued in federal district court. In light of the domestic relations exception to federal diversity jurisdiction, why could the federal courts hear this case in the first place?

3) What is the discrimination in *Zablocki*? What classifications does the Wisconsin statute create?

4) What level of scrutiny applies in *Zablocki*? Why?

5) Does the Wisconsin statute’s classification advance a compelling state interest? What was the state’s justification for the statute’s classification? According to the majority, were these justifications sufficient?

6) What does “narrowly tailored” mean to you here? Was the state’s action “narrowly tailored”?

7) Justice Potter Stewart says that the Court should have decided this case under substantive due process, and not equal protection. Mr. Redhail would have been permitted to marry either way, so what would have been the difference?

III.  

*Easley v. Cromartie* (p. 979)

Why did the Court apply the “clearly erroneous” test?

IV.  

*Vieth v. Jubelirer* (p. 980)

1) Why was this decision not controlled by *Baker v. Carr*, the one-person-one-vote decision from 1963? (*Baker* held that malapportionment cases did not present political questions, and overruled *Colgrove v. Green*, the 1946 decision that had reached a contrary conclusion.)

2) After *Veith*, does a political gerrymandering claim always present a political question?
3) If political gerrymandering presents a non-justiciable political question, why does racial gerrymandering not present a political question?

V. The First Amendment As a Limitation (p. 1011)

1) When state law requires a person to register with a particular political party as a condition for voting in that party’s primary election, what compelling interest does the state seek to advance?

2) If you wanted to raise a constitutional challenge to primary-registration laws, what would you say?

3) What compelling interests does the state have in setting requirements to appear on the ballot as a candidate?

4) Could a state constitutionally impose a modest fee (say, $10) on voters themselves as a condition of the right to vote?

5) Besides filing fees, what other methods might the state use to achieve its compelling interest in limiting access to the ballot?

VI. Shapiro v. Thompson (p. 1013) and Bona Fide Residency Requirements

1) Were the Shapiro plaintiffs shackled, bound, or otherwise physically restrained from moving from one place to another?

2) If the Shapiro plaintiffs were free to move to and fro, what right of theirs was violated? (How did the plaintiffs allege they were injured here?)

3) If the state of Missouri denies John Jones welfare benefits because the Jones family moves from Columbia to Joplin, will Shapiro help Jones if he files suit?

4) What if John Jones wants to travel to Cuba and the State Department denies him a passport for the trip? Does Shapiro help Jones in this situation? Should the right to travel encompass the right of international travel?

5) Does Shapiro stand for the proposition that when a person moves from state # 1 to state # 2, state # 2 may never impose a durational residency requirement on the person?

6) In Rosario v. Rockefeller (1973), the Court upheld a residency requirement of almost one year before a newcomer may vote in a state primary election. Shapiro strikes down a one-year residency requirement for receipt of state welfare assistance. Why the different results?

7) Why did the Court decide Shapiro under equal protection rather than under substantive
due process?

8) According to Shapiro, what was the government classification here? What justifications did the state proffer here in defense of the classification?

9) John Smith and his family travel from Columbia to Lawrence, Kansas for a month-long vacation. During their vacation, one of his children gets sick and is admitted to a hospital in Lawrence. The Smiths do not have health insurance, and the state of Kansas refuses to use state funds to pay for the hospital stay. Has Kansas violated the Smiths’ fundamental right of interstate travel? Are the Smiths’ circumstances different from the circumstances of the Shapiro plaintiffs?

10) Why did McCarthy v. Philadelphia Civil Service Commission (p. 1023) involve a residency requirement, and not a durational residency requirement? What rational bases may a city have for maintaining residency requirements, which are quite common? What if Philadelphia enacted a regulation that limited employment as a city firefighter to persons who were residents of the city for one year? For one month?

VII. Saenz v. Roe (p. 1035)

1) According to the majority, is Saenz a right-to-travel case?

2) Justice John Paul Stevens says the right to travel has at least three components. According to the Court, which constitutional provisions support the various components?

3) Now that the Court pinpoints for the first time that state discrimination against persons temporarily in the state implicates the Article IV Privileges and Immunities Clause, has the Court overruled Vlandis v. Kline (p. 1024) sub silentio? Put another way, does Mizzou now violate that Clause when it charges nonresident students higher tuition than it charges residents?

4) Assume three Nicaraguans come to southern Arizona, assume permanent residency (and thus become lawful resident aliens), but are denied welfare benefits during their first year residing in the state. Will Saenz help them? Would any other constitutional provision help them?

5) Saenz is only the second Supreme Court decision to invoke the Fourteenth Amendment Privileges and Immunities Clause in about 130 years. What did the Court cite for authority?

6) What level of scrutiny would the state durational requirement receive under the Fourteenth Amendment Privileges and Immunities Clause?

7) Part V of the majority opinion rejects California’s justifications of its durational
residency requirements. From this discussion, do you think a state could ever again scale first-year welfare benefits for newcomers, as California tried to do here?

8) What if John Smith travels with his family from North Carolina to California, stays with relatives for two months, and then applies for California welfare benefits. Assume California has administrative regulations which specify that to establish state residence, a person must purchase or rent real property, register to vote in California, and secure employment in California. Assume Smith has done none of these things. Does Saenz necessarily give him a claim under the Fourteenth Amendment Privileges and Immunities Clause? What if California enacted administrative regulations which specify that an adult can become a permanent state resident only by maintaining employment in the state for one year?

9) After Saenz, assume another state seeks to establish a durational residency requirement before a U.S. citizen may receive a government benefit. Would the Court decide the case under the Equal Protection Clause, as it did in Shapiro?

PROCEDURAL DUE PROCESS

I. Introduction

You graduated from the Mizzou Law School five years ago, and you represent several local restaurants and bars that hold liquor licenses issued by the state department of liquor control. One of your clients is “Easy Ed’s Place.” Following a “sting” operation designed to catch establishments that serve liquor to underage patrons, EEP has been served with notice that the department will seek to suspend its liquor license for 60 days. The suspension takes effect immediately, and department has scheduled a hearing for next month. Where will you look to determine when the agency must hold the hearing and what procedural rights the agency must grant your client?

II. Board of Regents v. Roth (p. 1098)

1) What process did Professor Roth get, and what process did he want?

2) In the trial court, did Roth ask for only procedural relief?

3) Assume that when Roth applied for a position on the university faculty, the university rejected his application and did not hire him. Would Roth have a due process property interest in a hearing about why he was not hired, with a statement of reasons by the university?

4) Professor Roth was hired for a one-year term from September 1, 1968 to June 30, 1969. If the university dismissed him without stating any reasons on November 1, 1968, would Fourteenth Amendment due process have guaranteed him a statement of reasons, and a hearing?
5) Why would Roth have a property interest in November, 1968 but not in July, 1969? What field of state law confers property rights on Roth here?

6) What if Roth’s employment contract promised him a hearing if the university decided not to renew his contract for a second year? Would due process guarantee him a hearing?

7) What if Roth had been teaching at the university for seven years and had tenure, which guarantees him lifetime employment during good behavior? If the university decided not to renew his contract after June 30, 1969, would due process have guaranteed him a hearing?

8) Assume you were counsel to the University of Wisconsin system. The University president has decided not to renew Professor Roth’s one-year contract, and the president wants to announce at a press conference that Roth would not be rehired for a second year because he often provided illicit drugs to students at fraternity parties. What would you advise?

9) Assume that on April 1, 1969, near the end of his one-year appointment, the untenured Professor Roth addressed a student anti-war rally and urged his listeners to “resist the University’s complicity with the war machine.” On May 15, the University tells Roth that he will be terminated effective at the end of his one-year appointment but gives no reason. Does Roth have any basis for filing suit to enjoin the University from terminating him on that date?

10) Under Roth’s definition of property, would due process permit the state of Missouri to deprive a person of welfare benefits, without any reason and without a hearing, if the legislature amended the state welfare code to include the following provision: “Welfare benefits are granted to needy persons at the state’s discretion, and the state may terminate these benefits at any time without providing any reason or a hearing”?

III. Sandin v. Conner (p. 1107)

1) What process did prisoner Conner get, and what did he want?

2) Why might the Court have reached a due process decision in Harper that was different from the decisions in Wolff and Meachum (cited on pages 1108, 1114)?

3) What do you think the Court was trying to accomplish in Sandin?

IV. Daniels v. Williams (p. 1116) and Wilkinson v. Austin (Supp. p. 37)

1) Assume that the state executes John Smith for first-degree murder after Smith had exhausted all his state and federal appeals. Six months after the execution, three witnesses recant, and another person, Bill Jones, confesses to the killing. The state convicts Jones, thus acknowledging that Smith was innocent. Smith’s widow files suit against the state, alleging that it deprived Smith of life without due process of law, in violation of the Fourteenth Amendment. What result after Daniels v. Williams?

2) Do you sense any problems with a hard-and-fast rule that the state does not “deprive”
a person of life, liberty or property under Fourteenth Amendment if an adequate state remedy (e.g., a tort remedy) is available?

3) What will be the likely long-term effect of *Daniels v. Williams*?

### VI. Conclusion

1) What are the basic goals of procedural due process?

2) Why the big deal about a hearing? If a federal or state agency wants to reach a particular decision, or even be arbitrary, can’t the agency usually provide a hearing, reject or ignore the claimant’s arguments, and then just make the decision it planned to make in the first place? For example, do you think a hearing would have done Professor Roth any good?

3) If due process guarantees a hearing to a person threatened with loss of a property or liberty interest, who cares whether the hearing comes before or after the government action (i.e., before or after the license suspension, firing, termination of benefits, etc.)?

**STATE ACTION**

### I. Introduction

1) On July 26, 2005, two Little League baseball teams for 14-year-olds were playing a state tournament game in Methuen, Massachusetts. One team’s coaches began giving field instructions to their players in Spanish. The umpire called “time out” and instructed the coaches that only English could be spoken on the field. The coaches challenged the ruling but kept their team on the field. (The incident reached the national media, and Little League International instructed local officials to suspend the umpire from officiating at any further playoff games because no such English-only rule existed.) See *Umpire Is Punished For Ban on Spanish*, Washington Post, July 30, 2005 at E02.

On August 1, 2005, the *Arizona Republic* carried a letter-to-the-editor stating the following: “Our First Amendment gives every person who steps foot in our country the right to free speech. Those boys had the right to speak Spanish during the game, just like every other team has the right to give hand signals for pitching.” If the letter writer was a friend of yours and asked you to review his letter before he sent it, what would you say to him?

2) What is the practical effect of a holding that challenged conduct does not involve state action?

### II. Company Towns and Shopping Centers (p. 1140)

1) If police in an ordinary town (like Columbia, Missouri) arrested the *Marsh* defendant for leafletting, would the arrest have implicated state action?
2) What is the difference between a company town and a shopping mall?

III. Flagg Bros., Inc. v. Brooks (p. 1141)

1) After this decision, will plaintiffs find it easier or harder to invoke the public-function exception to the state action doctrine?

2) In recent years, many states and localities have privatized many government functions, such as their prison systems and juvenile detention systems. Under contract with the state, prisoners or delinquent children are confined in these private prisons, many of which are the harshest and worst run prisons in the country. Assume that guards beat the children and deprive them of adequate food, and the children file suit for damages and injunctive relief, claiming that the conditions of confinement violate due process and the Eighth Amendment’s ban on cruel and unusual punishment. What does Flagg Bros. say about whether state action is present?

IV. Burton v. Wilmington Parking Authority (p. 1160)

Why was state action present in Burton but not in Rendell-Baker v. Kohn (p. 1165)?

V. Moose Lodge No. 107 v. Irvis (p. 1165)

1) Assume the Warren Court heard this case a day after it decided Burton in 1961. What facts mentioned in the Moose Lodge opinions might have led the Court to find state action based on entanglement?

2) What effect does Moose Lodge have on later efforts to find state action based on the fact that the government has issued one or more licenses to the assertedly private applicant?

VI. Brentwood Academy v. TSSAA (p. 1154)

1) Assume you are counsel to Missouri State High School Athletic Association (MSHSAA), which is based here in Columbia. What advice would you give concerning whether the organization’s conduct is state action, subjecting it to the constraints of the federal Constitution?

2) Does the Brentwood Academy decision turn on the facts or the law?


| FREEDOM OF SPEECH |

| Introduction |

27
1) Why should our society care whether people enjoy free speech? What purposes does freedom of speech serve in our polity?

2) Nearly all Supreme Court First Amendment speech law is 20th century law. The Court decided very few First Amendment before World War I. Why?

II. *Brandenburg v. Ohio* (p. 1284)

1) What is the *Brandenburg* test?

2) Did Clarence Brandenburg threaten violence here? Do you think Mr. Brandenburg would have had much trouble carrying out his threats for “revengence” at, or shortly after, the Klan rally?

3) Why did the Court overturn the conviction under the test enunciated in the opinion?

4) Are there limits to *Brandenburg*’s protection of speech? Could the government prosecute a person for merely publishing instructions for manufacturing illegal drugs? For publishing a manual on how to be a “hit man”? For publishing instructions for how to build a nuclear bomb? In each case, assume the person does not urge anyone to make imminent use, or indeed any use, of the published materials.

5) Does *Brandenburg*’s statement of the holding of the case (p. 1285: “These later decisions have fashioned the principle that . . . .”) apply to imminent, but relatively trivial, crimes? What if a speaker exhorts a small crowd to protest the local littering ordinance by crumbling up a piece of paper and throwing it on the ground on the way home. The speaker does not take this action, but other people in the crowd do. Could the city fine the throwers themselves for littering? Could the city imprison the speaker for inciting imminent lawless action?

III. *Coates v. Cincinnati* (p. 1293)

1) According to the majority, which of the voidness doctrine’s two requirements was at stake in *Coates*?

2) Was the Cincinnati ordinance unconstitutionally overbroad?

3) Suppose I stand on Main Street and shout obscenities at the top of my lungs. I am arrested and prosecuted under a statute that prohibits public speech “which is annoying to passersby.”

   a) Should the First Amendment permit the state to prosecute people who are shouting obscenities on the street corner at the top of their lungs?

   b) Should a reasonable person know that shouting obscenities on Main Street is something the state should be able to punish, indeed that this activity is inevitably “annoying to passersby”?
c) But can I successfully challenge the prosecution under the First Amendment on the ground that even if my shouting is not protected, the statute criminalizing “annoying” conduct would be vague or overbroad when applied to protected activity by others? What about the general rule that a person does not have standing to argue the legal rights of third parties? Should there be an exception for First Amendment claims?

d) The three Coates dissenters recognize the First Amendment exception to third-party standing, so what is their argument?

IV. Virginia v. Hicks (p. 1301)

1) What policies does the First Amendment overbreadth doctrine serve? What purposes are served by each of the exceptions to the doctrine? Why do we care whether a statute that snares unprotected speech also snares a substantial amount of protected speech?

2) A defendant is arrested for disturbing the peace because he loudly shouted obscenities on Main Street. Most speech snared by the statute would be unprotected, but he asserts an overbreadth defense because some protected speech might also be snared? Is this showing enough to establish a meritorious overbreadth claim?

3) In Coates, was the Cincinnati ordinance unconstitutionally vague, or was it overbroad – or both?

4) In 1950s (at the height of the Cold War), several states enacted statutes requiring public school teachers, and often other public employees, to file annual declarations listing all organizations to which they belonged or contributed financially. Were these statute vague? Were these statutes overbroad?

5) Did Kevin Hicks raise a facial challenge to the housing authority’s policy, or an as-applied challenge?

6) Was Kevin Hicks’ own conduct protected by the First Amendment?

7) Did Kevin Hicks have standing to assert the First Amendment interests of third parties not before the court?

8) Why did Mr. Hicks lose on his overbreadth claim?

V. Miller v. California (p. 1355)

1) What is the difference between pornography and obscenity? Assume a scale of 1 to 10, with 1 being “Snow White and the Seven Dwarfs,” and 10 being hard-core smut. Where
do pornography and obscenity fall?

2) How do judges know when something crosses the line from First Amendment-protected pornography to unprotected obscenity?

3) If you were a distributor of materials that might approach or cross the line from pornography to obscenity, would Miller’s “contemporary community standards” approach cause you any practical problems?

4) What if the government seizes copies of a medical textbook that contains two pages of photographs graphically depicting two adults having sexual intercourse? Could these two pages constitute obscenity?

5) What if police in Prude City seize the medical textbook, which has outraged every citizen in Prude City? Is that outrage enough to qualify the textbook as obscenity?

6) Assume the city of Columbia wants to ban manufacture and distribution of a video game that depicts non-stop blood, guts, machine guns, and maimed bodies. Could a court invoke Miller, classify the game as obscenity, and deny First Amendment protection?

7) Assume that the Village Gazette, a daily newspaper, plans to publish obscene material next week. Obscenity is outside First Amendment protection. May a court enjoin publication today?

VI. Jenkins v. Georgia (p. 1359)

Why might independent appellate review in obscenity cases be more important in civil cases (such as actions to abate a public nuisance) than in criminal prosecutions?

VII. Ashcroft v. Free Speech Coalition (p. 1360)

1) The Supreme Court’s First Amendment jurisprudence is replete with decisions protecting expression whose speaker or message, or both, are deplorable or even reprehensible to most people. Why do you think New York v. Ferber (cited in Ashcroft) took the extraordinary step of removing child pornography from the Amendment’s protection?

2) Once Ferber took child pornography outside the First Amendment, why did the Court need to decide Ashcroft?

3) If you were writing the 1996 congressional legislation, what would be your justifications for extending Ferber to virtual child pornography not involving a real child?

4) According to Justice Anthony Kennedy, why did the Child Pornography Protection Act violate the First Amendment?
5) Is Ashcroft necessarily the last word on the status of virtual child pornography under the First Amendment?

VIII. United States v. Playboy Entertainment Group, Inc. (p. 1369)

1) According to the majority, why did this statute violate the First Amendment?

2) Did this decision create new First Amendment law, or did it apply settled law?

IX. “Fighting Words” (p. 1399)

1) As applied to Walter Chaplinski, was the New Hampshire statute unconstitutionally overbroad?

2) What distinguishes Chaplinsky from Cantwell v. Connecticut (1940) (p. 1398)?

3) When a locality arrests and prosecutes someone for “fighting words,” what interests is the locality trying to protect? What is the locality trying to avoid? Is there a way to avoid a breach of the peace without prosecuting the speaker?

4) If an onlooker says, “I want to punch you in the nose and I’m going to get my friends to help me,” can you cite a decision for the proposition that the onlooker may be prosecuted?

5) In the normal case, who would make the initial decision about whether speech is so provocative as to cross the line and become “fighting words” likely to incite an immediate breach of the peace?

6) Under Chaplinski, must the state prove an actual breach of the peace? Or is a reasonably perceived threat sufficient?

7) The Court upheld Walter Chaplinski’s conviction under a statute that sounds very much like the statute the Court found unconstitutionally vague in Coates v. Cincinnati (p. 1293). Why did the Court uphold Chaplinski’s conviction and overturn Coates’?

8) Assume the state enacts a statute making it a crime “on any street or other public place, to address any offensive, derisive or annoying word critical of U.S. foreign policy.” John Jones is arrested for making a street corner speech opposing the Iraq War before a hostile audience that is yelling threats at him. Would the First Amendment permit the state to convict Jones under the statute?

IX. Virginia v. Black (p.1405) and R.A.V. v. St. Paul (cited and discussed in Black)

1) Were these speech cases at all? As far as we can tell, the perpetrators never said anything.
2) What are likely to be the differences between circumstances in the typical “fighting words” scenario, and the circumstances in the typical “hate crime” scenario?

3) Which clause of the St. Paul ordinance (R.A.V.) produced the First Amendment problems and led to facial invalidation?

4) Why was the Virginia statute different from the St. Paul ordinance struck down in R.A.V.?

5) After Black, would the First Amendment permit a state to enact a hate-crime statute (with significantly enhanced penalties) that proscribes burning a Bible during a public demonstration?

6) Why does the state have a compelling interest in punishing speech that constitutes a “true threat”?

7) Why did the Court strike down the Virginia cross-burning statute? How many Justices found that a properly drafted cross burning law could be constitutional? How many Justices found that the particular Virginia law at issue here violated First Amendment?

X. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (p. 1416)

1) Why does it matter whether expression is commercial speech rather than ordinary speech?

2) What is “commercial speech”? Which if the following, if any, concern commercial speech?:

a) Ford Motor Company runs an ad campaign opposing proposed federal fuel emissions standards.

b) Ford Motor Company begins running advertisements saying, “When you drive a Ford pickup, people will know you’re tough.” The ads feature mood music and show a Ford pickup driving on a picturesque country road, but do not advertise prices or urge anyone to go to their local dealer.

c) The Sierra Club begins running ads saying that if you buy pickup trucks, you are contributing to environmental pollution and you are supporting terrorists by spiking America’s need for foreign oil.

d) A tobacco company takes out ads saying that scientific studies show that smoking low tar cigarettes is less harmful than previously thought. The ad does not mention a particular brand, and does not tell listeners to go out and buy cigarettes.
e) Kids For a Smoke-Free America takes out an ad saying that low tar cigarettes are more harmful than ordinary cigarettes.

f) A candidate for city counsel takes out an ad saying, “Vote for me, and I will lower your taxes.”

g) A not-for-profit organization takes out an ad urging readers to buy candy so the organization can donate 100% of the proceeds to overseas famine relief.

3) As we saw when we studied economic substantive due process, economic regulation seemingly neutral on its face may actually be designed to protect some businesses at the expense of others. In *Virginia State Board of Pharmacy*, which pharmacists were likely to be protected by the advertising prohibition, and which were likely to be hurt?

4) According to Justice Harry Blackmun, whose rights were at stake in this commercial speech case (and thus in commercial speech cases generally)?

5) On the day after this decision, could the state of Virginia lawfully continue to license pharmacists and regulate their conduct by de-licensing ones who violated professional standards unrelated to advertising?

XI. *Greater New Orleans Broadcasting Ass ’n v. United States* (p. 1440)

1) Does First Amendment protection of non-commercial speech depend on whether the message is true or false?

2) Does the First Amendment protect non-commercial speech that advocates illegal behavior?

3) Which *Central Hudson* prong(s) proved fatal to the casino interests in this case?

4) Could the plaintiff broadcasters have raised an equal protection claim? What would their chances of success on the claim have been?

XIII. Public Forums

1) Does a person often have a First Amendment right of speech (demonstrations, rallies, picketing, etc.) on private property owned by others who do not want the person to speak on that property?

2) Would the First Amendment permit a city simply to close its streets and parks to expressive activity altogether?

3) May the government ever regulate or prohibit speech in a public forum?
4) What compelling government interests justify a time, place or manner restriction?

5) Assume a city ordinance prohibits any person, while standing on public or private property adjacent to a school, from making noises or diversions that tend to disturb the school’s operation. An anti-war group wishes to hold a demonstration across the street from a public school to protest the Iraq War, but the city denies them a permit. Did the city act constitutionally? What if the anti-war group wants to protest across the street from the school because the school board has allowed military recruiters to set up booths in the school’s hallways but has denied hallway access to the anti-war group?

6) May a city prohibit all billboards in any area zoned for residential use?

7) May a city prohibit all use of sound trucks on public streets or other public places between 5:00 pm and 7:00 am?

8) Assume a congressional statute bans display of any “flag, banner or device” in front of any federal court building. Congress says its aim is to prevent disruption of court proceedings. Does this statute create a reasonable time, place or manner restriction?

9) Would the First Amendment permit a city to enact an ordinance that imposes a fee on applicants for demonstration or parade permits, and allows the city to vary the fee depending on the city’s estimate of how much police protection would cost?

IV. Frisby v. Schultz (p. 1464)

1) If you were the city attorney, would you have drafted the ordinance in the way it originally appeared? What would you have said?

2) Does the Brookfield, Wisconsin ordinance restrict speech? Does the ordinance create a prior restraint on speech? Does the restriction on speech operate in a public forum? Is the ordinance content-neutral?

3) As interpreted and applied by the Supreme Court, would the First Amendment guarantee the right of the anti-abortion protesters to march through the entire neighborhood in which the target doctor lives? Could the protesters march up and down the doctor’s block?

4) Is the city ordinance a reasonable time, place and manner restriction? What standard of review does the Court apply to determine the reasonableness of the restriction?

XV. Arkansas Educational Television Comm’n v. Forbes (p. 1496)

1) If the Court had found that the candidates’ debate conducted by public television was a public forum, what would that finding have meant for the television station?
2) What if the trial court had found as a fact that the public television station had excluded Ralph Forbes because he was a Libertarian?

3) In the spring of 2004, people tried to solicit signatures on petitions for ballot initiatives on the steps leading up to the front doors of the Columbia Public Library. The Library asked them to leave. The question was whether the front steps were a public forum, a designated public forum, or a nonpublic forum. What kind of forum is the library’s front steps? The reading room? The streets on which the library fronts (Broadway and Garth)? See Tony Messenger, Library Becomes Living Forum for First Amendment Debate, Columbia Trib., Mar, 21, 2004.

XVI. Rust v. Sullivan

1) Should the First Amendment permit content-based distinctions when the government itself is the speaker?

2) The Rust petitioners (grantees and physicians) mounted a facial challenge to these regulations, and the Court reminded them that their burden on such a challenge is high. Why didn’t the petitioners raise an “as applied” challenge?

3) What government benefit is at stake here?

4) If a doctor tries to use Title X funding to pay for a client’s abortion and the government refuses to fund the abortion, would the First Amendment impose a barrier?

5) What might happen to a clinic where, during pre-conception preventive family planning, a doctor speaks to a not-yet-pregnant woman about the abortion option?

6) Could Congress enact a statute making it a crime for a doctor to speak to a pregnant woman about the abortion option?

7) Why doesn’t the Court apply the “unconstitutional conditions” doctrine? If the agency regulation did not establish the “no abortion discussion” condition, could the recipient clinic’s personnel (doctors and other staff members) speak about abortion with their clients? Under the regulations, what would happen if a recipient clinic’s personnel discussed abortion?

8) Could the doctors counsel clients not to have abortion? Are content-based restrictions normally permitted under First Amendment?

XVII. National Endowment For the Arts v. Finley (p. 1451)

1) May the govt make content-based decisions concerning who receives National Endowment for the Arts grants and who does not?
2) According to the majority, are NEA grant decisions typically content-based?

3) According to the concurrence and dissent, are NEA grant decisions typically content-based?

XVIII. *United States v. American Library Assn.* (p. 1555)

1) What was Congress trying to accomplish with this legislation?

2) Why wasn’t *New York v. Ferber* (the child pornography decision that pre-dated *Ashcroft v. Free Speech Coalition*, p. 1360) dispositive of this case, which involved children’s access to Internet porn?

3) Does this decision remove all future challenges to the Children’s Internet Protection Act (CIPA) in all circumstances?

4) Quite often, child-protective anti-pornography statutes are criminal statutes, either state crimes or (if there are interstate elements) federal crimes. The CIPA was not a criminal statute. Did that matter to the outcome?

XIX. *United States v. O’Brien* (p. 1566)

1) Assume David O’Brien stood in front of a microphone at a rally on these same courthouse steps, denounced the Vietnam War, and called for President Lyndon B. Johnson’s impeachment, but did not burn his draft card. Assume local authorities granted a permit for the rally, and there was no violence or incitement to imminent lawless action. Would the First Amendment have protected O’Brien’s speech?

2) What if instead of burning his draft card or making a speech on the courthouse steps, David O’Brien took out a full-page advertisement in the *Boston Globe* to denounce the war and call for President Johnson’s impeachment? Would the ad have been protected under the First Amendment?

3) Why do you think Mr. O’Brien burned his draft card, rather than merely make a speech or take out a newspaper ad?

4) On its face, was the congressional draft-card-burning statute content-neutral or was it content-based?

5) Did Mr. O’Brien’s act of burning his draft card qualify as symbolic speech, according to the test later enunciated in *Spence v. Washington*, 418 U.S. 405 (1974)? (*Spence* established a two-part test: Did the speaker intend to convey a particularized message, and was there a great likelihood that the message would be understood by those who viewed it?)
6) Assume I do not like your politics, and I want to tell you so. Without your permission, I break into your house, enter your living room in the middle of the night and begin making a speech that wakes you up. What if I enter your living room, remain totally silent, and simply hold a picket sign until you wake up? Under O’Brien’s test for determining when government may regulate or punish symbolic speech (i.e., conduct that meets the Spence test), may I be prosecuted, or does the First Amendment symbolic-speech doctrine protect me?

7) Does the First Amendment accord symbolic speech as much protection as it accords pure speech?

8) What if the city passes an ordinance prohibiting littering in public parks and providing for a $25 fine. You want to protest the ordinance because you often eat box lunches in a local park and you find that littering is much more convenient than cleaning up and carrying the refuse to the nearest garbage can. You protest this ordinance by throwing a paper napkin on the ground, and you are ticketed by a police officer who happened to see you do so, though you had not seen him. No one else was nearby. In municipal court, you claim that throwing the napkin was symbolic speech protected by the First Amendment. Was your conduct symbolic speech?

   a) What if a few people were watching and as you threw down the napkin, you said loudly, “This littering ordinance stinks. This is a free country, and I will litter of I want to.” Is your napkin throwing now symbolic speech? Will your littering and statement enable you to raise a First Amendment claim that beats the $25 fine?

   b) What if you made the statement but did not throw the napkin? Would your statement be protected?

   c) What if the city ordinance prohibited only littering by Democrats?

XX. City of Erie v. Pap’s AM (p. 1573)

1) According to the Court, did the Erie, Pennsylvania ordinance regulate speech, conduct or both? Did the nude dancers (or the establishment’s owners) intend to convey particularized message? Was the message likely to be understood by the people in the audience?

2) What if a “streaker” dances down Main Street naked but totally silent? What if the streaker dances down Main Street naked but shouting “Vote Republican”? Consistent with the First Amendment, could the naked dancer be prosecuted for public indecency under either scenario?

3) Under the O’Brien test, why does the Erie ordinance comport with the First Amendment?

4) If Mr. Pap or one of his nude dancers (with her clothes on) made a speech at a rally
supporting nude dancing, would the First Amendment have protected their expression?

**FREEDOM OF ASSOCIATION**

I. Introduction

1) Assume that in the late 1950s, the Mississippi legislature enacted an ordinance requiring all out-of-state corporations to file an annual registration statement listing the names and addresses of its members or shareholders in the state. The National Association for the Advancement of Colored People refuses to comply and has been fined. You are general counsel of the NAACP. In the enforcement proceeding, what claim would you raise?

2) The First Amendment does not expressly address a right of association. How can this right be justified?

II. *NAACP v. Claiborne Hardware Co.* (p. 1582)

Assume that the *Claiborne* demonstrators had a valid parade permit. During the march, a few protesters threw Molotov cocktails at a local statue. Would the First Amendment permit the arrest of these protesters?

III. *Boy Scouts of America v. Dale* (p. 1586)

1) In the summer of 2005, a nine-year-old girl tried to enroll in a summer baseball league conducted by a local private youth sports program in Illinois. All players in the baseball league were boys, and the program had a separate softball league for girls her age. The program’s commissioner refused to enroll her in the baseball league because she is a girl. The girl’s family has just hired you as their lawyer. What claim would you raise? What defense might the youth sports program raise? Would the youth sports program likely prevail on its defense?

2) What is the right of “intimate association,” and what sorts of groups enjoy it? What is the right of “expressive association,” and what sorts of groups enjoy it?

3) What if the Ku Klux Klan wanted to exclude blacks, or the American Nazi Party wanted to exclude Jews? Can you cite any decisions for the proposition that First Amendment freedom of association would likely permit exclusion? By excluding prospective members, have these groups practiced racial or religious discrimination or does the First Amendment protect their exclusionary practices? Why permit groups like the Klan or the Nazi Party to reject members who would be inconsistent with the group’s expressive message?

4) According to *Dale*’s majority, why did the First Amendment protect the Boy Scouts’ right to exclude gay members?

**FREE EXERCISE OF RELIGION; CHURCH/STATE RELATIONS**
I. Introduction

1) Assume a local school district refuses to permit student religious groups to use classrooms for meetings, though it permits other student groups to do so. What constitutional claims may be raised by the student religious group, and by the school board?

2) What values does the Free Exercise Clause seek to serve? If you were writing the Constitution from scratch, why would you guarantee free exercise of religion? In our society, why should people be able to practice religion freely?

II. Church of the Lukumi Babalu Aye v. City of Hialeah (p. 1839)

1) Suppose Boone County passes a law prohibiting consumption of all alcoholic beverages, and seeks to apply that law to a priest who wanted to use wine in communion or a Jewish family who wants to use wine at a seder dinner. Would the law be constitutional?

2) Now that neutral, generally applicable laws that burden religion do not raise a free exercise claim, why did the Court strike down the Hialeah city ordinance? Would the Free Exercise Clause have permitted the city to prohibit all slaughter of animals, even if it meant the Santerias could not thereafter have freely practiced their religion in the city?

3) Should it matter whether the city of Hialeah targeted one religious group? Assume a Mormon sect announces that its members will openly practice polygamy for now on. The state reacts by enforcing its statute prohibiting all polygamous marriages. May the state ban polygamy? Would this ban be any different from the Hialeah ordinance?

4) Assume that in a show of support for American troops fighting overseas, the city of Columbia enacts an ordinance requiring all public school children to salute the flag in class at the beginning of each school day. Two children refuse to recite the Pledge because they are Jehovah’s Witnesses and they and their parents believe that reciting the Pledge requires them to salute a graven image in violation of their religious beliefs. The children, suspended from school until they agree to recite the Pledge, file suit in federal court challenging the suspension order. In light of Smith and Hialeah, what is their strongest argument?

5) Assume a state enacts a sales tax exemption for “books and periodicals published or disseminated by a religious group that consist wholly of writings advancing the teaching of the group.” Would the exemption statute violate the Establishment Clause?

III. Zelman v. Simmons-Harris (p. 1793)

Does Zelman approve all school voucher programs? After Zelman, what characteristics must a school voucher program have to pass muster under the Establishment Clause?

IV. Mitchell v. Helms (p. 1783)
Which approach did the plurality embrace – strict separation, neutrality or accommodation? Which approach does Justice O’Connor take? Which approach do the dissenters take?

CONGRESSIONAL POWERS

I. McCulloch v. Maryland (p. 134)

1) Does the Constitution expressly grant Congress authority to charter a national bank?

2) What arguments did Chief Justice Marshall make in holding that Congress had authority to create the national bank?

3) Should history matter in determining the existence and scope of congressional authority?

4) Would the Necessary and Proper Clause be open to any interpretation other than the one Marshall gave it?

II. United States v. Morrison (p. 177)

1) According to defendant Morrison (and to the Court), which prong of Commerce Clause jurisdiction determined the outcome?

2) To prove a substantial effect on interstate commerce, what showing must the government make?

3) According to Congress in the Violence Against Women Act (VAWA), why did this federal damages remedy substantially affect interstate commerce? According to the Morrison majority, why weren’t these congressional findings sufficient?

4) Now that the Court has struck down the VAWA civil damages remedy, does the victim have any other potential remedy?

5) After Lopez and Morrison, how do you think the courts would rule on challenges to these federal criminal statutes?:

A) 18 U.S.C. § 2423(b), which makes it a federal crime to cross state lines to engage in any of a wide range of sexual acts with a person under eighteen.

B) 18 U.S.C. § 2252, which makes it a federal crime to transport, ship or receive in interstate commerce for the purpose of selling, any "obscene visual or print medium" if its production involved use of a minor engaging in sexually explicit conduct.
C) 18 U.S.C. § 2261(a)(1), which makes it a federal crime to travel across state lines with intent to injure or intimidate the defendant’s spouse or intimate partner, and who intentionally commits and act of violence that causes bodily injury.

D) 21 U.S.C. § 860(a) – Distributing, possessing with intent to distribute, or manufacturing a “controlled substance” (illegal drug) within 1,000 feet of a school.

E) 16 U.S.C. §§ 1531-44 – Killing an “endangered species” or “threatened species” of animal, even if the species is found within only one state and has no significant commercial or economic value.

III. Gonzales v. Raich (Supp. p. 3)

1) Why may the Supreme Court strike down a proposition approved by a majority of the voters of California?

2) Can you cite a decision (besides Gonzales) for the proposition that the Commerce Clause may reach personal crops grown by an individual for home use, where the crops do not enter the stream of commerce?

3) Which prong of Commerce Clause jurisdiction did Gonzales turn on (instrumentalities, channels, or effects)?

4) According to the majority, was the activity of the two patient-plaintiffs – cultivating marijuana for use in improving their medical conditions – “commercial” in nature?

5) Did the two plaintiffs assert that Congress could never regulate marijuana by legislation under its Commerce Clause authority?

6) As it did in Wickard v. Filburn, Congress found that private use of a crop, taken together with the private use of others, would have a substantial effect on interstate commerce in that crop. Will the Court second-guess Congress? Will the Court scrutinize the Court’s finding closely?

7) According to the Gonzales majority, why was this case different from Lopez and Morrison?

IV. Sonzinsky v. United States (p. 193)

1) Why do you think Congress wanted to tax bookmakers?

2) Do you think a tax would ever fail the Sonzinsky test?

3) Is Sonzinsky’s holding consistent with the language of the Taxing and Spending
Clause?

V.  *United States v. Butler* (p. 196)

1) According to *Butler*, may Congress tax and spend only to carry out powers specifically enumerated in Art. I § 8, or may Congress also tax and spend for unenumerated reasons concerning the “general welfare”?

2) Are there any limits on Congress’s power to tax and spend for the general welfare? What if Congress enacts a statute imposing a tax on wealth transfers by male testators but not by female testators?

VI. *South Dakota v. Dole* (p. 203)

In the late 1960s and early 1970s, Congress became concerned about the prevalence of child abuse and neglect in the United States, and about the states’ willingness or ability to combat it. Congress wanted to compel the states to take measures to encourage people to report suspected abuse or neglect, and to encourage states to deal more effectively with abusers. Could Congress enact reporting acts and other abuse and neglect legislation under the commerce power? How else might Congress get states to follow its wishes by enacting such measures?

**CONGRESSIONAL POWER (OFTEN OVER STATE SOVEREIGNTY)**

I.  *New York v. United States* (p. 231)

1) Why did the Court approve of the incentive involved in this case?

2) Does the Commerce Clause, taken by itself, authorize Congress to regulate disposal of radioactive wastes?

3) What constitutional provision does the majority say the “take title” provision violates?

4) If the Commerce Clause concededly grants Congress authority to regulate disposal of radioactive waste, is the Court’s Tenth Amendment holding here consistent with Chief Justice Marshall’s conclusion in *McCulloch* that the Constitution derives from the people and not from the states?

5) According to Justice O’Connor, why does the 1985 Act violate the Tenth Amendment if the Commerce Clause concededly grants Congress authority to regulate disposal of radioactive waste?

6) According to the majority, what prudential reasons underlie the decision to prohibit the federal government from forcing states to directly administer a federal program?
7) Does this decision leave Congress powerless in the effort to secure state cooperation in administering a federal program? What might Congress constitutionally do if it wants state cooperation in disposing of radioactive wastes?

II. *Printz v. United States* (p. 246)

According to the majority, why was the Brady Handgun Violence Prevention Act unconstitutional?

III. *Seminole Tribe of Florida v. Florida* (p. 263)

1) Will the *Seminole Tribe* decision open the federal courts to more suits against states or their agents, or will it close the federal courts to more suits against state or their agents?

2) May Congress, by statute, abrogate a state’s Eleventh Amendment immunity? What if the plaintiffs file a damage suit directly against the state under the Civil Rights Act of 1964, which Congress enacted pursuant to the Enforcement Clause (§ 5) of the Fourteenth Amendment? What if the plaintiffs (like the plaintiffs in *Seminole Tribe*) file a damage suit directly against a state under a statute that Congress enacted under the commerce power?

IV. *City of Boerne v. Flores* (p. 1206)

1) *Employment Division v. Smith* was a constitutional decision (an interpretation of the Free Exercise Clause), so how could Congress ever expect to overrule that decision with a statute?

2) Because *Smith* was decided under the First Amendment’s Free Exercise Clause, how could § 5 of the Fourteenth Amendment ever authorize Congress to enact the Religious Freedom Restoration Act? What is the constitutional connection between the Fourteenth Amendment and the church’s free exercise claim?

3) According to the majority, what is the key word in § 5 of the Fourteenth Amendment?

4) What did the *Boerne* dissenters (Justices O’Connor, Souter, Breyer) have to say about § 5? Did they agree or disagree with the majority’s interpretation of the section?

V. *Nevada Dep’t of Resources v. Hibbs* (p. 1223)

1) Who won the trial below? Was William Hibbs properly or improperly fired from his state job?

2) What is the test for determining what is valid prophylactic legislation?
3) What was the underlying constitutional violation alleged by Mr. Hibbs?

4) Why was the Family and Medical Leave Act different from the age discrimination act and section 1 of the disabilities act?

STATE REGULATION OF COMMERCE (THE DORMANT COMMERCE CLAUSE)

I. *Pike v. Bruce Church, Inc.* (p. 310)

1) Assume that a month after *Pike*, Congress enacts a statute authorizing states to require that fruits and vegetables grown in-state be packed in that state rather than in another state, provided that the state legislature recites that the measure is a necessary public health measure. Would the congressional statute be constitutional?

2) Now assume that five years before *Pike*, Congress enacted a statute expressly forbidding states from requiring that fruits and vegetables grown in-state be packed in that state rather than in another state. Would a state statute imposing that requirement be constitutional, would it run afoul of the dormant commerce clause, or would it be unconstitutional for some other reason?

II. *Reeves, Inc. v. Stake* (p. 331)

1) Where the state is a market participant, could state favoritism in favor of its own residents be challenged under any other constitutional provisions?

2) Are there any circumstances in which the Commerce Clause may not permit a state, acting as a market participant, to favor its own citizens?

SUPREMACY CLAUSE (PREEMPTION)

What if the Court holds that particular congressional legislation preempts state legislation, but Congress then disagrees and wants to make the state legislation operative? What can Congress do if the decision found express preemption? If the decision found implied preemption?