Anonymous Number __________

Constitutional Law Final Examination
Professor Levy
Fall 2002

INSTRUCTIONS:

1. Read these instructions before starting the examination, but do not read the examination until you are told to start. The examination has 23 pages, printed on both sides of each sheet, counting the instructions and affirmation. Be sure that you have the entire examination. You should also have an answer sheet and a number 2 pencil. The examination is open book; you may use any materials you have brought with you, but you may not use a computer during the examination. You have a total of four hours to complete the examination.

2. The examination consists of 7 fact patterns, each of which is followed by a number of multiple choice questions. There are a total of 55 questions. Answer the multiple choice questions on your answer sheet. Fill out the sheet as follows –

   a. Under Last Name, write “LEVY” and under first name write “CONLAW,” but do ***not*** blacken the corresponding circles. Do not write your name on the answer sheet.
   b. Under I.D. Number, write your anonymous number and blacken the corresponding circles, starting in the leftmost square.
   c. Choose one answer for each question and use a No. 2 pencil to blacken the corresponding letter on your answer sheet. Be sure to blacken circles completely and to erase wrong answers thoroughly; the machine will not count dimpled or hanging chads.
   d. No credit will be given if more than one answer is marked.

3. In evaluating the questions and answers, the following rules apply –

   a. If more than one answer seems correct, choose the best answer. For purposes of this examination, the ***best answer*** is the one that is most detailed and specific, yet still correct.
   b. If an ***unqualified statement*** in an answer is partially correct, but incorrect in some instances or respects, then it is not a correct answer.
   c. A litigant ***should*** or ***could*** make an argument if the argument is plausible under current doctrine, assuming the facts stated in the fact pattern are true, regardless of whether the argument would probably or certainly succeed.
   d. A result ***may*** or ***might*** occur or an argument ***may*** or ***might*** succeed if such an outcome is possible under current doctrine on the stated facts, even if it is not likely or probable.
   e. A result is ***probable*** or an argument would ***probably*** succeed if that outcome is more likely than not to occur, in light of current doctrine on the stated facts.
   f. A result ***should*** occur if the neutral application of current doctrine would ordinarily produce that result assuming the facts stated in the fact pattern are true, even if a court might come to a different conclusion.

4. Put your number (not your name) on your copy of the examination. At the conclusion of the allotted time, I will return to pick up your answers and the examinations. You must return your ***examination*** at the end of the allotted time in order to receive a grade in the course. If you finish before then, you may put your answers and examinations in the box at the front of the room. You may not remove the examination from the room.

5. Complete the affirmation on the last page of the examination, detach it, and place it in the separate envelope at the front of the room. You must submit an affirmation to receive credit for the course.

6. Good Luck!

QUESTIONS:

A. Assume for purposes of questions 1-8 that the hypothetical State of Shock authorizes local governments to provide public utilities, including water, natural gas, and electricity. By statute, Shock specifies that "when a municipality provides a public utility, no other entity may offer competing services within the territory of the municipality." The largest city in Shock is Electra City, which is nestled along the Dynamo River, famous worldwide for its powerful current. Electra City owns a hydroelectric dam and power plant along the Dynamo River. The Organization for Hydroelectric Management (OHM), an agency of Electra City, operates the dam and provides electric service to local residents and businesses as a public utility. OHM's rate structure produces a "cross-subsidy" by charging rates in excess of the market to business customers and using the extra profits to reduce rates for individual consumers. In addition, OHM sells any excess electricity throughout the state and nation at market rates.

Blowhard Windfarms, Inc., is a private corporation in the State of Breezia, which borders Shock across the Dynamo River. Blowhard produces electricity using wind generators fueled by the region's strong prevailing winds. Blowhard is prevented from selling electricity to potential customers in Electra City by Shock's no competition law, although it is free to sell electricity in many other parts of the state. Blowhard's fees for electricity are significantly lower than OHM's rates for business customers.

Meg A. Watt is a resident of the State of Exhaustion, which also borders on Shock. Exhaustion is a poor state with limited resources that suffers frequent electricity shortages. Ms. Watt is an artist whose work involves extensive electroplating and other media using large quantities of power. After a series of brownouts ruined some of her work, she contracted with OHM for electricity service. Pursuant to the contract, OHM is to provide "continuing electric service," and is required to indemnify Watt if her work is damaged by the failure to do so. Some time after the contract was formed, Electra City adopted a local preference ordinance requiring OHM to meet the needs of local customers first in the event of electricity shortages. During the peek summer months, a shortage arose and OHM gave preference to local customers, with the result that Watt had insufficient power and lost some important work.

1. If Blowhard challenges the state law banning competition with public utilities run by local governments as a violation of the "dormant" Commerce Clause –

   a. The dormant Commerce Clause would not apply because Blowhard is a corporation.
   b. The dormant Commerce Clause would not apply because there is no commerce involved.
   c. The dormant Commerce Clause would not apply because Electra City is acting as a market participant.
   d. All of the above.
   e. None of the above.

The correct answer is "e." Answer "a" is incorrect because the DCC does apply to corporations (the P & I Clause of Article IV does not). Answer "b" is incorrect because the sale of electricity is commerce. Answer "c" is also incorrect, even though there is a market participant exception to the

*DCC. The challenge here is to the state **law banning competition**, and the city's role as a market participant is irrelevant to that challenge. That "d" is incorrect follows from what has already been said.*

2. If Blowhard challenges the state law banning competition with public utilities run by local governments as a violation of the Privileges and Immunities Clause of Article IV –

   a. The Privileges and Immunities Clause of Article IV would not apply because Blowhard is a corporation.
   b. The Privileges and Immunities Clause of Article IV would not apply because Electra City is acting as a market participant.
   c. The Privileges and Immunities Clause of Article IV would not apply because the law applies to both in and out of state residents.
   d. All of the above.
   e. None of the above.

The correct answer is "a," because the P & I Clause protects "citizens" and corporations are not citizens. Answer "b" is incorrect because there is no market participation exception to the P & I Clause. Answer "c" is incorrect because under Camden, a law may violate the P & I Clause even though it applies to some in state residents if it completely excludes citizens of other states. It follows then, that "d" is incorrect because "b" and "c" are incorrect, and that "e" is incorrect because "a" is correct.

3. Assuming (without indicating the correct answer to question 1) that the dormant Commerce Clause applies, the state law banning competition with local utilities is probably –

   a. Nondiscriminatory, if some in state companies are also affected by the ban.
   b. Nondiscriminatory, if Electra City is acting as a market participant.
   c. Discriminatory, if it directly regulates interstate commerce and there is no overriding local interest.
   d. Discriminatory, if it blocks the importation of electricity from out of state for protectionist purposes.
   e. Facially neutral but discriminatory in practical effect, if it burdens more out of state businesses than in state businesses.

*The correct answer is "d," because a protectionist import ban is paradigmatic case of discrimination under the DCC. Answer "a" is incorrect because under Dean Milk a law may violate the P & I Clause even though it applies to some in state residents. Answer "b" is incorrect because Electra City's status as market participant is irrelevant to whether the law **discriminates** even if it sometimes means that a discriminatory law is valid. (See Reeves v. Stake). Note, however, that the challenge here is to the state law banning competition, and the city's role as a market participant is irrelevant to that challenge. Answer "c" is incorrect because neither direct regulation nor the presence of an overriding state interest is relevant to whether a law is **discriminatory**, even if they may be relevant to the application of balancing to nondiscriminatory laws. Answer "e" is incorrect. Even though one might characterize the law as facially neutral but discriminatory in practical effect, the fact that it burdens more out of state businesses than in state business would not, standing alone, be sufficient to support that result; i.e., it is false in some cases. Thus, "d" is clearly a better answer than "e."*

4. Assuming (without indicating the correct answer to question 3) that the law banning competition is regarded as nondiscriminatory –

   a. There is no dormant Commerce Clause violation because nondiscriminatory laws are valid.
   b. The law is valid if the state's purpose of providing cost-effective public utilities for residents is legitimate and the ban is rationally related to it.
   c. The law is valid unless the burden on interstate commerce clearly outweighs the local benefit of cost-effective public utilities for residents.
   d. The law is valid unless it restructures interstate electricity markets in ways that benefit local firms.
   e. The law is valid only if providing cost-effective public utilities for residents is a legitimate and nonprotectionist purpose and the law is narrowly tailored to meet it.

The correct answer is "c," which simply restates the current balancing test for neutral laws in terms of the facts of the case. Answer "a" is simply incorrect, because neutral laws may violate the DCC under the Pike test. Answer "b" is incorrect, because it is the application of the rational basis test, which is not the correct test for neutral laws under the DCC. Answer "d" is incorrect because the restructuring of markets in ways that benefit local companies does not establish a DCC violation, as indicated in Minnesota v. Cloverleaf Creamery and Exxon v. Maryland. Answer "e" is incorrect because is apples strict scrutiny, which is the incorrect test for neutral laws.

5. Assuming (without indicating the correct answer to question 3 above) that the law banning competition is regarded as discriminatory –

   a. There is a per se violation of the dormant Commerce Clause without regard to any possible state purposes.
   b. The law is invalid unless providing cost-effective public utilities for residents is a legitimate and nonprotectionist purpose and the law is narrowly tailored to meet it.
   c. The law is invalid unless the local benefit of cost-effective public utilities for residents clearly outweighs the burden on interstate commerce.
   d. The law is invalid because providing cost-effective public utilities for residents is an impermissible purpose under the dormant Commerce Clause.
   e. Both answer "b" and answer "d" are correct.

The correct answer is "b," which applies DCC strict scrutiny to the facts, and strict scrutiny is the correct test for discriminatory laws. Answer "a" is incorrect, even though the Court has sometimes indicated that there is a ***nearly*** *per se rule against discriminatory laws, because some laws pass strict scuriny. (See Maine v. Taylor). Answer "c" is incorrect because it appliues the balancing test for neutral laws. Answer "d" is incorrect, because there is nothing illegitimate about the purpose. Answer "e" is incorrect because answer "d" is incorrect.*

6. If Meg A. Watt challenges Electra City's ordinance giving a preference to local customers as a violation of the dormant Commerce Clause –

   a. Electra City should argue that the ordinance discriminates against both in and out of state customers and the rational basis test applies to neutral laws.
   b. Electra City should argue that it is acting as a market participant and its rules do not have any regulatory effect.
   c. Watt should argue that the ordinance is facially discriminatory and therefore per se invalid under the dormant Commerce Clause regardless of the City's purpose.

d. Watt should argue that the market participation doctrine does not apply when a market participant abuses its monopoly on the market.
e. Both answer "b" and answer "d" are correct.

The correct answer is "b," because these arguments might be successful under current doctrine. Here the challenge is to the City's preference for local customers, which is analogous to the preference upheld in Reeves. The City should also argue that the rule has no regulatory effect to distinguish Wunnicke. Answer "a" is wrong because local preferences are discriminatory under Dean Milk and because even if the law was neutral, the rational basis test would not apply; the Pike balancing test would. Answer "c" is incorrect, because even Watt should argue that the law is discriminatory, that would not make it per se invalid. (See Maine v. Taylor). Answer "d" is incorrect because this argument was rejected in Reeves, where there was also a monopoly. Answer "e" is incorrect because answer "d" is incorrect.

7. If Meg A. Watt challenges Electra City's ordinance giving a preference to local customers as a violation of the Privileges and Immunities Clause of Article IV, her best argument with for applying the Clause is –

a. That access to public utilities is a "privilege and immunity" protected by the Clause.
b. That the loss of electric power interfered with her pursuit of a calling, which is a "privilege and immunity" protected by the Clause.
c. That the loss of electric power interfered with her artistic expression, which is within the fundamental right of free speech protected by the Clause.
d. That the destruction of artworks interfere with a property right, which is within the "privileges and immunities" protected by the Clause.
e. That it is unnecessary to establish interference with a fundamental right under the Clause because the ordinance is facially discriminatory.

*The correct answer is "b," because the pursuit of a calling has been recognized as a privilege of state citizenship for purposes of the P & I Clause. See Toomer, Camden, and the bar admission cases. Answer "a" is incorrect because there is no suggestion of support in the cases for this proposition. Answers "c" and "d" identify rights protected by other constitutional provisions, but not necessaril;y by the P & I Clause. While it might be possible to argue that these rights, as well as access to public utilities should be fundamental rights under the Clause, the **best** argument is "b" because it is based on a recognized right. Answer "e' is an incorrect statement of the law. See Baldwin v. Monatana Fish & Widlife.*

8. If Meg A. Watt challenges the ordinance as a violation of the Contracts Clause –

a. The Clause would apply only if the ordinance retroactively impairs her contract with OHM by relieving it of the obligation to provide electricity.
b. The ordinance may be valid even if there is a substantial retroactive impairment of her contract with OHM.
c. The courts would apply a form of elevated scrutiny to the ordinance because it relieves the city (through OHM) of its own contractual obligations.
d. All of the above.
e. None of the above.

The correct answer is "d" because answers "a", "b", and "c" are all correct. A violation of the Contracts Clause does require a retroactive impairment. Even if there is a substantial retroactive

impairment, the law is valid if the impairment is incidental to a valid police power action. Under United States Trust v. New Jersey, *heightened scrutiny would apply to a law relieving the state or the city of its own obligations because of the possible conflict of interest. Answer "e" is obviosuly incorrect.*

B. The following hypothetical facts apply to questions 9-17. Assume that the hypothetical State of Recession was suffering from severe budgetary shortfalls as a result of a recent economic downturn, which caused tax revenues to fall far below initial budgetary estimates. Because the state's constitution requires a balanced budget, Governor Sonya Littlecott imposed budget rescissions on various state entities. The state's university system received some of the largest cuts; its budget was subjected to a 25% reduction. Intellectual Oblivion University (IOU), the flagship institution of the state university system, was particularly hard hit. Chancellor Passin D. Buck declared a state of financial emergency, laid off staff and faculty, and imposed other austerity measures. Among these measures was a "scholarship rescission," pursuant to which certain academic scholarships funded by the state moneys were cut retroactively by 25% for the Spring Semester.

Wanda Fullride was a student at IOU whose scholarship was cut by Chancellor Buck's austerity plan. She was a brilliant student who earned a full four year scholarship based on her outstanding high school record and SAT scores. Fullride was outraged at the reduction of her scholarship, especially when she learned that some scholarships had not been cut. When she inquired about the reasons for the difference in treatment, Chancellor Buck sent Fullride a letter explaining that merit-based scholarships had been cut, but that need-based scholarships had been spared because "unanticipated scholarship reductions would have an especially devastating effect on needy students." Dissatisfied with this explanation, Fullride launched a public campaign intended to force Chancellor Buck to change his policy. Fullride distributed petitions, attempted to organize protests, and sent out a series of "spam" e-mails to students. These mass unsolicited e-mailings went out daily to all students and faculty on the IOU campus, and became increasingly abusive and caustic toward Chancellor Buck, accusing him of "conspiring to undermine the pursuit of intellectual merit at IOU." The language in the e-mails included various insults to the Chancellor and was laced with profanity.

In response to the e-mail campaign, IOU revoked Fullride's access to the university e-mail server and closed her e-mail account. An IOU administrative hearing body upheld these actions as justified under the IOU e-mail policy, which states that "Use of the university e-mail system is a privilege open to all students and faculty at the university. However, this privilege can be revoked if it is abused." The administrative hearing body concluded that although Fullride's mailings did not overload the server, "unsolicited mass e-mails by individual students, if allowed to continue, would soon overwhelm the system and impede its use for legitimate business." The hearing body distinguished mass e-mails by the university administration and recognized student organizations, which could continue to send mass e-mails "related to official university business."

Outraged, Fullride sued IOU, challenging both the reduction in her scholarship and the revocation of her e-mail privileges. During the discovery phase of the litigation, she sought and obtained information regarding the scholarships that were and were not cut. This information revealed that approximately 90% of state-funded, need-based scholarships had been awarded to

racial and ethnic minorities, while 90% of merit-based scholarships went to whites. In addition, there was a memorandum from IOU's Affirmative Action Office advising Chancellor Buck that "cutting need-based scholarships to minority students would have a devastating impact on IOU's efforts to recruit and retain minority students."

9. If Fullride argued that the reduction in her scholarship violated due process and the court applies the rational basis test –

   a. The reduction would probably be upheld because protecting needy students is a legitimate purpose and the decision to spare need based scholarships is reasonably related to it.
   b. The reduction would probably be invalid because preferring needy students can only be explained by animus against the wealthy, and that is an illegitimate purpose.
   c. The reduction would probably be upheld because the Due Process Clause does not apply to education.
   d. The reduction would probably be invalid because it is wholly arbitrary to cut merit scholarships and not need-based scholarships.
   e. Both answer "b" and answer "d" are correct.

Answer "a" is correct, because it is a correct application of the rational basis test in terms of both purpose (ends) and reasonable relation (means), and the test usually results in upholding a law. Answer "b" is incorrect because even if animus against the wealthy is an illegitimate purpose under the DP Clause (it is illegitimate under equal protection, see <u>*Romer*</u>*, but the issue has not been addressed under DP), that is not the only explanation for helping the needy. Answer "c" is incorrect because the DP Clause applies to education, even though education is not a fundamental right. Answer "d" is incorrect even though a wholly arbitrary action should fail the rational basis test because it is not wholly arbitrary to cut funds for the wealthy before the needy (even if there may be good policy arguments against it). Answer "e" is incorrect because answers "b" and "d" are incorrect.*

10. If Fullride argued that the reduction in her scholarship violated equal protection –

   a. Strict scrutiny should apply because the rescission discriminated on the basis of wealth, which is a suspect classification.
   b. Strict scrutiny should apply because the reductions disproportionately benefitted minority students.
   c. The rational basis test would apply because the law is facially neutral as to race and wealth is not a suspect classification.
   d. Strict scrutiny should apply because the reductions disproportionately benefitted minorities, unless IOU can establish that there are neutral reasons for preferring need-based scholarships.
   e. The rational basis test should apply because the reduction is based on a facially neutral criteria, unless Fullride can establish that the actual purpose of sparing need-based scholarships was to benefit racial minorities.

Answer "e" is correct. Under <u>*Washington v. Davis*</u>*, the rational basis test applies to facially neutral laws with disproportional racial effects unless a racially discriminatory purpose can be proved. Answer "a" is incorrect because wealth is not a suspect classification. See* <u>*Dandridge v. Williams*</u>*. Answer "b" is incorrect under* <u>*Washington v. Davis*</u>*. Answer "c" is incorrect because it is false if the Fullride proves discriminatory intent, even though would be true if discriminatory intern is not shown. Answer "d" is incorrect because disproportionate impact does not trigger strict scrutiny and the burden of proving neutral reasons does not ordinarily rest on the defendant.*

11. If Fullride wants to argue that Chancellor Buck's decision constituted racial discrimination in violation of the Equal Protection Clause –

   a. The courts would not look for hidden motives behind the Chancellor's facially neutral decision.
   b. The racially disparate impact, standing alone, is some evidence of discriminatory intent.
   c. Because there is disparate impact, the burden would shift to the Chancellor to offer a race neutral explanation for the decision.
   d. The memorandum from the Office of Affirmative Action would be evidence of a race-based purpose, if it can be shown that the Chancellor relied on it in some way.
   e. Both answer "b" and answer "d" are correct.

Answer "e" is correct because both answers "b" and "d" are correct. Answer "b" is correct because the disparate impact is ***some*** *evidence of intent, although it is usually not enough to prove intent standing alone, absent a very strong pattern. Answer "d" is correct because the letter expressly embraces a race-based purpose, but that purpose can only be attributed to the Chancellor if he relied on it. Answer "a" is incorrect because courts do look for motives in disparate impact cases; proof of discriminatory intent is required. Answer "c" is incorrect as a matter of general constitutional law, although such a burden shifting is appropriate under some statutory claims and for a narrow category of constitutional cases involving the use of peremptory challenges to exclude jurors. See Batson.*

12. Assuming (without indicating the correct answer to question 10 or 11) that IOU defended the differential reductions as part of an affirmative action plan to increase minority enrollment–

   a. It would probably lose, because racial classifications are per se invalid, even if they benefit minorities.
   b. It would probably lose, because strict scrutiny would apply to race-based affirmative action and no state action ever survives strict scrutiny.
   c. It may prevail even though strict scrutiny applies, because increasing academic diversity has been recognized as a compelling government interest.
   d. It may prevail even though strict scrutiny applies, if the preference is a narrowly tailored remedy for past discrimination at IOU.
   e. The outcome could go either way because intermediate scrutiny applies to affirmative action.

Answer "d" is correct, because it correctly states the current doctrine under Croson. Answer "a" is incorrect, even though IOU would probably lose, because racial calssifications are not per se invalid; strict scrutiny applies. Answer "c" is incorrect, even though SS applies and academic diversity ***might*** *be a compelling interest, because that purpose has not yet been* ***recognized*** *as compelling. Answer "e" is incorrect, even though the outcome could go either way, because strict, not intermediate scrutiny applies to race-based affirmative action.*

13. If Fullride challenged the termination of her e-mail privileges as a violation of the First Amendment –

   a. The First Amendment would probably not apply because e-mail did not exist at the time of the adoption of the amendment and the Framers therefore did not expect it to be protected.
   b. Because the server is owned by IOU, the First Amendment does not afford any right of access and IOU has an absolute right to exclude anyone it wants
   c. The e-mail system probably is not a traditional public forum because e-mail has not been around for a very long time.
   d. Because communications systems have traditionally been open to all, the e-mail systems would

probably be regarded as a traditional public forum.

e. None of the above.

Answer "c" is correct even though the e-mail system might be some kind of public forum; it is not a traditional public forum because e-mail is a fairly recent development. This proposition is straight out of Lee. Answer "a" is incorrect even though the framers probably did not anticipate e-mail, because the first amendment protects many forms of communication that did not exist and were not anticipated at the framing. Answer "b" is incorrect because ownership by a government entity does not confer an absolute right to exclude; even if the server is not any kind of public forum IOU cannot exclude solely because it wants to suppress a particular viewpoint. See Perry. Answer "d" is incorrect because this kind of analogy was rejected in Lee (rejecting "transportation center" analogy). Because answer "c" is correct, answer "e" is incorrect.

14. Assuming (without indicating the correct answer to question 13) that the e-mail system is not a traditional public forum –

a. IOU can impose reasonable restrictions designed to preserve the system for its intended use.
b. IOU may have created a limited purpose public forum because it opened the system to students.
c. IOU cannot exclude Fullride merely because it wants to suppress her criticism of Chancellor Buck.
d. All of the above.
e. None of the above.

Answer "d" is correct, because answers "a", "b" and "c" are correct. Answers "a" and "c" restate the doctrine for nonpublic forums under Perry and its progeny. Answer "b" is correct even though the limited purpose public forum concept is pretty indistinct, because it accruately described the circumstances under which a limited purpose public forum might arise. See Forbes. Answer "e" is incorrect because "a", "b", and "c" are correct.

15. In evaluating the anti-spam rule, a court would probably conclude that –

a. The rule is a content neutral time, place, and manner regulation.
b. The rule is content based, because classifying e-mail as spam implies disapproval of the message.
c. The rule is viewpoint based, because it makes exceptions for some official messages.
d. The rule regulates conduct and not speech.
e. The rule is content neutral, because e-mail spam is annoying.

The correct answer is "a" because the spam is characterized as unsolicited mass e-mailings, which is unrelated to the content of the message. Answer "b" is incorrect, because the rule is unrelated to the content of the spam e-mails – it can be applied without knowing their content . While most spam messages may be unwanted and the term "spam" (like junk mail) has negative connotations, the negative implications have no impact on the application of the rule. Answer "c" is incorrect under Perry, in which differential access based on official status was not regarded as viewpoint based. Answer "d" is incorrect even though there is a conduct component to e-mail, because e-mail is mainly a communicative act. All speech has some conduct component. Answer "e" is incorrect because content neutrality is unrelated to whether speech is annoying or offensive. If the speech is annoying because of its content, then regulating it on that basis would be content based. (See Cohen).

16. Assuming (without deciding the correct answer to questions 13 or 15) that the e-mail system is a public forum and that IOU's revocation of e-mail privileges was based on opposition to the content of Fullride's messages –

a. IOU may nonetheless prevail because profanity is unprotected speech.
b. IOU may nonetheless prevail because the insults to the Chancellor are "fighting words" and fighting words are unprotected speech.
c. IOU may nonetheless prevail because Chancellor Buck is a public figure who receives special protection against defamatory statements.
d. IOU should lose because content based restrictions on speech are per se invalid.
e. None of the above.

The correct answer is "e" because the other answers are all incorrect. Answer "a" is incorrect because profanity is protected. See <u>Cohen</u>. *Answer "b" is incorrect because fighting words must be face to face communications likely to provoke an immediate violent reaction. Answer "c" is incorrect because public figures receive less protection against defamation, not more. See* <u>New York Times v. Sullivan</u>. *Answer "d" is incorrect because content based restrictions are not per se invalid, but may be upheld under strict scrutiny or under various low value speech doctrines.*

17. Assuming (without indicating the correct answer to questions 13) that the e-mail system is a public forum, the ban on "abusing" the system –

a. May be invalid because it is too vague.
b. May be valid because free speech rights can be revoked if they are abused.
c. May be upheld as a reasonable regulation to preserve the forum for its intended use.
d. All of the above.
e. None of the above.

The correct answer is "a" because the term abuse is arguably too vague to provide notice as to what speech is prohibited and may "chill" protected speech. Answer "b" is incorrect even though particular abuses of free speech rights (e.g., illegal advocacy) may be banned under some circumstances, that does not mean that free speech rights can be revoked, a proposition for which there is no authority. Answer "c" is incorrect because the rule stated applies to nonpublic forums or limited purposes public forums, but not a full public forum. Answer "d" is incorrect because answers "b" and "c" are incorrect; answer "e" is incorrect because answer "a" is correct.

C. Assume for purposes of questions 18-26 that Congress passed and the President signed the Literacy and Educational Access and Resource Normalization Act (LEARN). In legislative hearings held in conjunction with the deliberations on LEARN, Congress heard testimony and received statistical data summarizing nationwide funding patterns. Congress also heard expert testimony from academics and educational professionals concerning the impact of inadequate funding on educational performance in poor districts. Based on these hearings, Congress expressly found in section 1(a) of LEARN that:

(1) funding for school systems throughout the country varies dramatically according to the wealth of the district;
(2) funding disparities are particularly stark when comparing predominantly minority inner city districts with districts in surrounding suburbs, which are predominantly white;
(3) rural districts, regardless of their race, are funded at the lowest overall levels;
(4) inadequate funding often deprives children of their fundamental right to a basic education simply because they live in a poor district;
(5) inadequate education has an adverse effect on the economy and reduces the flow of interstate commerce;
(6) these funding disparities are not reasonably related to any legitimate purpose.

Section 1(b) of LEARN declares as its purpose "to ensure that states provide equitable and sufficient funding of public education so that all children in the state, regardless of wealth, receive an adequate public education." Section 2 of LEARN creates a private right of action against a state for failure to provide an adequate education. Under this provision, if a school district fails to meet funding and performance standards promulgated by the Department of Education (DOE), any student can sue the state for the costs of tuition at a private school of his or her choosing within the state.

The hypothetical State of Ignorance is a poor and largely rural state that has the lowest levels of educational funding in the nation. Its legislature refused to increase funding, even after the adoption of LEARN, and several of its districts failed to meet DOE standards. Juan Tuneaux is an honors student in one of the failing districts who has been admitted to Toney Preparatory Academy, an expensive but outstanding private high school in the state. He sued the state for the tuition money.

18. If Ignorance argues that LEARN is unconstitutional because it exceeds the scope of congressional authority –

    a. It will succeed if LEARN is beyond the scope of the commerce power.
    b. It will succeed if LEARN is beyond the scope of the power to enforce the 14th Amendment.
    c. It will succeed if LEARN is beyond the scope of the spending power.
    d. It will succeed if LEARN is beyond the scope of any one of the powers identified.
    e. It will succeed only if LEARN is beyond the scope of any of Congress's powers.

The correct answer is "e," because a law is within the scope of congressional authority if it is within the scope of any of the enumerated powers (provided it does not violate another constitutional provision). Thus, answers "a," "b," and "c" and "d" are incorrect because even if a law is beyond the scope of one of Congress's power, it may still be within the scope of congressional authority under some other power.

19. If Tuneaux defends LEARN as within the scope of the commerce power under *Lopez*, he probably would –

    a. Prevail, because education has a substantial effect on interstate commerce.
    b. Prevail, because education is an economic activity and its cumulative or aggregate effects will be considered in determining whether there is a substantial effect on interstate commerce.
    c. Prevail, because congress made appropriate findings in the act and it therefore does not matter whether education is an economic activity.
    d. Lose, because *Lopez* did not consider the cumulative or aggregate effects of education and there is no jurisdictional nexus requirement in LEARN.
    e. Lose, because education is a traditional state function and therefore beyond the scope of the commerce power.

The correct answer is "d," because that answer most precisely restates the current doctrine under Lopez. Lopez narrowed the consideration of cumulative or aggregate effects (see Wickard) to activities that are economic or commercial in character, and if education was not commercial or economic in Lopez it should not be commercial or economic here. Lopez indicates that when the cumulative effects are not considered, a jurisdicational nexus requirement (i.e., one that requires some connection to interstate commerce in each case for the federal statute to apply) can assure that there is a substantial effect in individual cases. In the absence of either cumulative effects or a jurisdictional nexus, it is unlikely (though not impossible) for the statute to be within the scope of

the commerce power, if appropriate findings are made by Congress (although under Morrison these findings cannot relate to cumulative effects). Answer "a" is incorrect because this proposition was expressly rejected in Lopez, because it would eliminate education as a traditional realm of state authority. Answer "b" is incorrect because the Court declined to consider the cumulative effects of education in Lopez. Answer "c" is incorrect because congressional findings here go to aggregate or cumulative effects, which are not relevant under Morrison. Answer "e" is incorrect, although education as a traditional state function was a factor in Lopez. Standing alone, this factor does not tell us much about likely outcomes, because legislation that is within the scope of the commerce power is not invalid merely because it regulates a traditional area of state authority.

20. Assuming that congressional regulation of education is otherwise within the scope of the commerce power, LEARN –

    a. Probably exceeds the scope of the commerce power because it compels the states to implement federal policy through legislative and executive action.
    b. Probably exceeds the scope of the commerce power because it regulates states as states in their corporate capacity.
    c. Probably exceeds the scope of the commerce power because it creates a cause of action against the state in violation of state sovereign immunity.
    d. All of the above.
    e. Answer "a" and answer "c" are correct.

Answer "e" is correct because answers "a" and "c" are correct. Under New York v. United States and Printz v. United States, under the commerce power, Congress may not commandeer the states by compelling them to legislate or execute federal law, which LEARN does by coercing states to fund education at federally specified levels. Under Seminole Tribe and Alden Congress may not abrogate state sovereign immunity pursuant to the commerce power. Answer "b" (and therefore answer "d" as well) is incorrect because under Garcia, which was distinguished but not overrules in New York v. Unites States, under the commerce power Congress may regulate states in their corporate capacity through generally applicable legislation.

21. If Tuneaux defends LEARN as within the scope of congressional power to enforce the Fourteenth Amendment, he should argue that LEARN is a measure to enforce the Equal Protection Clause because –

    a. The denial of an adequate education is a violation of a fundamental right for equal protection purposes.
    b. Wealth discrimination violates the Equal Protection Clause.
    c. Any law that classifies people and treats them differently violates the Equal Protection Clause.
    d. Congress could find that unequal funding is the product of racially discriminatory motives.
    e. All of the above.

Answer "d" is correct, because that rationale was sufficient to uphold the law in Katzenbach v. Morgan. Answer "a" is incorrect because the Court has consistently rejected the contention that education is a fundamental right. See Dandridge, Rodriguez, Plyler v. Doe. Answer "b" is incorrect because the Court has also rejected wealth as a suspect classification (Dandridge & Rodriguez) and also because, even if wealth were a suspect classification, the use of a suspect classification does not constitute a per se violation of equal protection. Answer "c" is completely wrong. Answer "e" is incorrect because answers "a", "b", and "c" are incorrect.

22. If LEARN is defended on the theory that wealth discrimination in providing an adequate education is arbitrary and irrational in violation of the Equal Protection Clause, it will probably be –

    a. Upheld because requiring adequate funding is rationally related to preventing or remedying this violation.
    b. Upheld because states have an affirmative constitutional duty to provide an adequate education.
    c. Invalidated because there can be no equal protection violation in the absence of a suspect classification.
    d. Invalidated because the law is not narrowly tailored to remedying this violation.
    e. Invalidated because under *Kimel* states may generally rely on classifications that are not suspect.

The correct answer is "e," because it correctly applies the analysis in Kimel, which indicated that it was rational for states to rely on age. Answer "a" is a ***possible****, but not* ***probable*** *result, and therefore incorrect. In theory, this argument could meet the test for legislation under § 5 of the 14th Amendment, but it did not work in either Kimel (which we read) or Garrett (which we did not). Answer "b" is incorrect both as to the probable result and, more obviously, the rationale suggested – states do not have an affirmative constitutional duty (under the US constitution, which is all the 14th Amendment enforces) to provide an adequate education. Answer "c" is incorrect even though the result suggested is correct, because the rationale is false, under Romer and the fundamental rights cases, there are equal protection violations without suspect classifications. Answer "d" is incorrect because it states the wrong test, SS, instead of the City of Boerne test, congruent and proportional.*

23. Assuming (without indicating the correct answer to question 21 or 22) that LEARN is otherwise within the scope of the power to enforce the Fourteenth Amendment, LEARN –

    a. Probably is within the scope of the power to enforce the Fourteenth Amendment even if it compels the states to implement it through legislative and executive action.
    b. Probably is within the scope of the power to enforce the Fourteenth Amendment even if it regulates states as states in their corporate capacity.
    c. Probably is within the scope of the power to enforce the Fourteenth Amendment even if creates a cause of action against the state in violation of state sovereign immunity.
    d. All of the above.
    e. Answer "a" and answer "c" are correct.

Answer "d" is correct (and answer "e" is incorrect) because answers "a", "b", and "c" are correct. Answer "c" is the clearest, because this exception was expressly recognized in Alden. Answer "a" is less clear but probably follows from the same "later in time" rationale as in Alden, a point we discussed in class. Answer "b" follows from the text of the 14th Amendment itself, the Alden reasoning, and Garcia.

24. If the provisions of LEARN are attached as conditions on the receipt of federal funding for education, the State should argue that –

    a. LEARN is unconstitutional because Congress cannot use conditional spending requirements to regulate matters beyond the scope of the commerce power.
    b. LEARN is unconstitutional because Congress cannot use conditional spending to induce states to implement federal policies.
    c. LEARN is unconstitutional because Congress cannot use conditional spending to induce states to waive sovereign immunity.

d. LEARN is unconstitutional because education is a traditional state function and the spending is therefore not "for the general welfare."
e. None of the above.

The correct answer is "e" because all of the other answers are incorrect. Answer "a" is incorrect because Dole *explicitly states that the spending power is not limited by the commerce power. Answer "b" is incorrect because* New York v. United States *explicitly states that Congress may induce implementation through conditional spending. Answer "c" is incorrect because* Alden *explicitly states that it Congress may induce waiver through conditional spending. Answer "d" is incorrect because the concept of "general welfare" does not exclude traditional state functions.*

25. If the provisions of LEARN are attached as conditions on the receipt of federal funding for education, under the *Dole* test for conditional spending –

a. The conditions must be congruent and proportional to the money provided.
b. The conditions cannot be unrelated to the purposes of the spending program.
c. The conditions are inherently coercive because no state can afford to turn down federal money.
d. The conditions must be unambiguously stated.
e. Answer "b" and answer "d" are both correct.

The correct answer is "e" because both answers "b" and "d" correctly state components of the Dole *test. Answer "a" is incorrect because the congruent and proportional test applies the the 14th Amendment power, not conditional spending. Answer "c" is incorrect because that proposition was rejected in* Dole.

26. The provisions of LEARN are most likely to be within the scope of –

a. The commerce power.
b. The power to enforce the Fourteenth Amendment.
c. The spending power, if they are attached as conditions on spending.
d. Answers "a", "b", and "c" are equally likely.
e. LEARN is beyond the scope of any of the identified powers.

The correct answer is "c" because there are no serious problems for the provisions under the spending power, but there are serious problems under other powers. Answer "a" is incorrect because LEARN has serious commandeering and sovereign immunity problems under the commerce power. Answer "b" is incorrect because under Kimel *it is unlikely that Congress may regulate the state's use of nonsuspect classification. Answer "d" for the reasons stated above. Answer "e" is incorrect because (under current doctrine) LEARN is probably within the scope of spending power.*

D. The following hypothetical facts apply to questions 27-34. In the Summer of 2003, after months of secret negotiations, President Bush announced the formation of a new international organization, officially named the "Antiterrorism League," but more commonly known as the Bush League. The league consists primarily of staunch U.S. allies who, pursuant to the founding agreement, undertook to "provide mutual assistance in the war on terrorism," including sharing of intelligence information, technological and financial aid, logistical support, and military personnel for "peacekeeping missions and anticipatory self-defense." The President did not submit this agreement to the Senate for treaty ratification, nor did he seek any congressional authorization, either before or after the making the agreement. Although some congressional leaders spoke in support of the Bush League and there were a few critics, no formal action was taken, either for or against the League.

After several terrorist attacks on tourist sites in Bush League member countries that caused numerous casualties, a few of whom were American tourists, the League accused Asi Noweevel, the leader of Koraqistan (a hypothetical country), of harboring the terrorist organizations claiming responsibility for the attacks. Under the urging of President Bush, a multilateral force of Bush League military personnel led by the United States invaded Koraqistan, overwhelmed the Koraqistani army, deposed Noweevel, and installed a friendly regime. The multilateral force continued to occupy Koraqistan in a "peacekeeping role." The invasion provoked some opposition in the United States, particularly when American forces suffered some casualties, and Congress held hearings on the invasion. As part of these hearings, the relevant Committees subpoenaed documents and sought testimony concerning the formation of the Bush League and the decision to invade Koraqistan, including the evidence on which the accusations against Noweevel and Koraqistan were based. The Bush administration declined to produce the documents, emphasizing that the materials contained information that would permit the identification of crucial intelligence sources. Congress challenged the President's assertion of executive privilege in federal court.

As the hearings dragged on and the occupation of Koraqistan continued, terrorist organizations targeted the United States for attack. Ultimately, a successful suicide bombing in Los Angeles killed a dozen US citizens and injured many more. The bombing produced a dramatic shift in the politics of the moment. Congress discontinued the hearings and instead quickly adopted the Presidential Authorization for National and International Counterterrorism Act (PANIC). PANIC declares that "a national emergency of unprecedented scope requires extraordinary presidential authority to combat terrorism," and authorizes President Bush to take "any measures, foreign or domestic, that he deems advisable to combat terrorism." Pat Seefus, an antiwar activist who opposed all of President Bush's actions and PANIC, filed suit in federal court.

27. In defending his assertion of executive privilege, the President should argue that –

a. The need for secrecy in the war on terrorism outweighs the congressional interest in the information sought.
b. The need for secrecy is paramount because Congress has no valid constitutional interest in obtaining the information sought.
c. Executive privilege cases inherently present nonjusticiable political questions because they pit the President against Congress.
d. The executive privilege of the President is absolute.
e. All of the above.

The correct answer is "a" because it incorporates the current balancing approach to executive privilege. Answer "b" is incorrect, even though the need for secrecy may be paramount, because Congress does have a valid interest in the information pursuant to its constitutionally assigned role in foreign relations (war declaration, treaty confirmation, etc.) Answer "c" is incorrect insofar as the Court has heard the merits of two prominent executive privilege cases and a conflict between the President and Congress does not automatically create a political question. Answer "d" is incorrect because the first Nixon case rejected absolute privilege. Answer "e" is incorrect because answers "b", "c", and "d" are incorrect.

28. In responding to the President's assertion of executive privilege, Congress should argue that –

a. It has an important constitutional interest in obtaining the information because of its power to declare war and the Senate's role in confirming treaties.

b. Any risks of disclosure can be minimized by blocking out particularly sensitive information and *in camera* review by a court.
c. The case is not a nonjusticiable political question insofar as the Court has previously adjudicated claims of executive privilege.
d. The executive privilege of the President is not absolute.
e. All of the above.

Answer "e" is correct because each of the arguments in "a"-"d" are plausible under current doctrine. Answer "a" is correct because these functions are constitutionally assigned to Congress and are relevant to the "essential functions" balancing test of Nixon. Answer "b" is correct because this approach was taken in Nixon. Answer "c" is correct because the Court has adjudicated executive privilege claims before, which means that they must be justiciable. Answer "d" is correct under Nixon.

29. If President Bush claimed absolute immunity from suit, he would probably –

a. Win, because the Court has recognized absolute presidential immunity for all official actions while in office.
b. Win, because the President is generally above the law.
c. Win, but only for the duration of his tenure in office because he will lose his immunity when he is no longer President.
d. Lose, because the Court denied presidential immunity in *Clinton v. Jones*.
e. Lose, because there is only qualified immunity and the need to enforce the law overrides the presidential interest in immunity.

The correct answer is "a" because that is the holding of Nixon v. Fitzgerald and that holding was not disturbed in Clintob v. Jones. Answer "b" is incorrect under Marbury and Clinton v. Jones; immunity from suit for official conduct does not place the President above the law. Answer "c" is incorrect because under Clinton v. Jones, the timing of the tortious conduct is at issue, not the timing of the lawsuit. Answer "d" is incorrect, even though Clinton v. Jonbes denied immunity, because the Court reasoned that conduct occurring before taking office did not engage the rationale for presidential immunity, and that reasoning would not apply here. Answer "e" is incorrect because the President ***has*** *absolute immunity; other executive officers receive only qualified immunity.*

30. If President Bush Argued that Seefus lacked standing to sue, Seefus could probably establish standing by arguing that –

a. She has suffered an injury to her interest in presidential compliance with constitutional norms.
b. She was injured by a stock market decline causing a decrease in her portfolio values that was the result of uncertainty surrounding the war.
c. She can assert injuries to third parties because the rule against third party standing is only prudential and an important constitutional interest is at stake.
d. All of the above.
e. None of the above.

The correct answer is "e" because answers "a", "b", and "c" (and therefore "d") are incorrect. Answer "a" is incorrect because compliance with constitutional norms is an abstract, not concrete, injury and would give rise only to a generalized grievance. Answer "b" is incorrect because the injury, even though concrete, is too remote to satisfy the causation and redressability requirements for standing. Answer "c" is incorrect even though the rule against third party standing is prudential and can be waived (e.g. in 1st Amendment vagueness and overdreadth cases), it is not automatically inapplicable whenever important constitutional interest are at stake.

31. If President Bush argued that the constitutionality of the Koraqistan military action presented a nonjusticiable political question, he would probably –

   a. Lose, because the Court is not afraid to enter the political arena.
   b. Win, because the President's role as Commander-in-Chief is a textual commitment of power to start a war.
   c. Lose, because there is no textually demonstrable commitment of these matters to the President.
   d. Win, because there are overriding prudential considerations, such as the need for the nation to speak with one voice and the embarrassment that would come from declaring these actions unconstitutional.
   e. Answer "b" and answer "d" are correct.

*The correct answer is "d" because it correctly applies some of the Baker strands of the political question doctrine. Although the prudential strands are less important than the "textual commitment" and "lack of judicially discoverable and manageable standards" strands, they continue to be good law, especially in the foreign relations context. Answer "a" is incorrect, even though the Court is not afraid to enter the political arena (e.g. Bush v. Gore), because that alone does not answer the PQ issue. Answer "b" is incorrect because the Commander in Chief power does not represent a **textual** commitment of the power to **start** a war. The power to "declare" war is reserved to Congress, which precludes such a reading of that power. The power to repel invasion or suppress insurrection, arguably within the President's powers are not the same as the power to start a war. Answer "c" is incorrect, even though there is no textual commitment of these matters to the President (alone) because there might be a PQ under one of the other PQ strands. Answer "e" is incorrect because answer "b" is incorrect.*

32. Assuming (without indicating the correct answer to question 29, 30, or 31) that a court reached the merits of Seefus's challenge to the agreement creating the Bush League –

   a. The President should argue that the Court has recognized a general power to make agreements pursuant to the President's role as chief representative of the United States in the field of foreign relations.
   b. The President should argue that by failing to act, Congress tacitly approved the agreement.
   c. Seefus should argue that the agreement is invalid because all agreements with foreign countries must be approved by the Senate.
   d. Seefus should argue that the constitutionality of executive agreements in the absence of an independent source of authority has not been established.
   e. Answer "b" and answer "d" are correct.

Answer "e" is correct because both answers "b" and "d" are correct. Answer "b" is correct because this kind of tacit approval was a factor in prior executive agreement cases and answer "d" is correct because the prior cases all relied on an independent source of constitutional authority (recognition in Belmont/Pink and historically accepted power to settle claims in Dames & Moore). Answer "a" is incorrect because all the cases upholding agreements relied on both the presence of an independent source of presidential authority and at least implied congressional approval through acquiescence. Answer "c" is incorrect because that proposition was rejected in Belmont, Pink, and Dames & Moore.

33. Assuming (without indicating the correct answer to question 29, 30, or 31) that a court reached the merits of Seefus's challenge to the initial invasion of Koraqistan –

a. The President should win because he has clearly established inherent emergency powers that authorize the use of force.
b. The President should win because congressional authority to declare war is constitutionally irrelevant now that countries no longer declare war.
c. Seefus should win because presidential invasions without express congressional declarations are unprecedented.
d. Seefus should win because there is no plausible argument to connect this case with the President's inherent authority to repel invasion or suppress insurrection.
e. None of the above.

The correct answer is "e" because none of the other answers are correct. Answer "a" is incorrect because any emergency powers to use force are not clearly established – the power to suppress insurrection or repel invasions, which arguably are clearly established, is not the same as a general; power to use force. The question of emergency powers was also left open in the Steel Seizure Case (Youngstown). Answer "b" is incorrect because the practical irrelevance of declarations of war does not mean that it is constitutionally irrelevant and congressional approval is probably required for the President to engage in full scale war. Answer "c" is incorrect even if Seefus might win, because there is historical precedent for independent presidential invasions (e.g. Grenada). Answer "d" is incorrect even if Seefus might win, because there is a plausible argument that the power to repel an invasion includes the power to prevent one.

34. If Pat Seefus argued that PANIC violates the nondelegation doctrine, she would probably –

a. Win, because PANIC delegates very broad discretion.
b. Win, because PANIC does not contain any standards.
c. Lose, because the Court repudiated the nondelegation doctrine after 1937.
d. Lose, because PANIC contains sufficient standards, especially because foreign relations is involved.
e. Lose, because the nondelegation doctrine does not apply in the foreign relations field.

The correct answer is "d," because the intelligible principle requirement of the nondelegation doctrine is satisfied by statutory standards and because under Curtiss-Wright broader delegations are permitted foregin relations field (because of the President's independent authority). Answer "a" is incorrect, becuase the delegation of broad discretion does not automatically violate the nondelegation doctrine, especially as currently applied. Answer "b" is incorrect, even though PANIC would be unconstitutional if it contained no standards, because there is a standard in the statute – the President may take action "to combat terrorism." This standard may be too broad (although probably not), but it is a standard. Answer "c" is incorrect because the nondelegation doctrine has not been repudiated, although it is not applied very aggressively. Answer "e" is incorrect because the doctrine applies in the foreign relations field, even under Curtiss-Wright.

E. For purposes of questions 35-41, the following hypothetical facts apply. The hypothetical State of Matrimony has traditionally supported marriage through a variety of legal means, including tax advantages, requirements that employers provide health and other benefits for spouses, and laws making divorce difficult. After a lower court applied Matrimony's marriage laws to "same sex couples who follow the prescribed legal steps for marriage," the legislature quickly amended the statute, which now defines marriage as "between persons of the opposite sex, as determined by reference to genetic makeup." Chris and Pat Androgeny are a same sex couple who underwent a religious marriage ceremony in a recognized church, but whose marriage is not legally recognized by the state. They sought to adopt a child, but their request was denied by the state adoption agency, which relied on a rule giving a preference to married couples. There is no indication, however, that

any married couple was waiting to adopt the child in question. In addition, the adoption agency concluded that "It is not in the best interests of the child to be brought up in a household in which both 'parents' are members of the same sex because the child is likely to be socially ostracized and stigmatized by the general public, which disapproves of such alternative lifestyles." The Androgenys challenged the law defining marriage and the decision denying their adoption request, and the case made its way to the United States Supreme Court, whose composition has not changed and which has issued no relevant decisions since December 5, 2002.

35. If the Androgenys argue that the statute excluding them from marriage violates due process, they would probably –

   a. Win, because the right to marry has been recognized as a fundamental right.
   b. Lose, because the traditional right to marry concerned only couples of the opposite sex.
   c. Win, because it is irrational for the state to promote marriage but decline to recognize same sex marriages.
   d. Lose, because the Court has upheld various limits on the right to marry, including a ban on polygamy.
   e. Both answer "b" and answer "d" are correct.

The correct answer is "e" because answers "b" and "d" are both correct. Answer "b" is correct because there is no historical tradition of recognizing same sex couples. Before <u>*Bowers*</u> *one might have argued for a broader conception, but more recent cases require that the specific right asserted be deeply rooted in our traditions and collective conscience/implicit in the concept of ordered liberty. That is a hard argument to win for same sex marriage. Answer "d" is correct because the polygamy case, especially, provides a strong parallel – moral objections to particular forms of marriage are sufficient to uphold limits. (Note that there is actually a stronger historical case for polygamy than for same sex marriages.) Answer "a" is incorrect even though marriage is a fundamental right, because the question remains whether same sex marriage is within this right (see above). Answer "c" is incorrect even though one might agree with the sentiment expressed, because under current doctrine it is not probably that the Androgenys would win with this argument under the Due Process Clause, because the Court applies the rational basis test very deferentially. (RB with "bite" has been applied under EP at times, but even that is something of a longshot.)*

36. If the Androgenys argue that the statute excluding them from marriage discriminates on the basis of gender, the state should argue that –

   a. By analogy to *Loving v. Virginia*, the law does not employ a gender classification because it bars both men and women from marrying persons of the same sex.
   b. Real biological differences between men and women justify the ban on same sex marriage.
   c. Gender classifications are subject only to rational basis scrutiny and the preservation of morals is a legitimate purpose under *Bowers v. Hardwick*.
   d. Even though strict scrutiny applies to gender classifications, the law is narrowly tailored to meet a compelling governmental interest.
   e. Both answer "b" and answer "d" are correct.

The correct answer is "b", because this argument is a potentially effective one under current doctrine. Answer "a" is incorrect because the the analogy to <u>*Loving*</u> *actually cuts the other way (something we discussed in class). Answer "c" is incorrect, even though moral objections are a legitimate purpose under* <u>*Bowers*</u>*, because gender classifications are subject to intermediate scrutiny, not the rational basis test. Answer "d" (and therefore answer "e") is incorrect because intermediate, not strict, scrutiny applies.*

37. If the Androgenys argue that homosexuality is a suspect or quasi-suspect classification –

a. They should argue that *Romer* established homosexuality as a suspect classification.
b. The state should argue that *Bowers v. Hardwick* precludes that result.
c. They should argue that sexuality is not a lifestyle choice, but rather an immutable characteristic.
d. The state should argue that only race and gender have been recognized as suspect classifications.
e. None of the above.

Answer "c" is correct, because immutability is a factor for establishing sexual orientation as a suspect classification. Answer 'a" is incorrect because Romer did not resolve this cquestion, but rather invalidated the law under the rational basis (with bite) test. Answer "b" is incorrect because a similar argument was rejected in Romer (see Scalia's dissent). Answer "d" is incorrect because there are other suspect (or quasi-suspect) classifications, including national origin, alienage, and nonmarital children. Answer "e" is incorrect because answer "c" is correct.

38. Assuming (without indicating the correct answer to question 35, 36, or 37) that the rational basis test applies to the ban on same sex marriages –

a. Moral objections to homosexual conduct are a legitimate purpose for the law.
b. Moral objections are not a legitimate purpose because morality is not within the state police power.
c. Promoting marriage as the basis for the nuclear family would not withstand scrutiny as a purpose for the law because the state recognizes opposite sex marriages without regard to the intent or ability to have children.
d. Promoting marriage as the basis for the nuclear family would not withstand scrutiny as a purpose for the law because the Androgenys want to adopt a child and have a family.
e. The courts would only consider the actual or articulated purposes of the law.

The correct answer is "a," because Bowers so held. Answer "b" is incorrect because morality has traditionally been recognized as within the state police powers ("health, safety and morals"). Answer "c" is incorrect, although it would be a good "overinclusiveness" argument if strict scrutiny applied, because overinclusiveness arguments are not generally recognized under the rational basis test. Answer "d" is incorrect, although it would be a good "underinclusiveness" argument if strict scrutiny applied, because underinclusiveness arguments are not generally recognized under the rational basis test. Answer "e" is incorrect because the courts will consider any plausible purpose for the law under the rational basis test.

39. The adoption preference for married couples –

a. Discriminates on the basis of sexual orientation because all same sex couples are adversely affected.
b. Discriminates on the basis of gender because all same sex couples are adversely affected.
c. Discriminates on the basis of marital status, which is clearly a suspect classification.
d. Would probably survive intermediate scrutiny because it is substantially related to the important purpose of providing a stable environment for adoptive children.
e. Would probably fail intermediate scrutiny because there is no reason to believe that single people or unmarried couples are worse parents than married couples.

Answer "d" is correct because intermediate scrutiny applies and because a court would probably accept the relationship between married couples and stable family environment, given the judicial attitudes toward marriage and the prevalence of adoption preferences for married couples. Of course, some married couples are unstable and some unmarried couples or single parents would provide a more stable environment, but a perfect fit is not required under intermediate scrutiny. Answer "a" is incorrect because the rule is facially neutral and adversely affects many opposite sex

(but unmarried) couples as well as single heterosexual adoptive parents. Answer "b" is incorrect for much the same reason (but even more so, because the connect between same sex couples and gender discrimination here is unclear). Answer "c" is incorrect because marital status is not "clearly" a suspect classification (and probably not even arguably). Answer "e" is incorrect, even though the preference might fail intermediate scrutiny, because even if there is no reason to believe that single people or unmarried couples are worse parents, the law might be upheld based on another rationale, such as more stable home environment. (Also, even if single people and unmarried couples are as good parents as married couples, the point is debatable, and thus it is inaccurate to say there is "no reason" to believe this statement.)

40. The denial of the Androgenys' adoption request would probably –

   a. Interfere with their fundamental constitutional right to have children so as to trigger strict scrutiny, because it effectively prevents them from becoming parents.
   b. Interfere with the constitutionally recognized fundamental rights of parents to the care and custody of their children so as to trigger strict scrutiny.
   c. Interfere with the constitutionally protected right to live as they choose in the privacy of their home.
   d. Not interfere with their fundamental constitutional right to have children so as to trigger strict scrutiny because adoption is a benefit and the state has not placed any new obstacles in the way of their choice to have children.
   e. Not interfere with the constitutionally recognized fundamental rights of parents to the care and custody of their children so as to trigger strict scrutiny because having a homosexual parent is not in the best interest of the child.

The correct answer is "d" because it the most likely result under current doctrine (see Maher v. Roe and Harris v. McRae). The inability to have children through sexual reproduction is not the product of state action. The right to have children does not include an affirmative constitutional right to adopt. For these reasons, answer "a" is incorrect. Answer "b" is incorrect because the Androgenys do not have a child so as to engage the right to care and custody. Answer "c" is incorrect because there is no constitutional right to live as one chooses in one's own home (see Bowers and the child pornography cases). Answer "e" is incorrect because the best interest of the child would not prevent interference of with parental rights from engaging strict scrutiny, even if it might satisfy strict scrutiny in some cases.

41. On the facts described in the problem, the Androgenys' best constitutional argument against the decision denying adoption is that –

   a. The explanation of the decision reveals that it is based on animus against homosexuals because reliance on the preference for married couples is an obvious pretext in this case and it is inappropriate to rely on the public's prejudice as a reason to discriminate.
   b. Because they are members of the same sex, they cannot have children except with the aid of the state through adoption, and the refusal to permit adoption effectively prevents them from having children.
   c. The denial is predicated on the state's refusal to recognize same sex marriages, and therefore is invalid because the ban on same sex marriage interferes with the fundamental right to marry and fails strict scrutiny.
   d. It violates the fundamental rights of the child to deny it a safe, loving family when no married couple is waiting to adopt.
   e. None of the arguments above are plausible arguments.

The correct answer is "a" because this is a plausible argument under Romer, which reasoned both that animus against homosexuals is not a legitimate purpose and that an obviously pretextual

justification may reveal animus. Reliance on public prejudice was held improper in Cleburne and Palmore v. Sidotti. Answer "b" is incorrect even though it might win, because it is weaker than the argument in answer 'a," as described in the answer to the previous question. Answer "c" is incorrect because same sex marriage is unlikely to be recognized as within the right to marry. Answer "d" is incorrect because the Court has not recognized any fundamental right of a child to a safe, loving family. Answer "e" is incorrect because answer "a" is a plausible argument.

F. Assume for purposes of questions 42-49 that the following facts apply. Pursuant to the federal Uniform Standards for Uncovering Rates and Yield Act (USURY), credit card companies are required to disclose certain information, such as the effective annual rate of interest, all fees associated with the cards, and any penalties that may be applied for late payments. The legislative history of USURY indicates that Congress intended to "provide comprehensive protection for consumers from misleading credit card practices" and to "facilitate interstate credit card transaction by providing for standardized disclosure requirements." The Act authorizes the Division of USURY Notification (DUN) within the Justice Department to promulgate regulations specifying disclosure requirements in greater detail, to investigate alleged violations of the Act and regulations, and to prosecute violations of the Act and regulations, which are subject to both civil and criminal penalties. Pursuant to the Act, the Director of DUN is appointed by the Attorney General and may be removed by the Attorney General for specified causes, including incapacity, incompetence, and malfeasance.

In recent years, many states, including the hypothetical State of Indebtedness, have become concerned that credit card companies are targeting younger and younger customers, marketing cards to college and even high school students, many of whom have little or no income with which to pay off their loans. Many of these younger credit card customers are financially unsophisticated and amass considerable debt, often on multiple cards. Aggressive collection practices then force these young people into bankruptcy or, more commonly, the parents of younger cardholders pay off the balance. In response to these problems, Indebtedness passed a law prohibiting the provision of credit cards to persons under the age of 18, and prohibiting the solicitation of credit card customers or distribution and posting of credit card advertisements on state university and college campuses. The law applies only to residents of the state and transactions within its territory, but because there are no credit card companies within the state, the only businesses affected are out of state companies.

Ivana Bynau is a 17 year old high school student from Indebtedness with a steady part time job. She wants to obtain a credit card from Parasite, Inc., a national credit card company that specializes in "high risk" cards. Parasite has approved Bynau for credit, but is prevented from providing her with a card by the state's minimum age requirement. In addition, Parasite wants to distribute flyers and advertise on college campuses in the state.

42. In a challenge to USURY's provisions concerning the appointment of DUN members –

a. Article II's appointment provisions do not apply because DUN members are not Officers of the United States.
b. Article II's appointment provisions would bar the appointment because DUN members are Officers of the United States and their method of appointment does not follow any of the means prescribed in Article II.
c. Article II's appointment provisions are satisfied if the Attorney General is the head of a department.
d. Article II's appointment provisions would be violated if DUN members have sufficient policy making authority to constitute principal or superior officers, because they are neither nominated by

the President nor subject to Senate consent.

e. Article II's appointment provisions would be violated even if DUN members lack policy making authority and are inferior officers, because they perform quasi-legislative acts and interbranch appointments are prohibited.

The correct answer is "d," because it correctly applies the requirements of Article II to the facts. Principal officers (judged at least in part by their policymaking authority under Morrison) must be nominated by the President and confirmed by the Senate. Answer "a" is incorrect because DUN members are officers of the United States because that have legal authority to implement USURY (see Buckley). Answer "b" is incorrect because appointment by the Attorney General, a head of a department, is within Article II if the officer is an inferior officer. Answer "c" is incorrect, even though correctly states the outcome for inferior officers, because it would be incorrect if DUN members are principal officers. Answer "e" is incorrect for several reasons, most obviously because interbranch appointments are not prohibited.

43. In a challenge to USURY's provisions concerning the removal of DUN members –

a. The provisions are invalid if they violate Article II's express provisions concerning removal of officers.
b. The provisions are probably valid because for cause restrictions on the President's power to remove executive branch officials are generally permissible.
c. The provisions are probably invalid because for cause restrictions on the President's removal power are permissible only if the official performs no executive functions.
d. The provisions are probably valid because for cause removal restrictions on officers who perform some quasilegislative functions are valid even if their predominant functions are purely executive.
e. The provisions are probably valid even though DUN members perform executive functions, if they lack significant policy authority and are inferior officers.

Answer"e" is correct because it accurately applies the holding of Morrison. Answer "a' is incorrect because there are no express removal provisions in Article II. Answer "b" is incorrect because for cause restrictions are impermissible for principal officers under Morrison. Answer "c" is incorrect because Morrison upheld for cause limits on the removal of officers performing executive functions. (Note that even "quasi-legislative" and "quasi-judicial" functions are still executive functions.) Answer "d" is incorrect because it overstates the holding of Humphrey's Executor, particularly in light of Morrison. High ranking (principal) officers whose predominant functions are purely executive may not be subjected to for cause removal merely because they perform some quasi-legislative functions.

44. If Parasite claims the state's law regulating credit card practices is preempted by federal law –

a. Parasite should argue that the state law stands as an obstacle to accomplishing the federal objective of facilitating credit transactions through uniform national standards.
b. Parasite should argue that the federal law completely occupies the field of credit card regulation.
c. The state should argue that the federal law is beyond the scope of the commerce power because regulation of credit transactions is within the traditional police powers reserved to the states.
d. The state should argue that there is no preemption unless the federal law expressly states that it preempts state law.
e. All of the arguments above are plausible in light of current doctrine.

The correct answer is "a" because it correctly applies one component of "conflict" preemption analysis to the facts of the case. Answer "b" is incorrect because the statute cannot support such broad occupation of the field; if any field might be occupied, it is the field of ***disclosure***

requirements. *Other aspects of credit card transactions, such as interest rates or collection practices, are clearly not covered by the law in question. Answer "c" is incorrect even if it is true that credit card transactions are within the traditional state police powers because that is insufficient to establish that the law is beyond the scope of the commerce power. Note that because credit card transactions are commercial frequently interstate in character, any attempt to argue that the law exceeds the commerce power would also be frivolous. Answer "d" is incorrect because preemption can be implied either from occupation of the field or a conflict between state and federal law. Answer "e" is incorrect because answers "b", "c", and "d" are incorrect.*

45. Assuming (without indicating the correct answer to question 44) that USURY has occupied the field of credit card disclosure –

    a. Any state regulation of credit card companies is per se invalid.
    b. The state law is valid if its purpose of protecting consumers is consistent with the purpose of USURY.
    c. The state law is valid if it does not regulate disclosure and therefore is not within the field occupied by federal law.
    d. The state law is invalid because the Commerce Clause deprives the states of any regulatory authority in the field.
    e. The state law is valid because the usual presumption is against preemption of state law.

The correct answer is "c" because it correct applies the occupation of the field doctrine to the facts of the case. Answer "a" is incorrect, even though a state law within the preempted field would be per se invalid, because the field occupied is credit card ***disclosure***, *and other forms of regulation (e.g., rates or collection practices) would not be within the field and therefore would not be per se invalid. Answer "b" is incorrect because under the occupation of the filed doctrine the state law would be invalid if it fell within the preempted field of disclosure, even if it had the same purposes as the federal law. Note that both scenarios described in relation to answers "a" and "b" are possible because it is unclear whether the state law here is within the field occupied. Answer "d" is incorrect because it is not a correct state of dormant Commerce Clause doctrine. Answer "e" is incorrect even though the usual presumption is against preemption, because the presumption might be overcome.*

46. If Parasite argues that the state law violates due process, it will probably --

    a. Lose, because the Courts apply a very deferential version of the rational basis test to economic regulation challenged under the Due Process Clause.
    b. Win, because under *Lochner v. New York*, liberty of contract is a fundamental right for purposes of due process.
    c. Lose, because the Due Process Clause only requires fair procedures and does not protect substantive rights.
    d. Win, because it is arbitrary and irrational to prohibit young people from establishing credit and learning responsible financial management.
    e. Both answer "b" and answer "d" are correct.

Answer "a" is correct because it accurately applies the current doctrine to the facts. Answer "b" is incorrect because <u>*Lochner*</u> *was repudiated in 1937. Answer "c" is incorrect because there is a substantive component to Due Process. (Where were you for the second half of the course if you chose this answer?) Answer "d" is incorrect, even though one might make this argument under current doctrine, because it would almost certainly be unsuccessful and Parasite would therefore not* ***probably*** *win. Answer "e" is incorrect because both answers "b" and "d" are incorrect.*

47. If Parasite challenged the state law as a violation of the "dormant" Commerce Clause, it should argue that –

a. The law is facially discriminatory because it only protects in state consumers.
b. Although the law is neutral, it imposes burdens on interstate commerce that outweigh local benefits because conflicting state credit card regulations impedes interstate transactions.
c. The law is facially discriminatory because the only credit card companies affected are out of state.
d. The courts should give less deference to the state's asserted interest because there are no in state credit card companies to provide a political process check.
e. Both answer "b" and answer "d" are correct.

The correct answer is "e" because both answers "b" and "d" are correct. Answer "b" is correct because this argument correctly applies current doctrine to the facts, even though if it is unlikely to be successful. Answer "d" is correct because it correctly applies an argument suggested in numerous cases, such as <u>Barnwell</u>, <u>Southern Pacific</u>, and <u>Kassel</u>, although it is unclear whether it is currently embraced by a majority of Justices on the Supreme Court. Answer "a" is incorrect even if it only protects in state consumers, because this would not establish that the law discriminates against ***interstate commerce****. Answer "c" is incorrect even if there are no in state companies, because that would not make the law* ***facially*** *discriminatory (and probably would not make it discriminatory in practical effect, although the practical effect argument should be made).*

48. If Parasite challenged the ban on solicitation on college campuses as a violation of its right to free speech under the First Amendment (as incorporated by the Fourteenth), it would probably –

a. Lose, if the solicitation is commercial speech because commercial speech is unprotected.
b. Win, if the ban is more extensive than necessary to serve the state's interest in protecting young people from exploitation.
c. Lose, if the state has a legitimate interest in protecting young people from exploitation by credit card companies.
d. Win, if the solicitation is truthful and not misleading and is directed toward students over the age of 18, because the state may not prohibit truthful advertising relating to lawful conduct as a means of discouraging that conduct.
e. Lose, if the college campus is state owned, because as property owner the state may deny people access for whatever reason it wants.

Answer "b" is correct because it correctly applies one component of the <u>Central Hudson Gas</u> test which is still applied by the Court. Answer "a" is incorrect because commercial speech receives some protection under the 1st Amendment, even if the <u>Central Hudson Gas</u> test is lest protective than strict scrutiny. Answer "c" is incorrect because a legitimate interest is insufficient, standing alone, to satisfy <u>Central Hudson Gas</u>. Answer "d" is incorrect, even though some Justices (particularly Justice Thomas) have taken the view that truthful advertising related to legal activity may not be prohibited in order to discourage that activity. See <u>44 Liquor Mart</u>. The majority of Justices continues to apply <u>CHG</u>. Answer "e" is incorrect because under the public forum doctrine, state ownership does not confer absolute right to deny access for speech.

49. If Bynau challenged the state law as an interference with her fundamental right to make and enforce contracts –

a. She should rely on the Privilege and Immunities Clause of Article IV, because the right to enter into and enforce contracts is one of the fundamental rights of state citizenship recognized by the Supreme

Court under that Clause.

b. She should rely on equal protection, because young people are a politically powerless class and laws burdening them are therefore subject to heightened scrutiny.
c. She should rely on the Contracts Clause, because the law prevents her from entering into a contract.
d. She should rely on the Due Process Clause, because the right to borrow money is a fundamental right that is deeply rooted in our traditions and collective conscience and implicit in the concept of ordered liberty.
e. None of the above.

Answer "e" is correct, because none of the other answers is correct. Answer "a" is incorrect, even though the right to make contracts is one of the P & I's of state citizenship under Article IV, because the P & I prohibits discrimination of ***nonresidents****, and therefore cannot be asserted by Bynau against her own state. Answer "b" is incorrect, even though minors are politically powerless and that might tend to support an argument for a suspect classification, because age has been rejected as a suspect classification (see* Mass Bd. of Ret. v. Murgia*) and there is no caselaw suggesting minority status as a suspect classifications, even though many laws limit the rights of minors. Answer "c" is incorrect because the Contracts Clause applies only to retrospective impairments of existing contractual obligations. Answer "d" is incorrect even though one might argue that this right should be fundamental, because the question states it as a fact. This argument is also so unlikely to succeed that it borders on the frivolous.*

G. In questions 50-55, assume that Bigtime City is a large metropolis in the hypothetical State of Fanatic. Bigtime City is the home of the Bigtime Players, a hypothetical professional sports franchise. When the owner of the Players, Roland Indough, threatened to move the team unless the Players had a larger, state-of-the art arena to play in, civic leaders worked out a plan to construct a new arena for the Players. Under the plan, a private, nonprofit corporation was created that would own the stadium and enter into a long term lease with the Players for its use. The Fanatic Legislature authorized the use of eminent domain to acquire the necessary land and provided loan guarantees so that the corporation could secure funding. In addition, the arena was given a tax exemption from all state and local taxes. Bigtime City participated in the development of architectural plans and its approval of the plans was required before the construction could continue.

The new facility was named the Bigtime Arena and consistently sold out for home games. Although Bigtime Arena was excellent in many respects, soon after its opening it became clear that the women's restrooms were inadequate, consistently producing long lines with waiting times often in excess of one half hour. Although the number of stalls in the women's restrooms exceeded the number of stalls in the men's restrooms, men's restrooms also contained urinals and could handle a larger number of users at once than could the women's restrooms. A group of female fans – tired of missing important and exciting plays while they waited in line – filed suit, challenging the facilities as unequal and claiming gender discrimination. In architectural and planning documents produced during discovery, it emerged that (1) the cost of the men's and women's restrooms were the same (because stalls are more expensive than urinals) and (2) the corporation had assumed that "having a similar capacity in the women's restrooms is unnecessary because women are not as big sports fans as men."

Ima Spoilsport owns a hobby and crafts store near the site of the new Bigtime Arena. On game days, there is so much traffic in and around the arena that customers cannot easily get to her store, and typically do not bother to try. Her business on game days has dropped dramatically and she can no longer afford to keep the store open on those days. There has also been a significant drop off of

her business on other days, which she attributes to customers who use or have used competitors on game days and continue to frequent the competitors thereafter out of familiarity and convenience. She wants to sue Bigtime City for the loss of business resulting from the construction of Bigtime Arena.

50. If the corporation asserted that it was not a state actor, and the fans relied on the "public function" argument for state action, they would probably –

    a. Lose, because construction and operation of public facilities is not traditionally the exclusive province of the state.
    b. Win, because Bigtime Arena is a public facility, so the corporation is performing a public function.
    c. Lose, because only state actors perform public functions.
    d. Win, because the Court applies the public function test very generously.
    e. Answers "b" and "d" are correct.

The correct answer is "a" because correctly applies the test for the "public function" strand of state action doctrine. Answer "a" is incorrect because the fact that a facility is a public facility does not necessarily mean that its management is a public function, which requires that the function is one that is traditionally the ***exclusive*** *province of the state. Answer "c" is incorrect because the state action requirement is satisfied if the state delegates public functions traditionally performed* ***exclusively*** *by the state to private actors. Answer "d" is incorrect because the Court applies the test narrowly and it the argument is very unlikely to succeed on the facts. Answer "e" is incorrect because answers "b" and "d" are both incorrect.*

51. If the corporation asserted that it was not a state actor and the fans relied on the state facilitation strand of the state action doctrine, their best argument is that –

    a. Granting a corporate charter and tax exemptions confer important legal privileges so as to constitute state facilitation and create state action.
    b. The State of Fanatic provided loan guarantees for the construction of the Arena and delegated the power of eminent domain, so it is responsible for all of the corporation's actions.
    c. Bigtime City's involvement with and approval of the plans constituted created a sufficient nexus for to establish state action in light of the close interaction between the city and the corporation through the process.
    d. The corporation has been given a monopoly on Bigtime Arena, which is sufficient state facilitation to establish state action.
    e. In the area of gender discrimination under equal protection, *United States v. Morrison* rejected the state action requirement.

Answer "c" is correct because this argument correctly applies the current test for state facilitation (including the specific nexus requirement) and this argument might be successful. Answer "a" is incorrect because these advantages are insufficient to create state action (or else all non profit corporations would be state actors); there must be a specific nexus between the state facilitation and the challenged private conduct. Answer "b" is incorrect because the state facilitation lacks a nexus to specific conduct. Answer "d" is incorrect because there is no nexus and because under <u>*Jackson*</u> *a state conferred monopoly does not create state action. Answer "e" is incorrect because* <u>*Morrison*</u> *reconfirmed the state action requirement rather than rejecting it.*

52. Assuming (without indicating the correct answer to question 50 or 51) that the Equal Protection Clause applies, the differential restroom facilities would probably –

a. Not be treated as a gender based classification because both men's and women's facilities cost the same amount.
b. Be treated as a gender based classification because the restrooms are different, even if they cost the same amount.
c. Not be treated as a gender based classification, because the Supreme Court still recognizes the separate but equal doctrine in the context of gender.
d. Be treated as a gender-based classification, because the Supreme Court has expressly rejected the separate but equal doctrine as applied to gender.
e. Both answer "b" and answer "d" are correct.

The correct answer is "b" because differences in treatment create inequality even if they cost the same (consider: if the state paid equal amounts to put A in prison and B in a luxury hotel, there is a difference in treatment). For this reason, answer "a" is incorrect. Answer "c" is incorrect because the Court has not recognized the separate equal doctrine for gender (although it has not expressly repudiated it either). Answer "d" is incorrect because the Court has not ***expressly*** *repudiated the doctrine (although it has not recognized it either). The* <u>*VMI*</u> *case might be read as* ***implicitly*** *rejecting the doctrine because the Court rejected the creation of a women's school as a remedy, but this new facility would not be equal because it is new and lacks the reputation. In any event that relates to remedy, not to the underlying violation. Answer "e" is incorrect because answer "d" is incorrect.*

53. Assuming (without indicating the correct answer to question 50 or 51) that the Equal Protection Clause applies and assuming (without indicating the correct answer to question 52) that the differential restrooms is a gender based classification, the fans' challenge would probably –

a. Succeed, because gender-based classifications are subject to intermediate scrutiny, which is nearly always "fatal in fact."
b. Fail, because saving money is an important interest and providing fewer stalls for women is substantially related to that purpose.
c. Succeed, if the decision is based as much on stereotypes about whether women are sports fans as on any real differences between men and women.
d. Fail, if in fact there are fewer women sports fans because then it is rational to provide fewer stalls for women.
e. Succeed, because the Equal Protection Clause would require identical restrooms for men and women.

The correct answer "c" because this is the ***best*** *application of current doctrine to the facts. Answer "a" is incorrect even though gender classifications are subject to intermediate scrutiny, because intermediate scrutiny is not "nearly always 'fatal in fact.'" (That would be strict scrutiny.) Answer "b" is incorrect, because it is not as good an answer as "c" for two reasons. First, saving money is a legitimate interest, but it has not been recognized as an important one, and has essential been rejected as sufficient in the context of gender discrimination (see* <u>*Frontiero*</u>*). Second, on the facts of the case and applying intermediate scrutiny it is hard to say absolutely that the challenge would either probably succeed or probably fail – a lot would depend on whether the Court perceived the decisions to be based on real differences or stereotypes, and consideration is reflected in answer "c." Answer "d" is incorrect because it assumes a rational basis for the decision is sufficient to satisfy intermediate scrutiny – it is not. Answer "e" is incorrect because it is too extreme and absolute; clearly some differences between restrooms are tolerated.*

54. If Spoilsport argued that the interference with her business constituted a physical taking, she would probably –

a. Lose, because the state has not acquired her property or interfered with her possession of it and there is no physical invasion.
b. Prevail, because there are lots of people invading the streets around her shop and effectively blocking access.
c. Lose, because the construction of the stadium was for a legitimate public purpose and she has not lost a lot of money.
d. Prevail, if people going to the games trespass on her property.
e. Lose, because she should have expected that the construction of the stadium would cause traffic tie ups.

*Answer"a" is correct because a **physical** taking requires acquisition, interference, destruction or its equivalent. Answer "b" is incorrect because neither invasion of the street (a public space) nor the resulting impediment to access is itself a physical invasion of Spoilsport's property. Answer "c" is incorrect because purpose of the state action and the extent of loss are not relevant to whether there is a physical taking. Answer "d" is incorrect because the actions of private persons is not a taking by the **state** (or city). Answer "e" is incorrect because Spoilsport's expectations are irrelevant to whether there has been a physical taking.*

55. If Spoilsport argues that the is a regulatory taking, she would probably –

a. Prevail, because there has been a complete destruction of the economically viable uses of her property on game day, which is a per se taking.
b. Lose, because there is only a partial loss of value and the *Penn Central* test would apply, which seldom results in a taking.
c. Prevail, because the Bigtime Arena does not serve any legitimate public purpose, but rather merely benefits Roland Indough.
d. Lose, because there can be no taking in the absence of a physical invasion.
e. Prevail, because under the *Nollan/Dolan* test the burden on property rights must be proportional to harm caused by the property owner.

Answer "b" is correct because under the Lake Tahoe case a temporary destruction of economically viable is analyzed as a regulatory taking under the Penn Central test. Answer "a" is incorrect for the same reason. Answer "c" is incorrect because the public interest requirement is broadly conceived and interests such as the economic benefit to the community from a professional sports franchise is generally sufficient. Answer "d" is incorrect because there can be a regulatory taking under cases like Lucas, Nollan, and Dolan. Answer "e" is incorrect because the Nollan/Dolan test does not apply in the absence of an exaction.

Constitutional Law Final Examination
Professor Levy
Fall 2002

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To receive credit in Constitutional Law, you must sign and submit the following affirmation:

I, ___________________________, understand that students in this course will be taking the examination at different times and that the fundamental fairness of the examination depends upon maintaining confidentiality concerning its contents. I understand that it is an honor code violation to give students who have yet to take the examination information concerning its contents, or for students who have yet to take the examination to receive information concerning its contents. I also understand that submitting a false affirmation is a separate honor code violation. To prevent even inadvertent disclosure of information, I will not discuss the examination in any way with any students yet to take it, and will refrain from discussing the examination with any other person in any context in which the confidentiality of the examination might be compromised.

Signed,

____ ___________
Name Date