Exam Post-Mortem
Constitutional Law II – Spring 2008
Professor Massey

Below is a brief dissection of the examination. What follows is a repetition of each of the questions and a summary indication of the issues and the approach to be taken in handling those issues. ***This is not a model answer***. The responses merely identify the principal issues, outline the analytical approach to those issues, and provide some feedback with respect to common errors or omissions. A model answer would analyze these issues thoroughly and persuasively in grammatically correct, well-organized, even elegant, prose. Some common errors were 1) attempting to deal with every conceivable issue, even when the issues were peripheral or irrelevant. Some of you belabored the obvious, to the detriment of space devoted to the real issues. The range of raw scores on this exam was 62 to 18. The median raw score was 36. Points reflect the accumulation of your recognition of issues and the quality of your analysis of those issues.

PART ONE
Answer ONLY ONE of Questions One and Two.

Question One
1500 Word Limit

The State of Marshall, a state of the United States, has enacted the following statute:

> "Any person who makes a false statement of fact concerning a candidate for elective office, with knowledge of its falsity or in reckless disregard of its truth or falsity, shall be imprisoned for six months for each such incident."

Bob White, a candidate for the Marshall State Senate, has declared repeatedly to the press that his opponent, incumbent Senator Mary Green, "does not care for the downtrodden. She has repeatedly voted to deny to welfare recipients any increase in their benefits." In fact, although Senator Green voted once against such an increase, she has voted seven other times for an increase in welfare benefits. These facts were known to White at the time he made the statements about Green to the press. White has been charged with sixteen counts under the quoted statute, each count pertaining to a separate assertion that Green had repeatedly voted against increases in welfare benefits. White's attorney has moved to dismiss the charges on the ground that the statute is unconstitutional on its face, and as applied to White. Please assess the issues thus presented and give your reasoned conclusion as to the likely disposition of these motions.

[Fourteen states have statutes similar to the one in this question. The constitutional validity of the Ohio version was upheld in Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991). The Washington Supreme Court struck down Washington's version in* Rickert v. Public Disclocure Comm'n*, 161 Wn 2d 843 (2007).]*

The statute makes criminal false statements of fact uttered about a public figure if they

are made with knowledge of their falsity or in reckless disregard of their truth or falsity. The statute is directed at a subcategory of false statements of fact – false statements made in a political campaign and about a political candidate. This impinges upon political speech and is based on the content of the speech. Thus, while it appears that the statute is presumptively invalid and the burden is on the government to prove that it has a compelling interest to which this prohibition is necessary, the threshold issue is whether the category of speech proscribed by the statute is outside of free speech protection.

False statements of fact are not generally protected. As the Supreme Court stated in Gertz, *"[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." On the other hand, it is necessary to tolerate some false statements of fact to avoid chilling speech that does matter. The actual malice test, which the statute incorporates, is the culpability test that the Court employs to mediate this tension. That test has been used as a device to mark the outer limits of constitutional protection for false statements of fact with respect to defamation of public figures, and for false statements about private figures that cast such people in a false light. However, the Court has never decided the question of whether a knowingly false statement about a public figure, but which is not defamatory, is unprotected speech. Here, White's speech is not defamatory per se – Green's supposed refusal to increase welfare benefits is not an imputation of criminality, or immorality, or any other repugnant quality that constitutes defamation on its face – although if proven to be harmful to Green's character it could constitute defamation. (If the statements are defamatory Green could recover actual and punitive damages from White, but since the question involves the validity of the criminal prosecution of White for his deliberate lies about Green, the question of White's civil liability for defamation will not be addressed further.)*

The hard question is whether the exile from free speech of knowing falsehoods is limited to defamatory speech – because of the desire to vindicate injury to a specific person's reputation – or whether it extends to all knowing falsehoods, on the theory that there is such a low value to deliberate lies that they should all be exiled from free speech protection. Deliberately false commercial speech is outside of free speech, as is fraudulent solicitation of charitable contributions. Trade libel may be punished (at least when there is nothing of public concern in the libelous statement), and perjury and other false statements of fact to government officials are punishable. The deliberately false invasion of privacy that casts a person in a false light without injuring their reputation is also unprotected, and the Court has even suggested, in Brown v. Hartlage, *that a deliberately false statement of fact in a political campaign might be outside of the First Amendment. However, in* Brown *the Court struck down the statute at issue because it punished even the inadvertent falsehood.*

On the other hand, New York Times v. Sullivan *and* Rosenblatt *each suggested (but did not hold) that the deliberately false statement of fact about the government (as distinguished from a public official) could not be punished. Moreover, a general exile from free speech of all deliberate falsehoods other than defamation would present the question of whether governments could criminalize deliberate falsehoods about scientific or historical facts (e.g., the age of the universe, or the existence of the European holocaust). That prospect smacks of censorship, especially of viewpoints. Though that issue is not presented here it lies somewhere down the slope that begins with the exile of all deliberate falsehoods except defamation.*

We need not go down that slope, however. Here, the statute prohibits only the deliberate lie about another candidate, a specific person. Even if loss of reputation is not involved the people have a substantial, perhaps compelling interest, in ensuring that electoral campaigns present honest facts for evaluation by the public. Some falsehoods must be tolerated, of course, because much politicking is a blend of opinion and asserted fact, and often involves the use of facts in contexts that may distort them. But such is the nature of politics and, in the end, we must rely on the good sense of the people to decide what to believe. The deliberate lie is different, though. If deliberate lies can be easily identified, the cost to political discourse of their punishment should be modest, but if it should prove difficult or impossible to separate the deliberate lie from the negligent falsehood, the cost may be considerable, paid in the form of chilled political speech.

The statute may well be overbroad. It sweeps all deliberate lies about political candidates within its reach, including the deliberate lie spoken over the dinner table among family or friends. Moreover, the punishment is draconian, and that may well bear on the question of overbreadth.

If the deliberate lie about a political candidate is within free speech protection, can the state justify its punishment under strict scrutiny? Cleansing political campaigns of deliberate lies may be a compelling interest of the people, for the "big lie" has been a favorite and effective tool of demagogues to subvert and destroy democratic processes. The statute is narrowly tailored because it is addressed precisely to the deliberate lie about political candidates. On the other hand, the law prohibits such lies even in casual conversation among friends.

If the statute is facially valid, it is surely valid as applied to White. The question is whether the statute is facially invalid because it is substantially overbroad. It does not favor or disfavor any particular viewpoint, but it is content-based – only deliberate lies about political candidates are punishable. The statute could punish the reckless falsehood uttered by one private citizen to another about a political candidate (e.g., "Barack Obama is a Muslim," "Hillary Clinton murdered Vince Foster," or "John McCain was a traitor when he was a P.O.W."). These sorts of lies, while uttered about individuals, sidle close to seditious libel, which the Court has suggested is protected. Of course, such lies are effective (e.g., the George Bush campaign's whispered claim in the 2000 Republican South Carolina primary that John McCain had fathered a black child out of wedlock) and some are hard to distinguish from opinion (e.g., the catty refrain of Richard Nixon's supporters in the Cold War-tinged 1950 California Senate race that Rep. Helen Gahagan Douglas, Nixon's opponent, was "pink right down to her underwear"). The possibility that the statute could be used to punish private citizens from such remarks, however reckless, made in private conversations (perhaps the hearer is an informant or simply disgusted with the charge and so makes a complaint) casts a considerable chill over private political speech. Because the statute does not readily lend itself to a construction that would limit it to deliberate lies made about candidates by other candidates or their immediate agents, the law might well be substantially overbroad.

White may claim that, even if all deliberate lies receive no constitutional protection, the statute as so construed violates the principle of R.A.V. v. St Paul, *that the government may not selectively punish some false statements. This argument fails for several reasons. 1) The selection of deliberate falsehoods about a political candidate is viewpoint neutral. 2)* R.A.V.

permits such selectivity when "the basis for the content discrimination [within the unprotected category] consists entirely of the very reason the entire class of speech at issue is proscribable." Deliberate lies are proscribable because they do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Deliberate lies about a political candidate do nothing to advance public discourse, and may well distort it. 3) Because " the nature of the content discrimination" in this statute "is such that there is no realistic possibility that official suppression of ideas is afoot," the R.A.V. *limit does not apply.*

Question Two
1500 Word Limit

The Stolen Valor Act of 2005 amended 18 U.S.C. §704 to add the following provision:
"(b) . . . Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both, [but in the case of the Congressional Medal of Honor the offender shall be subject to imprisonment for not more than one year.]"

Merton Weems, a judge of the superior court of the State of Marshall, a state of the United States, displays a framed Medal of Honor on the wall of his chambers and tells visitors who ask about the medal that he received it while he served as a U.S. Marine in Vietnam. In fact, Judge Weems never served in the military and has never been awarded a Medal of Honor. When the true facts came to light Judge Weems was indicted by a federal grand jury for violating 18 U.S.C. §704(b). Judge Weems has moved to dismiss the indictment, claiming that the statute is constitutionally invalid as applied to him. You are the law clerk to the U.S. District Judge presiding over *United States v. Weems*. Your employer has asked you to prepare a memo discussing the constitutional validity of the law as applied to Weems, and presenting a conclusion on that question. Please do so.

[A local public official in California has been prosecuted under this statute and has raised free speech as a defense. The case is pending as of spring, 2008.]

The statute makes criminal false statements of fact uttered about oneself – specifically, the claim that the speaker has received certain military medals. Weems has falsely claimed that he received the Medal of Honor, thus coming within the sweep of the statute. Judge Weems, however, has several arguments that the statute violates the free speech guarantee, but none of them are convincing.

First, Weems will contend that the statute is facially invalid because it is substantially overbroad. The statute criminalizes the false statement of fact with respect to the military medals, without specifying a standard of culpability for the falsehood. A negligent falsehood on this subject is as criminal as the deliberate lie. A person could be confused about what medal

they received, or could believe they were awarded a medal when they were only recommended for one, and these negligent falsehood would be as harshly punished as the deliberate or reckless lie. However, the probability that a person would negligently claim to have been awarded a medal when he had not in fact received the award is very low. Military medals, especially the Medal of Honor, are conferred amid considerable ceremony. A person would have to be seriously obtuse, deranged, or cognitively impaired, to think he had received a Medal of Honor when he had not been awarded that high honor. Because of this, the statute should be construed to apply to only the knowing or reckless false claim that the speaker had received one of the covered medals. Such a construction eliminates any possible overbreadth problem.

Second, even if the statute is construed to apply only to the deliberate or reckless lie, Weems will contend that the statute is based on the content of the speech and thus presumptively void, forcing the government to justify it under strict scrutiny. Before this contention is examined, we must first determine whether the category of speech – false statements of fact – are exiled from constitutional protection. False statements of fact are not generally protected. As the Supreme Court stated in Gertz, "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." The hard question is whether the category of knowing falsehoods that may be constitutionally punished is limited to defamatory speech – because of the desire to vindicate injury to a specific person's reputation – or whether it extends to all knowing falsehoods, on the theory that there is such a low value to deliberate lies that they should all be exiled from free speech protection. Deliberately false commercial speech is outside of free speech, as is fraudulent solicitation of charitable contributions. Trade libel may be punished (at least when there is nothing of public concern in the libelous statement), and perjury and other false statements of fact to government officials are punishable. The deliberately false invasion of privacy that casts a person in a false light without injuring their reputation is also unprotected, and the Court has even suggested, in Brown v. Hartlage, that a deliberately false statement of fact in a political campaign might be outside of the First Amendment. However, in Brown the Court struck down the statute at issue because it punished even the inadvertent falsehood.

On the other hand, New York Times v. Sullivan and Rosenblatt each suggested (but did not hold) that the deliberately false statement of fact about the government (as distinguished from a public official) could not be punished. Moreover, a general exile of all deliberate falsehoods other than defamation would present the question of whether governments could criminalize deliberate falsehoods about scientific or historical facts (e.g., the age of the universe, or the existence of the European holocaust). That prospect smacks of censorship, especially of viewpoints. Though that issue is not presented here it lies somewhere down the slope that begins with the exile of all deliberate falsehoods except defamation.

We need not go down that slope, however. Here, the statute, if construed to cover only the knowing or reckless falsehood, prohibits only the deliberate lie about oneself. While it is true that negligent falsehoods on matters of public concern receive constitutional protection, in this case the statements seem to be neither of public concern nor negligent. Weems's claim that his lies were of public concern could take one of two forms: 1) even a false assertion that a judge is a war hero increases public respect for the judiciary, or 2) a false assertion by a judge about his past is cause for public concern about the judge's fitness for office. The first claim is tenuous at

best, and ludicrously disingenuous at worst. While the public career of a judge is surely of public concern, lies by that judge about his career are hardly the sort of discourse that increases respect for the judiciary. The second claim is plausible; the lie itself is of public concern, but condemnable. In this case, Weems's conduct and statements indicate that he was a deliberate liar. He never served in the military, a fact of which he was surely aware. Only service members may receive the Medal of Honor. The inference is inescapable that he knowingly and deliberately lied. The possibility that the statute could be applied to a negligent lie about one's military past is slim, and while such negligent lies might be of public concern, they are only marginally so.

Third, Weems may claim that, even if all deliberate lies receive no constitutional protection, the statute as so construed violates the principle of R.A.V. v. St Paul*, that the government may not selectively punish some false statements. This argument fails for several reasons. 1) The selection of deliberate falsehoods about one's receipt of certain military medals is viewpoint neutral. 2)* R.A.V. *permits such selectivity when "the basis for the content discrimination [within the unprotected category] consists entirely of the very reason the entire class of speech at issue is proscribable." Deliberate lies are proscribable because they do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Lies about one's status as a war hero do nothing to advance public discourse. 3) Because " the nature of the content discrimination" in this statute "is such that there is no realistic possibility that official suppression of ideas is afoot," the* R.A.V. *limit does not apply.*

The indictment should not be dismissed.

PART TWO

Answer EACH of Questions Three and Four

Question Three

1500 Word Limit

Since 1873, the State of Marshall, a state of the United States, has required that in order for a marriage to be valid, it must either be officiated or declared. Under Marshall law, an officiated marriage requires an officiated ceremony of solemnization, which may only be performed by judges, justices, aldermen, other civil officers appointed to solemnize marriages (a term which in practice is limited to specially deputized county clerks), and ordained ministers (a term which excludes anyone whose ordination has been by mail order or via the Internet and which is limited to ministers who "have been ordained by a religious group with members who regularly congregate to practice or profess their beliefs"). The mail order and Internet limitation was added in 1999 after the Marshall legislature concluded that there were tens of thousands of such ministers in Marshall, none of whom appeared to regularly perform any observable religious functions. Marshall law stipulates that a "declared" marriage is one that occurs without an officiant and in which the bride and groom declare publicly their vows to unite in marriage. Applicants for a marriage license may obtain either a license to perform an officiated or a declared marriage, but not both.

Anna and Bob decided to marry and obtained a Marshall officiated marriage license. The

ceremony was solemnized by their friend Ted, who in exchange for $20 had obtained ordination via the Internet as a minister of the Cosmic Church of Universal Being, a brainchild of Wynatt Bearp, a defrocked minister of a well-recognized church. The Cosmic Church of the Universal Being is located in Bearp's home in Tupelo, Mississippi, where at regular intervals followers of Bearp gather to chant the church's slogan: "Do the Right Thing." Cosmic Church doctrine holds that a marriage is not valid unless a Church minister chants "Do the Right Thing" while officiating at the marriage rites. Anna, Bob, and Ted met at a Cosmic Church chanting in Marshall. After their marriage, Anna and Bob filed a Marshall state income tax return claiming a filing status of "married." An anonymous and malicious tipster informed the Marshall Department of Revenue that Anna and Bob were not legally married. Investigators from the Marshall Department of Revenue unearthed the facts recited above and the Department disallowed their claimed filing status, recalculated their taxes as single persons, and assessed each of them for the tax deficiencies. Anna and Bob paid under protest and have brought suit in Marshall state court to recover the additional taxes.

What federal constitutional issues are raised in *Anna and Bob v. Marshall Department of Revenue* and how will (or should) those issues be resolved?

[The statute in this question is modeled after a Pennsylvania statute that, so far as I know, has not been the subject of constitutional challenge.]

Anna and Bob's suit raises issues under equal protection, substantive due process, and the two religion clauses. Of these four areas, only the establishment clause claim is likely to succeed. There is also a minor issue of procedural due process. Each of the issues will be discussed below.

Equal Protection. *The statute distinguishes between conventionally ordained ministers and mail-order and Internet ordained ministers. This classification does not track any currently recognized suspect classification, nor does it trigger the classic indicia of suspect classifications: immutable characteristics, a history of prejudice toward a discrete and insular minority, or perennial lack of access to the political process. Nor does it fit into the recognized quasi-suspect classifications – sex and illegitimate birth. The classification is presumptively valid. The government's legitimate interest is probably to ensure that ecclesiastical marriages are solemnized by a bona fide ecclesiastical officiant. The risk of a fraudulent ecclesiastic solemnizing a marriage is increased by permitting mail order parsons to officiate. That connection is at least rational, so the classification should survive minimal scrutiny.*

The statute places no significant burden on the constitutionally fundamental right to marry. A couple can be married by a simple declaration of their intent to marry, or they may choose to have their marriage performed in either a civil or religious ceremony. The only burden placed on marriage is that a couple choosing a solemnized marriage may not have the ceremony performed by a mail order or Internet minister. This burden is a far cry from the ban at issue in Zablocki v. Redhail *and is even less than the burden upheld in* Califano v. Jobst.

The statute does not violate the equal protection guarantee.

Substantive Due Process. *The Supreme Court requires a "careful description" of the liberty claimed to be constitutionally fundamental. In this context, that means that the liberty*

interest that Anna and Bob claim has been infringed by Marshall consists of a right to be married by a minister ordained via the Internet or by mail. Is this right deeply tooted in our history and tradition, or so embedded in our national conscience that neither liberty nor freedom could be thought to exist without this right. This is a dubious claim. The Internet is an extremely recent phenomenon, and ordination by mail order is quite likely a creation of the mid to late 20th century. If Anna and Bob do not possess a constitutionally fundamental liberty interest the statute is presumptively valid. The arguments for Marshall's legitimate interest and rational connection to that interest have been made in connection with equal protection, and the same conclusion applies here. There is no violation of substantive due process.

Free Exercise of Religion*. Because Anna and Bob met Ted at a Cosmic Church chanting, it is appropriate to infer that Anna and Bob are adherents to the Cosmic Church. They may claim that the Marshall statute interferes with their freedom to exercise their religious faith because their faith does not recognize their marriage unless it is performed by a Cosmic Church minister who chants "Do the Right Thing" during the ceremony. Their claim will be unsuccessful. The Marshall statute is one of general applicability. There is no indication that Marshall was motivated to prohibit Cosmic Church practices when it acted to exclude from marriage solemnization ministers ordained by mail order or Internet. Nor is there any indication that this exclusion has had any effect on the ability of Cosmic Church adherents to practice their faith, including marriage. The Cosmic Church could ordain its ministers in some manner other than by the Internet or mail order, and Cosmic Church ministers would thus be permitted to solemnize marriages, as those ministers would "have been ordained by a religious group with members who regularly congregate to practice or profess their beliefs." Moreover, Anna and Bob could enter into a declared marriage or a civilly officiated marriage to secure marital status under Marshall law and also unite in marriage under the auspices of Ted in order to secure marital status under the tenets of the Cosmic Church. Marshall erects no barrier to the latter ceremony; it simply refuses to recognize such a ceremony as sufficient to create a valid marriage under Marshall law. Thus, Marshall has not unconstitutionally interfered with Anna and Bob's freedom to exercise their religion.*

Establishment Clause. *Marshall has drawn a line that discriminates between different religious sects, favoring conventional religions and disfavoring marginal or unusual religions that lack regular congregants and which create new ministers via the impersonal and hasty media of mail or Internet. While the law does not literally create any established church it does manifest a preference for conventional religions.*

For the law to be valid under Lemon *it must have a secular purpose and have a primary effect that neither advances nor retards religion. (The inextricable entanglement element of* Lemon *has been subsumed into the primary effect prong of* Lemon *as a factor to be considered in assessing the primary effect of any law.) A secular purpose is difficult to detect. A purpose of preventing ecclesiastical fraud is hardly secular. Perhaps Marshall's purpose is to reduce the number of people permitted to officiate at marriages in order to reduce the likelihood of hasty (and often regrettable) marriages. That is a sufficient secular objective, though given the ease of performing a declared marriage, the Marshall law is probably not very effective in achieving its goal.* Lemon*, however, does not disqualify a secular purpose simply because it is not likely to be achieved unless there is persuasive evidence that the ostensible secular purpose is mere puffery*

*to obscure a religious purpose. (*Edwards v. Aguillard.*) That evidence may exist but it is not contained in these facts. The primary effect of the law may be to deter hasty marriages or it may be to prevent oddball religions that spread their clergy by means of the Internet or mail from officiating at marriages. If the former is the primary effect, the statute is valid; if the latter is the primary effect, the statute is invalid. Because the statute displays a preference for conventional religion it probably violates the anti-preferential canon of* Larson v. Valente, *even though there is no smoking gun of animus present here.*

The law might also constitute a forbidden endorsement of conventional religion or, in the obverse, a forbidden condemnation of unconventional religions. A reasonable and objective viewer would understand the law as a government statement of approval of some religions and disapproval of others. We must assume, after McCreary County, *that the reasonable observer knows the context in which the governmental statement is made, and that context includes the proliferation of mail order and Internet ordinations of such real churches as the Universal Life Church.*

The law is not coercive and, under that test, there would be no violation of the establishment clause. However, the coercion test, as the sole test of the establishment clause, has not garnered a majority of the Court.

The Marshall statute violates the establishment clause. Elimination of the offending limitation on ordained ministers means that Anna and Bob were validly married. They should get their money back from the Marshall Department of Revenue.

Procedural Due Process. *There is a minor issue of procedural due process. The facts are unclear regarding what process, if any, was afforded Anna and Bob prior to the state's recalculation of their tax liability. At a minimum, they are entitled to notice and opportunity to be heard, but that is afforded in this suit. Given the factual opacity, I did not expect much discussion of this issue. It was sufficient to note that the issue might be present, depending on what procedures the state utilized.*

Question Four
1750 Word Limit

After a federal government public health study identified Marshall as the state with the second-highest proportion of its residents in a condition of obesity (Arkansas was first), the following bill has been introduced into the Legislature of the State of Marshall, a state of the United States.

> Section 1. (1) The provisions of this section shall apply to any food establishment that is required to obtain a permit from the State Department of Health . . . , that operates primarily in an enclosed facility[,] and that has five (5) or more seats for customers.
>
> (2) Any food establishment to which this section applies shall not be allowed to serve food to any person who is obese, based on criteria prescribed by the State Department of Health after consultation with the Marshall Council on

Obesity Prevention and Management . . . or its successor. The State Department of Health shall prepare written materials that describe and explain the criteria for determining whether a person is obese, and shall provide those materials to all food establishments to which this section applies. A food establishment shall be entitled to rely on the criteria for obesity in those written materials when determining whether or not it is allowed to serve food to any person.

(3) The State Department of Health shall monitor the food establishments to which this section applies for compliance with the provisions of this section, and may revoke the permit of any food establishment that repeatedly violates the provisions of this section.

Section 2. This act shall take effect and be in force from and after July 1, 2008.

You are legislative counsel to Marshall Senator Mary Large. She asks you to assess the constitutional validity of the proposed law and, if you detect any constitutional flaws, to suggest changes that you think might be needed to make the law valid. Please do so.

[This bill was actually introduced into the Mississippi Legislature during the late winter or early spring of 2008.]

This proposed law raises questions under equal protection and due process. Each will be discussed below.

Equal Protection. *Under existing law, obesity is not a suspect classification, nor is the right to be served food in a regulated restaurant while in a condition of obesity a constitutionally fundamental right (for purposes of equal protection). Obesity is not generally an immutable characteristic, though for some people it is extremely difficult to lose weight due to genetic or medical conditions that render their obesity almost immutable. Until recently, there has not been widespread prejudice against the obese. While obese people are a discrete minority (in the sense that obesity is a highly visible characteristic) obesity does not generally produce insularity (though perhaps the morbidly obese are insular if only because of their ponderous size and lack of mobility. The proposed statute does not single out the morbidly obese, though, and given the hypothesized immobility of the morbidly obese the statute would have relatively little impact upon them.) Nor have the obese been perennially denied access to the political process. The normative argument for subjecting classifications on the basis of obesity to strict scrutiny is weak.*

Constitutionally fundamental rights (for equal protection purposes) must be either explicit or implicit in the Constitution. The right to be served food in regulated restaurants while obese is not explicit and there is hardly any textual source from which such a right may fairly be implied. Perhaps this claimed right is among the rights retained by the people that are mentioned in the Ninth Amendment, but the Ninth Amendment has never been regarded as the sole source of any judicially enforceable right. To the extent it has been relied on at all by the Supreme Court it has been invoked to add weight to some other source of an unenumerated right. See, e.g., Justice Goldberg's concurring opinion in Griswold*, or the "troika" opinion of Justices*

O'Connor, Kennedy, and Souter in Casey. *To the extent that this claimed right may be inferred from the word "liberty" in the due process clause the right is better examined as an aspect of substantive due process. See below.*

Is there any reason to treat the classification as involving a "quasi-suspect" classification? The reason that sex classifications are so treated is the belief that sex classifications are far more frequently germane to legitimate government purposes than are, for example, racial classifications. However, because there are many instances of sex classifications reflecting "archaic and overbroad" stereotypes about sex roles, the government is required to justify such classifications by proving that the classification at issue is substantially related to an important state interest. Classifications based on illegitimate birth are subjected to intermediate scrutiny because many such classifications reflect a prejudicial bias against bearing children outside marriage and visits that prejudice upon the innocent child. However, some such classifications are surely quite relevant to legitimate governmental objectives. These policy reasons for subjecting some classifications to intermediate scrutiny are not readily applicable to this classification because eating would seem to be a primary cause of obesity and this statute is aimed at eating – at least in regulated restaurants. Thus, the law is likely subject only to minimal scrutiny.

The Marshall government is evidently concerned about the public health hazard of obesity – both to the obese themselves and to the public fisc of Marshall and its citizens through the social costs (medical and economic) imposed by obesity. This is surely a legitimate government interest. Barring these regulated restaurants from serving obese people will prevent the obese from impulse dining – especially given the ubiquity of fast food restaurants that specialize in highly caloric fat-saturated offerings – but it will also prevent the obese from obtaining a bowl of miso soup at a festive occasion celebrated in a restaurant. Moreover, the proposed law does nothing to prevent obese people from eating mounds of food at home, whether prepared at home or ordered in by the truckload from a pizza parlor. Despite this simultaneous overinclusion and underinclusion, the law is rationally related to its objective. The legislature is free to "take one step at a time" and equal protection does not require a legislature to eradicate "all evils of the same genus."

Is there some reason to ignore these hypothesized purposes of Marshall and, instead, search for the government's actual purpose. Without more facts, there is no reason to think that Marshall is motivated by a bare desire to harm an unpopular minority. The apparent reason for the bill's introduction is the exposure of Marshall as the second-most obese state in the nation and the implicit assertion that this is a public health problem. Nor is the statute so wildly underinclusive as to permit the inference that the actual purpose is to punish an unpopular minority. The proposed law is consistent with the equal protection guarantee.

A restaurateur's challenge to the law would fail, as the claim is essentially a claim of unequal economic regulation. Cases such as Railway Express and Lee Optical would doom such a claim.

Due Process. *There are two issues concerning due process. Is the law void for vagueness? Does the law infringe upon a constitutionally fundamental liberty without sufficient justification?*

Vagueness. *Until the "State Department of Health, after consultation with the*

Marshall Council on Obesity Prevention and Management" has issued the criteria that define obesity and which will be used to monitor compliance with the law, it is not possible to determine whether the law is void for vagueness. This will prevent any facial challenge from being successful. However, it is critically important that the criteria that the law mandates be developed be precise, readily understandable, and capable of application without undue interference with the bodily integrity of restaurant patrons. For example, the criteria could provide a safe harbor for any restaurant that has weighed and measured each patron upon entrance (perhaps by a scale that each person much pass through at the entrance) and ascertained their height by means of a vertical scale posted at the entrance). A simple body mass index, using weight and height could be published and restaurants relying upon the published BMI criteria after having weighed and measured patrons would be entitled to a safe harbor. If the criteria developed are subjective (e.g., "gross," "major league fat," "hugely protruding belly") the criteria themselves will be readily susceptible to invalidation as vague. It is critical that the criteria provide adequate advance notice to would-be restaurant patrons that they are obese or not.

Substantive Due Process. *A "careful description" of the liberty interest affected by this proposed law is that the interest is the right of an obese person to obtain food in a restaurant. It is not the right to be obese; Marshall takes no action to punish the condition of obesity. Is this right deeply rooted in our history and tradition, nestled in our collective conscience so firmly that it would shock us to see it infringed? So far as I know, we have never had a tradition of denying food to the obese in places of public accommodation. Based on the paintings of some of America's founding generation, it looks like a fair number of them ate well and, given their extended stays away from home putting the country together, it must be the case that they were amply served in restaurants in Philadelphia, New York, and other locales. If resort to historical tradition is truly the guidepost for locating constitutionally fundamental liberty interests, this liberty would appear to qualify. If so, Marshall will be required to justify the infringement by proving that it has a compelling interest for prohibiting restaurant service to the obese and that this ban is narrowly tailored to that interest.*

Marshall's interest is both patriarchal and utilitarian. The patriarchal interest is its desire to enhance the health of the obese by curbing their ability to feed outside the home. The utilitarian interest is the state's desire to reduce public medical costs (borne by the state through public emergency services and provision of health care to the indigent obese) and private medical costs (via increased health insurance premiums charged to all insured Marshall residents and their employers because of the high incidence of obesity in Marshall). Marshall also has a utilitarian interest in increasing the economic productivity of the state's work force, because the obese may be more susceptible to sickness or other factors limiting productivity. Are these ***compelling*** *interests? The Court has never given us a general metric for determining what constitutes a compelling interest, but reasoning from past cases we can conclude that patriarchal objectives are not compelling and that the economic interests, while legitimate, are not compelling. The law is likely to be voided for want of a compelling purpose.*

Even if there is a compelling purpose, the law is probably not narrowly tailored to its purpose. There are so many other ways in which the obese can satisfy their food cravings that the law would appear to be poorly suited to accomplish its aims.

A restaurateur's SDP challenge would fail because the claimed liberty interest is, in essence, the discredited liberty of contract that was recognized in Lochner but repudiated in the 1930s with Nebbia and its progeny.

Given the current Supreme Court's evident distaste for increasing the stock of constitutionally fundamental rights (and the hostility of some justices towards the entire project of substantive due process) it is entirely possible that the law would be upheld, despite the conclusion reached here. If the legislature is willing to suspend its independent judgment about the constitutional validity of the law (which, in my opinion, it should not do) it can enact the law and await a lengthy test of its validity in the courts. There are few ways to narrow the law and still have any hope of reducing obesity. Perhaps a better policy would be a public health information campaign, aimed especially at parents and children, emphasizing the rudiments of good nutrition. If prohibition is preferred, it may be constitutionally acceptable to prohibit fast food restaurants from serving minors unless they are in the company of their parent or guardian, or to prohibit restaurant service to obese minors. Each of these options raise additional constitutional questions which cannot be answered here, but the state surely has a heightened interest in protecting minors.

[Some of you raised a procedural due process issue but that is a non-issue. Procedural due process does not apply to changes in substantive law, which may be challenged on their merits. There are some possible due process issues in the administration of the law – e.g., deciding which individuals are obese, or deciding when a restaurateur's license should be revoked for "repeated" violations of the law – but these are speculative. Mention of them was fine, but peripheral.]