

**Constitutional Law I  
Examination Post-Mortem  
Fall 2005  
Professor Massey**

Set forth below is the examination, my thoughts on the issues presented and the approaches that might have been taken with respect to analysis of them, and some comments on your examination answers. The grade you received reflects your identification of the issues, the thoroughness with which you analyzed those issues, and the soundness of your analysis. Some common shortcomings are summarized here:

– *Essays on the law, unconnected to analysis of specific issues.* Some of you provided very nice abstract essays on points of law, but either didn't connect them to the specific factual issues presented or devoted considerable time and energy to proof of points that were not really in dispute, given the facts of the problems. These essays did not produce a whole lot of credit.

– *Conclusions bereft of analysis.* Some of you provided stark conclusions but didn't give much explanation of how you reached those conclusions.

– *Failure to identify key issues.* Some of you failed to see what was important, others were confused about either the facts or the law applicable to the facts. Neither condition conduced a great deal of credit.

– *Muddled Analysis.* Some of you employed analysis that was inconsistent, confused, or which failed to lead to a conclusion, either stated directly or even fairly to be inferred.

– *Global Overkill.* Some of you tossed every conceivable issue into your answers, even when some of those issues were either not relevant, or not in dispute. I gave no credit for discussions of irrelevant issues and little or no credit for discussion of issues not in dispute.

I have repeated the questions below and then set out an analytical framework after each question. These are not model answers; they are guides to assess your own answers.

**Question One  
40% of the exam score  
7500 Character Limit  
(Approximately 1375 words)**

In response to heightened public awareness of the issues surrounding cessation of artificial sustenance to severely brain-damaged persons who have failed unambiguously to express their desires concerning their care in the form of a living will, durable power of attorney for health care, or other written instruction executed while

competent (a “terminally dependent undocumented person”), Congress enacted and the President signed into law the “Preservation of Human Life Act” (the “Act,” or the “PHLA”). The Act conferred jurisdiction on the federal courts to hear and determine all federal statutory or constitutional claims that might be asserted on behalf of a terminally dependent undocumented person, and provided that “any relative of” a terminally dependent undocumented person has standing to assert any claims of that person that arise under the Act. The Act also created a Human Life Commission, and empowered the President to appoint three of its five members, with the remaining two members to be appointed by the Chief Justice of the United States Supreme Court. The commission members serve for twelve year terms and may be removed only by the Surgeon General of the United States for good cause, provided that a majority of the United States Court of Appeals for the D.C. Circuit agree with the Surgeon General, who is a presidential appointee for a four year term, removable only for good cause. The Human Life Commission is charged by the Act with “the responsibility to develop guidelines for determining the circumstances when, in the absence of a living will, durable power of attorney for health care, or other written instruction concerning health care executed while competent, an incompetent person kept alive by artificial sustenance should have the sustenance removed and permitted to die of dehydration, taking into account the medical, ethical, and legal issues that bear upon the problem.” Under the PHLA, the Commission’s Guidelines, once promulgated, are binding upon any court that has jurisdiction of any suit in which at issue is the question of whether or not to remove artificial sustenance from a terminally dependent undocumented person.

The President appointed two United States Senators, each of whom are physicians, to the Commission, and also a well known medical ethicist. The Chief Justice appointed a medical professor and a law professor to the Commission. The Commission created an elaborate set of Guidelines that have been duly promulgated.

Norah is a 42 year old woman who has suffered irreversible brain damage and is being kept alive by artificial sustenance in Home Sweet Home, a private hospice. Norah never executed any written instructions concerning her health care while competent. Roger, her husband and legal guardian, petitioned the general trial court of the State of Floribunda, a state of the United States, for an order directing that Norah’s artificial sustenance cease. Carrie, Norah’s sister, objected but the Floribunda court concluded that, under the Commission Guidelines, Norah’s artificial sustenance should cease. The trial judge stayed the order pending exhaustion of all appeals. Carrie appealed to the Floribunda Supreme Court and lost. Carrie filed a joint petition for writ of certiorari in the United States Supreme Court which has been granted. You are a newly appointed clerk to your favorite Justice of the Supreme Court. He or she has asked you to draft a comprehensive memo outlining the constitutional issues presented, the arguments relevant to those issues, and a recommended resolution of those issues. Please do so.

*The first issue is the standing of Carrie to raise the constitutional objections to the PHLA she asserts before the U.S. Supreme Court. The Act explicitly confers standing upon “any relative of” a terminally dependent undocumented person. Thus, unless Congress has exceeded its authority Carrie has standing. Despite the Act’s explicit*

*grant of standing it is essential that Carrie has suffered personal injury in fact, or is immediately threatened with such injury, that is caused by the Act and which is susceptible to judicial redress. Carrie's immediate threat of personal injury in fact is the emotional distress she will suffer by experiencing the death of her sister pursuant to the Floribunda court order. That threatened injury results from the Floribunda court's enforcement of the PHLA, and that cause is susceptible to judicial redress in the form of a declaration of the constitutional invalidity of the PHLA. Moreover, Carrie has third party standing to assert Norah's claims. Norah is, of course, incapable of asserting her own claims. Carrie's interest in preserving Norah's life is congruent with Norah's interest in continuing to live. To the extent that Norah's real interest is to die, Roger is capable of asserting that interest. Unless Carrie is permitted to assert Norah's interest in continuing to live Norah will be practically prevented from asserting this interest. There is, of course, no question that Norah is threatened with immediate personal injury in fact.*

*The next question is the constitutional validity of the Human Life Commission itself. The Act vests the appointment power of commissioners in the President alone and in the Chief Justice. If the commissioners are inferior officers of the U.S. it is permissible for Congress to vest the appointment power in the President alone, the heads of departments, or the courts of law. The commissioners are probably inferior officers because they serve for a limited term and have a limited jurisdiction. Morrison v. Olson. However, it is not clear that the Chief Justice may validly appoint commissioners. While the Chief Justice might be thought to be the "head" of the judicial department, or a representative of the courts of law, the real problem is that the power exercised by the Human Life Commission is incongruous with the judiciary. The authority granted to the Human Life Commission is to make rules binding on the courts, but those rules are not rules of evidence or procedure (matters peculiarly within the province of the courts), but are substantive rules of law. The powers exercised by the Commission are either executive or legislative, and are so remotely connected to the exercise of judicial power that it should be considered a violation of separation of powers to permit the Chief Justice to appoint commissioners. An obvious danger is the fact that the judiciary will appoint commissioners that will make the substantive rules that the judiciary is obliged to interpret and enforce. This fusion of judicial, legislative, and executive authority creates a conflict of interest and concentrates constitutionally divided powers in a single entity. Moreover, the appointment of two United States Senators to the Commission appears to violate the provisions of the final clause of Article I, §6, which bars any member of Congress from "holding any office under the United States" while serving in Congress.*

*Even if the appointment of the commissioners is valid, the removal power is not. If the Commission is entrusted with executive authority, the power to remove the commissioners must lie somewhere in the executive branch. Although Morrison upheld a denial to the President of the power to remove an independent counsel, the Court relied heavily on the fact that the counsel was removable by the Attorney General and, of course, the Attorney General is removable by the President. Here, however, even the indirect power of removal approved by Morrison is stripped from the President. The Surgeon General, a presidential appointee who is removable only for cause, may not remove a commissioner without the approval of a majority of the D.C. Circuit. Thus, the*

*circuit court could veto any attempted removal and, of course, the President has no power to remove federal judges. The total denial to the President of any power, however indirect, to remove an executive official without the consent of the courts, is such an abrogation of the line of accountability of executive officials to the President that it impermissibly interferes with the President's power and obligation to "take care that the laws be faithfully executed." Moreover, the requirement that a majority of D.C. Circuit concur in the dismissal of a commissioner imposes non-judicial duties on the judges, duties inconsistent and incongruous with the judicial role. See, e.g., Hayburn's Case. Unless the jurisdiction of the courts is limited to determining whether or not good cause exists, the discretionary power given by the Act to the courts to remove a commissioner is the power to exercise executive discretion, not judicial discretion.*

*Even if the Commission is properly constituted questions remain about the validity of the Guidelines promulgated by the Commission. The first issue is whether the Commission's Guidelines are the fruits of an unconstitutional delegation of legislative power. The discretion granted the Commission is almost totally unbounded. Congress may have declared a policy – decide when the sustenance of a terminally dependent undocumented person should cease – but has wholly failed to define the circumstances in which its policy should be effective. Congress has merely told the Commission to take into account the medical, ethical, and legal issues that bear upon the problem." That is an empty directive. Even more problematic is the fact that the entire purpose of the Commission is to make law. The Guidelines are not ancillary to any executive or judicial power – they are nothing but new law, and so are the product of an impermissible delegation of Congress's sole power to make law.*

*Even if the Guidelines are not the product of an invalid delegation of legislative authority, there remains the question of the source of authority for Congress to prescribe the creation of the Guidelines. There are two possible sources of congressional power – the commerce power and the enforcement power contained in §5 of the Fourteenth Amendment. Each will be considered.*

*The circumstances under which a terminally dependent undocumented person should cease to receive sustenance is not a commercial matter, though it may have some commercial consequences. Nor do such circumstances necessarily involve interstate commerce itself or the instrumentalities of interstate commerce. Congressional power to regulate such circumstances exists, if it exists at all, only because such circumstances substantially affect interstate commerce. Because the activity regulated is wholly intrastate in nature and not commercial, and because Congress apparently made no findings of fact concerning the connection between interstate commerce and cessation of sustenance to a terminally dependent undocumented person, the Court is free to determine the degree of the connection for itself. The effect upon interstate commerce of cessation of sustenance to a terminally dependent undocumented person is weak. Even considering the class of regulated activities as a whole, the effect of the entire class upon interstate commerce is highly attenuated. The death of some small number of terminally dependent undocumented persons will have a negligible impact upon interstate commerce, produced by the decrease in demand for the health care services provided such people. Nor is the underlying activity – cessation of sustenance to terminally dependent undocumented persons – related to some valid regulatory scheme such that the failure to regulate this activity will undercut the independent and valid regulatory scheme. Raich v. Gonzales*

*was founded in part on the latter point, and it is simply not relevant to the PHLA. Nor is Raich's emphasis on the economic nature of marijuana growing and consumption for medicinal purposes of much help here. The Court in Raich thought that because marijuana was a commodity every aspect of its possession, distribution, or use could be controlled by Congress under the principles of Wickard v. Filburn. But it is extremely difficult to characterize the maintenance or cessation of artificial sustenance to incompetent persons lacking enforceable medical care directives as a commodity, and thus economic.*

*The Guidelines are not within the enforcement power of Congress under §5 of the Fourteenth Amendment because they do not remedy a declared or reasonably probable violation of due process or equal protection. Congress has made no showing that states have failed to provide procedural or substantive due process to terminally dependent undocumented persons. Nor has Congress shown that states have failed to provide equal protection to such persons. States have no constitutional obligation to prevent private persons from taking human life. De Shaney v. Winnebago County. Without some showing that there is a real problem of states violating the constitutional rights of terminally dependent undocumented persons the Guidelines are neither congruent with a constitutional violation nor proportional to any assumed but unproven constitutional violations.*

*Finally, in the unlikely event that the Guidelines are valid, they would be properly applicable to state courts, via the supremacy clause.*

**Question Two**  
**30% of the exam score**  
**4750 Character Limit**  
**(Approximately 900 words)**

Surprise, Floribunda, is a small town (pop. 5,000), composed of single family residences of 1,000 to 2,500 square feet in area and commercial businesses of 500 to 10,000 square feet in area. Thus, Surprise lacks any large "big box" retail stores. Big box stores offer a wide range of merchandise, either within a category (e.g., Home Depot, home building and repair; or Circuit City, electronic entertainment devices) or across a number of categories (e.g., Best Buy, Costco, or Wal-Mart), in very large facilities (often several hundred thousand square feet in area), and usually featuring low prices. Big box stores are very large because they purchase in large quantities to obtain price discounts that are passed on to consumers. Because such stores reduce their profit margins, and thus undercut smaller competitors on price, they need large spaces to generate sufficient sales volume to make their business strategy profitable.

The Surprise town council learned that Wal-Mart had purchased a vacant parcel of land, zoned for commercial use, on a highway on the outskirts of the town, but within the town limits, on which it planned to construct a 250,000 square foot Wal-Mart retail store. Concerned about the effect on the community of this new store, the town council enacted the following ordinance.

### *Very Large Retail Store Ordinance*

The Surprise Town Council makes the following findings of fact:

1. The town of Surprise is a small town characterized by close personal relationships among residents.
2. The character of Surprise and the quality of life in Surprise would be altered detrimentally by the destruction or erosion of those relationships.
3. The presence of very large retail stores, especially those that offer virtually every product within a given consumer category, located along major roads on the outskirts of Surprise will tend to increase traffic, promote development that is unfocused and sprawls, and contribute to degradation of the physical, social, and commercial environment of Surprise

Based on the foregoing, the Surprise Town Council enacts into law the following:

1. No retail store may be established within the town of Surprise if it occupies a floor area of 20,000 square feet or more, unless it shall have first obtained a Retail Special Use Permit from the Surprise town council.
2. A Retail Special Use Permit shall be issued only if the applicant has established by clear and convincing evidence that the proposed retail store will not pose any appreciable threat to the factual premises upon which this Very Large Retail Store Ordinance is founded.

Wal-Mart applied for and was denied a Retail Special Use Permit for its proposed store, after the town council determined that the store would have a detrimental effect upon traffic, development, and many of the existing retail establishments of Surprise. Wal-Mart has now brought suit in the federal district court for the District of Floribunda, seeking a declaration that the ordinance violates the U.S. Constitution and an injunction to restrain Surprise from enforcing the ordinance. Please assess the constitutional validity of the Surprise ordinance as applied to Wal-Mart, and provide your reasoned conclusion concerning the likely result.

*Wal-Mart may base its constitutional challenge to the Surprise ordinance on the negative, or dormant, commerce clause. The privileges and immunities clause of Article IV of the Constitution is not implicated because Wal-Mart is a corporation and the benefits of Article IV's privileges and immunities clause are available only to citizens. Corporations are not citizens for purposes of Article IV.*

***Dormant Commerce Clause.*** *The Surprise ordinance is not facially discriminatory towards interstate commerce. The first hurdle that Wal-Mart must overcome is to persuade the District Judge that the ordinance is either so motivated by a desire to discriminate against interstate commerce or delivers such strongly discriminatory effects against interstate commerce that the ordinance should be presumed to be void, thus placing the burden upon Surprise to prove that the legitimate purposes sought to be accomplished by the ordinance cannot be achieved by any less*

*discriminatory means. If Wal-Mart cannot do so, the burden will be upon it to prove that the incidental effects upon interstate commerce of the Surprise ordinance grossly outweigh the putative local benefits sought to be obtained by the ordinance.*

*The first problem with Wal-Mart's attempt to shift the burden of justification upon Surprise is to decide whether proof of discriminatory purpose, without accompanying discriminatory effects, is sufficient to trigger heightened scrutiny. A statute prompted by protectionist motives that is so artlessly drawn that it does not deliver its intended effects produces no actual injury to the uninhibited national market that is the dormant commerce clause ideal. On the other hand, such a statute is revealed as the product of illicit motives and, as such, the presumption of invalidity is a useful prophylactic device to ensure that no actual injury may occur in the future as a result of the statute, and to deter other legislatures from permitting protectionism and discrimination against interstate commerce from infecting their deliberative process.*

*A protectionist and discriminatory purpose is implied in the findings of fact, which speak of the importance of preserving the existing relationships between local residents, and implies that the commercial relationship between local merchants and residents is one of the things to be preserved. This hint is given somewhat stronger force by the third finding of fact, which speaks of erosion of the commercial environment. That may not be enough, by itself, to prove a protectionist motive, but is suggestive of such a motive. The implication of a protectionist motive is given added weight by the fact that the ordinance was enacted after Wal-Mart's intentions became known to the Town Council, a circumstance that suggests that the ordinance was motivated by opposition to the proposed Wal-Mart, an out-of-state enterprise.*

*The discriminatory effects of the Surprise ordinance may be seen by the fact that Wal-Mart, Costco, Home Depot, and Best Buy, to name just a few of the big box and category killer stores excluded by the ordinance, are interstate operations that are presumably headquartered somewhere other than Floribunda. (Wal-Mart, of course, is actually based in Arkansas.) More important is the fact that the size limit in the ordinance that triggers the Retail Special Use Permit requirement is set at a level that produces no impact whatever on existing Surprise retailers, but which makes it uneconomic for mostly out-of-state big box and category-killer stores to locate in Surprise. In addition, the size limit is set at a level that would permit local retailers to expand without triggering the ordinance. The fact that the ordinance might have some effect on some Floribunda businesses is of no moment, according to Dean Milk.*

*If the ordinance is protectionist in purpose and effect, and has no other purpose, it will be found to violate the commerce clause. If it has other legitimate purposes (which it seems to have, in the form of concern about development sprawl and increased traffic) Surprise must show that those legitimate purposes cannot be accomplished in any less discriminatory way. The question will be whether denial of a permit is the only way to achieve these objectives. Perhaps a smaller store (say, 100,000 square feet in area) would still be economic to Wal-Mart and blunt the detrimental impact of traffic and sprawl. Or, the permit could be granted on the condition that Wal-Mart provide a shuttle bus service from Surprise's central square, coupled with restrictions on the size of the parking lot to encourage patrons to use the shuttle bus.*

*However, the ordinance is facially neutral as to interstate commerce. The barriers it creates apply with equal force to in-state and out-of-state very large retail*

*enterprises. It does have some incidental effect on interstate commerce, given that most such big box retailers are multi-state corporations, but the putative local benefits are real and substantial in that Surprise seeks to maintain its quality of life, characterized by a small town, personal flavor. The effects on interstate **commerce** are not necessarily huge – anything that a big box retailer sells is not restricted from flowing across state lines into Surprise. Moreover, Exxon v. Maryland tells us that the commerce clause protects interstate commerce, not interstate **competitors**, and if the principal effect on interstate commerce is that certain interstate competitors have a harder time locating in Surprise, that should be of no significance to the dormant commerce clause analysis.*

*Thus, the better resolution of this matter is to uphold the ordinance under Pike v. Bruce Church balancing. The proof of discriminatory purpose is weak, and the discriminatory effects on commerce, as opposed to competitors, are modest.*

*A surprising number of you analyzed this problem exclusively in terms of the takings clause. I gave very little credit for that analysis, as the claim that the ordinance is a taking is so easily dismissed that I did not even regard it as an issue. Wal-Mart's possession of the land it acquired is unimpaired; Wal-Mart retains any number of ways in which it might profit from the land it has acquired, even though its intended purpose – construction of a big-box store – is foreclosed. Thus, none of the categorical rules apply and the nature of the ordinance interferes so little with the economic utility of the land (as distinct from the specific purpose Wal-Mart has in mind) that it is not a taking. Penn Central's "investment-backed expectations" do not extend to every conceivable expectation an acquirer of property may have as to its development. If it did, no regulation of land use would ever be valid, as all regulations foreclose some uses entirely.*

**Question Three**  
**30% of the exam score**  
**4750 Character Limit**  
**(Approximately 900 words)**

You are a newly employed assistant attorney general for the State of Floribunda, a state of the United States. The following memo has just landed on your desk. Please respond to the memo.

To: New A.A.G.  
From: Attorney General, State of Floribunda  
Re: H.R.418

The U.S. House has passed H.R. 418 and the bill has been referred to the U.S. Senate for consideration. Title II of H.R. 418 provides that a "Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the [Secretary of Transportation certifies that the] State is meeting the requirements" of Title II of H.R. 418. Title II

requires States to verify the identity, place of residence, date of birth, Social Security number, and citizenship or lawful residence status of each applicant, and requires States to capture the facial image of each applicant by digital technology, display that image on the driver's license or identification card, and embody in a machine readable data strip all of the information obtained by the issuing State concerning the identity, age, residence, citizenship, and Social Security number of the person to whom the driver's license or identification card has been issued. The reason advanced for H.R. 418 is to deter terrorism within the United States by increasing the integrity of commonly used means of identification. The federal Transport Security Administration has indicated that, should H.R. 418 become law, it will require air travelers to submit either a passport or Title II-certified driver's license or identification card in order to clear airport security. Federal law enforcement and security agencies have indicated they will adopt the same policy, which means that a visitor to many federal facilities, such as federal courthouses or the U.S. Capitol, must present a passport or Title II-certified identification to gain entry. I'm told only about 20% of Americans hold passports.

The Governor is concerned about this bill becoming law and wants to be ready to challenge its validity in court. Please give me your thoughts concerning the source of authority for Congress so to act. If there are multiple sources of authority, please consider all of them. If there are problems with any source of authority, please identify the problem(s) and assess the likely resolution in the Supreme Court of any such problem(s).

*The principal constitutional question presented by H.R. 418 is whether it impermissibly intrudes upon the autonomous governance processes of the states. H.R. 418 applies uniquely to actions of the states and thus, if its requirements are mandatory, is susceptible to state autonomy scrutiny. Before examining that question directly, it is helpful to clarify what it is that Congress seeks to regulate by H.R. 418 and separate that which is certainly valid from that which is of contestable validity.*

*Congress surely has authority to specify the form of personal identification acceptable to federal agencies for purposes that are otherwise within the legitimate scope of federal authority. Thus, Congress may specify acceptable identification requirements for access to federal installations as a necessary and proper means to "make all needful rules and regulations respecting the . . . property belonging to the United States." Art. IV, §3, cl. 2. Similarly, so long as it does so consistent with the various individual rights provisions of the Constitution, Congress may specify the identification requirements that are necessary to use the air travel system, an undoubted instrumentality of interstate commerce. Were this all that H.R. 418 mandated its constitutional validity would be nearly certain. But it does more.*

*On its face, H.R. 418 does not compel the states to do anything with respect to its driver's licensing or identification card issuance requirements. H.R. 418 merely specifies a federal consequence if the states fail to act in the manner specified by the act. In this respect it is similar to a condition imposed on the receipt of federal*

expenditures. The law is unambiguous in that the consequences of a state's failure to comply is fairly clear: The residents and citizens of such a state who possess only the state-issued driver's license or identification card would be denied access to air travel, a great many federal facilities, and perhaps subjected to other disabilities. Of course, such persons could obtain and use a U.S. passport or, if they are non-citizens, a foreign passport. As with valid spending conditions H.R. 418's identification requirements are related to a legitimate federal interest in projects or programs and, for present purposes, do not violate any independent constitutional bar. The core question is novel and untested: Is the effect of H.R. 418 so coercive that the driver's licensing and identification requirements have become, in effect, mandatory? This question need not be answered if Congress can validly require the states to issue driver's licenses and identification cards only in conformity with federal standards, but Congress cannot do so. *New York v. United States* clearly establishes that Congress may not commandeer a state legislature by directing the state's legislature to act in a certain fashion and *United States v. Printz* holds that Congress may not conscript the executive officials of a state to implement or enforce federal law. Under either view, the federal requirements of H.R. 418, **if they constitute a federal directive to the states**, are invalid. Thus, we must consider the question of whether a nominally voluntary option offered to the states is so coercive in effect as to constitute compulsion.

Because only 20% of Americans possess passports it is reasonable to conclude that the consequences of non-compliance with H.R. 418 to a state will be a pervasive and angry backlash of public opinion against the state. Citizens who find air travel more difficult (and, in some cases, temporarily impossible) will likely blame the state for their misfortune. This suggests both that it will be politically unacceptable for a state to fail to comply with H.R. 418 and that H.R. 418, in practice, poses the same sort of concern about blurred accountability that undergirds *New York v. United States*. The level of practical coercion present here is of far greater magnitude than the loss of a mere 5% of highway construction funds that faced South Dakota in *Dole*. Moreover, the qualitative nature of the pressure (in the form of blurred accountability) strongly suggests that H.R. 418 should be found to be coercive and its identification requirements an impermissible intrusion upon the autonomous governance processes of the States.

Of course, the Court has shown a marked reluctance to apply the coercion element of its conditional spending doctrine to find coercion, and it is by no means clear that the Court would be willing to import its coercion test from conditional spending to the related, but different, area of state autonomous governance. (Indeed, it declined to do so in *Pierce County v. Guillen*.) While there appear to be sound reasons for using coercion as a device to measure whether the nominally voluntary is actually compulsory, and to conclude that the terms of H.R. 418 will, in practice, so undermine clear accountability that H.R. 418 should be deemed to be coercive, it cannot be concluded with confidence that the Court would actually so rule. Because citizens can (and, over time, likely will) obtain U.S. passports the coercive effect of H.R. 418 is blunted. Its effects, even on non-compliant states, may be only temporary.

Even if H.R. 418 is coercive and the Court is willing to apply its coercion doctrine in this context it is questionable whether it would do so if the United States were to assert that it enacted H.R. 418 by using its power to implement war making. Given the congressional resolutions of September 2001 (with respect to Al Qaeda and its supporting states) and October 2002 (Iraq) it may well be within congressional power to

*implement war making to override any state autonomy concerns implicit in H.R.418.*

*Because the constitutional questions raised by H.R. 418 are sufficiently novel, and the arguments for the invalidity of H.R. 418 sufficiently plausible, the State of Floribunda should contest its validity, if that is the policy decision of the Governor and the Attorney General.*