

Exam Post-Mortem
Constitutional Law I – Fall 2008
Professor Massey

Below is a brief dissection of the examination. What follows is a repetition of each of the three 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, outlines the analytical approach to those issues, and provides 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. A discouraging number of the exams displayed numerous grammatical errors, awkward syntax, misspellings, incorrect word choices, typographical errors, and misstatements or misunderstandings of the facts. Organizational defects, which blurred inexorably into analytical lacunae, were all too common. Too many of you tried to deal with every conceivable issue, even when the issues were non-existent 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 74 to 20. The median and the mean raw score was each 40 points. Points reflect the accumulation of your recognition of issues and the quality of your analysis of those issues.

Question One
2000 Word Limit

After appropriating \$700 billion for emergency financial aid in October 2008, Congress enacts another law, the Restore Easy Credit Until Election Act (the “RESCUE Act”), which appropriates an additional \$500 billion (the “RESCUE Fund”), directs the Secretary of the Treasury to “make such investments of the RESCUE Fund as he shall think appropriate to the goal of restoring confidence in the global financial system, subject to approval by the RESCUE Fund Commission,” and authorizes the Secretary to “waive any legal requirements which may in the sole judgment of the Secretary impede the prompt and efficient investment of the RESCUE Fund.” The RESCUE Fund Commission is established by the RESCUE Act, and consists of three members: the Chairman of the Federal Reserve System, an appointee of the President, and an appointee of the Treasury Secretary. Members of the RESCUE Fund Commission serve until the RESCUE Fund has been terminated by sale or repayment of all the assets acquired by the RESCUE Fund, unless they have earlier been removed for good cause by majority vote of the Board of Governors of the Federal Reserve System, each of whom are appointed by the President for a 14 year term and confirmed by the Senate.

The Treasury Secretary uses \$7 billion of the RESCUE Fund to make a short term loan to the State of California, fully subordinated and junior in priority to all other debt issued by California. In so doing, the Treasury Secretary invokes the waiver power to override a provision of federal tax law that strips a state of its tax exemption for interest paid on its debt if the federal government has loaned money to the state. The loan is approved by the RESCUE Fund Commission.

George, a taxpayer, brings suit in federal court, challenging the validity of the loan to California. In a separate suit in federal court, the State of Nevada, a state that has not received any federal loans, challenges the validity of the California loan. The suits are consolidated before

your boss, a federal district judge, for whom you are clerking. The judge asks you to prepare a memo assessing all constitutional aspects of these two suits. Please do so.

*The threshold issue is **standing**. George's claim to have standing appears to rest on his status as a taxpayer. While *Flast v. Cohen* recognized taxpayer standing it required taxpayers to show that there is a specific constitutional bar to the expenditure they are attacking. Here, George's claim on the merits is that the RESCUE Act, which authorizes the loan, violates a variety of separation of powers principles. None of these principles (discussed below) are a specific constitutional bar to the taxing or spending powers. Instead, the separation of powers objections that George raises are general limits upon the exercise of federal powers, and thus do not support taxpayer standing under *Flast*. George's injury appears to be a generalized one, shared in common with all Americans: The RESCUE Act is alleged to fail to conform to requirements imposed by the Constitution's separation of the federal powers. In the absence of some particularized injury to George, he lacks a critical element of the constitutional core of standing: personal injury in fact, causation, and redressability. George's claim should be dismissed for lack of standing.*

Nevada's asserts standing on either of two theories. First, because the Treasury Secretary has waived California's loss of its tax exemption he has conferred an (allegedly) unlawful competitive advantage on California, to Nevada's detriment. California's solvency has been bolstered by an infusion of \$7 billion that is junior to all other debt of California, and this makes it easier for California to raise money in the tax-exempt capital markets, to the detriment of a competitor such as Nevada. The competitive injury was caused by the Treasury Secretary's allegedly unlawful action and a court can redress that injury by ruling that the RESCUE Act is unconstitutional, thus rendering all acts taken under it (including the California loan and the Secretary's waiver) null and void. The government will argue that this interest is remote and speculative, because there is no proof that an improvement in California's credit will in fact impede Nevada's ability to borrow. Even if California lost the tax exemption for its bonds there is no proof that this would enhance Nevada's ability to borrow. Also, because any alteration in Nevada's attractiveness to lenders would result from the independent decisions of those lenders, there is insufficient causation between the Secretary's acts and Nevada's asserted injury. Finally, the injury claimed by Nevada – loss of competitive advantage – is judicially redressable only if one assumes that the only reason for this loss is the Secretary's action and that the only reason investors might spurn Nevada debt in favor of California debt is the Secretary's act. This linkage is too attenuated; on this theory Nevada lacks standing.

*However, Nevada has a second theory to support standing: As *parens patriae* it seeks to vindicate its quasi-sovereign interest in securing the benefits of federal union, one of which is observance by the federal government of the constitutional procedures for altering federal law that applies to the states. Nevada claims that the Secretary's exercise of an unlawful waiver authority deprives Nevada of its quasi-sovereign interest in having the federal government use only lawful means to change the terms on which interest paid on state-issued debt is taxed by the federal government. According to *Mass v. EPA*, neither causation nor redressability need to be proven as clearly when a state asserts a claim as *parens patriae*. Proof that the Secretary's act contributed to Nevada's injury is all that is needed, and that is present here no matter how the injury is characterized. The Secretary's act has contributed to an indeterminate degree to Nevada's competitive injury and the Secretary's act has directly caused injury to Nevada's*

claimed quasi-sovereign interest. Redressability is established if the judicial relief sought would ameliorate the injury to some unknown degree, and that is true with respect to either the competitive injury or the injury to Nevada's quasi-sovereign interest. On this latter theory, Nevada should have standing. [Many of you misunderstood the nature of the waiver, and thus failed to appreciate the nature of Nevada's claimed injury. The waiver preserved the exemption from federal income tax for interest California pays on its debt to the holders of that debt – usually private investors. Without the exemption, California would have to pay a higher interest rate to entice investors to buy California's debt. The waiver enabled California to avoid that harm and the loan strengthened California's creditworthiness, thus making California a more competitive borrower in the capital marketplace.]

*On the **merits**, the RESCUE Act is alleged to violate several principles of separation of powers: 1) Congress has unlawfully delegated its legislative power to the Secretary and the RESCUE Fund Commission, 2) the RESCUE Fund Commission is unlawfully constituted in that its members are not constitutionally appointed, 3) the process of removal of members of the RESCUE Fund Commission is unconstitutional, and 4) the waiver power vested in the Secretary is an unconstitutional delegation of legislative power, but, if not, it is legislation that is void because it violates the bicameralism and presentment requirements. Each of these contentions will be examined below.*

***Delegation.** This argument takes two forms. First, by directing the Treasury Secretary to “make such investments of the RESCUE Fund as he shall think appropriate to the goal of restoring confidence in the global financial system, subject to approval by the RESCUE Fund Commission,” Congress has given discretion without bounding it by an ascertainable standard, thus impermissibly delegating its legislative power to the Secretary, an executive officer. The problem with this argument is that Congress has directed the Secretary to make appropriate investments that are calculated to restore confidence in the financial system. While this goal is nebulous it is hardly less so than other such general goals that the Court has concluded do not constitute an impermissible delegation of legislative power. The fact that the Secretary's investment decisions are subject to approval by the RESCUE Fund Commission lends some, but not much, weight to the argument that there is no improper delegation. The standard to be used by the Commission in consenting to the Secretary's decisions is not specified. The Commission is not Congress and if it were it is quite possible that the retention of this approval mechanism might violate the bicameralism and presentment requirements in a fashion analogous to the legislative veto. The best argument for finding this to be an impermissible delegation is that the standard is so flaccid it permits unbridled discretion. Any investment of the Fund is surely to be thought appropriate to restoring confidence. However, because of the Commission oversight and the expressed requirement that the Fund be invested in a manner calculated to restore confidence in the financial system, this may not be an improper delegation.*

However, the absolute lack of any standard given to the Commission with respect to the exercise of its veto power over the Secretary's decisions is surely an impermissible delegation.

***Appointments.** If the members of the Commission are principal officers of the United States, their appointment is plainly invalid for want of Senate confirmation and, in the case of the Fed Chairman, presidential appointment to the Commission (as distinguished from presidential appointment to his post as Chairman of the Fed). However, the members of the Commission are inferior officers. Their tenure is limited, albeit indefinite. They are subject to removal, although not by the executive branch. Their authority is limited to approval or*

disapproval of RESCUE Fund investment decisions of the Treasury Secretary. The authority of the independent counsel considered in Morrison v. Olson was more than that possessed by the Commission, and she was found to be an inferior officer. The principal objection to a finding that the Commission members are not inferior officers is that they are not subject to removal by the President or any of his subordinates who are, in turn, removable by the President. The Board of Governors of the Federal Reserve System are appointed by the President and confirmed by the Senate for 14 year terms. Yet, in Morrison, the Court held that the independent counsel was inferior even though she could only be removed by the Attorney General upon proof of good cause.

Even if the Commission members are inferior officers there remains the question of whether the appointment process is valid. The appointment by the President is valid, as is that by the Treasury Secretary (because he is a Department Head), but the stipulation by Congress that the Chairman of the Board of Governors raises an issue. The Chairman is a presidential appointee, so the congressional action of making him a member ex officio would seem to be in literal compliance with the requirement that inferior officers be appointed, as Congress directs, by the President, courts of law, or Heads of Departments. This argument is strengthened by the fact that the legislation calls for the Fed Chairman (whoever that may be at any point in time) to serve, rather than specifying Ben Bernanke, the current Fed Chairman. The difference is that Congress has simply specified which presidential appointee will fill the role, rather than specifying an actual person to serve. Yet, the President does not have any choice in the matter; he cannot appoint the Fed Chairman to the Commission; Congress has already done so. This would appear to be, in substance, a congressional appointment of a person already chosen by the President and confirmed by the Senate to a different position. Congress may not appoint inferior executive officers, and the functions performed by the Commission are executive (especially if the powers exercised by the Commission are not an invalid delegation of legislative authority).

Removal. *The Commission members may only be removed by a majority vote of the Fed Governors. That body, although consisting of members appointed by the President and confirmed by the Senate, is not accountable to the President or any other executive official. The ultimate question is whether these limits on removal of the Commission members “impede[s] the President’s ability to perform his constitutional duty” to faithfully execute the laws. This may be such a case. Even Morrison noted that the limits on removal of the independent counsel did not present “a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the ‘faithful execution’ of the laws.” This is that case. An executive official who is not removable by at least some other executive official who is removable by the President is wholly unaccountable to the President or his subordinates. That lack of accountability was, in part, a reason for the Court’s conclusion, in Printz, that Congress could not impose on state officers a duty to execute federal law. The same principle applies here. The Commission is invalid because its members, wielding executive power, are not accountable to and removable by any executive officer.*

Waiver Power: Lack of Bicameral Action and Presentment. *The power given the Treasury Secretary to waive any requirement of law is much like the power given the President under the Line Item Veto Act. For much the same reasons, it is invalid. If the waiver power, in substance, is a power to make new law by carving out exceptions as the Secretary sees fit, it is little different than the power given the President to cancel specific spending or tax provisions.*

Because of the lack of bicameral assent and presentment to the President, this effective new law, created ad hoc by the Secretary, is no law at all. On the other hand, if the waiver power is not the creation of a new law, but merely the exercise of discretion granted pursuant to a law that indisputably satisfied bicameral action and presentment, the question is whether the waiver power constitutes an impermissible delegation of legislative power. There are no explicit boundaries on the Secretary's discretion in exercising the waiver power, but there is an implicit boundary – that the waiver be used to accomplish the confidence restoring purposes of the RESCUE Fund. This may be an adequate boundary, as discussed above. Moreover, as Justice Breyer argued in the Line Item Veto case, the power given here is indistinguishable from such a power imbedded in every law. A big difference, however, is that these sorts of dispensing powers have been historically associated with the royal prerogatives of the Stuart kings, which makes such a power an unlikely tool of the executive in the government created by revolt against the successor to the Stuart kings. Given the breadth of the waiver power, its unsavory ancestry, and its highly unusual nature, it is either an invalid delegation or the creation of new law that lacks the requirement of bicameral assent and presidential presentment.

Nevada should ultimately prevail. The waiver power is ultra vires; the Commission is unlawfully constituted; but there is no need to rule on the validity of the remainder of the RESCUE Act, assuming that the waiver power and the Commission can be severed from the remainder of the Act. If they cannot be severed, the RESCUE Act is void.

[Many of you devoted considerable space to establishing that Congress had power to enact the law under either or both of its power to spend or to regulate interstate commerce. This is not wrong, but a waste of space as the Act is clearly a valid exertion of the spending power. Some of you devoted valuable space to issues of mootness or ripeness, which are not present here unless you failed to see how Nevada might have an injury that supports standing. Some of you wandered into irrelevant topics, such as executive immunity, the political question doctrine, or the Eleventh Amendment. Immunity is not relevant because Nevada would not be seeking damages from any official; the Eleventh Amendment is not relevant because no state is being sued for damages here. The political question doctrine is irrelevant because these issues are not textually consigned to another branch of the federal government for decision, standards of decision are judicially cognizable, and none of the other prudential grounds for finding a political question are strongly implicated.]

Question Two

1250 Word Limit

The State of California enacts the following law:

“To preserve the cleanliness and healthiness of California’s air and water, no vessel of any kind or type is permitted to operate in California waters if it uses or stores bunker fuel. The term “bunker fuel” means No. 6 fuel oil, the heaviest and most viscous residue of the oil refining process.”

Bunker fuel is used by virtually all large ocean-going vessels as the fuel to power their engines. Ninety-eight percent of those vessels who enter California waters are engaged in

interstate or foreign commerce. Bunker fuel is used by ocean-going vessels because it is cheap and the engines that use it are less expensive to build and maintain. Diesel engines are used by some ocean-going vessels but diesel is about twice as expensive than bunker fuel. There are virtually no coal-fired steam engine powered large vessels in existence; that technology is considered obsolete and is even filthier than bunker fuel in terms of air pollution. Conversion of bunker fuel engines to diesel would cost about \$2 million per vessel. Spills of bunker fuel are rare, and occur only when a ship sinks or when its fuel tanks are pierced by collision. Bunker fuel is also used in electrical generation facilities to start up a coal-fired electrical generation plant and is also used as a primary fuel for electrical generation in some plants. There are thirty-seven coal-fired electrical generation facilities located in California, and two electrical generation plants in California that use bunker fuel as a primary fuel. Bunker fuel is laden with heavy metals, sulfur, and other contaminants. Bunker fuel is not used by small vessels, such as the ferries on San Francisco Bay, nor is it used by small recreational craft. Assume that there are no federal laws addressing any aspect of this activity.

Socrates Parnassus, an extremely wealthy American shipping magnate who lives in New York, owns individually a large fleet of ocean going container ships and bulk carriers. His vessels regularly carry cargo to and from California, China, Japan, Korea, and other Pacific ports. In a typical voyage his ship will consume about \$500,000 of bunker fuel. His average profit on each voyage is about \$500,000. Parnassus has asked you to advise him concerning the constitutional validity of the California law. Because Parnassus was once a professor of constitutional law you need not explain matters as you would to a layman. Please prepare a memo that sets forth the constitutional issues (if any) posed by the law, and assesses the likely outcome of any litigation challenging the validity of this law.

Because there is no federal regulation of the issue, California's statute is susceptible to challenge under the dormant commerce clause and under the privileges and immunities clause of Article IV. There is a good probability of success on the dormant commerce clause claim, and a much weaker possibility of success on the privileges and immunities claim.

Dormant Commerce Clause. *California is regulating shipping, rather than participating in the shipping market, so the dormant commerce clause is fully applicable. California's regulation is facially non-discriminatory. All vessels are subject to the ban on bunker fuel, whether or not they are engaged in interstate or foreign commerce. There is no indication that California's objective is to achieve economic protection for California businesses. Nor is there any indication that California is seeking to protect a public investment choice of the sort at issue in either United Haulers or Kentucky v. Davis. California's objective is declared to be environmental protection, and that is supported by the fact that bunker fuel is "laden with heavy metals, sulfur, and other contaminants." Spills of this fuel into California waters can be expected to cause considerable environmental damage, and the exhaust from burning these fuels probably emits considerable damaging pollutants into the air. The effects of the regulations, however, are fairly discriminatory. None of the small vessels that ply California waters and that are likely owned and operated overwhelmingly by Californians are affected. Nor are any of the 37 coal-fired power plants located in California affected, and each of those plants uses bunker fuel. The only interests affected are large ocean-going vessels, and the overwhelming portion of those vessels are engaged in interstate or foreign commerce. As with Dean Milk, the regulation applies to burden virtually all shipping engaged in interstate or foreign commerce, and burdens*

some shipping engaged in intra-California commerce. The discriminatory effect of the law may be sufficiently sharp that, as in *Dean Milk*, *West Lynn Creamery*, or *Hunt*, the law should be treated as if it were overtly discriminatory. California bears the burden of proving that it cannot achieve its environmental protection objectives by some less discriminatory alternative. California could require all vessels using bunker fuel to keep the bunker fuel in compartments designed to minimize the danger of spillage in the event of collision, and to employ pollutant trapping devices on exhaust stacks to reduce the air pollution produced by burning bunker fuel. Of course, these measures would apply only to the same vessels subject to the bunker fuel ban, and thus do not appear to be any less discriminatory. But California could ban all use of bunker fuel, thus requiring its 37 coal-fired electrical generation plants to use some other fuel to start their plants, and requiring its two bunker fuel-fired electrical generation plants to shut down or switch to another fuel. A flat ban of all uses of bunker fuel is a less discriminatory alternative. If strict scrutiny applies, as it might be, California's law will be voided.

Even if the law is treated as non-discriminatory, it is still subject to *Pike v. Bruce Church* balancing. Parnassus must prove that the burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits. He can show that his costs will be considerably increased – indeed his current profit will be eliminated by forced conversion to diesel fuel. (Diesel costs twice as much as bunker fuel, and he currently spends \$500,000 per voyage on bunker fuel, earning a profit per voyage of \$500,000. Increasing his fuel costs to \$1 million per voyage eliminates that profit.) Yet, because every shipper is subject to the bunker fuel ban, it is not unreasonable to expect that all shippers will raise their rates for shipments to and from California to reflect higher fuel costs. Thus, Parnassus may still turn a profit, though possibly reduced from current levels. Alternatively, shippers like Parnassus may simply avoid California and use Portland or Seattle as ports. This would shift some of the risk of bunker fuel pollution to Oregon and Washington, perhaps akin to the trucking safety problem presented in *Kassel*. The environmental benefits are harder to calculate. It is not clear how much of an air quality improvement can be expected from conversion of bunker fuel to diesel, and it is “rare” to have a bunker fuel spill in California waters. Moreover, the law does nothing to curb bunker fuel usage by the electrical generation plants. While the disparity between burdens and benefits may not be as large as in *Southern Pacific* or *Kassel*, they still seem to be large. This might be a case where the safety and health benefits are at least non-illusory and thus deference should be paid to the legislative judgment. However, these safety and health benefits take big chunks out of the hide of interstate and foreign commerce, so even if *Pike* balancing applies California may well lose.

Article IV Privileges and Immunities. Because Parnassus is an individual he is eligible to assert an Article IV Privileges and immunities claim. The first hurdle is to establish that California is infringing upon an interest that is fundamental to national unity. California's regulation does not directly deny Parnassus access to a livelihood; rather, the regulation is a straightforward regulation of shipping. Even though Parnassus appears to make his living from shipping (and presumably a good living) he is not denied that right. He is only required to alter his business practices. Thus, it does not appear that any privilege or immunity protected by Article IV is implicated. Moreover, the regulation does not facially discriminate against out-of-state citizens. The regulation does have a discriminatory effect, though, as discussed above. While the *P&I* cases all deal with facially discriminatory practices, an analogy could be made to the dormant commerce clause cases. When a state law is sharply discriminatory in its effect

perhaps it should be analyzed as if it were facially discriminatory. This is, of course, a speculative and normative observation, not the law as it presently is.

Assuming that the California regulation could be treated as discriminatory and that it infringes a fundamental interest (still a dubious proposition, even under this theory), California may be unable to justify the infringement. The “peculiar source of the evil” that California seeks to address is largely, but not exclusively, produced by vessels engaged in interstate shipping. Yet, the fact that California has chosen not to regulate the local sources of the “evil” suggests a less benign, and more discriminatory, purpose. Moreover, there is no evidence that the local uses of bunker fuel are any less harmful to California’s air and water than the shipping uses of bunker fuel. However, because California’s regulation does not infringe any interest that is fundamental it will not be found to violate Article IV’s P&I clause.

[Some of you discussed the Eleventh Amendment. Of that group, some assumed that the 11th Amendment was a bar to suit by Parnassus. Others noted, correctly, that so long as Parnassus was seeking only a declaration of the invalidity of the California law and an injunction to bar its enforcement, the 11th Amendment was no obstacle to Parnassus’s suit. Some of you discussed takings, and some of that group dwelled unduly long on the subject. This is no taking. Parnassus is left in possession of his ships and can use them in an unrestricted fashion anywhere else in the world (presumably). The contracts clause is not applicable here, as some of you strained to do.]

Question Three **1350 Word Limit**

In *Roe v. Wade*, the United States Supreme Court held that, under the Fourteenth Amendment’s due process clause, a woman has a fundamental liberty to terminate her pregnancy. In *Casey v. Planned Parenthood*, the Supreme Court refined *Roe* by ruling that any abortion restriction imposed before fetal viability is void if it constitutes an undue burden upon a woman’s termination of her pregnancy. An undue burden was defined as any law that in purpose or effect is a substantial obstacle to obtaining an abortion. *Casey* concluded that Pennsylvania’s 24 hour waiting period before obtaining an abortion was not an undue burden. *Casey* also held that governments could regulate or prohibit abortions after fetal viability so long as they did not bar abortions when necessary to preserve the life or health of the pregnant woman. In an earlier case, *DeShaney v. Winnebago County Dep’t of Social Services*, the Supreme Court ruled that “nothing in the...Due Process Clause [requires] the State to protect the life, liberty, and property of its citizens against invasion by private actors.”

Assume that two bills are introduced in Congress. The first, the “Freedom to Choose Act,” resulted from testimony before Congress that 24 hour waiting periods in large states with few abortion providers (such as Montana and Wyoming) required women to travel hundreds of miles, stay overnight, and account for their absence from home in order to obtain an abortion. Evidence was also introduced before Congress that some states impose waiting periods, coupled with mandatory disclosures of the state of fetal development and abortion alternatives (such as adoption), to cause a pregnant woman to reconsider her decision. The “Freedom to Choose Act” provides as follows:

“Congress finds that the imposition of waiting periods before obtaining an abortion constitute an undue burden on a woman’s right to terminate her pregnancy. No government, whether state, local, or federal, may require any waiting period as a condition to obtaining an abortion performed before fetal viability.”

The second bill, the “Preservation of Life Act.” provides as follows:

“Any abortion performed before fetal viability must be performed in the manner most likely to result in the delivery of a living human being. Any person who knowingly violates this requirement shall be imprisoned for a term of not less than 10 years and not more than 15 years.”

You are a legislative aide to Senator Hiram Windvane. Senator Windvane tells you he can’t make up his mind which bill to support, and wonders whether Congress has the constitutional authority to enact either or both of the bills. Senator Windvane says he is not interested in any analysis of whether the bills infringe upon a woman’s right to terminate her pregnancy. Rather, he asks you to provide him with a memo analyzing whether Congress has a constitutional source of authority to enact each of the Freedom to Choose Act and the Preservation of Life Act, and to provide a well-reasoned conclusion concerning the constitutional validity of each bill. Please do so.

There are two potential sources of authority to enact either bill: the interstate commerce power and the power to enforce the substance of the Fourteenth Amendment. I shall discuss each source of authority with respect to each of the proposed bills.

Commerce Power. *Neither the Freedom to Choose Act nor the Preservation of Life Act regulates any channels or instrumentalities of interstate commerce. Accordingly, if Congress has authority to enact either of these bills under its interstate commerce power it is because the activity regulated has a substantial effect on interstate commerce.*

Freedom to Choose Act. *There are an estimated 1.2 million to 1.6 million abortions performed annually in the United States. The average cost of an abortion is about \$372, taking into account low-cost or no-fee abortions. That means that abortions represent about \$450 to \$600 million of commerce annually. This would appear to be a very substantial commercial activity. But this law does not regulate the category of “abortions”; it regulates waiting periods imposed as a prerequisite to obtaining an abortion. It is much harder to identify the total costs associated with waiting periods, but assuming that a typical waiting period is 24 hours (the period upheld as valid in Casey), one can identify some likely categories of cost: transportation, motel or hotel rooms, and lost wages from taking time off from work. While Congress has found that waiting periods pose an undue burden, it has made no findings of fact concerning the effect on interstate commerce of waiting periods. The activity regulated – waiting periods – are not themselves commercial, and do not necessarily involve interstate activity. Nor are waiting periods within the Court’s conception of commerce in Raich – any activity capable of exchange. Given that in Morrison the Court found that provision of a federal civil remedy for violence against women did not substantially affect interstate commerce, despite congressional findings that such violence impeded interstate movement and inhibited economic activity, this regulation seems to have at least an equally attenuated connection to interstate commerce. Some of the costs associated with waiting periods may affect interstate commerce, but the amount of the costs, and their impact on interstate commerce, is very uncertain. Nor is this*

legislation part of some larger regulatory scheme of which this is an integral part. This is a single subject act, much like the Gun Free School Zones Act invalidated in *Lopez*. Congress probably lacks authority under the commerce clause to enact this law.

[A fair number of you thought that state autonomy was impaired by this law. While it is true that the law only applies to the states, its effect is to preempt contrary state law by barring enforcement of state laws mandating waiting periods. States are not required to legislate in a fashion prescribed by Congress. They do not have to repeal their laws; they simply cannot enforce them if this law is a valid exercise of the commerce power. Nor are they required to administer a federal regulatory program. Again, they simply can't enforce a waiting period.]

Preservation of Life Act. Under this Act Congress seeks to regulate the manner in which abortions are conducted. While this regulation might constitute an undue burden, the question to be addressed is whether Congress has authority under the commerce clause to regulate the manner in which abortions are performed. The manner in which a physician conducts an abortion has no connection to commerce. Although the particular manner in which an abortion is provided could be capable of exchange, in that a person might bargain for a particular method of abortion, this possibility is so far removed from ordinary experience as to be fanciful. Physicians use their medical judgment; they do not negotiate with their patients about possible alternative surgical procedures. Moreover, the impact on interstate commerce of abortion methods generally, and this requirement that the method used be the one calculated to deliver a living human, has a highly attenuated connection to interstate commerce. It might be claimed that a requirement that physicians use the method most likely to produce a living human will increase population and thus commercial activity, the PLA only applies to abortions performed **before** fetal viability. Because almost none of those fetuses will survive, even if delivered in the fashion most likely to produce a living human, the argument is quite weak. As with the Freedom to Choose Act the activity regulated by this Act does not substantially affect interstate commerce. This Act is not a valid regulation of interstate commerce.

Fourteenth Amendment Enforcement Power. Congress has authority, under section 5 of the Fourteenth Amendment, to prevent violations of the substantive rights protected by the Fourteenth Amendment. One of those rights is the liberty interest of a woman to terminate her pregnancy prior to fetal viability. But Congress may not redefine those rights. To be remedial, Congress's regulation must be congruent with the constitutional injury to be prevented and must be proportional to the constitutional threat of injury.

Freedom to Choose Act. The constitutional injury that Congress seeks to prevent is the substantial obstacle that a waiting period may pose to the obtaining of an abortion. Although the Supreme Court in *Casey* ruled that Pennsylvania's waiting period did not pose such an obstacle, Congress had evidence before it that in some localities a waiting period could be a substantial obstacle. On the other hand, there is no evidence that waiting periods of any length at all pose a substantial obstacle. The Act equally forbids waiting periods of six hours, six days, or six weeks. The first period would probably never constitute a substantial obstacle, the second would be an undue burden in some (possibly many) circumstances, and the last period would be an undue burden in almost all circumstances. Yet, because a woman has a constitutionally protected right to terminate her pregnancy before fetal viability without a substantial obstacle being created by governments, the courts should display greater deference to the congressional judgment concerning the breadth of the remedy needed to prevent the constitutional injury. Recall that the level of judicial deference to the congressional judgment

about prophylaxis increases with the level of judicial protection afforded the constitutional right sought to be protected. An abortion prior to fetal viability may not be a constitutionally fundamental right, but it surely is entitled to heightened judicial protection. Hibbs regarded mandatory leave to take care of ill family members as sufficiently congruent with the constitutional right, grounded in equal protection, of freedom from sex discrimination. Similarly, this remedy may be congruent with the constitutional injury to be prevented – freedom from substantial governmental obstacles to obtaining a pre-viability abortion. On the other hand, Casey explicitly upheld Pennsylvania’s 24 hour waiting period as not constituting a substantial obstacle. For congruence to be established, Congress might have to demonstrate how waiting periods do create a substantial obstacle or, alternatively, how the imposition of waiting periods threatens other constitutional rights, such as freedom from sex discrimination. .

The remedy chosen by Congress is no doubt greater than needed to prevent the constitutional injury, for it would prohibit waiting periods like Pennsylvania’s (already ruled valid) as well as those imposed by Montana and Wyoming (apparently far more likely to be an undue burden). Because Congress may not have acted on evidence that the waiting period problem was widespread, it is possible that the flat ban is disproportionate to the threat. Yet, in Hibbs the Court was willing to accept a widely applicable provision even in the absence of much evidence that the states had been persistent constitutional offenders. The apparent reason for this deference was the presumption that sex discrimination is unconstitutional. While governments have the opportunity to justify their sex discrimination, an undue burden upon a pre-viability abortion is invalid per se. Thus, there is an even stronger presumption of invalidity of such government practices, a fact that suggests that the courts will be more deferential to congressional judgments concerning the breadth of the remedy necessary to confront the threat of constitutional injury. It is likely that Congress does have power under section 5 of the Fourteenth Amendment to enact the Act.

Preservation of Life Act. *The constitutional injury that Congress seeks to prevent with this Act is much harder to identify. [Some of you thought that limiting the Act to abortions before viability was a typo; others thought the law was simply bizarre.] Congress might be attempting to ensure that fetuses on the cusp of viability are given every chance to become living humans. Yet, there is no constitutional obligation of governments to seek to preserve human life against private invasion. Moreover, the Act is directed to private action, rather than state action. Morrison found congressional power to enforce the Fourteenth Amendment lacking when Congress enacted a federal civil remedy for the victims of privately inflicted violence motivated by sex. One problem with the Violence Against Women Act civil remedy, said the Court, was that the provision was not directed toward wrongdoing by the states. Here, even if one engages in the dubious supposition that Congress is acting to remedy the states’ failure to act, it is clear that the states have no constitutional obligation to act. Thus, there would appear to be no constitutional injury that Congress can remedy. Accordingly, the Act is incongruent with the constitutional violation (because there is none) and is disproportionate to the threat of the constitutional injury (because there is none).*