



Constitutional Law I
Professor Schapiro

FINAL EXAMINATION
May 3, 1996

Instructions

1. This exam consists of five pages, including this instruction page. Please check to make sure that your copy is complete.

2. There are three questions. Please answer each question in a separate bluebook. Please label the front of each bluebook to indicate which question you are answering.

3. The exam is modified open book. You may use only the casebook, the supplement, any material distributed to the class, and any notes or outlines that you prepared yourself or participated in preparing. Commercial outlines are not permitted.

4. The total time allowed for this exam is 3 hours 30 minutes. Take time to outline your answers before writing them.

5. The time suggestions indicate the weight that will be accorded each question. Parts of an individual question are not necessarily accorded equal weight.

6. Please put your exam number on this sheet and on the front of each bluebook NOW.

7. In addition, please put your exam number on the manilla envelope provided NOW.

8. At the conclusion of the exam, please put the bluebooks, along with the exam itself, into the manilla envelope. Please then seal the envelope and hand it in.

9. Good luck! Have a great summer!

Question One

(70 minutes)

The city of Palms, Florida is on the west coast of Florida. Palms has two sections: the western section is an island; the eastern section is on the mainland of Florida. The two sections are connected by a bridge. Each day, the bridge is badly clogged with rush hour traffic. To relieve the congestion, the Palms city council decided to widen the bridge connecting the two sections.

The population of Palms is 70% Hispanic and 30% white non-Hispanic. The population of the eastern (mainland) section of Palms is almost entirely Hispanic. The population of the western (island) section of Palms is almost entirely white non-Hispanic.

At one time, the city had an ordinance requiring that 30% of all subcontractors on city projects be Hispanic. This ordinance stated that its purpose was to remedy the effects of prior and ongoing discrimination against Hispanics in the construction industry. In the wake of the Supreme Court's decision in City of Richmond v. J.A. Croson Co., the council repealed that ordinance.

In preparation for the bridge contract, the city council adopted two new ordinances, Ord. 96-1 and Ord. 96-2:

Ord. 96-1 required that 40% of all subcontractors on the bridge project be residents of the eastern section of Palms and that 40% of all subcontractors on the bridge project be residents of the western section of Palms. (The ordinance thus dictated the residence of 80% of the subcontractors on the project.) The ordinance stated that the residency requirement would "help to reduce the flow of traffic through Palms and across the bridge, thus minimizing any further traffic congestion in Palms caused by the construction."

Ord. 96-2 required that all building supplies for the bridge construction be purchased within 100 miles of Palms. This area includes portions of Georgia and Alabama as well as Florida. According to the ordinance, this requirement would "minimize unnecessary truck and rail transportation on the Florida arteries and in the city of Palms."

Write a memo analyzing

- (1) Whether Ord. 96-1 is constitutional under
 - (a) the Commerce Clause,
 - (b) the Privileges and Immunities Clause, and
 - (c) the Equal Protection Clause;

and

- (2) Whether Ord. 96-2 is constitutional under the Commerce Clause.

Question Two

(60 minutes)

Assume that Congress passed and the President signed into law a "line-item veto" statute. This statute gives the President the right to "veto" any portion of a bill. That is, the line-item veto statute purports to give the President the authority to prevent a portion of a bill enacted by Congress from becoming law, while allowing the rest of the bill to become law. The line-item veto statute thus purports to give the President an additional option, besides vetoing the whole bill or allowing the whole bill to become law. The line-item veto statute provides that Congress may "override" a line-item veto by a two-thirds vote of each chamber of Congress.

Under longstanding law, American arms manufacturers are prohibited from selling weapons to foreign countries. When Congress wishes to permit sales of weapons to particular countries, it passes legislation specifically authorizing sales of specified weapons to those countries.

After the line-item veto statute was enacted, Congress passed a large foreign affairs bill, containing dozens of provisions. As part of the foreign affairs bill, Congress included a provision permitting American arms manufacturers to sell the F-99, an advanced fighter plane, to Bosnia.

Invoking her line-item veto authority, the President "vetoed" the portion of the bill permitting the sale of the F-99 fighter plane to Bosnia. The President then signed the bill into law, attaching to the bill a "signing statement" specifying that she was "signing" the bill except for the provision allowing the sale of the F-99 to Bosnia. Stating that she wanted to "avoid any possible ambiguity with regard to a very delicate matter of foreign relations," the President then issued a separate "executive order," Executive Order 1234, specifically prohibiting the sale of all weapons to Bosnia. After the President's actions, Congress took no further action with regard to the sale of arms to Bosnia.

The F-99 is manufactured exclusively by Douglas, Inc., an American company. Douglas filed a lawsuit in federal district court, challenging Executive Order 1234 and the President's purported veto of the provision authorizing the arms sale to Bosnia.

(question continued on next page)

The line-item veto legislation assumed in this question varies in significant ways from the actual line-item veto legislation that was recently enacted. Please base your answer on the legislation described in the question, not on the actual legislation.

Write a memo analyzing (1) whether Douglas has standing to bring the suit, and (2) whether Douglas will succeed on its contentions (a) that the line-item veto violated Art. I, § 7 and the separation of powers, and (b) that the President had no authority to issue Executive Order 1234.

Question Three

(80 minutes)

Assume that the State of Utah recently enacted the Multi-Marriage Act, which permits polygamy. The statute permits a man or a woman to marry, even if he or she is already married to someone else.

In reaction the United States Congress is considering the following legislation:

The Monogamy Enforcement Act

Sec. 1. Findings.

- (a) Congress finds that the practice of polygamy is inimical to the progress of civilization, creates discord both within the marital units that practice it and within the societies that permit it, demeans the status and economic independence of women, and has adverse economic effects on societies that permit it.
- (b) Congress finds, in specific, that even if multiple marriages are in theory available equally to men and to women, in fact it is more likely that men will have multiple wives than that women will have multiple husbands. Congress further finds that the practical effect of permitting polygamy is to demean the status and economic independence (i) of the women who share a husband with other women and (ii) of all other women in society, even those not involved in polygamous marriages.

Sec. 2. Prohibition of Polygamy.

The practice of polygamy is prohibited.

Sec. 3. Penalties.

The practice of polygamy is a felony punishable by imprisonment for up to two years and the nullification of all purported marriages subsequent to and concurrent with the first marriage.

Write a memo analyzing

(1) Whether the Monogamy Enforcement Act is a valid exercise of Congress's power under (a) the Commerce Clause and (b) section 5 of the Fourteenth Amendment;

and

(2) Whether the Monogamy Enforcement Act violates (a) due process or (b) equal protection.

CONSTITUTIONAL LAW
Spring 1997
Professor Schapiro

Answers to 1996 Exam

The following are the issues that I thought were important in answering the questions on the 1996 exam. I also have attached two examples of good student answers.

Question One

I. Ordinance 96-1

Commerce Clause

Discrimination

Facial discrimination?

Require 80% subcontractors from city thus state Counts as discrimination against out-of-state, even though in-state also affected. Carbone.

-like partial embargo; Philadelphia v. N.J.

-political/economic theory: costs on outsiders, benefits on insiders

-promotes Balkanization

-intentional discrimination?

Is justification compelling?

-not quarantine

Even if not facial discrimination, burden on ISC
no substantial local benefit.

Might be burden on ISC (need more facts)

Market participant

state may regulate when participating in market

on theory of White, city participating in market, subs like

employees of contractor, working for the city

not downstream like Wunnicke

Privileges and Immunities

Applies even though

city, not state regulation

discrimination is by municipality

Is privilege fundamental?

right to work for public contractor is. Camden

the issue here is different, but has similarities

Does substantial reason support disparate treatment?

city's money at stake

reason seems rather flimsy

Equal Protection

Level of Scrutiny

suspect class

Facial discrimination? - No

Facially neutral w/intent to discriminate (Loving)

Arguably yes, intent to create set-asides

If not, then merely discriminatory effects, no strict scrutiny (Washington v. Davis, McCleskey)

fundamental right

analysis might differ from question whether fundamental right for purposes of privileges and immunities

if look to precedent or history - likely no fundamental right involved

If apply strict scrutiny

fails:

underinclusive - other people cause much traffic

overinclusive - 40% seems irrational, not all out-of-towners cause traffic

no attempt to justify as affirmative action under Croson standard

If rational relationship test applies:

A bit odd, but no worse than other cases we studied

II. Ordinance 96-2

Facial discrimination. Carbone.

Overinclusiveness probably does not save

-not perfect cost-shift to outsiders, but close

-threat to political union

excuse insufficient

market participant

what is the market

arguably not in market for building supplies

not as downstream as Wunnicke

Question Two

I STANDING

injury in fact

for both:

- injury appears concrete and particularized, not generalized or hypothetical
- for line-item veto, Douglas is directly and singularly affected
- for executive order, others affected also, but still not generalized

causation

for both

- harm seems fairly traceable to challenged conduct, not result of third party intervention

redressability

for line-item veto

- some question as to remedy: if treat "line-item" veto as general veto, then no relief will be forthcoming; but this goes more to remedy than to redressability in standing context

for executive order

- likely that injury would be redressed by favorable decision

Note that requirements might be different for 2 challenges

merits-based approach

Structural principle of separation of powers, Art. I, s 7, and limitations on President's authority -- all designed to protect citizens against tyrannical lawmaking. Thus they do confer enforceable rights on adversely affected citizen

II LINE ITEM VETO

textual argument: Art. I, s 7

- apparently exclusive means for presidential involvement is by vetoing "bill"; if not veto, it becomes law
- question of what is "bill", can line-item veto legislation construe each provision as a "bill", or can each congressional vote produce only one "bill"

general separation of powers argument

delegation

- Congress has broad authority to delegate power, as long as not delegating to itself (Chadha, Bowsher); here not delegating to itself
- But, this is super-delegation: delegating ability to thwart congressional will

broad policies of separation of powers

- practical effect: huge enhancement of

presidential power
-danger of tyranny
-promote energetic executive
practical accommodation
-Congress maintains basic power to override by 2/3
vote
-maintain basic principles of checks and balances
-in Chadha, Bowsher, Court rejected Justice
White's view of practical accommodation

III EXECUTIVE ORDER

Curtiss-Wright affirms broad presidential power in foreign
affairs

But Dames & Moore shows that Steel Seizure
framework does apply in foreign affairs

But may apply with greater deference to President

Justice Jackson's Steel Seizure framework

What category

If line-item veto stands, then arms sale is contrary to
statute

-then, executive order is in accord with Congress
in that President is enforcing the law (even
though against will of Congress as recorded in
vetoed legislation).

If line-item veto fails, then executive order is in
direct conflict with Congress, in which case
President's power at minimum.

However, could argue that because Congress granted
line-item veto (even if unconstitutional), any action
pursuant to line-item veto is impliedly authorized by
Congress

Extras

Justice Black's categorical approach
Analysis of other presidential powers

Question Three

Commerce Clause

Lopez Framework

- 1) regulate channels of Interstate Commerce ("ISC")
 - does not seem to be a channel of ISC
 - (not like motel necessary for interstate travel)
- 2) regulate instrumentalities of ISC or persons or things in ISC
 - does not regulate instrumentalities of ISC
- 3) regulate (economic) activities that "substantially affect" ISC
 - a) not economic activity, which though intrastate in itself has effect on ISC; not economic activity at all
 - b) no jurisdictional element ensuring on case by case basis that has effect on ISC
 - c) does conduct substantially affect ISC?
 - unlike Lopez, have findings to assist, not essential but helpful; arguably does affect commerce
 - closer connection to commerce than guns in schools
 - more like Perez

Other factors

area of traditional state concern?

Yes, family relations

Also criminal law

coordination problem; i.e., can't be regulated by one state?

Yes, can get married in one state, effects in another state

-affect even those who don't marry

New York v. United States

a) Is this commandeering state legislative process/requiring state to regulate?

No, just applying federal law to people in state

b) threaten accountability?

Not more than other times when state court enforces fed law

Section 5

Remedial Theory:

question whether polygamy violates equal protection

Not clear it does

Arguably intent to discriminate against women

If not,

-hard to justify as remedy for past or future violation

-perhaps "remedy" to prevent arguable violation (but state action problem)

Substantive

fact-finding competence

Due Process

Level of Scrutiny

Fundamental Right

text - no

precedent - Zablocki v. Redhail: right to marry is fundamental, but that does not necessarily imply a right to polygamy

Griswold, Eisenstadt, Roe, Casey - could read as protecting any intimate conduct, or as only decisions about procreation

tradition

-depends on level of generality

No tradition of polygamy, but

tradition of protecting intimate associations

Strict Scrutiny

-if compelling interests are those stated in findings, likely fail because not all polygamous marriages have these ill effects

-if compelling interest is enforcing the Fourteenth Amendment, then may pass

Rational Basis

Rationally related to legitimate state interest

Equal Protection

distinguishes between monogamous and polygamous marriages

suspect classification

are polygamous spouses a (suspect) class

some history of discrimination, but not other indicia

fundamental right

see above

strict scrutiny

Is it only polygamous marriages that cause the identified problem?

rational relationship

rationally related to legitimate state interest

SAMPLE STUDENT ANSWER NO. 1

Question One

1) (a) The Commerce Clause

Evaluation of Ordinance 96-1 under the commerce clause of the Constitution (Art I§8) leads to a 'dormant commerce clause' analysis. Although the text of the Constitution does not mention states, the Supreme Court has consistently read the clause to include a negative element; thus, certain state actions can violate the commerce clause, even if Congress has not acted in the area. Reasons for this interpretation include the need for national unity, the concern about "cost-exporting" by the states, and the prevention of state "barriers" to trade.

Ordinance 96-1 is promulgated by a city council rather than a state, but that does not change the analysis. Carbone essentially held that any discrimination on the basis of geography is essentially discriminating about state lines. Thus, even though this ordinance only implicates "residents" of a city and not a state, it is still subject to a dormant commerce clause analysis.

Because Ord. 96-1 is geographically discriminatory on its face there is a presumption of invalidity. (City of Philadelphia) However, there are exceptions that can overcome the presumption.

First, if Congress had consented to the discriminating, then it is not invalid. There appears to be no Congressional intent in this case.

Second, if the city could show both a legitimate state benefit and pass a rigorous showing of no alternative, the ordinance would be valid. There is a significant question whether there is a "legitimate benefit" gained from this (Possibly that employment in the city increases). Assuming arguendo the city could pass that test, it is unlikely a court would find no possible alternative. This is not a Maine v. Taylor situation in which a quarantine is necessary.

Finally, there is an exception to the presumption of invalidity if the state is a market participant. If so, the state like any private employer, is permitted to show favoritism.

The instant ordinance looks strikingly similar to White v. Massachusetts Council of Construction Employees (1983). In White, the City of Boston required 50% of all employees on city project be city residents. The Supreme Court upheld the Boston ordinance. In this case, there is a difference in that the city is requiring subcontractors to be residents rather than

employees. Additionally the percentage is much higher (50% compared to 80%). However, the city does look like a buyer (market participant) in this case more than a regulator.

However, the Court placed some further restrictions on the MP doctrine in South-Central Timber Development v. Wunnicke. First, the regulation by the city cannot be too far downstream. This could be a question in this case since the city is regulating subcontractors rather than employees. Second, the Court looked at whether the city was involved in a complex process or in natural resources. It seems fair to classify this as part of a complex process (like Reeves and White). Third, the Court looked to see if foreign commerce was involved. There appears to be no foreign commerce involved in the instant case.

There is also always a question over what exactly the "market" is that the city is involved in. In this case it seems like they are a buyer for construction but they are regulating subcontractors. That might be too far "downstream". Overall, though, it appears that Ordinance 96-1 would pass a dormant commerce clause analysis with a market-participant exception.

The Privileges and Immunities Clauses

The year after White, the court heard a very similar case in United Building and Construction Trades v. Camden. That case involved employees also, requiring that 40% of residents of the city for city construction contracts. Although the Court ultimately remanded the case it set out methodology by which the case should be analyzed under the Privileges and Immunities Clause (Art. IV §2).

First of all, the court said that cities were subject to the same scrutiny as states (though the P&I clause specifically says "state"). Next, the Court said it must be determined if the challenged ordinance involves a fundamental privilege. Essentially, the question is whether what is being burdened is fundamental to the promotion of interstate harmony. After some discussion, the court determined that the right to pursue one's livelihood (thought it involved a "city" job) was a fundamental privilege.

This leads to the next step of the inquiry: Is there a substantial reason for the differential treatment? While the Court did not decide in Camden, they did mention that, as under the MP doctrine, the city should be given "considerable leeway in analyzing local evils and in prescribing appropriate cures" (Camden quoting Toomer). In the instant case, there appear to be inadequate facts to answer this question. While the ordinance discusses the "traffic flow" problems in Palms and across the bridge, that alone would likely be enough to satisfy the

substantial reason for different treatment.” Accordingly, the ordinance appears to fail the P&I clause on the information given, but more facts are necessary for a thorough determination.

The Equal Protection Clause

Applying equal protection analysis to Ordinance 96-1 first requires “classifying” the ordinance. This ordinance is non-race specific, and is facially neutral. There does not appear to be a “suspect class” listed in the statute itself, for neither residents on the east or west side of Palms are “suspect” according to the Court that is, not by that classification. There does not appear to be a recognized fundamental right that is implicated by the statute either, unless the Court were to find that the right to employment is fundamental, which is unlikely.

If there is no suspect class involved nor a fundamental right, the statute would receive rational basis review under equal protection analysis. As such, the city would have to show that it was “rationally related to a legitimate state interest.” This rational basis test is essentially a court’s rubber stamp of approval on whatever a city/state does. Controlling traffic flow does appear to be a legitimate state interest. Restricting who can be a subcontractor on the bridge may seem silly, but a court is very unlikely to find it “irrational”. They are extremely deferential to legislatures under rational basis review. Although this ordinance is both overinclusive and underinclusive for traffic control purposes, the Court would let it stand because legislatures may act “one step at a time” (Williamson v. Lee Optical).

If the ordinance were to have to undergo strict scrutiny, it would have to be shown to be “narrowly tailored to advance a compelling state interest.” Strict scrutiny in itself is essentially fatal, as J. Marshall said in Fullilove. The city would not be able to show that this ordinance was narrowly tailored, nor that the traffic issue is “compelling.” Additionally, the overinclusiveness and underinclusiveness would kill the ordinance under strict scrutiny for a lack of narrow tailoring.

However as stated above, it appears that Ord. 96-1 would only receive rational basis review and would thus not violate the equal protection clause. [Note: even if there were a disparate impact on some “suspect class,” it would still receive rational review.]

Whether Ordinance 96-2 is constitutional under the Commerce Clause

As stated in section one above, Ord. 96-2 would be subject to dormant commerce clause analysis similar to that for Ord. 96-1. Again, Ord. 96-2 discriminates on the basis of geography

(though it includes parts of Georgia and Alabama), and discrimination on the basis of geography is presumed to be discrimination about state lines.

This would render the statute facially discriminatory and presumed invalid unless it met an exception. Congress does not appear to have consented. This does not appear to be similar to a quarantine. If the state is viewed as a market participant under Ord. 96-2, it appears they are controlling too far downstream, similar to Wunnicke. It does not appear the MP exception applies.

The state could try to show that there is a legitimate benefit and no non-discriminatory alternative. However, the legitimate local benefit of reduced traffic flow on Florida arteries and in the city of Palms is questionable. Actually, the traffic flow by truck and rail will be exactly the same in the city of Palms no matter where the goods come from. Further, the city had not yet shown no non-discriminatory alternative possibly by boat or plane. Thus, the ordinance would be unconstitutional according to the dormant commerce clause on this analysis.

Further, this does appear to be a substantial burden on interstate commerce and threaten national unity, because the market is essentially being shutdown. Costs are borne by out of staters (with the minor exception of a few Georgians and Alabamans) and possibly costs by Palm resident who pay higher prices for goods. Benefits all flow to Palms and the immediate area. This appears to be unconstitutional.

Question 2

The Court would first address whether Douglas has standing before proceeding to the merits of the case. The requirement of standing promotes the goals of judicial restraint and separation of powers (and the counter majoritarian difficulty), assures concreteness and adversariness in the process and reinforces individual autonomy.

There are three requirements of standing: injury in fact, “fairly traceable” (causation), and redressability. First, there must be an injury in fact to the plaintiff. Douglas would suffer direct economic harm, particularly because Douglas is the sole manufacturer and was basically almost assured of a sale, so our analysis must proceed.

Second, the injury must be “fairly traceable to the challenged conduct”. This is the causation prong. It appears that Douglas would meet this requirement because without the president’s action, Douglas would now be permitted to sell the F-99 to Bosnia.

Third, the plaintiff must meet the requirement of redressability; that is, if the court does what you ask, will your injury be remedied. In the instant case, a remedy would not likely redress the injury, because there would still be a ban on sale of F-99s to Bosnia (from the “long history”). However, it would assure that this conduct does not happen in the future, so there is a possibility this would be met.

Overall, it appears Douglas would have standing to bring suit under the traditional formulation.

Alternatively, we could look at a merits-based approach to standing. Such an approach would effectively ask: “Does the plaintiff have a legal right to judicial enforcement of a legal duty? “This would likely lead to a finding that Douglas did have standing, especially in regard to constitutionality of the line-item veto.

Did the Line Item Veto Violate Art I § 7 and the Separation of Power?

Procedurally, the line item veto appears to have been passed in accordance with the constitution, as it met the two requirements of bicameralism and presentment, set out in INS v. Chadha. The Supreme Court has also intimated that Congress can delegate powers so long as it

does not delegate them to itself (see Bowsher v. Synar). This on the surface appears to meet the requirements.

However, potential problems arise as we look deeper. Article I, § 7 sets out a specific way for legislative activity to occur⇒through bicameralism and presentment. There is a very strong textual argument that the language of “every Bill” means every bill. The constitution does not mention parts of a Bill, which occur through the line item veto. This is essentially an “exclusio unius” argument; because the constitution talks about a Bill, it does not mean portions of a Bill.

A textual counter argument could be that since the Constitution gives Congress the power to do this with Bills, it should be able to with smaller parts. If they can do the greater, they should be able to do the lesser, so long as it still meets the requirements of bicameralism and presentment. This is some what akin to J. White’s “this is no big deal” argument dissenting in both Bowsher and Chadha.

On a structural level, we have set-up “separation of powers” to promote accountability and to prevent tyranny. The line item veto does not seem to promote Congressional accountability, for they could pass things and allow the President to veto them out and blame him. However, to the extent “pork” legislation is vetoed it promotes accountability. Thus, the accountability argument seems to cut both ways.

The prevention of tyranny seems to be a stronger motif at work. This looks like an abdication of Congressional power and an increase in executive that may be unhealthy.

A strong historical argument also exists that the framers set the constitution up to act as a “bill” with a “veto”, and did not put in a line item veto. Years of history attest to this established practice. However, the counter argument is that times are different and the constitution can adapt to the times as necessary.

Overall it appears the stronger arguments lie on the side that this line item veto does violate the separation of powers and Art. I, § 7.

The seminal case involving presidential power is Youngstown v. Sawyer. The court held there that the president does not have the power to make laws, only to enforce them, according to J. Black writing for the majority. However, the case spawned several opinions, the most famous

of which is J. Jackson's concurrence, which a later court effectively adopted in Dames & Moore v. Regan.

Executive Order 1234 looks like it falls in Jackson's category 3, which is against Congressional action (explicit or implied). This is owing to Congress' passage of a bill that was vetoed. But, there is also a history of "longstanding law" of prohibiting arms sales, that might be enough to get this into Jackson's category 2 ("twilight zone"). If it is in category 3, it must withstand heavy scrutiny; if category 2 one must look at the circumstances.

An additional element to consider is that this case involves foreign affairs, and the president is seen as the sole organ of foreign affairs. Accordingly, the president has more leeway in this area according to U.S. v. Curtiss-Wright and possibly Dames and Moore.

Further, the longstanding tradition of prohibiting the sale of arms might be seen as a "gloss on the history" of the constitution. (J. Frankfurter in Youngstown). This lends further credibility to the President's action.

Thus, although a strict reading of Youngstown majority opinion might lead to deeming Exec. Order 1234 unconstitutional. This probably would be constitutional. This is because J. Jackson's categories have been adopted overall and this involves history and foreign affairs, and would thus satisfy the Jackson analysis.

Question Three

Is the Monogamy Enforcement Act a valid exercise of Congressional Power under the Commerce Clause?

The Supreme Court's most recent commerce clause cases U.S. v. Lopez, outlined three areas that Congress may regulate. First, Congress may regulate the channels of interstate commerce. This does not appear to apply to this Act. Second, Congress may regulate the instrumentalities of interstate commerce. Again, this does not appear to apply to this Act. Third, Congress may regulate things that have a substantial effect on commerce. It is this third item that merits further investigation here.

This Act does not appear to be an economic activity. However, the Congressional findings indicate that there are "adverse economic effects" associated with and stemming from polygamy. Such findings were noticeably absent in Lopez, and are helpful here.

However, there is no jurisdictional element present, (the same was lacking in Lopez). This is not fatal to the Act, though harmful. Even with the lack of a jurisdictional element, congress may be permitted to aggregate the economic effects of any marriage (see Wickard). So while this Act does not directly involve "commerce," it looks like it may have a substantial effect on it.

The inquiry should further ask if this is traditionally a matter left to the states. Family issues, such as marriage and divorce, are traditional state realms. However, there appears to be a significant potential coordination problem. If Utah law allows polygamy and 49 other states ban it, people may go to Utah and become "legally" married multiple times. This would frustrate the purpose of other states, and so there is a legitimate coordination problem.

The inquiry should further ask if this Act would be a "commandeering of state functions:" and threaten political accountability (New York v. United States). It appears that this case is distinguishable from New York in that New York would require states to make laws, while this Act would only require enforcement by the States.

In sum, with the great level of deference given to Congress to determine commerce clause issues, coupled with the fact that Lopez is the only act struck down as unconstitutional under the commerce clause in over 50 years, this Act likely would be deemed constitutional, though it may be a very close call.

Is it a valid exercise of power under §5 of the 14th Amendment?

Section 5 of the 14th amendment specifically allows Congressional enforcement of that Amendment. The Court has held in Katzenbach v. Morgan that this is valid under certain circumstances, for both remedial purposes and substantive ones.

The remedial aspect is fairly uncontroversial. Congress may “enforce” the 14th amendment when the right being protected is a remedy for other constitutional violations. This can be both to remedy past judicially established violations or to “remedy” (prevent) future violations. In the instant case, it appears Congress would be trying to prevent future violations, protecting the “status and economic independence of women” under the equal protection clause (see analysis below).

In a substantive manner, Congress can enforce the 14th Amendment b/c of their particular fact-finding capabilities. This is seen as a “one-way ratchet” ⇒ that is, congress can only enforce [expand] rights, but not dilute them. While this element is more controversial, and it could be argued that congress is “diluting” the rights of individuals, it is more likely the Court would find Congress to be enforcing the rights of women in status in society, due to Congressional fact-finding. Thus, this appears to be proper enforcement.

Does the Monogamy Act violate Due Process

The Due Process clause of the 5th amendment is involved because this case involves Congress [the federal government]. The basic question is whether a fundamental right is implicated by the Act. If so, then strict scrutiny would apply and the Act would have to be narrowly tailored to advance a compelling government interest. If no fundamental right is involved then rational basis review applies and the Act need only be rationally related to a legitimate government purpose.

It is difficult to define exactly what right is implicated in this Act, or any other. It is arguable that this is a right to polygamy, a right to marry whomever[s] you want, the right to privacy of intimate association [though with legal approval]. There is no clear textual basis for any of these rights. We could look to precedent for support. When we look to Griswold, Eisenstadt, and Roe, it then becomes a matter of interpretation and how we read the cases. If they are about the right to complete privacy in the sexual realm, then they would lend support to defeating the act. However, this Act involves more than sexual relations; it involves legal approval of a relationship, along with all the attendant legal benefits of marriage. This Act seems to be more in line with Bowers v. Hardwick and the notion that there is a limit to the right

of privacy. While one could read Zablocki v. Redhail as promoting a fundamental right to marry even in a situation like this, it is unlikely a Court would go so far on that analysis.

There is also a problem of levels of generality when looking to tradition for precedent. We could look more generally, as the majority in Casey did to practices broader than those at the time of the adoption of the Bill of Rights, or adopt Scalia's more specific level at generality.

If there is a fundamental right involved, the statute must withstand strict scrutiny. As such, it would almost certainly fall, for that is almost definitional for strict scrutiny. The compelling state interest would be the promotion the status and economic independence of women. However, even with that interest, the Court would most likely find this Act to be narrowly tailored. The Act does not eliminate economic dependence of women, and is thus underinclusive. This could be fatal under strict scrutiny.

If the Court does not find a fundamental right implicated, this would be subject to rational basis review. As such, it is again almost certain to pass. The state could use the tautological statement that it benefitted the group it intended to benefit through passage of this act. Promoting the status and economic independence of women is clearly a legitimate state interest, and this state is rationally related to the advancement of that goal.

It is likely the court would not find a fundamental right involved, and the Act would be subject to rational basis review. It would likely be found constitutional.

Does the Act violate equal protection?

Because the Act involves the federal government, the 5th Amendment is involved. The "equal protection" clause has been essentially "reverse incorporated" from the 14th Amendment and applies the federal government as well as state governments.

The initial equal protection analysis would look at the fundamental rights branch of equal protection (see analysis above).

Next, the equal protection would look to see if a "suspect class" was involved. In this case, gender appears to be involved. Gender has been held to be a class subject to intermediate scrutiny: the legislation must be substantially related to an important governmental purpose. However, other than the findings, gender is not mentioned. In this case, the statute could be read as a remedy.

Suspect classes are determined according to set criterion. The history of the 14th Amendment, the problem of a stigma or caste, and concerns about the political process. The Court is especially concerned about "discrete and insular minorities" (Carolene Products, note 4). In particular regard to gender, but also in general, the court is concerned about immutable characteristics and the vice of reinforcing stereotypes. Legislatures are permitted to pass law if real differences between genders are involved, but not based on stereotypes alone.

Subjecting this statute to intermediate scrutiny probably would lead to a finding of constitutionality, though it could go the other way too. The important government interest implicated would be protection of the status and economic independence of women. Based on the findings and the purpose and effect of this Act, it appears that the Act would be found "substantially related" to that interest, as required by Craig v. Boren.

SAMPLE STUDENT ANSWER NO. 2

Question I

I (a) Commerce Clause Analysis:

The dormant commerce clause (DCC) is derived from the Commerce Clause of the Constitution, and provides the proper method of analysis in cases in which states have acted in realms in which Congress has not. Congressional inertia provides that Congress will be unable to explicitly address each state interference with the national market, and argues for court review of such action. Such review also applies to municipalities, as in the present case (Clarkstown). The DCC limits state action.

Generally, under the DCC, statutes which are facially discriminatory are considered economic protectionism and therefore per se invalid. Such discrimination may be evident on the face of the statute or derived from a cost-benefit analysis. In this case, the ordinance clearly restricts employment to city residents at the expense of non-residents. This is a clear violation of national unity, similar to the requirement in Philadelphia v. NJ which required NJ not to import any more waste.

The only exceptions to this per se - invalidity are (1) the market-participant doctrine, and (2) the type of rigorous showing in Maine v. Taylor that the state has (a) no nondiscriminatory alternatives and (b) is pursuing a legitimate state interest, as in protecting state waters from contaminated fish.

In this case, the stated purpose of the statute is to reduce bridge congestion. Even if this is a legitimate state interest, it could be accomplished in several other ways, including but not limited to (1) building more bridges, and (2) encouraging car pooling. There is no need to restrict residency to accomplish reduction of traffic congestion.

The market-participant doctrine allows states to discriminate in favor of their citizens when acting as a market participant. This is permissible because the locality is spending its own money, and both costs and benefits are localized. However, there are several limitations (So-Central Timber). The state must not be (1) attempting to regulate downstream use of the resource, (2) selling natural resources, or (3) affecting foreign commerce. In this case, the city of

Question 1

Palms seems to be acting purely as a market-participant with respect to job hiring. This ordinance is similar to one upheld in White, which provided that 50% of all workers on city projects must be residents. The ordinance does not seem to touch any of the factors of So-Central Timber. Thus, the ordinance seems to be valid under the market-participant exception to the DCC.

However, an examination of the theories which lead to the DCC doctrine might produce a different result. Under the political theory, any ordinance violative of national unity should be invalidated. This ordinance, by restricting employment of non-residents, certainly is. Moreover, under the more widely-used political/economic theory, which looks mostly at cost-exporting, the statute would remain valid because the costs and benefits are both retained by Palms.

(b) Privileges & Immunities (Art IV, §2)

The Privileges & Immunities Clause (PIC) limits the applicability of the market-participant exception to the DCC by imposing a direct restraint on state action. Under the PIC a state may not impair a fundamental privilege of any citizen without a substantial reason for the disparate treatment. Therefore, PIC analysis requires (1) finding a fundamental privilege, then (2) finding a substantial reason for disparate treatment.

In this case, there is clearly a violation of this fundamental privilege of private employment. In Camden, the court addressed a statute similar to the Palms ordinance and similar to that upheld under White, which required that only 40% of the workers on city projects be residents. In Camden, the Court found that the statute did infringe on the privilege of employment.

Nevertheless, the ordinance may be justified if there is a substantial reason for the disparate treatment. In this case, as in Camden, nonresidents must be shown to "constitute a major source of the evil at which the statute is aimed." It appears that Palms will be unable to make the showing, as the major source of traffic congestion of the bridge is probably, in fact, Palms residents. Therefore the ordinance will probably be invalid under the PIC.

[c] Equal Protection Clause

Question 1

The Equal Protection Clause (EPC) is intended to protect the rights of individuals by placing limits on government powers. These limitations are especially strong where the classification is suspect, or a fundamental interest is concerned.

SUSPECT CLASSIFICATION:

Classification will be suspect if they are part of a "discrete and insular minority." (Carolene Products n. 4), determined by an immutable characteristic, have a political process problem, or have a history of discrimination or a tradition of stigma.

In this case, determination of the suspect class is important. It may be that the suspect class is the residents of the city vs. nonresidents, or in fact Hispanics vs. non Hispanics.

The classification of Hispanic/non-Hispanic is based on race and therefore would normally be subject to strict scrutiny. However, in this case, the classification is not based on race, it merely has a disproportionate impact because of the racial make-up of the city. Regulations passed "in spite of" their disproportionate racial efforts are subject to rational basis review, while those passed "because of" their disparate impact are subject to strict scrutiny.

If it can be shown that the statute was passed specifically to discriminate against the Hispanic mainlanders, then it will be subject to strict scrutiny. Strict scrutiny is strict in theory, but fatal in fact. The last race-based classification disadvantageous to minorities upheld by the Court was Korematsu in 1944, and it is doubtful that this would be repeated.

If however, no such showing could be made, the ordinance would merely be subject to rational basis review and would likely pass. Even such disparate impacts as death-penalty sentencing in McCleskey which was statistically supported, and the police officer vocabulary tests in Washington v. Davis passed rational basis review. In this case, the legitimate purpose could be reducing congestion, and limiting employability is certainly related to this purpose.

The classification of resident/nonresident does not seem to have any of the elements which make a class suspect under the EPC. In addition, the Court has been reluctant to extend the number of suspect classes. Therefore, rational basis review will be all that is required, and it will likely pass as described above.

Question 1

FUNDAMENTAL INTEREST:

To determine whether an interest is fundamental, the Court (except Scalia) looks at the text of the Const., tradition, and precedent. Scalia would look only at the text and a narrow view of tradition. (Casey)

The text clearly provides no right to private employment. In addition, most cases arising under the EPC involving fundamental interest involved marriage, procreation, the right to vote, and court access. Under the DPC, this has been extended to include the right to privacy. However, the right to freedom of contract, and economic freedom in general, was rejected after Lochner. Thus, the right to private employment may not be considered fundamental based on post-Lochner decisions.

If the right is found to be fundamental, the statute must pass the strict scrutiny test. As detailed under "suspect class" above, it probably would not. However, if it were not fundamental, the ordinance would probably pass rational basis review ut supra.

II. The DCC also applies to Ordinance 96-2.

Ord. 96-2 does not appear to be facially discriminatory, because it allows out-of-state purchases. However, if the actual effect based on the locations of suppliers or some other reason is to buy supplies only in the surrounding area, it could be invalid per se as economic protectionism. However, in such a case, it would probably still be acceptable because Palms is acting as a market participant and can therefore favor its residents (see discussion above).

If the ordinance is not considered facially discriminatory, but burdens interstate commerce, the Court will apply a balancing test of local concern with the effects on IC. It is hard to see how buying only w/in 100 miles would limit the traffic in Palms, because the good must still be transported. But if the city council reasonably believe there would be a benefit, and such beliefs is debatably true, the Court will generally defer to legislative judgement.

The burden on IC is that some out of state firms will be unable to sell to Palms. Thus, the burden on IC for defining a region in which the city may trade seems like a substantial effect on IC.

Because the benefit is minimal and the effect on IC is substantial, the ordinance will probably be struck down as a violation of the DCC.

Question 2

QUESTION II

STANDING:

The standing requirement is meant to insure concreteness of decisions, promote judicial restraint, and insure that decisions made benefit those actually injured.

To have standing under the traditional view, a potential plaintiff must meet 3 requirements: (1) injury in fact, (2) the injury must be fairly traceable to the complained-of conduct, and (3) the injury must be redressible by the Court.

The injury requirement is fairly easy to meet. The injury in this case is economic, and directly to Douglas. It is to the specific plaintiff, and not the sort of general injury found nonjusticiable in Lujan.

The injury is redressible. The Court could invalidate the line-item-veto and rescind the EO, allowing Douglas to attempt to sell its aircraft.

Another means of determining standing is the merits-based approach. This approach requires the Court to look at the law violated and determined whether it gives a cause of action to this plaintiff. The separation of powers (SOP) purposes of promoting accountability and preventing tyranny seem to give a cause of action to Douglas, as does the violation of Art. I §7. Giving the EO should be a basis for a cause of action because Douglas was one of the companies injured by the order, and if they cannot sue no one would have standing except possibly a Representative or Senator.

2(b)[2(a) done second] Executive Order

The authority of the President is contained in Art. II. In general, the President is limited to the powers actually described, unlike Congress which may pass all "necessary" laws.

In the absence of Congressional authorization to act, there are two approaches to analyzing Presidential actions put forth in Youngstown.

Question 2

Under the functional approach of the majority, if there is no law on point, then the President has no authority to act: this seems to be the case here: the President did not have the authority to act. However, the power of the President has traditionally been broad in the area of foreign affairs, due to (1) the necessity of speaking w/1 national voice, (2) the President's expertise and capacity to act secretly, and (3) the possible need for expeditious action. (US v Curtiss-Wright, - which upheld an arms embargo similar to this one). Thus, under this approach, the Pres.'s action might be upheld due to the tradition of broad executive authority in the area of foreign affairs.

Under Jackson's concurrences, there is a 3-pronged test used to determine the validity of presidential actions. If the Pres. acts with cong. authorization, the action is presumptively valid. If Congress has not spoken, then the Court should look at the circumstances of the action. Finally, if the Pres. Acts against the express will of Congress, his action is presumptively invalid.

In this case, the action may fall into either of the last 2 categories. Although Congress seemed to express contrary intent by passing in statute (which the Pres. vetoed), since Congress did not attempt to override, it may be argued that Congress was content to allow the Pres. to exercise his greater authority on matters of foreign affairs.

Since Congress did not attempt to override the veto, the action might be validated by looking at the circumstances. Given the Pres.'s ability in foreign affairs and greater knowledge of the Bosnian situation, the EO should be sustained.

2(a) The question of whether the line item veto violates the SOP or Article I §7 is determined first by the validity of the statute, and second by its constitutionality under both textual and structural ideas of the Constitution.

The line-item veto created pursuant to Art I §7, and complied with both bicameralism & presentment. Therefore, if it is invalid, it is not because it was incorrectly passed.

SOP. The separation-of-powers (SOP) idea provides that each branch of government must be strong and independent, and the branches should not overlap into the areas reserved for the other

branches. It also provides that each branch should limit the power of the others. This serves the aims of promoting efficiency, preventing tyranny, and ensuring accountability,

Giving the President a line-item veto power seems at odds with all of these purposes. It allows the President great control over the legislative process, and breaks down the compromises solutions reached so that legislation may be passed. The President breaks out of his sphere of "enforcing the laws," and begins to be involved in making the laws. Such ability on the part of the President not only takes away from the accountability of both the Congress and the President, but gives the President regent-like powers to pick and choose what the law of the land will be. Combined with the ability to pack the Court a la Roosevelt, this could make the President into something more powerful than the framers intended.

Although it is arguable that the line-item veto does not change the balance of power because the President could veto the entire bill, this argument is incorrect because the President can selectively choose the laws. At the very least, this line item veto would promote inefficiency because it would require Congress to revisit so many of its laws, and the President would be much more likely to employ the line-item veto than the traditional veto.

Art I §7 Art I §7 lays out the requirements for passing legislation and vetoes. By its terms, it speaks exclusively of the President vetoing, and Congress reconsidering, the entire Bill. It has no special wording which could be constructed to allow the President to veto part of a Bill. In addition, there is no tradition of allowing a line-time veto, and the framers appeared to intend that a veto must be "all-or-nothing." To allow such a power, it appears that an Amendment is necessary, because Art. I §7 does not by its term or by tradition allow a line-item veto.

Question 3

QUESTION III

I COMMERCE CLAUSE

The Commerce Clause determines the extent of the ability of Congress to regulate trade. Under Commerce Clause (CC) analysis, Congress seems to be able to regulate in 3 areas: (1) those affecting channels of commerce, (2) instrumentalities of commerce, and (3) activities with a substantial relation to commerce.

Channels of commerce include businesses that serve out-of-state persons, and are intimately connected with commerce, such as hotels and restaurants. The prevention of bigamy does not seem to fit here.

Similarly, bigamy is not concerned with the instrumentalities of IC, such as railroads.

Thus, if Congress may regulate bigamy, it must be because it has a substantial relation to IC. Almost any activity can be said to substantially related to commerce under the aggregate effects test of Wickard and Perez. In Perez, the activity regulated was crime, a traditionally local concern: however, the Court found that its aggregate effect was sufficiently burdensome to allow congressional regulation. Bigamy seems similar. Under pre-Lopez analysis, the statute seems to be valid.

However, the Lopez cases (guns in schools) informs the requirements to prove a substantial relation to IC. In Lopez, the court struck down a federal law prohibiting guns in schools and found 4 problems with the regulation: (1) not an economic activity being regulated, (2) purely local concern, (3) no congressional finding, and (4) no jurisdictional hook.

In this case, marriage does not seem to be an economic activity similar to buying, selling, or manufacturing which the Congress could traditionally regulate. And the Act is not part of a larger regulation of economic activity.

Second, marriage is an activity which has traditionally been regulated by the individual states, and is seen as a local concern.

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Third, there is not jurisdictional "hook" which would provide that this only applies to marriages which affect IC. However, as marriage is a non-economic activity, it is difficult to see what such a hook would be.

Finally, there are no specific legislative finding (unless there are others not given) which show that the activity being regulated has any more than a tenuous relation to IC.

If the Court continues its Lopez - type analysis, it is likely that the statute would be unconstitutional because it does not contain any of the 4 elements. However, justification by more legislative findings could push the Act into the realm of constitutionality.

In addition to the above restrictions. Congress also may not compel states to legislate, because that would interfere with accountability. (NY v US). However, this Act is not designed to force State legislatures to do anything.

Amend 14 §5

§5 of the 14th Amendment gives Congress the power to enforce the 14th Amendment. Thus, the 14th Amendment contains both guarantees of Due Process and Equal Protection, it seems that congress could legislate to prevent infractions of either. (See pt II for infractions)

Since the Act violates neither the DPC or EPC, it is apparently constitutional under these provisions. To show that the legislation is valid, Congress must legislate in either (1) a remedial or (2) substantive theory (Katzenbach v. Morgan). To be remedial, the legislation must either remedy past or future violations of rights, and the past violations must be judicially - established. Thus, unless congress can show rights violations, the legislation may not be sustained under the theory. No such findings are evident here, and no judicial decision are mentioned.

Second, Congress may use its fact-finding ability to find 14th Amend. violations. This is a one-way ratchet, under which congress may increase but not decrease protections. Still, it is difficult to see how bigamy violates the DPC or EPC. This statute does not appear necessary to support 14th Amendment rights. However, it does not appear even reasonably necessary to enforce the provisions of the 14th Amendment, and is therefore probably not a valid exercise of this power of Congress. However, if the Court decide that bigamy is a 14th Amend. violation, then the law would be a valid exercise of this power.

Question 3

II. Due Process (DPC)

Modern DPC analysis provides strict scrutiny of fundamental rights. When an Act is challenged, it first must be determined what the right in questions is. In this case, the right could either be “the right to marry” or “the right to engage in bigamy.”

Then each right must be examined to determine whether it is fundamental. This is based on (1) the text of the Cont., (2) tradition, and (3) precedent, under the majority view. Under Scalia’s view, only the text and a narrow view of tradition should be looked to,

Clearly, neither right above is texturally justified. However, there is a tradition of protecting marriage both throughout history and in the US. In fact, the case of *Zablocki v. Redhail* established that marriage is, in fact, a fundamental right which must be protected. Even Scalia might recognize the right to marry. Therefore, if the Court decides that the Act implicates the right to marry, then strict scrutiny must apply.

Justifying the “right to bigamy” is slightly mor problematic. Although some cultures, including Utah in the early 1800's, allowed bigamy, it has certainly never been part of US or English cultures. In addition, although cases such as *Roe* and *Griswold* might stand for a general right to privacy, the Court is more likely to interpret them at least as narrowly as “bodily integrity,” thus avoiding finding precedent to support a “right to bigamy.” If the Court finds that the Act implicates a more narrow “right to bigamy,” then rational basis is the proper standard.

If the court uses rational basis review, the standard is simply a rational relation to some legitimate state interest. Because protection of economy and society are legitimate state interests, and the Congress could rationally believe that the Act bore some relation to that interest, it should be upheld.

However, under strict scrutiny, the Court must find a compelling state interest, and that the statute is narrowly-tailored to serve it. Even if preventing negative economic affects on women is a compelling state interest, the Act is both over and under inclusive; as it prohibits bigamous relationships to women who would be better off, and because it fails to protect women in non-bigamous marriages who would be worse off. In addition, promoting morality seems to

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be not a compelling state interest after Roe. Under strict scrutiny, the statute would probably fail.

However, given that the right in Bowers was narrowly-defined as the "right to homosexual sodomy," the Court would probably find that the right on this case was "the right to bigamy," find that is not fundamental, and thus find no special protection for it, and uphold the Act under rational basis review.

In fact, if the Court finds bigamy protected under the "right to marry," the statute would be unconstitutional under the same Amendment.

Equal Protection Clauses (EPC):

The EPC provides special protection for (1) fundamental interests, and (2) suspect classes. For a discussion of (1), see the DPC analysis above. The two analysis are identical, and only developed separately because historically the DPC only protected procedure, not substantive rights.

Classifications will be suspect if they are directed against a minority (1) based on stereotype, (2) that is discrete and insular (Carolene n. 4); (3) that have a history of past discrimination, (4) if there is a political process problem, or (5) if the history of the 14th Amend. Intended protection for that class. In this case, the Act either discriminates against "those who want a bigamous marriage" (TWWBMs), or against women by its own terms.

TWWBMs might have suffered a history of discrimination, and be stigmatized. However, they are not discrete and insular, it is not an immutable characteristic, and was not covered in the history of the 14th Amend. Thus, such classification should probably only receive rational basis review, especially in light of the Courts reluctance to increase the number of classifications which receive heightened review.

For non-suspect classifications, the proper test is rational basis review, which merely requires that the classification be reasonably related to a legitimate state interest. The Court will

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generally not look for the actual purpose of the statute, nor require that the statute be a perfect fit (NYC TA v. Beazer). The Court will accept almost any plausible reason for upholding the statute, even if it appears to be special interest legislation (Lee Optical). As discussed under DPC analysis, the state has a legitimate interest in protecting social morals and the economy, and this Act is rationally related to that end.

Women are a protected classification, and laws relating to them are analyzed under intermediate scrutiny, which requires that the statute bear a substantial relation to an important governmental objective. The Court has accepted such objectives as preventing teenage pregnancy and remedying past discrimination as important. However, the Court does not uphold laws based on purely stereotypical attitudes about women, such as their financial dependence. In addition, the Court seems to require some evidence of correlation between the objective and the classification. In this case, the Court would probably not accept this Act under intermediate scrutiny because it is based on stereotypical attitudes about women, as indicated in the findings.

However, this analysis may be inappropriate because the statute applies equally to men & women, and Congress merely thinks it will have a disproportionate effect on women. If disproportionate effect is insufficient to trigger heightened scrutiny for race, it should be insufficient to trigger heightened scrutiny for gender also. Therefore, the gender classification is probably inapposite, and the statute should be subjected to rational basis review only, where it will be upheld.