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Question I

Part (1)

Gambrell has probably not violated the Equal Protection (EP) Clause of the 14th amendment when it funded GLBT High. The EP clause requires that states provide the equal protection of the laws to all persons. The first step in analyzing a possible violation of EP is determining whether there is a suspect classification. Historically, the original suspect classifcation was race, as the 14th amendment was passed based on post-slavery discrimination of African Americans. In footnote four of Carolene Products, the Supreme Court (SC) hinted in dicta that a determination of a suspect class might work depending on whether the group is a discrete and insular minority. National origin has also been recognized (Yick Wo) and more recently, gender (Craig, U.S. v. Virginia). The gender classification has been interpreted to protect the rights of males, not just females (Michael M.) Sexual orientation has not been recognized as a suspect class (Lawrence). The EP clause also protects some fundamental rights. While the right to education has specifically been held not to be a fundamental right (Rodriguez), the SC has afforded it special consideration given its social significance (Plyler). The identification of a suspect class or fundamental right is a key threshold issue that determines the level of deference the SC will give and the degree of scrutiny with which it will examine a state's actions. Finally, it is important to note that the 14th amendment only protects from violations by state action. Here, state action is clear because a public school is accused of discrimination.

Here, the potential suspect class is heterosexual students. Based on the Carolene Products test of a discrete and insular minority, this would not be a suspect class. However, in Craig, and again in Croson, the SC recognized the fact that any suspect class may be a group in the majority. However, as noted above, sexual orientation, whether it be heterosexuals or homosexuals, is not a suspect class (Lawrence). In Lawrence, the SC had the opportunity to recognize sexual orientation as a suspect class, but did not, instead making a due process determination based on a fundamental liberty interest. Notably, Justice O'Connor's concurrence described her approach, which would have used the EP clause. Because sexual orientation is NOT a suspect class, however, unless there is a fundamental right at issue, the SC will apply rational basis review, which requires the state demonstrate a legitimate interest that is merely rationally related to the means chosen. In most cases receiving rational review, the SC has demonstrated great deference to the state legislatures and upheld their laws. The SC has demonstrated a strong desire to not create new suspect classes, and given the fact that it has had the opportunity in Lawrence to do so wwith regard to sexual orientation, and the fact that it has declined to do so with respect to age, economic class (Rodriguez), and disabilities (Cleburne), it is unlikely to do so here.

The second possibility here is that Gambrell has violated the EP clause by violating a fundamnetal right. As mentioned above, the SC noted in Rodriguez that education is NOT a fundamental right. Although the SC did recognize the special nature of a basic level of education in Plyler, Gambrell has not in any way deprived any student of a basic education. Rodriguez was very clear that all public schools do not need to

provide the same level of facilities, materials, or class sizes, rendering Sally's parents' claims about these run-down aspects of her school moot.

If there is neither a suspect class nor a fundamental right implicated by a state law, the SC applies so-called rational basis review. Under this review, the SC will uphold the law if there is a legitimate government interest and the means of satisfying it is rationally related to it. Here, the interest in furthering gay and lesbian education would probabyl satisfy the legitimacy requirement and the means employed would probably be considered rationally related. However, the SC has held that diversity in education is a compelling government interest. Thus, if a higher standard of review were employed, Gambrell might be found to have violated the EP Clause. So-called middle tier scrutiny requires the state interest be important and the means emplyed substantially related to the interest. Though usually reserved for classifications based on gender and illegitimate children, teh Court may apply this standard here. If this intermediate level is applied, there may NOT be an important interest in furthering gay and lesbian education. Further, the previously described compelling interest in diversity in education might prevail. Given the Court's reluctance to apply strict scrutiny (requiring a compelling government interest and that the law be narrowly tailored to that interest) outside of the race or fundamental right arena, it is unlikely to do so here. If it did, this law would undoubtedly violate the EP Clause. The final possibility is that the Court will call its review "rational basis review," but will employ a heigtened scrutiny akin to middle tier scrutiny. Such "hybrid" review was used in Cleburne to invalidate a state law that did not allow for a group home for disabled people, despite the Court noting that there was no suspect class

or fundamental right. Thus, it is likely that Gambrell has not violated the EP clause by implementing GLBT High.

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Part (2)

The Commerce Clause

Article I, Section 8, Clause 3 of the Constitution grants Congress the power to regulate commerce among the several states, among other areas. Art. I, Sec. 8, Cl. 18 then grants Congress the power to make all laws which are "necessary and proper" to enforce itse earlier grants (including the commerce power). In McCulloch v. Maryland, the SC interpreted the Necessary and Proper Clause broadly, so that Congress may exercise its commerce power through any legislation that affects interstate commerce. In Gibbons v. Ogden, the SC recognized that purely intrastate activity may affect commerce when they regulate instrumentalities of interstate commerce. In Wickard v. Filburn, the SC upheld a federal statute that created quotas for farmers and allowed for a federal penalty on a farmer whose violation was kept to his own use of his own farm resources. This represented the Court's allowing for the aggregation of an activity to affect interstate commerce, even if the specific activity regulated was not in fact interstate. The commerce power continued to be read expansively in Heart of Atlanta Motel and in Katzenbach (Ollie's BBQ), two cases where a hotel and restaurant attempted to discriminate based on race. These cases represent the Court's recognition of another way an activity may be within Congress' commerce power: when the activity is related to "channels" of interstate commerce. Proximity to an interstate highway (Heart of Atlanta)

and the purchasing of food products from out of state to serve to customers (Katzenbach) satisfied this regulation.

Given the breadth of the above precedent, it might seem that Congress had a logical power to pass the Values in Education Act (VEA). However, a more recent SC has narrowed the comemrce power significantly in Lopez and Morrison. In Lopez, a federal law was unconstituional (not within the commerce power) when it regulated the possession of guns within school zones. In Lopez, the Court looked to a number of factors that are relevant to the present case. First, in Lopez, the Court noted that the law had not been based on any legislative history. The Morrison court didn't even discuss the fact that there had been legislative history in that case, and the legislative history there was even more explicit in tying the law (which provided a federal cause of action for victims of gender-related violence) to interstate commerce. Here, however, Congress' minimal findings as to the affect on children of being segregated by sexual orientation will most likely not satisfy the Court's desire for a relation to interstate commerce. . Next, in Lopez, the court was critical of the law for not having a so-called "jurisdictional hook," that narrowed its scope to only affect guns that had crossed state lines. Here, the VEA suffers from the same shortcoming, as Congress has made no attempt to legislate regarding schools or students who ever crossed state lines. The Lopez court also was wary to allow Congress to legislate in areas traditionally left to the state's police powers. Section (d) of the VEA references the morality of homosexuality, which is something that is not ususally considered within Congress' powers. In Lopez, the SC also noted that in order to maintain fundamental principles of federalism, there was a necessary limit to

Congress' commerce power. The SC echoed this concern in Morrison, when it set a new standard for aggregation of an activity: in order for Congress to consider the aggregate effects of an activity for commerce clause purposes, the activity must be commercial in nature. Here, public schools are not commercial. Section (c) of the VEA attempts to satisfy this element by noting the effect of injured economic performance on teh national economy, but both Lopez and Morrison were also related to schools and arguments about the negative effect on the national economy, via a downgrade in educational performance, were dismissed. Finally, though not discussed in Morisson, Congress might point to the VEA as a matter of national necessity. However, because there is no evidence that states have attempted to address the issue and have not been able to do so successfully, this will probably not be successful. Thus, the VEA was probably not within Congress' commerce power.

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The Spending Power

Under Article I, Section 8, Congress has the power to tax and spend. Congress has used its spending power to condition funds appropriated to states on the states' acting in certain ways. Again, this expansion of a core Congressional power is justified under the Necessary and Proper Clause. In South Dakota v. Dole, the SC recognized this right to condition funds, but did so with limits. The SC requires that the condition be tied to the general welfare (and the court is generally very deferential to Congress here), the conditions be unambiguous, and that the conditions represent a nexus between Congress' ends and means. The SC also cautioned that Congress may not coerce the states, although it has never explained when this would occur. Because in SD v. Dole, Congress

withheld a mere 5% of federal highway funds, it is likely that the condition would become coercion if the amount were significantly raised.

With respect to the VEA, it is possibly, but not likely, that Congress has employed its spending power appropriately. If we assume the SC would defer to Congress on the first issue of the general welfare (this is an education and discrimination bill, after all), the next issue is whether the condition is unambiguous. Section 2(b) (the last section of the Act) makes the lone reference to a condition on the states. This does not bode well for un-ambiguity. Congress, of course, will argue that by saying "no federal school funding shall be provided to any state..." is very unambiguous in its placing of a condition on the states. This issue could probably be decided either way. Assuming the court consideres the clause sufficiently unambiguous, the SC will look to whether there is a nexus between the ends Congress seeks and the means it chooses. Here, Congress seeks to diversify schools and does so by withholding federal education money to schools who do not comply. This requirement is liekly satisfied. In SD v. Dole, the condition was satisfactory when Congress conditioned federal highway funding on a minimum drinking age based on a perceived nexus based on drunk driving. Thus, this education-education nexus is likely satisfactory. Finally, the most damaging requirement may be the coercion factor. As discussed, the conditional funding in SD v. Dole was a mere 5% of federal highway money, while the conditional money in this case is 100% of education funding. This may very well cross the line into Congress coercing the states. However, the SC has never proclaimed a threshold, or whether the amount of money is, in fact, the determinative factor. Finally, there cannot be an independent

constituional bar to what Congress requires of states. In SD v. Dole, despite the fact that the 21st amendment gave states the right to regulate alcohol, Congress was allowed to condition money on South Dakota's raising its drinking age to 21. Thus, even in areas of traditional state concerns (education and general welfare), and in fact when a state has a constitutional right (21st amendment), Congress may condition funds. All in all, the detremination of whether the VEAs conditioning of all federal school funding on this integration rises to the level of coercion will be the determinative factor. very good 17

The Power to Enforce the 14th Amendment

According to Section 5 of the 14th amendment, Congress may also legislate in ways to enforce the goals of the 14th Amendment. The SC has approached this power in different ways. In Katzenbach v. Morgan, the Court recognized a very broad power of Congress to interpret the goals of the 14th amendment. There, the Court upheld Congress' law that prohibited states from imposing literacy tests as a prerequisite for voting, despite the Court's earlier pronouncement that such tests were constitutional. This very broad view has been generally dismissed, however, in favor of the narrow view espoused in City of Boerne v. Flores. In Boerne, the Court held unconstituional the Religious Freedom Restoration Act, which purported to give wide powers to religious organizations perceived discrimination. The Court formulated a new test for what constituted proper remedial actions by Congress in the face of perceived violations of the 14th Amendment's Due Process and Equal Protection Clauses. The Court made very clear that, since Marbury v. Madison, its job was to say what the law was. Part of this power was to interpret the 14th amendmetn and define the schope of rights that it

protected. The SC does accept remedial and preventative authority; Congress has the pwoer to adopt remedies and rpeventative measures to prevent future unconstitutional conduct under section 5 of the 14th amendment and is not limited to judicially discussed rights. However, such legislation must be congruent and proportional. To satisfiy this test, there must be a pattern of discrimination by the state swhich violates the 14th amend,ment and the remedy muist be congruent and proportional to the targeted violation. In University of Alabama v. Garrett, Congress overstepped its powers to enforce the 14th amendment when it created special rights for disabled people. In Tennessee v. Lane, however, the SC evidenced its inclination to allow Congress to enforce rights of non-suspect classes (as determined already by the Court) if Congress was protecting a fundamental right. In Lane, the relevant right was the 7th amendment right to a jury trial. Finally, in Nevada Dept of Human Resources v. Hibbs, the Court gave guidance as to what would satisfy the congruent and proportional standard. There, a law that required men receive the same benefits in certain circumstances normally reserved to women, was congruent and proportional because it was limited to unpaid leave, limited to certain enumerated circumstances, the worker must have worked a certain number of hourse and months, and there was a short (2 year) statute of limitations. Further, Congress had made previous attempts to curb sexual discrimination.

Thus, the first question is whether the VEA protects a right described by the SC as fundamental. Here, the VEA may be read to protect a right to diversity in education. In Grutter, the SC recognized diversity in education as a compelling government interest. If the Court extends this recognition of a compelling government interest to fundamental

right status, the VEA might be constitutional based on the Court's rpecedent in Lane. However, given its specific holding in Rodriguez that there is NO fundamental right to education, it is unlikely to consider the right to a diverse education such a right. Of course, the Court might look to Brown v. Board of Education as precedent, but that was based on a suspect classification, and as described above, there is no suspect classification here. Since it is not based ona fundamental right, the next question is whether the VEA is congruent and proportional to the governement's interest in curbing perceived discrimination. Unlike the many limitations on the rights recognized in Hibbs, the VEA is very broad. The government will argue that it IS congruent and proportional because of the compelling nature of the right to a diverse education noted in Grutter. Overall, this probably does not fall within Congress' power to enforce the 14th amendment.

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Question II

SAPA may violate Paula Pound's (P) and Lori Lasker's (L) due process rights, but it is not certain that it does. The 14th amendment of the constitution prohibits a state from depriving a person of life, liberty, or property without due process of law. P's so-called substantive due process rights might have been violated, while L's ability to bring suit is questionable. I will address them in turn.

Substantive due process refers to the rights that the government (states through 14th amendment, federal govt through reverse incorportation into the 5th amendment) cannot violate, regardless of the process used. The first question in determining whether

due process has been violated is whether the law implicates a fundamental right. In Griswold v. Connecticut, the Court recognized a fundamental right to privacy. Although the majority's opinion resorted to looking in the penumbras and emanations of the 1st, 3rd, 4th, 5th, and 9th amendments, Justice Goldberg's concurrence has been more critically accepted. Justice Goldberg described the 9th amendment as retaining rights protected by the constitiution that were not enumerated. In Griswold, this new right to privacy protected a married couple's right to use contraception. Justice White's concurrence is also relevant, as he looked at the relationship between the means and the ends of the law. Then, in Eisenstadt, the Court extended the right to privacy to non-married couples' use of contraception. This expansion paved the way for Roe v. Wade the following year, which recognized a woman's fundamental right to choose an abortion. The Roe decision was upheld, but limited in Planned Parenthood v. Casey, when the Court set up a new standard for addressing any abortion law. Casey specifically allowed for states to regulate abortions before viability (previously unconstitutional under Roe), as long as the state did not impose an undue burden on the woman's right to an abortion. Casey itself shed light into the standard by striking a portion of the bill that required a woman give her husband notice before obtaining an abortion. Other limitations, however, passed the test (including a 24 hour waiting period and a requirement of parental consent for a minor to obtain an abortion, among others). Stengberg v. Carhart held that any abortion bill had to provide an exception in the case of the mother's health, not just the mother's life. These cases seem to recognize a right to sexual autonomy as a means of self-determination that may be relevant to the present case. In non-abortion

jurisprudence that is relevant to SAPA, the Court also recognized marriage (Zablocki v. Redhail) and child-rearing (Troxel v. Glanville, although this was a relatively narrow holding) as fundamental rights upon which the state cannot infringe.

Given this background, SAPA may violate P's right to due process because it may unduly burden her right to choose to have an abortion. SAPA satisfies the requirement in Stenberg, so the focus is really on Casey. The undue burden test requires a state to demonstrate that it has not placed an undue burden on a woman's right to get an abortion. Here, SAPA allows a woman to choose an abortion whenever she wants, as long as she has not chosen to find out the sex of the baby. The government's interest in maintaining a normal male-female ratio is probably sufficiently substantial. SAPA specifically noted findings of increased violence (specifically recognized as important by the Court in Casey) and social instability. These are surely significant state interests. Because Casey allowed for a requirement that minors obtain parental consent before being able to get an abortion, it is possible that the limitations on abortion in SAPA do not pose undue burdens on the woman's right to an abortion. However, the parental consent provision in Casey did provide for a judicial bypass in certain cases. This allowed for minors to get abortions by receiving permission from a judge instead of a parent or guarian. SAPA does not contain any such provision, which would alleviate the harshness of SAPA. Further, the right to rear children discussed in Troxel might be used to protect parents' right to find out the sex of their baby without any repercussions on their right to an abortion.

If the Court views this restriction as a violation of the fundamental rights of marriage (Zablocki), family (Moore), and child-rearing, (Troxel) it might assess the law under strict scrutiny. Abortion, after Casey, is not necessarily a fundamental right, and therefore does not receive strict scrutiny. But if this regulation of a parents' right to know the sex of their children is deemed to be encompassed by the above fundamental rights, strict scrutiny would likely cause it to be overturned. As discussed, the state probably could make out a compelling interest based on studies of violence and social instability. While most laws that draw strict scrutiny are held unconstitutional for not being narrowly tailored to the compelling government interest, this might be deemed tpo be narrowly tailored. This is unlikely, however, as there are surely better ways to achieve the states' goals of avoiding violence and social instability.

L's due process rights may also be implicated, but her case may not be justiciable. Constitutional and prudential limitations do not allow all claims to be heard by courts. First is the requirement of standing, which requires a claimant to prove injury-in-fact, a causal nexus, and the court's ability to redress the injury. The claim must also be ripe; this requires that the harm not be conjectural (Lujan). In Roe, the Court allowed for standing, despite the fact that the woman had already had the baby and was not seeking to have an abortion at the time of the case. However, teh Court recognized an exception for cases in which the harm could be repeated in the future. L can probably demonstrate injury in fact, even though she has not actually attempted to get an abortion yet. Unlike the plaintiffs in Lujan, who described past trips abroad (where there was supposed environmental harm going on) and a general desire to travel in teh future, L has a specific

desire to abort and has only not done so in fear of it being illegal. Such a claim is considered ripe and L should have standing.

15

Question III

The MCA may violate the dormance commerce clause (DCC). The so-called DCC is a judicial protection of interstate commerce. The DCC is used when Congress is silent on an issue and the states try to define their own powers under commerce. The Court sometimes acts to preserve the national economy and Congress' basic power to regulate interstate commerce (Article I, Section 8, Clause 3). The DCC is based on both politicla and economic theories. When a state affects interstate commerce in certain ways, it poses problems to national unity and can create political divisions. As Justice O'Connor has observed, states' actions can lead to "Balkanization." There is also an economic, or free trade, aspect underlying the DCC. When states place undue regulations on interstate commerce, they interfere with the free market. A state can violate the DCC in one of two ways. First, a state law that discriminates against out-of-state economic interests by protecting its own in-state interests is a per se violation of the DCC. And second, a facially neutral state law that places an undue burden on interstate commerce may also vioalate the DCC (Kassel). Because the MCA is facially discriminatory, only the first possibility requires analysis in this case.

In Philadelphia v. NJ, the Court held unconstitutional a New Jersey state law that prohibted importation of certain types of waste. The purpose of the law had been to protect NJ's natural resources, but this was not deemed a sufficient basis for such blatant

discrimination of out-of state interests (this, despite the fact that many in-state interests were harmed, as well). After Philadelphia v. NJ, there is a strong presumption against any facially discriminatory statute. Carbone v. Town of Clarkstown is another case demonstrating the DCC. In Carbone, the Court invlaidated a local law that required that all trash travelling throught the town be processed in a singel private plant. This violated the DCC even though most in-state interests were also discriminated against. All that was important was the fact that out of state interests were negatively affected. The state must demonstrate that there is a satisfactory purpose behind the discrimination. In Maine v. Taylor, a state law that did not allow for the importation of outside baitfish was upheld by the SC, despite its facial discrimination. The Court accepted Maine's argument that the quarantine of baitfish was a sufficiently necessary measure given certain bacteria in outside fish. However, even if the state can't show a sufficient interest, the state may avoid the DCC by demonstrating that it is a so-called "market participant," as opposed to merely a market regulator. If the state is itself participating in the market, it may discriminate against out-of-state interests. Again, there is a caveat, however, as states may NOT place "downstream" restrictions on its goods. (South Central Timber v. Wunnike). This means that states may not attempt to control the goods they sell as market participants once the sale is completed. IN Wunnike, Alaska could have gotten around the DCC as a market participant when it tried to sell its own timber. However, it did violate the DCC when it required purchasers to use in-state processing plants to process the timber. Such conditions are not allowed because states are not, in reality, true

market participants. They may undercut their comepetitors on a commidty (for instance, timber) in an effort to create jobs or economic prosperity within their state.

The holding in Maine v. Taylor probably allows Sections 1 and 2 of the MCA to remain, as Florida can demonstrate enough of a dire natural situation (danger of wildfires, danger to native plants, drainage of water) to allow Florida to prohibit the importation of melaleuca seeds, etc. However, sections 3 and 4 of the MCA are violative of the DCC. As mentioned, section 3 is plainly discriminatory against out of state interests. By prohibiting out of state citizens from taking jobs to cultivate an harvest a Flordia resource, Florida is engaging in the exact protectionist measures the DCC seeks to eliminate. This is analagous, but even more extreme, to Carbone, where a single in-state company was benefited. Here, ALL Floridians are benefited. Like Carbone, NO out-of-state interests have the possibility of partaking in this economic activity.

Further, although Florida will not violate the DCC (based on the market participant exception) by selling the oils from its own lands, it may not be able to attach the further regulation that the oils extracted be processed by a Florida plant. Florida will argue that this is NOT a downstream regulation (a la Wunnike) because nobody has actually purchased the oils before they are processed. However, the SC may point out the fact that Florida is not participating in a common market such as timber. Further, like Alaska in Wunnike, the state has imposed a requirement that its natural resources be processed by a private interest. This signa;s the fact that Florida is no longer a market participant.

In the end, it is likely that Florida's complete discrimination will not be forgiven by its being a market participant. Courts are hesitant to allow the market participant doctrine to expand because its continued expansion would eliminate the DCC altogether. Generally, the market must be narrowly defined and not encompass any activity after the intiial activity. Here, Flordia attempts to define the market very broadly. Most importantly, it violates policies set out in Wunnike: it restricts foreing commerce (by not allowing the importation of the plants) and it hoards natural resources. It is worth noting that regardless of the DCC, Congress could legislate to make this tpye of acitviity constitutional.

This law is also clearly violative of the Privileges & Immunities Clause of Article IV, Section 2. This clause prohibits discrimination against out of state citizens when a state withholds privileges and immunities it affords its own citizens. In that case, a two part test would look at (1) whether it is facially discriminatory; and (2) whether it is substantially related to a substantial state interest.

16