FALL ‘99

CAMPUS ID: ____________________

COURSE: ________________________

PROFESSOR: ____________________

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAM

Santa Clara University

School of Law

Constitutional Law
Professor Griffin
Three Essays

December 13, 1999
Fall 1999
3 1/2 Hours

CLOSED BOOK; OPEN CONSTITUTION

THE EXAMINATION RULES AS STATED IN THE CURRENT STUDENT HANDBOOK GOVERN THIS EXAMINATION

INSTRUCTIONS

The examination consists of three essay questions, all of which you must answer. You should devote 35 minutes to Question I, 90 minutes to Question II and 55 minutes to Question III. Note that Question I is worth 20 points, Question II is worth 50 points, and Question III is worth 30 points. You have an extra half hour to use for organization.

Read carefully. Think before you write. Accurate reading of the questions is essential. Good organization, clear statement and avoidance of irrelevancies and filler all count in your favor.

You may consult and should cite to any applicable provisions of the United States Constitution.

Some of the questions may be similar to current events. You should draft your answer based on the facts as they are set out in the question and not on outside reading.

Good luck, and have a good holiday.
Some abortion rights proponents in Congress have studied the Supreme Court’s decisions in Roe and Casey. They are concerned that Casey is more restrictive of abortion rights than Roe. Accordingly they launch a series of hearings on abortion. From their witnesses, they learn that, in response to Casey, several state legislatures have passed legislation that defines the time of viability. The states are split on the date; several have chosen twenty-two weeks, while some have chosen twenty-one, twenty or nineteen. At the end of the hearings, the House and Senate sponsor and pass legislation—the Privacy Act—that adopts the Roe standard as federal law. The President signs the legislation.

What will be the wording of the Privacy Act?

Is the Privacy Act constitutional?
Under a 1997 State of Utopia law that was enacted following a statewide referendum, doctors may, in some circumstances, prescribe drugs to enable terminally ill patients to end their lives. Utopia’s Death With Dignity Act allows physicians to prescribe (but not administer) lethal doses of drugs for patients who have less than six months to live, are deemed mentally competent, choose death voluntarily in front of witnesses, and sign an informed consent form that affirms that they are knowingly choosing death.

In 1998, Attorney General Reno stated that the Justice Department, including its Drug Enforcement agents, would not prosecute Utopia doctors who assist in a suicide and fully comply with the procedures of Utopia’s law, under federal law.

In a report on the first year of its assisted-suicide law, Utopia concluded that fifteen people ended their lives with lethal medications in 1998.

Members of Congress, however, alarmed by Utopia’s legalization of physician-assisted suicide, passed a law that makes it a federal crime for doctors to prescribe drugs to help terminally ill patients end their lives. Supporters of the legislation argued that they were trying to protect the sanctity of life by forbidding doctors to prescribe drugs for the purpose of hastening death. They also argued that the new law promotes the uniform application of federal drug laws. They claimed that Congress has the authority to legislate on this issue because it can regulate the use of potentially dangerous drugs. For this reason, this new legislation was passed as an amendment to a 1970 federal law, the Controlled Substances Act, which sets uniform national standards for the control of morphine and other narcotics.

All the members of the Utopia congressional delegation, from both the House and Senate, voted against this new federal legislation.

The legislation includes the following provisions:

For purposes of this Act and any regulations to implement this Act, alleviating pain or discomfort in the usual course of professional practice is a legitimate medical purpose for the dispensing, distributing, or administering of a controlled substance that is consistent with public health and safety, even if the use of such a substance may increase the risk of death. Nothing in this section authorizes intentionally dispensing, distributing, or administering a controlled substance for the purpose of causing death or assisting another person in causing death.

The Attorney General of the United States shall give no force and effect to State law authorizing or permitting assisted suicide or euthanasia. She shall authorize Drug Enforcement Agents and other Department of Justice personnel to investigate and prosecute the dispensation of controlled substances for the
purpose of causing death or assisting another person in causing death.

Congress recognizes that federal law enforcement officials may have difficulty enforcing the prohibitions of this legislation in all fifty states. Accordingly, under the terms of this statute the Attorney General may require state police officers or state health employees to collect the signed consent forms of patients for whom controlled substances are prescribed for the purpose of hastening death. These officers or employees shall forward copies of the forms to the Drug Enforcement Administration of the Justice Department, in Washington, D.C.

The minimum penalty for doctors convicted of violating this act is twenty years imprisonment.

Utopia’s Members of Congress, several Utopia doctors, and three terminally ill Utopia patients who have a year to live bring suit to challenge these amendments to the Controlled Substances Act as unconstitutional.

What arguments should they make?

Will they succeed?
In response to the impeachment of President Clinton, and because of the expiration of the Independent Counsel Act, Congress passed, and the President signed, the Impeachment Counsel Act (YMCA’”). During the House and Senate debates about passage of IMCA, many members of Congress argued that IMCA is necessary because too much of Congress’ time and energy was consumed by the Clinton impeachment and trial. The budget, the test-ban treaty and other national problems were left unaddressed while the impeachment and trial took place. The American people and future Congresses should be spared such a waste of resources.

IMCA requires the Attorney General, upon receipt of information (from any source) that she considers “sufficient grounds” that the President has committed an impeachable offense, to conduct a preliminary investigation of the allegations. In this preliminary investigation, if the Attorney General finds “reasonable grounds” to assume that the President has committed an impeachable offense, she must apply to the Special Division of the U.S. Court of Appeals for the District of Columbia for the appointment of an Impeachment Counsel. The Special Division created by IMCA consists of three Circuit Judges appointed by the Chief Justice for two-year terms.

IMCA grants the Impeachment Counsel full authority to exercise all investigative and prosecutorial functions and powers of the Justice Department. It states that, if the Counsel discovers evidence of a crime committed by the President, the Counsel shall present that evidence to a grand jury. Like any Justice Department prosecutor, the Counsel may ask the grand jury to return an indictment against the president once it has considered all the evidence.

IMCA states that the Counsel must report the results of the grand jury deliberations to Congress. Moreover, IMCA also states that, if the grand jury returns an indictment against the President, then the Members of the House must vote to impeach the President. In contrast, if the grand jury refuses to return an indictment, IMCA states that Congress may not hold impeachment hearings and may not schedule any vote to impeach the President on the floor of the House.

Is IMCA constitutional? Analyze the arguments for and against its constitutionality.
Question I should have been very easy for everyone. For the wording of the Privacy Act, you needed to write the Roe trimester framework (p. 534, Gunther). In order to assess whether the Privacy Act was constitutional, you had to consider Boerne. You could also consider whether Congress had power under the Commerce Clause to pass this legislation, but you HAD to review Boerne. A good answer gave a careful analysis of whether passing Roe post-Casey would be remedial or substantive.

For Question II, it was important to read the question. You were not asked to assess the constitutionality of the Utopia law (although in order to write a good answer, you had to realize that Glucksberg says that it is for now up to states like Utopia to legislate in this area). If you read the question, you will see that legislators, doctors and patients brought suit; you had to analyze whether they had standing. For the legislators, you should have talked about Raines.

In Question II, Congress was passing legislation, so you should be embarrassed if you forgot to mention that, because our government is one of enumerated powers, Congress needed a source of authority for its action. Commerce Clause, Lopez; Section 5, Boerne (with much more time given to commerce than to Section 5). Many of you were confused about what Glucksberg holds. You should at least understand that Glucksberg makes it difficult for plaintiffs to argue that their fundamental right to physician-assisted suicide has been violated (unless they fall into the untreatable pain exception, not present in the facts). Under Printz, you should have questioned the law's provision for state police officers to collect signed consent forms.

For Question III, most of you mentioned functionalist and formalist. But you forgot to argue about the case law. I expected that an Impeachment Counsel would remind you of an Independent Counsel (Morrison). Most of you did mention the text of the Constitution, but for some inexplicable reason many of you talked about the Senate only. The House has the "sole Power of Impeachment," the Senate "shall have the sole power to try all Impeachments." Those are two different tasks, and you should not confuse them. Under (Judge) Nixon you must ask if this is a justiciable question (probably yes, but explain why). Then you should have used Chadha and New York v. Clinton to clarify the two types of arguments, textual and separation of powers.

I hope you have been reading the newspapers and so noticing that the Supreme Court is continuing to address the basic questions of federalism that we studied in Con Law I.