Student Exam Number __________

Final Examination
Constitutional Law, Professor Leslie Griffin
University of Houston Law Center
May 5, 2003
1-5:30 P.M.

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

This examination is CLOSED BOOK, NO NOTES. You may consult only the copy of the Constitution that is provided with this examination. You may not consult any other materials or communicate with any other person. You are bound by the Law Center’s Honor Code. Don’t forget that it is a violation of the Honor Code to discuss the exam’s contents with any student in this class who has not yet taken it.

Write your examination number in the blank on the top of this page. If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. If you are using the computer, write your examination number on each diskette and at the beginning of your response to each question. At the end of the exam, you MUST turn in the examination along with your answers. Please do not write your name, social security number or any other information that provides me with your identity.

This exam is five pages long, with FOUR questions. Question I is worth 30 points. Question II is worth 30 points. Question III is worth 25 points. Question IV is worth 15 points. You have four hours and thirty minutes. I recommend that you spend 60 minutes on Question I, 60 minutes on Question II, 60 minutes on Question III and 45 minutes on Question IV. You have an extra 45 minutes to use at your discretion.

Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor. In your answers, you should cite to any applicable provision of the United States Constitution and to the governing case law that is relevant to the question. If the questions are 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.

If you write your exam, use ONE SIDE of a page only, and SKIP LINES. If you type, DOUBLE SPACE, and leave wide margins.

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. Sign your number and not your name.

PLEDGE: __________________________

Page 1 of 1
Question I

(30 points, 60 minutes)

State Penal Code δ 1.0 (“Homosexual Conduct”) provides:

   A. A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. An offense under this section is a misdemeanor.

   B. “Deviate sexual intercourse” means:

      1. any contact between any part of the genitals of one person and the mouth or anus of another person; or

      2. the penetration of the genitals or the anus of another person with an object.

Gary is president of Gay Network, a national activist group that seeks equal rights for homosexuals. He does not live in State but his Network has offices there that are staffed by local residents.

Paul and Pete are State residents. In February state police received a (false) report of guns being fired at Paul and Pete’s house. When police arrived at the house, they saw Paul and Pete engaging in oral sex and arrested the two men. Paul and Pete were convicted of violating State Penal Code δ 1.0 and were fined $500.

Paul and Pete’s neighbors, the married couple Sally and Sam, were home when the police arrested Paul and Pete. They were offended by watching the police arrest their neighbors. Sally and Sam believe strongly that “a violation of one person’s rights is a violation of everybody’s rights!” They called Gary, an old friend from college, and told him about the arrest.

Gary, Gay Network, Paul, Pete, Sally and Sam decide to join forces to challenge the constitutionality of State Penal Code δ1.0. Identify the constitutional arguments that they should raise. Will they succeed or fail in their constitutional challenge? Why?
State is the largest state in the U.S. It is composed of vast rural areas with many mountains spread out across many miles. State Legislature enacted a new Abortion Act to regulate abortion providers in clinics, hospitals and doctors’ offices. The Act includes three types of provisions:

First, facilities regulations. These regulations require the covered health care facilities to verify that their sanitation, housekeeping, and maintenance standards are excellent by sending “facilities reports” to the State every four months. The covered health care facilities also must undergo inspection by State inspectors of their physical plant (including emergency rooms and recovery rooms) every six months.

These facilities regulations apply only to health care facilities that perform three or more second-trimester abortions or five or more first-trimester abortions per month, and not to other health care facilities. Compliance with the facilities regulations increases costs by $75 per abortion.

Second, consultation provisions. The Abortion Act requires that all covered health care facilities must make “arrangements for consultation or referral services with obstetricians, gynecologists, pathologists and clergy to be available to all abortion patients.” Such arrangements include providing literature about these services to patients and having these consultants on-call for emergencies and other counseling situations.

Third, waiting requirements. In order to encourage women to think about their choice, the Act mandates that women must wait 24 hours before they have an abortion. A woman who wants an abortion must a) enroll at the facility by filling out a form that records the date and hour of her arrival. She is then eligible b) to have an abortion in the same facility only no sooner than 24 hours from that date and time.

The appropriate plaintiffs (i.e., they have standing) challenge the Abortion Act on constitutional grounds. Is the Abortion Act constitutional? Why or why not?
Question III  
(25 points, 60 minutes)

When some members of the U.S. Congress learned that the majority of states had passed “Homosexual Sodomy” statutes like the one described in Question I, they held hearings about possible discrimination against gays. At the hearings they learned that 35 states had passed statutes that criminalize homosexual but not heterosexual sodomy. They heard testimony from some gay citizens who said they would and could not move to a state with a homosexual sodomy law. Other citizens said they would leave their home state because it has a homosexual sodomy law. 25 State Chambers of Commerce testified that they lose 7% of their business dollars because the tourist trade suffers when these laws are in place.

Congress concluded that the state homosexual sodomy statutes violate the rights of gay citizens, are passed out of animus toward gay citizens and hurt business profits around the nation. In response to the hearings and letters from their constituents, Congress passed the Anti-Gay Discrimination Act, which states:

Congress finds that a majority of the states has passed homosexual sodomy acts. We find that these acts interfere with corporate profits across the U.S. We find that such statutes violate citizens’ fundamental rights and are motivated by an animus against homosexual citizens. Accordingly we decree that states may not impose criminal penalties on homosexual sodomy.

A. Is the Anti-Gay Discrimination Act constitutional? Why or why not?  
[The Supreme Court has not decided Question I so apply only current U.S. Supreme Court precedents to your answer.]

B. Assume for this part only that the Act is constitutional. The Act includes another clause that reads: “Anyone prosecuted by a State for homosexual sodomy has a cause of action against the State for damages, including emotional distress and lost wages.”

Paul and Pete reappear from Question I and sue their State for damages. Will they succeed? Why or why not?
Question IV
(15 points, 45 minutes)

Remember to answer this question on the facts presented below and not on your knowledge about Iraq war.

In October 2002, because of the President’s comments about an impending war with Iraq, the Congress of the United States met to discuss the possibility of war. They debated passage of a resolution to support the President. They argued whether to pass a joint resolution or a concurrent resolution. A joint resolution is passed by both Houses of Congress and becomes law when the President signs it. A concurrent resolution is an action of Congress passed in the form of a resolution of one House, the other concurring, that expresses the sense of Congress on a subject. A concurrent resolution does not require the approval of the President.

After lengthy debate in both Houses, the Senate passed a concurrent resolution and the House agreed to support it. The text is printed below:

Concurrent Resolution

The Congress of the United States supports the efforts by the President to:

(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in those efforts; and

(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

(3) AUTHORIZATION: The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to

(a) defend the national security of the United States against the continuing threat posed by Iraq; and
(b) enforce all relevant United Nations Security Council resolutions regarding Iraq.

When President Bush spoke publicly in January about sending troops to Iraq, plaintiffs (who are active-duty members of the military, parents of military personnel, and members of the U.S. House of Representatives) sued President Bush to enjoin him from initiating a war against Iraq. They asserted that starting the war against Iraq would violate the Constitution.

What arguments should they use in their lawsuit? Will they win or lose?
Constitutional Law Exam  
Professor Griffin  
Spring 2003

Your letter grades were awarded according to the Law Center's grading curve. The letter grades were awarded based on the following point totals on the exam.

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**Question I** should have been the easiest question for you, as we discussed it in class. You needed to talk about the parties' standing, and their equal protection and substantive due process challenges to the statute. You should have talked about *Hardwick* and *Romer*. Students who gave more thorough analyses of these cases received more points.

**Question II** was a trick question. I know that many of you expected partial birth abortion. To answer this question you needed to understand the details of *Casey*. The facilities regulations could be upheld because of the state's interest in protecting health and providing safe abortions. Most of you asked if the $75 would be an undue burden. My consulting regulations were similar to the informed consent requirements that were upheld in *Casey*. In *Casey* the Court upheld a twenty-four hour waiting requirement. You needed to ask here if such a requirement would pose a substantial obstacle/undue burden on the right to abortion in a state where women had to travel great distances.

Now for the tricks. The minute you read "clergy" you should have thought of the *Establishment Clause*. And when you read about the facilities regulations: "These facilities regulations apply only to health care facilities that perform three or more second-trimester abortions or five or more first-trimester abortions per month, and not to other health care facilities," you should have asked if this classification violated Equal Protection!

In **Question III** Congress was acting. So you should have asked if Congress had the power to pass this Act, because our government is one of enumerated powers. You should have discussed the Commerce Clause (*Lopez* and *Morrison*) and also Section 5 of the 14th Amendment (*Boerne*). "Corporate profits" suggested the Commerce Clause. "Fundamental rights" suggested that Congress might be trying to overrule *Hardwick*, which would be prohibited under *Boerne*. Or was Congress trying to enforce *Romer*? A good answer considered all these points.

Part B was about the Eleventh Amendment. You got more points the more case law you mentioned.
When you read about that concurrent resolution in **Question IV**, you should have thought immediately about *Chadha*, with its requirement that the finely-wrought procedures of the Constitution be observed. The Court might step in to nullify a declaration of war that did not meet the bicameralism and presentment requirements. You also needed to identify and discuss separation of powers: the President's power as Commander-in-Chief and the Congress' power to declare war.

Wars are usually political questions, however, so you needed to discuss the political question tests. And you should have considered standing, especially to conclude that the legislators would not have standing under *Raines*.

I will be away from the office all summer. But your exams are there for review. You may pick them up from my assistant Michelle Ozuna. Please be sure to sign out your exam. You are welcome to take your plastic bag and keep it, i.e., to keep your answer and the exam. I will check e-mail over the summer if you have questions for me; lgriffin@uh.edu. Or you can schedule an appointment after I return on August 22.

Michelle will also have copies of the best student answers if you want to look at them.
Question 1 -Homosexual Conduct

Justice Stevens would write the majority opinion: Before the Court does an analysis of the fundamental right and equal protection issues, we must determine who has standing. The first of these requirements under constitutional standing is injury in fact. There is no injury to the Sixth Circuit and the State or the State's gay network. Although the Sixth Circuit has not suffered any injury, Paul, Pete, Sally, and Sam have shown injury. Paul and Pete are being directly affected by State Penal Code (P.C.) § 6.0 and Sally and Sam even directly offended by witnessing their neighbors being arrested. However, Sally and Sam cannot say that their
Injury came about because of UCC §310. Sally and Sam
would feel the way regardless of the law being written.
Paul and Peter claim clear harm to the causation aspect.
They were arrested because of the law and this Court
can redress their injury with a ruling. Paul and Peter
also meet all the prudential requirements for standing;
they are directly affected and not simply third parties.
They bring in a generalized grievance like Gay
National, and they have a direct interest in that the
law directly affects them.

This Court has always said that the right
to privacy is a fundamental right of the individual
older than the Bill of Rights and is deeply rooted in
this country's history and tradition. Mr. Griswold,
We said that contraception, a non-procreative
right, is a right that falls under privacy for
married couples. For Eisenstadt, we expanded
that right to include non-married individuals
for what is done in the bedroom is none of the
Government’s concern. However, the areas chosen
doesn’t even begin to extend that right to
homosexuals engaged in sodomy.

In my dissent in Roe v. Wade, I stated that
just because a majority sees something as
immoral, it is not sufficient to prohibit it. Times
have changed from our ruling in Roe v. Wade. Now, only
a few states still make homosexual sodomy an illegal. For
us, not to see that the gay rights movement is
being accepted and that fundamental rights mean

a right all of us share would be wrong. Note that

Code §1 does not criminalize a conduct in

which everyone is held equal under the law, it

only criminalizes those who are different than the

majority. The fundamental right to have sex

the privacy of one's bedroom should be extended to all,

and since §PC §1 does not do so, it is still unconstitution

in that violates our right of privacy an extension in Griswold

and Eisenstadt.

The liberty interest in the 14th Amendment

is fundamental to everyone, not only to those the

majority feels is deserving. By classifying others

different from the rest, the law also fails an
equal protection provision. Under Brown we held
an inviolable Amendment to violate homosexual

equal protection to be involved in the political process.

Under a rational basis review the law fails
for its animus toward a subculture that is

as big a part of America as the political process.

Here [5:41] discriminate in its face toward
homosexuals because a man and a woman can
engage in the same conduct and will not be barred

required by the State but same sex couples

will. This is not a rational reason under

morality. Just because something is held immoral

by a majority does not be sufficient to prohibit

it. The country is built on tolerance and accepting
It is the ruling of this Court that the right to non-procreative sex is a fundamental right to all and any precedent to the contrary is overruled. Also, because the law (5 E.C. 21) does not extend the equal protection of the law to all engaged in the same conduct, that law is struck.

O'Connor - Concurrence

The history of tradition of the country of law changed since an act in Cowan. With a vast majority of people and state accepting homosexuality into the ever-changing culture of America, I cast my vote to change my ruling.
to all people of from Georgia. This law only 
holds a class of people separate from the 
civil and social laws that define ordinary human 
behaviour. It is akin to setting aside the 
1668 statute regulating heterosexual sodomy and 
2 statutes recognizing same sex marriage, I 
see that to hold the law up would be contrary to 
the changing traditions.

Sorby, Thomas, and Rehnquist - Dissenting.

The Court has just substituted its values and 
morals on those in place of those of the citizens 
of the State. Homosexual sodomy is illegal 
and to say that this law is necessary forwards 
an insular and discrete minority is against 
this Court's history and traditions. The decision 

...
The social history and tradition of this country has never recognized homosexual and still held their conduct as illegal. The very moral fiber of this country has been cast by the today's decision. Benner should be upheld. To extend equal protection for all law-abiding citizens to those engaged in illegal activity be unAmerican. Homosexual sodomy is an illegal activity and has been since the founding of our country. I Dissent.
2) Question II

There are two potential claims against the state by two potential parties. First, women who are wanting an abortion would be able to bring a claim that the new act violated their right to privacy claim under the right to have an abortion. Second, health care facilities that perform abortions would be able to challenge the act under equal protection of the laws.

For the women bringing the claim, they would need to argue that the guidelines set out by the act place an undue burden on their right to have an abortion. The undue burden requirement was set forth by the Supreme Court in Planned Parenthood v. Casey. Casey was a case that upheld the Roe v. Wade decision in spirit, but struck down the trimester framework it put forth. Instead, in Casey, the Supreme Court held that the state had a compelling interest in regulating abortions before viability, but that it could not place an undue burden on abortions. The court never defined undue burden, however, and many of the limitations placed on abortions before Casey have since been upheld as not being an undue burden. Therefore, none of the provisions in the act can be expressly said to violate or comply with the undue burden test.

The court has upheld reporting requirements by the state for facilities that perform abortions. But
the facilities regulation seems to go beyond this and requirest facilities to undergo inspections on a regular basis. While the women wouldn't be able to claim this as an injury directly, the argument could be made that since the requirements increase the cost of the abortion by $75, the added cost would place an undue burden on the women. It is hard to say how the court would rule on this since I'm not sure how much an abortion costs to begin with. If this was only a relatively small increase to the general cost of abortions, it seems likely that the court would rule that the state's interest in maintaining adequate facilities was sufficient enough to warrant the cost increase. If, however, the cost was substantially more than what a normal abortion costs, then there would be a greater argument for finding that there would be an undue burden placed on the women. Most likely, though, it seems that the added cost would have to be shown to make the procedure would cost substantially more in order to get O'Conner (the likely swing vote) to find an undue burden.

The consultation provisions seem more likely to prevail. In Casey, the Supreme Court ruled that the state is allowed to try to persuade the woman not to have an abortion. The court feels that persuasion does not place an undue burden on the woman's rights. Since the court held that in Casey, the only way it seems that this provision could be overruled would be if the number of consultation requirements was great enough that it placed an undue burden on the women.

Finally, the waiting requirements might be proven to place an undue burden on the women's rights. The court has upheld 24 hour waiting requirements before. But the geography of the state at issue might play an important role in determining the validity of the waiting requirement.
Since the state is composed of vast rural areas with many mountains spread across many miles, this implies that there is a great difficulty in travel. Since the facility regulations are so strict, it seems fair to assume that only a limited number of hospitals would meet the standards — requiring women from the rural areas to travel a great distance to have the abortion performed. To add a waiting period to this already existing difficulty could be seen as being an undue burden. Even though the court has upheld waiting requirements before, O'Connor is known for deciding cases on the facts. If she could be persuaded that the specific facts invalidated this requirement, that could get enough votes in the court to strike it down.

The health care facilities might be able to challenge the facilities regulation as being a violation to the fourteenth amendment equal protection rights. While the amendment applies equal protection rights to "persons," corporations — in the eyes of the law — are considered persons. Since the constitution did not say "natural persons," they are included in being protected.

The health care facilities can claim discrimination not only because the facilities requirements don't apply to facilities that don't perform abortions, but also because they don't even apply to facilities that perform less than the requisite number of abortions per month. Because of this discrepancy, the facilities that do have to meet the requirements can claim that the statute is underinclusive and that they are being discriminated against. There are two obstacles that the facilities would face. One is that the Supreme Court has upheld legislation that was underinclusive before holding that the legislatures were allowed to legislate in steps, and as a result an underinclusive statute is more tolerable than an overinclusive one. Another is that even
if the court agreed that it was discriminatory, they would likely also agree that the state had a compelling interest in protecting the fetus. If the state's interest was compelling enough, then a the discrimination would be upheld. It seems that more and more the court is moving away from Roe v. Wade, and it seems unlikely that the two most likely swing voters in this case (O'Connor and Kennedy) would find for the facilities.

One final element deserves mention. The second provision requires that, as part of the consultation requirements, clergy be available to all abortion patients. The right party could argue that this is a first amendment violation of the establishment clause. The first amendment states that "Congress shall make no law respecting an establishment of religion." The Supreme Court has interpreted this to include that there can be no "excessive entanglement" between church and state. By requiring that clergy be a part of the consultants that must be on-call for emergencies and counseling, it seems that the state has violated this portion of the first amendment right. The test set forth by the Supreme Court in the Lemon case requires that (i) the statute is secular in purpose, (ii) the statute neither condones nor inhibits religion, and (iii) there cannot be an excessive entanglement. Here, it could be argued that since clergy is a part of the requirements for consultation, that it isn't secular in purpose, is does condone religion, and as a result there is excessive entanglement. It is a strict scrutiny test, so the government would have to show that there was no other less intrusive means available. Because of this, the court would most likely strike down at least the requirement for clergy.
A. Justice Rehnquist delivered the opinion of the Court:

Whenever Congress acts, especially with respect to the states, it must demonstrate a source and authority for such power. Though this statute does not explicitly state its source of authority, we may infer it is either the Commerce Clause, or Section 5 of the 14th Amendment. Such a determination is irrelevant, because the act is unconstitutional under either source of power.

Article I, Section 8, Clause 3 of the Constitution gives Congress authority to "regulate commerce...among the several states."

Additionally, Clause 18 of Section 8 states that Congress has authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing power." In reference to interstate commerce, Congress does have the power to regulate—but it is not absolute.
Following *us. v. Lopez* and *us v. Morrison*, this court has established that commerce's instrumentalities and channels may be regulated (though this is not the case before us). Additionally, if an activity bears a substantial relation to commerce it may be regulated. The action we look at here are anti-sodomy acts. To establish if they "substantially affect" interstate commerce, we first look to whether the activity in question is economic. In our case, as it is a sodomy statute, it does not. (Much like in *Morrison* and *Lopez* where violence against women and gun possession were not economic activities). Next we look to if there is a jurisdictional element here, tying the Act to interstate commerce. In the wording of the statute, the fact that such sodomy laws "interfere
with corporate profits across the US" is mentioned, but that is not an explicit jurisdictional element, nor would it be dispositive to give Congress authority if it did establish jurisdiction. Next, we examine Congressional findings. While in Lopez we had no such findings, in Morrison we were mandated with data referring to the impact violence against women has on the economy. Here, we have a smattering of findings: anecdotal evidence from homosexuals, chamber of commerce stipulations that sodomy statutes cost states 2% of business and more. Morrison's findings were much more in-depth, and yet they were found to be insufficient. We believe the same holds true for this "evidence."

Next, we examine how attenuated the action in question is from commerce. The interaction back required to
believe those statutes are related to interstate commerce is similar to when parties asked us to believe that gun possession of one young man at school, and the raping of a woman at Virginia Tech impacted the economy. We cannot, and will not do so. This law is not authorized by the Commerce Clause because the court is stretching far beyond its powers.

Justice Kennedy and O'Connor concurred here, emphasizing that, like Morisson andopez, the most important power of the States, the police power, was being directly hijacked by this Act. Kennedy emphasized that the beauty of dual sovereignty was that liberty would always be protected, but with this Act, citizens would not be able to rely on the sovereignty of the States.
and order in the state, and political accountability would go out the window.

Justice Thomas concurred, adding that while the holding was correct, the "substantially affects" test has no basis in the constitutional and should be abandoned in favor of pre New Deal era conceptions of commerce power—Congress may regulate what directly affects commerce.

Justice Stevens, Souter, Breyer and Ginsburg dissented stating that much more deference should be given to Congress, especially in the light of such findings. They further stated that the question is "on the macro level, does homosexual discrimination affect the economy." Because they felt that the Congress could have reasonably believed so, they thought the Act was authorized under the commerce clause.

Justice Breyer:ist continues. Next, we must examine whether the Act is authorized under § 5 of the 14th Amendment, which states "Congress shall have the power to enforce, by appropriate legislation, provisions of this article." This power is a remedial, rather than substantive, power meaning Congress can enforce the Constitution or rulings of the Supreme Court, but it may not interpret or change the law. Further, the acts of Congress must bear a proportionality and congruence to the ends of the law.

It is inherently the province of the Supreme Court to say what the law is (Marbury). Furthermore, according to Article III and Dickerson, the Constitution and the Supreme Court are the supreme law of the land. If states or Congress wish to change the law, they may do so.
wrought procedures of the amendment process are available. The supreme court has never held sodomy laws are unconstitutional and has explicitly stated in Bowers v. Hardwick that the right to engage in sodomy was not a fundamental right. Congress, through this Act, is not acting remedially, but substantively in overruling Bowers. Furthermore, the congruence and proportionality of this Act is in question. To eliminate 35 state statutes is a hugely powerful strike. To support such an action, Congress would need to show a pattern of abuse under the existing law, or continuing harm to homosexuals. All we are offered is anecdotal evidence from some gay citizens. It is entirely inappropriate for Congress to change the law, especially so directly in the face of
Controlling Supreme Court precedent. This action calls to mind the case of "City of Boerne, in which Congress, via the Religious Freedom Restoration Act explicitly attempted to overrule the rational standard established for review of facially neutral laws infringing on people's religious exercise. Here, the law attempts to throw out Bowers, something Congress simply is not entitled to do. Though this Act does attempt to target state actors, [unlike Morrison] it is one of the few things it got right, and is not enforceable.

B. Justice Rehnquist delivered the opinion of the court:

The particular clause of the Act in question is an abrogation clause. Such a clause is an attempt to by-pass the 11th Amendment, which states that "the judicial power of the United States shall not be construed to
extend to any suit in law or equity, commenced or
prosecuted against one of the United States by
citizens of another state." For our purposes, however,
the situation is slightly confused by the fact that
Yankee and Pete, who under this act do appear to have
a concrete injury in fact (§520 of the)
act) and redressability (emotional distress and loss
wages), are attempting to sue their own state. Under
state sovereign immunity principles gleaned from
Fitzpatrick, we know that legislation attempting to
abrogate immunity must be so clearly, which appears
to have been satisfied by the wording of the clause
("has a cause of action against the state"). However,
as established in Seminole Tribe, for Congress to abrogate
state sovereign immunity (while acting under commerce clause and)
Clear intent in the legislation is insufficient. In addition, the State must consent to be sued. In Seminole Tribe, the State of Florida was sued after legislation passed by Congress stated that the tribe had a cause of action if Florida did not negotiate in good faith. However, since Congress was acting under commerce clause power, which makes us cognizant of the interests of the State, consent of Florida was retired. As State has not consented to being sued, is this Act is authorized under commerce clause, it will fail. However, as abrogation under § 5 of the 14th Amendment requires merely clear intent in the legislation, which we have here, the suit would go on. The humiliation a State faces when forcibly told to allow a lawsuit is a significant...
factor which must be considered. Justice Stevens dissenting:

Having established the Act is constitutional, there is little doubt that 

the Senate may sue in accordance to it. The majority's idea that consent must be given in a lawsuit pursuant to authorization under the Commerce Clause is not supportable. Seminole Tribe was just the latest example of the Court, following Lopez and Morrison, of erroneous decisions regarding the Commerce Clause. For over 50 years, no challenges prevailed, and then in 1995, the bombshell of Lopez was dropped. I am convinced it, as well as Seminole tribe, was improperly decided and thus all Congress must do is clearly indicate that the right...
have suffered both economic and emotional damage, they should recover.
4)  

STANDING

1. Members of the U.S. House of Representatives. According to Raines, members of Congress may use their voting power to address grievances.

In the present case, the Representatives could vote not to declare war against Iraq. (The resolution authorizes the President to use Armed Forces, but if and when the President chooses to do so, then he must report to Congress. Only Congress has the power to declare war—Art. I, section 8, clause 11.)

In other words, there is no injury, causation, redressability for the Representatives. Rather, this is a political question the court will likely leave the issue to the President and Congress to work out. The item is non-justiciable.

2. Active-duty members of the military. They may suffer an imminent REAL injury in battle in Iraq, caused by the Resolution giving the President power to engage in military action. Such injury cannot be redressed by a court's favorable ruling. Active-duty military are employed to defend the country;
to allow them to stay home because they do not wish to fight Iraq would destroy the U.S. military. This can be seen as a generalized grievance of members of the military. Just like no one wants to pay taxes, most military personnel do not want to go into battle; but there are times when both are required. The Court has discretion to hear generalized grievances, and will probably not give standing to the military personnel.

3. Parents of military personnel. The parents are not within the zone of interest of the law. Nothing in the Resolution allows for 'any person' or even parents of military to have a cause of action. The Court has discretion to hear or dismiss claims brought by people outside the zone of interests.

Likely, the Court would not allow standing to the parents.

Without standing and justiciability, no arguments are needed because the case will not get to court.

ARGUMENTS

In the event that standing were granted to any of the plaintiffs, the following arguments may be made:
1. Violation of separation of powers by Congress giving away its power to declare war.

In this case, the actors are the President and Congress. The Constitution gives Congress the power to declare war (Art. I, Sec. 8, Cl. 11), and names the President as the Commander in Chief (Art. II, Sec. 2, Cl. 1). Congress—specifically the Senate via a Concurrent Resolution—is giving power to the President to use the Armed Forces as he deems necessary to defend national security and enforce UN resolutions regarding Iraq. There is nothing in the Resolution of when war will be declared, and may be inferred that declaration of war is not needed because the resolution gives "AUTHORIZATION" to the President to use the Armed Forces.

This is somewhat similar to Chada when the legislature sought to give its lawmaking power to another branch. It could not stand then. But it might here.

2. Violation of separation of powers by acting through a concurrent resolution.
In another case we studied this semester, the court did not allow action by a single house of Congress. The court held that Acts of Congress must meet bicameralism and presentment. Bicameralism means that BOTH houses of Congress must pass a bill, and then it must be presented to the President to be signed into law (presentment) (Art. I, Sec. 7, cl. 2-3). The action of the concurrent resolution fails both requirements: bicameralism and presentment. It was passed by only the Senate, and the House agreed to support it. Nothing is in the record as to the level of support the House gave. It could have been that only a few members of the House were supportive of the resolution, (not enough to pass it as law), and that is why the item was passed as a resolution. Also, the resolution was not signed by the president. Most laws (after passing both Houses of Congress) require signing.

Under a functionalist view, Stevens will argue that the situations presented in wars today are different than the ways that wars were fought when the founding fathers drafted the Constitution. Therefore, there is no violation of separation of powers. Ginsburg, Souter, and Breyer will side with him.

O'Connor, based on the facts will see the need to empower the President in the unique situation
in which he is placed.

Scalia and Thomas will argue that the Constitution must be interpreted by its text and looking at history. Kennedy and Rehnquist will be adamant about keeping distinct lines between powers.