Final Examination
Constitutional Law, Professor Leslie Griffin
University of Houston Law Center
May 9, 2005
9 A.M. to 1:30 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 student examination number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are using the computer, write your examination number on each diskette and at the beginning of your response to each question. If you are handwriting, please do not use pencil. At the end of the exam, you MUST turn in the examination AND the Constitution 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 eight pages long, with FOUR questions. Question I is worth 40 points. Question II is worth 30 points. Question III is worth 15 points. Question IV is worth 15 points. You have four hours and thirty minutes. I recommend that you spend 90 minutes on Question I, 60 minutes on Question II, and 45 minutes each on Questions III and IV. You have an extra 30 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: __________________________
Question I
(40 points, 90 minutes)

Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. The Act provides:

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in section 2 of the Civil Rights of Institutionalized Persons Act, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application. This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives federal financial assistance; or
(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian Tribes.

RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” RLUIPA creates a federal private right of action, allowing “any person” to “assert a violation of RLUIPA as a claim in a judicial proceeding” and to obtain “appropriate relief against a government.” The United States may also seek injunctive or declaratory relief to enforce the statute.

Prisons are institutions as defined in the Act. State Prison receives 12% of its budget from federal funds. Prisoners John and Daryl, members of a polytheistic religion called Asatru, claim that they were not allowed to wear religious medallions, even though their jewelry was similar to that of mainstream religions. Arthur is a member of the Christian Identity Church, whose followers believe that races should be separate. He, John and Daryl claim they were denied the opportunity for group worship. Sam is an Orthodox Jew who claims that the prison did not provide him with a kosher diet. Michael is a Satanist, and Lee is a Wiccan witch. All of these prisoners make the common claim that they are arbitrarily and discriminatorily denied access to religious literature. According to their attorney, prisoners can use their inmate accounts to order books, but when the reading material arrives, officials determine whether it is appropriate or if should be sent back or mailed to a designated family member.

State Prison authorities argue that they must limit the prisoners’ access to literature because it may promote violence. The authorities also argue that, because some gangs identify themselves by jewelry, they must limit jewelry to prevent gang
identification and violence. The authorities also argue that Sam has adequate nutritional alternatives, namely a choice of regular, vegetarian or pork-free daily menus.

The prisoners sue State Prison in federal court arguing that their constitutional rights have been violated. What arguments should the prisoners make? How should the State Prison reply? Which side will win in the United States Supreme Court? Why?
Peter is an attorney who graduated with honors from Indiana University School of Law in 1979. He is licensed to practice law in Indiana, Ohio, and California. He was admitted to practice law in Indiana in 1979. He was admitted to practice in Ohio in 1981. Until his move to California in 1984, Peter maintained law offices in both Indiana and Ohio. He was admitted to practice in California in 1985. Peter relocated to North Carolina in 2000. On December 15, 2003, he submitted a comity application for admission to the North Carolina Bar. In the six years immediately preceding his application for admission, Peter practiced law in both California and as in-house counsel in North Carolina.

North Carolina Board of Law Examiners Rule .0502 lists the requirements necessary for obtaining a comity admission. Subpart (3) of that rule requires that the applicant "prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law."

On January 20, 2004, the North Carolina Bar Examiners advised Peter that his application for a comity admission was denied. Upon further inquiry, Peter discovered that his application had been denied because he had not practiced in a state having comity with North Carolina for four of the six years preceding his application to the North Carolina Bar. Rather, he had practiced law in California, which does not have comity with North Carolina. Indiana and Ohio do have comity with North Carolina.

Peter wishes to challenge the constitutionality of North Carolina’s Bar Rules. What arguments should he make? Will he win or lose his case in the United States Supreme Court?
Question III

(15 points, 45 minutes)

Because they are frustrated with federal court rulings safeguarding privacy rights and denying protection to fetuses and comatose patients, President Bush and the Republican Congress are eager to have the president’s judicial nominees confirmed. The Democrats wish to block some of these appointments because they think the nominees are too extreme in their views and will not honor the Constitution if they take the bench. The Democrats blocked some of the nominations by use of the filibuster: they kept talking and voting was stalled. President Bush and Republican Senators accused Senate Democrats of abdicating the Senate's constitutional responsibilities concerning federal judicial nominees.

The Senate has always permitted filibusters. For 128 years, from 1789 until 1917, individual senators could prevent the Senate from voting on nominations or legislation by refusing to stop talking. In 1917, the Senate passed the first major reform of the filibuster rule. No longer could one senator exercise a veto over the entire Senate. Under the new rules, filibusters would be cut off if two-thirds of the Senate voted to end debate. In 1949, the filibuster rule--which by then was known as Rule XXII--was extended to cover not only pending bills but also pending motions and other matters, including nominations. In 1975, the number of votes needed to end a filibuster was reduced even further, from sixty-seven votes to sixty.

The Republicans came up with an option to stop the filibuster, the so-called nuclear option. It reduced the number of votes needed to end a filibuster from sixty to fifty-one. Here’s how it happened. The Republican Senate Majority Leader called for a vote on the judicial nomination of Judge Smith. A Democratic Senator objected, signaling her intention to filibuster the nomination. The Majority Leader then offered a motion declaring the filibuster to be in violation of the Constitution. Vice President Cheney--acting in his capacity as presiding officer of the Senate—allowed the motion to proceed to a vote. The Republican motion passed by a Senate majority of 51-49 and the filibuster was declared unconstitutional by this majority vote. The same majority then confirmed Judge Smith to the federal bench. This same filibuster-free process will now apply to the president’s nominees to the U.S. Supreme Court.

The Democratic Senators filed a lawsuit in federal district court challenging the anti-filibuster motion. What arguments should they make? How will the district court rule? Who will win if the case is appealed to the Supreme Court of the United States? Why?
The New York Times ran the following article about a proposed new Medicare policy. Assess the constitutionality of the proposal in a memo for Representative Smith, who is eager to hear your assessment of the following reforms.

WASHINGTON, April 23, 2005 A new federal policy will make it significantly more difficult for Medicare beneficiaries to obtain hearings in person before a judge when the government denies their claims for home care, nursing home services, prescription drugs and other treatments.

For years, hearings have been held at more than 140 Social Security offices around the country. In July, the Department of Health and Human Services will take over the responsibility, and department officials said all judges would then be located at just four sites -- in Cleveland; Miami; Irvine, Calif.; and Arlington, Va.

Under the new policy, Medicare officials said, most hearings will be held with videoconference equipment or by telephone. A beneficiary who wants to appear in person before a judge must show that "special or extraordinary circumstances exist," the rules say. But a beneficiary who insists on a face-to-face hearing will lose the right to receive a decision within 90 days, the deadline set by statute.

The policy change comes as Bush administration officials are predicting an increase in the volume of cases, with the creation of a Medicare drug benefit expected to generate large numbers of claims and appeals. But in a recent study, the Government Accountability Office, an investigative arm of Congress, questioned the heavy reliance on videoconferences, saying that "beneficiaries are often uncomfortable using videoconference facilities and prefer to have their cases heard face to face."

All beneficiaries are 65 or older or disabled. About 5 million of the 41 million beneficiaries are 85 or older, and some are so sick they die while pursuing appeals.

When claims are denied, beneficiaries and their health care providers can challenge the decisions in an appeals process that has several levels of review. Their best chance to win coverage comes when they appear before impartial, independent adjudicators known as administrative law judges. Over the last five years, beneficiaries and providers prevailed in two-thirds of the 283,000 cases decided by these judges.

The Department of Health and Human Services defended its new policy, saying the use of videoconference equipment would enable judges to "complete more cases" within the 90-day deadline, because they would not have to spend time traveling to remote sites. In a summary of its plans, the department said it was "not economically or administratively feasible" to station judges around the country.
"Having fewer offices is more cost-effective in terms of management, technology and training," the department said in a letter answering questions from Congress.

Michael O. Leavitt, the secretary of health and human services, said, "Access to hearings for Medicare beneficiaries will be as good as or better than" what is now available. For some beneficiaries, he said, video hearings could be more convenient. "Video teleconferences will allow hearings to be provided more timely, with vastly more access points than Social Security currently provides through its offices," Mr. Leavitt said.

But lawmakers, judges, consumer groups and lawyers for beneficiaries expressed concern. Senator Charles E. Grassley, the Iowa Republican who is chairman of the Finance Committee, and Senator Max Baucus of Montana, the senior Democrat on the panel, said four hearing offices were not enough.

Mr. Grassley and Mr. Baucus were among the principal authors of the 2003 Medicare law. The law, they noted, says Medicare judges are to be distributed "throughout the United States."

Under the new arrangement, hearings for Medicare beneficiaries in New York, New Jersey and all of New England will normally be held by judges in Cleveland. Hearings for people in Iowa, Kansas, Missouri and Nebraska will be held by judges in Southern California.

Judith A. Stein, director of the Center for Medicare Advocacy, which has represented thousands of people in hearings since 1986, said: "The videoconferences are one of many changes that will reduce the beneficiaries' ability to get fair, favorable decisions. Sick, old and disabled people can be much more effective in person because the judge can see their illnesses and infirmities -- how they walk, how they get up from a chair, how their hands shake with tremors."

Nancy M. Coleman, director of the Commission on Law and Aging, a policy and research arm of the American Bar Association, said, "It's a travesty, what's happening to the appeal rights of Medicare beneficiaries."

Videoconference equipment transmits a picture and sound so that a Medicare beneficiary, a judge and witnesses in different parts of the country can see and hear one another over secure networks. Signals will be encrypted to protect the privacy of medical information. The judge will have the file, but a beneficiary can send and receive additional documents using a fax machine.

Ronald G. Bernoski, president of the Association of Administrative Law Judges, said face-to-face hearings were valuable for judges and beneficiaries alike. "Video teleconferences will undermine the judges' ability to assess the credibility and demeanor of witnesses," said Mr. Bernoski, a judge based in Milwaukee. "And it could reduce the beneficiaries' confidence in the proceedings. The intrinsic value of a Medicare hearing
is that citizens have an opportunity to sit down in front of a high-ranking official and tell their story to someone who listens carefully and makes a reasoned decision."

The 2003 law shifted the responsibility for hearing Medicare appeals from Social Security to the Department of Health and Human Services, which is in the process of hiring 50 judges.

The government is still working out details and lining up sites with the necessary videoconference links. Nancy A. Thompson, director of the transition team at the department, refused to answer questions about the new hearing and appeal procedures or the logistical arrangements.

Ronald T. Osborn of Charlotte, N.C., who has been an administrative law judge since 1974 and has specialized in Medicare cases since 1996, said he had no interest in moving to the Department of Health and Human Services.

"Under the department's procedural rules," Mr. Osborn said, "judges will have less freedom to handle individual cases as they see fit."

Ms. Stein said that under the rules "it will be easier for Medicare officials to participate in hearings and to influence decisions, often to the detriment of beneficiaries."

Bill Hall, a spokesman for the department, said such concerns were unfounded because the judges would report to the health secretary, not the Medicare program chief.

Medicare and Social Security officials have long contended that some administrative law judges were improperly favoring beneficiaries. For their part, the judges have periodically complained that officials put pressure on them to approve fewer claims. In the early 1980's, the tension became so acute that the judges filed suit against the secretary of health and human services to preserve their independence.

Under the new rules, issued in March by the Centers for Medicare and Medicaid Services, administrative law judges must follow the Medicare law and regulations and must "give substantial deference" to manuals and guidelines issued by Medicare officials. In a particular case, a judge can decline to follow a Medicare policy but must explain why.

Now write your memo for Representative Smith.
I awarded grades according to the law school’s grading curve. The curve was as follows, based on a total possible 100 points. The number in parentheses indicates the number of students who received that letter grade.

86-100  A  (7)
85      A-  (7)
76-84  B+  (19)
66-75  B   (24)
60-65  B-  (12)
56-59  C+  (3)
46-55  C   (11)
40-45  C-  (2)
30-39  D+  (3)
Below 30 D  (1)

You are welcome to pick up your exams at the front desk of the Health Law Institute. You will need to know your exam number in order to get the exam. The exams are in the boxes in order of grades and not in numerical order.

Question I was a question about Congress’s powers. You had to talk about Congress’s spending, commerce clause and section 5 powers in order to write a good answer. Many of you lost points because you forgot the spending clause. You also had to link all three sources of Congress’s power to an analysis of state sovereign immunity.

For Question II, the most important point was to talk about Saenz and Fourteenth Amendment privileges or immunities. If you didn’t do a good job on Saenz, you didn’t get many points even if you covered other issues well. Another point was that many of you listed the relevant case law here, but never applied it to the facts given. You can’t write a good answer unless you analyze the facts. (If Peter lives in North Carolina, how can he be from out-of-state?)

For Question III, you had to write about two key cases, Raines and (Judge) Nixon. Do legislators have standing, and would the Court hear a case about Senate rules? With the Constitution in front of you, you should have cited Art. I, § 5, cl. 2.

We spent a lot of time this semester studying procedural due process; you should have known it inside out. You needed to know at least the Mathews test. Many of you did an inadequate job using the facts of Question IV. When a question presents a lot of facts, you are supposed to use them to build you argument.

Below are the best student answers.
Question #1:

Prisoner Arguments:

The prisoners all have standing to bring this action against the government. To have standing, an injury in fact or imminent injury is required, there must be causation, and there must be redressability. All of the prisoners have been injured because they are not allowed access to religious literature. This is caused by the state action the prison takes and this is redressable in the constitution. Therefore, there is standing.

The state government has violated the Free Exercise Clause of the 1st Amendment. They have substantially burdened the prisoners from fully exercising their religious beliefs. The prisoners rely on the Sherbert Test which states that any substantial burden placed on religious exercise must have a compelling state interest involved. This case was modified in Smith, however, to become a test which states: if a law is religiously neutral, and has general applicability, the law will stand. Smith does provide that if there is a burden on the free exercise of religion and another Constitutional right is involved, then the Sherbert Test will be used (Smith Hybrid). Also, if animus can be shown to a particular group, the Sherbert Test is used. Here a Smith Hybrid is created because a violation of the Equal Protection Clause of the 14th Amendment has occurred.

John and Daryl were not allowed to wear their religious medallion, even though their jewelry was similar to mainstream religions. The Asatru people are therefore a class that is being discriminated against. The Asatru should be treated as “discrete and insular minority” in accordance with Footnote 4 of Carolene Products. Because there is animus shown in the state rule against these religions, even a national basis review would fail. See Moreno, Romer. The animus is shown in that the rule was passed so that they may not practice their religion. Therefore, under Equal Protection the prisoner’s rights were violated just like the hippies in Moreno and the homosexuals in Romer.

Since an Equal Protection violation is shown and animus is in the rule, the Sherbert test should apply. The prisoners’ religious exercise has been substantially hindered so there must be a compelling governmental interest. The argument that the literature may promote violence and that gays identify themselves by jewelry is not a compelling interest. In Skinner, the prisoners were allowed to procreate and another case, prisoners were allowed to marry. Violations of these fundamental rights were not allowed, so a violation of the fundamental rights to free exercise should not be allowed here.

Finally, the RLVIPA states that a compelling governmental interest must be shown and that the rule is the least restrictive means of furthering that compelling interest. This rule violates the RLVIPA. The RLVIPA is a Constitutional act of Congress under the Commerce Clause and the Spending Clause. The books being sent to the prisoners are an instrumentality of interstate commerce. Under Lopez, a law must affect the channels or instrumentalities of interstate commerce or be substantially related to interstate commerce. Here that is met. The act also is Constitutional under the Spending
Clause. South Dakota v. Dole stated that a spending act may be conditional if 1) it was in the interest of the general welfare, 2) it is clean and unambiguous, 3) there is a federal interest in a federal project, and 4) it is not otherwise banned by the constitution. Here, the general welfare is met because it helps all people of all religions to free exercise. It is clean and unambiguous. There is a federal interest at state because they are providing the funds in these prison projects.

Finally in Dole the court found that a 5% cut in the federal funding was not coercive, so a cut of 12% of federal funding should not be coercive also. The state has violated RLVIPA, as well as the equal protection and the free exercise clause.

State Prison reply:

This action is not a violation of the Free Exercise Clause under the test set out in Smith. The rule is religiously neutral and applies to all prisoners regardless of religion. Under Smith, this rule is applicable and constitutional. Also, the law shows no animus to any religion. The rule was stated not to hurt any one religion, but to protect the inmates. Since gangs identify themselves by jewelry and literature promotes violence, this rule is directed at all inmates to protect all the inmates and guards.

Equal Protection has traditionally held the state to a rational basis standard. See Lee Optical. In order to be held to a heightened level of review, the group must be classified and discriminated against because of race, ethnicity, national origin, sex. This group is not a discrete and insular minority. They have the ability to vote in legislature that might change like the Native Americans in Smith the prison rules. Therefore, a rational basis review is appropriate here. Since these rules were initiated to stop violence, this rule passes rational basis review. Since there is no equal protection claim, a Smith hybrid does not exist and the Smith test should control.

The RLUIPA is an unconstitutional act created by Congress. Under City of Boerne v. Flores, Congress may only pass remedial action that is proportional and congruent. See also U.S. v. Morrison. The RLUIPA is a violation of Boerne because it is a substantive law meant to overrule Smith. Also, the law violates both the Spending Clause and the Commerce Clause. Religious action and regulating religious rituals are not substantially related to interstate commerce and are not channels or instrumentalities of interstate commerce which is required by Lopez. The RLUIPA violates the Spending Clause because it is too coercive under Dole. Under step 4 of the Dole test (stated in prisoner’s argument), is a law is considered too coercive it fails the test and is unconstitutional. A 12% reduction is federal funds is almost 3 times as much as was allowed under Dole. 12% is highly coercive and should not be allowed to stand. Finally the law fails because it violates State Sovereign Immunity granted by the 11th Amendment. Under Seminole Tribe, Congress cannot abrogate state sovereign immunity if the act was passed based on an Article I power. Since this act was passed under Article I powers it may not abrogate state sovereign immunity because the 11th Amendment was ratified after the Article I. As this act is unconstitutional, there is no equal protection claim, and the Smith test is in favor of the state, the state prison rule should stand.
Supreme Court:

The Supreme Court would have a 5-4 decision striking down the RLUIPA and ruling for the state prison.

Justice Kennedy joined by Scalia, Chief Justice Rehnquist, Thomas would rewrite for the majority and would invalidate RLUIPA under his own opinion in Boerne. He would rely on Smith to take care of the Free Exercise Claim. Justice O’Connor would concur, relying on the Sherbert test and would find that prison violence is a compelling state interest. Justice Stevens joined by Justice Breyer, Ginsburg, and Souter would agree that Sherbert is the correct standard and that a compelling state interest was not present here.

Questions #2:

STANDING:

Peter does have standing to file his suit (for full analysis see the standing section of the preceding essay) because he was actually injured by not being licensed in North Carolina and the state's decision not to admit him to their bar under the comity rules caused this injury. His injury could also be redressed if the court found that the bar rules were unconstitutional. All justices would agree on this point.

PETER'S ARGUMENTS & The COURT'S DECISION:

JUSTICE O'CONNOR writes a 6-3 decision:

Peter presents an argument that this court should hold unconstitutional North Carolina state BLE Rule .0502, as applied to him, b/c it violates the privileges and immunities clause of the 14th amendment by restricting his fundamental right to interstate travel. Peter further asserts that by denying a qualified applicant a license to practice law in North Carolina has violated his procedural due process and equal protection rights. Finally, Peter asserts that the arbitrary bar admittance rules violate the dormant commerce clause by creating a burden to interstate commerce.

In 1999, this court held in Saenz v. Roe that a state could not deny a person welfare benefits based solely on the fact that she had recently moved to the state. Saenz served to revive the P&I clause of the 14th amendment that had been virtually dead since the courts decision in the Slaughter House cases that only national fundamental interests were protected under the clause, whereas a person should look to state courts for protection of particular state privileges and immunities. Saenz declared that when a state infringed on the right to travel it would have to justify that burden under strict scrutiny.

Though the right to practice law in a particular state is assuredly a P& I subject to state protection, when that right is denied arbitrarily to a particular person who is duly licensed to practice in another state it is an impingement on that person's right to travel.
from state to state as protected by the 14th amendment and subject to strict scrutiny under Saenz v. Roe. To satisfy strict scrutiny North Carolina would have to justify this infringement as being necessary to further a compelling state interest. The necessary component of the test would only be satisfied if the means used to accomplish the compelling interest were narrowly tailored to achieving the goal, and the state had entertained, in good faith, less restrictive means for accomplishing its compelling interest.

Though a state certainly has a compelling interest in assuring that the lawyers w/ its blessing are competent and qualified, the rule in question does not appear necessary to further that interest as applied to the facts of this case. Peter has shown that he is competent to practice law by obtaining licenses in three different states and maintaining successful practices during his time residing in those states. Further, the North Carolina BLE has determined that two of those three states (Ohio and Indiana) have comity with North Carolina and would therefore allow Peter to get a comity license if he had moved directly from either of them, and the facts state that Peter has practiced as in-house counsel in NC during the past six years. It appears that the NC BLE would be able to satisfy the compelling interest of only licensing competent attorneys by employing a means more narrowly tailored accomplishing this end. Only granting licenses to applicants from states that have comity with NC is a patently arbitrary means of ensuring that only qualified persons will gain admission to the state bar, and as such cannot be necessary to the achievement of that state objective.

The state could use other means, such as years of service with out blemishes on the bar record, or admittance to other state bars instead of comity with out the state that the applicant is moving from. The requirement of comity does not even appear to be rationally related to the achievement of a competent bar because it seems to judge only the good will between NC and the prior state of the applicant's residence rather than the applicant's individual record, or even the compatibility between the prior state's laws, and the laws of North Carolina. Therefore, under the Saenz rule the NC BLE Rule .0502 does not satisfy strict scrutiny and is hereby struck down.

Justice Rehnquist dissents (with Scalia and Thomas) to argue that the state's compelling interest in having a qualified bar is furthered by the comity license requirements and that the states should be given deference to decide the rules that will apply to a profession as essential to the state as the legal profession.

As to the claims for violation procedural due process and EP, Justice O'Connor continues. The court has also recognized that whenever a person is denied a life liberty or property interest by the states, they must be given adequate procedures to assure that the denial is not arbitrary. See eg Bd. of Regents v. Roth. Peter had no property interest b/c he has never been licensed to practice law in NC and therefore the BLE's decision to deny his comity application was not a taking of a property interest that deserves process. The problem w/ the property interest is that Peter had no vested interest. However, since the court has decided that Peter's fundamental liberty interest in the freedom to travel from state to state was impinged upon the state does owe him procedures to assure that the right is not taken arbitrarily. Further, since the court found that the procedure's present under BLE Rule .0502 were not sufficiently narrowly tailored to meet the strict
scrutiny test of Saenz, we will now use the Mathews v. Eldridge test to determine what process would be sufficient to deny Peter the license.

The Mathews test weighs the value of the interest that the state is burdening or taking away combined with the risk of erroneous deprivation under the current procedures and potential value of additional procedures to ensure protection of the right against the burden that supplying the additional procedure would place on the state. Since the denial of a license violates a fundamental right to travel and impinges on a person's necessary ability to provide for themselves, and the fact that the procedures in place under BLE Rule .0502 have proven to lead to erroneous deprivation of the interest, the state will be forced to undertake the slightly enhanced burden of providing additional procedure to protect the liberty interests of applicants. Here the state need only use the current application evaluation method (i.e. using the BLE) but consider factors that are more narrowly tailored to ensuring that an applicant is competent to practice law than the comity factor previously employed. These factors could include number of years of practice, similarity of the legal systems of the applicant's preceding state of residence to NC etc. A good faith effort to provide more fair procedures will allow North Carolina to provide for application restrictions w/o necessarily providing the least restrictive means.

As for the equal protection violation, this is an economic liberty interest that is at stake for Peter and applicants who are situated like him so Carolina need only provide that a differentiation between applicants from out of state and applicants who have passed the full bar exam is rationally related to its purpose of ensuring competent attorneys getting licenses. Lee Optical. Once the state amends the application procedures it will be able to satisfy this requirement b/c taking procedural steps to ensure that person's who were not originally licensed in your state are truly qualified is rationally related to an interest in giving licenses to only competent attorneys.

Finally as to the dormant commerce clause implication here, the states action does impose a burden on interstate commerce through indirect regulation of who gets licenses to practice law in the state. However, (again once the procedures are amended to fit the ruling above) the state has a compelling interest in assuring that only competent attorneys get to practice in the state and therefore the regulation is allowable when it meets the procedural requirements. There is also a possible version of the market participant exception (South Central Timber) since the state is essentially licensing lawyers as competent administrators of the states laws. Therefore, if the procedures for licensing are sufficient, the DCC challenge should be dismissed.

Justice Rehnquist dissents (w/ Scalia and Thomas) to reiterate his point on deference to the states and the adequacy of the old procedures.

Questions #3:

The Democratic Senators will fail in their challenge because they do not have standing to challenge the rule. In addition, it is likely that the court will consider the
issue non-justifiable under the political question doctrine.

In Raines, a group of Senators attempted to challenge the Line Item Veto Act. In that case, the court held that they did not have standing to assert their claim because the loss of power was an institutional one, and so there was no injury to an individual Senator. In this case, the loss of the ability to filibuster will not be considered an injury. In addition, the Senators will run into a standing problem because of the issue of redressability. The court will likely find this to be a political question, so even if they could prove an injury the court would not have jurisdiction.

Even if someone else comes and claims a particular injury from the rule, the court is still unlikely to reach the merits. The court has many times in the past decided that it did not have jurisdiction where the Constitution unambiguously assigns power to other branches. The power to make the Rules of the Senate is unambiguously assigned to the Senate in Article I § 5 cl. 2. In Nixon, a judge tried to argue that the Senate did not use proper procedures to impeach him. The court held that the Constitution gave the Senate the "sole power to try all impeachments," and it is not the court's place to say how they should do so. Although some Justices mentioned that they might be able to step in if the Senate obviously abused its power, the court is unlikely to find the decision to ban filibusters to be such a case of abuse, so that argument is unlikely to come up. In Powell, the court found a constitutional argument that was justiciable, because the House of Representatives was attempting to apply its interpretation of the Constitution. The court, being the final arbiter of the Constitution, may step in where another branch is attempting to apply a particular interpretation of the Constitution. In this case, the filibuster is not really a Constitutional issue. It is not listed anywhere in the Constitution, and does not seem to be implied in it. Even if the court felt that it could exercise jurisdiction, it would most likely still choose not to, because the process of appointing new judges is one of the few checks that the other branches have on the power of the judiciary. In that respect, it is more like the impeachment process in Nixon than the Representative attempting to take his seat in the House of Representatives in Powell. In addition, the decision in the filibuster case will have to be based on a policy decision, and determining policy is normally outside the boundaries of the court.

It is possible to argue that since the motion declared the filibuster unconstitutional, it raises a question of Constitutional interpretation. In addition, the argument could be made that the unconstitutionality was determined by only one house, violating the bicameralism and presentment clauses of the Constitution under Chadha. Finally, a challenger could argue that the power to declare something unconstitutional is the sole province of the judiciary, per Marbury. This would be a challenge of form over substance. It is unlikely that the Supreme Court would choose to meddle in the internal affairs of Congress for such a triviality. Substantively, the Senate previously had a rule, and chose to vacate that rule. Although the court may be upset at the terms used, it is unlikely to break longstanding tradition to overturn the new Senate Rule, especially one that is directly related to one of the few checks on the judiciary.

The court will wait until a better challenge comes along, one that can assert
standing. If a challenger that can assert standing comes along, the Supreme Court will most likely reiterate its previous history on avoiding political questions, but may choose to take the case to clarify the muddle that the Senate made of its motion. If it reaches the merits, the court will find that the filibuster is not, in fact, unconstitutional, but that the Senate had the power to remove the rule that allowed it under Article I § 5 cl. 2.

**Question #4:**

This amendment would most likely be found to be constitutional if it was challenged in court. The 5th Amendment states that "no person shall be...deprived of life, liberty, or property, without due process of law". If someone were to challenge this law, they would most likely argue that they have been deprived of due process by the amendment, in that it impairs their ability to get a hearing in person. This would be an argument of deprivation of procedural due process. When the Court engages in a procedural due process analysis, it is a two step process. First, the Court looks to see if the person has been deprived of life, liberty, or property and they way the Court looks at this is to see whether or not the person has received an entitlement to anything. If the Court determines that what the person is claiming they were deprived of is life, liberty, or property, the Court then has to decide what procedure is due to that person.

I believe that a court would find that Medicare benefits are created by an entitlement and therefore are encompassed under the "life, liberty, or property" part of the 5th Amendment. I believe they would look to Goldberg v. Kelly, which found that welfare benefits were created by an entitlement and therefore someone was entitled to due process before being deprived of these benefits. The due process that was found to be needed in Goldberg was a hearing. I think that Medicare benefits would be analogous to welfare benefits in terms of whether or not Medicare benefits are an entitlement of which a person is guaranteed due process before they are taken away. Since Medicare benefits would probably be found to be an entitlement, the next thing a court would do is determine what procedure is due. I think, again, that a court would look to Goldberg and decide that a hearing would be the appropriate due process.

The next thing a court would probably do is perform the balancing test analysis that the Court set forth in Matthews v. Eldridge. Here, the Court said that in determining what process is due once an entitlement is found, there is a balancing test between three factors, which basically amounts to a balancing of the private interests of the individual against the interests of the government. The first factor is the interest of the individual that is being affected by the official action. The second factor is the risk of depriving that person of that procedure and the probable value, if any, of imposing additional procedures or safeguards. The third factor is the interest of the government; including the function involved and the burden that would be imposed on the government were additional safeguards or procedures to be implemented.

I think that when a court performed this balancing analysis on this amendment, it would come out in favor of the government. The interest of the individual involved that is being affected is the Medicare benefit. There is a risk in depriving someone of that
benefit, in that they may not be able to afford medical care, and there is some evidence that was presented in this article that would indicate that having a hearing in person would be more beneficial to the individual than would videoconferencing. The burden on the government of having all hearings in person would, at least from the facts presented in this article, seem to be very heavy, as the article states that having judges stationed around the country would be "not economically or administratively feasible". The balance here seems to come out in favor of the governmental interests. The individuals are still receiving a hearing, just a different type, and it is speculative to come up with what might happen as a result of these videoconferences, whereas a cost analysis for the government is not speculative. Basically, the balance seems to come down to the risk on the individual being that they may or may not get a less fair hearing versus an insurmountable cost barrier on the side of the government.

The fact that there is a hearing at all would, I believe, be enough to satisfy the procedural due process due the individual, especially given the burden on the government created by having to perform the hearings in person. The 5th Amendment guarantees that life, liberty, or property will not be taken away without due process of law. This guarantee does not include a promise that the procedures guaranteed to individuals be preferential to their interests, but is only a promise that they will receive the proper procedural safeguards. This amendment does not take away a procedure due to the individual, it only changes the nature of it, and this would probably be found to be constitutional. It would depend on the ultimate answer that a panel of judges would give to the question of whether the risk of depriving the person of a hearing in person is greater or lesser than the burden imposed on the government to have such a hearing, but it would seem, in general, that the risk is a little less than the burden.