Final Examination
Constitutional Law, Professor Leslie Griffin
University of Houston Law Center
May 8, 2006
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 also 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 25 points. Question II is worth 30 points. Question III is worth 25 points. Question IV is worth 20 points. You have four hours and thirty minutes. I recommend that you spend 60 minutes on Question I, 75 minutes on Question II, 60 minutes on Question III, and 45 minutes on Questions 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 on a typewriter, DOUBLE SPACE, and leave wide margins. If EXAMSOFT fails you should immediately start writing in your bluebooks.

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
(25 points, 60 minutes)

Sally is a student at State University, a big rural university surrounded by farm land. She lives in Farmer House with several of her fellow students. Farmer House is owned by a graduate of the university, a local farmer, who rents the house to the students. The students pay their rent to the farmer. A faculty sponsor, Professor, also lives in Farmer House, but does not pay rent. Professor is a part-time professor at State University and also an assistant coach of the school's baseball team. Farmer likes having Professor live in the house because he keeps an eye on the property and on the students.

Sally and some of her friends do not like Professor because they disapprove of some of his activities. In particular, Professor researches different methods of enhancing the baseball team's performance. He has run some studies on the influence of caffeine on athletic ability, and has also examined the properties of steroids and how they affect athletic performance.

One night, as they were about to graduate, Sally and her friends kicked in the back door of Farmer House and spread gasoline throughout the building. They lighted a match and then left the house. Most of the house burned down. Although Professor was in the house when the fire started, his room was not burned and he was not harmed. When the police arrived to investigate the fire, however, they discovered supplies of some steroids in the professor's room. Professor had been conducting tests of the steroid, Gammabutyrolactone (GBL), with the baseball team. GBL is not listed as a controlled substance in the federal Controlled Substances Act.

Another steroid, Gamma hydroxybutyric acid (GHB) is listed as a controlled substance under the federal Controlled Substances Act, and therefore it is illegal for individuals in Professor’s circumstances to possess it. GBL is very similar to GHB. Once GBL is ingested, it naturally converts into GHB and has the same effects as GHB. For that reason, regulators at the Food and Drug Administration, which enforces the Controlled Substances Act, enacted a new regulation that allows the government to impose fines on any individual found in possession of GBL.

Federal arson law provides that "whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than five years and not more than 20 years."

Federal prosecutors charge Sally with the crime of arson. She challenges the constitutionality of the prosecution. What arguments will she make? How will the federal government respond? Will she win or lose the case in the United States Supreme Court? (question continues on next page)
Federal prosecutors fine Professor $1,000 for conducting tests on GBL. His lawyers challenge the constitutionality of the fine. What arguments will they make? How will the government reply? Will Professor win or lose his argument in the Supreme Court of the United States?
Question II  
(30 points, 75 minutes)

State was one of the States affected by Brown v. Board of Education; its schools were integrated by court order during the 1960s. Sam is State’s only African-American State Senator. He made his reputation locally and nationally by fighting for civil rights. He opposed apartheid in South Africa and is a foe of the death penalty. Sam is frustrated by the condition of state public schools, and is particularly worried about the way they fail African-American males, who are less likely to graduate from school than white males.

City is State’s largest city and it is surrounded by rural suburbs. Sam introduced legislation in the State legislature that creates three school districts in City, one largely black, one white and one mostly Hispanic. Each City district is then divided into three schools: one mixed-gender, one for females only and another for males only. The division along gender lines was suggested by Senator Susie, who believes that single-gender schools promote women’s self-confidence. Susie promised Sam her vote if he added the provision about gender to his school bill. Susie told colleagues that “women did better in the old days, when there were women-only schools.”

Sam told his colleagues that the new districts would allow black educators to control schools in black neighborhoods. “My intent is not to have an exclusionary system, but we, meaning black people, whose children make up the vast majority of the student population, would control.” Sam persuaded his colleagues to vote for the legislation because he has long been an opponent of discrimination and they respect his views. Sam also told his colleagues about social science studies (given to him by Susie) that demonstrate that women perform better if they are educated in single-gender schools. He placed those studies into the Senate legislative record.

Sam’s proposal won instead of an alternative bill, introduced by a Senate colleague, proposing that the State should build a magnet school on the edge of City that would attract black male students by offering them scholarships. Sam was supported by white suburban representatives who dislike City politics and do not like the idea of the magnet school because it will bring more urban students into the suburbs. The suburban rural areas that surround City are composed of a majority of white residents and all the rural schools have a majority white population.1

Students from the new schools, who have standing, challenge the constitutionality of the three districts and the division of those districts into mixed and single-gender schools. What arguments will they make? How will the state respond? Who will win in the Supreme Court? Why? (question continues on next page)

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1 Based on Sam Dillon, Law to Segregate Omaha Schools Divides Nebraska, The New York Times, April 15, 2006.
Would it be constitutional for State to use Sam’s school districts as the basis for its voting districts? Why or why not?
President Bush recently announced that he wants line-item veto power over specific provisions in congressional spending bills. "Forty-three governors have this line-item veto in their states,” the president said. “Now it’s time to bring this important tool of fiscal discipline to Washington, D.C."

Under Bush’s proposal, the president would send to Congress proposals to strike “earmarks” and special interest tax proposals from bills. An earmark “refers to any element of a spending bill that allocates money for a very specific thing—a given project, say, or location, or institution.”

The president made the following explanation of his proposal:

Today, I am sending the Congress a legislative proposal to give the president line item authority to reduce wasteful spending. This legislation will help to limit spending and ensure accountability and transparency in the expenditure of taxpayer funds. Although the Congress achieved significant spending restraint this past year, appropriations and other bills that are sent to my desk still contain spending that is not fully justified, is a low priority, or is earmarked to avoid the discipline of competitive or merit-based reviews. When this legislation is presented to me, I now have no ability to line out unnecessary spending.

My proposed legislation, the "Legislative Line Item Veto Act of 2006," would provide a fast-track procedure to require the Congress to vote up-or-down on rescissions proposed by the president. There has been broad bipartisan support for similar proposals in the past. Under this proposal, the President could propose legislation to rescind wasteful spending, and the Congress would be obligated to vote quickly on that package of rescissions, without amendment. The same procedure would apply to new mandatory spending and to special interest tax breaks given to small numbers of individuals.

The president recommended the following statutory language:

SECTION 2. LEGISLATIVE LINE ITEM VETO
Section 2 amends Title X of the Congressional Budget and Impoundment Control Act of 1974 by deleting Part C and inserting the following new Part:

PART C—LEGISLATIVE LINE ITEM VETO
Section 1021. (a) PROPOSED RESCISSIONS. This subsection provides the President with the authority to propose the rescission of any dollar amount of discretionary budget authority or any item, in whole or in part, of new direct spending.

(b) TRANSMITTAL OF SPECIAL MESSAGE. This subsection describes the
transmittal of a special message by the President to the Congress proposing to rescind budget authority contained in an appropriations Act or any item of direct spending. The contents of the special message shall include: (1) the amount of budget authority or the specific item of direct spending proposed to be rescinded; (2) the account, department, or establishment of Government that is the subject of the rescission; (3) reasons for the rescission; (4) the estimated fiscal, economic, and budgetary effect of the proposed rescission; (5) other relevant information about the proposed rescission; and (6) a draft bill that would effectuate the President’s request. The subsection specifies that the amounts of budget authority or items of direct spending that are rescinded must be used for deficit reduction and cannot be used to offset other spending increases. In addition, the subsection specifies that not later than five days following the date of enactment of a rescission bill, the Chairmen of the Senate and House Budget Committees would be required to make the necessary adjustments to Committee allocations. Also, the Office of Management and Budget would be required to make the necessary adjustments to its spending caps.

(c) PROCEDURES FOR EXPEDITED CONSIDERATION. This subsection specifies that the House and Senate Leadership may introduce (by request) the President’s proposed bill to rescind budget authority or an item of direct spending within two days following receipt of the special message by the President. After that period has elapsed, any member of Congress may introduce the President’s proposal. Once introduced, the rescission bill would be referred to the appropriate committee and that committee would have five days to report the bill without substantive revision and with or without recommendation. Failure to meet the specified deadline would result in the bill being automatically discharged and placed on the appropriate calendar for action. A vote on final passage must occur in the House and the Senate on or before the close of the 10th day of session following introduction of the bill. This subsection would also establish procedural rules for consideration of a rescission bill in the House of Representatives and the Senate. For example, motions to proceed to the consideration of the bill would not be subject to debate, motions to limit debate would not be subject to debate, and motions to recommit or reconsider would not be in order. Debate on the bill would be limited to four hours in the House and 10 hours in the Senate.

Is the proposed legislation constitutional? Why or why not?

While the president was waiting for Congress to pass this legislation, Congress sent him a new budget bill. In order to show that he is serious about budget reform, the president wrote into a presidential signing statement that he would not spend the funds allocated to Arizona for storm relief in the budget bill. Arizona did not receive its funds. The State of Arizona sues the federal government to gets its money. What arguments should the State make? How should the president defend his action? Should the State win or lose? Why?
Ben Hur is a 1959 film that is subtitled “A Tale of the Christ.” It was the first film to receive eleven Oscars. The movie tells the story of a Jewish nobleman, Judah Ben Hur, who is played by Charlton Heston. Ben Hur is imprisoned by a Roman tribunal after he accidentally loosens tile onto a parade of the new Roman governor. Ben Hur later escapes and returns to seek his revenge against those who imprisoned him.

Jesus Christ appears three times in the story. The film first opened with a series of tableaux of the birth of Christ in a Nativity scene or crèche. Second, when Ben Hur is chained to other prisoners on his way across the desert to captivity, he falls and says “God help me,” and a hand reaches out and gives him water. Ben Hur later realizes that the hand belonged to Jesus. In a third scene, Ben Hur helps Jesus as Jesus carries the cross to his death.

Ben Hur was a very popular movie, and in 1960 many towns and cities across the country placed framed pictures of Jesus carrying the cross, with Ben Hur by his side, in the entrance corridors of their city halls and state capitol buildings. Some, but not all, of the pictures were signed by Charlton Heston. The Ben Hur film lovers group gave the pictures to the towns and cities.

In 2004 a different movie, the Passion of the Christ, was released. As the title suggests, this movie focused on the life and death of Christ and emphasized the suffering that he endured as he was crucified on the cross. Moviegoers who were deeply affected by the movie hired a sculptor to create an image of Jesus on the cross. The sculptor created a five-foot high marble sculpture. State officials added the sculpture to the monument park outside their state capitol. The park already contained many sculptures and monuments, including one of the local football team, a tribute to the city’s founders, and replicas of the Statue of Liberty and the Washington monument.

The sculpture was so popular that small replicas of it were made and sold in stores. State Judge purchased one and placed it on the bench where he hears his cases.

Philip, a lawyer, had business in the state court, which is located in the state capitol building. He had just moved into state to start a new law practice, and had never been to the capitol before. On his way into court, he noticed the Passion marble monument in the park outside the capitol building. His case was assigned to the courtroom of State Judge, and he saw the replica of the Passion monument on the judge’s desk as he argued his case. At the end of the day, on his way home, he noticed a Ben Hur framed picture on the staircase that leads into and out of the building.

After losing his lawsuit, Lawyer filed suit against the State, challenging the constitutionality of the displays. How would you expect the Supreme Court to rule on his case if they heard it? Explain your reasoning.
Constitutional Law Exam Memo
Spring 2006
Professor Griffin

This course was subject to the Law Center’s mandatory grading curve, which requires that the class average be between 2.9 and 3.1. I awarded the following grades, with a class average of 3.1, for your final exam.

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Here’s how you should have reasoned your way through the questions.

**Question I.** Question I was about *federal* prosecutions. You should immediately have asked yourself about whether Congress had the authority to pass the laws involved in the question. Sally is challenging her prosecution for arson (not for drug violations) and, as most of you realized, her best way to do that was under the Commerce Clause. You should have discussed the leading cases, *Lopez, Morrison* and *Raich*. Remember that you must always apply the law to the facts. What were the facts in her favor? That this was a local house, a farm, and that the building was not in interstate commerce. What facts were in the government’s favor? Most important was the fact that individuals were paying *rent*. The farm facts should have triggered your memory of *Wickard* and *Raich*, and you should have used them in your answer. It is not the *drugs* in *Raich* that make the case important to the government here; the drugs are important in Professor’s case. It is the Court’s reaffirmation of *Wickard* to reach far into the local setting that should concern you.

Professor also had a Commerce Clause challenge to his prosecution, and because his prosecution was about drugs you correctly talked about *Raich*. Many of you forgot, however, the case we talked about in class (but did not read), *Gonzales v. Oregon*, 126 S.Ct. 904 (2006), the Oregon physician-assisted suicide case, in which the Court held that the Attorney General did not have the authority to reach the Oregon doctors under the Controlled Substances Act. With that case in mind, in this question you needed to write about the FDA’s authority to regulate GBL and whether there were any separation-of-powers limitations on their ability to do so.

Standing was not hard here as both Sally and Professor faced imminent prosecution that would end if the laws were declared unconstitutional. Note that it is their standing, and not the government’s, that is at issue.
Question II

Most of you recognized that that was a double-barreled Equal Protection question, where you must write about racial and gender classifications. Most of you did well as long as you remembered that even benign racial classifications get strict scrutiny (Adarand) and that gender gets intermediate scrutiny (VMI). Within that case law, particular issues you should have talked about were whether the comments on women were based on stereotypes, and whether there was a more narrowly tailored means available than the racial school districts, namely the magnet school.

For the voting issue, you should have discussed Shaw v. Reno, and remembered that the Court will exercise strict scrutiny over racial classifications in the voting context.

The reference to Brown in sentence one served to demonstrate that there had been prior discrimination in State, which is important under Croson.

Question III

In this Question you had to compare President Bush’s proposal to the line-item veto act declared unconstitutional in the Clinton v. New York case. They are not the same, so you could not just state that this proposal was unconstitutional. This is another question where you needed to struggle with facts and details and decide whether the President’s policy complied with the finely wrought procedures of the Constitution.

On the Arizona part, after talking about standing, you had to deal with presidential signing statements. Recall when we talked about presidential signing statements in class and whether they have any constitutional status. You misread the question if you thought that Bush was operating under the line item veto act in when he withheld the funds from Arizona.

Question IV

Question IV was about the Establishment Clause, and you should have applied the three tests we studied in class, namely Lemon, endorsement and coercion. You lost points if you forgot to talk about standing; you gained points if you remembered that Judge Alito raised standing questions in his Third Circuit Establishment cases.

To write a good answer you had to discuss Van Orden and McCreary. Once again, you should not just say that those cases determine the outcome here. You had to deal with these new facts in detail. A crucifixion scene, for example, is not a crèche or a Ten Commandments monument, and you should have asked if the nature of these displays made a difference. Do you think the swing vote, Justice Breyer, would find it divisive to take a Ben Hur picture off a wall? That is different from taking a monument out of a state park. Would Justice Breyer think a new monument deserved less protection than the Texas Ten Commandments? And so forth.
Throughout all these questions, and as I told you in class, the facts matter. You should not have written essays about the law as it is, but instead applied the law to the facts. Those of you who did that well got the highest grades.

I am happy to speak with you about your exams if you have any questions.

Enjoy the summer and congratulations on completing your first year in law school.