

[Sample answer follows the questions. This exam also had 30 minutes of multiple-choice questions.]

Part I

There are three questions to be answered in 2 ½ hours. Grading will be weighted according to the time allocated for each question (60-60-30).

**Question # 1
(60 minutes)**

The Port Washington, New York, School District instituted a policy requiring school counselors and nurses to follow a sequence of steps when they discover that a female student is pregnant. The policy is based on a provision of the New York state constitution recognizing the “family as the constitutive unit of society” and protecting the “rights of parents in raising their children.” The school policy states that a student's disclosure of her pregnancy to any staff member is “not a communication protected by legal privilege,” and that in fact, such a disclosure may trigger legal reporting obligations. The policy requires that staff members who become aware of a student's pregnancy “should immediately” report it to a school social worker. The social worker should “encourage” the student to voluntarily disclose her pregnancy to her parents, and if the student represents that she will inform her parents, confirm that such a disclosure was made. If the student “refuses” to voluntarily inform her parents, the social worker should offer to meet with the parents and the student to help the student inform her parents and/or offer to inform the student's parents without the student being present. If the student “continues to insist” on keeping the information from her parents, the social worker should inform the student that she/he will inform the parents. “After consultation with the Principal and Superintendent, the social worker should inform the parents.”

Assume that Congress, as part of the Education Improvement Act of 2005, requires that all K-12 schools (both public and private) respect the privacy rights of their students and creates a private right of action for a student whose privacy rights are violated by a school. The teachers' union in Port Washington sues to enjoin the new policy. How should the court rule?

See Port Wash. Teachers' Ass'n v. Bd. of Educ., 2005 U.S. Dist. LEXIS 4363 (E.D.N.Y. 3/22/05).

**Question # 2
(60 minutes)**

As you may know, the state of Nevada continues to resist a federal proposal to store high-level nuclear waste material underground at Yucca Mountain in its remote western desert region. Nevada does not have any nuclear power plants and it generates very little nuclear waste material. Congress has nonetheless tentatively approved the Yucca Mountain storage site pending further safety studies, and it has appropriated funds for these studies, directing the President to submit a final safety report by January 1, 2006.

The United States is a signatory to the multi-lateral Nuclear Waste Management Treaty, which was approved by the Senate several years ago. One of the treaty provisions bans the underground storage of high-level nuclear waste unless and until such storage is certified by the United Nations to be safe and no threat to the earth's ground water supplies. The UN has never made such certification.

Citing its concern with highway safety, the Nevada legislature has passed a statute banning all high level nuclear waste, regardless of source, from the state's roads. In addition, citing the need to protect the state's scarce groundwater resources from potential contamination, the Nevada legislature has prohibited the underground storage of or disposal of any hazardous or radioactive material, though it contains an exception for radioactive materials generated from state-owned universities or hospitals. The combination of the two

statutes means that Nevada generators of nuclear waste must develop on-site storage for their waste, and only the state-owned facilities are allowed to store materials underground.

The President, asserting that homeland security could be compromised by the nation's inability to solve its long-term nuclear waste storage problem and to protect this material from potential terrorists, has taken two separate actions. First, he has renounced and cancelled the Nuclear Waste Management Treaty. And second, he has issued an executive order authorizing final construction and operation of the Yucca Mountain site.

Based upon the material covered this semester, identify, analyze, and resolve the constitutional issues raised by this controversy.

Question #3
(30 minutes)

This critique appeared in a column by David Brooks in the NEW YORK TIMES on April 21, 2005:

Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th-century American. When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since, and now threatens to destroy the Senate as we know it.

When Blackmun wrote the *Roe* decision, it took the abortion issue out of the legislatures and put it into the courts. If it had remained in the legislatures, we would have seen a series of state-by-state compromises reflecting the views of the centrist majority that's always existed on this issue. These legislative compromises wouldn't have pleased everyone, but would have been regarded as legitimate.

Religious conservatives became alienated from their own government, feeling that their democratic rights had been usurped by robed elitists. Liberals lost touch with working-class Americans because they never had to have a conversation about values with those voters; they could just rely on the courts to impose their views. The parties polarized as they each became dominated by absolutist activists.

Using what you have learned this semester, write your own editorial dealing with the issues raised by Mr. Brooks.

Sample Answer 2005

Question 1

The first issue in this case is whether or not the teachers' union in Port Washington has standing to sue to enjoin the new policy. To have standing, Art. III of the constitution requires there to be a "case or controversy." To meet this requirement a plaintiff must meet 3 requirements, they must show: (1) injury in fact; (2) causation; and (3) the court must be capable of redressing the wrong. Courts may also look to various prudential elements such as the importance of making such a ruling, the possible consequences of the ruling upon others, etc. Furthermore, in deciding whether to grant a 3rd party standing courts will look at whether or not a special relationship exists.

While the act gives students a private right to bring action; it does not say anything about whether or not teachers have similar rights. Thus, it is necessary to go through the standing analysis. First, whether or not the teachers' union suffers a concrete injury from the Education Improvement Act up for debate. The teachers could claim the new policy hurts their ability to develop a close relationship with their students because they will be afraid of the possible consequences of developing such a relationship; that if they receive information about a student's pregnancy they will then have to violate that trust. However, this seems somewhat speculative and it's likely, given the court's ruling in Lujan, that no injury in fact will be found. Regarding causation, it does seem possible that if there were an injury, such as impairing teachers' ability to teach and develop a close relationship with their students, it would likely be the cause of the new policy. It could be argued, however, that teachers don't normally get involved in these things and the statute has a greater impact on counselors and students; not teachers . . . so it may not be a cause of injury to teachers either. Lastly, it does appear that if teachers did find an injury related to the new policy it would be redressable because a court could enjoin the new policy. Enjoining the new policy would negate any possible injuries caused by the policy.

The teachers could claim, however, they are also representing counselors and nurses who would have a much stronger claim for standing because they are suffering injury, it is clearly caused by the statute, and would be redressable by enjoining the statute. However, given the courts general rule of not allowing parties to raise the rights of 3rd parties it seems unlikely the court would allow standing in this case. Having the teachers raise the rights of nurses and counselors does not seem necessary to ensure that the counselors' rights will not be diluted or impaired because they could easily bring the suit themselves if they felt so inclined. Thus, the teachers' standing would have to be based on injuries suffered by the teachers themselves; not injuries suffered by the counselors or nurses.

One last issue relating to standing is that of ripeness. The ripeness doctrine allows courts to refuse to hear a suit where it is still premature and the necessary requirements for standing have not yet occurred. Because the teachers union is seeking to enjoin the suit, and have not yet had an actual case arise where a particular teacher was injured by the new policy, it would appear the case is not yet ripe for the court to hear it. Thus, a court should dismiss the case for lack of standing.

However, assuming the court does hear the case, the next issue is whether or not the state has a liberty interest requiring nurses and counselors to follow the outlined procedures when they discover a female student is pregnant. When evaluating substantive due process claims it is necessary to distinguish between fundamental rights and non-fundamental rights. If the court finds the right to be non-fundamental they apply a rational basis test and the law is almost always upheld. However, when a right is deemed fundamental, or a liberty interest, the standard of review is much stricter. Courts employ strict scrutiny in analyzing such issues to determine whether or not the state has a compelling interest in protecting the right.

Because this case involves ones right to privacy it would appear this case deals with a liberty interest. As was mentioned, such cases demand the court to employ strict scrutiny when evaluating such claims to determine whether or not the right is a unmerited right which demands protection under the Constitution. In making this determination, the court should look at other decisions made in this area for guidance. In Palko

v. Connecticut, Cardozo laid the foundation for recognizing non-enumerated rights as being guaranteed to all citizens by espousing that the 14th amendment guaranteed those rights essential to the concept of ordered liberty. Later, in *Griswold v. Connecticut*, Justice Douglas laid the groundwork for modern decisions in this area when he held a state statute prohibiting use of contraceptives by married couples was unconstitutional. This paved the way for *Roe v. Wade* and other cases where the right to an abortion was deemed to be a fundamental right requiring the protection of the Constitution. Along these lines, in a series of cases about whether minors seeking abortions need parental consent to obtain them, the court has essentially held that parental notification and even parental consent can be required; but only if provisions are made whereby a judge can grant permission for the abortion where the minor has sufficient maturity or where parental involvement would not be in her best interests. Thus, it appears courts have left the door open for minors to not be required to inform their parents while seeking an abortion; albeit under special circumstances. Considering this, it appears unlikely the court would go so far as to require students to inform their parents they are pregnant when courts haven't even made it a flat-out requirement they obtain parental consent to obtain an abortion. Thus, it appears likely the court would enjoin the new policy and include in the student's right to privacy the ability to not disclose their pregnancy to their parents.

The last issue of this case deals with federalism and pre-emption. There is a constant struggle between the federal government and states who wish to be sovereign and exercise their own powers. Because the fed was created with limited powers, with all rights not expressly enumerated in the Constitution being reserved to the States, the fed has sought to make as broad a use of the powers enumerated to them as possible. Historically, the Fed has been successful in doing so as their powers have expanded through exercise of such Constitutional rights as the necessary and proper clause, the commerce clause, and Supremacy Clause. It is the Supremacy Clause that is particularly germane to the problem at hand. The Supremacy clause says that if a state law is inconsistent with a valid federal law, the state law is invalid; also, if Congress has manifested an intent to occupy the entire field, then any state regulation in that field will be found invalid.

Because the fed has sought to protect the right of privacy of students by requiring all public and private schools to respect that right, it would appear the fed has attempted to preempt any local legislation which would harm this right. Their intent, as it appears from the broad language of the law, was to occupy the entire field of privacy rights for students. Even if Congress did not intend to occupy the entire field, the local law is in conflict with the federal law. In either case, the local policy would be invalid and the court should enjoin the new policy on grounds that the Federal policy is supreme. The court can do this because, as was discussed above, the federal law is consistent a valid exercise of their Constitutional authority to uphold the right to privacy as a liberty interest.

[Critique: With regard to standing, the reference to *Lujan* would have been stronger if it indicated how it was relevant (that the plaintiffs there had no current plans to do something that would be prevented by the statute). In addition, the teachers might attempt to assert the rights of the students, who might not be in a very good position to protect their own rights and as to whom the teachers do have a special relationship. With regard to the federal statute, it is not clear what power Congress is invoking – Lopez would seem to eliminate commerce power but the 14th Amendment might be available.]

Question 2

The first issue in this case is whether the Nevada statutes banning all high level nuclear waste, regardless of source, from the state's roads and prohibiting underground storage of or disposal of any hazardous or radioactive material (with exceptions for radioactive materials generated from state-owned universities or hospitals) is in violation of the Dormant Commerce Clause.

The dormant commerce clause limits state's power to enact legislation affecting interstate commerce. States may not discriminate against interstate commerce absent substantial justification; nor may they place unreasonable burdens on interstate commerce. The DCC was first discussed by Justice Marshall in *Gibbons*

v. Ogden where he addressed the problem of whether or not a state regulation could operate in an area which would be Congress' under the commerce clause if Congress has not yet acted. Also, Article I Section 10 of the Constitution prohibits states from levying taxes against imports from other states. The combination of these concerns led to an analysis of whether certain state statutes violate a dormant power in congress to regulate commerce. This debate is related to the ongoing debate between dual federalism and cooperative federalism where the main issue is whether or not the state governments and the federal governments can occupy the same regulatory space. The court has held, in *Cooley* for instance, that there may be some situations where the local regulations, even if touching commerce, may be appropriate absent specific dissent from Congress. However, the debate goes on concerning Congress' ability to grant states regulatory authority through acquiescence or express grant if the states never have had the ability to promulgate such regulations. And, since the states were given no regulatory power over interstate commerce by the Federal Constitution, they have typically relied on their police powers as the source of their authority to regulate. Most regulations put forth by the states typically have some relation (be it direct or indirect) to the general health and welfare of the state's citizens; without such a connection many state regulations would be invalid. The Milk Wars, for example, dealt with a series of cases where states, in the name of police powers, banned or otherwise inhibited the importation and selling of out of state milk. The rationale behind the regulations was that out-of-state milk could not be inspected by the state and therefore posed a health risk to citizens. In adjudicating such statutes, that could have a bearing on interstate commerce, the state must analyze them to determine whether the state interest outweighs the burden the regulation places on interstate commerce. Each such regulation must be analyzed to determine whether it is indeed a valid use of state police powers or if it is protectionist in nature and therefore discriminatory towards other states or the citizens of other states.

The modern test for the dormant commerce clause first involves a determination of whether or not the regulation serves a legitimate state interest. Then, the regulation must be rationally related to that legitimate state interest. A majority of states will then balance the local and national interests while a minority of states would focus only on the first two tests. Also, under *Pike v. Bruce Church, Inc.* it was held that even where a statute regulates evenhandedly to effectuate a legitimate local public interest it can still be invalidated if its effects on interstate commerce, imposes an undue burden on such commerce and the effect is clearly excessive in relation to the putative local benefits. Lastly, it is important to note that a state is not subject to the dormant commerce clause if it is acting as a market participant.

For the case hand, then, it is first necessary determine whether Nevada's regulations are protectionist or discriminatory in nature; or if they serve a legitimate state interest. In *City of Philadelphia v. New Jersey*, a case not unlike the present situation, the Supreme Court struck down a New Jersey statute prohibiting waste from being brought in from outside the state is being unconstitutional because it was discriminatory to out-of-state operators. However, Nevada's statute can be distinguished from New Jersey's because Nevada's statute was not discriminatory; it banned all nuclear waste from its roads, regardless of source. Also, it prohibited underground storage or disposal of any hazardous material, the only exception being that radioactive materials generated from state-owned universities or hospitals could be stored underground if at on-site storage facilities. This would imply the state owned the storage facilities and thus, was acting as a market participant. While acting as a market participant, the state has the right to discriminate against out-of-state parties if they so chose.

However, per *Pike*, we must still determine if Nevada's interests in enacting the legislation outweigh the burden they impose on interstate commerce. Historically, such concerns as highway safety and protecting water/resources from contamination are held to be legitimate state interests. When regulations serve such purposes, they are generally given deference and courts will begin by presuming such regulations to be valid. Thus, for the statute to be found invalid the government would have to demonstrate a substantial burden on interstate commerce. While the government asserts homeland security as a primary interest for needing to store waste in Nevada, that does not appear to be sufficiently related to interstate commerce to overcome the deference given to states in such situations. The government would have to find other burdens as well. The government could argue that Nevada is choosing to hoard its resources by not allowing nuclear waste to be

stored, as was argued in the New Jersey case. But, ultimately, it would appear that Nevada's statute would be upheld as being valid because the legitimate state interests outweigh any undue burdens they place on interstate commerce.

The second issue deals with the President's Executive Powers relating to treaties and his ability to issue executive orders to other states. Article II, Section 2 provides that the president shall have power "by and with the advice and consent of the Senate, to make treaties, provided two-thirds present concur." However, over time executive agreements have by and large replaced treaties and consequently, the special prerogative of the Senate has been largely abrogated as the President's role and power in foreign affairs has increased. Also, a common argument for granting the president this increased power is that the president needs to be on equal footing to leaders of other nations and he is in the best position to make determinations relating to foreign commerce. The president would likely argue that because of his role, and expanded power in foreign affairs, he should be able to unilaterally withdraw the U.S. from a treaty. He will claim he is in the best position to deal with such issues and his authority to make such decisions is absolute. Congress, however, would cite their roles in managing treaties (2/3 consent required) as well as their ability to regulate foreign commerce and claim that the President cannot act unilaterally in withdrawing the U.S. from a treaty. However, ultimately it seems likely the President would have the ability to withdraw the U.S. from a treaty because of his wide authority in the area of foreign affairs.

However, whether the President has the authority to issue an executive order authorizing the final construction and operation of the Yucca Mountain site is a different matter. In *Youngstown Sheet & Tube Co. v. Sawyer*, the court struck down an executive order from President Truman where he sought to seize the nation's steel mills to avert a strike during the Korean War. The court concluded that such an action was an unconstitutional exercise of lawmaking authority reserved to Congress. In an infamous concurrence, Justice Jackson identified three theories of presidential power. The first is that where the President is acting with the authorization of Congress, his acts will not be prohibited. However, if Congress has been silent on the issue the question is more difficult and courts will have to look at the circumstances to determine if the President has power to act. Lastly, the President has no authority when acting contrary to Congress's implied will or authority.

In the case at hand, the President's actions would likely fall in Jackson's second category because Congress has yet to act on the issue. However, given that Congress did consent to the treaty which prohibited underground storage of high-level nuclear waste unless and until such storage is certified by the UN to be safe, it could be implied that Congress is against such storage of nuclear waste, especially where the UN has never made such certifications.

Given this, it appears likely that the President's executive order is an unconstitutional exercise of authority and should not be upheld because the only action taken by Congress on the matter indicates, if anything, their reluctance to permit underground storage of nuclear waste.

Question 3

Mr. Brook's primary concern involves the political question doctrine. He essentially is saying that courts should stay out of such political hot-beds as abortion because they create turmoil and divide the country. He feels such issues are better decided by legislatures, the voices of the people, because legislators will then have to "face the music" come time for re-election. If legislators don't uphold the beliefs of their constituents, they will be voted out of office. Thus, moral issues such as abortion would ultimately be left to the people to decide. However, by allowing judges to make these determinations it takes away the voice of the people. Judges face no repercussions for making decisions against the will of society because they are appointed; they will never have to face angry activists on the campaign trail, nor will they have to worry about losing their job over an unpopular decision. Therefore, according to Mr. Brooks, such decisions should be taken from the hands of judges and left to the people to decide.

The political question doctrine provides the answer to this sticky problem. Judges not bent on making history or becoming infamous have an opportunity to take the high road by invoking this sacred doctrine to avoid “damaging our democracy,” as Mr. Brooks put it. In determining whether or this doctrine is applicable to the case at hand, it’s helpful to look at *Baker v. Can*, where Justice Brennan discussed the doctrine and provided six indicia of a political question. Brennan felt it was important to evaluate the following factors to determine whether a political question is before the court: (1) the history of the issue’s management by another governmental branch; (2) lack of judicially manageable standards for resolving it; (3) the impossibility of deciding the case without an initial policy determination calling for nonjudicial discretion; (4) the impossibility of resolving it without expressing lack of respect due other government branches; (5) an unusual need for adherence to a political decision already made; and (6) the potential embarrassment from a variety of announcements by different governmental departments on one question.

By applying these factors to the issues presented by Mr. Brooks, we can see that the court clearly could have, and should have, left the abortion problems in the hands of the people and their representatives in the legislature. As to the first indicator, the abortion issue had clearly been under the hands of legislatures until the court took it from them in *Roe v. Wade*. For number two, we need not look any further than the courts subsequent ruling in *Casey* to find a lack of judicially manageable standards for resolving the issue. The court has clearly struggled to find the best method of managing the abortion issue and the debate rages on as to whether or not the undue burden test espoused in *Casey* is a manageable solution. For number three, regulating abortion and calling it a fundamental right is clearly a policy determination by the court because it stems from issues of morality. The fourth factor is also present in because the judiciary did demonstrate a lack of respect for the legislative branch of government when they took away their authority to regulate abortions and granted it to themselves. The 3-trimester framework of *Roe* and the undue burden test of *Casey* reek of legislative action, rather than judicial determination. Regarding the fifth indicator, given that most jurisdictions at the time already had laws regulating or prohibiting abortion, it would appear the political decision had already been made and the court should have adhered to that. Lastly, clearly the court faces potential embarrassment from a variety of announcements by different departments on the question of abortion. O’Connor acknowledged a potential for embarrassment....