CONSTITUTIONAL LAW
Section 2
General Information


2. **ON RESERVE**: I have requested the library staff to place several books on reserve including two Constitutional Law treatises: one written by Erwin Chemerinsky and another written by John Nowak and Ronald Rotunda. The hornbooks may assist you with any particularly confusing topic. I recommend that you become familiar with both.

3. It is important that you attend class. You are responsible for compliance with the attendance policies as set out in the Student Handbook.

4. Please try to arrive to class on time. We will start and end promptly each day.

5. **PARTICIPATION**: I expect each member of the class to participate in our discussions. I will call on students in reverse alphabetical order; several students may be called on in one class. **When I ask you to prepare a brief of a case, please prepare a one-page, typed brief of the essential points of the case. Please make sure your brief is completed the day before you are scheduled to present it in class. Please post your brief on TWEN for this class.** Any of you may be called on at any time to discuss the majority, concurring, or dissenting opinions; to discuss note cases; to discuss hypotheticals; or to discuss the subject in general. Thank you for your preparation.

6. **EXTRA PARTICIPATION**: I urge you to participate regularly in our class discussions. Students who in my judgment make extremely valuable contributions may have their final grade raised by (.334) of a letter grade. In most years, only two or three students earn this bonus.

7. **EXAMINATION**: There will be a final examination in the course as scheduled by the Registrar. It will be 3 to 4 hours long and an open book exam. It will include between 30 and 35 multiple choice questions similar to those which appear on the Multi-State Bar Examination (“MBE”) and at least one essay question. You may bring to the exam your casebook and any written outline or summary of the course material that you yourself created. You cannot bring in a commercial outline. You may not consult on-line materials or summaries on your computers during the exam.
The Honor Code applies to each part of the exam. If you have a problem and cannot take the exam, you should speak to Dean Marsh. Any cheating will be punished severely.

8. **PRACTICE EXAMS:** I will provide you with several practice essay questions during the semester. I encourage you to work through each practice question.

9. **OFFICE HOURS:** I will have office hours on Tuesdays from 1:15 p.m. to 2:45 p.m. If I am busy during those hours or you wish to see me at other times, you can schedule an appointment to meet with me. My office telephone number is 348-7494. If you have an emergency, call my assistant, Brittany Moon (348-8870), and she will find me, or email me.

10. **READING ASSIGNMENTS:** We will try to move through the reading material at a rate of 30-40 pages per class meeting. I will make additions and deletions to the syllabus, so do not read too far ahead each week. For a few cases, you will need to read the case online. I will try to tell you each class what I expect us to cover during the next day or so.

11. **ADA ACCOMMODATIONS:** The Law School is committed to meeting the needs of students with physical, learning, and other disabilities, and provides appropriate accommodations and services tailored to each person's specific requirements. The Law School's deans and the University's Office of Disability Services work together to help individuals with disabilities achieve and maintain individual autonomy. Students with disabilities are encouraged to contact Jenelle Marsh, Associate Dean for Students/Academic Services at (205) 348-5750 or 348-5751 or jmarsh@law.ua.edu so that the individual's needs for support services can be evaluated and accommodated in a timely manner.
Assignments

For each assignment, I list the primary cases for discussion. If a case is not in the book or supplement, look it up online. Regrettably, we will not have time to discuss every case in the casebook.

Classes 1-2

I. A Summary of Constitutional Principles and An Introduction to Constitutional Analysis

- Introduction to Constitutional Documents – check out the following websites
  - Chronology of American History: avalon.law.yale.edu/subject_menus/chrono.asp
  - Declaration of Independence: avalon.law.yale.edu/18th_century/declare.asp
  - Articles of Confederation: avalon.law.yale.edu/18th_century/artconf.asp
  - United States Constitution: avalon.law.yale.edu/18th_century/constmad.asp

Readings:
- pp. 2-23; pp. 1830-1839: Everson v. Board of Education

Sample Brief

**Everson v. Board of Education**

330 U.S. 1 (1947)

**Topic:** The Establishment Clause of the First Amendment

**Relevant Facts:** A New Jersey statute permitted its local school districts to make rules and contracts for the transportation of children to and from schools. Acting pursuant to the statute, a local school board authorized reimbursements to parents of money they expended for bus transportation for their children. Some reimbursements went to parents of children attending Catholic schools which gave regular instruction in tenets conforming to the Catholic faith. Everson filed suit challenging the Board’s right to reimburse parents of parochial school students.

**Constitutional issues presented:**

1. Whether such reimbursements violate the Due Process Clause of the Fourteenth Amendment?

2. Whether such reimbursements violate the First Amendment’s Establishment Clause, which the Fourteenth Amendment made applicable to the states?
Brief answers:

1. No, because the legislation serves legitimate public purposes -- a) educational opportunity for children, b) avoiding risk of traffic hazards.

2. No, because the state may extend benefits of general welfare legislation to all children, and cannot exclude persons either because of their faith or their lack of it.

Court's analysis:

Rule/Test/Legal Standard

The "Establishment" Clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities, or institutions . . . to teach or practice religion.

Holding: We cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school students as part of a general program under which it pays the fares of pupils attending public and other schools.

Rationale: While New Jersey cannot aid the teaching of religion, it also cannot hamper its citizens in the free exercise of their own religion. It cannot exclude members of any faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation.

Dissent: Four members of the Court disagreed: Two great drives are constantly in motion to abridge the complete division of religion and civil authority which our forefathers made: a) introduce religious education/observances in public schools, b) obtain public funds to aid/support private religious schools.

In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court.

Review Questions:

1. Does Everson mean that government may extend reimbursements to parents whose children attend religious schools, or does it mean government must extend the reimbursements to such parents? See Locke v. Davey.

2. What is the relationship between the Establishment Clause and the Free Exercise Clause? Are they in conflict?
Classes 3-4

Religion and the Constitution

1. Establishment Clause - Readings: pp. 1839-1845; 1862-1875; 1907-1921
   - Santa Fe Independent School Dist. v. Doe (Han Zin Yoo)
   - Van Orden v. Perry (Whitney J. Woodard)
   - Zelman v. Simmons-Harris (Wesley W. Wintermyer)

   - Wisconsin v. Yoder (Daniel T. Wilson)
   - DHR of Oregon v. Smith (Jennifer A. Williams)
   - Locke v. Davey (Mary C. Wheeler)
   - Cutter v. Wilkinson (Kacey L. Weddle)

Classes 5-6

II. Constitutional Protection of Expression and Conscience

A. Introduction to Problems of Content Control of Speech: Penalizing Advocacy of Action
   pp. 1354-1361
   - Brandenburg v. Ohio (Dargan M. Ware)

Classes 7-8

B. Vagueness, Overbreadth, and Prior Restraint
   pp. 1363-1366; 1373-1378
   - Coates v. Cincinnati (Reilly K. Ward)
   - Near v. Minnesota (Christopher E. Vinson)

C. Speech Conflicting with Other Values:

1. Protection of Reputation and Privacy
   pp. 1388-1392; 1393-1399
   - Gertz v. Robert Welch, Inc. (Kiara S. Tucker)
Class 9

2. Control of Obscenity/Pornography
   pp. 1423-1426; 1428-1436
   Miller v. California (Stephen A. Swain)
   Free Speech Coalition (Burl Q. Sumlin)

Class 10

3. Control of Fighting Words and Offensive Speech
   pp. 1463-1465; 1470-1481
   Cohen v. California (Catherine A. Simon)
   Virginia v. Black (Alexandra K. Roussos)

4. Regulation of Commercial Speech
   pp. 1488-1495
   Central Hudson Gas & Electric Corp. v. PSC (Tessa E. Ross)

Class 11

III. Restrictions on Time, Place and Manner of Expression

   A. Traditional Public Fora: Streets and Parks
      pp. 1528-1532
      Frisby v. Schultz (Ashley M. Ross)

Class 12

   B. Speech in Public Schools
      pp. 1584-1586; 1599-1605
      Tinker v. Des Moines Independent School Dist. (Ashley H. Robinson)
      Morse v. Frederick (Ashlee D. Riopka)

1. The Intersection of Free Speech and the Religion Clauses
   pp. 1883-1891; Supplement pp. 15-21
   Good News Club (Preston T. Pope)
   Pleasant Grove v. Summum (Charlotte M. Pool)
Class 13

IV. Federal Judicial Power

A. Judicial Review
pp. 25-40

Marbury v. Madison (Meredith L. Pelton)
Ex parte McCardle (Mary R. Pate)

Classes 14-15

B. Standing – Article III
pp. 62-82

Warth v. Seldin (Robert J. Parrott)
Arlington Heights v. Metropolitan Housing Dev. (Christopher D. Odom)
Craig v. Boren (Pascal M. Nkengla)
Lujan v. Defenders of Wildlife (Laura W. Murphy)
Massachusetts v. EPA (Amber F. Murphy)

Classes 16-17

V. The Scope of National Legislative Power

A. The Establishment of a National Government
pp. 136-157

McCulloch v. Maryland (Nicholas S. Mote)
Gibbons v. Ogden (Suzanah R. Moorer)

B. The Scope of National Power Today - Commerce Power
pp. 173-176; 179-207

Heart of Atlanta Motel v. U.S. (Catoya T. Mitchell)
Morrison (Jared A. Miller)
Gonzales v. Raich (Heather L. Miller)

Class 18

VI. Intergovernmental Relationships Within the Federal System

A. State Immunity From Federal Regulation
pp. 238-271

Garcia v. San Antonio Metropolitan Transit Auth. (Collin R. Mickle)
New York v. U.S. (Daniel W. McKnight)
Printz v. U.S. (Elizabeth B. McDermott)
Classes 19-20

VII. The Scope of State Power

A. Limits on State Regulatory Power: The Dormant Commerce Clause Principles

1. Discrimination Against Interstate Commerce or Undue Burden
   pp. 290-295; 314; 381; 321-322; 335-337
   - New Energy Co. of Indiana v. Limbach (Fallon F. McClure)
   - Minnesota v. Clover Leaf Creamery Co. (Janece L. Maze)
   - Granholm v. Heald (Kyle L. Mathis)
   - Pike v. Bruce Church, Inc. (Victor C. Mason)
   - Maine v. Taylor (Ida D. Mashburn)

2. Market Participant Exception
   pp. 342-346
   - Reeves, Inc. v. Stake (Jessie E. Lowe)

Classes 21-22

VIII. The Bill of Rights, the Civil War Amendments and Their Inter-Relationship

Film: “Mr. Justice Hugo Black”; Interview with Eric Severeid and Martin Agronsky
pp. 509-512; 1104-1115; 537-550; internet

- Saenz v. Roe (John D. Leverton)
- Duncan v. Louisiana (Krista E. Leonard)
- BMW v. Gore (Nicholas R. Krupa)

Class 23

IX. Application of the Post Civil War Amendments to Private Conduct: Congressional Power to Enforce the Amendments

“State Action Doctrine”
pp. 1202-1208; 1226-1231

- Civil Rights Cases (Hilary L. Jones)
- Brentwood Academy v. Tennessee Athletic Ass'n (Brett A. Janich)
Classes 24-25

X. The Due Process Clause: The Rise and Fall of Due Process

A. Due Process as a Restraint on the Substance of Legislation (Substantive Due Process)

1. State Economic Regulatory Legislation
   pp. 554-567
   - *Lochner v. New York* (Caylan M. Holland)
   - *Nebbia v. New York* (Wallace C. Hasslinger)
   - *U.S. v. Carolene Products Co.* (John H. Hagood)

Class 26

2. State Legislation Regulating Personal Liberties
   pp. 627-639; 660-663
   - *Griswold v. Connecticut* (John C. Guin)
   - *Moore v. City of East Cleveland* (Lindsay J. Gower)
   - *Troxel v. Granville* (Joelle H. Ginsburg)

Classes 27-28

663-693

- *Roe v. Wade* (Mariam Gillis)
- *Planned Parenthood v. Casey* (Brandon M. Ford)

   pp. 705-730

- *Lawrence v. Texas* (Matthew S. Edinger)
- *Washington v. Glucksberg* (Helen L. Eckinger)

Class 29

B. Defining the Scope of “Liberty” and “Property” Protected by the Due Process Clause - The Procedural Due Process Cases

1. What “Property” or “Liberty” is Protected and What Constitutes a Deprivation?
   pp. 1167-1175
   - *Board of Regents v. Roth* (Jason B. Douglas)
   - *Town of Castle Rock* (Anthony J. Culver)
XI. The Equal Protection Clause and the Review of the Reasonableness of Legislation

A. Introduction to Scope of Equal Protection and Equality
pp. 748-754; 757-761

Gulf, Colorado & Santa Fe RR Co. v. Ellis (Samantha A. Chandler)
FCC v. Beach Communications (Summer T. Cato)

B. Suspect Classifications:

1. Classifications Disadvantaging Racial Minorities
pp. 770-778

Loving v. Virginia (Elizabeth R. Campbell)
Palmore v. Sidoti (Joel T. Caldwell)
Korematsu v. U.S. (Elisa J. Burnum)

C. A Note on Heightened Scrutiny Classifications

Classes 32-33

2. Racial Segregation in Public Schools and Other Public Facilities
pp. 781-787; Film: “The Road to Brown”

Plessy v. Ferguson (Griffin D. Bruns)
Brown v. Board of Education (Jessica K. Boyd)

Classes 34-35

Film: “Women In American Life 1860-1970”

3. Classifications Based on Gender
pp. 818-827; 840-850

Craig v. Boren (Elizabeth L. Blair)
U.S. v. Virginia (Blake M. Bernard)

Class 36

4. The Requirement of Discriminatory Purpose: The Relevance of Discriminatory Impact
pp. 858-865; 867-870

Washington v. Davis (Amelia D. Beck)
Personnel Administrator of Mass. v. Feeney (Caroline A. Baalwa)
Classes 37-38

5. “Benign” Discrimination: Affirmative Action Based on Race
   pp. 952-971

   Parents Involved in Community Schools v.
   Seattle School Dist.
   Roberts opinion
   Kennedy opinion
   Breyer opinion

Classes 39

D. The Equal Protection Clause as a Protector of Voting Rights

1. Equal Protection and Ballot Evaluation
   pp. 1072-1075

   Bush v. Gore

Class 40

Review/Questions
Handout #1

SAMPLE QUESTIONS
MULTIPLE CHOICE

Questions 1 and 2 are based on the following facts:

Barnes was hired as an assistant professor of mathematics at Reardon State College and is now in his third consecutive one-year contract. Under state law he cannot acquire tenure until after five consecutive annual contracts. In his third year, Barnes was notified that he was not being rehired for the following year. Applicable state law and college rules did not require either a statement of reasons or a hearing, and in fact neither was offered to Barnes.

1. Which of the following, if established, sets forth the strongest constitutional argument Barnes could make to compel the college to furnish him a statement of reasons for the failure to rehire him and an opportunity for a hearing?

   (A) There is no evidence that tenured teachers are any more qualified than he is.
   (B) He leased a home in reliance on an oral promise of reemployment by the college president.
   (C) He was the only teacher at the college whose contract was not renewed that year.
   (D) In the expectation of remaining at the college, he had just moved his elderly parents to the town in which the college is located.

2. Which of the following, if established, most strongly supports the college in refusing to give Barnes a statement of reasons or an opportunity for a hearing?

   (A) Barnes's academic performance had been sub-standard.
   (B) A speech he made that was critical of administration policies violated a college regulation concerning teacher behavior.
   (C) Barnes worked at the college for less than five years.
   (D) Barnes could be replaced with a more competent teacher.

3. Anystate enacts the Young Adult Marriage Counseling Act, which provides that, before any persons less than 30 years of age may be issued a marriage license, they must reside in Anystate for 12 months, establish a record of employment for at least 6 months with the same employer, and receive at least 10 hours of marriage counseling from a state-licensed social worker. These requirements are designed to assure that applicants for marriage licenses know their legal rights and

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duties in relation to marriage and parenthood, understand the "true nature" of the marriage relationship, and understand the procedures for obtaining divorces.

In a case in which the constitutionality of the Young Adult Marriage Counseling Act is in issue, the burden of proof will probably be on the

(A) Person challenging the law, because there is a strong presumption that elected state legislators acted properly.

(B) State, because there is a substantial impact on the discrete and insular class of young adults.

(C) State, because there is a substantial impact on the right to marry, and that right is fundamental.

(D) Person challenging the law, because the Tenth Amendment authorizes states to determine the conditions on which they issue marriage licenses.

Questions 4 and 5 are based on the following facts:

On November 7, 2009, the people of Briggsville, Florida, narrowly passed a voter initiative barring the employment of any male homosexual in a day care or child care center. Jeffrey Anderson has been employed for seven years at the Briggsville Township Child Care Center, a day care facility run by the city for its employees. Anderson has a stellar employment record and, in 1988, was honored as Employee-of-the-Year.

On December 1, 2009, Anderson was summoned into the office of Gail Bannon, the Briggsville supervisor. Bannon informed Anderson that because he was unmarried, had never been known to date women and had a male roommate, the township had reason to believe that he was a homosexual. Accordingly, Bannon advised Anderson that he was being discharged immediately in compliance with the newly enacted township initiative. Because Anderson has 7 months remaining on his present contract, Bannon indicated that some financial compensation — an amount to be worked out later — would be offered.

4. Which of the following Fourteenth Amendment constitutional challenges should Anderson raise in court?

(A) Privileges and Immunities Clause and Equal Protection Clause.

(B) Equal Protection Clause and Due Process Clause.

(C) Due Process Clause and Privileges and Immunities Clause.

(D) The Right to Privacy Clause.
5. Under relevant precedent, Anderson would most likely prevail under which of the following constitutional theories?

I. Procedural Due Process

II. Substantive Due Process

III. Equal Protection

IV. Privileges and Immunities

(A) II and III only.

(B) III and IV only.

(C) I and III only.

(D) I and II only.

Questions 6 and 7 are based on the following facts:

In 1980 there were 10,000 deaths of persons under 21 years of age who were involved in alcohol-related accidents on interstate highways. According to congressional committee findings, one related cause of the accidents is that states have established different drinking age requirements. So, for example, North Anystate set its drinking age for beer at 21 years or older, while South Anystate set its drinking age for beer at 19 years or older. Congress found similar differences in drinking age requirements in neighboring states throughout the country.

Congress also found substantial evidence that persons living near the borders of states with different drinking ages frequently travelled to the neighboring states to purchase alcohol in the state with the lower drinking age. Therefore, the lack of an uniform drinking age appeared to cause an increase in interstate travel and an increase in alcohol-related accidents.

Congress determined that it could reduce the number of deaths by setting uniform drinking age regulations. In light of its findings Congress enacted a National Minimum Drinking Age Act ("NMDAA"). The Act required all states to adopt age 20 as the minimum age for drinking alcohol. Part of the Act requires the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from states in which the purchase of any alcoholic beverage by a person who is less than twenty years of age is lawful. South Anystate continues to set its minimum alcohol-drinking age at 19 years or older and is concerned about losing federal highway subsidies.

South Anystate sued the Secretary of Transportation alleging that the NMDAA and the condition placed on receiving federal highway funds violated constitutional limitations. In addition, Good Beer Co. wants to intervene on the ground that the law interferes with its business operations in South Anystate.
6. Which statement reflects relevant precedent?
   A. Congress can enact the NMDAA pursuant to its federal police powers.
   B. Congress can enact the NMDAA pursuant to its general police powers.
   C. Congress can enact the NMDAA pursuant to its commerce and spending powers.
   D. Congress cannot enact the NMDAA.

7. Which statement reflects precedent?
   A. Good Beer Co. has third party standing.
   B. Good Beer Co. has individual standing.
   C. Good Beer cannot meet the requirements of Article III.
   D. Good Beer has associational standing.

Questions 8 and 9 are based on the following facts:

Shoal Lake, located in County, is known throughout the country for its beautiful scenery and clean beaches. Since Shoal Lake is the only one of its kind in County, County has always limited commercial access to beachfront property.

In order to improve facilities near the beaches, County leased land to a privately-owned corporation, Lakeco. The lease required Lakeco to design, build, operate, and maintain a restaurant, hotel, marina, and swimming area, and to pay 10% of its net profits as rent to County. Lakeco submitted its bylaws to County for review. The bylaws provided that its facilities would be open to members only, and that its membership committee would set “standards” for membership, including membership fees and dues. County approved Lakeco's bylaws.

Shortly after the facilities were completed, the County Liquor Licensing Board granted Lakeco a license to sell alcoholic beverages at the restaurant. Lakeco's membership committee decided on a $1,000 initial application fee and monthly dues of $100. The committee also decided
that no applications for membership would be accepted from women, atheists, or from persons of English descent.

8. A resident of County, who was denied membership in Lakeco on the basis of his parents' English ancestry, brought suit to compel admission to Lakeco on the grounds that the membership standards violated his constitutional rights.

Who will probably prevail?

(A) Plaintiff, unless Lakeco can prove some rational basis for the exclusion of persons of English descent.

(B) Lakeco, because plaintiff has no constitutional rights infringed by Lakeco on the above facts.

(C) Lakeco, because, on the above facts, its denial of membership to persons of English descent cannot be regarded as government action.

(D) Plaintiff, even though the discriminatory acts were committed by a privately-owned corporation, because of government entwinement.

9. A citizen of County with English ancestors, who was denied membership in Lakeco, brought suit to compel admission on the grounds that the membership standards violated his constitutional rights. Who will probably prevail?

(A) Lakeco, since its members can determine a membership policy on any basis they select.

(B) Plaintiff, unless Lakeco can prove some compelling interest for the exclusion of people of English ancestry and that the policy is narrowly tailored.
(C) Lakeco, unless denial of membership is shown to be justified by some legitimate interest.

(D) Lakeco, because classifications based on sex have not yet been held to violate the Equal Protection Clause.

10. Holt, a construction worker who had recently been laid off, brought to focus public attention on the plight of the unemployed within the State of Columbus. A Columbus statute provides that: “No controversial political speech making or picketing may take place outside any state office building between 8:00 a.m. and 9:00 a.m., 11:30 a.m. and 12:30 p.m. and 4:00 p.m. and 5:00 p.m. on state working days.” One Thursday afternoon, at 4:30 p.m., Holt began voicing his frustration on being unemployed to a group of about 100 onlookers who gathered on the sidewalk outside the offices of the State of Columbus Employment Development Agency. Holt spoke for approximately 20 minutes. During the course of his talk, Holt became quite excited and animated. At one point he shouted: “The entire group of legislators in this state should go to hell, because they do not care about the unemployed.” When Holt finished with what he had to say, the crowd disbursed.

If Holt is prosecuted under the state statute, and defends on constitutional grounds, which of the following best describes the proper burden of proof?

(A) The state would have to prove that it had a compelling need for the statute and that there were no less restrictive means by which it could satisfy that need.
(B) Holt would have to prove that the state did not have a rational basis for enacting the statute.

(C) The state would have to prove that it had a rational basis for enacting the state statute.

(D) Holt would have to prove that the state did not have a compelling need for this statute or that it had less restrictive means by which it could satisfy that need.
For several years, Anystate has been engaged in a policy discussion about how best to expand educational benefits and to promote intellectual, moral, and character development among its citizens. Some policymakers have suggested that Anystate should design a comprehensive education plan to fund educational grants for all Anystate citizens, ages 3–22 to attend the schools of their or their parents’ choice. Others have argued that Anystate should allocate state resources for students or parents with children attending public schools only. They oppose the use of public money even indirectly at religious schools.

Anystate is considering adopting the following Grace Scholarship Plan (GSP). It desires to provide educational subsidies to parents with children between the ages of 3 and 19 to attend any school within Anystate, except those schools that require devotional exercises or require students to learn the tenets of a particular faith as part of their educational program. Anystate wants to expand the educational choices available to parents for their children. At the same time, it seeks to avoid violating constitutional guarantees. The subsidies range in value depending on financial need. The smallest grant is $1,000; the largest is $7,500 per year.

I am the Anystate Attorney General. The Governor has come to my office seeking a thorough analysis of the constitutional issues raised by the GSP. You are my brilliant law clerk. I need you to write me a memo identifying all the constitutional issues presented and how they would likely be resolved in light of the relevant precedent. Discuss. Please limit your memo to ten typed pages. Be sure to summarize the plausible arguments on both sides of each issue, indicating how each side would use the relevant precedent. (I have asked another clerk to analyze any Article III standing issues.)
I. How to Write an Essay Answer

Each of you must develop the skill of organizing your analysis on essay exams. One key to doing this is speaking with your professors about their preferences or suggestions and doing any practice exercises they assign. No one can help you prepare for law schools exams as well as your professors. Go see them and ask questions.

In this handout, I want to suggest how you might organize an essay answer for me. I have borrowed many of my ideas about exam analysis and writing from Professor Kenney Hegland, former dean at the University of Arizona. His book Introduction to the Study and Practice of Law is my favorite book on how to be successful in law school, including how to analyze legal issues and write about them.

A. General Approach

Organizing an Answer
(Adapted from Kenney Hegland’s Introduction to the Study and Practice of Law)

Introduction (a summary of the issues to be resolved in the analysis of the broad questions.)

Issue one: (a precise statement of the narrow legal question.)

Controlling law: (a precise statement of the rule or legal standard that applies to the issue.)

What will plaintiff argue? (A statement of the plausible arguments that the plaintiff might assert in light of the precedent and the facts.)
What will defendant argue? (A statement of the plausible arguments that the defendant might assert in light of the precedent and the facts.)

Who has better argument? (A statement of who you think has the weight of authority and facts, who should win on the issue.)

Next issue and its relationship to previous issue: (a simple transition from first issue to the next.)

Controlling law for this issue:

What will plaintiff argue?

What will defendant argue?

Who has better argument?

Next issue/relationship to previous issue:

Controlling law:

What will plaintiff argue?
What will defendant argue?

Who has better argument?

[Repeat above for each of the remaining issues.]

**B. Organizing by Questions**

In some cases, you will need to organize your analysis differently, for example, around the specific questions that the Court raises and answers. In those cases, each of those questions becomes an issue. If the Court raises and answers a series of questions in its analysis of a constitutional claim, you should raise and answer the same questions.

For example, I have suggested that if a party is challenging the constitutionality of a federal statute, the Court appears to ask and answer a series of questions.

1. Whether Congress had a valid source of power to enact the statute?
2. What is the nature and scope of the source of power as framed by the Court?
3. What are the limits on the federal power?
4. What is the nature and scope of the pertinent limits on federal power?

If you are analyzing the constitutionality of a federal statute, I would expect you to ask and answer the same questions raised by the Court, applying the same precedent the Court does.

**C. Organizing by Test**

At other times, the Court will announce a test and in your analysis you must determine if each part of the test has been met. For example, to determine whether the government can regulate so-called commercial speech. That is, speech proposing an economic transaction or speech advancing the economic interests of the speaker, you must
analyze each prong of the applicable test - the Central Hudson test.

We will learn soon that according to Central Hudson, the government has broad powers to regulate speech that is misleading or that proposes unlawful activities. But if the commercial speech is not misleading or if it does not propose illegal activities, the government must justify regulations on commercial speech by showing a) a significant government interest, b) the regulation directly advances the government interest, and c) the regulation is not more extensive than is necessary to serve that interest. This four-part analysis must be applied in commercial speech cases.

Finally, I prefer analysis before conclusions. I prefer that you identify the questions, issues, test; that you tell me the controlling legal standards; that you tell me how each side will frame arguments in light of the cases we have read; and who you think has the better argument.
In 1976 Congress enacted a statute called the Federal Land Act ("FLA") that placed all federal lands under the control of the Department of the Interior and the Bureau of Land Management ("BLM"). The BLM is charged with maintaining and developing federal lands for the public benefit. The BLM has power both to open and close federal lands to various uses, including mineral exploitation. In 1984, the BLM arranged to have 1 million acres of such land opened to mining. The land was thereby closed to the public. The FLA provided that any person could bring a lawsuit in federal court for declaratory relief by alleging that the BLM or other Department of Interior officials had acted improperly with regard to federal lands.

Various individuals and groups complained about the BLM policy. In early 1985, the National Wildlife Federation ("NWF") filed a lawsuit in federal court against the Director of the Bureau of Land Management and the Secretary of the Interior. NWF alleged that it represented 100,000 members around the country who opposed the reclassification of the federal lands. The complaint alleged that the reclassification would cause destruction of the natural beauty of the federal lands, including a portion of two national parks that were frequently visited by members of NWF. In addition, NWF alleged that BLM had violated federal policy which required it to develop and maintain the federal lands, not destroy them. Finally, NWF alleged that BLM did not conduct the required environmental impact study before implementing its decision. NWF seeks a declaratory judgment that the BLM has acted contrary to congressional intent.

Dean Hansford, an avid hiker and outdoorsperson, has filed a motion to intervene in the NWF suit. Hansford alleges that the BLM policy will prevent him from completing his forthcoming book on national parks. He alleges that his book requires a personal visit to each park in order to provide his readers with a personal description of its resources.

You are my law clerk. I need your advice on whether the NWF lawsuit is justiciable. Can Dean Hansford intervene? What constitutional issues are presented and how would the U.S. Supreme Court likely resolve them? Discuss.
SAMPLE ANALYSIS

Dear Judge,

In order to determine whether the NWF lawsuit is justiciable and whether Hansford can intervene, we must evaluate the constitutional and prudential limitations on the invocation of jurisdiction that the U.S. Supreme Court has set forth. One aspect of justiciability falls under the term standing (Warth, Arlington Heights, Craig, Lujan, Raines, Clinton): whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III.

The Supreme Court had held that a plaintiff must show that he/she/it is the proper party to invoke the Court's judicial power by alleging such a personal stake in the outcome of the controversy as to warrant his invocation of the Court's jurisdiction and the Court's exercise of its remedial powers (Flast, Warth). The Court has held that proof of standing requires the plaintiff to demonstrate at a minimum that the plaintiff has a live case or controversy as set forth in Article III of the Constitution (Warth, Craig). To meet the case or controversy limitation under Article III, plaintiff must specifically allege facts that show (1) some threatened or actual injury; (2) a causal relationship between the alleged injury and the defendant's conduct; and (3) that if the Court decides the controversy it can redress the plaintiff's harm (Warth, Arlington Heights, Clinton). Article III judicial power exists only to redress or protect against injury to the complaining party (Warth, Arlington Heights, Clinton).

In addition to these constitutional limitations, the Court has articulated several significant rules of self-governance that it uses to control its exercise of jurisdiction (Ashwander). For example, the Court has said it will not decide complaints about generalized grievances that are not especially unique to the plaintiff. Also, the Court has said that generally a plaintiff must assert his/her/its own legal rights and not the rights of third parties (Warth, Lujan, Raines).

Along with the general principles set forth above, the Court has articulated special rules for the standing of an Association (Warth, Arlington Heights, Lujan). Generally, an association may seek to assert standing on its own behalf, on behalf of itself and its members when the alleged injury is common to both, or solely as a representative of its members (Warth). These principles will be discussed more fully with respect to NWF below.

Finally, the Court has held that Congress may by statute grant or confer standing (Warth, Lujan). To do so, Congress must specify the injury it seeks to vindicate and identify the class of persons entitled to assert claims. All plaintiffs who claim citizen standing conferred by a statute still must meet the nonwaivable Article III requirements. It is in light of these principles that we must analyze the NWF and Hansford lawsuits.
NWF is an association that claims to represent 100,000 members who are opposed to the BLM reclassification. As stated in Warth and Arlington Heights, an association like NWF can assert its own rights or actual or threatened injury. In Warth, the Court found no association had standing. However, in Arlington Heights, the Court ruled that because MHDC had selected a site and negotiated a contract it could meet the Article III standing requirements. However, it is not clear from the facts that any of NWF's allegations reflect threatened or actual injury to itself. NWF is more like the association in Warth where the Court held none of them, except Metro-Act asserted the association's interests. As in Warth, NWF cannot raise the interest of its members who suffer indirectly from the BLM policy. The BLM policy does not implicate the members/associational ties. But in Arlington Heights, the Court concluded that MHDC did show the requisite injury, causal connection and redressability. Arlington Heights is distinguishable from Warth and NWF principally because MHDC had a site and contract to build subsidized housing, but was then denied a permit by the zoning board. Also MHDC was asserting its own associational interest. The Court did not find that MHDC was representing the individual plaintiffs. The Court might be influenced by the fact that BLM did not conduct the required environmental impact study. That seems significant. If NWF cannot meet the palpable injury requirement it will probably fail the Article III requirements.

NWF's best chance is to assert the rights of its members solely, but even then NWF must allege that its members would meet the Article III requirements. The facts suggest that some of NWF's members used two parks that have now been closed. The Court must decide if this injury is personal or if it is one shared in common with many others. This case compares closely to Lujan where the Court found no standing despite a congressional statute. There, wildlife conservationists challenged a regulation regarding an ESA. The Court noted that they did not meet the injury requirement because they had not personally suffered. Similarly, the government will argue here that no NWF member has alleged a personal injury. The Court might find Congress has not met the requirements that Kennedy indicated essential to congressionally-conferred standing. It does not seem nearly as significant that a portion of two national parks have been closed to NWF members. That sounds like the kind of generalized grievance that the Court would use its prudential limitations to keep out of court. I think NWF would probably lose, unless the Court believes that Congress conferred standing by its statute (see below).

Finally, the FLA contains language that suggests that "any person can bring a lawsuit for declaratory relief by alleging that BLM . . . acted improperly . . ." In Warth, the Court said that Congress can confer standing by statute. This may have been intended by the quoted language. But the Court seemed to say in Warth that such a congressional grant would not suspend the specific requirements of Article III, but instead only the prudential limitations. In Lujan, the Court made clear that the requirements of Article III must be met by all plaintiffs, even those who claim "citizen standing" under a congressional statute. Justice Scalia asserts that a plaintiff raising only a generally available grievance about government — claiming harm to his and every citizens' interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy. The province of the Court is solely to decide the rights of individuals. In concurrence, Justices Kennedy and Souter wrote that Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy. Congress must identify the injury it seeks to vindicate
and relate the injury to the class of persons entitled to bring suit. The government will argue this level of specificity was not achieved in the FLA.

Hansford would have to meet the Article III and prudential limitations as well. He alleges that the closure will prevent him from completing his book. That is an allegation of personal and concrete injury — economic injury. The Court has not limited Article III to economic injury, however. As for the causal connection between Hansford's injury and the BLM's conduct, there seems to be a close connection between the defendant's conduct and the putatively illegal action. And, if the Court granted the relief sought by Hansford, the Court's reversal of the BLM policy would redress Hansford's injury. All of the Article III standing requirements are arguably satisfied.

The Court, however, might reject Hansford's motion to intervene on the same ground that it rejected a similar motion to intervene in Warth. However, in Warth the intervenor was an association asserting the interests of third parties. Here, Hansford is an individual plaintiff. Or, the Court might reject Hansford's motion under its generalized grievance prudential limitation. The result would depend on whether the Court perceived Hansford's injury as common to many or unique to him. I think his injury is unique. Hansford seems more like Ransom in Arlington Heights and the potato grower and hospital association in Clinton than the plaintiffs in the other cases.

I think Hansford may have a better chance of success than NWF.
In 1980 there were 10,000 deaths of persons under 21 years of age who were involved in alcohol-related accidents on interstate highways. According to congressional committee findings, one related cause of the accidents is that states have established different drinking age requirements. So, for example, North Dakota set its drinking age for beer at 21 years or older, while South Dakota set its drinking age for beer at 19 years or older. Congress found similar differences in drinking age requirements in neighboring states throughout the country.

Congress also found substantial evidence that persons living near the borders of states with different drinking ages frequently travelled to the neighboring states to purchase alcohol in the state with the lower drinking age. Therefore, the lack of a uniform drinking age appeared to cause an increase in interstate travel and an increase in alcohol-related accidents.

Congress determined that it could reduce the number of deaths by setting uniform drinking age regulations. In light of its findings Congress enacted a National Minimum Drinking Age Act (“NMDAA”). The Act required all states to adopt age 20 as the minimum age for drinking alcohol. Part of the Act requires the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from states in which the purchase of any alcoholic beverage by a person who is less than 20 years of age is lawful. South Dakota continues to set its minimum alcohol-drinking age at 19 years or older and is concerned about losing federal highway subsidies.

South Dakota sued the Secretary of Transportation alleging that the NMDAA and the condition placed on receiving federal highway funds violated constitutional limitations. In addition, Good Beer Co. wants to intervene on the ground that the law interferes with its business operations in South Dakota.

You are my law clerk. I need your considered opinion, in light of any relevant precedent, regarding how the Court will decide the case. (I have asked another clerk to brief the relevance of the 21st Amendment.) Write the memorandum.

Based in part on South Dakota v. Dole, 97 L. Ed. 2d 171 (1987).
In recent years, many environmentalists have advocated greater environmental awareness by governmental policymakers and agencies. Consequently, many legislatures have enacted comprehensive legislation to regulate the various issues arising from the increasing demands of solid waste disposal. Anystate has become one of the nation's principal repositories for solid waste. Some solid waste is generated and disposed of within Anystate; however, at least 55 percent of the solid waste disposed of in Anystate is generated by other states.

Residents of Anystate have reported to their representatives substantial concerns about the regulation and disposal of solid waste in Anystate. One concern is that residents want the first opportunity to dispose of solid waste in the landfills located in Anystate. Alternatively, residents want Anystate to create a state-owned landfill for the disposal of resident solid waste only. Residents of Anystate also want out-of-state generators who seek to dispose of solid waste in private landfills in Anystate to pay an additional fee for maintenance and clean-up costs. Also, residents want part of the extra fee for out-of-state generators to go to subsidize Anystate's private landfill operators.

In June 1996, the Anystate Legislature held hearings regarding the status of solid waste landfills and their operation. The hearings resulted in the following findings:

1. Anystate disposes of more out-of-state solid waste than in-state solid waste. At the current rate of disposal, Anystate's landfills will be full by 2015.

2. Some solid waste that enters from out-of-state is misclassified as nonhazardous when in fact it contains some hazardous waste. This misclassification is the result of sloppy inspection and labelling procedures outside of Anystate.

3. Anystate cannot rely on inspections outside the state. Only in-state inspection will ensure proper labelling and disposal.

4. Residents of Anystate will incur substantial costs for disposing of waste generated by nonresidents who pay no taxes.

In response to these findings, Anystate enacted the following provisions of the Anystate Code:

Section A:
Residents of Anystate who operate solid waste landfills will receive a subsidy to defray their costs, to be paid from additional fees imposed on waste generated from outside of Anystate.
Section B:
Anystate will operate a state-owned landfill for the disposal of waste generated by Anystate residents only. Also, residents will have priority over nonresidents to dispose of solid waste at private landfills in Anystate. Anystate's privately-owned landfills must set aside two-thirds of their available space for waste generated by residents.

Section C:
All companies that bring solid waste into Anystate for disposal at private landfills shall have that waste inspected at an approved inspection site within Anystate, and shall pay an additional fee of $100 per ton for disposal of out-of-state waste.

You are my law clerk. Our office has been contacted by Nancy Barrett, who operates three private landfills in a neighboring state and whose company brings 250,000 tons of solid waste into Anystate each year. She wants to know if the provisions Anystate has enacted will withstand constitutional challenge. Can she bring a claim in federal court? How would the court likely rule?

Please write a memo to me setting out a reasoned analysis of the issues presented.
The Sorensen Act, passed by Congress in 1995 as an amendment to the Omnibus Gun Control Act of 1967, imposes a waiting period of up to five days for the purchase of a handgun, and it subjects purchasers to a federal background check during the waiting period. The waiting period and background check prescribed by the Act are not required in states that have handgun permit systems meeting the federal standards.

Within five years from the date of the Act, such background checks will be performed instantaneously through a national criminal background check system maintained by the federal Department of Justice. Meanwhile, the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser’s place of residence. Each county must designate a CLEO pursuant to the Act. The Act requires CLEOs to make a reasonable effort to ascertain whether receipt or possession of a handgun by the prospective buyer would violate any laws. CLEOs perform the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. Finally, the Act requires every state legislature to create a fund for victims of handgun violence and their families. Any state which fails to create such a fund will not only lose half its federal welfare subsidy, but also must cover the medical expenses of such victims.

Roger Sayers, as Sheriff of Anycounty, is the CLEO for his jurisdiction. He has brought suit in federal district court to challenge the Sorensen Act’s provisions imposing duties on him. He thinks he should decide who can buy a handgun based on Anycounty’s criteria. He wants the feds to stay out of it. Ike Adams, Attorney General of Anystate, wants to challenge the victim fund provisions.

James Taaffe, editor of GUN MAGAZINE, has filed a motion to intervene in the Sayers’ suit, insisting that his readers all over the country have an interest in the case. Taaffe asserts he once had to wait twenty days for a background check under Anystate’s permit system.

You are my law clerk. Sayers, Adams, and Taaffe have asked me for a detailed evaluation of the constitutional issues presented. What constitutional issues should I raise with them? Please draft your analysis and set out the reasons and rationale for your conclusions. (I have asked another clerk to brief me on the Second Amendment issue so you should disregard that issue.)
On November 7, 2009, the people of Briggsville, Florida, narrowly passed a voter initiative barring the employment of any male homosexual in a day care or child care center. The campaign was a particularly mean-spirited one, with the initiative’s sponsors sparing no effort – and no expense – to tap the rural community’s substantial homophobic passions.

Jeffrey Anderson has been employed for seven years at the Briggsville Township Child Care Center, a day care facility run by the city for its employees. Anderson has a stellar employment record and, in 2008, was honored as Employee-of-the-Year. On December 1, 2009, Anderson was summoned into the office of Gail Bannon, the Town supervisor. Bannon informed Anderson that because he was unmarried, had never been known to date women and had a male roommate, the township had reason to believe that he was a homosexual. Accordingly, Bannon advised Anderson that he was being discharged immediately in compliance with the newly enacted township initiative. Because Anderson has 7 months remaining on his present contract, Bannon indicated that some financial compensation – an amount to be worked out later – would be offered.

Fresh from your clerkship and your subsequent internship with Senator Packwood, you have opened a practice in nearby Jacksonville. This morning, Jeffrey Anderson visited you and asked you to represent him. Write a memo to your files exploring what claims you believe can be made on Anderson’s behalf, how you can best present your case and the obstacles you will face. Evaluate your chances for success.
For over fifty years, Anystate has regulated picketing and protests of both funerals and funeral processions, seeking to protect the privacy of those mourning the loss of a loved one. Initially, the law regulated such pickets and protests for one hour before and through the end of the burial service. In recent years, Anystate has concluded that a more expansive regulation was necessary because of a series of protests by a group that targets funerals to express their view that God is punishing the people in this country because of what they call the sin of homosexuality.

In response, Anystate amended its law. The amendment made three major changes. First, the amendment extended the time within which the statute applies, from one hour before until one hour after a funeral or burial service. Second, the amendment defined a specific boundary within which the statute applies, 500 feet. And third, the amendment expanded the definition of protest to “other protest activities” that disrupt or disturb a funeral, burial service, or funeral procession. Thus, the statute now reads:

Every citizen may freely speak, write, and publish the person’s sentiments on all subjects, being responsible for the abuse of the right; but no person shall picket or engage in other protest activities, nor shall any association cause picketing or other protest activities to occur, within five hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place.

As used in this section, “other protest activities” means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.

A person or group convicted of violating the provision is guilty of a third-degree misdemeanor.

Anygroup is an association whose members regularly engage in picketing at funerals in Anystate. Members even believe that God is killing American soldiers, among others, and they have engaged in protests at the funerals of service members. Its leader has come to our office, seeking our professional opinion regarding the constitutionality of Anystate’s amended law.

You are my law clerk. You have just completed an intensive study of U.S. Supreme Court precedent. I need you to write a thorough analysis of the constitutional issues presented by the Anystate law. Would a challenge by Anygroup be justiciable? Discuss all potential constitutional challenges and how a federal court would likely resolve them.

Each of you will be responsible for preparing a typed, one page summary of one of the principal cases (these cases are listed on the syllabus). Your summary should include the essential parts of the case. Please post your briefs on TWEN for this course. You will present your summary to the class and I will provide support and background when appropriate.

Reading assignment for first two weeks (Jan 10-13 & 19-20):

I. A Summary of Constitutional Principles - (Jan 10-13)
   
   Introduction to Constitutional Documents – check out the following websites

   Chronology of American History
   [avalon.law.yale.edu/subject_menus/chrono.asp]

   Declaration of Independence
   [avalon.law.yale.edu/18th_century/declare.asp]

   Articles of Confederation
   [avalon.law.yale.edu/18th_century/artconf.asp]

   United States Constitution
   [avalon.law.yale.edu/18th_century/constmad.asp]

   pp. 2-23; pp. 1830-1839

   Everson v. Board of Education

II. pp. 1839-1845; 1862-1875; 1907-1921; 1936-1962; 1883-1891;
    Supp. pp. 92-97

   Case Briefs - (Jan 19-20)

   Santa Fe - Han Zin Yoo
   Van Orden - Whitney J. Woodard
   Zelman - Wesley W. Wintermyer
   Yoder - Daniel T. Wilson
   Smith - Jennifer A. Williams
   Locke - Mary C. Wheeler
   Cutter - Kacey L. Weddle