CONSTITUTIONAL LAW

Information

1. TEXT: Weaver, et al, Constitutional Law: Cases, Materials, and Problems (4th ed.) No supplement required. The Casebook is optional, but the syllabus tracks the 4th edition. (You can locate all the assigned cases online, but they are unedited). There are used copies of the CB available on the secondary market.

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 one of them to help master the leading cases and doctrine.

3. ATTENDANCE: It is important that you attend class. I will use class to explain and interrogate basic doctrine. You are responsible for compliance with the attendance policies as set out in the Student Handbook. Please try to arrive to class on time. We will start and end promptly each day.

4. PARTICIPATION: I expect each member of the class to participate in our case discussions. I will assign briefs to each of you in reverse alphabetical order (please see the last two pages of the syllabus for brief assignments); several students may be called on in one class. When I ask you to prepare a brief of a case, please prepare a typed brief of the essential points of the case. Your briefs should contain the key facts, legal issue, legal rule, holding, and rationale. 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. Careful preparation is essential for success on the examination.

5. EXAMINATION: There will be a final examination in the course as scheduled by the Registrar on Friday, May 3 at 1:30 p.m. It will be 4 hours long and an open book exam. It will include between 30 to 35 multiple choice questions similar to those which appear on the Uniform Bar Examination (“UBE”) and at least one essay question. You may bring to the exam your casebook and any written outline of the course material that you yourself created. You cannot bring in a commercial outline or hornbook/treatise. You may not consult online materials or summaries on your computers during the exam.
6. **GRADING:** The Law School has a mandatory grade curve which I will follow as nearly as possible. I will evaluate your exams based on your mastery of the cases and materials. Your answers should reflect the language used by the Court. As you prepare and practice, be sure to incorporate the language and legal standards established by the Court.

The Honor Code applies to each part of the exam. If you have a problem and cannot take the exam, you should speak to the Associate Dean. Any cheating will be punished severely.

7. **PRACTICE EXAMS:** I will provide you with several practice questions during the semester. I encourage you to work through each practice question as we cover each topic. I am willing to review one practice exam for you before Spring Break.

8. **OFFICE HOURS:** I will have office hours on Tuesdays, 2:00-4:00 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. If you have an emergency, call my assistant, Brittany Lovette (348-8870), and she will find me, or email me.

9. **READING ASSIGNMENTS:** We will try to move through the reading material as set out in the syllabus at a rate of 25 to 30 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.

10. **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 the Associate Dean for Students/Academic Services at (205) 348-7190 or 348-5750 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 primary case is not in the book, look it up online. Regrettably, we will not have time to discuss every case in the casebook. The notes and examples are there for you to reflect on, in light of the primary cases. Reading assignments are linked to the 4th edition of the casebook. Our first class will be on January 7, 2019.

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

Course Introduction

Classes 1-2

Readings: Heller, McDonald (both online), pp. 1721-1736

Questions:

What are the key rights of the People?

Who decides?

Who determines conflicts? How?

What are the key powers of government?

Who decides the nature and scope of government powers?

Who determines disputes over government power? Under what principles?

What is a constitutional claim?

How do you frame constitutional claims?

How do claims get to the U.S. Supreme Court?
Who was Heller?

What constitutional claim did he present?

What constitutional right did he rely on in his claim?

What is the nature and scope of that right?

What did the DC government claim?

What power did it assert?

What did the Court say was the constitutional issue?

What legal standard did the Court apply to resolve the dispute?

What was the Court’s holding?

What was the Court’s rationale?

Was there a major dissent?

What was the primary argument of the dissent?

What was the principal question in McDonald?

What was the constitutional issue in McDonald?

Who was McDonald?

What did McDonald claim?

What did the government claim?

What legal principles did the Court apply?

What did the Court hold?

What was the Court’s rationale?

What are the limits on Heller and McDonald?
What is the meaning of the Second Amendment?

II. The Religion Clauses

A. The Establishment Clause Cases

Class 3
1. Financial Aid
   Readings: pp. 1579-1591, 1599-1611
   Everson (see sample brief)
   Lemon
   Zelman

Class 4
2. Government Sponsored Prayer
   Readings: pp. 1611-1615, 1619-1623
   Lee v. Weisman
   Town of Greece (online)

Class 5
3. Public Displays
   Readings: pp. 1643-1665
   Van Orden
   McCreary v. ACLU

Class 6
B. Free Exercise Clause Cases
   Readings: pp. 1667-1678, 1683-1689
   Yoder
   Smith

C. Free Exercise and Establishment Clause Tensions
   Readings: pp. 1716-1719
   Locke v. Davey
   Trinity Lutheran (online)

III. Freedom of Speech under the First Amendment: An Introduction to Categories of Speech Regulation
Class 7
1. What values are advanced by the free speech clause? Political Speech
   Readings: pp. 1041-1050, 1073-1087
   Brandenburg
   Holder v. HLP

Classes 8 and 9
2. Fighting Words, Offensive Speech, and Hostile Audiences
   Readings: pp. 1087-1108
   Chaplinsky
   Feiner v. NY
   Cohen

Class 10
3. Defamatory Statements
   Readings: pp. 1099-1114
   NY Times v. Sullivan

Class 11
4. Obscenity
   Readings: pp. 1158-1170
   Miller

5. Adult Pornography vs. Child Porn
   Readings: pp. 1187-1197
   Ashcroft

Class 12
6. True Threats
   Readings: pp. 1219-1246
   Virginia v. Black

7. Commercial Speech
   Readings: pp. 1268-1280
   Central Hudson (online)

IV. Judicial Review

Classes 13 and 14
1. The Power and Jurisdiction of the Supreme Court
   Readings: pp. 1-21
   Marbury v. Madison
   Ex Parte McCardle
   Martin
**Cooper**

**Class 15**

2. The Case or Controversy Requirement- Standing
   
   Readings: pp. 39-45, 67-71, 82-85
   Warth v. Seldin (online)
   Daimler
   Lujan

V. National Legislative Power- Affirmative Commerce Clause

**Classes 16, 17, and 18**

Readings: pp. 101-110, 117-124, 144-153, 158-166, 166-177
McCulloch
Gibbons
Wickard
Heart of Atlanta
Morrison
Raich (online)
Sebelius

VI. The Relationship Between the States and Federal Government

**Class 19**

A. State Immunity from Federal Regulation
   
   Readings: pp. 355-367
   Garcia

B. Anti Commandeering Principle
   
   Readings: pp. 367-381
   NY v. U.S.
   Printz

VII. State Power to Regulate Commerce (Negative/Dormant Commerce Clause)

**Class 20**

A. Facial Discrimination/Discriminatory Effects
   
   Readings: pp. 403-421
   Granholm
   Philadelphia v. N.J.
   Dean Milk
Class 21
B. Neutrality and Balancing
   Readings: pp. 436-447
   Minnesota v. Cloverleaf
   West Lynn Creamery
   American Trucking

C. Market Participant Exception
   Readings: pp. 447-454
   Reeves
   Wunnick

VIII. State Action

Classes 22 and 23
   Readings: pp. 493-498, 512-525
   Civil Rights Cases
   Burton
   Moose Lodge
   Brentwood Academy

IX. Due Process

Classes 24-25
A. Economic Liberties and Due Process
   Readings: pp. 591-607
   Lochner
   Nebbia
   Carolene Products (online)

B. Takings and Due Process
   Readings: pp. 607-614
   Kelo

Classes 26-27
C. Due Process and Fundamental Rights
   1. Private Choices/Autonomy
      Readings: pp. 688-700, 702-731, 738-741
      Griswold
      Roe
      Casey
2. Family Liberty/Privacy  
   Readings: pp. 741-750, 756-792  
   Zablocki  
   Lawrence  
   Obergefell

X. Due Process and Fair Procedures

**Classes 28-29**
A. Deprivation of Liberty or Property Right  
   Readings: pp. 555-565  
   Goldberg v. Kelly  
   Bd of Regents v. Roth (online)

B. What Process is Due?  
   Readings: pp. 569-576, 578-589  
   Matthews v. Edridge  
   Board of Curators v. Horowitz

XI. Equal Protection

**Classes 30 and 31**
A. Government Economic Regulations and Equal Protection  
   Readings: pp. 813-822  
   Railway Express  
   Beach Communications

**Classes 32-33**
B. Racial Classifications and Equal Protection  
   1. Separate but Equal  
      Readings: pp. 822-834  
      Dred Scott  
      Plessy  
      Korematsu

**Classes 34-35**
2. Racial Classifications and School Segregation  
   Readings: pp. 834-851  
   Brown I and II  
   Swann  
   Dowell
Jenkins

Class 36
3. Finding Discriminatory Purpose/Intent
   Readings: pp. 852-861
   Loving
   Washington v. Davis
   Arlington Heights

Class 37 and 38
4. Affirmative Action and Equal Protection
   Readings: pp. 869-874
   Grutter

5. Diversity and Integration
   Readings: pp. 875-899
   PICS v. Seattle
   Fisher v. UT Austin (Fisher II)

XII. Equal Protection and Gender Discrimination

Classes 39-40
   Readings: pp. 899-916
   Reed
   Frontiero
   Craig
   U.S. v. Virginia

Classes 41 and 42
   Review/Discuss Exam
Handout #1

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 makes 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.

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**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* and *Trinity Lutheran*.

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

**Notes:**
Questions 1 and 2 are based on the following facts:

Anycity School District, through its School Board, operates six elementary schools, two middle schools, and two high schools. The District has no history of operating de jure segregated schools, however, over the past two decades the District has become aware of significant enrollment imbalances, especially in the middle and high schools. At one high school, North High, there are 1600 students; at the other, South High, there are only 900 students. Similar imbalances exist in the middle schools. North High is housed in a five-year-old state-of-the-art facility. South is housed in a sixty-five-year-old facility that needs substantial repairs.

In recent years, minority students have made up about 20 percent of the total student population. The Board noted that some of its schools had larger numbers of minority students, while others had smaller enrollments. The School Board sought to prevent racial isolation in its schools.

After numerous public meetings and after considering a number of different proposals, the School Board adopted a Redistricting Plan to improve the educational quality and the broad diversity of all of its schools. The Plan’s overarching goals were:

- To equalize the enrollments at the two high schools;
- To keep elementary schools at or under capacity;
- To not increase the number of buses required for transportation;
- To use geography to enhance diversity in the schools; and
• To avoid racial isolation in the schools.

To achieve its broad goals, the School Board decided that it needed to rezone 350 high school students from North High School to South High School. The Board also decided that the neighborhood with the largest number of African American students should be split in half by geography. Those African American students living in the northern section of the targeted neighborhood would stay at North High. Those living in the southern section would be rezoned to South High School. Approximately, half the rezoned students were African American. The others were white or Latino students from adjacent neighborhoods. The Board explained that its primary goals under the Redistricting Plan were to promote balanced enrollments and better student-teacher ratios, to encourage broad geographic diversity, and to avoid racial isolation, along with its other goals. The Board planned to address similar concerns in the middle schools in the future, after it resolved the issues at the high schools.

The parents of the ten African American children who were rezoned from North High to South High under the Redistricting Plan have filed suit challenging the new redistricting policy.

1. According to relevant precedent, what is the strongest argument the plaintiffs can make against the Redistricting Plan?

   I. That it is a form of racial balancing and subject to strict scrutiny.

   II. That it violates *Plessy*.

   III. That it promotes de facto segregation.
IV. That it violates the principles of *Swann*.

(A) All of the above.

(B) II and IV only.

(C) III only.

(D) I only.

2. Under relevant precedent, who is likely to prevail?

(A) The School District because the new plan is presumptively valid.

(B) The parents because the new plan violates *Brown*.

(C) The parents because the new plan uses racial demographics which is prohibited.

(D) The parents because the school district had a duty to eliminate racial isolation from its schools.

3. MTV-News is a nightly news program providing a daily digest of the legal troubles of celebrities, including reports on marriages, divorces, and an array of criminal allegations or charges. To promote its program, MTV-News seeks to advertise its daily news program on a series of prominently-located and highly visible billboards throughout Anycity.

An Anycity sign ordinance requires a special permit for all signs (including billboards) except those containing “a political or non commercial message.” MTV-News sought to install a series of temporary billboards without first obtaining the required permit. Anycity has declared that MTV-News’ billboards are subject to the ordinance.
In a law suit challenging the constitutionality of the ordinance, who is most likely to prevail?

(A) Anycity, because zoning regulations are subject to rational basis review and judicial deference.

(B) The challenger, because the ordinance bans political speech.

(C) Anycity, because economic regulations are subject to deference.

(D) The challenger, because the ordinance is subject to heightened scrutiny under the Commercial Speech doctrine.

4. Anycity is a large city known for attracting tourism and convention business. In an effort to improve its appearance and the transportation available to its many visitors, Anycity has adopted a policy limiting the number of permits available to operate taxicabs. Every taxicab operator must obtain a permit to offer transportation for hire in Anycity. The new policy also gives permit preference to taxicab operators who have been in business for at least five years and who have had no safety violations.

In a suit challenging the permit policy, who is likely to prevail?

(A) The challenger because of the Equal Protection Clause.

(B) The challenger because of the Article IV Privilege and Immunities Clause.

(C) The challenger because of the Due Process Clause.

(D) Anycity because the policy is rationally-related to a legitimate interest.
5. The Daily City News is a leading newspaper in Anytown with a circulation of 100,000 copies per day. It is a general paper, covering local affairs, politics, sports, legal, and judicial affairs. One of its reporters, Jude Laws, recently published a series of articles criticizing a local judge.

In the articles, Laws wrote that the judge had granted bail to a man who had previously been charged with aggravated assault, who, shortly after his release, murdered a 12-year-old girl. The articles implied that the judge had released the suspect, despite the suspect’s history of violence, including charges of assault and weapons violations. In fact, the judge did not know about the suspect’s violent history because the information was absent from his criminal file history when the judge granted bail.

In an action for defamation against the Daily News, who is likely to prevail?

(A) The judge because the statements were false.

(B) The Daily News because the First Amendment shields the press from tort damages on these facts.

(C) The judge because states have an interest in protecting vulnerable plaintiffs from libel.

(D) The Daily News because the First Amendment affords the press absolute immunity from tort damages.

6. Anystate’s Board of Funeral Directors has become increasingly concerned about expanding competition in the casket industry. The Board adopted a rule prohibiting anyone other
than licensed funeral homes or funeral directors from selling caskets in Anystate. The St. Joseph Abbey, an Order of Monks, who had been making simple wooden caskets and selling their inexpensive caskets for only $1,500 to $2,000, challenged the law in federal court.

The strongest constitutional argument against the rule is

(A) The law violates the right to contract.
(B) The law is arbitrary and discriminatory and lacks a legitimate justification.
(C) The law violates the establishment clause.
(D) The law violates the free exercise clause.

7. Anycity School District has sought ways to expand the educational opportunities of its high school students. It adopted a new policy allowing its public high school students, grades 10-12, to take up to 3 credits for off-campus study of philosophy or religion at a local private college. Parents must approve participation. Students who complete the courses are given up to 3 credits toward graduation.

In a suit challenging the policy, who is most likely to prevail?

(A) The challenger because of pervasive entanglement.
(B) The challenger because of excessive entanglement.
(C) Anycity because the policy is one of neutrality and true private choice.
(D) Anycity because school officials have broad control over selecting its courses.

8. Anystate has been under tremendous public pressure to adopt new restrictions on gun
possession, after a series of high profile cases where persons were attacked with guns in court, in church, and in schools, among other sensitive sites. Under the new law, persons are prohibited from carrying weapons in bars, courts, schools, churches, and work places, unless they are members of law enforcement or unless they have a special license to provide security at the site.

In a suit challenging the new gun law, who is most likely to prevail?

(A) The government because it has the authority to enact reasonable gun regulations for sensitive areas.

(B) The challenger because the government cannot regulate guns.

(C) The challenger because the Second Amendment guarantees each person the right to possess guns wherever they need them for personal defense.

(D) The government because it has the authority to ban guns as it thinks best.

9. Anycity has seen an enormous rise in its population in recent years, primarily from recent Latino immigrants from various parts of the Americas. Anycity voters adopted a new ordinance which made it unlawful to rent property to noncitizens or persons who could not prove they were lawfully in the United States. In a suit challenging the new ordinance, what is the strongest argument against the law?

(A) The law violates the Full Faith and Credit Clause.

(B) The law is presumptively invalid under the Equal Protection Clause.

(C) The law is presumptively invalid under the Commerce Clause.

(D) The law is invalid under the Procedural Due Process Clause.
10. Central High, East High, and South High are the three public high schools in Anytown School district. For the past decade, the three schools have held their respective graduation ceremonies in the main sanctuary of the Mega-Dome, a local Christian evangelical religious center. Students from each of the high schools requested the move from the high school gym to the church sanctuary, which is much nicer, much larger, and air-conditioned. The senior class in each school voted on the change. The school principals and the district superintendent then chose to move the graduation ceremonies to Mega-Dome.

The Mega-Dome is adorned with large crosses and other religious symbols. The church lobby is filled with religious banners, posters, and literature.

In a suit challenging holding the graduation ceremonies in the Mega-Dome, who is likely to prevail?

(A) The challengers because the policy violates the Establishment Clause.

(B) The challengers because the policy violates the elections clause.

(C) The district because the relevant speech is private, not public.

(D) The district because the Court has abandoned the Lemon test.
Suggested time
(90 minutes)

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 Grace Scholarship Plan (GSP). It provides 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.)
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 banned such pickets and protests during the burial service. In recent years, Anystate has concluded that a more expansive regulation is necessary because of a series of protests by a group that targets funerals to express their view that God is punishing the people of this country because of what the group calls the sin of homosexuality. Group members routinely show up on streets outside funerals with various signs expressing their views. Many mourners find the group’s activities offensive and hurtful. They want to prevent the funeral protests entirely.

In response, Anystate amended its law. The amendment made three major changes, 1) extending the time within which the statute applies, from one hour before until one hour after a funeral or burial service, 2) creating a 1000 foot buffer zone between protesters and mourners, and 3) the amendment expanded the definition of “protest activities.” 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 1000 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 service or a funeral procession.

A person or group convicted of violating the provision is guilty of a third-degree misdemeanor, punishable by a fine of up to $10,000 or up to six months imprisonment.

Anygroup is an association whose members regularly engage in picketing at funerals in Anystate. Members assert 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 brilliant 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. Discuss all potential constitutional challenges and how a federal court would likely resolve them.
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 STANDING 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, Daimler, Craig, Lujan): 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). Article III judicial power exists only to redress or protect against injury to the complaining party (Warth).

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).

Along with the general principles set forth above, the Court has articulated special rules for the standing of an Association (Warth, 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 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 2012, 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 2020.

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 or ship 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.)
Each of you will be responsible for preparing a typed 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.

Case Briefs

Everson  Professor Fair
Lemon  Young, Alyssa
Zelman  Wirtes, Joey
Lee v. Weisman  Udupi, Kaustubh
Town of Greece  Tyler, Alyssa
Van Orden  Traylor, Andrew
McCreary v. ACLU  Steffen, Kelly
Yoder  Stafford, Clifford
Smith  Smoot, Tyler
Locke v. Davey  Slater, Clifford
Trinity Lutheran  Shiever, Emily
Brandenburg  Shewmake, Reave
Holder v. HLP  Shelton, Jordan
Chaplinsky  Santee, Rachel
Feiner v. NY  Sandlin, Jennifer
Cohen  Ross, Ian
NY Times v. Sullivan  Roman, Jarrett
Miller  Richardson, Will
Ashcroft  Purser, Gillian
Virginia v. Black  Pope, Jessica
Central Hudson  Ogren, Mark
Marbury v. Madison  Nikolic, David
Ex Parte McCardle  Milling, Catherine
Martin  McCullers, Crawford
Cooper  Marcroft, Anna
Warth v. Seldin  Lunney, Connor
Daimler  Kidd, Mindy
Lujan  Kerem, Danielle
Washington v. Davis
Arlington Heights
Grutter
PICS v. Seattle
Fisher
Reed
Frontiero
Craig
U.S. v. Virginia