An Informal History of How Law Schools Evaluate Students, With a Predictable Emphasis on Law School Exams

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Final exams play on a law student’s world like some weirdly orbiting moon. They are always in sight; but while they’re at a distance, they serve merely to create the tensions which swell daily like tides—to read, to keep pace, to understand. As exams draw close, however, . . . their gravitational force starts to shake the whole place to pieces.¹

American law schools currently employ one essential, formal method of student evaluation—course-end examinations.² While informal evaluation, particularly observation of student oral class performances, does occur, the exams are usually the exclusive method by which a record of student performance is created. Examinations serve to measure the ability of the student to use the material assigned, whether they are fit or unfit for the practice of law, or for the recognition by the school that sufficient skill is had to award a law degree,³ whether they should be recognized and identified for the employers as outstandingly fit,⁴ and to signal the strengths and weaknesses of a student’s work for the student’s future development, as an incentive both to learn as much as possible during instruction and to review that instruction later.⁵ The exams of the many American schools now follow a surprisingly few patterns based on a few hypothetical questions and, less often, on a group of many multiple-choice questions. This pattern—of hypothetical essay examinations being the sole record of the students’ performance—is a recent stage in the evolution of U.S. legal education. Once exams were only one form of evaluation to judge fitness, used in conjunction with class recitations, notebook inspections, and moot court performance. This complicated

¹. Associate Professor, Thomas M. Cooley Law School. I thank the editors of the UMKC Law Review for their invitation to write this article; without their exhibition of blind faith in agreeing to publish the unwritten, it would have remained so. I am also grateful to the Thomas Cooley librarians, particularly Sharon Bradley, Ardena Walsh, and Steve Boudette in locating some of the more obscure material for this odyssey, to Kristin Keck, Jill Pullum, and Cindy Hurst for their typing assistance. Frank Lorenz of Hamilton College, Kent McKeever and Whitney Bagnall of Columbia, and David Warrington and David DiLorenzo of Harvard were particularly helpful in locating some of the more critical bits of academic flotsam on which this paper is based.

². SCOTT TUROW, ONE L 157 (1986).

³. These goals for examinations and their resultant grades are well established. See, e.g., Karl N. Llewellyn, Lawyer’s Ways and Means, and the Law Curriculum, 30 IOWA L. REV. 333 (1945).

⁴. Again, these goals are old hat. See, e.g., John L. Grant, The Single Standard in Grading, 29 COLUM. L. REV. 920 (1929).

⁵. These goals are, unsurprisingly, less often noted in the literature of this century.
evaluation scheme was replaced by graduation exams, designed to measure the specific knowledge acquired over the whole course of study.

These in turn were followed by annual and course-end examinations. The questions of these exams evolved from brief didactic questions designed to measure rote memory to complicated hypotheticals designed to measure application. In this century, the objective question, the spiritual descendent of the then-obsolete didactic question emerged, allowing both faster evaluation of the student submission and broader coverage in the evaluation. This article describes this evolution, commencing with its English antecedents and influences.6

I. THE ENGLISH EXPERIENCE TO 1900: TRIAL AND ERROR

A. Moots

Blackstone maintained that the English Inns of Court arose in response to the operation of Magna Carta and other acts fixing a permanent location of the law courts in London. "Here exercises were performed, lectures were read, and degrees were at length conferred in the common law, as at other universities in the canon and civil."7 From the Fourteenth to the early Seventeenth Century, the Inns were power-houses of legal instruction,8 and their primary form of education was the argument of moot cases,9 which when done by the students, served as the student's oral examination.

The most spectacular of these moot arguments were performed semi-annually by senior barristers in the Readings, held in the Lent and Autumn vacations; student attendance was compulsory.10 As reported by Nathaniel Bacon, the senior barristers would select a reader, who would choose a statute to describe and criticize, offering an...
argument for reform of the statute. This argument would then be challenged by other barristers in a debate that would last three or four days per week for two or three weeks.11 Besides these showpiece arguments by the senior lawyers, the seniors observed student moots and arguments throughout terms and vacations, with varying degrees of participation by senior barristers.12 The Readings set the standard and the style of the student moots. The problems assigned for student mooting, as for many of the Readings, tended to be hoary and well-tested, but this did not make the disputation easier. Professor Baker illustrates a typical moot problem from Lincoln’s Inn:

Two coparceners, seised of a manor by descent, have a tenant who holds the manor by homage and fealty and by the services of 20s. a year, repairing the mill and roofing the hall of the manor; the tenant grants part of the manor to a stranger, to hold of the chief lord of the fee by the services due; one of the parceners commits felony, for which she is attainted; the lord enters as in his escheat; and then they make partition between themselves, so that the mill is allotted to the lord and they hold the hall and the other services in common; and then they grant the hall to a man pur termes d’autre vie, during whose time the hall is unroofed; he for whose life the hall was leased dies; they enter as in their reversion; the lord makes a recognizance to a stranger to pay certain money at a certain day, at which day he does not pay, and so the other sues execution and has execution in respect of the mill; and during that time the mill falls down; the money is paid; the lord enters and distrains them; the tenants make replevin. Ceux?”13

In observing students in the arguments lasting several hours, the senior lawyers both evaluated and coached their apprentices. The Inns’ moots, however, were interrupted by the English civil war, an event from which they never fully recovered.14

B. Examinations

In the mid-sixteenth century, an oral examination was required of candidates to be called to the bar, examining, primarily, for satisfaction of residence, mooting, religious observance, and attendance requirements.15 In 1596, the Readers of each Inn were given quotas of students who should be called, from the “fittest for then learning and honest conversation,” although even such students should only be qualified to practice “very sparingly, in respect of the great multitude that there be already.”16

14. Lemmings, supra note 11, at 78-83. Lemmings collects citations of various scholars who disagree slightly over the dates of the beginning of the decline of the moots in the century prior to their interruption in 1642. Id. at 78 nn.7-9.
15. Inner Temple passed such a requirement in 1556. 1 Inner Temple Records 225-26 cited in Richardson, supra note 9, at 171 n.15.
16. Rules of Government of the Inns of Court and the Inns of Chancery, Appendix 5, June 20,
Thus, the exams were mere formality, and students were selected for professional qualification based on interview and on observation in such moots as were held, a state of affairs lasting from the Seventeenth to the Nineteenth century. By the early Nineteenth century, however, even the moots had deteriorated to a series of desultory mechanical exercises held over lunch.

Oxford, which had held lectures in Roman and, until Henry VII, canon law, since the twelfth century, established examinations in its reforms under the Caroline Code of Archbishop Laud of 1636. During the years of study, a law student would be expected to attend lectures and to give disputations on set topics; thus, the education was said to be analytic and dialectic. The topics for argument in the disputations were usually posted on college walls, and the arguments were usually conducted in the afternoons before the officers of the university. Each student performed at least one disputation per term, and there were then four terms.

The examinations to conclude the degree were oral, initially conducted with three examiners questioning a single student, although by the eighteenth century, students were examined in pairs. Responding to the increasingly lax curriculum, the exams steadily eroded to a relatively ceremonial, formal exercise in which performance was often based on simple rote memory and in which failure was almost unknown. By

1596, art 11. reprinted in RICHARDSON, supra note 9, at 175.
17. LEMMINGS, supra note 11, at 63, 261-63.
18. Bagehot recounted his moot from 1850:
A slip of paper was delivered to you, written in legible law stationer's hand, which you were to take up to the upper table where the Bencher sat, and read before them. The contents were generally not intelligible: the slip often began in the middle of a sentence, and by long copying and no revision the text had become quite corrupt. The topic was, "Whether C. should have the widow's estate?" and it was said that if you pieced all the slips together you might make a connected argument for and against the widow. . . . [I]n 1850 the trial "case" had dwindled down to the everlasting question, "Whether C. should have the widow's estate?" The animated debate had become a mechanical reading of copied bits of paper, which it was difficult to read without laughing. Indeed, the Bencher felt the farce, and wanted to expedite it. If you kept a grave countenance after you had read some six words, the senior Bencher would say, "Sir that will do," and then the exercise was kept. But this favor was only given to those who showed due gravity. If you laughed you had to read the "slip" all through.
19. The origins of Oxford legal education in the use of Vacarius's Liber Pauperum and the later vicissitudes of legal education there, are briefly described in Sheppard, supra note 7.
21. A student for the Bachelors of Laws would spend three years in residence, or five years if not a Master of Arts at his matriculation, the other two spent studying logic, moral philosophy, politics, and humane letters. 2 CHARLES E. MALLETT, A HISTORY OF THE UNIVERSITY OF OXFORD 325 (1927), citing Caroline Code, VI, S, iv, c. I.
22. SUTHERLAND & MITCHELL, supra note 19, at 470-71.
23. Id. at 472.
24. MALLETT, supra note 20, at 325. The experiences of Jeremy Bentham and others are reported in SUTHERLAND & MITCHELL, supra note 19, at 474.
1770, the examinations had become almost perfunctory, as witnessed by Lord Eldon's famous description of his examination for a double bachelor's degree:

I was examined for a degree in Hebrew and in History.
"What is the Hebrew for the place of a skull?"
I replied, "Golgotha."
Who founded University College?"
I stated (though by the way, the point is sometimes doubted), "that King Alfred founded it."
"Very well sir," said the Examiner, "you are competent for your degree."

Oxford's examination system was overhauled in 1800, with newly appointed examiners instructed to be more rigorous, which had a rather interesting and unintended effect on instruction in common law. Law examinations were set solely for the bachelor's in civil law, and neither it nor any other degree required instruction in common law. Thus, even after Charles Viner established a professorship to teach the common law, held by William Blackstone and then Robert Chambers, there was little student demand for such instruction. Still, common law instruction continued sporadically, even after civil law instruction had declined. By the mid-nineteenth century, the Professors of Civil Law in Oxford and in Cambridge had ceased to lecture, although the Vinerian lectures still attracted thirty-eight students who still were not examined in common law.

Of course, Victorian Oxford was a time of reform, and the exams finally given in Oxford, which were printed and distributed in the United States, reflect a more thorough-going scrutiny of the preparation of the student than Lord Eldon suffered. The 1871 examination in Real Property lists a dozen questions, testing by rote the student's knowledge of the field.

1. What do you mean by tenure? What are the practical results of the fact that no one can have more than an estate in land?
2. Explain the following tenures -- in frankalmoigne -- by cornage -- in gavelkind -- ancient demesne.
3. The statute De Donis created estates tail. Show the exact meaning of this statement.
4. Trace successive means by which the holding of land in mortmain was restrained.
5. State the rule in Shelley's case, and show how it is related to the original interpretation of a gift to a man and his heirs.
6. What was the object of the Statute of Uses, and by what means was it evaded?

25. Oxford University Commission Report, 1852, p. 59, quoted in Mallet, supra note 20, at 16. Note the skepticism as to Lord Eldon's veracity. Id. Lord Eldon was, of course, correct to suggest he answered one of his two questions inaccurately but to the happiness of the examiners; his answer conforms with what is now politely called the "Aluredian myth." Its origins as part of a fourteenth-century property fraud by the college fellows are illustrated in Jan Morris, The Oxford Book of Oxford 23-24 (1978).
26. Oxford University Statutes, supra note 19, at 29, University Statutes from 1767 to 1850.
27. J.L. Barton, Legal Studies, in Sutherland & Mitchell, supra note 19, at 604-05.
7. Explain the terms general occupant, corruptio sanguinis, vivum vadium, reversion, defeazance.

8. Enumerate the various forms of life estate, and specify the differences between them as regards the rights of the tenant over the land.

9. What changes were made in the rules of intestate succession by the statute 3 and 4 Wm.IV c.106? Show by examples the importance of the changes.

10. Explain the exact nature of Livery of Seisin, and show how the Statute of Uses was employed to evade it.

11. What is the origin of Dower? Trace the successive changes in the law on this subject.

12. Explain the effect of each of the following, and the reason for each:
   (1) Feoffment to A and his heirs (before and after the Statute of Uses)
   (2) Grant to the use of A, to uses as B shall appoint.
   (3) Feoffment to A on condition that B dies before Christmas.
   (4) Verbal lease to A for five years.

These exams were printed and then widely distributed, including distribution in the United States. Of course, the university exams were not alone in their reformation. The Law Society, which oversees the training of clerks who wish to become solicitors, introduced a compulsory written examination in 1835, a requirement enshrined in statute in 1843. This examination was not an overwhelming burden, however, and a Parliamentary committee considered it no more than a "guarantee against absolute incompetency." Indeed, the select committee, finding that legal education in England was nearly non-existent, found that what little existed was overly concerned with the technicalities of law and insufficiently concerned with more general, doctrinal instruction.

It was about this time that England, or at least many of its public institutions, embraced the written examination. In 1853, the India Act made positions in the Indian Civil Service dependent upon performance of an examination, rather than upon patronage as had been the case; competitive exams for appointment were partially mandated for the Home Civil Service in 1855, becoming compulsory in 1870.
1850, secondary school admissions were first based on external examinations, and in 1857 and 1858, Oxford and Cambridge followed suit. By 1862, even government-supported elementary schools were required to give written examinations in reading, writing, and math. As a whole, examinations were seen as a method for the competitive and democratic movement from social preferment to merit as a means of access to education and position. The exams allowed classification of students, testing their skills for those believed to be needed in the professions, and providing opportunity in a slightly more egalitarian fashion.\(^3\)

The Inns of Court first required trainee barristers to take a written exam in 1844, creating the Council of Legal Education in 1852 to create a standard exam, which was initially only required of students who had not attended lectures.\(^36\) The exam became a universal requirement in 1872.\(^37\) It was partly written and partly oral, and it was not demanding.\(^38\)

The 1853 English Bar Exam questions are reproduce in full in part one of the Appendix to this article. It is clear that the exam questions performed several functions. The four preliminary questions echoed the ancient concerns of how long, what about, and with whom the student studied. Most of the questions in the five areas of subject matter — common law and practice; conveyancing; equity and procedure; bankruptcy and practice; and criminal law and procedure — require specific recitations of definitions or pleading elements. A significantly smaller number of questions are in the form of brief hypothetical requiring the student both to supply a particular doctrine and to give an opinion of its application to a few specific facts. There are some idiosyncratic questions, as well. Question eighteen requires the drafting a pleading and a judgement. Question twenty requires recitation of a history of conveyancing. (Many of these questions styles are also to be found in American bar exams in the following years, as in the New York exam also reprinted in part one of the Appendix.)

The University of London commenced a course in English Law leading to the Bachelor’s of Laws degree, graduating three students in 1836 and 135 by the century’s end.\(^39\) University-run legal education in nineteenth century England was not seen as a serious academic enterprise, remaining an unpopular professional option in the face of renewed instruction in the Inns and in local crash courses designed to prepare students for the Law Society exams.\(^40\)

Despite these efforts at reform, the close of the nineteenth century found the professional examination still founidering. At the turn of the century, both English and

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35. See ROACH, supra note 33, at 8-34. That this rationale was somewhat of a driving force in the adoption of the exams may be seen in considering the arguments made by James Booth, vice-principal of the Liverpool Collegiate Institution in 1847. James Booth, Examination the Province of the State: or the Outlines of a Practical System for the Extension of National Education (1847), discussed in ROACH, supra note 33, at 56-60.

36. The idea of examination as requirement for entry to the bar was highly controversial. An effort to require examinations in classics in order to enter the Inns and to require an examination in law in order to be called to the bar was killed in the 1830's. See RAYMOND COCKS, FOUNDATIONS OF THE MODERN BAR 23 (1983).

37. Gower, supra note 30, at 141.

38. A popular student guide at the time noted that "The whole examination is an easy one — in fact, a great deal too easy, still it is impossible to pass it without some knowledge of the subject." WALTER R. BALL, THE STUDENTS' GUIDE TO THE BAR 22 (1879).


40. Twining, Laws, supra note 27, at 96.
American critics were alarmed at English instruction that represented about a third of the instruction of an American school and examinations that “do not afford any trustworthy test of adequate knowledge of the law.”

It is, perhaps, unfair not to describe the renaissance of English legal education and examination in this century, leaving the reader with an unwarranted impression that matters are as they were a century ago. The parochial focus of this essay, however, is to consider English forms of educational evaluation and their contributions and their influence on American programs, which waned considerably in the twentieth century. That said, a useful summary of later styles of the English law exam is still had in the review of exam technique by University of London law professor L.C.B. Gower. Considering the English law exam in its collegiate and professional forms, he summarized its question formats in 1950 as falling roughly into three classes:

1. Pure tests of memory on points of detail. For example: “What is the order of succession in the case of deaths after 1925?” This type is common in the professional examinations.

2. Essay questions. For example: “Sketch the history of freehold tenures.” This type is found principally in the university examinations.

3. Hypothetical problems. This type is now increasingly common in both university and professional examinations and there is no need to give examples.

Of these forms, Gowers believed the hypothetical problem to be the most valuable, as it tests understanding of principles and practical proficiency more than mere knowledge.

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43. Gower, supra note 30, at 137, 193.
44. Id. at 193.
II. THE AMERICAN EXAMINATION EXPERIENCE, PART I: EXAMS OF THE COMMENTATORS

Examinations were part and parcel of early American legal pedagogy. While there were graduation examinations, the evaluation of the student through frequent written or oral questioning was integral to the lecture. Given the relationship of the lecture to the commentary style, the examination was really a measure of how well the student had recognized and could later remember and repeat the information in the commentary or, later, the treatise. This system was made longer and more thematically comprehensive in the graduation examination. As the commentary system came into competition with case method instruction, and as bar exams and foreign exams became more hypothetical, the questions evolved into the application of a doctrine or two to solve a simple fact pattern, requiring the student not only to recall the doctrine that applies in such facts, but to apply it to determine which hypothetical party's interests are favored under it. While these exams were often showpieces, many were given as graduation exercises that were held to high standards and that could be barriers to promotion into the second year or to graduation. Finally, as the exams became less frequent and more summary, used to conclude a course of study over a semester or a year, the exam began to test a smaller sample of the student's work.

A. Classroom Exercises and Annual Essays

The first professional law school in America, the Litchfield Law School of Tapping Reeve and James Gould, held examinations of its students every Saturday. These quizzes, usually oral, were overseen by Judge Reeve during his ownership of the school, although Judge Gould hired two assistants, Jabez W. Huntington and Origen Storrs Seymour, to examine the students in his stead beginning in 1820. The questions were meant to give "a thorough investigation of the principles of each rule, and not merely of such questions as can be answered from memory without any exercise of the judgement." Given the structure of the Litchfield lectures, it is a

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45. This section and the next, concerned as they are with the evaluation of matriculated students, generally omit discussion of entrance examinations. The struggle to impose a uniform system of entrance examination was resolved with the advent of uniform use of the products of the Law School Admission Service, but that is a struggle beyond the scope of this essay.


47. McKENNA, supra note 5, at 120, 171-72; ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 121, 356 (Carnegie Foundation for the Advancement of Teaching, Bulletin No. 15, 1921) (1976). While Seymour’s contributions were late in the day and rather slight, Professor, later Justice, Brandeis seems to have been in error in declaring that Jabez Huntington, along with Reeve and Gould were “the only instructors whom the school ever had.” Louis Brandeis, The Harvard Law School, 1 THE GREEN BAG 10, 12 (1889).


49. Few of the Litchfield notebooks have anything other than weekly lectures in them. None reviewed by the author to date had weekend questions, although it is likely that some of them do. For a
reasonable assumption that these questions were quite specific, created to measure the degree with which students could recall specific points of the week’s lectures.

In the earliest days of Harvard’s law school under Asahel Stearns, students were given oral or written examinations weekly as well as at the end of each text or topic. Written examinations were not apparently required in every course, however. In 1826, Stearns’ report to the school’s overseers described the system of instruction included in regular exercises of the school: “1. Recitations and Examinations in several of the most important text books, such as Blackstone’s Commentaries, Cruise on Real Property, Saunders on Uses, Fearne on Remainders, etc.”

A final examination, of a kind, was also required, covering the content of the entire course, in the form of set dissertations. The students were given topics set by the faculty, which they answered in descriptive essays. The 1820 dissertation questions were these:

1 -- The Rules of Descent and Distribution of Real and Personal Property by the Civil Law, the Law of England and the Law of Massachusetts.
2 -- The several injuries to which the Heir is liable in relation to his right of succession to Real Property, and the several remedies by Entry or Action which are furnished by the laws of England and of Massachusetts.

After 1829 Judge Story and Professor Greenleaf gave quizzes and examinations in class, often several times a week, but these examinations were as voluntary as was class attendance. This system persisted through Joel Parker’s deanship. So, from 1829 to 1871, Harvard seems to have had no formal examination of student performance that could bar a student from the degree. While this became a criticism of the program, the absence of exams was obviously not seen by Story, Greenleaf, Parsons, and the other lights of mid-nineteenth century Harvard as sufficiently problematic to cause them to institute any tests of greater rigor.

B. The Graduation Examination and Annual Examinations

Of course, that Harvard abandoned the exam did not mean that it was not in flower elsewhere. The University of Virginia Law School, reorganized in 1829 under discussion of the notebooks, see Sheppard, supra note 7. The time available in the drafting of this article did not allow review of the Litchfield notebook holdings in Yale. The publication of a transcribed Litchfield notebook in the Yale collection is forthcoming.

50. Reed, supra note 48, at 357.
53. Annual Report on Harvard University, 1829-30 xxviii; Annual Report of the University of Cambridge, 1847-48, 31, cited in Reed, supra note 48, at 356 n.3; see also Warren, supra note 5, at 434-36; Sheppard, supra note 7.
55. Parker maintained that the professional examination was a task for the bar, not the schools, which provided an honorary certification with the degree. Joel Parker, The Law School of Harvard College 32-32 (New York, Herd & Hoffman, 1871); Warren, supra note 55, at 368-70 n.6.
John Tayloe Lomax, required its graduates not only “to display a competent knowledge of the Common Law and the Law Merchant – embracing generally all of the branches of what is commonly considered ‘municipal law,’ [but also] to have passed an examination in English grammar and literature.” 56  The Virginia exam was tough. Indeed, during the tenure of John B. Minor, who took up his post in 1845, a candidate was required to answer five-sixths of the questions on the graduation examination. In the first ten years of Minor’s tenure, only fifty-nine of the 649 students who matriculated were awarded degrees. 57

Examinations in law were necessary for those law schools whose students benefitted from the diploma privilege and could be admitted to the bar of the schools’ states with no further exam. As schools were granted the right for their graduates to enter the profession without further examination by the local bar, the schools’ examinations took on the role of both professional certification and justification of the privilege. 58 Thus, Theodore Dwight secured the diploma privilege for Hamilton College in 1855, under a legislative act allowing the court to appoint a committee of lawyers to examine Hamilton law students at the school. 59  In 1859, Albany Law School persuaded the New York legislature to designate its own faculty as bar examiners. 60  Dwight worked his magic again when he moved to Columbia, not only securing the diploma privilege for his own school’s graduating class of 1860, but also representing both Columbia and New York University in suits to defend the privilege. 61  By 1870, nine schools held this privilege in their own states, although Oregon, which had no law school of its own, extended it to the graduates of everyone else’s. 62

In carrying out the new obligations of professional bar examiner, the faculties usually resorted to written exams, as well as daily or weekly quizzes. Thus, the Columbia course of instruction in 1864 included obligations for the student in two forms of examination. He must “prepare himself each day upon a subject selected by the Professor. He is then examined upon the subject studied. Having grappled with some of its difficulties, he is then prepared for the oral exposition which accompanies the examination.” 63  Further, he was obliged to complete a “pass” or final examination

56. University of Virginia, Faculty Minutes, April 5, 1828, quoted in John Ritchie, The First Hundred Years: A Short History of the University of Virginia for the Period 1826-1926, 15 (1978).
57. Id. at 41. Virginia’s exams remained tremendously exacting into this century. In 1901, UVA professor Raleigh Minor argued for strenuous standards for all law school graduation exams, even though “[o]bjection is frequently raised to a high and fixed examination standard” being unjust, particularly because of the examiner’s potential, even if nonexistent, caprices. Raleigh C. Minor, The Graduating Examination in the Law School, 7 VA. L. REG. 468, 471 (1901).
59. N.Y. LAWS 1855, c.310 (1855); see also Reed, supra note 48, at 251.
60. N.Y. LAWS 1859, c.287 (1859); see also Reed, supra note 48, at 251.
63. Report of the Board of Trustees to the State Regents, 1863, reprinted in A History of the School of Law, Columbia University 60 (Julius Goebel, ed., 1955) [hereinafter, History].
at the close of the senior year, which were held before the Law Committee, a group of faculty and external examiners, and which lasted for three days. These examinations were oral, and "adopted to secure greater familiarity with the subjects in which they had been instructed, every effort being made to avoid cramming." Columbia also held prize exams administered to students prior to graduation, but which do not appear to have led to sanction for poor performance, and daily quizzes held under third-year student tutors. There are no apparent records of failures in these exams.

Whether through the influence of law-school examiners on the bar, or bar examiners on the schools, or both, a strong similarity in question form is evident between law school exams in the middle of the century with the bar exams. Bar exam questions in New York as late as 1888, reprinted in part one of the Appendix, mirror the patterns of the school exams.

That schools with the diploma privilege carried on examinations does not suggest that this is the only reason for them to do so. Virginia actively sought to avoid such a privilege, although it continued to require a rigorous exam, and other schools, such as the St. Louis Law School, began to examine students without such a privilege.

The University of Iowa first required an examination for graduation of its class matriculating in 1865, a bar-like examination that included not only knowledge of the law but of character. Four local attorneys were jointly appointed by the school and the Iowa Supreme Court as examiners, who held, apparently, oral examinations over three days. The earliest known written record of Iowa's exams is that of its Fall 1868 examinations. These were held on two days in its fall term, with two more supplementary days of exams of fall material given in January of the following year. Each question was an elemental inquiry, requiring a recitation of a term, definition, or specification of a legal doctrine, and each exam drew questions from several topics of law. The first day's examination consisted of fifteen questions, which include intermingled questions of constitutional law, property, contracts, and commercial paper:

1. What are the sources of the Law of Nations?
2. When have the Federal Courts jurisdiction in common law cases?
3. What are the sources of municipal law in this country?

64. Id. at 62; REED, supra note 48, at 356.
65. Theodore W. Dwight, Columbia College Law School, New York, 1 THE GREEN BAG 141, 152 (1889).
66. Id. at 154.
67. Id. at 157.
68. The diploma privilege statute passed in Virginia in 1842 allowed graduates of the College of William and Mary and of the University of Virginia to enter the bar based solely on their law school diplomas. This statute was repealed in 1849 at the request of Virginia's Professor John B. Minor, who argued that the law school and its graduates would be better off if the students' "fitness to practice law should be tested in the same way with students in private offices or in private law schools." COMMONWEALTH OF VIRGINIA, REPORT OF THE REVIEWERS 824 (1849), quoted in REED, supra note 48, at 350.
70. List of Questions Propounded at Examination, Fall Term, in Journal of William G. Hammond 58 (Special Collection, University of Iowa Law School Library). This journal is described more fully in Moylan, supra note 70, at 108.
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4. State the absolute rights of persons, and define each.
5. What constitutes a valid marriage at common law?
6. What interest had the husband at common law in each kind of his wife's property?
7. When is a father responsible for his child's contracts and torts?
8. State the distinction between real and personal property.
9. What are the essential elements of a valid contract?
10. What did the Statute of Frauds provide?
11. Define a bailment, and enumerate the various kinds.
12. What is the difference between a bill of exchange and a promissory note?
13. What is an easement?
14. State the difference between the present legal rights of [a] mortgagee, and those he had at common law.
15. What are the chief differences between our rules of descent and those of the common law?⁷¹

The second day's exam included questions, similarly constructed, touching on civil procedure and trial evidence, contracts, torts, and crimes. This exam's first question was a question of case reading, "What is an issue, and how is it to be reached?"⁷² These questions followed instruction by Professors Hammond and Cole with student readings assigned in Kent's Commentaries, Stephen on Pleading, the Iowa Code of 1860, and Greenleaf on Evidence. Professor Hammond's Torts lectures appear not to have corresponded to a particular book.⁷³ Iowa's supplemental exams, given half on January 16 and half on January 30 of the next term, included more questions of a similar style, drawn from similar topics of law, but on a slightly more sophisticated plane. These are the questions of the first day:

2. Who are entitled to the rights of the native-born citizens of the U.S.?
3. Of what do the written and the unwritten law of this country severally consist?
4. What are the powers belonging to a corporation as such?
5. When & how far is a husband liable for his wife's debts?
6. When is the endorser of a note liable upon it?
7. How does a fee differ from a freehold, and what are the different kinds of fees?
8. How does a mortgage differ from a conditional sale?
9. Define each of these terms, reversion, vested remainder, contingent remainder.
10. What are the essential parts of a deed.
11. What do we mean by recording a deed, and what will be the effect of omitting to record it?
12. What is a noncupative will, & when is it valid?
13. How may a will be revoked?
14. What is the difference between the English rules of descent, and the American?

⁷¹ Journal of William G. Hammond 58 (Special Collection, University of Iowa Law School Library).
⁷² Id.
⁷³ Moylan, supra note 70, at 110-11.
15. What is the right of eminent domain?  

Questions of the second day were based largely in pleading, evidence, tort, and crimes.  

The University of Chicago Law School, opening in 1859, required examinations of its students prior to graduation, and the exams were first given over three days in July of 1861. Similarly, the St. Louis Law School, of Washington University in St. Louis, required an examination of the students of its first entering class, in 1867. These students took not only termly exams that were written and graded by the professors but also graduation exams given at the end of the second year that were written and graded by an outside board of lawyers and judges. Boston University Law School, opening its doors to the many who sought to avoid the Harvard case method in 1872, commenced its instruction with both annual and graduation examinations.  

The idea of the annual or termly examination as the sole method of evaluation did not, however, gain universal acceptance, and many schools continued to hold weekly or daily examinations. The University of Michigan established a general examination in 1860, but it also hired recent graduates and young lawyers, called “quizmasters,” who oversaw daily oral and written examinations of the material covered in earlier lectures, beginning in 1859. These oral exams became increasingly rigorous over the years, and, by 1883, students were barred by poor performance from promotion to the second year.

74. Id. at 59.
75. Id.
76. The Chicago Daily Tribune of July 1, 1862, reported the content of the examination questions in detail. The property question entailed a fair portion of Washburn’s property treatise, which was the assigned text:

The intricate questions as to real estate were extremely well handled. In connection therewith, the various modes of holding property, from feudal days down to our own times, were closely examined and contrasted, and peculiar relations of lessors, lessees, tenants for life, tenants at will, and the various modes of conveyancing, fully considered. The multitudinous questions arising out of wills, divorces, and the rights of husbands in the property of wives were next entered into. The subjects of dower and jointure were treated. quoted in James E. Babb, Union College of Law, Chicago, 1 THE GREEN BAG 330, 337 (1889).
77. REED, supra note 49, at 357. Charles Warren believed that this was the first law school examination in the country to be required for a degree. WARREN, supra note 5, at 364 n.1.
78. Charles C. Allen, The St. Louis Law School, 1 THE GREEN BAG 283, 285, 287-88 (1889). For examples of the questions of the examiners, which are not unlike those of the Iowa exam described above, see WASHINGTON UNIVERSITY SCHOOL OF LAW, CATALOGUE WITH Moot COURT AND Examination Papers for the School Year 1882-83 (1882).
79. George W. Swasey, Boston University Law School, 1 THE GREEN BAG 54, 58 (1889).
81. Id. at 192-94.
82. An example of the written questions of the quizzes appears to be found in the numerous quiz books that came from Michigan during this era. See, e.g., CHARLES CLINTON WALSH, THE STUDENT’S QUIZ BOOK, CONTAINING QUESTIONS, ANSWERS AND A HISTORY OF THE LEADING CASES IN ANSON ON CONTRACTS AND BLACKSTONE, AS TAUGHT BY THE PROFESSORS IN THE MICHIGAN LAW SCHOOL (1892).
83. University of Michigan Law School, Announcement 1885-1886, quoted in BROWN, supra note 81, at 197.
INFORMAL HISTORY OF EVALUATIONS

This form of dual evaluation, of frequent quizzing with annual or graduation examinations, was not uncommon in many schools toward the last quarter of the century. Iowa's curriculum, designed by William Hammond, required quizzing, three termly final exams, and a graduation exam.\textsuperscript{84} Cornell held daily examinations in all of its lecture classes, particularly in its elementary law class, as well as termly and graduation exams.\textsuperscript{85} Penn held frequent examinations as well as a graduation exam.\textsuperscript{86} Columbia's combination of daily quizzes, annual prize exams, and graduation exams, has been discussed.\textsuperscript{87}

III. THE AMERICAN EXAMINATION, PART II: EXAMINATIONS OF THE CASE SCIENTISTS

Famously, the 1870's saw the advent of the case method of instruction, starting first at Harvard under the aegis of Dean Christopher Columbus Langdell. At the same time, Harvard reintroduced examinations.\textsuperscript{88} The exams that accompanied case method instruction came, fairly quickly, to emulate the style of instruction, with examinations built around full-blooded essay questions of a complexity that increased over time. Over the century from 1870, these questions have placed a greater emphasis on developing the facts that might lead to a decision, on identifying the various doctrines that would govern those facts, on demonstrating the rationale of the doctrine and the manner in which it applies to the facts, and on an expectation that the student might criticize the rightness of the application of the doctrines that would seemingly govern the outcome.

These essay questions have required an increasing depth of analysis of fewer issues and subjects. The questions represent increasingly complicated choices by the examiners in the method of evaluation, sometimes requiring a greater portion of the answer to be occupied by policy analysis and criticism than by recitation or application of the applicable rules. For these reasons, and because of the influence of the bar exams, the essays have been augmented with the addition of batteries of short machine-scorable "objective" questions, which were initially true-false and then multiple choice.

Student performance on these end-of-term exams, whether or not they include shorter or machine-scorable questions, form the basis, almost universally in this century, of grades. The grades are, of course, averaged, allowing a student to be placed in rank order among other students, as well as given honors, allowed to graduate, or asked to leave.

\textsuperscript{84} Emlin McClain, \textit{Law Department of the State University of Iowa,} 1 \textit{THE GREEN BAG} 374, 383-84 (1889).
\textsuperscript{85} Harry B. Hutchins, \textit{The Cornell University School of Law,} 1 \textit{THE GREEN BAG} 473, 484-85 (1889).
\textsuperscript{86} C. Stuart Patterson, \textit{The Law School of the University of Pennsylvania,} 1 \textit{THE GREEN BAG} 99, 107 (1889).
\textsuperscript{87} See supra notes 64-68 and accompanying text.
\textsuperscript{88} The case method is well-known to any survivor of the modern law school. Its dawn at Harvard and pre-dawn antecedents are described in Sheppard, supra note 7; see also William P. LaPiana, Logic \\& Experience: The Origin of Modern American Legal Education (1994).
A. From Quiz to Hypothetical Essay

Alfred Reed described Harvard's renewed use of annual exams as being made under the influence of the English examination movement and, perhaps, in recognition of disappointing bar exam performances by its graduates. The Harvard Law School Circular of 1871 announced that the LL.B. would only be conferred upon students who shall pass satisfactory examinations in all the required subjects and in at least seven of the elective subjects, after having been in the School for not less than one year.

The examinations for a degree will be of a thorough and searching character; but will be limited in scope to the ground covered by the instruction given in the School in the several subjects.

This announcement "came upon the public as an innovation of a most startling character." These exams were first administered between June 14 and 22, 1871.

Printed questions were submitted in June to the candidates, covering all the principal topics of Law and Equity. These questions they were required to answer in writing; the answers being written in the presence of some member of the faculty, without consultation with other persons or with books.

The examinations occupied six days, and judging by the questions and such of the written answers as have been inspected... it was an honest and thorough test of the acquirements of the student.

A critical facet of the newly reconstituted Harvard exam was not only that it served as a guide to student progress, but also that it could be a bar to further attendance or receipt of the degree. With the 1872 exams, students who failed to pass the first-year exam were made ineligible for the degree, even though the degree would not have been conferred until the end of the second year. In 1872, twenty-six students...
sat for the first-year exams, of whom nineteen passed but seven failed, disqualifying them for further study.65 Passing a first-year exam required performance of at least seventy percent, and students could fail no more than two of the subject-specific exams.66 In the 1871 second-year exams, which qualified for the degree, thirty-one had been examined; twenty-eight passed and three failed. This pattern continued in 1873, when forty-six of the fifty-six first-year examinees passed.67

Dean Langdell’s exams followed the pattern of examinations in England, as well as in Litchfield, Columbia, and Iowa, in asking specific questions to measure specific knowledge of points of law. Thus, in 1871, typical questions from the exams were quite in keeping with the earlier models. Each question is designed to elicit a specific rule or law or definition. Agency questions included mere recognition of limits on capacity for agency of infants and married women,68 and corporations, equity, and property questions all included demands for simple definitions.69 This form of specific question was soon modified by the questions propounded by Langdell’s faculty, if not by himself.

In his collection of examinations published in 1899, Northwestern Professor John Wigmore argued that the “most fair and practical test of the results of a law-student’s work, and of his capacity to apply his knowledge and to give sound legal advice to future clients, is an examination consisting of practical problems in the form of concrete hypothetical cases.”100 Wigmore gave the credit for implementing these problems as the exclusive basis for an examination paper to James Barr Ames, in his 1873 examinations.101

In Harvard’s 1878 exams, while Langdell’s style remained as of old, and John Chipman Gray used hypotheticals on an earlier model, James Barr Ames was casting his questions in brief and more dramatic hypothetical. Langdell demanded a recitation of the use a particular pleading. Gray’s exam was something between the extremes of Langdell and Ames, asking a more narrow question that would not have been out of place on the older English bar exams, designed to elicit an opinion on behalf of a sheep farmer.102 Meanwhile, Ames has his students advise an employer about actions against a Lothario who seduced the employer’s servant, making her leave his employ. Ames had set the stage for a the use of a number of specific facts for the application of a particular rule, which was not in itself novel. What made his stage important was to place the student in the role of acting in the drama. He made the student the lawyer, not

96. These standards were set by faculty vote on June 24, 1872. Warren, supra note 55, at 385 n.2.
97. Id. Such pass/fail ratios were not uncommon. Hastings College of Law examinees in the late 1880’s fared similarly. In 1886, twenty-five seniors passed and five failed; in 1887, the ratio was twenty-one passed to three; in 1888 twenty-five passed to three, and in 1889 eleven passed but two were advised not to appear. Similar academic attrition occurred in lower-class annual exams. Charles W. Slack, Hastings College of the Law, 1 THE GREEN BAG 518 (1889).
98. See Appendix, part 2.
99. Id.
101. Id.
102. See Appendix, part 2.
merely the expositor of the law. In this way, the hypothetical essay question came, perhaps ironically, to resemble the moot court arguments of the early Inns. By giving the hypothetical characters a more human dimension, and by adding sufficient details to tailor the result to the problem assigned, the "practicality," which Wigmore cheered was achieved.

With Ames's hypothetical problems also came a greater range for student creativity became possible, including the pursuit of some ability to criticize the law or to discuss matters of policy. One sees questions of policy interjected into James Bradley Thayer's exams of 1887, which are profoundly evident in the significantly more fact-intensive questions he propounded in 1890.103

Thus, within the first decade of its re-employment at Harvard, the most essential ideas of the modern essay question had appeared and become the norm. Wigmore claimed that this exam style had, within ten years, become nearly universal in "a dozen schools."104 One of the most important features of the new Harvard exam was that it not only determined whether students passed or failed but that it was graded.105

Under the leadership of Harvard poachee William Keener, Columbia's exams took on the character of the Harvard models, adapting them somewhat but employing both the short hypothetical and policy question, emphasizing the rationale for any conclusion. These questions were interspersed with questions in the older style demanding definition or explanation of specific points of law. The Spring 1894 exams illustrate this point nicely.106

First-year students were examined in separate exams on the elements of jurisprudence, contracts, and equity on May 24; common law pleading and practice on May 28; criminal law on May 29; torts on May 31; persons and domestic relations on June 4; real and personal property on June 5. Each examination begins with the italicized instruction, "Give your reasons for every answer." Second- and third-year students were examined on a similar schedule in their respective courses.

Some questions are clearly willing to represent unusual behavior for the purpose of eliciting an application of particular doctrines, such as the first question in equity. "1. A, who has already assaulted B, threatens to assault him daily and to enter upon his lands for that purpose. What are B's rights?"107 The examination in first-year property is in a style typical of the other exams, and several of its questions are reproduced in the Appendix. It consists of three printed pages of nine questions. Two questions require specific doctrinal information to be related, mainly in the extent of current application of ancient doctrines. The other seven are hypotheticals presenting a set of facts among parties, from which the student is to ascertain the claims and defenses of various parties, including those rooted in minority doctrines,

103. Id.
104. WIGMORE, supra note 101. Wigmore noted that he drew his six-hundred-odd pages of exam examples from all of the schools known to him to employ the hypothetical question. Id. These included, in 1899, Cambridge, Colorado, Cornell, Harvard, Illinois, Iowa, NYU, Northwestern, Penn, and Oxford.
105. REED, supra note 48, at 357.
107. COLUMBIA COLLEGE, supra note 103, at 15.
always giving "reasons for your answers." Each of these questions tends to require the application of several doctrines.

The new-fangled annual examination approach to the degree was not, however, readily and universally embraced. For instance Yale, during the 1880s, responded to what its dean saw as Harvard's over-reliance on an otherwise unchecked examination system. Yale allowed office study to count toward time required for its law degree, and it gave a law degree to a student with one year's study, if that student had already passed a state bar exam. Other programs, unaffected by the squabbles of the East coast, continued to employ a graduation exam rather than an annual exam. Hastings, under the rule of John Norton Pomeroy, required an examination at the close of the third year, covering topics from all three years, with an emphasis on recognition of doctrine rather than applications to facts. Thus, an 1882 Hastings question in constitutional law asked

Has the State of California, or any other State, power by statute to prevent Chinese or other foreigners from coming within the State to reside? Give the reasons for your answer. Where does the power of exclusion reside? Assuming that there are no treaties concerning the subject, has or has not the United States Government the power, under the International Law, to prevent the people of any foreign country from coming to and residing within the limits of the United States?

The graduation examination continued in fitful popularity well into this century, popular because it could serve as a bar examination in itself and because it resembled the comprehensive examinations of graduate students in other academic departments of the university. In 1931, Cornell instituted a comprehensive examination at the end of its third year. The test was partly oral and partly written, and it was often drawn with elective questions that emphasized areas in which the student had performed poorly in the preceding five series of semester examinations. This era seems to have one in which law comps. test were popular, judged at least by one attack against them. As well as the graduation exam, some schools continued to rely on the effectively "comprehensive" bar examinations rather than internal examinations as their tests of fitness.

108. Simeon E. Baldwin, Graduate Courses at Law Schools, 11 J. SOC. SCI. 123 (1880).
109. REED, supra note 48, at 174-75. Yale did, however, administer examinations in the course of its regular lectures, at least in 1889. See Leonard M. Daggett, The Yale Law School, 1 THE GREEN BAG 239, 250 (1889).
110. Tulane, for example, appears to have required its graduates to complete a "searching, accurate, and extended" exam after the "improved method of modern professional education." Lamar C. Quintero, The Law School of the Tulane University of Louisiana, 2 THE GREEN BAG 116, 118 (1890).
112. EXAMINATION PAPERS FOR SENIOR CLASS 1882 ON CONSTITUTIONAL LAW, (Bancroft Library, Keith papers, shelf mark CB595 (carton 3)) quoted in BARNES, supra note 108, at 115.
114. Francis W. Jacob, Comprehensive Examinations in Law Schools, 7AM. L SCH. REV. 1133 (1934).
115. In 1889, the newly-opened Buffalo Law School required essays in certain courses, but it seems to have given no examinations; its graduates merely passed the state bar exam. See Charles P. Norton, The Buffalo Law School, 1 THE GREEN BAG 421, 435-36 (1889).
By the turn of the century, the procedure of annual examination had spread among law schools, in part because of the influence of the American Association of Law Schools. At the Association’s first meeting, Virginia Professor Raleigh C. Minor argued for the written examination as a requirement for law school graduation.116 In the 1903 AALS meeting, St. Louis Law School Professor William Curtis described the parameters of the contemporary examination.117 The exam for a given subject should last three or four hours and not much longer to avoid it becoming an endurance test for the students. He was also concerned that the exam receive neither a perfunctory nor a long-delayed review.

Necessarily, then, the examination cannot extend beyond ten to twenty questions, supposing, of course, the questions to be carefully prepared in presenting concrete problems for the application of principles as well as calling for abstract rules and definitions. With fifteen questions the examiner, I contend, may test the student’s knowledge of any one of the well-known topics in which the law finds itself divided. With a class of from fifty to seventy-five, the examiner cannot well report the results short of a week or ten days, employing his fragments of time, or of forty-eight hours in case he does nothing else. Long-delayed examinations are as great a nuisance as long-delayed decisions, and for much the same reason.118

Clearly, the questions Curtis had in mind were not dissimilar to the early Iowa questions or to Ames’ Harvard questions, a group of fifteen or so specific questions of reasonable simplicity designed to identify, or to identify and apply, discrete knowledge of particular doctrines of law. One of the more important of Curtis’s observations clearly applies no matter the form of the question, that the students should have feedback following the exam. He argued that individual students should be told the percentage of performance, with a mark on each question, not merely a pass or fail for the whole, because the student has a right to know both the nature of his error and the idiosyncrasies of the examiner. Further, he suggested that all of the papers written by the class should be accessible, so that students can compare answers and marks.119

One last component of the examination process was, perhaps, inevitable with the raised stakes the exam represented, the institution of standards against cheating. Law schools responded through the use of proctors to observe students in examination rooms and through the adoption of honor codes.120

118. Id. at 43-44.
119. Id.
120. See William Draper Lewis, The Honor System of Conducting Examinations in Law Schools, 5 AM. L. SCH. REV. 454 (1910). For an example of the preference for honor codes, see William Minor Lile, The Honor System, 5 AM. L. SCH. REV. 456 (1910), describing the adoption of Henry St. George Tucker’s honor code at UVA in 1842, which required each candidate to certify on his examination answers, “I, A.B., do hereby certify on honor that I have derived no assistance during the time of this examination from any source whatever, whether oral or written or in print, in giving the above answers.” Id. at 457. Lile’s support for this system was unequivocal. When asked whether he believed in the honor system, he replied, “Yes, as I do in the Christian religion.” Id. at 456.
As the mechanics of the exam began to reach a rough uniformity, the exams themselves did so, too. Through the first half of the twentieth century, an apparently uncoordinated but national transformation took place in the evolution of the essay questions. Slowly over the century, particularly in the years following the second world war, the forms of the essay exam evolved. Various customs grew up, as schools adopted local icons to replace, or at least supplement the venerable exam characters, the widow X, the son Y, and the devisee Z, or seller A, buyer B, and squatter C, who had so often had their rights to Blackacre and Whiteacre, located in the neverland of the common law assessed. In their place, Harvard examinees found themselves in the State of Ames, and Columbia's discovered their practice was in the State of Kent, as students of other schools moved in similarly mythic states and, as often, in real ones, to represent clients with ascribed names rather than letters.

Harvard exam questions collect in part two of the Appendix illustrate this transition. The questions of the 1870's move from stale statements of A sells to B in order to locate, gratuitously, the parties in Boston, New York, and Concord. By 1890, the parties to the hypotheticals include not just A, B, X, and "the owner" or "the carrier" but "The Corporation of Harvard College" and William Kemmler, the first convict to be executed in the electric chair. By 1935, the hypotheticals regularly include names or real and fictitious clients, decedents, beneficiaries, contractors, and so on, in a tremendously rich factual environment. By 1956, the exam questions include hypothetical statutes, and are. Rather well established in the pattern apparent in the survey of recent examinations in part five.

Similar patterns of evolution are apparent in the sample exam questions from Columbia, in Appendix part three, and Michigan in Appendix part four. Among the innovations in these examples, Karl Llewellyn's clear allowance for the student to alter or complete the hypothetical deserves special mention. His 1928 exam typically requires the student to "State any facts you find it desirable to assume." This instruction has become a commonplace, and a typical example of its current use is in Steven Shiffrin's exam in Appendix part five.

A modern question often demands the students to work with complex facts, which disguise multitudes of claims and defenses. The student must isolate the issues involved and perform a variety of forms of analysis in order to give reasoned support for conclusions about the interests of the hypothetical parties. Moreover, the questions themselves have grown more complicated and lengthy. Fact patterns began to include facts that were unnecessary to resolve the issues designed for student evaluation; they began to acquire red herrings.121

In response to this complexity, students both became more prolix and resorted to numerous artifices to give the appearance of scrutiny to the question and of recollection and reason in its reply.122 In response, time, space, word, and page limits were devised,

121. Dean Goodrich defended the red herring in 1931.

We cannot, in an examination, test the man's ability to dig out information and get together the factual material he needs. But we can test his ability to analyze his facts by giving him a more elaborate story than he needs, and watching his selection of the legally significant material out of it. That kind of test is worth making, although it cannot be done in every question for the practical reason that it takes too long a time.


122. Some unfortunately accurate depictions of putative student responses to a modern question are presented in C. Steven Bradford, The Gettysburg Address as Written by Law Students Taking an Exam,
which both required the student to prioritize arguments and allowed the professor a shorter reading time in the evaluation. Harlan Fiske Stone threatened wordy students with a reduced grade, a penalty often asserted by his successors. Among the more entertaining solutions to student prolixity are admonitions to emphasize issue designation and legal reasoning over mere prose, such as Llewellyn’s instruction to “Think first, and don’t write until you see where you are going.” This instruction is compounded by his caveat that he would grade the questions on the structure of the analyses more than on their fullness, “It is not necessary to finish any question. State the law before you discuss or criticize it.”

A signal degree of comparison in the form of exam instruction is that between the exams prior to the 1960’s with many of those collected in part 5, offered over the last several years. Besides admonitory language such as Larry Tribe’s “Concise answers will be rewarded in grading; unduly long answers will be penalized,” he gives instructions on legible handwriting and clear typing. Similar instructions are given by Frank Michelman. These are brief compared to the instructions given by Ronald Rotunda at Illinois, which include similar concerns for clear thought and good organization, along with requests to be polite when leaving the examination room. It seems certain that the greater degree of specificity in these instructions is in response to occurrences within institutions, which in turn provoke clarifying instruction. If this is so, some unusual insight to student behavior in the examination room may be gleaned from such clarifications.

Beginning in the early years of the twentieth century, political, or at least theoretical, ideology began to be seen as a basis for examination. In Laura Kalman’s study of legal realism at Yale, she noted that most of the realists’ exams were conservative, or typical of the exams then used nationally. Even so, she noted that Morris Cohen’s and Harold Laski’s jurisprudence finals tended to be more daring. In 1930, Cohen required students to “state and criticize various views as to what law is and what it should be. When is a case wrongly decided? Indicate the relation of a science of law to the social sciences, to logic, to ethics, and to psychology.” In 1931, Laski asked his administrative law students to illustrate and discuss the gobbet, “[i]n a field where every case involves a multitude of pertinent elements which vary in importance from case to case it is impossible to find the criteria out of which legal rules emerge.” Such concerns for policy in the Yale exams were not unusual, as in Fred Rodell’s 1939 exam question, asking for criticism or defense of this: “It is practically useless to pass a pro-labor statute in these United States. The courts will emasculate it . . . . They already have.”

A later, and more common, approach combines require the student to demonstrate both substantive evaluation and critical theory in providing a case for the student to analyze either as clerk or justice. A classic example of this genre is question one of Herbert Wechsler’s 1976 Constitutional Law exam, reproduced in full in part three of the Appendix.

The desire to increase the effectiveness of the exam as a tool for evaluation, and the desire to do so more efficiently, and sometimes a wild-eyed desire to fiddle around have led professors into the design of numerous experimental questions. There have, of course, been experiments in question design that have failed. In the 1928-29
academic year, Leon Green reportedly set a Torts examination at Yale in which he posed eight complex hypotheticals and directed the students to list the questions posed by the problems but not to attempt to answer them. As Arthur Corbin related the story, "[h]ow happy that made the young pups! And how miserable they made Green. Not even the best ones, or Green himself, would know all the questions."²

Green may have merely used Corbin's contracts grades for the same students instead of compiling his own grades from the botched torts exam.²²

Despite such experimentation, which continues somewhat, there is a profound similarity in the construction of the essay questions offered by different professors in different faculties in American schools. The examinations collected in part five of the Appendix were chosen somewhat randomly, albeit from schools of national influence that distribute their exams. While there are differing emphases among them, there are dramatically more frequent similarities. Examinees are given a story, a narrative requiring the recognition of particularly appropriate legal doctrines, enunciation of the component requirements of the doctrines, application of those components to the myriad facts, which must be prioritized so that irrelevant facts are discarded, and, often criticism or extrapolation of the current rule.

The modern essay question was described by Tulane Professor Ferdinand Stone in his popular 1952 Handbook of Law Study as a test, not of knowledge of the law, but of its use. The essays are designed not to reward memorization but to reward application, which itself requires memory of the law being applied.²²° Such advice to students has been often echoed, not least in Stanley Kinyon's currently popular West...
Nutshell, *Introduction to Law Study and Law Examinations.* The specific details of this "use" are, though, sometimes the subject of disagreement.

One of the more careful expositions of examination performance, by Philip Kissam, suggests that the blue book grade measures more than just use. Rather, he concluded that blue book performance measures more a series of work-performance capabilities.

Successful performance on Blue Book exams appears to require some imprecise combination of four complex but general attributes. I call these attributes the internalization of doctrine; conventional legal imagination; the quality of legal productivity; and the capacity for self-study and self-learning in diffuse, complex, and uncertain situations.

There have been occasional paens to the modern hypothetical essay question as a measure of, or a mismeasure of, the student's ability to make a lawyerly application of the subject matter of the course to a particular problem. The heart of this process of application is multi-faceted, although there is some continuity in the merit of each facet. In 1931, the Dean of Penn, Herbert Goodrich, quoted the New York board of bar examiners' instructions to candidates as a model of the component tasks of any essay examinee.

The answer should show: A recognition of the problems; an analysis of the material facts; the doctrine of law applicable thereto; the solution, and the different steps of reasoning relied on by the applicant to support his solution. Clearness of expression and conciseness of statement will count. The applicant should confine himself to the particular problem presented and should not volunteer information that is not material to the solution. The value of an answer depends not upon its length, nor upon the mere correctness of conclusion, but upon the evidence it displays of the elements above mentioned. Unnecessary length and verbosity detract from the value of an answer.

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128. STANLEY KINYON, INTRODUCTION TO LAW STUDY AND LAW EXAMINATIONS (1971). This pamphlet is the successor to Lawrence Vold's *Suggestions on Studying Law and Writing Law Examinations,* which was also published by West. Vold presents models of successful and unsuccessful essay answers in *Types of Essay Law Examination Answers — Good and Bad,* 3 HASTINGS L.J. 85 (1951).

Of course, the desire of the student taking the test is restricted in many cases merely to passing the damned test rather than in commandingly demonstrating the knowledge sought by the examiner. See Louis B. Schwartz, *How To Pass Law School Examinations,* 11 J. LEGAL EDUC. 223 (1958) (noting that, while some students have passed without knowing anything about the subject, it would be a mistake to assume that ignorance is helpful).


131. Goodrich, *supra* note 115, at 103. Dean Goodrich went on to characterize this task: "What we want to get at, then, is the examinee's ability to handle legal problems; to tear his set of facts apart, dissect out the problems and build up a solution, either in the form of a legal opinion, or a plan for action on the part of the client." *Id.*
Throughout this century there has been an increasing pattern of professors writing their tests alone, although this practice is still not universal. Even so, professors still very rarely provide feedback or evaluation of the final examination essay. Indeed, in many schools, return of the students’ examination answers to the students is rare. Exams have been given with greater concern for time between one exam and another. Examinations have become anonymous. One other development in examination administration in recent years is the growth of technology, primarily in allowing or requiring students to perform examinations on computers and in using multimedia components of the test construction.

There are differing views as to the reliability of essay grading as an objective measure of student performance. In Ben Wood’s experiments at Columbia in the 1920s, there was greater variation among student performance on essay question performance than there was in the answer of true-false questions. Even so, in an LSAC study twenty years later, seventeen contracts law professors in the study tended to agree on their evaluations of any typical essay. This result may not say so much about the particular exactitude of law professors; that same study showed that non-lawyers tended to also assign the same grades to the essays that the professors gave them.

One other function that the essay question performs is to guide future student review to emphasize applications of the law to particular situations rather than rote memorization. This, along with encouraging professorial emulation, motivated Wigmore’s decision to publish a comprehensive collection of exams in 1899. Moreover, many law schools make institutional provision for universal access of their students to past exams, a practice that seems to have become relatively common at the beginning of the twentieth century. Columbia published and distributed bound

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132. See examples in the Appendix. There is an increasingly common practice of inter-school borrowing of exam questions, brought about by the exchange of questions through the Internet. It must be stressed that the mere fact, however, that two professors use the same exam question does not, depending on the question, lead to a conclusion that the professors would similarly or should similarly evaluate a particular answer to that question.


134. A seemingly early example of this is the practice, established in North Carolina in the 1950’s to space exams with at least one day between them. See Richard B. Amandes, How We Examine, 11 J. LEGAL EDUC. 566 (1959).

135. Id. at 568 (“One school” was exploring anonymous grading in 1959.).


137. In particular, see the analyzes in Kissam, supra note 128; Steve H. Nickles, Examining and Grading in American Law Schools, 30 ARK. L. REV. 411 (1977).


140. Wigmore, supra note 106, at iii-iv.

141. St. Louis Law School Professor William Curtis argued that exams should be printed in sufficient
copies of its examinations every year from 1891 to 1945.\(^\text{142}\) The University of Michigan continues to do so, a practice it began by at least in 1904.\(^\text{143}\) Chicago and Indiana began to do so in 1906.\(^\text{144}\) Cornell has done so at least since 1911.\(^\text{145}\) Stanford published its finals in 1934.\(^\text{146}\) Many law schools disseminate these examinations widely. Harvard published its examinations in the "red books," paper-bound copies of each year's questions, apparently first published in 1947 or 1948.\(^\text{147}\) Each year, copies of the red books were placed in crates throughout the law school, which were taken away by students\(^\text{148}\) as well as distributed to subscribers, usually to law libraries.\(^\text{149}\) Harvard's last year for this practice was 1996, when examination questions were distributed through posting on the law school's web page.\(^\text{150}\)

B. The Objective Test: True-False and Multiple Choice Questions

Of course, the essay question is not the only form of the modern law school exam. In the 1920's, in response to the new educational theory developed in schools of education and elsewhere, greater concern about the validity of measurement in the law school examination led to the development of short-answer questions. These questions could be answered by giving the student a statement regarding a doctrine or its application to a set of facts and then requiring the student to mark the statement as true or false.\(^\text{151}\) The answers to such questions can then be quickly, and mechanically, tabulated and scored against a set of predesignated correct answers.

In 1921, Northwestern professor Albert Kocourek performed an experiment comparing student performance on "ratiocinative" or essay questions, compared to "dogmatic" questions that were answerable with a "yes or a "no" or by the shortest possible answer if a yes or no were not possible.\(^\text{152}\) In that experiment, the dogmatic number for the students who take them to keep them and to freely distribute to subsequent classes. William S. Curtis, Examinations in Law Schools, in American Association of Law Schools, Proceedings of the Third Annual Meeting 41, 43 (1903).

\(^{142}\) Columbia University School of Law, Examination Papers (Columbia Law School Treasure Room shelf mark CU C735 Ex15).

\(^{143}\) See, e.g., Law School Examinations - 1904 (University of Michigan Library).

\(^{144}\) University of Chicago Law School, Examination Questions (Columbia Law School shelf mark T C43e); Indiana University School of Law, Examination Questions, the Indiana University School of Law (Columbia Law School shelf mark T In27e).

\(^{145}\) The Columbia law school catalog lists publication beginning in 1911. Cornell Law Examinations (Columbia shelf mark T C8141).

\(^{146}\) Stanford University School of Law, Final Examinations (Columbia Law School shelf mark T L5368f).

\(^{147}\) In 1996, access to the Red Set at Harvard Law Library was curtailed owing to renovation and construction. Based on a review of the catalogs, David Warrington, director of special collections of the library, assessed the belief that the first entries for red books of exams was either 1947 or 1948. Telephone Interview with David Warrington, Director of Special Collections (Dec. 9, 1996).

\(^{148}\) Turow, supra note 1, at 157.

\(^{149}\) Telephone Interview with Mark Slassen, Assistant Registrar, Harvard Law School (Nov. 18, 1996). In recent years prior to 1996, approximately 85 copies were annually distributed in this way.


\(^{151}\) Albert Kocourek, Objective Law Examinations, 16 Ill. (Nw. U.) L. Rev. 304 (1921).

\(^{152}\) Id. Kocourek's views were, to say the least, controversial. For an assault on both Kocourek's
or “objective” questions were asked aloud, and the student wrote the answers in a brief
time following the reading of each of fifty questions, the first of which were:

1. Which is the broader term, “chattels” or “personal property.”
2. Were chattels subject to feudal tenure?
3. Do chattels pass to the heir or to the executor?
4. May a gratuitous bailee maintain a possessory action?
5. Suppose that A is the owner of a chattel which he has leased to B for a year. If
   A retakes the chattel from B wrongfully before the end of the term, can B recover
   against A in trespass?  

From 1922 to 1925, Ben Wood at Columbia conducted similar research, administering true-false examinations, based in part on the construction of the federal civil service exams, to the contracts and property courses initially before expanding into twenty-two different courses. One of his most significant conclusions was to find a strong correlation between objective question performance and essay question performance. In 1928, Charles Clark reported that both Yale and Columbia had for several years been using true-false questions in combination with essays on their exams, and their use at Yale was no longer considered experimental but part of the regular program. He acknowledged the difficulties in creating careful questions but dismissed concerns that the tests cannot examine lawyering skills, such as the recognition of causal effect, by stating that such limitations were only caused by the limits of the ingenuity of the author of the exam.

By the time of a 1929 survey, true-false examinations were given in forty-four of sixty law schools. In those schools that used such tests, they were distributed across practically all courses, but two-thirds were used in first year subjects. Forty-nine professors of sixty-three surveyed believed the tests were successful, and the tests were generally more often employed in larger courses. Eight professors relied solely on true-false questions, although most used the question for roughly half of the test. Despite such wide acceptance, however, strong voices of doubt persisted, particularly that the chance to guess the right answers made these questions “an insult to the good student’s abilities” but a “healthy gambling chance” for the poor student.

methods and his conclusions by a professor at Northwestern, see George P. Costigan, Jr., *Objective Law Examinations*, 20 Mich. L. Rev. 514 (1922).

155. *Id.*
158. *Id.* at 703.
159. *Id.* at 704.
The objective question format did not long remain tied to the binary limitations of answers that are either true or false. There was considerable interest in the design of law exam questions to test a student's analytical skills with the precision being developed by the Educational Testing Service, the initial authors of the LSAT. The Law School Admission Test was first developed in 1947, employing multiple-choice questions that are designed in a style similar to those of the true-false questions pioneered in the 1920's, in which there were objectively correct answers.

By 1950, the true-false question was already fading from preference in favor of multiple-choice questions and, occasionally, questions that required sentences to be completed and questions that required matching of definitions to terms from a list.

The first use of a multiple choice question at Harvard appears to have been in Robert Braucher's 1956 Legislation exam. A question from that exam required the student to mark one answer to the following:

Check the best statement:
A Lawyer who is retained to perform legal services in seeking the enactment of a private bill by Congress

(a) is guilty of a federal crime if he contracts for a fee contingent on success.
(b) is engaged in unethical practice if he charges a fee.
(c) regularly finds that any bill enacted contains provisions limiting his fee.
(d) may properly offer to pay fair compensation to a Congressman who sponsors and supports the bill, subject only to any limitation enacted as a part of the bill.

Although interest in and use of multiple choice questions grew during the 1960's, the great interest in law school administration of such exams with such questions followed the advent of the multi-state bar examination. The Multi-State Bar Examination was first given in February 1972.

The pedagogical advantages to the examiner of using multiple-choice questions were significant, beyond those of the earlier true-false format. The multiple-choice

163. LSAS/LSAC, The Law School Admission Test: Sources, Contents, Uses 1-2 (September 1991). The questions were initially designed after the structure of tests given by the U.S. Navy and by the Pepsi-Cola Scholarship Test, which later became the NMSQT. Thomas O. White, A Retrospective Examination of Law School Admission, the Law School Admission Council, and Law School Admission Services, in WALTER RAUSHENBUSCH, LAW SCHOOL ADMISSIONS, 1984-2001: SELECTING LAWYERS FOR THE TWENTY-FIRST CENTURY 25 (Walter B. Raushenbush, ed., Law School Admissions Service, 1986).
164. Henry Weihofen, Panel: What Examination Techniques Best Test Legal Capabilities? Types of Questions, 23 ROCKY MTN. L. REV. 110, 112 (1950). Weihofen also described short answer and "master list" questions in which a student identified gobbets from opinions according to the author, as well as a matching and comparison questions that require a logical sorting of statements that support or oppose other statements. This form of matching and comparison question was then used in federal civil service exams for lawyers. See Henry Weihofen, The Written Federal Attorney Examination, 11 U. OF CHI. L. REV. 154, 167 (1944). Weihofen's example of a multiple choice question has a complicated fact pattern from which the student is to identify the principal issue in dispute.
166. Jarvis, supra note 59, at 380-81.
format reduces the benefit of students' guessing answers and gives a correspondingly higher degree of validity. It also allows for the construction of a greater variety of question formats by requiring students to judge among particular rationales or conclusions, rather than merely accepting or rejecting them. Furthermore, the examiner can test student ability to apply a specific doctrine with less distraction in ascertaining which doctrine is to be applied.

The objective question cannot easily be used to measure the student's process of analysis in reaching a conclusion, or style or correctness in writing the analysis or conclusion, and so many environments in which objective questions form a portion of the exam continue to incorporate essay questions.

In a 1995 survey of law professors teaching traditional lecture class subjects, fully two-thirds did not report using computer-graded questions, although use was higher in

167. For a careful discussion of the manner in which questions are constructed in order that this might be the case, see Howard J. Gensler, Valid Objective Test Construction, 60 St. John's L. Rev. 288 (1986). See also Wood, The Measurement of Law School Work III, supra note 131, at 803-26. For an illuminating argument that “multiple guess” questions do not achieve this goal, see Eileen N. Wagner, Multiple Choice Exams are Ineffective for Teaching the Nuances of Law. True or False?, 20 Student Law 42 (Dec. 1991).


169. John A. Winterbottom, The Use of Essay and Objective Techniques in Bar Examinations, 38 The Bar Examiner 5 (1968). Interestingly, Dr. Winterbottom took pains to discredit the use of true/false questions, recommending only the use of multiple-choice questions in lieu of the essay.

classes in the first year and in statutory or code courses. Of those professors who did use them, most used them for twenty-five percent of the examination or less.

C. A Brief Word on Examinations and Grades

An essential function of the modern law school examination is to serve as the method for generating grades. These grades in turn place the examinee into strata, including those unfit for graduation, those fit for graduation, those who are outstanding, and many gradations among them, including individual location in a class rank.

171. Question 122 of the survey asked, “How much of your typical examination is computer-graded? (1) none (2) 1-25% (3) 25-50% (3) 50%-75% (4) 75-99% (5) all.” Of all respondents teaching lecture courses, the responses were (1) N=278 or 66%; (2) N=69 or 16%; (3) N=15 or 4%; (4) N=1 or 0%; (5) N=5 or 1%.

172. Id.

173. While inexorably linked in a modern discussion of exams, the subjects of grades, grading systems, and the history of their use in law schools is too large a subject to be reasonably treated here except in the most cursory fashion. Still, some few points seem necessary in order to place the evolution of the method of evaluation through law school exams in some context.

174. For a general description of grades and their relationship to examinations, see Jay L. Feinman, Grades, 65 UMKC L. Rev. 647 (1997); Nancy H. Kaufman, A Survey of Law School Grading Practices, 44 J. Legal Educ. 415 (1994); Nickles, supra note 136; W.B. Schrader, Law School Grading Practices, 1970 Survey (LSAC Report 71-6), in Law School Admission Council, 2 Law School Admission Research 165 (Law School Admission Council, 1976). For the origins of grading systems in America, see SMALLWOOD, supra note 5, at 40-45. For the idea that the examinations are designed to separate the fit student from the unfit, see STONE, supra note 121, at 134. For the idea that such a division is necessary as part of the case method see sources collected in WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 126-27 (1978). For the effect of the stratification of students upon self-image, see WAGNER THIELENS, JR., THE SOCIALIZATION OF LAW STUDENTS 331 (1980).
There appears to be no record of grades in the modern sense being given in colonial and early federal law classes: the result of unsatisfactory quizzes was either to improve or to be dismissed, and the result of failure of the graduation exam was to be denied the degree.

Standards of performance required throughout the nineteenth century varied widely by time and school. Harvard, at mid-century, had no real standards at all, while Virginia failed a high percentage of its graduates. In 1901, Raleigh Minor reported that of nineteen of the “most prominent law schools,” the standards to pass examinations were widely scattered. Two had no fixed percentage standards, one required fifty-five percent, three sixty percent, one sixty-five percent, five seventy per cent, three seventy-five percent, three eighty percent, and one eighty-three percent.¹⁷⁵

Throughout this century, there have been numerous attempts to experiment and modify grading systems in order to achieve various ends. There has long been concern for grades that are not uniform among instructors in a single faculty. In 1920, Dean Wigmore at Northwestern calculated the percentages of good grades to all grades awarded by each member of his faculty. Among all courses, good grades accounted for anywhere between forty-one and one hundred per cent, although teachers in the large lecture courses varied only from fifty-six percent to seventy-four percent.

In his 1921 report on legal education, Alfred Reed presented six concerns of the modern annual or semester-end exam, of which two were based on the integration of annual and semi-annual courses. He advocated intermittent recitations or quizzes by students, which would both provide an alternate method of testing proficiency and deter procrastination in student study. Perhaps more effectively, he also suggested that some differentiation among marks be made, allowing recognition of both unusual excellence in performance and greater significance of a course content. He argued for a more scientific method by which grades among instructors can be equalized.¹⁷⁶

In line with such calls for reform, several schools re-evaluated their examination procedures. Columbia, under Dean Harlan Fiske Stone, adopted a new system of recording and averaging student grades in the annual examinations, based on Wood’s research and requiring a minimum level of performance to remain enrolled. In its first year, the system led to the dismissal of seventy-eight students of an enrollment of 692.¹⁷⁸ This system replaced an older pass-fail system that had led to considerable attrition in its own rights,¹⁷⁹ but this system was itself replaced.¹⁸⁰ There is continuing

¹⁷⁵. Minor, supra note 58, at 474-75.
¹⁷⁶. Kocourek, supra note 143, at 305 n.2.
¹⁷⁷. Lastly, he argued for a reduction in the labor necessary to grade, to avoid “this deadening intimacy with ignorance and mental fog,” which saps a professor’s strength from classrooms and ambition from scholarship. REED, supra note 48, at 359-60.
¹⁷⁸. COLUMBIA REPORTS, 1922, 70, cited in HISTORY, supra note 64, at 233. See also the Wood studies, supra note 131 and accompanying text. The last study related to this change is John Grant’s survey of grading practices at Columbia through 1928. John L. Grant, The Single Standard in Grading, 29 COLUM. L. REV. 918 (1930).
¹⁷⁹. In 1900, Columbia lost one-third of its class between matriculation and graduation, a currently
concern, however, that these changes and reforms have yet to produce consistency in grades, and that, perhaps, such consistency is unattainable. 181

Despite the general abandonment of pass-fail exams in favor of graded exams, pass-fail examinations have continued to find intermittent popularity, used both in particular courses and in particular years. Michigan even allowed students to opt for graded or pass-fail credit in any one course per semester in 1970, an option taken by thirty-one percent of the students, with mixed results. 182

Further evolutions of the role of grades and the manner of grading have continued throughout this century, notably with the advent of targeted curves or distributions for a course grade list. 183 Students have sought and received greater procedural guarantees both within the law schools in the courts that grades are not overly arbitrary. 184 The most salient feature of these changes has occurred in the years following World War II, and particularly in the 1980's and 1990's. Law schools have markedly reduced the rigor of their grades and diminished the level of academic attrition; they have inflated their grades. 185 This change in standards may be attributable to increasing emphasis on careful admissions processes, competition among law schools for applicants, dissatisfaction by students, competition among schools for prestige, or, perhaps charitably, an increase in the quality of law school applicants.

IV. EVALUATION ALTERNATIVES

A. Alternatives, Part I:
Oral Performance: Moot Courts and Class Questions 186

As the brief review of pre-revolutionary English legal education made clear, the moot argument was an essential tool not only of student instruction in the Inns and at unknown percentage of which apparently left for failing exams. HISTORY, supra note 64, at 188.


186. This section presents but a cursory glance through the history of moot arguments. For a fuller description, see Ralph Brill, Legal Research and Writing Programs, in CLOSSEN ET AL., A HISTORY OF LEGAL EDUCATION (forthcoming). See also William Adams, Trial Practice, Clinical and Moot Court Programs. Id.
Oxbridge but also of student evaluation. This was the state of affairs in the eighteenth and throughout the nineteenth century in American schools as well.

William and Mary held moot courts and mock legislatures under George Wythe.187 James Wilson held “law exercises” every Saturday morning at the College of Philadelphia.188 Litchfield held regular moot courts on weekday afternoons.189 The predecessor of Yale Law School, the New Haven law school owned by Samuel J. Hitchcock, opened in 1824, and its first annual announcement specified that, “[a] moot court is held once a week, or oftener, which employs the students in drawing pleadings and investigating and arguing questions of law.”190 Moot courts, required in the curriculum, were long organized at Harvard under the auspices of student clubs, such as the Coke, Marshall, PowWow, Thayer, Ames, and Langdell clubs, which also held discussions, quizzes and other activities to enhance student understanding of the law.191 Indeed, the Langdell club also begat the first staff of the Harvard Law Review.192 Other schools’ student associations were active in moot courts, perhaps most notably Michigan’s Lawyer’s Club.193 Most schools opening in the nineteenth century included moot courts as part of their curriculum.194

Two changes in moot courts in the twentieth century are particularly of note. First is the advent of course credits and grades led eventually to participation and supervision of moot court programs receiving academic credit, albeit often on a pass/fail basis or writing credit only.195

The second major change is the development of interschool competitions. The Association of the Bar of the City of New York began sponsorship of a national competition following an interschool competition between Yale and Columbia in 1947, which was expanded by 1950 to a national competition.196 In 1950, Georgetown beat Kansas,197 arguing in the State of Jefferson the case of Fayerweather v. Wetmore and Rain Control, Inc., over whether “a landowner can restrain an adjoining landowner from increasing the productivity of his soil by artificially withdrawing moisture from

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187. LYON G. TYLER, EARLY COURSES AND PROFESSORS AT WILLIAM AND MARY COLLEGE (1904), cited in REED, supra note 46, at 117 n.1.
188. REED, supra note 48, at 122.
189. The account of Augustus Hand’s unfortunate moot argument one Friday afternoon in 1828 is reprinted in MCKENNA, supra note 5, at 170.
193. BROWN, supra note 81.
194. For example, Iowa established an organized moot court in its first program in 1868. Moylan, supra note 70, at 110-11. Despite the relative universality of moot court programs until World War II, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, 229 n.88 (1983), they were not uniformly applauded. See Law Apprenticeships, 5 ALBANY L. J. 97 (1872).
195. See, e.g., COLUMBIA UNIVERSITY SCHOOL OF LAW, CATALOG 1985-1986, 104 (moot court participation satisfies writing credits requirements).
197. Id.
clouds above his land."

In the intervening years, several other competitions have developed, the most famous of which may be the Jessup competition in international law, which includes many foreign law schools and was begun in 1960.

As well as moot courts held apart from the lecture hall, an important form of student evaluation based on oral performance occurs in student recitations in class. Central to the case method, student response to questions is often the basis by which a student perceives success or failure in the classroom and by which teachers signal acceptable or poor performance, but student participation is only occasionally a portion of the grading for a course.

B. Alternatives, Part II: Writing Exercises, Legal Writing Programs, and Seminar Papers

The idea of a student writing requirement has been nearly a constant element of American legal education and has taken many forms. Students in England and early American schools maintained common-place books, in which definitions and applications of every doctrine they learned were recorded, subject to review by their teachers. Students at Litchfield and other early schools not only copied their lectures in inspected notebooks but took written quizzes from oral questions. As well as these programs, however, nineteenth century law schools frequently had graduation dissertation requirements and course thesis requirements.

198. Id.


200. A discussion of class recitations both before and after the adoption of the case method is in Sheppard, supra note 7. For the purposes of this essay, the importance of oral student questioning prior to the case method may be seen in Butler’s plan for the first-attempted New York University Law School, in 1835, which required the use of occasional interrogatories, such that the Professor should put at least one question to each member of the class every lecture. See Benjamin F. Butler, A Plan for the Organization of a Law School in the University of the City of New York, reprinted in The Gladstone Light of Jurisprudence: Learning the Law in England and the United States in the 18th and 19th Centuries 164, 178-79 (Michael J. Hoeflich, ed., 1988).

201. For the idea that students must not be discouraged by rejecting class answers as “wrong” see Paul T. Hayden, On Wrong Answers in the Law School Classroom, 40 J. LEGAL EDUC. 251 (1990). For opposing views see Joseph R. Paul, Yes, Virginia, There Are Wrong Answers: A Reply to Professor Hayden, 40 J. LEGAL EDUC. 473 (1990). See also David P. Leonard, On “Right” and “Wrong” Answers: A Reply to Professor Hayden, 40 J. LEGAL EDUC. 477 (1990).

202. There have been occasional attempts to restore the oral exam as a basis for the grade. See, e.g., Steven I. Friedland, Towards the Legitimacy of Oral Examinations in American Legal Education, 39 SYRACUSE L. REV. 627 (1988).

203. For a description of commonplace books, including John Marshall’s student book, see Sheppard, supra note 7.

204. For copybook examples, see Sheppard, supra note 7. For a discussion of the oral quiz, see supra notes 171-186 and accompanying text.

205. Buffalo required theses on set topics concerning the constitution in its first constitutional law
At the turn of the century, a new device for encouraging student writing arose, the student-edited law review. The first student-edited journal, the *Albany Law Journal*, was published in 1875, lasting only a year. The first student journal of any influence appears to have been *The Columbia Jurist*, a publication started by six Columbia students in 1885, which, though also short-lived, influenced the founding of the *Harvard Law Review*, which published its first issue in 1886. The Harvard journal served as a prototype for other schools, and in short order, law reviews had spread through the major law schools of the country. Students selected for the staffs of law reviews are given considerable supervision in writing and editing, and the reviews are supported by their schools in many ways, both to enhance the prestige of the schools and to provide a writing and editing lab for their students. In most cases, however, only a small percentage of a law school class is needed for journal membership, and the remaining students are excluded from this experience.

The twentieth century law school, however, more often segregates instruction in legal writing into programs distinct from large-lecture courses. The specialized writing programs are usually offered as classes in a first-year legal writing course, although there are upper-year seminar papers in which little writing instruction is given.

The legal research and writing course, in some regard, is an outgrowth of early courses in legal bibliography and programs in advocacy and rhetoric connected to moot courts. One of the earliest legal writing programs, and still one of the best known, is that led by the Bigelow Teaching Fellows at Chicago, which was established in 1938. In this year-long program, the first-year student was called on to write twelve assignments, including five legal memoranda, a precis, a radical condensation of a prior memorandum, two editorials, a preliminary question list, a preliminary definition of a field of research, and a book review. An early description of the program noted that the legal memorandum is the staple of the program and the other forms of assignment "are..."
added for fun."212 The students averaged roughly 300 hours of work time and wrote 25,000 words, receiving eight hours of credit from the year’s forty-hour load.213

Other schools followed suit, some focusing on developing remedial skills, and others following Chicago’s more developmental approach.214 A typical course of this expansion is the second-year course in legal research and writing instituted at Michigan in 1957. It was staffed by instructors, recent graduates of Michigan and other law schools, under the supervision of a faculty member, initially Jack Pearce.215 The Dean’s Report of 1957-1958 described the program:

The principal aim of the program was to train students to apply legal principles studied in their regular courses to legal problems presented in hypothetical fact situations. During the first semester, the students, in groups of 15 to 20, met weekly with the instructors for the purpose of discussing such problems as the drafting of wills, contracts, and forms of business transactions, statutory research and interpretation, and the elicitation and analysis of facts. Small groups made possible a large measure of individual participation together with criticism and evaluation of individual work. It was expected that the program would lend additional meaning to the regular classroom studies and this proved to be the case. Furthermore, it served to provide the students with more direct and personal familiarity with the law library and the research tools of the legal profession.

During the second semester, each student was required to engage in individual research in the preparation of a memorandum on some reasonably difficult legal proposition. Instructors met with the students individually during the progress of this work. In effect this phase of the program gave to all members of the second-year class the kind of opportunity that had hitherto been made available only to editors of the Law Review.216

Legal writing programs have proliferated,217 increasingly run with tenured or tenure-track directors supervising contract instructors, who teach both research and

212. Id. at 110.
213. Id. at 109.
216. Id.
writing in courses lasting two semesters of the first year, assigning grades based on the sufficiency of analysis and accuracy of writing. These programs often include appellate brief writing exercises coupled with oral argument in a moot court, although moot court instruction in these programs has declined in recent years. Legal writing classes usually include lectures, although a critical feature of most legal writing programs is that of feedback. Students receive specific criticism of their work, which is usually the basis for subsequent redrafting of assignments, a trend increasing in recent years.

V. SUMMARY OBSERVATIONS

The exam as the sole method of grading has led to some obvious advantages, particularly in reducing faculty work-load. But its disadvantages are profound, particularly the difficulty of student improvement with so rare and sparsely evaluated feedback, the common limitation of oral performance and intermediate writing experiences from calculation in the grade, and the calculation of the grade from stressful and artificial circumstances. Part and parcel with these concerns is what Kissam has accurately described as the disengagement of professors from the learning of the student at the point of examination. Not only do these disadvantages affect the utility of the evaluations for student improvement, they lead to a continuing skepticism among law students that the construction of their exam questions or the review of

218. Regarding supervision, see Jan M. Levine, Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs, 45 J. LEGAL EDUC. 530 (1995). While this staffing is the norm, it is not universal. Thomas M. Cooley Law School, for example, has five tenured or tenure-track professors teaching legal writing courses full time. Regarding semester requirements, see Jill Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image (forthcoming publication on behalf of the Legal Writing Institute).

219. Id. See also supra notes 29-43 and accompanying text.

220. For a criticism of the standard lecture pedagogy of the legal writing classes, see Mary Kate Kearney & Mary Beth Beazley, Teaching Students to “Think Like Lawyers” : Integrating Socratic Method with the Writing Process, 64 TEMP. L. REV. 885 (1991) (encouraging the use of a Socratic inquiry method in legal writing classes).

221. Id. at nn.46-55. For a view that the content of these writing exercises should be expanded to include documents and instruments more akin to the first Chicago program, see Lucia Ann Silecchia, Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?, 100 DICK. L. REV. 245 (1996).


223. Cooley Howarth at Dayton reports a complaint of unfairness based on insensitivity to student ideology. The exam question revolved around the proper interpretation of the word “creed” in an antidiscrimination statute. The statute prohibits discrimination on the basis of “race, color, creed, religion, ancestry, national origin, etc.

The fact pattern has a luncheon delivery business refusing to deliver to an abortion clinic on religious grounds. The clinic owner sues claiming that her “non-religious philosophical moral and political beliefs” in support of abortion fall within the statute’s prohibition on discrimination on the basis of “creed.”

The student objected to having to answer this question because of her “strongly held pro-life” beliefs and her reluctance (I guess that’s the right word, perhaps distaste might fit as well) to having to make arguments on behalf of the clinic’s interpretive position. She added that such a topic was particularly inappropriate in the context of an examination given
their essays is thorough or fair.224 Many variables may enter into the accuracy of the examination as an evaluation of student performance, not the least being stress.225 Thus it is no surprise that many calls for reform in the curriculum, particularly in its evaluation methods, have been made of late.226

One of the most interesting of the recent efforts at reform has been the re-inclusion of written work into the lecture course, alleviating many of the problems of absent feedback and improvement attendant with the course-end exam,227 although, as in so many other “reforms” this movement not only echoes nineteenth century practices but also represents only the most recent incarnation of a cyclical reformation.228 The

under a time limit and its inherent “pressures.” She felt that I should have been more sensitive to such issues in the design of the examination.

... My response to her was that while I regretted her discomfort, this exam question was based upon a legitimate issue of statutory interpretation taken from a real case and not an issue of constitutional law, and, from a practical point of view, there seemed little I could possibly do for her at ten minutes into the exam. She did not feel that I was really “sorry” and left quite abruptly.

Electronic mail, Cooley R. Howarth, Jr, to Steve Sheppard, Friday, December 13, 1996.

224. Alex Tanford relates this story from his 1975 second-year exam in Trusts and Estates at Duke under Bertel Sparks, then known as “a cranky and feared old codger.”

We were all convinced, based on the randomness of our 1st year grades, that the professors did not read our exams. One student wrote on the next-to-last page, “I am certain you will not actually read this. The class will be at the student union at [a certain date and time] to buy you a milkshake. If you don’t show up, our belief that professors never read the exams will be confirmed.” At the appointed hour, there must have been fifty law students waiting to see if he would show up -- he did.

Electronic Mail, Alex Tanford to Steve Sheppard, December 13, 1996.

225. Joshua Dressler, at McGeorge School of Law, examined an English-speaking law student who wrote her entire 3-hour exam in French, her undergraduate major, and did not realize that until it was brought to her attention when he tried to grade it. Electronic mail, Joshua Dressler to Steve Sheppard, Friday, December 13, 1996.


228. At the turn of the century, Penn professor Owen J. Roberts, joining aim and responding to
use of written problems allows detailed feedback and guidance of individual student work concerning the course materials, as well as a broader base for formal evaluation of the student’s performance.229

It is clear that, whatever changes there may be to evaluative methods, certain functions of the formal evaluation system will likely be retained. First, some method that faculties believe to be fair and valid will continue to be used to rank student performance within each group of students and graduates. This method will account both for changes in technology and in culture that attend not only other law school systems of evaluation but also examinations for law school admission and for bar admission. More than likely, this method will include components of measurement of both analytic skill in applying law to new situations and rote skill in recalling specific doctrines, thus measuring both depth and breadth of student ability to recall and apply the substance of each law course. Changes will likely also include a greater frequency of evaluation, coupled with methods of reducing professorial labor.

Student evaluation has almost universally been a part of the law school experience. With brief exceptions in the nineteenth century, the demands of the profession and of the faculty to evaluate the success of student learning have made some form of exam practically inescapable to the law student, even while the forms of the exams have evolved. That this will continue to be the case is practically certain. That it will remain in its current forms is doubtful.


229. The author of this article employs frequent written assignments for courses in property and constitutional law and finds this to be the case; in his school institutional policy even bars scores from these assignment being factored into a final grade. For a experiments in a similar, but graded, exercise regime see John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL ED. 447 (1992). For a similar experiment based more strictly on exam question answering, see Louisa D. Del Duca & Donald B. King, *Student Examination Answers: Education Tool or Incinerator Fuel?*, 13 J. LEGAL ED. 499 (1961). For a spiritual antecedent, see Henry W. Ballantine, *Teaching Contracts With the Aid of Problems*, 4 AM. L. S. REV. 115 (1916).
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PART 1. VICTORIAN BAR EXAMINATION QUESTIONS

English Bar Exam Questions

QUESTIONS AT THE EXAMINATION

*Trinity Term, 1853*

I. PRELIMINARY.

1. WHERE, and with whom, did you serve your clerkship?
2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship.
3. Mention some of the principal law books which you have read and studied.
4. Have you attended any, and what, law lectures?

II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS

5. Is a verbal undertaking to pay the debt of another person obligatory in law, and if not, why not?
6. When is a master answerable for damage done by his servant? In the case of a coachman driving against, and injuring a cart, must the master be present to be liable?
7. What persons cannot bring actions in their own names, and how can they proceed to recover damages for an injury?
8. A notice to quit being given by a landlord to a tenant, what pecuniary liability does the tenant incur by holding over?
9. What preliminaries must be observed before an attorney can bring an action on his bill?
10. Is there any appeal from the decisions in the County Courts, and in what cases, and what is the practice in County Court Appeals?
11. State the different steps taken in conducting an ordinary action in one of the Superior Courts from its commencement to its termination.
12. How long does a writ of summons remain in force, and how may it be continued?
13. By whom may an affidavit of increase be made?

14. How, and in what cases, are the costs of "cross issues" allowed?

15. A man was born 11:30 p.m., on the 1st January, 1800; at what hour, and on what day and year, did he become capable of making a will?


17. What are the rules affecting actions by paupers?

18. Make out a plaintiff's bill of costs on a judgment by default, with a Judge's order to proceed as if personal service had been effected, on both scales.

19. What is the derivation and meaning of the term "Nisi Prius?"

III. CONVEYANCING

20. What was the origin of conveyancing — what were the usual methods of conveying or transferring property, and which of those methods has ceased by Act of Parliament?

21. State the parts of general outline of a conveyance of freehold property by a vendor seised in fee to a purchaser, and that the widow of the latter may not be dowable, and under what Act of Parliament?

22. To convey a lake or piece of water, what words should be used to assure the freehold thereof to a purchaser; and if the water alone be conveyed, what would pass to the purchaser?

23. By what tenures may property be held, and how are they respectively assured?

24. As to properties in registered counties — when should the conveyance of them be registered, and what may be the consequence of delay in doing so?

25. Two persons (not partners) are to give their bond to A for the payment of money — how is the obligation to be framed — that if one of such two persons die, A may claim upon the deceased’s estate?

26. Suppose the two obligors are partners, and they give their joint bond to A and one of the obligors die, what claim has A upon the surviving obligor and upon the deceased's estate?

27. A joins in a bond with B to C. A being merely a guarantee for B — what should A require for his indemnity against his obligation?

28. A conveyance is made to a purchaser in fee of certain defined land, but the buildings upon it, or mines or minerals under it, are omitted to be noticed — what would be the result to vendor or purchaser? State any legal maxim applicable to the question.

29. B. is tenant in tail in possession of an estate, and has agreed to sell the fee simple to vendor; by whom and under what authority can that fee simple estate be assured to C.?

30. In examining an abstract of title with the title-deeds, state what should be carefully attended to.

31. Suppose the title-deeds are not in the vendor's possession but in the hands of another person, what course is to be adopted to examine them with the abstract?

32. The deeds or instruments abstracted are on record — and the originals cannot be produced — and the conditions of sale are silent as to any attested copies of such deeds, &c., how is the purchaser to obtain such attested copies, and at whose expense?

33. To avoid searching for incumbrances until immediately before the completion of the purchase — what should be done?

34. When do judgments bind leasehold estates, and where should searches be made as to such incumbrance?
IV. EQUITY AND PRACTICE OF THE COURTS.

35. Name the several Courts of Equity in England, and state what appeals lie from them respectively?
36. Specify some of the objects attainable through a Court of Equity.
37. What are the necessary proceedings to bring a defendant, having privilege of peerage, before the Court?
38. State the nature and object of a bill of discovery and name some cases in which it does and does not lie.
39. What is the nature of a bill to perpetuate the testimony of witnesses? and state under what circumstances it is advisable to file such a bill.
40. What is the nature and object of a bill of interpleader, and what must the plaintiff show by his bill to enable him to maintain it?
41. Specify the various matters which must now be commenced before a Judge at Chambers.
42. Has the Lord Chancellor power to appoint a guardian of the person, and a receiver of the estate of a lunatic, without a previous inquiry under a commission of lunacy?
43. Can a married woman sue separately from her husband, and if so, under what circumstances?
44. Is, or is not, a plaintiff examining a defendant as a witness, prevented from taking a decree against him? and give a reason for your answer.
45. What steps must be taken by a as regards a defendant, whom he has caused to be taken upon an attachment for not answering; and in default of such steps being taken, is the defendant entitled to his discharge?
46. A trustee having power to advance his trust fund upon mortgage of real estate, can he advance the same upon leaseholds for lives renewable for ever?
47. Is a power directed to be executed under the hand and seal of the donee well executed by a will not under seal, but executed in conformity with the Statute 7 Wm. 4, and 1 Vict. c. 26.
48. A. having a judgment against B., issues an elegit, under which he gets possession of B.'s estate; B. afterwards charges this estate with the payment of an annuity to C., and subsequently to this A. takes a conveyance of the estate from B. in consideration of his judgment debt, has this conveyance any, and what, effect upon C.'s annuity?
49. What are the four general cases in which an agreement will not be binding in Equity?

V. BANKRUPTCY, AND PRACTICE OF THE COURTS.

50. What must be the amount of a creditor debt in order to enable him to petition for adjudication of bankruptcy against his debtor?
51. What mode or modes are there which a creditor should proceed if he desire to compel his debtor to commit an act of bankruptcy?
52. In what way can a trader voluntarily and intentionally commit an act of bankruptcy?
53. In what cases and under what conditions can a trader petition for, and obtain, an adjudication of bankruptcy against himself?
54. In what cases does a trader remain liable to his creditor, notwithstanding that the has obtained his certificate of conformity?
55. Within what times and in what various modes (if any) has the trader the power of disputing the adjudication, and in what cases.

56. To what Court does an appeal lie for any party from the decision of the Commissioner, and how is such appeal to be preferred and prosecuted?

57. Can an Englishman, a trader, resident abroad, and having his only house of business out of the county, be made a bankrupt in our court, in any, and what cases, and by what proceedings?

58. If a grader, adjudged bankrupt, do not surrender after having received proper notice of the adjudication, to what penalty or punishment is he liable, and how can the same be enforced?

59. What are the facts that must be proved in order to obtain an adjudication of bankruptcy on the petition of a creditor?

60. What is the nature of the evidence that must be produced, and of what facts in order to obtain such adjudication? State several instances or examples of what would be sufficient, embracing all the facts to be proved in each case.

61. What constitutes an act of fraudulent preference by a trader?

62. In what cases will a sale be a trader in insolvent circumstances be upheld, and when will it be set aside as against the assignees?

63. State under what circumstances a payment made by a trader on the eve of bankruptcy will be upheld, and in what cases will the assignees be able to recover the amount for the benefit of the estate?

64. Which, if any, of the officers of the Court of Bankruptcy are protected in relation to acts done by them in the bankruptcy, and in what cases are they answerable to third parties, or to the bankrupt.

VI. CRIMINAL LAW, AND PROCEEDINGS BEFORE MAGISTRATES.

65. Have all the Superior Courts at Westminster a concurrent jurisdiction in criminal matters, or is it confined to any, and which of them?

66. State the nature of the jurisdiction of the Court of Queen’s Bench in regard to felonies and misdemeanors.

67. On a conviction in a criminal case is there any, and what, right of appeal, and to whom?

68. What is the mode of proceeding to exercise that right?

69. When can, and when cannot, a new trial be granted in criminal cases?

70. What is the mode of proceeding in exhibiting articles of the peace?

71. What are the allegations necessary to be stated in support of an application to exhibit articles of the peace?

72. State what will be required of the party against whom a successful application is made.

73. Can the party against whom the articles are exhibited controvert the statement, and if he bound to submit, what remedy has he if the statement is untrue?

74. Will the compounding an offence in any, and what, instances subject the party compromising to an indictment?

75. Are any, and what, precautions necessary to protect parties effecting a compromising to an indictment?

76. Define a common nuisance.

77. How is a nuisance redressed, and is the remedy the same in all cases?

78. Will an indictment lie for a private as well as a public nuisance?
79. In an indictment for a nuisance can the prosecutors be compelled, and by what means, to deliver to the defendant a particular of the acts of nuisance intended to be relied upon?

New York Bar Exam Questions

*Note: Each department of the Supreme Court, which is New York's trial court, administered its own exam, with different questions, albeit of similar character.*

Supreme Court Examination
First Judicial Department
*Saturday, November 17th, 1888, 10 o’clock, A.M.*

PELING AND PRACTICE.

1. What is a pleading in a Civil Action?
   Name the various pleadings in Courts of Record?
2. What is the rule as to folioing papers? What advantage can be taken of neglect to folio?
3. What do you understand to be the difference between a bill of particulars and a copy of items of account, and how would you proceed to obtain each?
4. What is the effect of a bill of particulars as to limiting a party's right to give evidence on the trial?
5. What is the effect of serving a pleading defectively verified?
6. Within what time may a pleading be amended of course?
7. Where an answer sets up a counter claim what further pleading is required from the plaintiff?
8. What is a supplemental pleading and how would you obtain your right to serve it?
9. Upon a judgment rendered in the City Court of New York, state what steps you would take to examine defendant in supplementary proceedings and where you would obtain your order?
10. “A” being the owner of two adjacent city lots, mortgages them in one description to “B.” Subsequently he mortgages one of the lots (No. 1) to “C,” and afterwards the other one (No. 2) to “D.” He then again mortgages No. 1 to “E” “B” forecloses his mortgage against both lots, and the decree of sale directs the property to be sold in parcels in the inverse order of alienation as to the subsequent mortgages, and further directs the property to be sold, "or so much thereof as shall be sufficient to discharge the mortgage debt, costs," &c. Both parcels are required to be sold to realize the necessary amount but a surplus arises more than sufficient to pay off “C”’s mortgage. To whom is the surplus next distributable?

REAL ESTATE.

1. What is a freehold estate?
2. What is a qualified fee?
3. What is the rule in Shelley's case[?] give an example?
4. Wherein does an executory devise differ from a contingent remainder?
5. State the requisites to a valid deed of real estate?

PERSONAL PROPERTY.

1. What are the essentials for a valid title of personal property?
2. What is meant by a conditional sale of personal property?
3. On a sale of personal property, what is sufficient to constitute an implied warranty of title?
4. Where one dies leaving a wife and no children, how is his personal property divided?
5. What is the statute regarding the filing of chattel mortgages. How and when would the mortgage be renewed?

CONTRACTS.

1. What are the essential elements in general of every legal contract?
2. State and define the classes into which contracts are divided with respect to time.
3. How are contracts divided with regard to grade; state them in their rank, and define them; give examples.
4. When may there be a valid contract without consideration?
5. What is the effect on the liability of the remainder of the release of one of several joint debtors; state the reason what is the exception of this rule; give an example?

PARTNERSHIP.

1. What Court has almost exclusive jurisdiction over this subject and why?
2. What is the interest of a partner in the assets of the firm?
3. How may persons be liable on their contracts as partners who have never intended to occupy that relation to each other; give the principle of law which occasions the reasons for the rule in each case?
4. What is the effect as to third person on the liability as partner, of a person who makes an agreement to share in the profits as such, if he stipulates that he shall not be liable for its debts?
5. What is the legal relation which each partner bears to the others, and how far will the acts of one bind the others as to third persons?

NEGOTIABLE PAPER

1. In what respect does the liability of the indorser of a promissory note differ from that of an ordinary security.
2. What is meant by "certification" of a check?
3. What is acceptance of a bill of exchange?
4. Can an indorser dispute the genuineness of the signature of the maker of a note?
5. If a promissory note is made and delivered in Connecticut, payable in New York, to the laws of which state is it subject?

PRINCIPAL AND AGENT.

1. Give an illustration of what must be shown in order to justify the arrest of an agent in an action for money had and received to his principal's use?
2. Explain what is meant by a del credere factor?
3. What are the rights of a factor who has made advances to his principal on goods in the former's hands?
4. Assuming that a factor has advanced generally to his principal on the consigned goods, and has guaranteed the sales he has made, can the factor transfer a good title to a debt not yet due, arising on a sale of the consigned property before calling on the principal to repay the advances?

5. Has an agent who is directed in general terms to ship goods by a certain carrier, the authority, as between the principal and the carrier, to agree to a shipment on terms that limit the common law liability of the carrier?

**Principal and Surety.**

1. Is mere indulgence of the principal debtor by a creditor sufficient to discharge the surety? Give your reason for your answer.

2. Is it competent for one or two makers of a promissory note when sued thereon to show by oral evidence that he signed the note as surety only, and that the holder of the note, with knowledge of the suretyship, and without the consent of the surety, made a valid agreement with the other maker of the note, as principal, to give the latter an extension of time?

   It is assumed that on the face of the note both defendants appear as makers, without any indication of suretyship.

3. Does the right of contribution exist in favor of a surety who did not know that there was another surety until after paying the debt? Give your reason for your answer.

4. Is it possible for the principal and the creditor to arrange to give the principal an extension of time without discharging the surety? If so, how?

**Insurance.**

1. Define the contract of insurance?

2. What is the difference between a warranty and a representation in the law of insurance?

3. What is re-insurance?

4. What is double insurance, and in case of loss how much can the insurer recover?

5. What are "time" and "voyage" policies in marine insurance?

**Executors and Administrators.**

1. What is an executor; an administrator; an administrator with the will annexed; an executor de bonis non?

2. In case there is no will, and an administrator is appointed, state in what order the right of administration exists.

3. State the duties of an executor or administrator in order of time.

4. What is a general legacy; what is a special legacy. Give examples; which class is to be paid first; if the legatee dies, what becomes of the legacy?

5. What is an advancement; what is its effect?

**Bailments.**

1. Is it a defense for a common carrier, sued for non-delivery, to show that the goods were taken from his custody under judicial process, and that he notified his bailor promptly thereof, or must he show also that under such process they were delivered to the true owner?

2. Assuming that a common carrier, by a contract containing no limitation of common law liability, has agreed to carry a horse by sea from one port to another, and that the horse receives injuries caused partly by more than ordinary bad weather and partly by
the conduct of the horse himself, by reason of fright and struggling, but without negligence of the carrier, is the carrier liable or not? Give your reason for your answer.

3. Does the relation of bailor and bailee exist between a bank and its depositors?

4. A bailee receiving property under instructions to deliver it to no one except upon a written order from the bailor, delivered the property to the bailor's wife upon an order that proved to be forged, what rights, if any, has the bailor? Give your reason for the answer.

5. Assuming that goods are shipped, and the transportation by the carrier begun under an oral contract, does the acceptance and retention by the shipper later in the same day of a bill of lading containing provisions inconsistent with the oral contract merge the prior oral contract in the subsequent written contract so us to make the written contract prevail? Give your reasons for your answer. It is assumed that there is no evidence of any prior course of dealings between the parties.

CORPORATIONS.

1. Into what classes are corporations divided; define them?
2. What was the effect of the Dartmouth College decision with regard to corporate charters?
3. Since that decision, how has its effect usually been nullified in the State Constitutions subsequently adopted; what is the effect of such a provision?
4. What is ultra vires; give an illustration?
5. State the grounds for which an action may be maintained in this state; 1, to sequester the property of a corporation; 2, to dissolve a corporation; 3, to annul a corporation; where are these provisions to be found? By whom must these actions be brought respectively? What becomes of the property of a corporation after sequestration; after it is dissolved; after its charter is vacated?

PERSONAL RIGHTS.

1. State in substance Section I, of the XIV. amendment of the U.S. Constitution?
2. Section I. of the XV. amendment U.S. Constitution?
3. What is an ex post facto law? Are such laws valid?
4. What is the principle governing the use of your own possessions with reference to those of your neighbor?
5. What is false imprisonment?

DOMESTIC RELATIONS.

1. Can either husband or wife convey land directly to the other?
2. Is a husband who has deserted his wife liable to his mother-in-law for the amount expended by her in supplying her daughter with necessaries after his desertion?
3. A married woman having died intestate, leaving personal property and next of kin, but no issue, who is entitled to letters of administration, and for whose benefit is the personal property administered?
4. What effect, if any, does the marriage of a woman have upon a will that she executed before marriage?

WILLS.

1. What is a holographic will; what is a noncupative will?
2. At common law, when could a married woman make a will?
3. What is the effect of war upon the capacity of persons to take under a will?
4. State the doctrine of moral duress in the law of wills - give an example.
5. Give the requisites of the statutory attestation clause in New York State.

PART 2. SELECTED EXAMINATION QUESTIONS AND INSTRUCTIONS:
TRANSITIONS IN EXAMINATION STYLES AT HARVARD

1871 Agency [Holmes]

In what case can an infant be an agent? or a married woman?

1871 Contracts [Langdell]

Can a simple contract be put an end to in the same modes before and after breach; if not, what will be sufficient for that purpose in one case and not in the other?

1871 Corporations [Holmes]

Give a brief and general definition of a corporation.

1871 Equity [Holmes]

What is the essential purport of the maxim, "Aequitas sequitur legem"?

1871 Real Property [Emory Washburn]

What are Alluvion and Accretions? What is the rule as to ownership of islands formed in rivers not navigable? What is the filum aquae? What is the effect of a sudden or material change in the course of a stream upon the boundary line between of opposite riparian owners?

1875 Contracts [Langdell or Ames]

A, in Boston, writes to X, Y, and Z, in Concord, offering X a certain estate at a certain price, offering Y a certain horse then in Y's stable, and offering Z a certain mare then in Z's stable. X and Y reply according to A's request, by return mail, accepting their respective offers. Z, according to A's request, deposited the purchase money for the mare with A's banker in Concord. A dies before receiving any intelligence of the acceptance of his offer. Were any contracts, unilateral or bilateral made, or not, and why?

1878 Civil Procedure at Common Law - Langdell

What is the proper return to a fi. fa. under all the different circumstances which may arise? State in particular what the return should be when the sheriff has made a levy upon goods, but has not sold them; also what proceedings should be taken after such a return?
1878 Real Property - Gray

A, having held a farm for three years, has put up a shed for sheep; it consists of a roof supported by posts driven into the ground. A's tenancy is about expiring and he is desirous to remove the shed, which can be done without injury to the soil. The shed can be removed in sections and set up elsewhere. The landlord forbids the removal. Has A the right to remove?

1878 Torts - Ames

M contracted to be a servant in the house of A in Boston from November 1 to May 1 in each of the three following years, and also contracted to be a servant in the house of B in Newport, from May 1 to November 1 in each of the same three years. In December of the first year she was seduced by X, and in the following June was obliged to retire from service. Has A or B a right of action against X, or not, and why? If either has a right of action, from what moment would the Statute of Limitations begin to run, and why?

1883 Contracts [Langdell]

1. A, in New York, writes to B, in Boston, offering to sell to him bales of cotton and enclosing a sold note in due form and duly signed. B answers, accepting the offer and enclosing a bought note; but, while his letter is on the way, he telegraphs to A, rejecting the offer. What are the rights of the parties, and why? Suppose the facts to be as stated above, with the additional fact that B encloses his check for the price of the cotton, and requests A to forward the cotton.

2. A writes to B, requesting insurance on a certain vessel then at sea. B makes out a policy and forwards it to A, but while it is on the way, he telegraphs to A, declining the risk. What are the rights of the parties, and why?

3. A sent a writing to B by which he agreed, in consideration of $1, to sell to B 10,000 bushels of barley on certain terms; upon receipt of which B sent to A the $1, together with a writing by which he agreed in consideration of $1, to buy of A 10,000 bushels of barley on the same terms, but neither the money nor the writing was ever received by A. What are the rights of the parties respectively and why?

4. A agreed with B, in consideration of $1, to sell to B 1,000 bushels of wheat at $1 per bushel, and B agreed with A, in consideration of $1, to buy of A 1,000 bushels of wheat at $1 per bushel. How many contracts are there between A and B, and are they unilateral or bilateral, and why? Is the delivery of the wheat conditional upon the payment of the money, or the payment of the money upon the delivery of the wheat, and why? If yea, is the condition precedent or concurrent, and why?

5. A, having committed a crime, requested B to do his endeavor to obtain for him a pardon. B accordingly did his endeavor and obtained a pardon, and A, in consideration thereof, promised to pay B $1,000. Can B recover $1,000 or any other sum, and why? If yea, what should be the form of his declaration, and why?

6. A had a summer house near an extensive forest. While the house was shut up, the forest took fire and the house would have been destroyed, but for the services of B in fighting the fire. B was only occupied himself in this service for several days, but he employed several other men and paid them. Upon learning the facts, A promised B to pay him for his services. Can B recover, and why? If yea, what should be the form of his declaration, and why?

7. If an executory contract for the sale of chattels be not performed by either party, what must each allege and prove to enable him to recover against the other? Why?

8. If a contract for the sale of land be not performed by either party, what must each allege and prove to enable him to recover against the other? Why?
9. Under a charter-party, a portion of the freight-money was payable upon the vessels sailing, and the remainder upon the right and true delivery of the cargo. During the loading of the vessel the master committed several breaches of the charter-party in not attending at the broker's office to sign bills of lading, and in refusing to receive cargo on board. At length, however, all the cargo was received and the vessel sailed. Can the owner recover the first instalment of the freight-money and why? Suppose the vessel had finally sailed with an incomplete cargo, in consequence of the master's refusing to receive cargo?

10. A agreed to furnish straw to B at the rate of one load per week for one year at $5 per load. Upon the first load's being delivered, B refused to pay for it, claiming that the straw was not to be paid for till it was all delivered. A claimed that each load was to be paid for on delivery; and accordingly A furnished no more straw. What are the rights of the parties respectively, and why?

1887 Constitutional Law - Thayer

To what extent, if any; can the Congress of the United States forbid discrimination against passengers by common carriers in Massachusetts on the ground of color? Why?

1890 Constitutional Law [James Bradley Thayer]

1. A fruit dealer in Massachusetts bought strawberries at the South, and a carload of them arrived on the first of May; he was taxed for them. No sales were made until May 2. Taxes are regularly assessed in that State as of May 1. Is the tax lawful? Why?

2. "It has been determined," said a text writer, "that the word "law" [in the phrase 'law impairing the obligation of contracts'] comprehends . . . judicial decisions of State courts of last resort, rendered subsequently to the making of the contract in question . . . and altering by construction the constitution and statutes of the State in force when the contract was made," citing Gelpcke v. Dubuque, 1 Wall. 175. State, if you know, whether this is a true interpretation of that case. Is the doctrine, in itself, a sound one? Why?

3. The Congress of the United States charters a railroad corporation in the District of Columbia, and reserves therein the right to amend, alter, or repeal the charter. The corporation incurs large debts, and there is reason to fear that it may become unable to pay them. A station is needed at a certain point. Congress enacts a law purporting to be in amendment of the charter and requiring the corporation to build a station of a certain specified kind at the said point, and also requiring it to pay into the United States Treasury annually a certain sum to constitute a sinking fund for the payment of said debts. Are these enactments valid? Why?

4. "The deliberate decision," says a judge of the Supreme Court of the United States, "of the national legislature . . . would determine me [in considering the validity of a statute], if the case was doubtful, to receive the construction of the legislature." Is this sound? Does the same doctrine extend to the enactments of State legislatures? Why?

5. The Corporation of Harvard College owns a large tract of flats on Charles River which is becoming pestilential. The legislature passes a statute requiring the Corporation to raise the flats by filling. The Corporation also owns, in common with six other parties, a lot of swamp land, which some owners desire to improve; but others refuse. The legislature enacts that the land shall be drained by commissioners and the expense assessed proportionately upon owners. Are these statutes valid? Why?

6. A charter for an elevated railroad is granted by the legislature along two streets in the crowded part of a city; the fee of one street is owned by the city; of the other by the abutters. The constitution requires compensation where property is taken for public
use. The charter makes no provision for compensation, but the city government assents to the charter. Is it constitutional? Why?

7. "A uniform tax imposed by a State on all sales made in it, whether the goods sold are the produce of that State enacting the law or of some other State, is valid." Is that a sound proposition? Why?

8. Can the New York legislature repeal the law for executing Kemmler by electricity and substitute a law under which he may be hanged, or imprisoned for life? Assume that ex post facto laws are constitutional there. Give your reasons.

9. A State enacted that all lawyers and physicians shall take out and pay for a license, and in default thereof shall not be permitted to practise or to continue practising their professions. Assuming the ordinary provisions to be in the constitution, is this valid? Why?

10. A statute enacts that the judges of the Supreme Court shall prepare the headnotes for the official reports of their decisions. Making the same assumption as in the last question, is this valid? Why?

1883.

1895 Contracts [Williston, or Langdell, or Ames]

1. A wrote B a proposal for a contract of partnership, setting forth terms and conditions. B replied promptly: "I am preparing to make the arrangements with you on the terms you name." A received the letter. Is there a contract between the parties?

2. A, by letter, offered to sell B a piece of land, stating the offer would remain open a week. The next day A wished to revoke the offer, and on that day and the following days made all possible endeavor to find B or to communicate with him, and sent a letter of revocation to B's house. B, however, had closed his house and left without leaving his address. Within a week B telegraphed his acceptance of the offer, being at the time in ignorance of A's wish to revoke it. The telegram was duly received. Is there a contract?

3. A offered to sell B a horse, the offer to remain open till June 20. On June 21 B accepted the offer by letter. On June 23 a servant of A led into B's yard the horse and offered to deliver him to B, who refused to accept him. What are the rights of the parties?

4. A had a claim against B and C for money lent, and against D for the non-delivery of a horse according to contract. All the claims were barred by the statute of limitations. B said to A: "I shall pay you half that debt in monthly instalments." C said to E: I owe A some money and I am going to pay it." E repeated this to A. D said to A: "I will deliver your horse to you at once." What are A's rights?

5. A, for good consideration, promised B to pay C a debt B owed him, and A informed C of the agreement. Thereafter B released A from his promise by a duly executed release under seal. What are C's rights?

6. A agreed to sell and deliver on July 1 certain goods, and B agreed to buy and pay for them on that day. June 30 B wrote A: "I shall not fulfil my contract." July 2 A sued B. At the trial B offered evidence to prove (1) that A had made no tender of the goods, (2) that on June 30 A had not in his possession goods which would fulfil the requirements of the contract, and that from the peculiar character of the goods it would have been impossible for A to have obtained them by July 1. The evidence was objected to as immaterial and irrelevant and the court excluded it. Should it have been admitted?

7. A, an inventor and applicant for letters patent, assigned his invention to B, who agreed in consideration thereof to pay all expenses in obtaining the patent, to use all reasonable efforts to put the patented article on the market, to manage the business for the joint benefit of both, to advance all requisite funds and look to the business for
repayment. After part performance of this agreement, B died and C was appointed his administrator. What are the rights of the parties?

8. A, B, and C owned property near a building belonging to D. In order to increase the value of their property A, B, and C severally agreed to pay D $200 a year if he would lease his building to the United States for a post office at a nominal rent. D leased his building accordingly, the low rent being the chief inducement to the United States for taking the building. Can D recover the sums promised by A, B, and C?

9. A made a contract with B for the repayment of money lent with 12 per cent. interest. The contract was within the province of a statute against usury. The statute declared that all usurious contracts were void. Before the money was due according to the terms of the contract the statute was repealed. What are the rights of the parties?

1895 Criminal Law - Peale

Defendant, the head of a labor organization, ordered a couple of workmen, who were servants merely at will, to refuse any longer to work for their employer A, until the latter should induce a friend of his to pay higher wages to his servants. The result of the order was a strike; and many ill-disposed persons, none of them strikers, took advantage of the occasion to commit acts of violence upon the property of A. Defendant, though he expected this result, did not wish it, and ordered the strikers to take no part in it. Is he guilty of a crime?

1908 Sales - Williston

B went into a ready-made clothing establishment kept by A, and selected a suit of clothes, the price of which was $25. The clothes were not a perfect fit, and B said he would not take them unless certain alterations were made, and declined to pay the price until the alterations were made. A said they should be made within twenty-four hours and B agreed to return the next day and pay the price and take the clothes. The alterations were made on the same day on which the parties had this conversation. During the following night a fire destroyed A's shop and the suit of clothes in question. A now brings suit against B for the price. Can he recover?

1926 Contracts - Page

A planned to publish a book containing pictures of the Prince of Wales, expecting to sell it to various residents of Boston, New York, and Long Island, in view of an announced visit of the prince to these shores. B, a bookseller, contracted to buy from A 1000 copies of the book; and C, a clothing-merchant, contracted to insert an advertisement of "The Wales Knicker." The book had been published when the visit of the prince was called off. B refuses now to buy the books, and C refuses to pay for the advertisement. Very few copies are being sold. What are the rights of A?

1926 Criminal Law - Pound

Indictment for assault with intent to do great bodily harm. The evidence is that A and B were in an automobile, A driving very fast. B said to A, "I bet you can't run over that dog." A said, "Watch me," and steered for the dog, going as fast as he could. At that moment P, whose dog it was, came around the corner and was hit by the car and badly injured. Motion to direct a verdict. What ruling?
Give reasons in all cases. Thirty pages in a suitable maximum.

George R. Gray by will after providing for his wife and the children of a deceased brother directed his executors, "to divide the balance of the said one-half of said residue into the number of shares that I have brothers and sisters, who survive me, and to pay over as soon as conveniently may be done, the said shares to my said brothers and sisters, with the exception of the shares to John Norman Gray and Albert Howard Graham Gray. The shares intended for the benefit of John Norman Gray and Albert Howard Graham Gray shall be invested by my trustee and the income from each share paid to each of said brothers during their respective lifetime, and if any special circumstances arise, which in the sole discretion of my trustee justifies the drawing on the principal of the said two shares or either of them going to the said John Norman Gray and Albert Howard Graham Gray, my trustee is hereby empowered to draw on said principal and pay it out for the benefit of these two brothers; and whatever amount may remain of the share of either of said brothers at his death, to divide the balance of said share equally among his surviving brothers and sisters other than either the said John Norman Gray or Albert Howard Graham Gray."

The testator was survived by three brothers John Norman, Farquharson, and Albert Howard Graham.

The testator told his attorney that he wanted to provide for Albert and Norman and to see that their interests were properly safeguarded but the attorney understood the testator to say, "John Norman Gray" and "Albert Howard Graham Gray." Should this evidence be admitted and should the property be distributed?

1956 Constitutional Law - Brown, Freund and Howe

On March 5, 1956 the Governor of South Carolina approved a Bill passed by the Legislature of that State requiring all wholesale and retail establishments in the State dealing in Japanese textile goods, or garments made therefrom, to display prominently so as to be visible and clearly legible throughout their establishments a sign or signs reading "Japanese Textiles Sold Here." By resolution the Legislature requested other southern and New England states, where the textile industry is important, to adopt similar legislation. Alabama has since done so. The legislation imposes substantial fines for violations.

Importers of Japanese textiles, who have been developing a growing market in this country because of slightly, but appreciably, favorable price differentials report that orders and re-orders from wholesalers and retailers in South Carolina and Alabama have fallen off to zero since the enactment of this legislation. In April, 1956 the Japanese Ambassador in Washington delivered to the Secretary of State a Note reciting these facts, stating that he was informed that this legislation was at best of questionable validity and protesting that in any event it was in contravention of those provisions of the 1953 Treaty of Friendship, Commerce and Navigation between Japan and the United States which, in Art. XVI, state: "Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

[The Ambassador's Note omitted reference to the Protocol to the Treaty which, in § 7, permits regulation of the sale of goods to comply with marking requirements "to assure
that the true geographic or commercial origin of such goods is correctly represented."]
The Note concludes:

"In view of the foregoing, the Ambassador, under instructions from the Government of Japan, has further the honor to request the Government of the United States urgently to take appropriate measures to meet this regrettable situation and to prevent similar situations from arising in other states."

You are on the Legal Staff of the State Department. Prepare, for the Secretary's consideration, an analysis of the legal aspects of the situation presented, together with your recommendations as to the tenor of the Secretary's reply to the Japanese Note.

1956 Legislation (b) - Braucher

Check the best statement:
A lawyer who is retained to perform legal services in seeking the enactment of a private bill by Congress
____ (a) is guilty of a federal crime if he contracts for a fee contingent on success,
____ (b) is engaged in unethical practice if he charges a fee,
____ (c) regularly finds that any bill enacted contains provisions limiting his fee
____ (d) may properly offer to pay fair compensation to a Congressman who sponsors and supports the bill, subject only to any limitation enacted as part of the bill;

Taxation, 1956 - Griswold

Commander Edward Whitehead has a luxurious red beard, and is well-known as a corporate executive and a photographers' model. The Commander is invited to appear on a television show. One of the other participants is a wealthy sportsman. During the course of the show, the sportsman says to him: "Commander, if you will let me shave off your beard, I will give you $100,000." In considering this, the Commander wants to know what the tax consequences would be if he received the $100,000. He comes to you for advice. Give it.

Property I, 1956 - Casner

Jane Zendman bought a diamond ring for $12,000 at an auction held at the gallery of Brand, Inc., on the Boardwalk in Atlantic City, New Jersey. Harry Winston, Inc., a diamond merchant located in New York City, claims ownership of the ring. Brand and Winston had done business together for years. It was the custom of Harold Brand, the owner and proprietor of Brand, Inc., to visit Winston's premises in New York several times a month and select article that were later sold at the gallery in Atlantic City. In October of 1947, Brand chose the ring — later purchased by Miss Zendman — advising that he wished to show it to a customer, and, at his request, that one item was mailed to the gallery in New Jersey. Accompanying it was a memorandum, reciting that the goods were only for Brand's examination and that no title was to pass "until you have made your selection, notified us of your agreement to pay the indicated price [$11,000] and we have indicated our acceptance thereof by sending to you a bill of sale."

Upon receipt of the ring, Brand placed it in one of its public show windows, such display being with the knowledge and acquiescence of the owner Winston. The ring remained on display until, more than a month later, it was put up at auction and, after some bidding, "knocked down" and sold to Miss Zendman for $12,500. She received a bill of sale from Brand and knew nothing about the written memorandum or the circumstanced under which Brand had obtained possession. Sometime in January 1948, Winston discovered that Brand had sold the ring to Miss Zendman and, on
February 2nd, demanded its return. On the following day, an involuntary petition in bankruptcy was filed against Brand.

Section 23 of the Uniform Sales Act is in force in New Jersey and New York Personal Property Law, Section 104, is identical. Section 23 is as follows:

"Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The decision of the New York Court of Appeals in Zendman v. Harry Winston, Inc., 305 N.Y. 180 (1953) was based on the facts recited above. Miss Zendman sought a declaratory judgment as to the title to the ring and Winston filed a counterclaim for replevin.

Give your opinion as to how this case should have been decided and set forth the reasons in support of your conclusion.

PART 3. SELECTED EXAMINATION QUESTIONS AND INSTRUCTIONS:
TRANSITIONS IN EXAMINATION STYLES AT COLUMBIA

Questions for First Year Papers: Real and Personal Property
Columbia, June 6, 1894

Give reasons for your answers.

1. Describe the evolution of the fee, or feud, from its beginning to its present form. What was subinfeudation, and how was it affected by legislation? To what extent does it still survive?

2. What were the modes by which lands could be conveyed at common law? What characteristic had they in common? How did the Statutes of Uses and of Enrolments affect conveyancing?

3. X, having three sons, devised his lands to them as follows: to A for life, remainder to the heirs of B for life, remainder to U for life. A conveys the lands in fee simple in the lifetime of B and C. What is the effect of the conveyance on his own estate? On those of the remaindermen respectively? Who is the reservationer, and what is the effect of A’s alienation upon him? What would be the present operation of such a conveyance, and how has this result been brought about?

6. In an action of ejectment brought to recover possession of a tract of 1250 acres of land, defendant shows (1) that he entered under a will devising the property to his wife under the description of testator’s “Rock Hill Farm;” (2) that he and his wife had been in possession for upwards of twenty years; (3) that his possession had consisted in the habitual cultivation of a tract of about 250 acres, and in cutting fire-wood in the woodlands forming a part of the farm. The plaintiff claimed under a later will, which was duly established; he proved that the farm consisted of two distinct tracts of land: “farm-lands,” a part of which was occupied by the defendant, and “wood-lands,” which law at some distance from the other parcel. He showed that the defendant had himself been in possession less than twenty years, and that he took the estate as tenant by the curtesy from his wife, who had been the original disseisor. What are the rights of the parties? Would it have made any difference if the order of succession had been reversed, the husband taking the lands under the will, and the wife succeeding as doweress?

8. (a) Land is conveyed by a deed which describes its boundary line as running from a point 100 rods west of a certain highway to a stake standing by the west side of said
highway, thence along said highway to another stake and stones on the west side of the same, thence westerly at right angles with the highway 100 rods, etc. The highway is six rods wide. What is the length of the grantee's side-line?

(b) What presumption arises when land is conveyed bounded upon a stream or highway? Upon the sea-shore? Upon a private way? Upon a "paper" road, -- never actually laid out? How may this presumption be rebutted? What conflicting views have the courts taken upon this point?

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Harlan Fiske Stone, Trusts, 1922

If a candidate for graduation in June, 1922, write above your name on the cover of your answer book Candidate for Graduation-June, 1922

First give your conclusion, then state your reasons. Answers should not exceed two pages in length. Books not complying with these requirements will be marked only "C" or "F."

1. B owed A $1,000. B at A's request and on A's agreeing to relinquish his debt, notified C that he, B, held $1,000 in trust for C. At that time B had no money but shortly after he inherited $1,000 with which he purchased Blackacre, a piece of unproductive land. B paid from salary earned by B, to C, at intervals, sums of money which he represented to be income from the trust. At the end of seven years Blackacre was worth $2,000 and B was bankrupt. What are the rights of the parties?

2. A devised land and buildings worth more than $10,000 to B, subject to a charge of $10,000 in favor of C. B exchanged the land with X, who knew nothing of the charge, for Whiteacre. Whiteacre was worth $8,000 and the buildings on it were worth $4,000. B then sold Whiteacre to W for $53,000 who had notice of the charge. The buildings on Whiteacre then burned. What are the rights of C?

3. X having given to A a covenant to convey Whiteacre to A offered to give to A a similar covenant to convey Blackacre to A if A would render certain specified services. A assigned all his "right, title and interest" in and to "the covenants and to Whiteacre and Blackacre" to B in trust for C. A retained possession of the covenant relating to Whiteacre. Thereafter he rendered the services and X executed and delivered to A the covenant with respect to Blackacre. What are C's rights?

4. A orally declared himself trustee of Blackacre and the proceeds thereof, if sold, for B. A carried out the trust for a time, paying to B the rents and profits of Blackacre. Thereafter X, A's wife, who knew of the trust, persuaded A to convey one-half of Blackacre to her and to sell the other half. A invested the proceeds in Whiteacre which he afterward conveyed to X as a gift. What are B's rights?

5. A, the owner of a promissory note, not yet due, for $1,000 declared himself trustee of the note for X, a volunteer. A then endorsed the note "Pay $500 of this note to Y, signed A, and delivered it to Y as security for a loan of $500. Y had no notice of any claim by X. What are the rights of the parties?

(b) Suppose Z, the maker, had paid Y $500 without notice of the declaration in favor of X. What would your answer be?

6. A, trustee for B, deposited $2,000 of the trust funds in the X Savings Bank in A's name as trustee for Z. The X Bank at A's request then applied $1,000 of the deposit
in satisfaction of A's mortgage on Blackacre to the X Bank. Both A's and X Bank's property being liquidated in insolvency proceedings what are the rights of B and Z?

7. A, trustee for B, an infant, loaned trust moneys to X, whose credit rating was of the highest, on his demand note payable to A as trustee for B, secured by stock collateral having a market value of three times the face of the note. Seven years later B came of age. X has not paid the note and the collateral has become worthless. What are the rights of A and B?

8. A, trustee for B, pursuant to his powers as trustee leased a store, trust real estate, to X, A covenanting in the lease to keep the leased premises in repair. A in violation of the covenant neglected to repair certain shelving in the leased premises which fell and damaged X's merchandise. A being personally insolvent what are X's rights?

SLES, MID-YEAR EXAMINATION, JANUARY, 1928, COLUMBIA, LLEWELLYN

PART-I
To be given first. Time two hours.

If a candidate for graduation in February 1928, write above your name on the cover of your answer book "Candidate for Graduation, February, 1928." The student may use his casebook, the mimeographed materials, and any notes of his personal manufacture. Use not more than 40 minutes on Question 1 and divide the balance of your time between Questions 2 and 3. Think first, and don't write until you see where you are going. It is not necessary to finish any question. State the law before you discuss or criticize it. State any facts you find it desirable to assume.

1. B was a jobber in groceries working a limited territory. - S was a canner whose trade was national. On June 1, 1923, B and S signed a written agreement whereby B agreed to buy and S to sell all B's requirements of canned fruits and vegetables for the following two years, price to be seller's opening price for the season, but B to receive the benefit of any lowering in S's quotations before shipment; sizes, qualities, kinds, and quantities for any month to be specified by B before the 10th of such month, otherwise S to have option not to ship. On June 15, B placed a large order with S for July shipment. On July 1, S announced an opening price list well above the market, filled B's order, and billed B accordingly. B took and used part of the shipment, which he needed once, but contested the bill; the balance he rejected. B, on July 5, placed a second order, conditioned on some reduction of S's price. S refused to lower his price for B or other of his customers in like case, who together accounted for 80 per cent of S's output. B can take the goods at S's price and still do business at a profit, but the margin to him will be much less than is customary in the line. S's goods command no important premium from the retailer or the consumer.

Is B liable in regard to any of the goods ordered or shipped, and to what extent? Is he liable for damages for not ordering more goods out? If he has or should be held to the contract for the future, can you advise him of any way to reduce or end his liability?

2. S had the "New York agency" for the sale of Atlas steam boilers. He made contracts for their sale in his own name, and collected the price. He paid the Atlas Co. For each boiler ordered, irrespective of his own collections, although the boilers were often on his instruction, shipped direct to a purchaser. B was solicited by S to put an Atlas boiler into the plant B was constructing. B gave the specifications he required, including ability to stand 150 pounds pressure. S said: "The Atlas 2XX is exactly what you want. A contract was signed calling for delivery to B of one Atlas Giant 2XX
boiler: the contract contained the clauses: "To stand 150 lbs. pressure safely. Money back if B not satisfied after test." When installed, the Atlas Giant 2XX boiler (which had been shipped direct by the Atlas Co.) had a defective pressure gauge, so that in the higher ranges it registered forty to sixty pounds under the true pressure. B's engineer looked the boiler over and reported: "It looks good; it looks quite O.K." A painstakingly careful inspection would have revealed the defect. On the second day of use it became necessary to use full pressure; the engineer, misled by the gauge, raised the pressure to 200 lbs., believing he was only reaching 150. The boiler burst, injuring X, Y and Z (the entire force of engine room helpers) and damaging the building. B promptly notified S, saying: "I'm going to see my lawyer. I'll hold you to the limit" S claims the price, urging that the boiler complied with the contract, that it cannot in any event be returned in statu quo, and that the test which burst it was improper and due to B's negligence. He has brought suit. The law of the state makes B liable to the engine room force, but leaves them free to pursue other remedies, if any, at their option. X is suing B. Y is suing S. Can Y or Z recover? Can S? Advise B as to his rights and course of action.

3. S of Bayonne made three contracts to sell, and B of Philadelphia, to buy naphtha. The terms of each contract were identical: one carload 10 dollars a barrel f.o.b. Bayonne, less freight charges to Philadelphia; terms net 30 days. (a) the first carload, shipped out according to contract, was destroyed by accident en route. S claims the price. B damages for non-delivery.

(b) Before the second carload was shipped, S heard that B was in financial difficulties, took a bill of lading to his own order with sight draft attached, and present it to B through a Philadelphia bank. B refused to honor the draft, and brought suit against S for non-delivery, attaching the naphtha in the hands of the carrier. S contested the attachment. B then offered to call off all legal action on either carload if S would deliver on 15 days' credit. S agreed. The attachment was dissolved, and S instructed the carrier to deliver the naphtha to B. The carrier had on June 1 just placed the car on B's siding and B had begun to affix pumps for unloading, when orders from S reached the carrier to withhold delivery; S had heard of B's insolvency, which supervened on May 31. S now insisted on cash against delivery. B's trustee (who had all B's rights) on June 2 offered, "expressly reserving all his rights, however," to pay cash if the naphtha proved, on inspection, up to contract, and asked S to have a test made by a local chemist. S refused. The market on June 2 was $10.50 a barrel for naphtha of this grade. During the negotiations, however, it suddenly broke, dropping to $8.00 a barrel on June 15, and S, fearing further decline, resold the carload at that price without notice to B's trustee. The demurrage charges of the railroad came to an additional dollar per barrel. B's trustee believes he has an action either in trover or for non-delivery. S believes he has a claim for damages of $3.00 a barrel to prove against B's estate.

(c) B's trustee (as he had legal power to do) insisted on performance of the third contract, the market for naphtha having more than recovered, and on demand S he remitted the price. S was engaged in loading the car, and had filled it three quarters full. He had asked the railroad to make out the bill of lading straight to B's trustee as soon as the measurement and loading was completed; but this bill of lading had yet been signed or delivered by the railroad. At this juncture the naphtha in the car and in S's tanks was attached by a creditor of S. S then became insolvent. It developed later that the naphtha being loaded was of a lower grade than that called for by the contract. B's trustee intervened in the attachment proceeding, claiming the naphtha in the car, and an undivided share of that in the tank. Discuss the claims and rights at the parties.
Federal Courts and the Federal System - Final Examination - April 1976
Columbia, Wechsler

ANSWERS MUST BE WRITTEN IN INK OR TYPEWRITTEN.

IF YOU ARE A CANDIDATE FOR GRADUATION IN MAY, 1976, WRITE PROMINENTLY ON THE FIRST SHEET OF YOUR EXAMINATION ANSWER "CANDIDATE FOR GRADUATION IN MAY 1976."

Instructions:
This is an open-book, take-home examination. You may consult any published sources you like, and of course your notes, but you will be expected to conform with the required pledge that you have not discussed examination questions with anyone or given or received any aid in answering the questions.
Do not permit your answers to exceed the specified length. Explain your answers. There is a premium on clarity, brevity, organization and good prose. Place your number at the top of each page of your answer. It is recommended that you keep a copy of your answer for the unlikely contingency that your answer is lost.
The examination should be handed in to the Chief Proctor no later p.m. on the following dates: degree candidates, Friday, April 30 in Room F; non-degree candidates, Thursday, May 6 in the Dean's Office.

[Question Number] I [Space Maximum: 750 words]

In Taylor v. St. Vincent Hospital, 369 F. Supp. 948 (D. Mont. 73), the plaintiffs, a married couple, sued in the United States District Court to enjoin the hospital, a charitable non-profit Catholic institution, from refusing to permit the plaintiffs' physician to perform a sterilization procedure on the woman after completing a contemplated Caesarean delivery of her second child. The hospital was the recipient of federal and state grants of funds and was the only institution in the area in which the plaintiffs lived.

In the view that the receipt of public funds gave the hospital a public character and that Griswold and Roe conferred as against public authorities the right of competent adults to elect sterilization, the Court granted a preliminary injunction. Immediately thereafter Congress enacted Section 401(b) (2) (A) of the Health Programs Extension Act of 1973, 87 Stat. 95, providing that a hospital's receipt of federal funds under the Public Health Service Act (the source of St. Vincent's public funding) "does not authorize any court or any public official or other public authority to require..., such entity to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs moral convictions. . . ."

Upon the enactment of the statute the Court dissolved the injunction and dismissed the complaint, saying that "there can be no doubt that Section 401(b) which restricts the course and power of inferior federal is a valid exercise of Congressional power. Under Article III of Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it deems appropriate for the public. Lockerty v. Phillips . . . [Further,] Congress is free to legislate with respect to remedies the inferior Federal courts may grant. Aetna Life Ins. Co. v. Haworth . . . ."

1. Assuming that the complaint asserted a substantial federal claim on the merits and that the plaintiff could establish jurisdictional amount was the judgment of dismissal correct?
2. The legislative history of Section 401(b) makes clear that the enactment was inspired by the temporary injunction granted in the Taylor case and that the purpose of Congress was to terminate it if it could. Do these facts have any bearing on the correctness of the decision?

3. If the plaintiffs had brought suit in a Montana state court and the defendant invoked Section 401(b) in support of a motion to dismiss the complaint, what issues should the court resolve?

[Question Number] II [Space Maximum: 900 words]

The decision and opinions of the Supreme Court in Vachon v. New Hampshire, 415 U.S. 478 (1974), are reproduced hereafter. [Ed. note: footnotes were provided in the exam, which reproduced the opinion as a photocopy from the U.S. Reports advance sheets. The footnotes are largely omitted here.]

VACHON v. NEW HAMPSHIRE
No. 73-573
SUPREME COURT OF THE UNITED STATES
[414 U.S. 478; 94 S. Ct. 664; 1974 U.S. LEXIS 148; 38 L. Ed. 2d 666]
January 14, 1974

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

On the basis of evidence that a 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at a store operated by him, appellant was convicted of "wilfully" contributing to the delinquency of a minor in violation of a New Hampshire statute. The New Hampshire Supreme Court affirmed. Held: An independent examination of the trial record pursuant to Supreme Court Rule 40(1)(d)(2) discloses that evidence is completely lacking that appellant personally sold the girl the button or that he was aware of the sale or present in the store at the time, a fatal void in the State's case that was not filled by appellant's concession at trial that he "controlled the premises" at the time. A conviction based on a record completely lacking any relevant evidence as to a crucial element of the offense charged violates due process.

PER CURIAM. A 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at the Head Shop in Manchester, New Hampshire. In consequence, appellant, operator of the shop, was sentenced to 30 days in jail and fined $100 after conviction upon a charge of "wilfully" contributing to the delinquency of a minor in violation of New Hampshire's Rev. Stat. Ann. § 169:32 (Supp. 1972). In affirming the conviction, the New Hampshire Supreme Court held that the "wilfully" component of the offense required that the State prove that the accused acted "voluntarily and intentionally and not because of mistake or accident or other innocent reason." 113 N. H. 239, 242, 306 A. 2d 781, 784 (1973). Thus, the State was required to produce evidence that appellant, knowing the girl to be a minor, personally sold her the button, or personally caused another to sell it to her. Appellant unsuccessfully sought dismissal of the charge at the close of the State's case on the ground that the State had produced no evidence to meet this requirement, and unsuccessfully urged the same ground as a reason for reversal in the State Supreme Court. We have reviewed the transcript of the trial on this issue, pursuant to Rule 40(1)(d)(2) of the Rules of this Court.

Our independent examination of the trial record discloses that evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time. The girl was the State's only witness to the

3. The statute provides in pertinent part:

"Anyone . . . who . . . has knowingly or wilfully done any act to . . . contribute to the delinquency of [a] child, may be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both."
sale. She testified that she and a girl friend entered the store and looked around until they saw "a velvet display card on a counter" from which they "picked out [the] pin." She went to some person in the store with the button "cupped in [her] hand" and paid that person 25 cents for the button. She did not say that appellant was that person, or even that she saw him in the store. Rather, she testified that she could not identify who the person was. We therefore agree with Justice Grimes, dissenting, that "there is no evidence whatever that the defendant sold the button, that he knew it had been sold to a minor, that he authorized such sales to minors or that he was even in the store at the time of the sale." 113 N. H., at 244, 306 A. 2d, at 785. This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26." That concession was evidence at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.

In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged ... violate[s] due process." Harris v. United States, 404 U.S. 1232, 1233 (1971). (DOUGLAS, J., in chambers); Thompson v. Louisville, 362 U.S. 199 (1960); Johnson v. Florida, 391 U.S. 596 (1968); see also Adderley v. Florida, 385 U.S. 39, 44 (1966).

The judgment is reversed and the case is remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

Appellant Denis M. Vachon operates the Head Shop in Manchester, New Hampshire, where he sells various beads, dresses, posters, and the like. In July 1969, a 14-year-old girl, accompanied by her girl friend, went to the shop seeking to purchase a button or pin like the one purchased by her friend the previous week. She found the button, inscribed "Copulation Not Masturbation," and purchased it from a salesperson in the store. It was conceded in the New Hampshire courts that appellant was in control of the premises where the sale was made. At a jury-waived trial, appellant was convicted of contributing to the delinquency of a minor, a statutory offense proscribed in these words:

"Anyone ... who shall knowingly or wilfully encourage, aid, cause, or abet, or connive at, or has knowingly or wilfully done any act to produce, promote, or contribute to the delinquency of [a] child, may be punished ...." N. H. Rev. Stat. Ann. § 169:32 (Supp. 1972).


The Court decides that appellant's conviction under this statute violates rights secured to him by the Due Process Clause of the Fourteenth Amendment, concluding on the basis of its "independent examination of the trial record" that "evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time."

In one sense there can be no doubt that the Court's conclusion is based upon an "independent examination of the trial record," since the claim sustained here was neither made in constitutional form to the Supreme Court of New Hampshire, nor even presented by appellant in his jurisdictional statement in this Court.

A litigant seeking to preserve a constitutional claim for review in this Court must not only make clear to the lower courts the nature of his claim, but he must also make it clear that the claim is constitutionally grounded. Bailey v. Anderson, 326 U.S. 203 (1945). The closest that appellant came in his brief on appeal to the Supreme Court of
New Hampshire to discussing the issue on which this Court's opinion turns is in the sixth section (at 17-18), which is headed: "The State's failure to introduce any evidence of scienter should have resulted in dismissal of the charge following the presentation of the State's case." Appellant in that section makes the customary appellate arguments of insufficiency of the evidence and does not so much as mention either the United States Constitution or a single case decided by this Court. The Supreme Court of New Hampshire treated these arguments as raising a classic state law claim of insufficient evidence of scienter; nothing in that court's opinion remotely suggests that it was treating the claim as having a basis other than in state law.

The Court purports to decide the scienter question on the basis of Rule 40 (1)(d)(2) of the Rules of this Court, which provides:

"1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated --

(d)(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

The very language of this rule makes it clear that it applies to this Court's review of cases in which it has previously either noted probable jurisdiction or granted certiorari. The cases cited by the Court in support of what it does here are therefore necessarily cases in which review had been granted and which had been orally argued; in addition, each of those cases arose in the federal courts. See Columbia Heights Realty Co. v. Rudolph, 217 U.S. 547 (1910); Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

Whatever the import of Rule 40 (1)(d)(2) in cases arising in the federal courts, it surely does not give this Court the power to simply ignore the limitations placed by 28 U. S. C. § 1257 on our jurisdiction to review final judgments of the highest court of a State. That jurisdiction permits review in this Court by appeal where a state statute has been upheld against a federal constitutional challenge, or by writ of certiorari where a federal constitutional challenge is "specifically set up or claimed" in state court. Our prior cases establish that we will "not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See Crowell v. Randell, 10 Pet. 368 (1836). Since the Supreme Court of New Hampshire was not presented with a federal constitutional challenge to the sufficiency of the evidence, resolution of this question by the Court is inconsistent with the congressional limitation on our jurisdiction to review the final judgment of the highest court of a State.

II

Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on Thompson v. Louisville, 362 U.S. 199 (1960), I would nonetheless be unable to join in the Court's disposition of it. In Thompson, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right of appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which Thompson was convicted. This Court therefore had no choice but to engage in its own construction of the statute and upon doing so it concluded that the record was "entirely lacking in evidence to support any of the charges." Id., at 204. Thompson was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore
been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction.

Here, however, the Supreme Court of New Hampshire construed the state statute defining contributing to the delinquency of a minor, and held that the evidence adduced at the trial was sufficient to support a finding on each element of that offense. While the Supreme Court of New Hampshire did say, as the Court indicates, that the State was required to prove that the accused acted "voluntarily and intentionally and not because of mistake or accident or other innocent reason," 113 N.H., at 242, 306 A.2d, at 784, it said this in a context of several paragraphs of treatment of the elements of the offense. Just as those reading and relying upon our opinions would be ill-advised to seize one phrase out of context, I think we are ill-advised to so treat the opinion of the Supreme Court of New Hampshire. That court had several observations to make about the statutory offense which bear on the issue of "wilfulness" upon which this Court focuses:

"It is uncontested that the defendant was in control of the premises where the sale was made. There was evidence that a girl friend of this minor had previously purchased there a pin 'like that.' These pins were displayed on a card on a counter. The trial court saw the minor and had an opportunity to conclude whether her minority should have been apparent to whoever sold the pin. The court could find that the defendant was aware of the character of the pins which were being offered for sale and sold in his establishment.

"Defendant is charged with wilfully contributing to the delinquency of a minor by selling or causing to be sold to her the button in question. To act wilfully is 'to act voluntarily and intentionally and not because of mistake or accident or other innocent reason.' [Citations omitted.] The trial court could properly find and rule that the sale of this button to the minor was intentional. The trial court could further conclude that the seller of this type of button should have realized that it would tend to be harmful to the morals of the purchaser or others. R. S. A. 169:32 (Supp. 1972). This would warrant a finding and ruling that the defendant wilfully contributed to the delinquency of this minor as charged in the complaint. [Citations omitted.]" Id., at 242, 306 A. 2d, at 784.

The Court simply casts aside this authoritative construction of New Hampshire law, seized one phrase out of context, and concludes that there was no evidence to establish that the appellant "[knew] the girl to be a minor, personally sold her the button, or personally caused another to sell it to her." The word "personally" is the contribution of this Court to the New Hampshire statute; it is not contained in the statute, and is not once used by the Supreme Court of New Hampshire in its opinion dealing with the facts of this very case. Indeed, the entire thrust of the opinion of the Supreme Court of New Hampshire is that appellant need not personally have sold the button to the minor nor personally have authorized its sale to a minor in order to be guilty of the statutory offense. The only fair reading of the above-quoted language from the Supreme Court of New Hampshire is that the word "wilfully" in the statute does not mean "personally," and the facts that the appellant controlled and operated the shop, that the same type of pin had been previously purchased at the shop, and that the pins were prominently offered for sale were sufficient evidence on the issue of willfulness.

This may seem to us a somewhat broad construction of the language "wilfully" or "knowingly," though our own cases make it clear that we are dealing with words which may be given a variety of meanings by their context:

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be
willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. United States v. Murdock, 290 U.S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness."


But since our authority to review state court convictions is limited to the vindication of claims of federal rights, we must take the meaning of the statute, and of the words "wilfully" and "knowingly" which it uses, as given to us by the Supreme Court of New Hampshire. I would have thought such a proposition well settled by our prior decisions:

"We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." Garner v. Louisiana, 368 U.S. 157, 166 (1961).

We do have constitutional authority in appropriate cases to hold that the State's construction of its statute is such that the statutory language did not give a criminal defendant fair warning of the conduct which is construed to be embraced within it. Cole v. Arkansas, 333 U.S. 196 (1948); Bouie v. City of Columbia, 378 U.S. 347 (1964). But this is a far cry from our own rewriting of a state statute in order to make it require a highly specific intent, and then turning around and saying that there was no evidence before the state courts to prove the kind of intent which we have said the statute requires. I would at least note probable jurisdiction over the appeal and set the case for oral argument. Since the Court instead chooses, without ever having heard argument, to rewrite the New Hampshire statute and substitute its interpretation for that of the Supreme Court of New Hampshire, I dissent.

1. Did the Supreme Court properly take jurisdiction on appeal from the New Hampshire Supreme Court?
2. If you were a law clerk to a Justice when the case was in the Court and he asked you for your views, would you have recommended that he subscribe to the per curiam or the dissent or that he write something on his own, and if the latter, what?
3. On the remand, is there anything that the New Hampshire Supreme Court could properly have done or said to vindicate its judgment that the statute is violated by a person in control of premises on which obscene material is offered for sale and in fact sold to a minor?

[Question Number] III [Space Maximum: 600 words]

Rule 23.1 of the Federal Rules of Civil Procedure deals with derivative actions by shareholders and requires, inter alia, that the complaint allege that "the plaintiff was a shareholder . . . at the time of the transaction of which he complains."

In Bangor Punta Operations v. Ban-or & A.R. Co., 417 U.S. 703, 708 n. 4 (1974), Mr. Justice Powell said:

"The 'contemporaneous ownership requirement in shareholder derivative actions was first announced in Hawes v. Oakland, 104 U.S. 450 (1882), and soon thereafter adopted as Equity Rule 97. This provision was later incorporated in Equity Rule 27 and finally in the present Rule 23.1. After the decision in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), the question arose whether the contemporaneous ownership requirement was one of procedure or substantive law. If the requirement were substantive, then under the regime of Erie it could not be validly applied in federal diversity cases where state law permitted a noncontemporaneous shareholder to
maintain a derivative action. See 3B J. Moore, Federal Practice ¶23.1. 31-23.1.15[2]. Although most cases treat the requirement as one of procedure, this Court has never resolved the issue. Ibid."

1. If the validity of the requirement is challenged in a shareholder's action arising solely under state corporation law, with jurisdiction based on diversity of citizenship, when no such requirement is imposed by the state of the governing law, what should the ruling be?

2. If the shareholder's action referred to above was brought in a state court and properly removed by the defendant and the contemporaneous ownership rule is held applicable and valid, should the District Court dismiss the action or remand to the state court?

[Question Number] IV [Space maximum: 900 words]

The National Commission on the Causes and Prevention of Violence under the chairmanship of Milton S. Eisenhower reported in 1969. One of its major recommendations was that Congress enact legislation "that would confer jurisdiction upon the United States District Courts to grant injunctions, upon the request of the Attorney General or private persons, against the threatened or actual interference by any person, whether or not under color of state or federal law, with the rights of individuals or groups to freedom of speech, freedom of the press, peaceful assembly and petition for redress of grievances."

Senators Hruska and Hart, who were members of the Commission, thereupon introduced S. 3976, 91st Cong., 2d Sess., providing in major part as follows:

CERTAIN CONDUCT UNLAWFUL

SEC. 2. It shall be unlawful for any person or group, except as authorized by law, to interfere, either willfully by the use of physical force, by the use of disruptive noise with specific intent to interfere, or by the unreasonable withholding or limitation under color of Federal or State law of any required permit, license, or other permission —

(1) with the orderly conduct of any meeting, address, discussion, worship, or other assembly, or with the free passage of persons or the conduct of business or research in any street, building, or other place incidental to the exercise of the constitutional rights of religion, speech, press, assembly, or petition; or

(2) with the exercise by any person or group, by demonstration, picketing, publication, or other means, of the rights of free speech, free press, peaceable assembly, or petition to the Government for redress of grievances.

ENFORCEMENT BY PERSONS AGGRIEVED

SEC. 3 (a) Any individual, group, institution, or other public or private person who claims to have been injured, or who believes that he will be irreparably injured, by conduct in violation of section 2 of this Act, may bring a civil action for appropriate relief.

(b) The United States district courts shall have original jurisdiction of civil actions under this Act. A civil action under this Act may be brought without regard to the amount in controversy in the United States district court for the district in which the unlawful conduct is alleged to have occurred or to be about to occur.

(c) In any civil action under this Act, the district court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award damages together with court costs.
Upon timely application in any civil action under this Act brought in a United States district court, the court shall permit the Attorney General to intervene if he certifies that the case is of general public importance.

The bill was promptly attacked on constitutional grounds, namely, that insofar as the bill purports to make unlawful the conduct of private as distinguished from official individuals or groups, not acting under color of federal or state law, it exceeds the power of Congress. You are a law assistant to one of the sponsors of the bill and he has asked you to consider whether there is any way the bill can be revised to meet the constitutional objection (whether or not you believe that it has merit). Specifically, since the conduct that it is the purpose of the bill to prevent (breaking up meetings, etc.) is bound to be unlawful under state law even if it is not unconstitutional, the important goal is not the federal declaration of illegality but the enlistment of the federal courts in its prevention.

Is there any way the bill can be revised to serve this purpose? If so, how? If not, why not?

Would the enactment of the Proposed Federal Court Jurisdiction Act (Judicial Code Pamphlet, p. 631) lead to a different result in such a case as:


**PART 4. SELECTED EXAMINATION QUESTIONS:**

**TRANSITIONS IN EXAMINATION STYLES AT MICHIGAN**

**University of Michigan, Department of Law**

**Questions on Common Law Pleading**

**Second Semester, 1895-96**

1. Define an action. What are the classes of actions. Define each. How were real actions divided.

2. What is the real distinction between real and personal actions.

3. Name the superior courts of the common law, give the jurisdiction, and number of judges in each. Have these courts encroached upon the jurisdiction of each other. How.

4. How were actions commenced originally (a) in the courts of King Bench (b) in the common pleas (c) in the exchequer.

5. What was this original writ. Out of which court did it issue. Was it under seal. To whom was it directed. What did it contain. What was its object. What was the effect of a failure to comply with this writ.

6. Were there different forms of original writ. How many.

7. What were the different writs used in real actions. Define each.

8. Name the modern mixed actions.
9. What can you say of the action of forcible entry and detainer.

10. May a judgment in the action of "forcible entry and detainer" be plead in bar of an action of ejectment.

11. What can you say of the possession necessary to maintain this action. Must the possession be actual. May it be constructive. May one in wrongful possession have benefit of this action.

12. What can you say of the force necessary in order to maintain this action. Will a mere trespass be sufficient. Is entry by means of keys a forcible entry. May this action be maintained where the original entry was lawful. When. When not.

Constitutional Law, May 26, 1924

Please do not repeat the questions. Give only your answers. Give reasons in all cases as clearly and concisely as possible. Discuss all reasonably possible constitutional objections to the legislation involved in these questions.

I.
A state constitution provides that "private property shall not be taken for public use without just compensation." A railroad company built its road along one side of A's farm but did not at any point cross the boundary line with its road-bed. Cinders from the many passing locomotives caused A some inconvenience and injuriously affected certain crops. The jarring caused by passing trains shook down much earth from a railway embankment at a certain place, upon A's land and so diverted water in a ditch running parallel to the road as to flood a part of A's farm after heavy rains. Has A any remedy?

II.
A state statute subjects all who are "engaged in mining or producing iron or other ores" within the state to the payment of an "occupation tax" equal to 6% of the value of the ore mined or produced during the preceding year. B is engaged in mining ore. Practically all of his output is mined to fill existing contracts with persons outside the state, and passes at once into the channels of interstate commerce. Steam shovels sever the ore from its natural bed and lift it directly into cars, which are then run into the railroad yards, where they are put into trains which start the ore on its interstate journey. Must B pay the tax?

III.
The A Co. deeded a lot with a residence upon it to B, expressly reserving to the grantor the right to mine and remove all coal under the surface, the grantee taking the premises with the risk and waiving all claims for damages that might arise from mining the coal. Thereafter the legislature passed an act forbidding the mining of coal in such way as to cause a subsidence of structures used as human habitations. Can the act be applied to B's land?

IV.
A state statute created a drainage district, describing it by bounds, and provided for taxing all property therein, for the construction of a sewer for house drainage only. Plaintiff brought an action to cancel the assessment as to his property, on the ground that his land was so situated that it could not benefit from the improvement, unless the district would construct a branch sewer not yet planned, and that he had had no notice and had been given no hearing upon the fixing of the boundaries of the district or the assessment of the tax. Should he succeed?
V.
A state statute imposed what it called an “occupation tax” of 2% upon all premiums paid by corporations of the state and by foreign corporations doing business in the state, to insurance companies outside of the state not authorized to do business with the state. Is the statute valid?

VI.
A city having legislative authority therefor, constructed subways, tunnels and road-beds and leased this property to a railroad company, to operate as a public railroad. Thereafter the company became insolvent, and the state legislature thereupon passed a special Act, creating a board of trustees to take over and operate the railroad, and to pay dividends if earned, to the stock holders. The statute also provided for the assessment of taxable property in the city to meet a deficit if any should arise from operation of the road. The rentals provided for in the lease were to be paid to the city from net earnings, if any. Was this action constitutional?

VII.
Suppose an Act of Congress by Sec. 1 conferred upon the Supreme Court original jurisdiction in all cases brought by municipal corporations of one state against municipal corporations of another state; and by Sec. 2 conferred original jurisdiction upon the District Courts, in all cases brought by or against foreign ambassadors and ministers; and by Sec. 3 gave to the parties in cases arising under Sec. 2, the right to appeal such cases from the District to the Supreme Court. Discuss the validity of the statute.

VIII.
A state constitution provides that juries shall be made up of “citizens of the state, of the age of 21 years or above.” The state supreme court had construed this clause to mean “male citizens” of the required age. What if any effect has the adoption of the “equal suffrage” amendment to the U.S. Constitution upon the eligibility of women to jury service in said state?

IX.
The “Pure Food Act” of Congress requires manufacturers of canned foods to attach labels to the cans, giving in a described manner the contents thereof, in the case of all such products carried in interstate commerce. A state pure food act requires a different and somewhat conflicting label on all canned goods offered for sale within the state. At what time, if any, may the state labels be attached to canned goods, brought in from other states (a) to the separate cans, and (b) to the wooden boxes in which such cans are packed?

X.
Would a state statute authorizing a state commission, created for that purpose, to acquire under eminent domain, all slaughter-houses in the state slaughtering annually more than 1,000 animals for food purposes, and to maintain and operate such plants, and to sell meat and the by-products at “reasonable prices, the cost of production and marketing considered,” be valid?

END

University of Michigan
Law School,
Constitutional Law
May 25, 1935

Please do not repeat the questions. Give only your answers. Give reasons in all cases as clearly and concisely as possible. Discuss all reasonably possible constitutional objections to the legislation involved in these questions.
A state statute provided for the allowance of a reasonable attorney's fee not exceeding $25 to successful plaintiff in any suit in which an attorney is actually employed upon a claim not exceeding $250 against any person or corporation doing business in the state, for personal services rendered, labor or material furnished, or for overcharges on freight or express by such person or corporation, where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed. A railway company operating its lines in that state and adjoining states had judgment for the full amount claimed by plaintiff and a $25 attorney's fee entered against it. Is the judgment good?

Another statute concerns the furnishing of cars by railways to shippers, and provides that when cars applied for, in accordance with the statute, are not duly furnished, the railway company shall be liable to the shipper for a penalty of $10 a day for each car not furnished, and for a reasonable attorney's fee. Shippers who fail to load cars within two days after they are placed at their disposal are liable to the company for a similar penalty, but not for attorney fees. Is a judgment carrying attorney fees against a railway company good?

A state statute provides that in every attachment suit brought in any of the courts of the state by non-residents of said state, the plaintiff shall file an indemnity bond in favor of the defendant, the bond to be for an amount equal to double the value of the property attached, and to be approved by the court, before the issuance of the attachment writ. Residents of the state bringing attachment were not required to file indemnity bonds, unless the judge of the court so decided and then in an amount to be fixed in the discretion of the judge.

P, a non-resident, sued D, a resident, for an amount claimed to be due upon D's promissory note, but by mistake of P's lawyer, and through inadvertence of the judge, who had not observed that P was a non-resident, the bond was filed in conformity with that section of the statute relating to resident plaintiffs in attachment and it was for an amount fixed by the judge at less than double the value of the property attached. Three months after the filing of the suit, it was dismissed on defendant's motion for non-compliance with the statute. The statute of limitations on the cause of action had run one month before the dismissal. A month after the dismissal of the suit, the state legislature passed an act directing the court to reinstate the case when and if the plaintiff should file a proper bond within thirty days after the passage of the Act. D, at the appropriate time, objects to the reinstatement. Discuss the validity of both statutes.

The Detroit Street Railway Company is incorporated under a Michigan statute, and is authorized to operate cars in certain Detroit streets, after securing appropriate franchises from Detroit for a period of thirty years. It is required to maintain its tracks, cars and equipment in good condition, to provide adequate service for the districts it serves and charge fares at not to exceed six cents each. The Company secured proper franchises from the City of Detroit to operate its lines for the period of thirty years. After the Company had operated for five years, the Mayor of Detroit, alleging that the Company was not maintaining "adequate service" for certain neighborhoods and was violating the provision as to fares, because it refused to give transfers from one to others of its lines, issued an order suspending the right of the Company to operate, and directed the police to enforce the order. Is the order valid?

The National Recovery Act of Congress, after declaring the existence of an economic emergency, authorizes the President, upon the application by one or more trade or industrial associations or groups, to approve a code or codes of fair competition for the trade or industry, if the President finds (1) that such association or group imposes no
inequitable restrictions on admission to membership; and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises; provided that such code or codes shall not permit monopolies or monopolistic practices.

The Act further declares that after the President has approved any such code, the provisions thereof shall be the standards of fair competition for such trade or industry, and that any violation thereof shall be deemed an unfair method of competition in commerce. It further provides that whenever the President shall find that destructive wage or price cutting, or other activities contrary to the policy of the Act are being practiced in any trade or industry, and, after such public notice and hearings as he shall specify, shall find it essential to license business enterprises, in order to make fair codes or fair competition, no person shall, after the date fixed by the President, engage in or carry on any business in or affecting interstate or foreign commerce, unless he shall have first obtained a license pursuant to such regulations as the President shall prescribe.

The shoe manufacturing industry was organized conformably to the Act, and adopted a Code which, among other things, contained a schedule of wages and hours of labor for employees. M, a manufacturer, is found guilty by the code authorities of violation of this schedule, fined and "ordered" to conform. The finding supporting the code of schedule of wages is that "this schedule of wages is reasonable and fair to employers and employees". M claims that compliance with the schedule would involve him in loss and insolvency. He imports leathers from other states and sells his finished product throughout the country. His manufacturing is all done in Ohio. Is the order valid?

During the period prior to 1900, the R telephone company had established a system of long distance telephone communication over large parts of the states of Iowa and Missouri. It also owned and controlled local telephone exchanges in many cities and towns in this territory. The American Telephone and Telegraph Company by license and stock ownership controlled the R company so that the latter, with its local and long distance lines, became allied to the Bell system extending throughout the United States. There also existed in the two states named many independent local telephone exchanges which competed with the local exchanges of the R company. Said competition was not comprehensive and complete because the independent exchanges were not connected with each other by long distance lines and hence could not give long distance service to their patrons. The R company refused to permit the independent exchanges to use its long distance lines.

For the purpose of furnishing long distance service to these independent exchanges, the U company was organized as an independent long distance company. It expended several million dollars in constructing its lines, and made contracts with the independent local exchanges providing for an interchange of business so as to develop a comprehensive and adequate independent telephone system which competed with the Bell system; and by 1910 was furnishing long distance service for one thousand independent exchanges. In the latter year the R company changed its policy and solicited exchange of business with the local independent companies. Several independent companies entered into contracts with the R company despite the fact known to all parties that the contracts of the U company with all of the independent companies provided that for points reached by that company the independent companies should give their long distance business exclusively to it. The U company gave much lower rates than did the R company, but its lines did not reach so wide a territory, though they were being rapidly extended.

The U company filed bills for injunction, asking that the independent companies be restrained from entering into contracts with the R company, setting up the above facts and alleging that the purpose of the R company associated in soliciting business of the local independent exchanges was to create a complete monopoly in the telephone
business and that such would be the effect if the new contracts were allowed to stand. Defendants demur. The R Company was incorporated under the laws of Maine and a statute of that state forbade monopoly and restraint of trade. Should the demurrer be sustained under either the Maine Act or the Sherman Anti-Trust statute?

VI

P, a manufacturer in Detroit, contracts to sell one hundred automobiles to B, a dealer of New York, fifty of said cars to be delivered at his place of business in New York and fifty at his plant in Jersey City. To save transportation expense, P ships the parts of the cars "knocked down": to his own assembling plant in New York, there to be "set up" ready for delivery. The cars arrive in New York March 1. New York property taxes become due April 1. On that day all of the cars are still in P's New York plant. Twenty of them are set up and marked and put aside for delivery to B in New York whenever he shall ask for them; twenty more are ready and set aside and marked for delivery to B in Jersey City, as soon as the transportation company has trucks available to take them to Jersey City, the order for said trucking having been given already. The remaining sixty cars are still being set up in P's New York plant. B has not paid for the cars. Can the New York taxes be enforced against either P or B, as to any or all of these cars?

VII

A shot and killed B. After arrest and arraignment he pleaded guilty. As the law stood when the homicide was committed it was provided that if the defendant pleaded guilty, sentence of death should not be pronounced unless the jury in their verdict should find that the killing was deliberate and premeditated. Before A's trial the law was so changed as to provide that where the plea was guilty a jury should be impanelled to try the question whether or not the killing was deliberate and premeditated and the sentence made to depend upon their verdict. The new procedure was followed in A's case. The jury found that the homicide was deliberate and premeditated and A was sentenced to death. Decide the case on appeal.

VIII

Eighty retail dealers in hardware, some of them doing business in the state of Michigan and the others in the state of Ohio, organized an association under an agreement which recited that "recognizing that we as retail dealers cannot meet competition from those from whom we buy, we pledge ourselves as members of this association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail hardware dealers who carry stocks commensurate with the demands of their communities, and we pledge ourselves not to buy from hardware commission merchants, agents and brokers who sell to consumers but do not carry stocks, nor from a manufacturer who sells to such hardware commission merchant, agent or broker". The association was open to any reputable hardware dealer. The agreement and by-laws provided no penalty for violation of the pledge and it is not shown that any was ever imposed. The association made no schedule of prices at which its members should either buy or sell, but prices were stiffened and raised by the activities of the Association. The state of Michigan on relation of its Attorney-General filed a bill to enjoin the Michigan dealers from continuing membership. The Attorney-General of the United States filed a bill for the dissolution of the Association. Decide the cases.

IX

A state legislature having constitutional authority therefor caused the issuance of state bonds for the building of a railway within the state to be operated by the state. The bonds provided for their payment in gold coin of the United States of the then specified weight and fineness. A purchased some of these bonds. After the purchase Congress passed an Act authorizing the President of the United States, in his discretion, to reduce the weight of the dollar by not more than thirty per cent. On the maturity of the bonds the State tendered the specified number of dollars of a weight reduced 20%, in
accordance with an order to that effect issued by the President under authority of the Act mentioned. Meantime, A had sold his bonds to Ohio for their full face value. Ohio refuses to receive the specified number of reduced dollars in full payment and sues to recover a number of dollars equivalent in value to the amount specified in the bond. Decide the case.

X

A state legislature created a state commission for the conservation of petroleum and allied products, and authorized it to make rules and regulations designed for the intelligent, just and economic production of petroleum and associated products. Among other provisions the Commission ordered that where several persons own separate lots in a common oil field, such owners shall be allowed to drill wells and pump or otherwise withdraw oil or gas only upon permits issued by the Commission, and then in such quantities as should be specified. The Commission further provided that the oil and gas taken from such common and regulated pools or fields should be measured and that each owner should be paid from the sales his pro rata share of the proceeds, as determined by sound engineering methods. W, who is the owner of wells capable of producing far more oil than he was allowed to take under these regulations, contests the validity of the Act and the regulations referred to.

First Year Property
May 31, 1935

I

A’s car was stolen by B. Later is was levied on as B’s property and sold on execution sale to satisfy a judgment of a creditor of B. C Who bought at the sale had no notice of A’s ownership. After C had improved the car by putting on two new tires, a new horn and a new battery, A sued B in trover and secured a judgment for the value of the car at the time of the defendant’s conversion. This judgment being unsatisfied, A thereafter sued C in an action in the nature of replevin. C counterclaims for the value of the horn, tires and battery. What decision?

II

While engaged in painting A’s barn, B observed in an abandoned bird’s nest under the eaves three twenty dollar bills. Reaching as far as he could with his paint brush, he knocked the nest down so that the bills fell on land of C adjoining A’s farm. B then climbed down and picked up the money. A admitted that he knew nothing about the bills. But when it appeared that the real owner could not be found, A sued B in replevin for the bills. At the trial it appeared that A had bought the farm in January and taken possession shortly thereafter; that the barn was painted by B the following March; and that the eaves in which the bills were found projected above land of C. How should the court decide?

III

A purchased a new car of a dealer B, trading in his old car as half the purchase price and giving his unsecured note for the balance. B was induced to make the sale to A only on the representations of the latter that the used car traded in had been driven carefully by no one but A and that the mileage, 3500 miles, indicated by the speedometer represented the total distance which the car had been driven. But as A well knew, the car had been used for taxi service prior to the time when he acquired it, and had been drive some 25,000 miles. Some time after A bought the new car, he took it to C’s garage for repairs. A few days later B discovered the fraud which had been practiced on him, and demanded the new car back, indicating his willingness to return the used car which A had traded in. C, however, refused to give up the car he had repaired until his charges had been paid. B thereupon sued C in replevin. What decision?
IV
A had $800 on deposit in a savings account in X bank. A lived at the home of B, and C, the daughter of B, was a great favorite with A. One evening while Mr. and Mrs. B and A were sitting at the dining room table in their home, A referred to his bank account and said: "I've got a will here** I understand I have got to have two signatures". Thereupon, at the request of A, Mr. and Mrs. B. signed the following document as witnesses: "Dear Carlotta: I give to you my money in X bank. (Signed) A". As soon as this instrument was signed by the witnesses, A put it in his bank book and stepped into the parlor where C was, saying, "Carlotta, I will give you this", and he handed her the bank book with the quoted document folded inside. Though A was apparently in good health at the time, he died two months later, leaving one sister, the defendant, who resided in Denmark. C filed a petition for the probate of the quoted document as a will, but probate was denied because of ineffective attestation. The administrator of A’s estate starts an action in court designed to determine whether the savings account should be paid to C, or whether it should be distributed to A’s surviving relatives. What result?

V
In 1600, A, owning Blackacre in fee simple, without consideration executed and delivered to his brother B a deed in which the conveying language was to the effect that the grantor A “bargains and sells Blackacre to the use of B so long as he shall reside on the premises, remainder to the use of the heirs of B”. B lived on the premises for his lifetime and died devising the land to C, who then entered. B’s only heir D sues C in an action in the nature of ejectment. What decision?

VI
L, the owner in fee of Blackacre, leased the premises to T for ninety-nine years. Thereafter, but before the ninety-nine year term had expired, L and T got together and executed a new lease of the same premises, the new lease running for a term of fifty years. The new lease contained a provision to the effect that the lease was made subject to the condition that in case the sale of intoxicating liquors should become illegal, then “this lease shall thereupon become null and void, and the lessor or his successors may re-enter upon the premises and repossess themselves of the same as if this lease had not been made”. Ten years after the new lease took effect, the sale of intoxicating liquors became unlawful by virtue of a constitutional amendment, and thereupon L went upon the premises and demanded possession thereof from T, who refused to leave. L now sues T in ejectment. What result?

VII
At the request of A, a form deed was signed by O, the deed naming A as grantee. At the time O signed the deed it contained no description of any land to be effected thereby. That part of the deed was left blank. A took the deed away with him, and after procuring the description of the land owned by O, which was typewritten on a separate piece of paper, he pasted this typewritten description onto the deed in the blank space where the description would normally be found. A then persuaded a notary public to fill out and sign and seal the certificate of acknowledgment as if O had appeared before him. A then took the deed to plaintiff bank, which loaned money to A, taking as security for the loan a mortgage by A on the premises described in the deed. The bank knew nothing of the circumstances just related. A, having failed to pay the debt secured by the mortgage, the bank proceeded to foreclose and O claims the premises free of any mortgage lien. What result?

VIII
A executed a deed of Blackacre to B and his heirs, the deed containing full covenants of title. As a matter of fact, at the time of the execution of this deed, Blackacre was owned by X instead of by A. Later on, however, A bought the land from X, who gave him a deed therefor, and shortly thereafter A died. The land was vacant at that time, and P, the only child of A, (who had died intestate) took possession. Not long
thereafter, the defendant entered into possession, ousting P from the land. In an action
now by P against defendant in ejectment, the latter seeks to rely upon the above facts,
showing that the right to the possession of the premises is in B, and that, therefore, P’s
action should fail. What result?

IX

O, the owner in fee of four tracts of land, was confined to a hospital suffering from
the effects of a severe fall. She also had irregular heart action from which her doctors
expected sudden death at any time. In that situation she sent for her undertaker, who
at her request prepared four deeds in favor of four grantees, relatives of O’s deceased
husband. O properly executed these deeds and handed them to the undertake saying:
“Take those papers and keep them, and then in a few days when I get better I will be
up and get them”. The following day her condition was obviously worse and an
intimate friend who then visited her testified that O said that she knew she was dying
and that “I have made some deeds and they are all right, and I am only sorry that I
haven’t time to make arrangements for my personal property”. She later sent for her
minister who prayed for her, and she expired early the next morning. In an action by
the grantees in these four deeds to recover possession of the land, which action was
contested by O’s heirs, the foregoing facts appeared, and also that O had a strong
prejudice against wills, having a firm belief that wills could be broken, as her mother’s
had been. It further appeared that she had conceived a hatred of her own relatives on
account of injustices to which she thought they had subjected her in early life. What
result?

X

On February 10th, O, the owner in fee of Blackacre, executed and acknowledged a
written contract to sell it to B for $10,000, of which one-half was paid in cash, balance
to be paid in installments as stated in the contract. This contract was not recorded. On
April 5th, O executed a deed, effective in form, conveying Blackacre to X and his heirs.
X paid value therefor and knew nothing of the arrangement between O and B. On April
20th, B recorded his contract, and a month later, when he had tendered the balance of
the purchase price, demanded a deed from O and X. The latter refused, and B sued to
compel the giving of the deed. It may be understood that a statute of the State where
the land is provides: “All deeds, mortgages and other instruments affecting the title to
land shall be acknowledged and recorded in the county in which the land lies, and if not
so recorded within ninety days of the time of execution, they shall be void as to all
subsequent purchasers for value without notice.” What result?

Constitutional Law
P.C. Kauper
May 30, 1950

The first part of this examination consists of objective questions printed separately.
The second part consists of the five essay questions printed below.

I

The statutes of State M governing elections and the qualifications of voters provide,
inter alia, that no person shall be eligible to vote in any state election unless he is a
citizen of the United States and unless he is properly registered as a voter at the city
clerk’s office.

At an election for state officers held in State M, X was refused a ballot by Y, the
election official, on the ground that he was not a citizen of the United States and also
on the further ground that he had not registered in advance. X thereafter brought a civil
suit for damages in the state court against Y for alleged unlawful denial of X’s right to
vote. In his suit X claimed that he was a citizen of the United States by birth; he also
claimed that he had properly registered in advance and that the city clerk had failed to
keep a proper record of his registration. The case reached the supreme court of State M which held that X stated no cause of action. The state supreme court found that X had not proved his citizenship since evidence in the record did not prove his birth in this country; it also found that X had not proved his advance registration as required by statute.

Sec. 1257 of the Federal Judicial Code, defining the appellate jurisdiction of the United States Supreme Court, reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in the question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Under the language of the Judicial Code quoted above, does the Supreme Court of the United States have jurisdiction to review the state supreme court's decision in X's case?

II

X, a Negro, was indicted on a manslaughter charge in a state court. It was alleged in the indictment that X through the grossly negligent and careless driving of his automobile had run down a pedestrian named Y and caused his death. The grand jury which indicted X consisted of both Negroes and whites. X, who was competently represented by counsel, entered a plea of not guilty and asserted his right under state law to a jury trial. Six Negroes were included in the venire of persons called for trial jury service. Under state law the prosecutor and defense were each allowed ten peremptory challenges in their examination of jurors. The prosecutor in this case exercised his right of peremptory challenge to exclude all six of the Negroes on the venire. As a result X was tried by a jury of all white persons.

At the trial the prosecutor did not produce any eye-witness of the alleged negligent homicide. The one witness called by the state testified that after he had turned the corner at the intersection where the homicide was alleged to have occurred, he saw X getting out of his car to examine Y's body which was lying a few feet from the front wheel of X's car. The same witness testified that he had smelled liquor on X's breath at that time.

X did not take the stand on his own behalf. The trial court gave the jury the usual instruction that they were not to find the defendant guilty unless they were satisfied beyond all reasonable doubt as to his guilt. The jury returned a verdict of guilty. The trial judge imposed a prison sentence of five years, the minimum allowed by statute in case of conviction on a manslaughter charge.

An appeal was taken by X to the state supreme court alleging a number of legal errors in the trial court proceeding, including some that raised questions under the Constitution of the United States. (It may be assumed that X's attorney in the course of the trial made timely and proper objections and motions to preserve the right to review of all legal questions raised in the course of the trial.) The state supreme court on review affirmed the judgment. It held that there was no legal error in the selection of the petit jury; that the evidence was sufficient to support a finding of guilty by the jury on the negligent homicide charge; that in any event the evidence supported a finding that the defendant was guilty of the crime of driving a car while intoxicated - an offense which under state law also carried a minimum penalty of five years in prison.
Does X have any substantial basis for petitioning the Supreme Court of the United States to review his case on the ground of denial of constitutional rights?

III and IV

A municipal ordinance of the City of Centerville in State M provides that no public meeting or assembly shall be held in the municipal park unless the persons sponsoring such a meeting shall first secure from the chief of police a license authorizing the same. A license fee of $1 is required to be paid at the time application is made for the license. The chief of police is required under the ordinance to grant the permit unless he finds the proposed meeting will conflict with a previously scheduled and licensed meeting in the park or unless he finds that the proposed meeting because of its anticipated size will interfere with the general public's enjoyment and use of the park's recreational facilities. The ordinance further provides that in all cases where a license is issued, the municipal police shall give maximum protection to the meeting when held and directs the chief of police to deputize as many assistants as needed in order to preserve order and protect the meeting. In case a meeting is held or attempted to be held in the municipal park in violation of the licensing requirement, each person sponsoring such a meeting or attempted meeting is subject to a fine of $100 and 30 days jail sentence.

A meeting of Jehovah's Witnesses was advertised to be held on Sunday afternoon in the municipal park of Centerville. X, a resident of Centerville and leader of the local group of Witnesses, sponsored the meeting. No attempt was made to secure a license as required by the ordinance. The advertised meeting was in the nature of a regional rally of Jehovah's Witnesses. Members of the sect residing in the nearby town of Smithville in State R were invited to attend.

On the Sunday afternoon when the meeting was scheduled to be held, a group of hostile residents of Centerville under the organized direction and effort of A, B and C, blockaded the road leading from Smithville to Centerville and attempted to prevent the caravan of cars carrying Smithville Witnesses from entering Centerville. Violence ensued and assaults were made on the Witnesses. However, the Witnesses succeeded in breaking through the blockade and proceeded to the municipal park in Centerville where they then assembled with the local group of Witnesses and started to conduct a religious assembly which was to consist of hymns, prayers and addresses. But again the same group of hostile residents led by A, B and C, interrupted the meeting, assaulted the speakers on the platform, including X, and in the end forced a disorderly breaking-up of the meeting. P, the local chief of police, and other police officers were present and witnessed the entire affair but made no attempt to give protection to the meeting or to arrest those who interfered with the meeting.

As a result of this incident the following three proceedings are now instituted. Give your opinion on the question raised with respect to each of them:

(1) X is arrested and tried in the municipal court of Centerville on the charge of sponsoring a meeting attempted to be held in the municipal park without having applied for a license as required by the ordinance. Does X have a valid defense under the Constitution of the United States?

(2) X institutes a damage action in the federal district court against P, the chief of police, under the authority of Sec. 43 of Title 8 of the U.S. Code, reading as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Does X have a valid basis for a damage action under this statute?

(3) The federal district attorney initiates a criminal proceeding in the federal district court against A, B and C under authority of Sec. 19 of the U.S. Criminal Code, reading as follows:
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . . they shall be fined not more than $5,000 and imprisoned not more than ten years . . . .”

Is there a valid basis for indicting A, B and C under this criminal statute?

A statute of State M makes it unlawful for an employer to discriminate in the hiring and discharge of employees on the ground of race, religion or national ancestry. Violation of the statute is made a criminal offense. The statute provides that in a proceeding brought in a state court against an employer for alleged violation of the statute, where the complaining witness charges that he was denied a job because of his race, religion or national ancestry, evidence shall be admitted to determine the numerical proportion in the community of the racial, religious or ancestral group to which the complaining witness belongs and by reference to which the discrimination is alleged. The statute further provides that in the event it is determined that the employer does not employ a proportionate number of employees in such a group equal to the groups proportion in the community, the employer shall be found guilty of violating the statute.

The Y Products Corporation which operates a small factory in the City of Brownville in State M, is now charged with a violation of the statute on the ground that in refusing employment to X, a citizen of Japanese ancestry, it discriminated against him because of his national ancestry. Evidence was introduced at the trial court showing that 5% of the residents of Brownville were persons of Japanese ancestry and that the defendant Corporation employed only 2% of persons of such ancestry. In defense the Corporation challenged the constitutionality of the statute on several grounds. It was permitted to introduce evidence which showed that X was not qualified for the position he had applied for; also that under a union contract it had with its employees, the job classifications that could be filled by persons of Japanese ancestry were limited and that the hiring of X for the position he had wanted would have violated the union agreement. The trial court overruled the constitutional objections to the statute and instructed the jury to consider the evidence and return a verdict in accordance with the terms of the statute. The jury returned a verdict of guilty and the court imposed the statutory fine of $1,000 on the defendant Corporation.

Does the Corporation have any substantial basis under the Federal Constitution for appealing the case on the ground of invalidity of the statute?

Property
Allan F. Smith & Ralph W. Aigler
June 1, 1950

I

A state statute provides: “The owner of any motor vehicle shall be responsible for any damages caused by the negligent operation thereof, regardless of whether said owner is himself driving said vehicle at the time such damages are caused.”

On January 1, 1943, Black was the owner of a certain Ford car. It was taken on that date by Clark, who repainted it and used it for his own personal and business purposes until January, 1948. During that month Clark negligently drove the Ford into P’s car. Through the police, Black learned that the Ford was in a local garage, and without Clark’s consent he repossessed it. Two days later, he was sued by P, who asked judgment for the damages caused by the negligent operation of the car. The statute of limitations for actions to recover personal property is four years. Can P recover from Black? Why or why not?
II

John Jones left his 1948 Ford sedan in a parking lot owned and operated by D. The lot was merely an unenclosed vacant corner lot in the business district of Detroit. Two driveway entrances were cut through the curbs on each side of the lot, and a small building housed the attendant. Plaintiff left his car, with the keys in it, in the lot about 9:00 a.m., telling the attendant he would return about 6:00 p.m. He received a check with a number on it, and a similarly numbered check was placed on the car windshield. The attendant parked the car. It was customary for patrons to pay charges at the attendant's building and then drive their cars away themselves.

About 3:00 p.m., X appeared at the attendant's building with a letter reading as follows:

"To the parking lot owner: The bearer of this letter is my brother. Please allow him to use the keys to my car to remove some things from the back of the car. My car is a '48 Ford, license JX-43-44, and the parking check I hold is numbered F-4374-49. You will greatly oblige me by doing so."

The letter was signed "John Jones."

D himself was in charge. He found the car in question, verified the parking check number, the license number, and checked the registration slip which was attached to the steering wheel. He found the car was registered in the name of John Jones. He thereupon gave the keys to the bearer of the letter and returned to the building. About five minutes later, X returned to the building carrying a small cloth sack and a suitcase. He returned the keys to D, and thanked him for his co-operation. John Jones picked up his car at 6:00 p.m.

X was an imposter. The letter was a forgery. The suitcase, reasonably valued at $25.00, belonged to Jones, and the cloth sack contained jewelry owned by Jones, having a value of $10,000. Jones brings suit against D to recover $10,025.00. Can he recover? Why or why not?

III

O was the owner in fee of Blackacre on which there is a ten-story hotel. One of the passenger elevators needed replacing. O made an arrangement for the purchase of such elevator from the Otis Elevator Company, the purchase price of $10,000 being payable $1,000 in cash, the remainder payable in three years, secured, as to the latter sum, by chattel mortgage. The elevator was delivered to the premises by the company by March 1st, and installed March 5th. On February 29th the mortgage was duly executed by O and recorded March 18th in the office of the County Clerk of the county in which O resides. On March 12th O sold and conveyed Blackacre to P, who paid value therefor, knowing nothing about the circumstances of the installation or of the unpaid purchase price of the elevator.

A statute of the state declares that "chattel mortgages shall be deemed fraudulent and void as to subsequent purchasers and mortgagees of the chattels mortgaged, unless the mortgage shall be recorded within thirty days in the office of the County Clerk of the county of the residence of the mortgagor."

On maturity of the debt for which the mortgage was given as security, it was unpaid, and the Elevator Company, pursuant to a provision in the mortgage authorizing the mortgagee in such event to repossess himself of the subject matter, started the work of removal. P started action to restrain the company from continuance of such work. What result?

IV

Blackacre and Whiteacre are adjoining lots. In 1927, the former was owned and occupied by A, the latter by B, the two being brothers. In that year, A completed a building on Blackacre, the wall on the side towards Whiteacre being built up to the line between the two lots. The windows in that wall were of the casement type, opening outward. When opened these windows swung in an arc over Whiteacre. They were often opened and left open. No communication ever took place between A and B.
regarding this encroachment. In 1940, B died, leaving a will by which he devised Whiteacre to X for life, remainder to Y in fee. After B’s death, the operation of the windows continued as before until the present time. Y died in 1946. Y is now erecting a building on his lot designed to occupy its full width. Realizing that when erected this building will prevent the use of his windows as he has been using them since 1927, A starts suit to enjoin Y from such interference. What result?

V

O is the owner in fee simple of Blackacre. He wants to place the legal ownership thereof in T in fee and the equitable ownership in fee in B. He consults you as a lawyer as to what he should do to bring about that result. How would you advise him if you were face with the question in

(a). 1500?
(b). 1550?
(c). 1800?

VI

Pursuant to a valid written contract for the sale of Blackacre from V to P, V signed a warranty deed with all the formalities required in the state. Under an agreement executed by V and P, the deed was given to John P. Absconder, with instructions that he was to keep it until P had paid the sum of $2,000, and then he was to give P the deed. The payments of $100 a month were to be made to Absconder and by him remitted to V. For 18 months P paid the amounts regularly. Mr. Absconder, however, remitted only $200 to V, and has now disappeared, leaving no assets or forwarding address. P tenders $200 and demands the deed. V insists that he will give him the deed only upon the payment of $1,800. What would be your opinion? Why?

VII

D, owner in fee simple of the land described below, executed and delivered an effective conveyance thereof to P. The deed described the premises as follows: “The Northeast Quarter of Section 9, Township 2, North, Range 6, East, County of X, State of Y, except the South thirty feet thereof, reserved for road purposes.” The deed was properly recorded. D also owned the Southeast Quarter of the above mentioned Section 9. Two years after the execution of the deed, D began to erect a barn which was to be located principally on the Southeast Quarter, but extending some twenty feet into the south thirty feet of the Northeast Quarter of Section 9, described above. Has P any grounds upon which he may prevent the erection of the barn?

VIII

A state statute provides: “The term ‘heirs’ or other technical words of inheritance shall not be necessary to create and convey an estate in fee simple, and every estate in lands which shall be granted, conveyed or devised, shall be deemed a fee simple unless it appears that by express limitation, by construction or by operation of law that a lesser estate has been granted.”

O, owner of Blackacre, executed and delivered an effective conveyance thereof, in which he conveyed Blackacre, “To P so long as P shall continue to operate a retail store thereon.” P continued to operate a retail store on Blackacre until his death on January 10, 1950. His widow is still operating the store, claiming a common law dower interest in Blackacre. O brings an action of ejectment to recover possession of Blackacre. What result? Why?

IX

A state statute provides: “In cases where, by the common law, any person or persons might become seized of lands in fee tail, such estate tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail.”

By an effective deed O conveyed Blackacre to “X and the heirs of his body.” At the time of the conveyance X had two children, A and B. On June 3, 1944, while X was still living, A and his wife executed and delivered a warranty deed, with the usual covenants, in which he purported to convey to P an undivided one-half interest in
Blackacre. A died intestate in 1947, leaving surviving a widow W and child C. X died intestate in 1949. Your client asks you to tell him what person or persons he should negotiate with to buy Blackacre. What is your advice? Why?

X

A owns Lots 1 and 2, Smith's Subdivision, City of X, Y County, state of your preference. A and his family live on Lot 2, and B wants to buy Lot 1. They have agreed on the following terms:

1. B will pay $2,000 for the lot.
2. A is to have the right to use the westerly six feet of Lot 1 as part of a common driveway.
3. B is to have the right to use the easterly six feet of Lot 2 as a part of a common driveway.
4. A cannot furnish an abstract of title, but B is willing to accept a deed by which A will guarantee that he, A, owns the lot; that there are no mortgages or judgment liens on the land; and that if anything ever happens in the future so that B or his successors lose the land, A will have to make good the damages.
5. B is married and wants to own the land with his wife, C, so that it will all belong to the survivor of himself and his wife.

(A) Draw the deed which will accomplish the desires of A and B.
(B) Tell in detail how you will have the deed executed, explaining your reasons for your requirements.

Constitutional Law
Paul C. Kauper

May 24, 1960

This examination consists of eight essay questions.

I.

Congress enacts a Fair Election Code containing inter alia the following provision:

"Every person eligible to vote at a general election to fill a national or state office shall be entitled to absent himself from his place of employment for the purpose of voting for a period of two hours during the time polls are open, without penalty or deduction of wages on account of such absence, provided that the period may be designated by the employer."

An employer denying a person the statutory right or penalizing the exercise of it is subject to fine.

Thereafter, on the day of an election for state officers the polls are open in Ann Arbor, Michigan, from 7:00 a.m. to 8:00 p.m. The regular hours of employment for the office force of the Pioneer Insurance Co. in this city are 8:00 a.m. to 5:00 p.m. with an hour off for lunch. The company authorizes dismissal of all office employees at 4:00 p.m. on election day for the purpose of enabling them to vote. Several employees nevertheless leave at 3:00 p.m. and suffer deductions of an hour's compensation each. The company is charged with violating the statute.

Does the company have any substantial constitutional arguments it may assert in defense? Discuss.

II.

In 1804 the United States with the consent of the Tuscarora Indians who then lived in North Carolina arranged the sale of their lands in North Carolina under an agreement with this tribe whereby they agreed to move to upper New York on land purchased for them by the United States out of the proceeds of the sale of the North Carolina land. The land purchased for their ownership and occupancy in New York consisted of about 4,000 acres. In connection with the acquisition of this land and the settling of the Tuscaroras there, the United States entered into a treaty with the tribe which contained the following clause:
“Now the United States acknowledges all the lands within the aforementioned boundaries to be the property of the Tuscarora Nation, and the United States will never claim the same, nor disturb the Tuscarora Nation in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States...”

A Congressional statute adopted in 1834 provides as follows:

“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”

The State of New York is now interested in developing a public power project that will utilize the water power potential of the Niagara River. This is a large project and will require the flooding of a very large ground area in order to develop the reservoir planned as part of the project. Under this plan the flooded lands will include about 1000 acres of the land owned by the Tuscaroras.

Under the Federal Power Act of 1935 the Federal Power Commission is authorized to grant licenses to public and private agencies for the development of water power projects on navigable waters of the United States, and in this connection is authorized to empower licensees to exercise the power of eminent domain to the extent needed to carry out the licensee’s project as approved by the Commission. The State of New York applies to the Federal Power Commission for a license to develop the water project on the Niagara River and incident thereto asks for authority to condemn the 1000 acres of land owned by the Tuscaroras.

After hearing and over the objections of the Tuscarora Indians the Commission grants the license and condemnation authority to the State of New York as requested. Determinations of the Commission are subject to review for errors of law by the Court of Appeals for the District of Columbia. Do the Tuscarora Indians have any substantial basis for attacking the legality of the Commission’s action? Discuss. (It may be assumed that all objections were properly raised in the first instance before the Commission.)

III.

Police of the City of Lewisburg in State K entered a cafe where they observed that D was dancing by himself in that part of the cafe reserved for dancing. D would dance for a while, then rest, then resume his dancing. Patrons sitting in the cafe were mildly amused and voiced no objections to the owner of the cafe. Upon inquiry by the police, the owner of the cafe stated that D had not had any drinks, that he had been there about half an hour, and that he had no objections to D’s action so long as he did not offend his patrons. The police recognized D as a person who had previously successfully resisted several arrests on minor charges by demanding counsel and the right to a hearing. They questioned D about his presence in the cafe, and he stated that he was simply passing the time while waiting for a bus. The police thereupon arrested him on a charge of loitering, and when D, without offering physical resistance, resorted to spirited argument in objecting to the arrest, the police further charged him with disorderly conduct.

The loitering charge was based on the local ordinance which provides as follows:

“It shall be unlawful for any person... who cannot give a satisfactory account of himself... to sleep, lie, loaf or trespass in or about any premises, buildings, or other structures within this city, without first having obtained the consent of the owner or controller of said premises, structure, or building...”

The disorderly conduct ordinance simply reads that “whoever shall be found guilty of disorderly conduct in the city shall be fined...”

D was tried before a municipal court judge on these two charges. The evidence consisted solely of the facts as stated above. Notwithstanding the request of D’s counsel that the case be dismissed for lack of sufficient evidence and that a conviction
would result in denial of D’s constitutional rights, the judge found D guilty and ordered him to pay a fine of $100 or, in the alternative, to spend 60 days in the municipal jail.

Under local law no appeal is permitted in any case from a conviction by a municipal judge unless the fine exceeds $100 or the jail sentence exceeds 60 days.

D’s attorney applies to the state supreme court for a writ of habeas corpus, but this is denied on the ground that the court has no authority to issue the writ under these circumstances. However, the state supreme court grants a stay of execution of the sentence for thirty days to permit D to pursue any remedy available to him in order to raise his claim of denial of federal constitutional right.

Does D have any basis for attacking his conviction, and what remedy, if any, may he have in order to get his case before the United States Supreme Court?

IV.

State R levies an excise tax on the privilege of purchasing common carrier transportation tickets at the rate of 5% of the purchase price paid by the passenger for the ticket. Under the statute the duty is imposed on the carrier selling the ticket to collect the tax by adding it to the price of the ticket and to forward the tax so collected to the state authorities.

The City of Smithville in State R levies a municipal business tax on all persons doing business in the city at the rate of 3% of gross receipts derived from the business.

X operates a travel agency in Smithville. He has contractual arrangements with a number of steamship companies that operate between the United States and foreign countries, whereby he is authorized to sell steamship tickets, subject to approval at the home office. He receives a commission on all tickets sold at the rate of 10% of the ticket price.

During 1959 X sold tickets for the National Steamship Lines as well as for other steamship companies. National, which is incorporated in New York, has no office, furniture, or employees in State R. Pursuant to the company’s instructions, X did not include the 5% tax as part of the price of tickets sold for the company. State R now brings a proceeding against National in the state court of the county where X operates his travel agency to collect the tax which under the statute should have been charged to the customers who bought the tickets. Under the statute any company selling transportation tickets is made personally liable for the tax in case it fails to collect the same as part of the purchase price. The suit is commenced by serving process on and sending notice by registered mail to National Steamship Lines.

A suit is also brought by City of Smithville against X to collect the 3% business receipts tax which X failed to pay with respect to the commissions he received in 1959 for his services in selling transportation tickets.

Do National Steamship Lines and X have any substantial constitutional defenses they may assert in these proceedings? Discuss.

V.

The City of Centerville in State M adopted a master plan for the development of the city’s resources and at the same time enacted a zoning ordinance which implemented the general plan and which classified all land in the city with respect to permissible land uses. One land use established by the ordinance is M-1 which permits use of the land for purpose of light industry only. The city is very much interested in attracting new light industry in order to increase employment and add to the tax base.

O owns a substantial piece of undeveloped land which is classified as M-1. He has no intention of developing a factory which fits the light industry definition. X Manufacturing Co. has approached him and made an offer for the purchase of the land which it would like for purpose of light industrial use, but O feels that he would rather hold on to the land since he is sure that with the city’s future development he will get a substantially higher price for it five years from now. This matter is called to the attention of the city council which then enacts an ordinance which provides that if the City Planning Commission, after a hearing, determines that a present owner’s failure
to develop land as permitted under the zoning ordinance will interfere with the city's economic development as projected by the master plan, the Commission may direct the sale of this land at a fair price to be determined by the Commission and on such terms as it sees fit, to any person who is interested in buying and who agrees to develop the land in accordance with the use for which the land is zoned. The ordinance further provides that the Commission may in such case grant the prospective purchaser an option to purchase the land at the fair price determined by the Commission, provided, however, that the option period may not extend beyond three years.

Acting under this authorization and following a hearing, but over O's objection, the Planning Commission grants X Manufacturing Co. an option to buy O's land for $75,000, subject to the conditions (1) that before the company can exercise the option it must secure the Commission's approval of its plan for the factory it proposes to develop and to post bond or other security to assure that it will go ahead with its plans when approved, and (2) that the option will expire unless exercised within three years.

O now files a declaratory judgment proceeding in the federal district court, naming the City and X Manufacturing Co. as defendants, and asking for a declaration that the City's action in forcing the option agreement on him is invalid under the Constitution of the United States, and that the option is null and void. Does O state a good case? Discuss.

VI.

The owner of a department store operates a lunch counter as part of the store's services and facilities. The management has no rules restricting who may patronize the store generally, but it permits only white persons to be served at the lunch counter. A group of Negro students enter the store and sit down at vacant seats at the lunch counter. The waitresses refuse to serve them, but the Negroes persist in occupying the seats. The manager of the store then calls the police who arrest the Negroes on a charge of criminal trespass. The Negroes are tried by the circuit court of the state and found guilty and given jail sentences. They appeal the case to the state supreme court, raising questions on the interpretation both of the state's criminal trespass statute and the Equal Protection Clause of the Fourteenth Amendment. The state supreme court affirms the conviction. In meeting the arguments of the appellants, the state supreme court holds (1) that the criminal trespass statute makes it a crime for anyone to enter, occupy or stay on property contrary to the expressed will of the owner; (2) that although as a matter of state law, any person who engages in a business establishment and holds himself out to the public to do business has an obligation to serve all the public, nevertheless, he may at his discretion refuse to serve any particular class or classes of people if he has reason to believe that his business will otherwise be injured; (3) that in any event the owner's policy in this case in restricting the use of his luncheon facilities to white persons was in accord with the state's general policy of requiring racial segregation in public places. The court concluded that the recognition and enforcement of the owner's property rights raised no question under the Fourteenth Amendment.

The Negro defendants apply to the United States Supreme Court for a writ of certiorari to review the state supreme court's affirmance of their conviction. The Supreme Court grants the application.

What issues may be raised before the Supreme Court in this review proceeding, and how should it dispose of the case? Discuss.

VII.

A statute of State M makes it a criminal offense for any person to sell to any person below 18 years of age any book, magazine, or other publication which because of its contents, including any part thereof, tends to corrupt the morals of youth.

D operates a store which carries a large stock of books and magazines. Two months ago he received a communication from the police office stating that the chief of police in conjunction with the local prosecuting attorney had determined that the books listed
in the communication were books that came within the prohibition of the statute referred to above. The chief of police stated that the sales of any of these books would lead to arrest and prosecution under the statute. Included in the list was the book “Forbidden Allurement” which D had for sale in his store.

Four weeks later D sold a copy of “Forbidden Allurement” to a young man. D made no inquiry about his age. D had not read the book and was not familiar with its contents. The book in some of its passages vividly depicts sexual relations in a context of violence and crime. D is now arrested and prosecuted in the state court for violating the statute. In the hearing before the local court, the prosecutor tenders the book in evidence, calls the court's attention to the objectionable passages, and proves that D had received notice from the chief of police that the book was on the proscribed list that D sold the book to the young man in question, and that the young man was 17 years old.

What constitutional defenses, if any, may D assert in this proceedings?

VIII

New York State levies an income tax on all the income of persons residing in the state, regardless of source, and on the income earned within the state by nonresidents. Nonresidents are taxed at the same rate as residents except that they are not allowed the benefit of any personal exemptions or deductions in determining their taxable New York income. With respect to income by way of compensation for services, the New York law requires employers to withhold the income tax from salaries and wages and account for the same to the state tax authorities.

The taxation by New York of income earned in New York by nonresident commuters who work in New York but live in other states has provoked the ill-will of neighboring states who have threatened various forms of reprisal measures.

To meet this situation New York amends its income tax law to provide that effective January 1, 1961, it will exempt from its income tax law income earned in New York by a nonresident who is taxable on that income by his home state, provided that New York is authorized by that state to compel the employer to withhold the tax and remit the same to the employee’s home state. In response to this New York legislation, New Jersey, which does not levy a general income tax, passes a statute which levies a tax on income earned in New York by New Jersey residents, this tax to go into effect on January 1, 1961. The tax is levied on the same basis, with the same exemptions and deductions, and at the same rate as the New York income tax. The New Jersey statute authorizes New York to impose on employers the duty of withholding the New Jersey income tax from salaries and wages paid persons who are New Jersey residents.

What constitutional objections, if any, may be urged against this arrangement when it goes into effect, and who would have standing to raise the question? Discuss.

END

Property (Section 1)

May 15, 1970

O.L. Browder

I.

Griffith owned Lots 42 and 43 in a certain subdivision. He lived in a house on Lot 42. Lot 43 was vacant. Griffith laid out a driveway along the side of Lot 42 which was adjacent to Lot 43. He also grew a hedge along the outer edge of the driveway, which extended the full length of Lot 42 from front to rear. In 1952 Griffith duly executed and delivered a deed describing Lot 43 to Eddy. Eddy took possession and built a house thereon. Nothing was said between them about the boundary between the two lots, but after the conveyance Griffith continued to use the driveway and trimmed the hedge.

In 1962 Griffith died leaving a will which devised Lot 42 to his son Samuel. Within a year the decree of distribution of the probate court awarded Samuel title to Lot 42. Samuel took possession and within two months leased Lot 42 to Thayer for a term of five years. In 1968, at the end of Thayer’s term, Samuel took possession of the lot and
made it his place of residence. The driveway continued to be used by these successive occupants of Lot 42.

In 1969 Eddy decided to sell Lot 43, and before doing so, had a survey made of his lot. The survey showed that the driveway and hedge encroached five feet onto Lot 43. Thereupon Eddy began suit to quiet his title to Lot 43. The applicable period of limitation for actions to recover possession of land is 15 years.

What defenses, if any, might Samuel assert against this suit? Discuss.

II.

Murphy owned a tract of land which he duly platted and subdivided into 495 lots. He sold 69 lots, each deed containing the following restriction, among others:

"Clause 4. No building of more than two apartments shall be erected on less than sixty (60) feet of frontage, except lots 134, 135, 136, and 137."

Later Murphy died devising by his will the remaining lots to his two sons. The sons issued deeds to 354 other lots, which contained the same restrictions imposed in the original 69 deeds, except that clause 4 was amended to read as follows:

"No building of more than two apartments shall be erected except on lots no. 134, 135, 136, 137."

The remaining 72 lots were sold by the Murphy sons, the deeds containing only the statement that they were "subject to restrictions record."

One Potter bought Lot 67, which was one of the original 69 lots. One Pierce bought Lot 254, which was one of the second group of 354 lots. One Dobbins bought Lot 165, which was one of the third group of 72 lots.

(a) Dobbins undertook to build on his lot a building consisting of more than two apartments, but the frontage of this lot was 75 feet. In other words, this building would not violate the restriction imposed in the deeds to the original 69 lots, if applicable, but would violate the restriction imposed on the second group of 354 lots, if applicable. Until this time only single family dwellings had been built on any lot. Does either Potter or Pierce have the right to object to the building which Dobbins proposes to build on his lot? Explain.

(b) Suppose Pierce, whose lot had a frontage of 55 feet, undertook to build there on a building consisting of four apartments. Again assume that until this time only single family dwellings had been built on any lot. Would Potter have standing to object? Explain.

III.

Grimes owned a parcel of land which he contracted to sell to Evans. The contract called for delivery of a deed by Grimes, naming Evans as grantee, to the Fidelity Abstract and Title Company, and for payments to be made on the purchase price by Evans to the company over a period of five years, upon completion of which, at any time during the five-year period, Evans was to be entitled to receive Grimes' deed. Grimes' wife, Helen, was not a party to this contract. The contract was not recorded.

Grimes prepared and signed a deed to Evans, which was also signed by Helen Grimes, had the deed duly acknowledged, and delivered it to the title company. Evans took possession of the land as provided by the terms of the contract.

Three years later Grimes died leaving a will by which he left all his real estate to his son George, and which named his wife Helen executrix of his estate. Helen was duly appointed executrix, and she listed the above land in the inventory of Grimes' estate. She renounced her interest in certain personal property given her by the will, and elected to take dower in all of the testator's real estate, as she was permitted to do by the law of the state. Then she went to the title company and persuaded an employee to return the Evans deed to her, saying that the deed no longer was any good. In due course theprobate court decreed a life estate in Helen in the land in question, with a remainder in the testator's son George. Soon thereafter Helen and George joined in a contract with one Bonner to convey this land to him in fee simple, in consideration of
the promise by him to pay the purchase price stated therein. At this time Bonner had no knowledge of the contract with Evans.

Soon thereafter Bonner discovered that Evans was in possession of the property, asked Evans what claims he had upon the property, and told him what had happened. Evans informed Bonner of his contract with Grimes. Evans then tendered to the title company the balance of the purchase price under his contract and demanded delivery of Grimes’ deed. When told that the deed was no longer in their possession, he sought advice as to his rights and remedies in respect to the land in question. How would you advise him?

IV.

One Simms, aged 86, entered a hospital for an operation. After entering the hospital and before the operation, Simms directed an attorney to prepare a power of attorney in favor of his nephew, Clay Smith. A written power of attorney was prepared, signed by Simms, and delivered to Smith. It authorized Smith to act for Simms in making deposits and withdrawals in all of Simms’ bank accounts and to provide for the support, care, and maintenance of Simms.

Upon the suggestion of a bank official, Smith opened an account in a bank in the name of “L. Clay Smith, Trustee.” Funds from all accounts in Simms’ name were withdrawn by Smith and deposited in this account. Smith drew several checks on this account to pay expenses and bills of Simms and to provide him money for his personal use.

Simms died two months after entering the hospital, without having recovered from his operation.

Smith filed a claim against Simms’ estate by which he asserted that the balance of $25,400 in the account at Simms’ death was his by way of gift. Testimony was heard from the attorney who prepared the power of attorney that when directions were given to prepare that instrument, Simms said further that all his funds on deposit should be placed in one account and that “if there is anything in that account after I get through all of this and after Clay has taken care of me, I want Clay to have whatever remains of the cash in the bank.” Two other witnesses testified that they heard Simms tell Clay Smith, “I expect you to have whatever is left.”

The probate court disallowed the claim on the ground that no valid gift had been made. If the statements attributed to Simms are taken as having been proven, is there a basis for challenging the court’s ruling on appeal? Discuss.

END
I
(50 minutes)

This question consists of 8 statements. With respect to each statement state your views as to its validity and justify your position in a brief comment and analysis. Primary credit will be given to your comment and analysis. You should devote no more than a few sentences to each statement.

a) The “necessary and proper” clause of the Constitution gives Congress power to enact any legislation which will promote the “general welfare” of the people of the United States.

b) In determining the validity of a particular state regulation of an instrument of transportation under the commerce clause, the degree to which the state regulation is consistent with the regulations imposed by other states is a relevant and often important factor.

c) In NLRB v. Jones & Laughlin Steel Corp., the Supreme Court could have ruled in favor of the government on the commerce clause issue on a much narrower basis than was actually used.

d) In United States v. Butler, the Court adopted a “Madisonian” view of the federal spending power.

e) A federal excise tax conditioned specifically on an activity or a product being unlawful under state law will be held unconstitutional by the United States Supreme Court.

f) Marbury v. Madison exemplifies a case where the United States Supreme Court could have reached the desired result on a narrower ground, but instead chose to reach its result by establishing a broad constitutional principle.

g) A state may not constitutionally apply its ad valorem property tax to an interstate railroad with respect to the land and fixed tangible assets of the railroad permanently located in the taxing state unless the value is apportioned to reflect the railroad’s intrastate operations in the taxing state.

h) “Under the Compact Clause . . . the federal questions are the execution, validity and meaning of federally approved state compacts. The interpretation of the meaning of the compact controls over a state’s application of its own law through the Supremacy Clause and not by any implied federal power to construe state law . . . .”

II
(40 minutes)

An Arizona statute provides that no vegetables or fruit produced in the state shall be shipped out of the state unless crated in accordance with regulations issued by the Commissioner of Agriculture and labeled “Quality Produce Grown in Arizona, The Sunshine State.” Under the authority of this statute the Commissioner has issued regulations relating to the crating of cantaloupes grown in the state designed to secure the shipment of only ripe, suitable cantaloupes and also to require that the crating be done in such a way that the product be evenly distributed in the crate and that there be no deception or fraud practiced by putting only the better products on top. The California statute similarly provides that no produce grown in California shall be shipped out of state except in accordance with crating regulations issued by its Commissioner of Agriculture and labeled to show it was grown in California. The California law further provides that any fruit crated but not grown in the state shall not be shipped out of state except in accordance with crating regulations issued by the Commissioner and shall carry a label showing it was crated in California and giving the name and address of the shipper.

A federal statute gives the United States Secretary of Agriculture the authority to prescribe crating requirements for all produce moving in interstate commerce and to require labeling which will identify the product and the name and location of the shipper. Under this authority the Secretary has issued regulations which provide crating standards for all cantaloupes shipped to wholesalers and retailers in interstate commerce.
commerce and require a labeling to show the name and location of the shipper. The crating standards are the same as those prescribed under the Arizona and California regulations.

Quality Fruit Producers, a California corporation with its principal land holdings, processing plants and home office in Sun Valley, California, is engaged in the production and marketing of high quality fruit which is shipped throughout the United States. Cantaloupes are one of its principal products. In 1964 it purchased an extensive tract of land in Arizona near the California border in order to increase its cantaloupe production. The land acquisition, clearing and irrigation equipment costs totaled $2,000,000.

This land yields a very high quality cantaloupe known as Pot-of-Gold. Indeed, this particular variety, grown only in Arizona because of the unusually favorable soil and weather conditions there, is considered the best cantaloupe grown in all the Southwest and commands the best market. Since the company also grows cantaloupes in California and has a large cooling, processing and crating plant in California only about thirty miles from the Arizona border, it has until recently shipped all its Arizona-grown cantaloupes in bulk by truck to its California plant where the cantaloupes are cooled, inspected, sorted, and crated in accordance with the California requirements and labeled Pot-of-Gold Cantaloupe, Quality Fruit Producers, Sun Valley, California.

The Arizona authorities now insist that under the Arizona statute the company must process and crate its Arizona-grown cantaloupes in Arizona, subject to Arizona inspection, crating and labeling requirements, including the requirement that it be labeled “Grown in Arizona the Sunshine State”, so that distributors, retailers and consumers will be sure to identify this high quality cantaloupe as an Arizona product. The company asserts that in order to comply with this requirement it will have to build a processing, cooling and crating plant in Arizona at a cost of $200,000, duplicating the plant in nearby California. The Arizona authority now brings suit in the state court to enjoin the company from shipping any Arizona-grown cantaloupes from the state except in conformity with the Arizona statute and regulations.

What defense or defenses may the company assert? Discuss.

III

(45 minutes)

In August 1963, Harry Beret, an Army Captain assigned to an American military advisory mission in Asialand shot and killed an Army Sergeant in a night spot in Coupville, the capital of Asialand. Both Beret and the victim were off-duty and on a rest and relaxation leave from their duties as advisors to Asialand armed forces fighting insurgents in the rural areas of the country.

At the time of the above incident, an Executive Agreement dated July 15, 1962, was in effect between the United States and Asialand under which exclusive jurisdiction was conferred on American courts-martial with respect to “any activity by American servicemen in Asialand constituting an offense under the Uniform Code of Military Justice of the United States in force as of the date of this agreement.” The Agreement among other things further provided that the United States would initiate proceedings to exercise that jurisdiction in all instances involving violence whenever reasonably requested to do so by the Asialand government. As a result of such a request, Beret was charged with murder under the Uniform Code of Military Justice (“Uniform Code”).

Beret was tried two months later in Coupville by a U.S. Army General Court-Martial, was found guilty under the murder provision of the Uniform Code and was sentenced to life imprisonment. During the course of the trial, the government offered evidence tending to establish that the killing resulted from animosity created by the mutual interest of both Beret and the victim in a local young woman. Beret’s conviction was approved at all military appellate levels and was finally upheld four years ago by the
United States Court of Military Appeals. Beret has now served 6½ years of his sentence.

A few days ago Beret requested the legal assistance of our law firm in seeking release from confinement. I am considering the initiation of a habeas corpus proceeding in an appropriate federal district court challenging the jurisdiction of the court-martial that tried Beret. Will I be successful? Explain fully and be sure to discuss all constitutional issues and problems reasonably raised by the above fact situation.

IV

(35 minutes)

You are a legal research assistant to a United States Senator and the Senator has informed you about his concern over the safety and environmental problems associated with the recent onslaught of snowmobiles in certain parts of the country. Snowmobiles are small snow vehicles utilized primarily for recreational purposes, and, in particular, to gain access in winter to remote wooded areas. Such vehicles generally are used personally by their owners in their state of residence, although a very small percentage of the vehicles are used by ranchers and others for commercial purposes. Although the manufacturers of these vehicles have been incorporating additional safety and anti-pollution devices annually in new models, the Senator is convinced that federal regulatory legislation is needed to insure that after the initial purchase, each owner will be required to install the latest safety and anti-pollution devices as they are subsequently developed by technological advances. A summary of this proposed legislation follows below.

Under the proposed legislation every owner (present and future) of a snowmobile in the United States will be required to equip his snowmobile with such “additional safety devices” as the Research Council of the American Recreation Vehicle Association (ARVA) determines from time to time to be “necessary or highly desirable for safety purposes.” ARVA is a non-profit industry research group financed by the major manufacturers of recreation vehicles. In order to control air pollution and its effects on wildlife and vegetation, the legislation provides that each such owner of a snowmobile shall keep his vehicle equipped with a pollution control device that at all times complies with the then current pollution emission standards established from time to time by the United States Public Health Service as being “conducive to the protection of the natural environment.” Any wilful failure to comply with the statute will be a misdemeanor.

Please advise the Senator as to whether Congress would have power to enact such proposed legislation and as to any other constitutional problems inherent in such legislation. Include any suggestions as to steps he should take in the legislative process that would enhance the chances that the legislation ultimately would be upheld in the courts.

V

(10 minutes)

Reggie Righteous, a federal taxpayer and citizen of the United States has brought an action in a federal district court against the Secretary of Defense, challenging on constitutional grounds appropriations and expenditures for the Viet Nam conflict. Reggie has asked for a declaratory judgment that the appropriations and expenditures are unconstitutional and a permanent injunction against such action in the future. A motion to dismiss has been filed by the defendant emphasizing non-substantive grounds for dismissing Reggie’s action. What are those non-substantive grounds? How should the court rule on them? Discuss very briefly.

END
PART 5. SELECTED EXAMINATION QUESTIONS:
RECENT EXAMINATIONS

Constitutional Law
Professor Tribe - Harvard
December 15, 1996

EXAM INSTRUCTIONS

This is a take-home, open-book exam. You may use any material you wish in preparing your answer. There is one question. Your answer should not exceed 2,000 words. Concise answers will be rewarded in grading; unduly long answers will be penalized. Please type if at all possible, but whether you write or type, use only every other line and one side of each page. If you write, please make an extra effort to be legible. If your handwriting is hard to read, please consider printing.

Please do not talk to anyone about the question or your answer. Good luck.

Ames is the fifty-first State of the United States. Orange, a suburban area with a population of around 35,000 near a major city in Ames, is a largely bedroom community most of whose adults must commute to their jobs between 20 and 30 minutes away in the city. Some of Orange's residents work locally; many more would do so if suitable jobs were available in Orange.

Under the Ames Constitution, Orange is governed as a privately owned, for-profit corporation which is authorized, subject to preemption by state legislation, to promulgate municipal rules regulating private conduct within its borders; to raise operational revenues by incurring debt through sales of municipal bonds, by levying taxes on real and personal property, by operating or investing in profit-making businesses, and by selling shares of stock to interested investors; and to operate local police, fire, transportation, and other basic municipal services. The Ames Constitution specifies that each such corporation is to be governed by a five-member board of directors, to be called its “Board of County Commissioners,” elected by the corporation's shareholders on a one vote per share basis. The 100,000 outstanding shares of Orange stock are owned by three shareholders: a large microchip company, a babyfood manufacturer, and a church.

A multi-billion dollar Silicon Valley giant, Apple Computer, Inc., proposes to build a $100 million office complex on a 130-acre site in Orange that Apple would like to lease from Orange. As inducement, Apple offers to sell Orange an equity interest in Apple Computer, Inc., in the form of a substantial block of (attractively discounted) Apple stock, and submits a business plan that promises to provide over 3,500 high-tech, high-wage jobs for Orange residents by the year 2,000. Apple's office complex would include space for numerous businesses, as well as a large shopping mall featuring the latest in interactive information services and video games.

To make this plan financially attractive for Apple, the firm says it must receive a significant abatement on the amount it would otherwise have to pay under the property tax that Orange levies on every commercial establishment owning or leasing land there. Specifically, Apple would need to have its property taxes reduced by $500,000 per year for each of the first five years of its Orange operation. The Orange Board of County Commissioners is glad to lease the 130-acre site to Apple; is eager to buy the equity interest offered by Apple; and is considering Apple's request for a five-year, $2.5 million property tax abatement. But three things about Apple concern various members of the Orange Board of Commissioners:

First, Apple confers employee health benefits not only on the spouses and children of all its employees but also on their unmarried partners, regardless of sex, whenever the employees designate such partners as “long-term companions.” This has led some commissioners to object that “Apple's health policy undermines traditional family
values—not to mention how it encourages sodomy and extramarital sex, both of which internal policies and will simply abandon its plans to launch an office complex in Orange, accepting an offer from Mexico City to locate its new facility there instead, unless the tax abatement is unconditionally approved, the special fee is rescinded, and the municipal rule is repealed.

The Orange Board rejects Apple's ultimatum. Because this decision threatens to hurt both the fiscal health and the reputation of Ames, the state's Governor—after unsuccessfully trying to persuade the State Legislature to preempt the actions taken by the Orange Board—calls the White House to urge President Clinton to telephone all five members of the Board of Commissioners personally. The Governor reminds President Clinton of his "campaign pledge to promote tolerance and economic growth" and pleads with him to "jawbone some sense into these fools."

The President seeks the advice of Attorney General Janet Reno as to his legal authority to pressure the Orange County Board of Commissioners into changing its vote. He hopes to invoke a long-ignored Act of Congress, passed in 1866, that says: "The President may rescind congressionally authorized and appropriated federal expenditures in any state or locality that declines to exercise its fiscal or rule-making powers in a manner the President deems to be required by the United States Constitution."

The President's plan is to inform the county commissioners that some $15 million in currently projected 1994-95 federal expenditures for Orange (mostly in connection with the space program) will be canceled within a month unless the commissioners promptly reverse themselves on the three matters of concern to Apple—the tax abatement, the special fee, and the rule.

The Attorney General, however, tells the President that, much as she would like to give him a green light, "principles of federalism and separation of powers are too important for me to ignore here." "Besides," she adds, "even if the commissioners are being stupid or bigoted, there's nothing in the Constitution that requires a corporation like Orange to give Apple a bite of its revenue pie, or to let businesses in its midst interfere with the adoption choices of their employees." "In fact," the Attorney General concludes, "I'm not at all sure that the U.S. Constitution even permits the managers of companies that receive tax benefits to interfere with the parental decisions of those they hire."

The President has serious doubts about the adequacy of this analysis and asks his White House Legal Counsel for a memo on the constitutional principles at stake and how he should resolve them. He tells his Counsel:

"You know I used to teach constitutional law, but that was some years ago, and the Court has changed course on lots of things since then. I guess it might help to have a sense of how individual Justices would approach this problem, but what I really need is some thoughtful guidance on what the Constitution itself tells me here, partly about the relevant structural issues--like my authority to apply this 1866 Act of Congress to impose my constitutional conclusions on Orange--but especially about substance: Would the Orange Board's denial of the tax and other economic benefits involved in this situation in fact violate any substantive constitutional prohibition? Would the recently enacted Orange rule be constitutionally enforceable against Apple? What about the Attorney General's remark that the Constitution might itself prevent companies that get tax benefits from interfering with the parental decisions of their employees? I have enough time to read only 2,000 words on all this, so you'd better stay within that limit in your memo to me. Unfortunately, I need it by the close of business today, since I'm leaving tonight for a summit meeting on world trade."

Please prepare the memo requested by the President. 

END
OVERALL WORD LIMIT. The combined length of all your answers to all the Parts may not exceed 3,000 words. This is equivalent to twelve double-spaced pages if you type or word-process using 12-point fixed-width type and normal margins. In any case, monitoring the length of your answers is your responsibility. I will deal with substantial violations of the word limit by disregarding whatever portion of an offending exam exceeds the limit.

The word limit may push you to prune extraneous and non-responsive material out of your answers. Clear and orderly presentation of the basic points about a problem should be your first aim, before getting into more extended refinements and more marginal possibilities. An answer that includes material not directly relevant to a full response to the problem or question presented is not as good as an answer that is free of such material.

PART I

Some Background Facts

(The “Background Facts are mainly relevant to Question I-C, but you should read them before tackling any of the Questions in Part I.)

Oscar died in 1940. At the time of his death, Oscar owned in fee simple absolute a certain 500-acre parcel of wooded land in Green County (hereafter called “the parcel” or “the land”). By his will, Oscar devised the parcel

"to my son Albert and his wife Alice and their heirs as tenants by the entireties, believing that they and each of them will cherish the land as nature made it and treat it with the same respect as I have done."

At this time, Albert and Alice had been living together since 1935, ostensibly as a married couple (as they were to do until 1955 when Alice died). However, unbeknownst to Oscar and just about everyone else, the two were never formally married.

In 1950, Albert executed a will. This will included the following provision:

“My 500-acre parcel of land in Green County, received by will from Oscar in January 12, 1940, I hereby devise to my beloved daughter Bess, as long as she remains a resident of Green County, Ames; and in case my said daughter shall ever remove her residence from Green County, title to the said parcel shall then immediately pass to the National Society for the Preservation of Wildlife.

Albert’s 1950 will further included a residuary clause proving as follows:

“Any interests that I may own in any property, otherwise undisposed of by this will, I hereby give, bequeath, and devise to Opus University.”

Apart from Albert’s will just mentioned, neither Albert nor Alice ever made any deed, will, lease, or other instrument purporting to affect in any way the title to the parcel. During the lifetimes of Albert and Alice, neither Albert nor Alice nor anyone else ever entered or occupied the land, which was left undisturbed in its natural state.

Alice died in 1955, leaving no will.

Albert died in 1960, survived by his daughter Bess.

At the time of Albert’s death in 1960, the parcel was still vacant, wooded, and undisturbed from its natural state. Thereafter, neither Bess nor anyone else ever entered, occupied, or disturbed the land, except as specifically described below. Bess remained a resident of Green County, Ames, from her birth until her death in 1989.

QUESTION I-A

In 1965, Bess executed and delivered to the Green County Conservation Society (GCCS) a deed to the parcel. By this deed, Bess granted the parcel

to the Green County Conservation Society in fee simple, it being a condition of this grant that neither the Society nor any successor shall ever improve the land or
alter it from its natural state, or allow the land to be improved or altered, but shall devote the land to preservation of the natural habitat and wildlife for the benefit and enjoyment of the Christian public of Green County.

The Green County Conservation Society (GCCS) was then, and remains to this day, a private organization supported by gifts from private donors.

At the time of her grant to GCCS in 1965, Bess owned one and only one other parcel of land — a residence in Green County about five miles distant from the 500 acre parcel.

For the first several years after receiving the deed from Bess, the GCCS left the parcel completely alone. In 1973, the GCCS cleared and graded a small area on the parcel (less than one-quarter acre), adjacent to one of its edges, for use as a parking lot capable of holding about 30 cars, and also cleared some footpaths through brush growing on the land to make it easier for visitors to get into the land for walks, bird-watching, and the like. Members of the public were thereafter made welcome by the GCCS to use the parking lot and footpaths whenever they liked, as long as they stayed on the cleared areas and left undisturbed the plant and animal life on the land. GCCS made no attempt to restrict entry to Christians. In the succeeding years, modest numbers of people including non-Christians — averaging about fifty visitors each week, year ‘round — came to the land and complied with the rules set by GCCS. Bess was not consulted about the parking lot, footpaths, or invitation to the public, and she never said anything to anyone about any of these matters. Bess herself visited the land infrequently, only two or three times during her lifetime after granting the land away in 1965.

Suppose it is now 1978. Bess is still alive. You are the legal assistant to the Executive Director of the GCCS. The Director wants to know whether Bess might have any plausible claims for any form of relief against the GCCS, based on the above-described 1965 deed and arising out of GCCS’s manner of using, and allowing others to use, the parcel since 1973. The Director is getting ready for a Board meeting and wants a quick, preliminary response. With regard to any plausible claims Bess may have, the Director also wants to know what lines of resistance and defense may be available to GCCS, along with your best preliminary guess as to the likely outcome of any litigation that might be brought by Bess against GCCS. The Director has specifically said to you: “I know you’re pressed for time right now, so be sure to tell me what lines of analysis and argument you think may need further consideration even if you can’t fully work them through today. Remember, I’m a lawyer, too, so you don’t have to spell everything out for me as you might to a non-lawyer. Also, let me make it as clear as I can that, right now, I only want to hear about possible claims that Bess may have against GCCS (even if there may be other conceivable claimants to interests in this land), so for purposes of this inquiry please just assume that Bess was the sole, rightful owner of the parcel (in fee simple absolute) when she made her deed to GCCS in 1965.”

Please prepare a draft of your memorandum responding to the Director’s inquiry.

QUESTION I-B

Now add the following to the facts you already have.

Bess never asserted any claims against GCCS. Instead, in 1980, Bess executed and delivered to GCCS a deed by which she “conveyed, quitclaimed, and released” to GCCS

“whatever right, title, or interest I may own in [the parcel], including any interest I may own in the nature of a real covenant or equitable servitude.”

Late in 1992, the GCCS, badly strapped for funds, sold the parcel to the DEF Corporation. DEF promptly fenced in the land, shut out public visitation, and began clearing, grading, and hard-topping the land for use as an industrial site. The governmental authorities of Green County are so anxious to have DEF’s industrial development on the land, as a counter to a serious problem of unemployment in Green
County, that they have negotiated with DEF a partial forgiveness of County real estate
taxes on the land for the first ten years of industrial operations on the site.

As a direct consequence of DEF’s alterations of the parcel, rain water that used to be
absorbed harmlessly into the ground has been diverted into the bed of a stream, causing
that stream to overflow in a torrent on land owned by Charles, one mile distant from
the parcel, causing great damage to Charles’s house.

You now work as an associate of DEF’s General Counsel. On your desk this morning
you find a note from the Counsel. Attached to the Counsel’s note is a history of the
parcel recounting the events and transactions detailed in Questions I-A and I-B of this
exam. The counsel’s note asks: “What can you tell me before leaving work today about
our possible liabilities to Charles? Please tell me what claim or claims Charles might
conceivably assert against DEF, indicate our possible responses and defenses, give me
your preliminary assessment of the likely outcome, and tell me about any additional
facts we may need to find out or additional legal research we may need to do in order
to make a fully informed assessment. Thanks.”

Please prepare a draft of your response to the Counsel’s inquiry.

QUESTION I-C

Refer again to the “Background Facts” above, and also keep in mind the later history
of the parcel recounted in Questions I-A and I-B. Now add the following to the facts
you already have.

First, Bess died in 1989.

Second, it seems that Albert was a prominent figure during his lifetime in Green
County. Recently Albert’s unpublished memoirs have come to light, revealing the fact
that Albert and Alice were never married. DEF’s General Counsel now wants to know
whether this revelation, or any other part of the history contained in the “Background
Facts,” might conceivably give rise to any outstanding claims to entitlements of any
kind respecting the parcel, which could cause trouble for DEF. Counsel inquires:
“Does this history suggest any claims that anyone might press to any sort of entitlement
to the parcel? If so, please tell me who the possible claimants might be, what claim or
claims each possible claimant might assert, based on what transaction(s) or event(s),
indicate our possible lines of response, and tell me any additional facts we may need
to find out or additional legal research we may need to do in order to make a fully
informed assessment of the situation. Again, my thanks.”

Please prepare a draft of your response to the Counsel’s inquiry.

END

The University of Chicago
The Law School
Property II
Professors Israel and Kauper
June 9, 1995

I

The Elementary Education Aid Act passed by Congress appropriates money to be
spent by public school boards in expanding and improving their educational programs
by various means which contribute particularly to meeting the special educational needs
of educationally deprived children, defined as children coming from families with
annual income of less than $3,000. The federal statute authorizes and requires school
boards that receive grants from the federal government to make the benefits of these
special educational programs, financed with federal funds, available to all children
attending schools within the boundaries of the public school district, including children
attending private schools. The federal statute stipulates, however, that the control of
expenditures of all funds must remain in the public school board, that no part of the
federal funds may be used to finance the acquisition of facilities and equipment for
private schools or to finance sectarian religious teaching.
A local school board in State M has received a grant from the federal government to enable it to engage in some special educational programs. Under one program it will hire remedial English teachers who will give special training during the school day at public schools to children with reading deficiencies. Children from private schools, including parochial schools, will be permitted to enroll in the public schools for the limited purpose of attending these classes. Under a second program, the public schools will send out speech therapists to all schools in the district, including parochial schools, on a regular schedule in order to give special attention to children with speech difficulties. Federal funds will be used to rent rooms at parochial schools in order to provide facilities for the speech therapy instruction.

The Constitution of State M provides that no public funds or property shall be used, directly or indirectly, in aid of parochial schools or sectarian education. This provision has been strictly construed by the supreme court of the state which has in the past invalidated the use of tax-raised funds to provide bus transportation and free textbooks for children attending parochial schools.

T, a local taxpayer and a parent of children in the public schools, brought a suit in the federal district court against the local school board, alleging that the proposed use of the federal funds and the administration of the same by the public school board, especially in so far as the benefits are made available to children attending parochial schools, violates both the United States Constitution and the Constitution of State M. He requests a decree enjoining the school board from extending the benefits of these special educational programs to any parochial school children. The district court held (1) that there would have been a violation of the state constitution but the force of the federal act made the state constitution inapplicable under the supremacy clause and (2) there was no violation of the federal constitution.

Discuss the possible dispositions of the case on review by the Supreme Court. (It may be assumed that all constitutional issues were properly raised in the proceedings below.)

II

John Smith was recently expelled from the Michiganda Educational Association (M.E.A.) and he has hired you to represent him in attacking the constitutionality of his expulsion. The M.E.A. is a non-profit organization incorporated under the laws of Michiganda with a membership of approximately 98% of all the teachers employed in the state's public schools. Although a state statute prohibits all state employees from joining a labor union, that statute specifically exempts the M.E.A. from this prohibition. In fact, the state presently recognizes the M.E.A., by virtue of a collective bargaining agreement, as the exclusive bargaining agent for all the teachers in the state. The agreement gives the association, *inter alia*, a veto power over any proposed changes in curriculum, teacher's hours, working conditions, etc.

All action of the M.E.A. is taken by an executive council that is composed of one representative from each of the state's 17 counties, the representative in each case being elected by all of the teacher-members in his county. The state recognizes the additional work burden carried by a county representative by assigning him a lighter teaching load. During the past year, your client, Smith, an ardent segregationist, was elected to the executive council. Soon after his election, Smith made the following announcement to the newspapers: "Acting as a private citizen of the United States, I have drafted a petition to the United States Senate requesting that it start impeachment proceedings against the Chief Justice of the Supreme Court on the ground that he has violated his oath of office by forcing the mongrelization of the races at the direction of his superiors in the Kremlin. I urge all patriotic citizens to support me in this venture."

The executive council of the M.E.A. called an immediate session and questioned Smith about his petition. Smith attempted to support his allegations against the Chief Justice by reference to an article, generally regarded as totally false, in a publication of a well-known "hate" group, The World Fascist Party. Although Smith apparently had
acted in good faith, the council felt that his action had seriously injured the M.E.A.’s image and its announced position in favor of integration. A motion was made to expel Smith from the M.E.A. and it carried by a vote of 16-1 (only Smith voting against it).

Smith believes the M.E.A. will reinstate him as a member if the action of the council is shown to violate his rights under the federal constitution. Prepare a memo on his behalf noting the weaknesses as well as the strengths of your arguments.

III

The government of Slobonia, a nation engaged in a nationalization program, sues in a federal district court of the United States to recover 3 tons of sugar which it expropriated while the sugar was still in Slobonia and which the owner, O, an American citizen who owns a sugar refinery in Slobonia, subsequently managed to ship out of Slobonia and has in his possession on a vessel at a wharf in the United States. (The jurisdiction of the federal court is based on the Article III power to decide controversies between citizens and foreign states.)

A treaty between Slobonia and the United States, executed in 1945, provides that Slobonia will not under any circumstances expropriate property of American citizens.

The Slobonian confiscation decrees provide for compensation in case of expropriation but the value is measured in a depreciated currency and compensation is paid in non-negotiable bonds payable at the end of thirty years out of net profits from the government’s operation of the sugar refineries.

Immediately after the suit was instituted by the government of Slobonia against O to recover the sugar, Congress enacted a law which provides that in any proceeding brought in a federal court by a foreign government resting on a claim based on expropriation of property owned by an American citizen, the federal court shall dismiss the proceeding if it finds that the expropriation violated the accepted rules of international law. The statute moreover explicitly states that the rule that private property shall not be taken for public use without just compensation is a rule of international law. The statute provides, however, that if the President of the United States files a written statement with the court saying that it would embarrass and prejudice the President’s handling of foreign affairs for the court to pass on the legality of the foreign government’s act of expropriation, the court shall not entertain any defense based on this ground.

In the proceeding initiated by the Slobonian government, the defendant O tenders as a defense that the act of expropriation was contrary to treaty and international law. Slobonia offers proof that no principle of international law forbids expropriation without compensation so long as aliens and citizens are treated the same way. But at this point the court receives a statement from the President of the United States in which he asserts that the State Department, in the process of negotiating with Slobinia with respect to protection of American property interests, already has accepted the validity of the expropriation act, and that a decision by the court passing on the legality of the expropriation of O’s property would prejudice the Executive Department in its further dealings with Slobinia.

Prepare a memorandum advising the district judge on the constitutional issues presented by this case and the possible course or courses of action open to him.

IV

On May 1, 1965, Julie Jones received the following letter from the Washington County Prosecutor: “At the request of Judge Justice, I have examined the record in Jones v. Haven, a paternity action brought by yourself on behalf of your child. On the basis of that record, I have filed in Circuit Court an information (copy attached) charging you with violation of state code §1240. That section makes it a misdemeanor (punishable by a maximum of 30 days imprisonment) to give birth to an illegitimate child. Please note that conviction under §1240 will bar further prosecution under §1242 which makes it a misdemeanor (same punishment) to commit adultery. Knowing that you are indigent, the court has appointed John Student, a 3rd year law student at
State U. to represent you. Arraignment is set for May 10th. Please call me if that date is inconvenient.”

On May 10th, Julie appeared in court with Student. She pleaded not guilty and requested a jury trial. The case was assigned to Judge Justice and went to trial on May 15th. The prosecutor introduced into evidence (1) a doctor’s certificate reporting the birth on March 15th of Allen Jones to Julie Jones, (2) a birth certificate for Allen Jones listing his mother as single and father unknown, (3) the following portion of the transcript in Jones v. Haven, a civil case decided on April 15th in favor of the plaintiff:

Judge Justice, “Miss Jones, since you brought this suit by yourself and have no lawyer, I feel that I should advise you of your rights. Are you aware, for example, of your privilege against self incrimination.”

Witness Jones, “Yes.”

Judge Justice, “Very well, please tell your story.”

Witness Jones, “Last month, I had a little boy. Although he and I aren’t married, Mr. Haven is the father. I first met him at... etc.”

Julie introduced no evidence on her behalf and did not take the stand. In charging the jury, Judge Justice stressed (1) Julie was not required to take the stand and her failure to do so cannot be held against her, and (2) although, as presiding judge in Jones v. Haven, he had ruled in favor of Julie, the standard of proof there was considerably different from that in a criminal case, so an acquittal would not be inconsistent with the previous verdict.

The jury found Julie guilty and the judge sentenced her to 3 days in jail. The state supreme court affirmed without opinion and the case is now before the United States Supreme Court on certiorari.

What constitutional issues are presented. Discuss. (It may be assumed that Student raised all relevant objections at the trial and appellate levels.)

END

UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
Examination Questions
Fall 1995

CONSTITUTIONAL LAW I
(Law 313), Section B
Monday, December 11, 1995
[A - M: Room D; N-Z: Room C; Typing: Rooms G, J, & K]

Read All Instructions Before Starting the Exam

PART II: Professor Rotunda
10:00 a.m. to 11:30 a.m.

This examination consists of TWO PARTS, weighed equally. This is Part II, which consists of two essay questions. This part will be passed out at 10:00 a.m. and collected at 11:30 a.m. This is an OPEN BOOK exam. That is, you may bring in your casebook and supplement, your own notes, or any outlines prepared by you or by other students so long as you have not purchased the study aid. You MAY NOT bring with you any commercial outlines or hornbooks. If you have any such material with you, leave them in the front of the room until after you have turned in your examination. PLAN the answer before writing. Credit will be given for clarity, good organization, and conciseness. Do not consider yourself to be paid by the word. If added facts are needed to answer a question, articulate your assumptions of facts and alternative assumptions of fact and answer the question as to all such assumptions. Discuss all issues reasonably raised in the problem even though your resolution of a prior issue in the problem may technically make decision of the other issues moot. However, lengthy displays of irrelevant learning, even if erudite, will be penalized. Please use your time
not only to answer the question but TO THINK. Remember: ORGANIZE YOUR ANSWER.

AS A COURTESY TO YOUR FELLOW STUDENTS, IF YOU LEAVE THIS EXAMINATION EARLY, PLEASE DO SO QUIETLY. If you leave the room before you finish the examination, you may not take the examination or your answers with you. Once you hand in this essay answer, you may not retrieve it for any reason.

BEGIN EACH ESSAY IN A SEPARATE BOOK. Please write on only one side (the right side) of the paper (except for inserts), and use a pen (or typewriter) for this portion of the examination. Then it will be easier for me to read your essay. If you use more than one examination book to answer an essay, mark each book clearly: e.g., "book 1 of 2 books." That way, I will be able to find all of your books in case they are separated. Write your examination number on each booklet. [If you forget your examination number, use your social security number.] It is also a good idea to use tried and true writing techniques such as paragraphs, margins, complete sentences, etc. Please avoid unusual abbreviations.

Before you begin this examination, please reread lines 31-40.

ESSAY I

[ONE HOUR; this essay will constitute one-third of the final exam.]
[Write on one side of the page only.]

The States of East Dakota (hereinafter "Dakota") and West Carolina (hereinafter "Carolina") are historic and competitive rivals. The competition is unbalanced, because East Dakota is a State blessed with more natural resources, a larger population, and a more educated citizenry.

SearMart, a national retailing chain, is headquartered in Dakota. The headquarters office employs over 5,000 employees. Carolina, in an effort to attract more business, is encouraging SearMart to move its headquarters to (and build its new SearMart Tower in) Carolina. Carolina promised SearMart that, if it relocates, it will give SearMart a property tax holiday for 5 years (i.e., there will be no property tax on the new SearMart Tower for 5 years). In addition, Carolina will contribute $40 million towards the $160 million construction costs for the new SearMart tower, and build a new highway to this new building.

Dakota is reluctant to engage in competitive bidding with Carolina because other companies also located in Dakota might get similar ideas. Therefore, Dakota’s congressional delegation lobbied Congress to enact legislation to kill Carolina’s proposal. Congress, in response to Dakota’s lobbying, enacted a law that created a Commission to study the problem. The Commission, under this legislation, is to study the problem and then propose a bill to Congress. The Speaker of the House and the Senate Majority leader each nominated four people (two Democrats and two Republicans), half of whom must be members of Congress. The legislation creating the Commission also provided that Congress (after receiving the Commission’s recommendation) must then approve or disapprove of the Commission’s proposal on an up or down vote. That is, no one would be allowed to propose any amendments to this legislation unless two-thirds of each House voted to suspend its rules and allow amendments.

The Commission’s hearing showed that many states and localities are giving tax holidays and other benefits in an effort to attract business from other states or from different parts of the same state. In addition, states and localities are also raising taxes and spending that tax money to attract major team sports (such as national baseball, football or basketball leagues). The tax money is then used to help construct buildings like the proposed SearMart Tower or major sports stadiums. Sometimes it is also used to build highways to the new stadiums, or other buildings to make them more convenient. Witnesses testified before the Commission that - if the states and localities were not competing against each other in this way - then state and local taxes could be
lower or the taxes could be used for worthier purposes, such as increased support for grade schools or for higher education, instead of being used for tax holidays, or sports stadiums, or private buildings.

The Commission proposed a new federal law. The proposed law prohibits any state (or locality) from offering any more tax holidays in an effort to entice businesses or major league sports teams to their state (or locality) from other states (or localities). It also prohibits any businesses or major league sports teams from accepting any tax holidays if they are used to entice the businesses or major league sports teams to relocate to another state (or locality). It also provides that if the state accepts any federal highway funds, it cannot spend any funds to build new highways to the new buildings or stadiums. Also, if the state or locality accepts federal highway funds, it cannot grant property tax holidays to businesses or major league sports teams that are enticed from other states or localities. It also provided that, if states have raised extra tax money in an expectation of using that money to lure businesses or major sports teams, then the states must now use that money to increase state support for higher education.

The proposed law was hotly debated in Congress, and a 55% majority of the Senate went on record as opposing the provision of the Bill that would apply to major league sports. However, under the rules under which the Senate (and House) were operating, no amendments could be proposed unless two-thirds of the Senate (and House) agreed. This condition was not met. Thus, both Houses of Congress voted on the Bill on an up or down vote with no amendments allowed. The law was passed, the President signed it, and it went into effect.

DISCUSS THE LAW THAT CONGRESS ENACTED. This question raises various issues, and so it is important to organize your answer so that you can discuss these issues in a logical order. If you think that the law may raise one or more constitutional problems, also discuss whether Congress might avoid these problems.

ESSAY 2

[Begin this essay in a new examination book.]

[Write on one side of the page only.]

[ONE-HALF HOUR; this essay will constitute one-sixth of the final exam]

Assume the following. Congress and the President, in an effort to compromise their dispute regarding the balancing of the budget, decide to reenact the law invalidated in Bowsher v. Synar [casebook, p. 300]. However, to respond to the majority's complaint, the new law provided that the Comptroller General is removable only at the initiative of Congress and only by impeachment.

DISCUSS.
1. (50 minutes) In November of this year, Hal approached landowner Lance and asked whether he could gain permission to enter Lance's land to do some hunting. Lance was willing to allow it, but only if Hal paid money. After some negotiation, Hal and Lance signed a short, written agreement in which Hal agreed to pay $200 and Lance gave to Hal the “exclusive right to hunt on Lance's land from December 1 through December 8, 1995.” Immediately upon signing the agreement, Hal paid the $200.

During the first few days of December Hal did some hunting without incident. On December 5, he returned to hunt on Lance's land, this time bringing his friend, Hank, with him. While they were hunting, Hank spotted and shot a wild turkey, wounding it but not so much that the turkey could not fly into the underbrush. Hank and Hal went after the turkey, and soon got snarled in the dense brush. While they were looking, Hank noticed something strange, on the ground, close to Hal's foot. He shouted to Hal to look down. Hal did so, and noticed a very expensive pair of binoculars, partially covered by dirt. Hal picked up the binoculars, and then worked his way out of the brush. Because it was lunchtime, Hank and Hal hopped in their truck and headed into a nearby town for lunch.

About an hour later, Hank and Hal returned from lunch, with Hal wearing the binoculars around his neck. As they were walking on Lance's land, intending to continue hunting and to look for the turkey that Hank had shot, they saw Lance approaching them. In Lance's hand was a dead turkey. Lance stared at them coldly. To make conversation, Hal mentioned that he had found the binoculars. Lance simply responded: “Is that so.” Hank then said, “Well, I see you found my turkey.” Lance simply scowled, and said: “I think you guys have done about enough hunting on my land, and I want you off, right now.” Hal objected, but Lance seemed sufficiently angry that he decided not to press the point. Both Hal and Hank then departed.

Identify and discuss the legal issues by these facts. What rights do the relative parties have? What remedies might the parties have against one another?

2. (30 minutes) As a young associate in a hot-shot Washington, D.C., law firm, you have been given an unusual assignment. The newly independent African nation of Zantu (a client of your firm) is in the process of revising its laws. One issue that has arisen is the matter of wildlife. The northernmost province in Zantu has extensive wildlife populations, including reasonably large numbers of grazing and browsing animals (antelopes, zebra, giraffes, etc.) that roam over large areas in the province. The land in Zantu is largely owned by a few dozen private landowners, with each owning one or more large tracts of land. You have been asked the following: Ignoring any customs and laws (including constitutional protections for property) that might already be in effect in Zantu, what are the principal options that Zantu has in writing laws dealing with the ownership of wildlife? What are the chief advantages and disadvantages of each of these options? Which option would you recommend for Zantu?

3. (70 minutes) In March of 1993, Alice and Bob Talent signed a lease covering a single family home in a Midwestern university community. The landlord-owner was Sarah Lance. The lease was a periodic tenancy from year to year, beginning July 1, 1993. The lease contained two pertinent clauses, one stating that the tenants could not sublet without the landlord's consent, the other stating that tenants would be
responsible for "ordinary repairs." Just before the lease began, Lance moved to New York City, where she intended to study wildlife populations (particularly populations of the familiar urban tenant, *Ratus ratus*).

During the first year of the lease, all was fine. The Talents made occasional repairs, but none was particularly expensive. In July, 1994, the house next door was purchased by the city. The city proceeded to remodel the house, adding a new wing, a third floor, and a 6-car garage that covered nearly the entire lot. In October of 1994, the city began operating a half-way house for recently released felons, including felons convicted of violent crimes and serious narcotics offenses. Some of the felon-tenants were reasonably behaved, but many were exceedingly noisy, playing loud music at all hours of the day and night. Some of the tenants seemed to have extraordinary numbers of visitors, and at times every parking spot within several hundred meters was taken. Many of the tenants would congregate on the sidewalk and street, including the sidewalk in front of the Talents' rented home.

During the winter of 1994-95 the Talents viewed the situation as tolerable, given that the weather was cold, windows were closed, and few people stayed outside very long. By late spring 1995, the problem become severe. The Talents found it uncomfortable to sit outside anywhere near the half-way house, and they complained regularly to the city about the noise. In July, 1995, several rocks were thrown through the windows of the Talents' rented home. The first time they repaired the window with a new window; after that they simply began putting up plywood over the broken windows. In August, they began complaining also to Lance, demanding that Lance do something about the situation. In October, the Talents' car tires were slashed, and a tape deck was stolen from their car while it was parked in their garage. When asked about it, the city claimed that its investigation produced no evidence who had engaged in the criminal conduct.

As their frustration increased, the Talents began to look closely at the half-way house next door. They realized that the large garage seemed to encroach on Lance's land, and they immediately notified Lance of the situation. At Lance's request (and expense), the Talents hired a surveyor, who determined that indeed the city's garage intruded some 3 feet into the side yard of Lance's lot. Once the city learned about the problem, it immediately offered to pay Lance for the right to maintain the garage. After a brief negotiation, Lance agreed to the compensation, and a deed was signed allowing the city to maintain the garage.

While this was happening, the Talents were getting increasingly angry, and they have come to you for legal advice. They believe that the noise and outdoor loitering by convicted felons have become more or less intolerable, and they want to know whether they can move out. You begin doing a bit of digging, and soon find that the entire neighborhood-including both Lance's lot and the city's lot—are covered by a restrictive covenant that limits use of the land to single-family houses only. As you are doing your research, the Talents call to tell you that, while they were gone one weekend, one of their plywood boards fell out of the window that it was covering, and substantial rain entered the house, damaging the carpet and a few items of furniture. They also tell you that they have found a group of students (law students they say) who might be willing to "take over" their lease, if this is possible.

Identify and discuss the legal issues raised by these facts. In the course of your answer, explain the relative rights of the parties. Also explain in full what options the Talents might have at this point against Lance and the city.

4. (30 minutes) In 1880, the Illinois Central Railroad constructed a rail line through the central part of the state. To make this possible, it purchased interests in land from existing land owners. In the deed that Illinois Central typically used, the landowner-grantor transferred to the railroad a 100-foot-wide section of land "as a railroad right of way." The railroad paid an amount equal to the full fair market value of the land.
In 1979, the Illinois Central ceased using the corridor for railroad purposes, and arranged to sell it to a local group, Prairie Pathways, which was interested in both the preservation of prairie remnants (often found along railroads) and the promotion of recreational trails for hiking and biking. Prairie Pathways began using the trail for this purpose as soon as the rails and the underlying ties were removed from the rail bed. In 1990, to facilitate this type of adaptive re-use of old railways, a federal statute was passed expressly authorizing preservation and recreation groups (like Prairie Pathways) to use abandoned rail corridors "for purposes of recreation and the preservation of biological resources."

One central Illinois landowner not pleased about this is John Harper, whose land is crossed by the Prairie Pathways corridor. He comes to you for legal advice, wanting to know whether he has to accept this pathway. The pathway along his property is quite flat, and he could easily plow it up entirely and add the full 100-foot-wide strip to his cornfield, which adjoins the pathway on both sides. As a lesser alternative, he is willing to leave a hiking trail down the middle of the corridor, but would like to farm the land on either side of the trail (all, that is, but a 20-foot-wide strip down the center of the 100-foot wide corridor). If he did this, he would destroy nearly all of the high quality prairie that has grown along the old corridor.

What legal arguments could Harper assert, and against whom, to gain what he wants? How likely is he to succeed on each argument?
ESSAY QUESTION 1 (22%)  
(Suggested time: 40 minutes)

Len Lewis owns a building with two commercial spaces. In one of the commercial spaces Lewis operates a clothing store. On January 1, 1992, Lewis leased the other space to Tina Taft for five years at $1,000 a month. The lease agreement states that the "lessee shall not assign or sublet or otherwise transfer her interests without the prior consent of lessor." Taft, who opened a toy store in the premises, began, in the second week of January, 1992, to complain to Lewis about what she referred to as "inadequate heat." Lewis has an old furnace in the basement of the building. During the winter months, the furnace keeps the temperature inside the building at no higher than 64 degrees Fahrenheit. During the coldest winter days, the temperature inside the building rises to no higher than 60 degrees Fahrenheit. After Taft complained to Lewis about the heat, he explained to her that he simply could not afford to buy a new furnace.

On December 15, 1994, Taft informed Lewis that she would be leaving the premises on January 1, 1995, because of the "continued problems with the heat." Taft further informed Lewis that "I have found a new tenant for you who is willing to sublet the premises for the remaining two years of the lease at $1,000 a month. Her name is Betty Bell and she will be opening a fruit and vegetable store in the premises." Lewis, barely able to contain his anger, responded as follows: "That is unacceptable to me. I can get more than $1,000 a month from a new tenant, and in any event, a fruit and vegetable store will bring to my building cockroaches and assorted vermin. I do not consent to this sublease. I will hold you liable for all future rents until the expiration of your lease on January 1, 1997." Taft vacated on January 1, 1995, and the space has remained empty ever since.

In March 1995, Lewis comes to your office seeking legal advice. After he tells you the above, he also mentions that in October, 1994, he was working in his clothing store when a customer by the name of Fred Foyer came up to him and showed him a gold tie-clip with three large diamonds. Foyer told Lewis that he had found the tie-clip in the store's bathroom on the floor near the sink. Lewis had never before seen the tie-clip. Lewis told Foyer the following: "Why don't you leave it with me in case the owner comes back to claim it?" Foyer did as Lewis suggested. No one has claimed ownership of the tie-clip. Foyer recently asked Lewis to return the tie-clip and Lewis refused to do so.

Lewis has asked you to write him a memorandum concerning his rights and liabilities arising from the above facts. Do not assume facts not provided. If crucial facts are missing, you can explain in your memorandum how these facts may affect the rights and liabilities of the parties.

** END OF QUESTION **

ESSAY QUESTION 11 (33%)  
(Suggested time: 60 minutes)

Doug Dell has been in the business of breeding, raising, and selling St. Bernard dogs for twenty five years. Dell conducts his business in his home on Maple Street in Kent City. For the last twenty five years, Dell has been making sufficient money from the selling of the dogs to pay all of his business costs and still make between $25,000 to $30,000 in profits a year.

Five years after Dell started his business, Kent City enacted a zoning ordinance restricting property use on Maple Street to "single family dwellings" and explicitly prohibiting "any and all commercial activity." Shortly after the new zoning ordinance went into effect, several individuals, including Mr. Peters, Ms. Petro, and Ms. Perry,
purchased plots of land on Maple Street and proceeded to build themselves single family dwellings. Twenty years later, Peters, Petro, and Perry brought an action against Dell seeking an injunction arguing that his business constituted a nuisance because the St. Bernards barked loudly at all hours of the day and night. Dell in response contended that his dogs did not create a nuisance, but that even if they did, the nuisance was legalized by prescription.

The trial court, after conducting a trial without a jury, concluded that Dell's business did constitute a nuisance because of the constant noise made by the dogs. The trial court also concluded as a matter of law that a nuisance cannot be legalized by prescription. The trial court issued an injunction ordering Dell to abate the nuisance within 90 days. Dell appeals to the State Supreme Court arguing that a private nuisance can be legalized by prescription. He also argues that the trial court erred in issuing an injunction and should have instead awarded damages to the plaintiffs.

Please answer the following two questions:

(1) Do you think the State Supreme Court should hold that a private nuisance can be legalized by prescription? (In answering the question you should discuss the policy rationales behind (i) adverse possession/prescriptive rights and (ii) the law of nuisance).

(2) If the State Supreme Court were to hold that a nuisance cannot be legalized by prescription, should it affirm the trial court's issuance of the injunction?

ESSAY QUESTION III (33%)
(Suggested time: 60 minutes)

The Devlin International Corporation has two subsidiaries engaged in commercial activities in the state of Kent. One subsidiary, the Devlin Real Estate Company (DREC), is in the land development business. The other subsidiary, the Devlin Satellite Company (DSC), manufactures and sells TV satellite dishes. The satellite dishes manufactured by DSC are 18 inches wide, considerably smaller than the dishes manufactured by any of DSC's competitor's.

In 1984, DREC purchased Greenacre, a large tract of undeveloped land in Kent City located between North Street and South Street. DREC divided Greenacre into twelve plots as shown below:

In 1985, DREC sold all twelve lots in consecutive numerical order to twelve separate individuals. Lots 1 - 5 were sold with the following two covenants:

Covenant A: "No building shall be erected upon the property unless it is a residential dwelling."

Covenant B: "No satellite dish may be attached to any erected structure unless the said satellite dish is an 18 inch satellite manufactured by the Devlin Satellite Co. This covenant shall run with the land and shall be binding on the purchaser, his successors in interest and assigns."

DREC sold Lots 6 - 12 with covenant "B" but not with covenant "A."

Alan Adams in 1985 purchased Lot 1 from DREC; as mentioned above, the deed contained covenants "A" and "B." Also in 1985, DREC sold Lot 6 to Bob Baker, Lot 7 to Carl Cash, and Lot 8 to David Davis; as mentioned above, all three deeds contained covenant "B" but none contained covenant "A."

In 1990, Ellen Ellis purchased Lot 7 from Carl Cash; the deed included covenant "B." Also in 1990, Ellis negotiated an easement with David Davis, the owner of Lot 8, for access to South Street. The easement allows for the "use of a private roadway across Lot 8 for ingress and egress from Lot 7."

In 1997, after the roadway easement was recorded, Ellis built herself a home on Lot 7 and purchased a satellite dish manufactured by the ACME Corporation. While the satellite dish built by ACME is
several times larger than the one made by DSC, it is considerably cheaper. Ellis had the satellite dish installed on top of her new house on Lot 7.

In January, 1995, Ellis purchased Lot 6 from Bob Baker. The deed from Baker to Ellis did not contain any covenants restricting use. After purchasing Lot 6, Ellis hired workers who began to build a large shed on her new lot. Ellis plans to use the shed to make beer; once the beer is made, she intends to sell it to a wholesaler for profit. In building the shed, Ellis's hired workers have used the roadway easement over Lot 8 to get access to Lot 6 (through Lot 7) from South Street.

In February 1995, with one third of the shed completed, Adams (the owner of Lot 1) brought an action against Ellis seeking an injunction prohibiting her from building the shed on Lot 6 and ordering her to remove the large ACME satellite dish from the top of her house on Lot 7. At the same time, Davis (the owner of Lot 8) brought an action against Ellis containing misuse of the roadway easement.

Discuss the rights and liabilities of Adams, Davis, and Ellis. Do not assume facts not provided. If crucial facts are missing, you can explain how these facts may affect the rights and liabilities of the parties.

** END OF QUESTION **
time he and Harriet commenced relations. He has since moved out and is living with Harriet. Bill and Harriet have been fired; they maintain their constitutional rights have been violated.

(c). The district maintains vending machines containing condoms in the junior high schools and the high school. The parents of a fourteen year old girl maintain that making condoms available for the child violates their constitutional rights to raise the child as they see fit.

II.

In an effort to limit the spread of graffiti, city X in State Z has outlawed the sale of paint spray cans. The producers of paint spray cans are predominantly located out of state. In an effort to combat a paint shortage some years ago and to minimize city unemployment, City X operates a paint factory (that does not produce spray cans). Economists suggest that the ordinance will have a slight impact increasing sales of the factory (although sales will also increase for out of state factories as well). Moreover, it is believed that graffiti will be reduced to some extent. City X will only hire residents of the city in its factory.

(a). John Smith is the owner of a spray paint factory in state A. SP corporation owns a spray paint factory in state A. They both assert that City X’s ordinance violates the Constitution.

(b). Mary Jones is a resident of State A. She has applied to work in City X’s paint factory and her application has been rejected because she is not a resident of City X. She maintains that the denial of her application violates the Constitution.

END

STANFORD UNIVERSITY
School of Law
Final Examination in Constitutional Law II
Fall 1995
Professor Kathleen M. Sullivan

December 15, 1995 Time: 7 ½ hours
8:30 a.m. - 4:00 p.m. Four Questions (choose any Three)

INSTRUCTIONS

1. This is a one-day take-home exam. It is open-book. In answering the questions, you may consult any materials you wish, but you may not consult any person.

2. There are FOUR questions offered, but you should CHOOSE ONLY THREE questions to answer - any three you like. Each question you choose to answer will count equally for one-third of the grade.

3. There is a word limit for each question. Your answer to EACH of the three questions you choose to answer should not exceed 750 words. Do not write more than 750 words on any one question even if you write less than 750 words on any other. Serious over length will be penalized in grading.

4. If there is any material fact that you think ambiguous or missing, please state what it is and why it matters.

5. If you type or word-process your exam answers, please double-space. If you write, please use dark ink, use only the front side of each blue-book page, and double-space.

6. Please limit your answers to issues arising under the speech, press and religion clauses of the First Amendment. Ignore any other constitutional or other issue that might seem present.

7. Please note the honor code acknowledgment on the last page of the exam.

GOOD LUCK!
QUESTION I

At long last the Telecommunications Deregulation Act of 1999 ("TDA") is enacted by Congress and signed into law by the President. The seven regional telephone companies have long had the technological capacity to transmit video as well as voice signals over the lines they own and operate, but prior telecommunications acts had barred them from providing video programming to subscribers in their respective telephone service areas, on the ground that permitting them to do so would enable them to monopolize video programming. The TDA for the first time lifts this ban on video programming by the telephone companies, citing "the increased competitiveness of the video programming market." But this deregulation comes at a price. Deploring the rise of "indecent" video programming in various media in recent years, and blaming it for "widespread moral and social disintegration," the TDA requires any telephone company that chooses to offer video programming to scramble the signals of any program that it judges to depict "sexual or excretory functions in a patently offensive manner," unscrambling such signals only upon affirmative subscriber request. The nation's numerous cable operators and Internet service providers ("ISPs," which transmit information and images over a worldwide network of linked computers) are covered by other provisions of the TDA but are explicitly exempted from the indecency provision. Findings accompanying the Act note that cable operators have already provided various parental control options as part of their subscriber packages, while ISPs exercise "virtually no editorial discretion" over subscribers' transmission of images over their systems.

You are a special assistant to the Attorney General of the United States. She has asked you to prepare a concise memo outlining the First Amendment challenges that the government should expect to be raised against this "indecency" provision of the TDA, and the government's best defenses.

QUESTION II

Congress enacts and the President signs the Congressional Campaign Reform Act of 1998 ("CCRA"). The Act is supported by extensive findings suggesting that political advertising is devoted more to personal attacks and brief "spot ads" than to articulate debate of the issues, and that the dominance of out-of-state funding of congressional candidacies over local funding sources has weakened representatives' responsiveness to their own home constituencies. The Act provides as follows:

In order to combat the negative effects of current campaign finance and spending practices on the quality of political debate and democratic representation, the following restrictions shall govern all elections for United States Representatives and Senators, subject to criminal penalty:

CONSTITUTIONAL LAW
Professor Kate Stith
Fall 1995

FINAL EXAMINATION

You have four hours in which to complete this examination. This is an open-book examination. You may write, type, or use a computer.

You are urged to be concise in your answers and to avoid unnecessary repetition. The approximate weight for grading purposes is noted for each of the three questions.
QUESTION ONE (40%)

Consider the following hypothetical, 1998 news report:

Washington, D.C. September 23, 1998:
Seeking to reduce the costs of basic welfare aid and medical care for the indigent the U.S. Senate today narrowly passed an amendment to the federal Medicaid law which prohibits payment for childbirth services to any woman presently receiving Medicaid benefits who has already borne three children. The measure prohibits use of state funds as well as federal funds. Sponsors expect the funding ban to reduce the number of children born to indigent families.

This is the second piece of legislation in three years aimed at reducing births among welfare recipients. In 1996, following the lead of several states Congress enacted legislation that denies an increase in welfare payments (from federal or state sources) when a woman presently receiving Aid to Families with Dependent Children (AFDC) has another child.

Among the strongest opponents of the Senate bill were anti-abortion Senators, who complained that the prohibition on public funding of births would lead to an increase in the incidence of abortion. Current Medicaid law permits states to pay for abortions for poor women.

Is the bill passed by the Senate unconstitutional? Explain. Be sure to address the strongest legal arguments against your position, as well as the arguments supporting your position.

QUESTION TWO (25%)

Consider the following hypothetical, which is, of course, based on recent events:

In connection with its investigation of Whitewater and related events, the U.S. Senate votes to subpoena certain documentary notes from the White House. The White House, which has already provided voluminous documents, announces that it will not comply with this particular subpoena. The Senate moves in federal district court in Washington to enforce its subpoena. The district court denies the motion, holding that the documents are protected by "executive privilege." The matter is now on appeal to the U.S. Court of Appeals for the D.C. Circuit.

It is stipulated that the notes at issue (a) were taken by a long-time political adviser of the President who is employed as an associate in the Office of White House Counsel, and (b) reflect political and legal analysis by both the adviser and the President concerning Whitewater and the investigations thereof. It is further stipulated that (c) the President's participation in the Whitewater investment itself was entirely terminated prior to his assumption of the Office of President.

You are a law clerk to a judge on the D.C. Circuit who is assigned to the panel hearing the appeal. Your judge asks you to write a brief memorandum laying out the salient constitutional issues in the case. Please write the memorandum. Note: you are not expected to address any issue of attorney-client privilege.

QUESTION THREE (35%)

Answer either A or B in full. In addition, you may (for "extra credit" and if you have time) give a brief answer to the other question:

A. Alexander Nardone, a resident of Minnesota, has been indicted in federal district court in Minnesota for violating a federal law enacted in 1992 that makes it a crime to "wilfully fail to pay a child support obligation with respect to a child who resides in another state." The statute applies only when an obligation of at least $5000 has been past due for more than one year.

The indictment of Nardone alleges that he and Nancy Peck were divorced in the State of Illinois in 1990, that the divorce decree requires that he pay $8000 per year to
Peck in support of their minor child, that following the divorce he moved to Minnesota and she moved to Connecticut, and that in each of the years 1993 and 1994 he paid less than $2000 in child support. Nardone contests certain key factual allegations in the indictment; in addition, he asserts that the statute itself is unconstitutional under *Lopez v. United States*.

You are a law clerk for the District Judge assigned to the *Nardone* case. She asked you to examine the history of the 1992 federal law. In your research thus far, you have discovered that (a) for many years, there have been inter-state compacts regarding enforcement of child support obligations, as well as other interstate financial obligations established by court order; (b) the child-support compact has been partially successful (for instance, the amount of money collected pursuant to the inter-state compact grew from one billion dollars in 1976 to five billion dollars in 1990); (c) in addition to the criminal prohibition, the 1992 federal law established a commission to study ways to improve interstate collection of child support obligations; (d) in a 1990 survey, nearly 60 percent of custodial parents in interstate cases reported receiving payments occasionally, seldom or never, and (e) since 1989, the annual deficit, in uncollected child support is about $5.1 billion (including intrastate failure to pay).

All of the foregoing facts were discussed in the legislative history of the 1992 federal law. You also discovered numerous statements in the legislative history of the federal law indicating that at least some of the lawmakers who voted for it did not understand the broad scope of the new prohibition. For instance, several sponsors of the bill stated that the law would make it a crime "to cross state boundaries in order to avoid child support obligations," when by its terms the law criminalizes the existence of child support debt whenever the child lives in a different state. There is no allegation in the *Nardone* indictment that the defendant moved to Minnesota for the purpose of avoiding child support obligations.

You have told your judge about your findings, and she responded that it was not clear to her which of these facts was relevant to the constitutional issue. She asks you to draft a quick memorandum to her explaining your initial thinking on the constitutionality of the law, and noting any further factual matters that need to be researched. Please write the memorandum.

B. In the past decade, the amount of garbage produced by the residents of Jefferson Township has increased greatly, while federal and state regulation of garbage disposal has also increased. Responding to these environmental and regulatory demands, Jefferson Township arranged for the construction of a garbage incinerator to replace the bursting, unsanitary landfill owned by the Township. Although the new incinerator is owned and operated by a private company (Incin Co.), the Town effectively finances the incinerator out of tax revenues. Specifically, the Township has enacted a “flow control” ordinance, which requires that all garbage generated in the Township be disposed of in the Incin Co. incinerator. In turn, by contract with the Township, Incin Co. charges a weekly fee to the Township, based on the amount of garbage dumped. Additionally, the Township has entered into a contact with private garbage haulers to pick up all residential garbage within the District and to deliver the garbage to the Incin Co. incinerator.

There is another privately owned incinerator company near to Jefferson Township. That company (Muck Brothers, Inc.) is seeking to expand its business and was an unsuccessful bidder for the Jefferson Township garbage contract. Muck Brothers has now threatened to bring suit alleging that Jefferson Township's "flow control" ordinance, its contract with Incin Co., and its contracts with the private garbage haulers all violate the Constitution.

Jefferson Township's top legal officer has hired you to write an opinion memorandum concerning the constitutionality of the Township's actions. Please write the memorandum.
You will be given three (3) hours for this examination. The examination is open book. You may use the course casebook, your class notes and other materials you have prepared or annotated. The examination consists of three (3) questions, with ten (10) numbered pages (including this page). Except as specified below, you should answer all questions in terms of general common law principles.

In answering each question, assume that the state has a Married Women’s Property Act. It also has a statute providing that no joint tenancy shall be created unless the grant expressly provides that the interests created shall be a joint tenancy; in the absence of such expressed intention, the grant shall be construed to create a tenancy in common. The state also has a statute providing:

“A landlord may not bring or threaten to bring an action for possession in retaliation against a tenant for making a bona fide complaint about building conditions to a governmental agency charged with housing code enforcement; provided, however, that this provision shall not apply if tenant is in default in rent.”

Housing codes are in effect. The state has summary eviction and forcible entry and detainer statutes. You should assume that unless a question specifically indicates otherwise it has no other landlord-tenant legislation.

I

(60 minutes)

In 1988 Phillip Pane was the owner in fee simple absolute of Blackacre, a two acre tract on which was located his home, a substantial garage, and a small storage building. He had owned Blackacre for five years. Blackacre did not front on a public roadway. Another tract, Greenacre, which lies directly to the south of Blackacre, fronts on its south side on Allen Road, which runs east and west. In 1984 Greenacre was owned by Roberta Rowe, who still owns it. In 1984, Rowe, by a properly executed and recorded deed, granted Pane the right to use an existing driveway which ran from Allen Road to the northern edge of Greenacre, thus giving Pane access to Allen Road from Blackacre. Rowe also used, and continues to use, the same driveway to reach her own garage which is located on the northern edge of Greenacre.

In 1988, Pane conveyed Blackacre by a properly executed and recorded deed to “Thomas Todd and Valerie Vance, husband and wife, with right of survivorship.” The deed does not mention the driveway across Greenacre. Todd and Vance were legally married. Both were employed at the time they purchased Blackacre. The purchase price for Blackacre was $100,000. Todd and Vance paid $20,000 in cash, with the $80,000 balance coming from a loan secured by a mortgage from a local bank. Shortly before the purchase of Blackacre, but after her marriage to Todd, Vance had received a substantial inheritance from her father. While Todd and Vance had previously handled their financial affairs through a single joint bank account to which both contributed their earnings, Vance put the inheritance from her father into a separate account in her own name. Of the $20,000 cash payment made on Blackacre, $15,000 came from Vance’s separate account. The remaining $5,000 came from their joint account. Until they separated, the couple made all mortgage and tax payments from their joint account. The same was true for improvements and repairs, except that a small addition to the house costing $20,000 was paid for from Vance’s account.

In 1991, Vance and Todd separated, although they remained legally married until the time of Vance’s death in 1994. At the time of their separation, Todd moved out of Blackacre. He lost his job and was desperate for cash. In January, 1992, Todd conveyed by a properly executed and recorded deed “all my right, title and interest in
Blackacre to Wilbur Warren and his heirs.” Warren paid Todd $3,000 for this interest. From the time he moved out until his conveyance to Warren, Todd made no further contributions to the mortgage, taxes or upkeep on Blackacre. He has made no such contributions since. The joint bank account was closed at the parties’ separation. During this period Vance paid $1,000 in mortgage payments, and $500 in tax payments. There were no major repairs or improvements during this period.

Vance continued in possession and continued to make all the mortgage and tax payments which, starting with the conveyance to Warren and ending with her death amounted to another $4,000 in mortgage payments and $3,000 in taxes. She also paid $12,000 to construct an addition to the garage in order to house two antique automobiles she had purchased. Until the time of her death in 1994, she was unaware of the deed from Todd to Warren. She paid nothing to Warren, and he paid nothing with respect to Blackacre. Warren made no effort to advise her of his interest.

In August, 1992, Vance purchased the fee interest in Whiteacre, a one acre tract which abutted Blackacre to the north. The northern edge of Whiteacre ran along Bates Road, which ran east and west. With her purchase of Whiteacre Vance had access for Blackacre to a public road by crossing Whiteacre. She put in a driveway across Whiteacre to Bates Road for this purpose. She was therefore willing, when approached by Rowe, to close the driveway across Greenacre which she had used until then. Rowe wished to build an addition to her house across the existing driveway. She agreed to pay Vance $3,000 in order to close the driveway. In 1993, upon receipt of this payment, Vance by a properly executed and recorded deed “released, surrendered and conveyed” to Rowe all of her interest in the driveway. Rowe then built her home addition across the driveway.

In March, 1994, Vance died. Under the terms of her validly executed will, Blackacre was left to Yolanda Young in fee, and Whiteacre was left in fee to Amos Arbor. The mortgage on Blackacre was paid off by Vance’s executor. Young promptly moved onto Blackacre. Shortly thereafter Arbor barricaded the driveway across Whiteacre, and has refused to permit Young to reach Bates Road across his property. While Rowe is willing to grant Young a new right of way from Blackacre across Greenacre to Allen Road, he will do so only upon receipt of $5,000, which Young does not want to pay. At the moment, Young has negotiated with another neighbor who is permitting her to cross his land to get to Bates Road, but this neighbor has made clear that his permission, which was given orally, is temporary. In the time she has been in possession Young has made no mortgage or tax payments.

The following actions have now resulted.

1. Warren has now appeared on the scene. He has filed an action against Young to recover possession of Blackacre. Young, in turn, insists that she, and not Warren, is the owner of Blackacre. She also claims that even if Warren has some interest in Blackacre, which she denies, it is no more than a one-half interest, and is in fact less because Vance made disproportionate contributions to the purchase price of Blackacre, as well as for taxes, improvements and mortgage payments while she and Todd occupied Blackacre as well as after their separation. Warren, in turn claims that he owns only one-half or some lesser fractional share of Blackacre Young owes him rent for the period she has been occupying Blackacre. Discuss all issues these actions present.

2. Warren has filed an action against Rowe asking for an injunction to reopen the driveway under the right granted by Rowe to Pane, and requiring that Rowe remove any encroachments over the right of way as originally granted. How should this action be decided, and why? Discuss.

3. Young has filed an action against Arbor seeking an injunction to prohibit Arbor from denying Young access from Blackacre across Whiteacre to Bates Road along the driveway built by Vance across Whiteacre. Warren has filed a similar action. Discuss all issues these actions present.
II
(90 minutes)

In 1988 Blackacre was an empty parcel of land owned in fee simple absolute by Betty Beck. Blackacre abuts Ryan Road, which runs east and west. Blackacre is immediately to the north of Ryan Road. In that year Acme Development Co. Acquired Blackacre from Beck, taking title in fee simple absolute from Beck in a properly executed and recorded deed.

In 1985 Whiteacre, a vacant parcel of land abutting Blackacre on the north, was owned in fee simple absolute by Cornelius Conn. Conn died in that year, leaving Whiteacre by a properly executed will “to Debra Dale and her heirs, but if no child of Debra Dale gives birth to a child within twenty-five years to my residual legatee.” The last clause of Conn’s will provided that “all the rest, residue and remainder of my property shall go to Ebenezer East.” At the time Conn died, Dale had one child, Elizabeth Ryan. Elizabeth was then childless, but had a son, Robert Ryan, in 1987. In 1988 Dale conveyed Whiteacre to Acme in fee simple absolute with a properly executed and recorded deed. Debra Dale died in 1991, leaving all her property by a properly executed will to Elizabeth Ryan.

Acme constructed a large apartment building on Blackacre. The building contains four retail stores fronting on Ryan Road on the first floor, and fifty apartment units on the five floors above. The building, which Acme calls “heartland,” is built entirely on Blackacre. It fronts on Ryan Road, with the rear of the building sitting just one foot short of the line dividing Whiteacre and Blackacre. Whiteacre contains a paved parking lot for the use of the tenants in Heartland. As designed, the main entrance to Heartland faces Ryan Road. A fire exit door also faces Ryan Road. Another entrance is at the rear of the building and provides direct access to the parking lot on Whiteacre.

Acme uses a standard form lease for all of the apartments in Heartland. It has never had trouble keeping Heartland full, and has refused to negotiate any changes in its form lease. The apartments are either two or three bedrooms. Rents range from $500 to $800 per month. All leases are for two years, commencing from the date on which the tenant is entitled to take possession. All apartment leases contain, *inter alia*, the following provisions: (1) Acme may terminate the lease if the tenant fails to pay rent by the first of each month or for breach of any other covenant by the tenant; (2) if the tenant abandons the premises, or is evicted for failure to perform, the tenant may be held liable for any loss incurred by the balance of the lease, at the election of the landlord; (3) landlord agrees to maintain the premises in compliance with the applicable housing code; (4) tenant agrees (subject to the obligation of the landlord to maintain the premises in compliance with the housing code set out in (3) above), to maintain the apartment and surrender it upon termination of the lease in as good condition as when leased; (5) tenant agrees not to assign or sublease without the landlord’s consent; (6) landlord agrees to supply heat, air conditioning, water sewage service, electricity and elevator service; and (7) landlord agrees to maintain all common areas (which the lease does not describe) in good condition.

Acme does not use this form lease for the retail units on the first floor. These leases are all separately negotiated. Each of the leases runs for a term of five years, commencing on the date at which the tenant is entitled to possession. Each of these retailer leases contain the following common provisions: (1) Acme may terminate the lease for failure to pay the monthly rent on time, or for the breach by the tenant of any other lease covenant; (2) tenant agrees to use the leased premises only for the purposes set forth in the lease; (3) tenant agrees to pay a monthly rental based on a set amount plus a percentage of its monthly gross receipts; (4) landlord does not warrant the fitness of the premises for any purposes; assign or sublet without Acme’s consent; (7) tenant agrees that heat, water and electricity shall be at its expense.

One of the retail shops was leased to Fred Farr on August 1, 1993. (None of the other retail leases are involved in this question.) The lease to Farr provided that Farr may use
the leased premises only for "the retail sale of books, magazines and newspapers," and
for no other purpose. The monthly rental was stated to be $1000 plus 2 percent of
Farr's gross receipts. Farr operated a bookstore in the leased premises until September,
1994 when he was taken quite ill. He then sought to turn in the business over to
someone else. In November, 1994, George Gage agreed to buy Farr's business, on the
condition that he get a lease of sufficient length of make up five years. On December
1, 1994, Farr granted Gage the balance of his existing lease (with Acme's consent),
reserving a right to terminate the arrangement if Gage defaulted "in any of the
obligations under the lease." On the same day Acme granted Gage a new lease to
commence on August 1, 1995, and end on November 30, 1999. This new lease is on
the same terms as Acme's lease to Farr except that it contains no use restriction.

The following additional events have now occurred. Helen Hall moved into
Apartment 47 under a lease which commenced on June 1, 1994 with a monthly rental
of $600. In August, 1994, she was assaulted in her apartment by an unknown assailant
who was seen entering the building through the rear door adjacent to the parking lot.
Hall suffered significant injuries, and decided to vacate her apartment. She moved out
in late September after an angry argument with the management of Acme, which
refused to terminate her lease or to pay her medical expenses. She is now living
elsewhere. As soon as her apartment was vacant, Acme showed it to a number of other
prospective tenants. Acme relet the apartment under a standard two year lease
commencing on February 1, 1995 to John James. James turned out to be a disaster.
James failed to pay rent to Acme on March 1. And on the evening of March 5, 1995,
James was drunk and took an axe to the kitchen cupboards, the walls and various other
fixtures in the apartment. Acme's building manager came to investigate, saw the
damage (which will cost some $4,000 to repair), and ordered James out of the
apartment. Two nights later James vacated the apartment. His whereabouts are
presently unknown. The apartment has not yet been repaired because Acme has
insisted that Hall pay for the repairs. She has refused. The management has made no
effort to relet the damaged apartment, which is currently vacant.

Following the assault on Helen Hall, and after further reports of unauthorized persons
entering the building through the rear entrance, in September, 1994 Acme placed a
twenty-four hour guard on the front entrance, and locked the rear entrance. As a result,
tenants can reach the parking lot only by going out the front entrance and walking
around the building to the parking lot at the rear. (There is no street parking permitted
on Ryan Road.) Most of the tenants have not raised objections, but two have insisted
that the rear door be reopened. Acme has refused. Jennifer Jones, whose lease on
Apartment 32 began on October 1, 1994, with a monthly rental of $700, protested that
Acme is required to provide access to the parking lot through the rear door, and that she
cannot be required to exit through the front and walk all the way around the building
in the rain and the snow to reach her car. Karl Kane, who leased Apartment 27 on July
1, 1994, has made even more strenuous objection. Kane, although able to drive his car,
is confined to a wheelchair. It is very difficult for him to use the front entrance. He
asked Acme either to reopen the rear door or provide him with a key so that he can use
the door himself. Acme, however, has been sufficiently concerned about the safety of
its other tenants and about potential liability if others are assaulted that it has refused
both requests. Finding this situation unacceptable, Kane moved out of his apartment
on February 1, 1995 and has refused to pay any further rent. The rent reserved in
Kane's lease was $800 per month.

There have been still further problems. In January, 1995, Acme leased Apartment 33
to Laurie Lyle, the lease to commence on March 1, 1995. The apartment was in need
of some renovation before Lyle moved in. Acme agreed to do the necessary work.
During mid-February, a fire broke out in Apartment 33 as a result of the negligence of
the contractor hired by Acme to do the renovation work. The damage was extensive,
and could not be repaired by March 1. Acme advised Lyle that it could not permit her
to move in on March 1 because until the damage was repaired the unit was not in compliance with the housing code. It offered to waive the rent until the apartment was brought into compliance with the code and to pay her for temporary housing during the period. Lyle refused to accept this offer, declared the lease terminated, and took another apartment elsewhere.

Apartment 41 was leased to Myron Mott commencing on August 1, 1994. Apartment 41 is a particularly desirable apartment because of the view from its living room window. At the time of leasing, Acme’s manager explained to Mott that because of the building’s structure, the central air conditioning in Apartment 41 was inadequate, and that it both could not and would not do anything to correct the situation. The normal rental on the apartment was $600 per month but because of the air condition problem Acme offered to reduce the rent to $500 per month. Mott, who wanted the view, agreed to accept the apartment on these terms. She told Acme she could easily get by in hot weather by opening the windows. In November, 1994, Mott’s employer transferred her to another city. With Acme’s consent, Mott assigned the balance of her lease to Nathan Norby. Neither Acme nor Mott advised Norby of the air conditioning problem. Norby could see that the unit appeared to have air conditioning, and did not inquire further about it. During a hot spell in February, 1995 it became apparent to Norby that the air conditioning did not work and he demanded that it be repaired. Acme told him that it could not be done, that Mott had so been advised and that the rent had been reduced as a result. Norby suffers from severe allergies and needs to be in air-conditioned facilities. Norby refused to pay any further rent, and is now three months in default.

Finally, we return to the bookstore. After Gage took over the bookstore he began to sell hard core pornographic books & magazines in addition to the other books and magazines he sold. Business began to pick up. He also allowed the use of his bookstore in the evenings as the headquarters of the local Socialist Workers Party, of which he is chairman. Other tenants of the building, along with persons who lived elsewhere in the community, protested to both Gage and Acme about his sales of pornography. The store was picketed regularly. As a result, Gage’s sales declined sharply. When Farr owned the store, the average monthly rental he paid Acme, which he always paid in a timely fashion, was about $1600 (the base $1000 plus, on average, $600 as 2% of his gross receipts). Gage continued to pay the rent monthly directly to Acme, but by March 1995 sales were so bad that the monthly rental had fallen to $1100. Acme demanded that Gage stop selling pornography, and that it cease allowing use of the store by the Socialist Workers Party which has as one of its main goals the passage of a local rent control ordinance). Gage refused both demands.

Out of these facts the following actions have resulted.

1. Ebenezer East has filed an action against Acme to recover possession of Whiteacre. How should this action be decided, and why? Discuss.

2. Acme has filed an action against Hall to recover rent on Apartment 47 from March 1, 1995 through June 30, 1996, and damages in the amount necessary to cover the repairs needed as a result of James’ drunken binge. Hall has filed a counterclaim against Acme seeking to recover her damages resulting from the injuries suffered when she was assaulted. Discuss all issues these actions present.

3. Jennifer Jones has filed an action against Acme seeking an injunction ordering Acme to reopen Heartland’s rear door. Is she entitled to such an order? Discuss.

4. Acme has filed a summary eviction action against Kane, asserting that Kane has failed to pay rent. How should this action be decided, and why? Discuss.

5. Acme has filed an action against Lyle seeking to recover all of the rent due on Apartment 33 from March 1, 1995 until the end of February, 1997. Is Acme entitled to all or any part of this rent? Discuss.

6. Acme has filed an action against both Mott and Norby to recover the rent due and owing on Apartment 41. Do either, or both, owe such rent to Acme? Discuss.
7. Acme has filed two actions with respect to the bookstore. First, it has filed a summary eviction action against Gage, asserting that it has the right to do so because of Gage's sale of pornographic material and the use of the premises by the Socialist Workers Party. Second, it has filed an action against Farr to recover monthly rental paid by Gage. In addition, Acme seeks to recover from Gage and/or Farr all rent for the bookstore through July, 1995. How should these actions be decided, and why? Discuss.

8. Finally, however you have decided the issues posed in 1 above, assume that a court has already concluded that East is entitled to possession of Whiteacre and that East has closed the parking lot. A group of Heartland tenants has now filed action against Acme for damages based on the unavailability of parking. Two other tenants have been withholding $200 per month from their rent for the same reason. Acme has moved to evict the latter two tenants. How should these two actions be decided and why? Discuss.

III
(30 minutes)

California and a number of other western states have community property law systems which govern the marital property rights of married couples. Traditionally, community property systems have been thought to stand in sharp contrast to those governing marital property rights in other common law states. It has now been asserted that over the past thirty years the law governing material property rights in non-community property states is, as a practical matter, the same as, or at least moving close to, the law applied in community property states. Do you agree? What developments support this proposition? To what extent do significant differences remain? Discuss.

T.E. Kauper
question in a separate blue book. Write neatly in ink or use a typewriter. These are simple rules I expect you to observe scrupulously. I will not read examinations that do not substantially comply with these groundrules or that are illegible. For your information, I often read examinations question-by-question rather than reading through an entire exam of a single student. Thus, be sure to treat each question as an autonomous unit.

*Students will be permitted a one-hour reading period in advance of commencing the examination. During that time, they can read through the examination, organize and outline their answers. But they may not actually begin writing the examination until that one-hour period has elapsed. These examinations, therefore, will be picked up 3 hours after they are distributed.

I.
(40 Minutes)
Assume that the Congress enacts the following legislation:

(1) Any citizen who alleges that he or she is the victim of knowing and intentional sexual harassment perpetrated by the President of the United States may bring an action for damages and/or for injunctive relief in a federal court of competent jurisdiction. This provision shall apply to conduct of the President that occurs while the President is in office or to conduct that occurred before the President took office.

(2) To avoid frivolous litigation, a party bringing such a claim against the President must establish in the Complaint or in pre-trial proceedings, to the satisfaction of the judge, that he or she has a substantial likelihood of success on the merits in order to proceed. In the absence of such a showing, the judge shall dismiss the suit against the President.

(3) Any trial on the merits in such an action will take place after the President leaves office, and no such claim shall serve as the basis for an impeachment inquiry while the President is in office.

Identify, analyze, and discuss the constitutional issues raised by the foregoing legislation.

II.
(50 Minutes)
The State of Harmony owns and operates a dumpsite for hazardous wastes. That dumpsite is also certified to receive low-level nuclear waste, which, by stipulation, is primarily generated by medical schools in their teaching and research activities. Although no law or regulation of Harmony has barred the operation of other dumpsites for hazardous or low-level nuclear wastes, no other such dumpsites exist in Harmony. Indeed, assume there are very few of these dumpsites, particularly for low-level nuclear wastes, in the nation.

Recently enacted legislation in Harmony prohibits any dumpsite in Harmony, existing or future, from receiving low-level nuclear waste. The asserted rationales are public safety (the danger of transporting nuclear waste to the dumpsite and the risk of accident or terrorism at the site) and environmental protection (concern about the poisoning of the ground and the seepage into the ecosystem and the water supply).

Because of its anti-vivisection laws (which bar experimentation on animals), Harmony has no medical school. Therefore, it produces relatively little low-level nuclear waste as compared to states that have medical schools. As a result of the Harmony ban on the receipt of low-level nuclear waste, medical schools in other states must ship their low-level nuclear waste much further distances to far-away dumpsites. This necessitates long trips through other states, often through densely populated areas. It is stipulated that, in the absence of the ban, Harmony would be the desired dumpsite for substantial quantities of low-level nuclear waste from out-of-state. It is even possible, although the evidence on this point is inconclusive, that privately operated dumpsites for low-level nuclear waste could be developed in Harmony because of
suitable soil conditions. Whether such private dumpsites could obtain local land-use permits is unclear, however.

Laboratory Resources International (LRI) is an international conglomerate headquartered in the State of Nature that operates a laboratory in the State of Harmony and another laboratory in the State of Nature. Those laboratories produce a small amount of low-level nuclear waste that must be shipped to dumpsites out of Harmony for dumping, even though the dumpsite in Harmony would be the most economically efficient site for LRI to use.

LRI consults your law firm about its prospects of bringing a constitutional challenge under the Commerce Clause to Harmony's ban on the receipt of low-level nuclear waste at the dumpsite owned and operated by the State of Harmony. Identify, analyze, and discuss the issues that would be presented by such a challenge by LRI.

III
(15 Minutes)

Assume that Congress enacts legislation to confer on the President greater flexibility in carrying out his responsibilities. Under this legislation, the President may reject an identified portion of a bill by not having to implement it. Congress could block that decision of the President by a majority vote of both the House and the Senate. What constitutional problems might be posed by such legislation?

IV
(15 Minutes)

Make the argument (and provide a brief critique of the argument) that the President should have authority to fire, at his discretion, all policymaking officials of the executive branch (including members of the independent regulatory agencies such as the Federal Trade Commission).

VANDERBILT UNIVERSITY SCHOOL OF LAW
Professor Brown Fall 1994
Section A-3 2 hours
CONSTITUTIONAL LAW I

Instructions:
1. This examination consists of 3 pages, including this cover page. Please check to be sure you have all of the pages.
2. This is an OPEN BOOK examination: you may refer to any materials that you wish.
3. The suggested time allocations for each question take into account time needed to prepare a well-organized, well-reasoned answer. It is a good idea to sketch out a rough outline of your answer on scratch paper before writing in the bluebook. You should spend a good deal of your time thinking through your answers in advance.
4. Please write on one side of the bluebook page and skip lines.
5. GOOD LUCK and Happy Holidays.

QUESTION I
(1 HOUR and 15 MINUTES)

Over the last few years, several states (not including Tennessee) have adopted what has come to be known as a "drop-out driver law". Under these laws, persons under the age of 18 are denied a driver's license if they have left school before completing high school. If a person under the age of 18 already has a driver's license and drops out before completing school, the license is suspended until the person reaches age 18.

In each of the roughly 16 states that have adopted such a law, the statutory preamble recites extensive legislative findings that failure to complete high school substantially limits a person's economic and personal prospects in life, that such
persons often end up imposing costs on society in excess of their ability to contribute to society, and that the threat of loss of a driver's license is the most effective device available for motivating teenagers to complete their secondary education. Experience in states that have these drop-out driver laws confirms the effectiveness of the measure in reducing the drop-out rate. For example, Kentucky's prior drop-out average of 5,000 per year fell to approximately 2,400 after implementing the drop-out driver law. Moreover, 450 Kentucky teenagers who had dropped out prior to passage of the law returned to school in order to reinstate their suspended licenses. Studies across the country show that Kentucky's experience is typical.

Congress has decided that the empirical evidence is compelling enough to make this effort a national priority. As a result, it passed, and the President signed into law, an amendment to the Federal Highway Appropriations Act (FHAA) that directs the Secretary of Transportation to withhold 10% of the federal highway funds allotted to any state that fails to adopt a drop-out driver law within one year after the date of the amendment. The amendment contains a preamble that essentially duplicates the language and legislative findings in the preambles of the existing state drop-out driver statutes.

Paul Rhodes is a licensed Tennessee driver, aged 16 and a half years. He dropped out of high school when he turned 16, in order to support his wife, child, and invalid mother by driving a delivery truck. He now quite reasonably fears that the Tennessee state legislature will comply with the FHAA by enacting a drop-out driver law that will result in suspension of his driver's license and loss of his livelihood. Paul has filed suit in federal court seeking an injunction prohibiting the Secretary of Transportation from enforcing the FHAA amendments against Tennessee, on the ground that the statute violates the U.S. Constitution.

Discuss the issues presented by Paul's suit, including arguments on both sides.

**QUESTION II**

(45 MINUTES)

Article I section 7, of the Constitution, reads, in part:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have o who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

Section 5 provides:

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

The new, feisty, Republican Congress implements two measures to help reduce waste and spending in Congress:

1. It passes a statute, signed by the President, which permits the President to single out specific portions or lines that he finds objectionable in a bill, sign the rest of the legislation, and excise the objectionable portions. Congress can then enact those excised portions into law, if it chooses to do so, with a majority vote of both Houses. The measure is seen as a boon to the efforts to curb wasteful spending by exposing specific measures to the light of a full vote.

2. The House of Representatives, where tax bills are constitutionally required to originate (Art. I, sec. 7, cl. 1), has long had an internal rule providing that all bills to be voted on by the House must first be approved for debate by the House Rules Committee. The House passes a new additional procedural rule providing that no bill
containing a tax may be considered by the Rules Committee for such approval unless it has garnered 60% in a preliminary vote of the entire membership of the House.

With regard to each of these two new measures, please discuss whether the Supreme Court, if presented with the question, would uphold the constitutionality of the measure, and the reasons underlying its analysis.