

Final Examination
Wednesday, May 4, 2011

INSTRUCTIONS:

1. Be sure to write your anonymous number in the place provided at the top of this page. You are required to turn these test questions in at the end of the examination. Failure to return the test questions will result in a grade of **F** for this examination.
2. This is an open book examination.
3. There are three questions. They will be weighted equally.
4. Unless you are using ExamSoft, use the “blue” books provided to write your answer. Be sure to put your anonymous number on each “blue” book. In addition, you **MUST** number each book, e.g., “1 of 1” or “1 of 3,” “2 of 3,” “3 of 3.”
5. If you are handwriting your exam, write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor!
6. This is a 3 hour exam.
7. If you wish to leave the room during the examination, you may do so. You must, however, leave your test materials in the classroom. Moreover, you may not speak with any member of the class while outside the room.
8. All the examinations at the law school are conducted under the Student Code of Conduct, which forbids cheating or collaborating on examinations. If you witness anyone cheating in any form, it is your responsibility to report this to the Registrar or the Dean of Students. You are required to sign the form indicating compliance with the Student Code of Conduct at the completion of your examination.
9. All students are required to have a Widener University School of Law picture ID card with a validation sticker for spring 2011 on the desk in front of them during the examination.

QUESTION I (1 hour)

1. There are numerous approaches to determining the constitutionality of a statute. Three of the most common rely on (a) the plain meaning of the Constitution (“textualism”), (b) the intent of the Framers (“originalism”), or (c) the prevailing social values (“the living Constitution”). For each of these approaches, do the following:

- i. Describe it, including the sources to be used in performing it;
- ii. Give one benefit of using the approach;
- iii. Give one drawback of using the approach; and
- iv. Identify one Justice (past or present) who has used the approach, giving an example of at least one opinion in which he or she followed it.

2. If you were a Justice, what approach would you use to determine the constitutionality of a statute? Why? (Do not feel constrained to use the three mentioned above. You may pick one of them, of course, but you may also want to use some combination of them or a completely different approach.)

QUESTION II (1 hour)

Section 1501 of the new federal Patient Protection and Affordable Care Act requires: “An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.” In short, beginning in 2014, individuals without health insurance will be required to get such insurance. There are exemptions from the mandate, such as for religious beliefs or for those who cannot afford the coverage.

Congress relied on its powers under the Commerce Clause in enacting § 1501, finding the following:

(1) *In General*.—The individual responsibility requirement provided for in this section (in this subsection referred to as the “requirement”) is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) *Effects on the National Economy and Interstate Commerce*.—The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from \$2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$4,700,000,000,000 in 2019. Private health insurance spending is projected to be \$854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance which is in interstate commerce.

(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by

section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.

(H) Administrative costs for private health insurance, which were \$90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) *Supreme Court Ruling.*—In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.

Numerous allegedly “applicable individuals” have filed several federal suits challenging the constitutionality of this provision. None of the Act’s exemptions apply to these plaintiffs. They claim that Congress’s attempt to require them to purchase health insurance they would otherwise not buy exceeds the authority granted in the Commerce Clause. To date, at least four courts have ruled on the question: two (the Eastern District of Michigan and the Western District of Virginia) have found that § 1501 is constitutional, and two (the Eastern District of Virginia and the Northern District of Florida) have found it to be unconstitutional. This issue is virtually certain to reach the Supreme Court. In addition, it is virtually certain that the Court’s ruling will not be unanimous.

1. Write an opinion finding in favor of the plaintiffs, striking § 1501 down as unconstitutional.
2. Write an opinion finding in favor of the defendants, who include Kathleen Sebelius, Secretary of the Department of Health and Human Services, and the Department itself, upholding § 1501.

QUESTION III (1 hour)

You are a newly-appointed Justice on the United States Supreme Court. You have just been assigned to write the opinion in a case challenging the anti-abortion statute below. Various plaintiffs (with appropriate standing) sued, seeking to have the statute declared unconstitutional. The federal district court upheld the statute. The circuit court of appeals, in a 2-1 decision, reversed.

1. Write your opinion, either upholding or striking down the statute. Be sure to explain your reasoning fully.
2. Identify one Justice who has been on the Court in the last 20 years who would dissent from your opinion and write the gist of that dissent in one paragraph.

Note: The footnotes are not part of the statute, but have been added to fill in a little scientific information for you.

REVISED CODE tit. 16, ch. 34-1

Sec. 9. (a) The general assembly finds the following:

- (1) There is substantial medical evidence that a fetus at 20 weeks of postfertilization age has the physical structures necessary to experience pain.¹

* * *

(b) The State asserts a compelling interest in protecting the life of a fetus from the state at which substantial medical evidence indicates that the fetus is capable of feeling pain.

REVISED CODE tit. 16, ch. 34-2

Sec. 1. (a) Abortion shall in all instances be a criminal act, except when performed under the following circumstances:

- (1) *During the first trimester of pregnancy* for reasons based upon the professional, medical judgment of the pregnant woman's physician if:

(A) the abortion is performed by the physician; and

¹Scientists disagree on how early fetuses may feel pain. At one end of the spectrum, some studies have shown that the fetal brain and body are coordinated enough to experience pain by between about 18 and 20 weeks. At the other end are studies finding that fetuses at 24 weeks or less do not feel pain and exist in a state of sedation even afterward.

(B) the woman submitting to the abortion has filed her consent with her physician. [“Consent” is defined in section 1.1.] However, if in the judgment of the physician the abortion is necessary to preserve the life of the woman, her consent is not required.

(2) *After the first trimester of pregnancy and before the earlier of viability of the fetus² or 20 weeks of postfertilization age*, for reasons based upon the professional, medical judgment of the pregnant woman’s physician if:

(A) all the circumstances and provisions required in subsection 1 are present and adhered to; and

(B) the abortion is performed in a hospital or ambulatory outpatient surgical center.

(3) *At the earlier of viability of the fetus or 20 weeks of postfertilization age and any time after*, for reasons based upon the professional, medical judgment of the pregnant woman’s physician if:

(A) all the circumstances and provisions required in subsections 1 and 2 are present and adhered to;

(B) the abortion is performed in a hospital having premature birth intensive care units and is performed in the presence of a second physician who shall take control of and provide immediate care for a child born alive as a result of the abortion; and

(C) before the abortion, the attending physician shall certify in writing to the hospital in which the abortion is to be performed that, in the attending physician’s professional, medical judgment, after proper examination and review of the woman’s history, the abortion is necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman.

Sec. 1.1. (a) An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:

²The limit of viability is the gestational age at which a prematurely born fetus/infant has a 50% chance of longterm survival outside its mother’s womb. With the support of neonatal intensive care units, the limit of viability in the developed world has declined since 50 years ago, but has remained unchanged in the last 12 years. Currently the limit of viability is considered to be around 24 weeks although the incidence of major disabilities remains high at this point. Neonatologists generally would not provide intensive care at 23 weeks, but would from 26 weeks.

(1) At least 18 hours before the abortion, the physician who is to perform the abortion has informed the pregnant woman orally and in writing of the following:

[Here the statute lists 10 items the physician must tell the woman, including]

* * *

(D) The risks of and alternatives to the procedure or treatment, including:

* * *

(iv) the possibility of increased risk of breast cancer following an induced abortion³ and the natural protective effect of a completed pregnancy in avoiding breast cancer.

(E) That human physical life begins when a human ovum is fertilized by a human sperm.

* * *

(G) That medical evidence shows that a fetus can feel pain at or before 20 weeks of postfertilization age.

* * *

(2) At least 18 hours before the abortion, the pregnant woman will be informed orally and in writing of the following:

[Here the statute lists 6 more items the woman must be told, all calculated to convince the woman not to have the abortion.]

(b) Before an abortion is performed, the pregnant woman shall view the fetal ultrasound imaging and hear the auscultation of the fetal heart tone if the fetal heart tone is audible unless the pregnant woman certifies in writing, before the abortion is performed, that the pregnant woman

³The American Cancer Society (ACS) and other major health organizations have rejected this theory. In February 2003, the U.S. National Cancer Institute brought together more than 100 of the world's leading experts who study pregnancy and breast cancer risk. They found that neither induced nor spontaneous abortions lead to an increase in breast cancer risk. According to ACS, these findings were considered "well established," which is the highest level for scientific evidence.

In June 2009, the highly respected American College of Obstetricians and Gynecologists Committee on Gynecologic Practice wrote, "Early studies of the relationship between prior induced abortion and breast cancer risk were methodologically flawed. More rigorous recent studies demonstrate no causal relationship between induced abortion and a subsequent increase in breast cancer risk."

does not want to view the fetal ultrasound imaging.