

**Constitutional Law – Greabe**  
**Final Examination (180 Minutes)**  
**May 4, 2010**

**DIRECTIONS -- IT IS VERY IMPORTANT THAT YOU READ THESE DIRECTIONS CAREFULLY AND UNDERSTAND THEM FULLY!**

These questions are "open book." You may use any of the course materials (including materials posted on the course website), handouts, and notes you have taken in class in preparing your answers to the following questions. You also may use any hornbooks, treatises, or commercial outlines which you have brought with you. The only limitation is that you work independently. If you have a question, please direct it to the examination proctor. Under no circumstances should you speak with, or look at the materials of, a fellow classmate.

Your student identification number should be placed at the top of the first page of your submission. **DO NOT PUT YOUR NAME OR OTHERWISE SUGGEST TO ME WHO YOU ARE ANYWHERE IN YOUR ANSWER.** Any adjustment to your final grade for class participation will be made after I complete the grading of your examination answers.

**Question 1 (100 points) (120 minutes)**

In the fall of 2008, Congress became concerned that high school administrators nationwide had been overreaching in punishing high school students for speech on social networking sites such as Facebook. At the same time, Congress also became concerned that corporations had been exploiting advertising opportunities offered by such sites to promote products and to send high school students messages that promote unhealthy behaviors. As a consequence, Congress enacted the Facebook Act of 2008. The Act provides:

**Preamble**

Whereas social networking sites such as Facebook present an important opportunity high school children to develop an ability to think for and to express themselves; and

Whereas local high school authorities are increasingly monitoring social networking sites such as Facebook and disciplining students for the expression of thoughts and ideas that school authorities believe to be inappropriate and harmful to the school environment; and

Whereas de facto censorship of this sort is not necessary to promote school discipline and an environment conducive to learning; and

Whereas social networking sites such as Facebook are increasingly turning to outside commercial sponsors for support; and

Whereas national corporations seek to exploit high school children through advertising on social networking sites such as Facebook for products and activities that promote unhealthy behaviors; and

Whereas it is the opinion of the Congress that Supreme Court decisions permitting public high school administrators to censor student speech are wrongly decided because they significantly undervalue the fundamental right to free speech that should be enjoyed by high school students; and

Whereas it is the opinion of the Congress that Supreme Court decisions protecting the commercial speech rights of corporations are wrongly decided because they fail to appreciate crucial differences between corporations and natural persons;

Therefore be it enacted that:

§ 101. Censorship Prohibited.

a. It shall be a felony for a school official to censor or otherwise prohibit or punish comment by any student on a social networking site such as Facebook.

b. Local public high school principals shall create and make available to all public high school students written literature concerning student rights under this statute by no later than July 1, 2009. It shall be a misdemeanor for a public high school principal to fail to discharge in a timely way the duties and responsibilities mandated by this provision.

c. Local private high school principals are encouraged to create and make available to all private high school students written literature concerning student rights under this statute.

§ 102. Advertising Prohibited.

a. No social networking site such as Facebook that permits high school students to use the site shall accept advertising from commercial entities.

b. Public high school principals who become aware of a violation of § 102(a) must notify their local United States Attorney within 7 days of becoming aware of such violation. It shall be a misdemeanor for a public high school principal to fail to discharge in a timely way the duties and responsibilities mandated by this provision.

§ 103. Scope of Application.

This statute will apply to both public and private high schools.

You represent Harvey Sparetherod, the principal of a local New Hampshire public high school. In January 2010, a federal grand jury returned an indictment charging Mr. Sparetherod with three counts of violating the Facebook Act of 2008:

Count 1: Mr. Sparetherod violated § 101(a) by suspending for three days a student in his school who made on her Facebook page what Mr. Sparetherod believed to be a “lewd” comment about her Civics teacher.

Count 2: Mr. Sparetherod knowingly failed to create and make available in a timely way the literature concerning students' rights required by § 101(b) by the statutory deadline.

Count 3: Mr. Sparetherod knowingly failed to discharge in a timely way the notification requirement created by § 102(b). (A local commercial “Friend Finder” service was advertising in the margins of the Facebook page on which Mr. Sparetherod saw the lewd comment that led him to discipline his student).

The indictment led to overwhelming local outrage, however, and in February 2010, the United States Attorney for the District of New Hampshire announced that all charges against Mr. Sparetherod had been dropped.

Enraged by the experience of having been indicted, Mr. Sparetherod has asked you to file a federal lawsuit seeking (1) a declaratory judgment that §§ 101(a), 101(b), 101(c), 102(a), and 102(b) of the Facebook Act of 2008 are facially unconstitutional, and (2) an injunction prohibiting the United States Attorney for the District of New Hampshire from seeking additional indictments under these statutory provisions. He points out to you that a New Hampshire statute that has been in effect for years explicitly confers on New Hampshire public school principals “immunity from all liability, criminal or civil, for decisions made in connection with the discharge of professional responsibilities that are objectively reasonable under binding Supreme Court case law.” Mr. Sparetherod believes, and you agree, that his decisions to suspend the student and to ignore the mandates of §§ 101(b) and 102(b) were objectively reasonable under binding Supreme Court case law.

Please write a memo to Mr. Sparetherod outlining any and all theories under which §§ 101(a), 101(b), 101(c), 102(a), and 102(b) of the Facebook Act of 2008 might plausibly be challenged as unconstitutional. Your memo should also evaluate the likelihood of Mr. Sparetherod succeeding with respect to the claims that you mention in your memo. A good way to organize your answer to this question would be to proceed in order through each section of the statute that Mr. Sparetherod would like to challenge, outlining first any and all constitutional problems you see with the provision and then briefly evaluating Mr. Sparetherod’s likelihood of success in getting the provision struck down.

### Question 2 (25 points) (30 minutes)

It is said that, under the Equal Protection Clause, gender classifications are subject to intermediate scrutiny and classifications based on sexual orientation are reviewed for a rational basis. But some commentators think that, as a practical matter, the Court really

applies a more general balancing test to such classifications, and that it ought to acknowledge that it is doing so. In an essay not to exceed three paragraphs, briefly explain this line of argument, making reference to specific cases and their holdings in support of your explanation.

**Question 3 (25 points) (30 minutes)**

Critics of the majority opinion in Lawrence v. Texas sometimes compare the case with Dred Scott, Lochner, and Roe v. Wade. In an essay not to exceed three paragraphs, briefly (1) explain the comparison, (2) state whether you think the majority opinion in Lawrence v. Texas was correctly decided, and (3) state whether you think the federal courts should be empowered to read unenumerated fundamental or quasi-fundamental rights into the Fifth and Fourteenth Amendment's due process clauses. With respect to the second and third questions, be sure to briefly explain your opinions.

**HAVE A GREAT SUMMER!**