Comments on the Winter 2007 Con Law exam

I was pleasantly surprised by a lot of the thoughtful answers to questions on this exam.

This was the first semester the law school used EBB in a big way, and it was the first time anyone here tried to use page limits in conjunction with EBB. It turns out that the EBB page counter is broken: just because an exam took up less than two pages according to the page counter, didn't mean that it printed out at less than two pages. In fact, almost all of the EBB exams had answers that printed out on more than two sheets of paper, and I assume that it wasn't the case that all of the EBB users wrote over-long answers. There was no apparent connection between "page counter" pages and printed pages. So I ended up having to accept all EBB answers of reasonable length. Lesson learned: I'll use word counts, rather than page counts, for all future EBB exam-takers.

Second, as I think I announced orally at the beginning of the semester, there was one exception to the rule that people who were signed in as "present and prepared" at least 21 times got a grade bump: People who scored an "A" on the exam did not necessarily get a bump to A+. Otherwise, I'd have completely broken the mandatory curve (and I'm not allowed to). An "A" is still really good, though.

What follows are my thoughts on the first two questions.

Question One

This is a pretty rich question. It should go without saying that I was looking for commerce-clause analysis; I tried to make it clear in the question that I wasn't looking for people to reargue the due process analysis in the Supreme Court's recent decision.

A key issue to focus on was whether, post-Lopez and Morrison, the Medi-Wayne clinics' performance of intact D&Es was "economic" activity. If not, that wouldn't rule out the possibility that the statute were within the commerce power, but the usual tools for finding attenuated connections to interstate commerce -- aggregation, arguments from Perez, etc. -- would be unavailable. Most of you took the view that the clinic's activities were not economic, largely because they were offered for free. Some of you disagreed, though, pointing out that the services were identical to services sold by other people for profit, and that the clinics employed people, purchased equipment, and otherwise existed as part of the economy.

Beyond that issue, you needed to get to the ultimate question whether the prohibited abortions affected interstate commerce (or rationally could be thought to affect interstate commerce). I tried to draft the question so that nobody would be crossing state lines into Wayne to get a prohibited abortion. The idea of the 60-day requirement was that nobody would cross into Wayne just to get an intact D&E, because if the woman presented in the first trimester the doctor would use vacuum aspiration in her home state, and if a woman were in her second trimester and thinking about moving to Wayne for an intact D&E, then the 60-day waiting period will push her past the point of viability. (On the other hand, I suppose that somebody might move to Wayne early in her pregnancy for the sake of a free
abortion, and end up getting an intact D&E. What role should that play in the analysis?)

Some people suggested that the prohibited abortions affected interstate commerce because absent an abortion, an additional person might be born who would become part of the economy. I don't find that wholly satisfying, because the statute in question didn't directly affect whether abortions take place, only what procedures the clinics use to perform them. In one sense, all abortions affect interstate commerce, because they require inputs (instruments, clerical supplies, whatever) that may have passed over a state line. But for readers who conclude that the activity was noneconomic, query whether that's enough. After all, if I carry a gun near a school, after all, I'm likely wearing clothes that have crossed over a state line -- and yet that didn't change the result in *Lopez*. Should the constitutional question turn on whether the instruments have traveled across state lines?

Another approach would be to find the Medi-Wayne abortions regulable under *Wickard* -- these abortions, even if not part of the interstate market, are affecting that market simply by virtue of having been withdrawn from it. That is, women who have abortions at Medi-Wayne clinics aren't having abortions at other clinics that are part of the interstate economy. On the other hand, while the activities of Medi-Wayne clinics may affect the prices of abortions in the interstate market (as in *Wickard*), that doesn't really relate to the regulation Congress put in place or the goals it was trying to advance.

Is regulation appropriate under a *Raich*-like theory? The argument would have to be that the regulation of this subclass of abortions, even if they have no substantial effects on interstate commerce, is a necessary part of a comprehensive scheme regulating the larger group of abortions that do affect interstate commerce. The counter-argument, though, is that this is a necessary part of Congress's scheme only if we see Congress's goal as one of banning intact D&E abortions entirely, without regard to whether they affect interstate commerce. If only people in Wayne will have access to the Medi-Wayne abortions, then this isn't a case like *Raich*, where the marijuana could leak into the interstate market.

Some people brought up *New York v. US* and its progeny. I don't see those cases as having much relevance here. The federal government wasn't compelling Wayne to regulate; it was just forbiddding it to engage in certain activity. That's covered by *Garcia*, not *New York v. US*. Finally, a claim based on the fourteenth amendment enforcement power seems untenable in light of *Boerne v. Flores*, since the Court has expressly declined to hold that government's failure to ban abortions implicates a fourteenth amendment interest.

**Question Two**

Here, of course, you were supposed to engage in due process analysis. (You can find the Ninth Circuit's discussion of this issue at *Raich v. Gonzales*, 2007 U.S. App. LEXIS 5834.)

A key question, of course, is how you define the right at issue. One broad way to formulate the right is as one against government interference with those steps, prescribed by one's doctor, necessary to avoid intolerable pain and preserve one's life. This resonates with themes of personal autonomy & bodily integrity; the claim to autonomy in making self-regarding choices to avoid intolerable physical pain and preserve one's life is the same sort of
autonomy the court was prepared to recognize arguendo in *Cruzan*. As some of you pointed out, Justice O'Connor in *Glucksberg* seemed prepared to recognize a constitutional right to such medications as are necessary to ensure death with dignity. And as others of you pointed out, *Roe* and progeny seem to recognize, even in the third trimester when there otherwise exists no constitutional right to abortion, a constitutional right to abortion-as-medical-treatment necessary for the life or health of the pregnant woman.

Is the asserted right described above "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty"? We run up against the problem that we've never recognized a fundamental right, in general, to use a medication of one's choice notwithstanding that the government doesn't consider it safe or effective. (Those of you old enough may remember the controversy over Laetrile, a purported cancer drug that the FDA considered bogus.) If this is distinguishable, it's because of the evidence Raich is proffering that medical marijuana *really will* save her life -- unlike, say, those of the Laetrile claimants. Is that good enough?

Another -- also broad, but different -- way to categorize the right is as a right to smoke marijuana, or to use illegal drugs. Plainly there's no fundamental right there.

The conflict here, thus, is less between a broad and a narrow characterization of the right than between two broad characterizations. At the intersection might be an asserted right to smoke marijuana prescribed by one's doctor as necessary to avoid intolerable pain and preserve one's life. What does tradition say? That marijuana has been illegal for the past 37 years suggests a tradition contrary to protection -- but we also have the pre-1970 history of tolerating/recognizing marijuana use for medical purposes. That history, I think, doesn't make the right fundamental without more, and neither does the recent movement towards legalization. Several of you urged that the mere fact that prior generations allowed medicinal marijuana use because of bad science, doesn't establish a tradition prohibiting the country from establishing a different rule based on better science. The history does suggest that there's no any deeply rooted specific tradition *contrary* to the asserted right.

If there is no fundamental right, the statute passes rational-basis analysis. If this case does implicate a fundamental right, what follows? We can concede a compelling government interest in fighting the trade in, and use of, harmful drugs. But the government's tools must also be narrowly tailored. The CSA isn't narrowly drawn if the government could enact narrow exceptions for the benefit of folks like Raich without undercutting its ability effectively to enforce the Act -- can it?