INSTRUCTIONS

Total time for exam: 3 hours and 15 minutes (195 minutes)

This exam consists of **TWO main questions, one of which has several sub-parts. The exam is open book: you may consult any printed or handwritten materials.** You may *not* bring into the examination room any electronic devices, including cell phones, blackberries, iPods, etc. You may turn on a laptop *only* if you are typing the exam, and only with the exam software running. You may *not* use a laptop to consult your outline or notes.

The suggested time for each question is as follows:

- **Question I: 60 minutes**
- **Question II: 120 minutes**
- **Bonus time to allocate as you see fit: 15 minutes**

You should answer all parts of every question. If you believe that further facts are needed to answer any of the questions, please state in your answer what facts you would need or what assumptions you have made. In evaluating your answers, I will be looking especially for correct identification of issues, thorough analysis, facility with the Supreme Court precedent, and logical organization. Your answer should not be in outline form[*] nor contain shorthand, abbreviations (except where clearly noted and defined), slang, or bullet points.

For grading purposes, the weight of each question will correspond to the suggested time for answering it.

Please write your exam number on every page of your exam. **Under no circumstances may you remove the exam from the room in which the exam is taken. If you fail to turn in all pages of the exam, you will not receive credit for the course**.

"I acknowledge that in this, as in all other law school activities, I am bound by the Emory Law School Professional Conduct Code."

Exam Number _____

GOOD LUCK!!!

[*] If you are running out of time to complete your answer you may include an outline for the remainder of the answer. You will receive some – though minimal – credit for doing so.

QUESTION I
(*suggested time:* 60 minutes)

As the presidential election campaign heated up in the summer of 2012, President Obama began to turn from criticizing Congress for gridlock to vigorously pressing his agenda through unilateral executive action.

When Congress seemed reluctant to intervene in Syria to protect civilians, President Obama provided humanitarian aid, then weaponry, and finally military advisors to Syrian rebels who had been violently attacked by the forces of Syrian President Bashar Assad. Critics in Congress decried this "foreign adventurism" and predicted further disasters like the costly and undeclared wars in Afghanistan and Iraq, both of which seemed to rapidly be sinking into civil wars after the drawdown of American troops.

Next, President Obama began to press a domestic agenda in response to being called a "do-nothing" president by Republican foes. For example, President Obama granted waivers of drilling permits, approved construction of liquefied natural gas terminals to ship natural gas overseas, and pushed the Nuclear Regulatory Commission to approve several new nuclear power plants. These actions inflamed environmentalists, who called the President's actions "a signal betrayal of everything sacred to us." President Obama also took strong steps to enhance enforcement of the Internal Revenue Code. The Internal Revenue Service (IRS) is part of the Department of the Treasury, which is an agency in the executive branch. President Obama directed the IRS to pursue criminal penalties in any case in which the IRS determined there was a shortfall of $1 million or more from any individual or corporation. These actions led to protests by a coalition of Republicans who said he was engaging in "class warfare" and by civil libertarians who were appalled at the aggressive actions of the IRS.

President Obama won reelection in November 2012, but substantial Republican majorities were elected to both the Senate and the House. To show the president where his authority ended and congressional authority began, Congress passed the Congressional Reassertion of Authority over the President (CRAP) Act of 2013. When, as expected, the CRAP Act was vetoed, Congress overrode the veto. The relevant text of the Act appears below:

CONGRESSIONAL REASSERTION OF AUTHORITY OVER THE PRESIDENT ACT

Section 1. The Constitution provides that the legislative power of the United States resides in Congress rather than the President. Presidents have increasingly ignored that constitutional principle, necessitating that Congress reassert its legislative supremacy.

Section 2. With regard to any executive orders, the following procedure shall be followed:

(a) At least two weeks prior to the proposed effective date of any executive order, the President shall provide to Congress a copy of such proposed executive order;

(b) A joint conference committee of Representatives and Senators appointed by the Speaker of the House of Representatives and the Majority Leader of the Senate shall consider such proposed executive order and accept it, reject it, or propose changes in it;

(c) If the joint committee accepts the proposed executive order or if the President makes the proposed changes, then the order will take effect;

(d) However, if the joint committee rejects the proposed executive order or if the President refuses to accept the proposed changes, then the proposed executive order shall not take effect.

Section 3. There is created in the Internal Revenue Service the office of Taxpayer Advocate. The Taxpayer Advocate shall be appointed by the Secretary of the Treasury, subject to confirmation by the Senate. Other than by impeachment, the Taxpayer Advocate may be removed from office only by the Secretary of the Treasury and only for good cause. No revenue collection measure may be undertaken by the Internal Revenue Service without the approval of the Taxpayer Advocate.

Section 4. In the event that an individual wishes to challenge a tax collection ruling by the Taxpayer Advocate on the ground that it violates such individual's Constitutional rights, such a challenge shall be reviewable solely through a declaratory judgment action in the District Court for the District of Columbia, whose decision shall be final and subject to no further appeal by either the taxpayer or the Internal Revenue Service.

* * *

You are the head of the Office of Legal Counsel, the unit of the Department of Justice charged with providing constitutional law advice to the executive branch. The President has asked your advice concerning whether the CRAP Act violates constitutional separation of powers principles. Please provide

this advice in a memo to the President, using appropriate references to the Constitution and Supreme Court case law.

****QUESTION II BEGINS ON THE NEXT PAGE****

QUESTION II
(*total suggested time:* 120 minutes)

Concerned about the growing problem of obesity in the United States, Congress held a series of hearings on the subject. Evidence presented to Congress during the hearings suggested that certain people were biologically prone to obesity due to genetic predisposition combined with infant and early childhood environmental factors. Experts also testified to the long history in America of mistreatment of overweight and obese persons, to their lower lifetime earnings, and to the many health problems faced by the obese. Early versions of legislation proposed by the House and the Senate revealed different views concerning the causes of obesity. The House version – H.R. 750 – as originally introduced, stated: "obesity is largely hereditary and not subject to an individual's meaningful control." The Senate version – S. 513 – stated: "overweight and obesity are caused primarily by lack of self-control, laziness, and gluttony." There was also testimony that the rates of obesity were greater among those with lower socio-economic status than those in the middle classes and upper classes.

As it considered major legislation to address the range of public policy issues related to childhood and adult obesity, Congress debated various responses to the particular problem of chronic morbid obesity in adults. Chronic morbid obesity is defined as weight that is at least 40% above the Recommended Body Mass Index (RBMI) that persists for more than five years. Experts presented evidence suggesting that a combination of drugs and behavioral techniques (dieting) could be effective for many people with appropriate monitoring; for about 30% of chronically morbidly obese individuals, however, drugs and dieting are ineffective and in fact may lead to weight gain. Other evidence supported the view that gastric surgery – primarily "LapBand" surgery in which a removable silicone belt or collar is placed around the stomach, thus constricting the stomach to approximately the size of a golf ball – has a higher overall success rate than drugs and behavioral techniques because of the difficulty of ensuring that individuals comply with drug and dieting regimens. It was uncontested that LapBand surgery poses an extremely low risk of complications and that the health risks of morbid obesity vastly outweigh the very slight health risk of the surgery.

Ultimately, Congress enacted the Fit And Toned Act of 2012. The FAT Act provided:

FIT AND TONED ACT

SECTION 1: FINDINGS

(a) The percentage of overweight and obese Americans has grown exponentially over the past two decades, with the Centers for Disease Control (CDC) now estimating that 60 million American adults are obese and that nine million American children and teens are overweight.

(b) Overweight and obesity and their associated health problems have a significant economic impact on the United States health care system as well as costs to employers and schools in the form of lost days and lowered productivity of employees and students. The annual cost of obesity in America is estimated at $270 billion.

(c) For some individuals, bariatric or other gastric surgery is more effective than behavioral therapy (dieting) or drugs in initiating and maintaining weight loss and in prevention and treatment of disease, including type II (adult-onset) diabetes.

SECTION 2: THEREFORE

(a) On or before December 31, 2012 the federal Department of Health and Human Services (HHS) shall establish, in every County in the United States, an official "County Weighing Station" (CWS).

(b) Every person aged eighteen years or older shall report to his or her CWS at least once per year to have his or her weight recorded.

(c) Any person who exceeds the Recommended Body Mass Index (RBMI) for his or her age and sex by 10% or more shall attend a mandatory four-hour exercise and nutrition seminar offered by an Approved Weight Management Provider (AWMP). The AWMP may charge individuals a reasonable fee for participation in the seminar in order to cover the costs of materials and to make a reasonable profit. Persons attending seminars under this subsection (c) shall swear or affirm, on penalty of perjury, to follow the nutritional and exercise guidelines established by HHS. Failure to attend such seminar and to make such pledge shall be a misdemeanor offense punishable by a fine of up to $1,000.

(d) Every public primary and secondary school shall establish separate programs for children above the target BMI for their age and sex. Children in these "Weight Conscious Classroom (WCC)" programs must have

separate classrooms and must spend a minimum of 90 minutes per school day in "high-calorie-burning" activities. In addition, such programs must contain a nutrition and weight loss educational component.

(e) Any person who exceeds the RBMI by more than 40% for three consecutive years shall undergo gastric LapBand surgery.

* * *

(A) Does Congress have the power to enact any or all provisions of the FAT Act of 2012? (*Suggested time:* 45 minutes)

(B) Analyze the constitutionality of the FAT Act under Equal Protection principles. (*Suggested time*: 45 minutes)

(C) Analyze the constitutionality of the FAT Act under the substantive component of the Due Process Clause. (*Suggested time*: 30 minutes)

END OF EXAM

HAVE A WONDERFUL SUMMER!!!

QII ANSWER KEY – THE FAT ACT OF 2012

(A) Does Congress have the power to enact any or all provisions of the FAT Act of 2012? (*Suggested time:* 45 minutes)

- If Congress has power to enact the FAT Act, this power must come from the Commerce Clause because there is no other plausible enumerated power that would support the statute. There is no spending condition that would support a spending power argument and there is no ground for Congress to purport to be enforcing the provisions of the EP or DP clauses with this statute.

- Under the framework established in *Lopez*, to fall within the CC power the Act must regulate either (1) channels of IC; (2) instrumentalities, people, or things in IC; or (3) activity that has a substantial effect on IC. Because the activity regulated here – weighing of individuals at their County Weighing Stations, school practices, and surgery – is purely local, the question in this case is whether the regulated activity falls within category three.

- There are two distinct activities being regulated here: first, individuals are compelled to be weighed once per year, to pay for and attend a mandatory seminar if their weight is above a certain threshold, and to agree to follow a certain dietary and exercise program (and – ultimately – to have surgery if necessary); second, the Act regulates schools' placement of overweight students and curriculum.

- In determining whether an activity has a substantial effect on IC, the Court looks to several factors (*Lopez, Morrison*). The first is whether the activity being regulated is economic in nature. As to the first activity described above – the weighing, seminar, and dietary guidelines (as well as the surgery) – the activity is partly non-economic and partly economic. The initial weighing is noneconomic activity, but the enrollment in a seminar is economic because the Act authorizes the seminar companies to charge a reasonable fee. The surgery would also be economic activity.

- However, because the Act compels individuals to enter into economic transactions that they would presumably not otherwise choose, one can argue based on the Affordable Care Act cases and SCOTUS briefing/argument that this type of economic activity should not count for purposes of CC power. Indeed, this is a stronger case against CC power than the ACA because there the government could at least argue that every person would ultimately participate in the health care market and that the regulation was simply as to timing; here, in contrast, it is difficult to argue that every person would ultimately participate in the market for seminars or surgery. Should the Court adopt this reasoning in the ACA case, this would argue here against CC power.

- A second factor in *Lopez* and *Morrison* is whether the statute contains a jurisdictional hook to tie it to IC. The FAT Act has no jurisdictional hook, which cuts against a finding of CC power.

- A third factor in *Lopez* and *Morrison* is whether there are express congressional findings, either in the statute itself or in the legislative history, as to the aggregate effect of the local, noneconomic activity on IC. Here, there is an express finding in the FAT Act: § 1(b), which states that obesity has a huge economic impact on the U.S. caused by the health problems associated with being overweight or obese. These give rise to health care spending as well as impacts on employment productivity. Congress in the Act estimates the annual cost of obesity in the U.S. at $270 Billion, an enormous economic cost.

- While *Morrison* noted that express congressional findings will not suffice to bring a statute within the CC power if the Court does not find a substantial effect, where, as here, Congress has made express findings this might count as a factor in favor of a finding of substantial effect. (*Lopez*).

- Finally, the Court looks at how closely the regulated activity is related to the effect on commerce. If the link is highly attenuated, the Court is less likely to find a substantial effect. Here, the link relatively close: there appears to be much evidence that being overweight or obese is closely tied to risk factors for diseases such as type II diabetes, which in turn impose a huge cost on society. In addition, there are findings in the statute that the problem of obesity in America is very large and is growing exponentially. A significant proportion of both adults and children are overweight or obese. The connection between the activity and the economic effect is closer than the "inferences upon inferences" criticized by the Court in *Lopez* and *Morrison*.

- With respect to the Act's regulation of schools, however, the connection between segregation of overweight students and a special curriculum on the one hand, and the effect on commerce on the other, is much more attenuated and thus this provision is probably not supported by Congress's CC power.

- Furthermore, school curriculum is a traditionally local concern, which several Justices have suggested is a factor in more narrowly construing the reach of the CC where Congress regulates such traditionally local activities. Justice Kennedy, in particular, reasons that federal regulation under these circumstances undermines democratic accountability. This federalism concern, which flows from the Tenth Amendment, cuts against CC power in this case.

(B) Analyze the constitutionality of the FAT Act under Equal Protection principles. (*Suggested time*: 45 minutes)

- The FAT Act classifies individuals on the basis of weight – more precisely, on the basis of their being above their "RBMI" for their age and sex. There are several provisions of the statute that contain such classifications: (1) § 2(c), which requires those who exceed their RBMI by 10% or more to attend a weight-loss seminar and to swear or affirm to follow a nutrition and exercise program thereafter; (2) § 2(d), which provides that public schoolchildren who exceed their RBMI must be segregated into separate programs at school; and (3) § 2(e), which requires individuals who exceed their RBMI by more than 40% for three consecutive years to undergo gastric LabBand surgery. (Because §2(e) also implicates the Due Process Clause, it will be addressed in the answer to question C.)

- The Act is facially discriminatory. All three provisions treat overweight individuals worse than non-overweight individuals. Section 2(d) is somewhat analogous to a "separate but equal" provision, but insofar as the overweight children have a different curriculum, the comparison (e.g. to *Brown*, *Loving*) is imperfect.

- In order to evaluate the constitutionality of the Act under Equal Protection doctrine, it is first necessary to determine the appropriate level of scrutiny based on the classification at issue. Certain "suspect" classifications, such as race and national origin, receive strict scrutiny. Gender receives intermediate scrutiny; the Court seems to view some gender classifications based on "real differences" to be legitimate but to view others, based on overbroad stereotypes, as illegitimate. Other classifications receive rational basis scrutiny, though occasionally the Court appears to apply that scrutiny with more rigor (sometimes called "rational basis with bite"). The Court has not addressed weight classifications, though it has held that disability classifications receive rational basis review (*Garrett*).

- With race as the paradigmatic suspect classification, the Court and commentators have suggested several factors – some gleaned from *Carolene Products* fn 4 – that might lead to finding a classification suspect and thus subject to some form of heightened scrutiny. First is immutability. Because weight is changeable (indeed that is the purpose of the Act), it is hard to argue that weight is immutable in the way that race or gender is considered immutable. On the other hand, there is evidence in the legislative history that suggests a biological/genetic component to being overweight. Application of this factor would depend on the extent to which a court were to find that weight is beyond the control of the individual.

- With respect to the issue of possible defect in the political process and the difficulty overweight people as a group might have in advancing their interests through the normal process, it does not seem that there is any reason that this group would be disadvantaged in this way. In particular, given their large and

growing numbers, it is unlikely that overweight and obese people are unable to represent their interests in the political process.

- The strongest argument in favor of considering obesity as a suspect classification is the historical and continuing mistreatment of overweight and obese persons in this country, as depicted in the evidence presented to Congress. Indeed, the statement in the Senate version of the bill arguably illustrates the very stereotypes that should give rise to heightened scrutiny, with S. 513 stating that overweight persons are lazy, gluttonous, and lacking in self-control.

- Notwithstanding the above, it is highly unlikely that the Supreme Court would explicitly hold that obesity is a suspect classification. The factors discussed above are mixed, and in comparison to mental retardation (*Cleberne*) and disability (*Garrett*), the case for obesity as a suspect classification is no stronger and is probably weaker. The same might be said for age, which the Court has held is not a suspect classification.

- Nonetheless, it is possible that the Court would apply rational basis review in a more rigorous way, even if not explicitly doing so. In *Cleburne*, for example, the Court held that mental retardation classifications were subject to rational basis review, but the Court struck down the zoning ordinance as applied to Cleburne Living under what many view as "rational basis with bite." Similarly, in *Romer v. Evans* the Court purported to apply rational basis review to strike down CO amendment 2 and its sweeping provision that the Court viewed as illegitimate targeting of gays and lesbians based on moral disapproval. Here, the FAT Act is quite sweeping and intrusive, is arguably based on illegitimate stereotypes, and carries a clear tinge of moral disapproval.

- Applying the normal brand of rational basis scrutiny, the classification would clearly pass muster as it is rationally related to a legitimate governmental interest. Congress could certainly have reasonably found that overweight and obese individuals cause much greater costs on the national economy and health care system. All of the provisions are reasonable means of addressing the significant interests at stake.

- Under a more searching form of rational basis review, it is possible that some of the provisions could be struck down. It is not clear from the facts whether the seminar and nutritional and exercise program will have much effect on overall weight and health; under rational basis with bite, §2(b) and (c) might fail. Similarly, the school segregation program might be vulnerable under this more searching version of rational basis review.

- Finally, it could be argued that the school segregation program violates the fundamental interests prong of EP doctrine, similar to *Plyler v. Doe*. There, children of illegal immigrants were prevented from attending public school at no cost. As in that case, the overweight children are innocent and blameless,

particularly since the legislative history suggests that genetics plus early environment (which the children could not control) both contribute to their being overweight. In addition, as in *Brown*, there is the likelihood that segregation will cause serious stigma on these children and affect their ability to learn. Finally, the correlation between obesity and social class may combine with the above factors to lead a court to strike down the segregationist program. On the other hand, the special curriculum and exercise requirement might have the beneficial effect of making these children healthier and promoting their success; further, unlike in *Plyler*, here the children are not being completely deprived of an education.

(C) Analyze the constitutionality of the FAT Act under the substantive component of the Due Process Clause. (*Suggested time*: 30 minutes)

- Two provisions of the FAT Act - §§ 2(c) and (e) – raise serious Substantive Due Process issues. The Due Process Clause is implicated when the government infringes individuals' liberty interests; where those liberty interests are deemed "fundamental," the government action must satisfy strict scrutiny to be constitutional.

- Under the framework laid out in *Washington v. Glucksberg*, the first step in a SDP analysis is to "carefully describe" the liberty interest at issue. In *Glucksberg*, the Court framed the asserted liberty interest very narrowly as the right to assistance in committing suicide, whereas the dissent framed it more generally as the right to die with dignity or the right of terminally ill patients to choose how they will die. Here, the liberty interests are quite specific and important – the right to be free from a forced surgical procedure (2(e)) and the right to refuse to participate in nutritional seminars and to choose one's diet and exercise regimen (2(c)). Framing of the interest here is unlikely to pose a major issue.

- Next, we must ask whether these liberty interests are "objectively, 'deeply rooted in the Nation's history and tradition' and 'implicit in the concept of ordered liberty' . . . ." (*Glucksberg*, quoting *Palco*). There is a very strong argument that the right to be free from mandated surgical procedures satisfies this test. The Court in *Cruzan* strongly implied (though did not exactly hold) that the right to be free from unwanted medical care is a fundamental interest protected by the DPC. The Court noted the long and clear history and tradition of protecting bodily integrity through the tort of battery. It is overwhelmingly likely that the Court would find this interest fundamental.

- The rights to choose one's food and activity and to refuse to participate in an educational seminar are not as clearly fundamental under the DPC. The former is more closely aligned with the right to refuse medical treatment and to control one's own body, but the latter may not be supported under the *Glucksberg/Palco* formulation. Certainly there is a tradition of mandated education, though not for adults. This would be a closer question.

- Assuming that the liberty interests in refusing surgery and in choosing one's food and activity for oneself are fundamental, the government may not infringe those interests "unless the infringement is narrowly tailored to serve a compelling state interest."

- With respect to the surgery provision: The state interest – addressing the health risks and economic burdens of morbid obesity – is certainly significant and is arguably compelling. The more difficult issue is whether the surgery provision is narrowly tailored to serve this interest. On the one hand, because the risk of the surgery is much smaller than the risk of remaining morbidly obese, this would

seem to be closely-tailored response to the problem. On the other hand, there are alternatives to surgery (education, diet, drug therapy) that would also serve the state's goals without infringing the liberty interest, and the legislative history suggests that these alternatives "could be effective for many people." Subjecting all chronically morbidly obese persons to surgery when a less-invasive alternative might be effective in individual cases is over-inclusive and thus not narrowly tailored.

- Furthermore, the Act's definition of chronic morbid obesity subject to the surgery mandate is not congruent with the scientific/medical definition as outlined in the legislative history. Chronic morbid obesity is defined in the legislative record as weight at least 40% above the RBMI for longer than five years; the statute mandates surgery for those only 30% above RBMI for longer than three years. Given this mismatch, it is unclear that the success statistics in the legislative record support the criteria for surgery for this group of individuals. This is another strong argument that the means is not narrowly tailored to serve the state's goals.

- Finally, if the interest in choosing ones own food and exercise is fundamental, we must ask whether the mandatory seminars and nutrition and exercise plans are narrowly tailored to further the state interests (already set out above). Here, there is a better argument that this scheme is narrowly tailored to encouraging weight loss and improved health outcomes. On the other hand, certainly not all overweight individuals will develop these health effects, so that alone may cause the provision to fail for lack of narrow tailoring.