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501-003 Introduction to Constitution Law
Spring 2013

UNM School of Law
Final Examination

Professor D. Sidhu
Th: May 2, 2013
1:00-4:00pm

Professor Instructions

Final Examination -- Part II

This examination culminates our formal exploration of the cases and principles within the Introduction to Constitutional Law course. The final examination has two parts. Part I, a take-home which was made available to students on April 22, 2013, consisted of Question 1. Part II, to be administered in-class on May 2, 2013, consists of Questions 2 and 3. Part II also includes a bonus question.

Students have three continuous hours within which to complete Part II of the examination.

The examination is "limited open-book." In particular, in completing this examination, a student may access and refer to only the following materials:

- The Chemerinsky CONSTITUTIONAL LAW casebook;
- Professor Sidhu's class slides and handouts, as made available on TWEN;
- Notes that the student has personally prepared; and
- The class outline developed by the course tutor, Shayne Huffman.

The use of any other materials for purposes of the examination is strictly prohibited. In completing this examination, students are reminded of their obligations to adhere fully to the law school's Student Code of Conduct.

Students' essays must comply with the Registrar's "technical instructions" on page two below. Students' essays will be assessed on the basis of these factors:

1. Format -- are the essays in the correct format (*e.g.*, margins, font)?
2. Style -- are the essays grammatically correct and well-structured?
3. Responsiveness -- do the essays directly address the questions?
4. Analysis -- do the essays apply the correct legal standard(s)?
5. Persuasiveness -- are the arguments convincing?
6. Originality -- do the essays advance persuasive arguments that are novel?
7. Intellectual honesty -- do the essays acknowledge, and respond to, possible counter-arguments?

Good luck, and best wishes for an enjoyable and productive summer.

Essay Technical Instructions

Bluebooks for writing: using black or blue ink only, write on every-other line and only on the front side of each page. On the front cover of each bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Laptop for typing:

1. Log off all programs that you are currently running or have opened!
2. Start the Exam4 program.
3. Make sure "**Prepare to start new exam**" is marked and click, "**Next.**"
4. Enter your "**Exam ID**" number and confirm it.
5. Click the drop box next to "**Course**" and select your course and professor and confirm. Click, "**Next**".
6. Optional choices screen: If you choose to change these options please do so. If not, click "**Next**".
7. Notice you should not turn off or restart your computer before contacting a proctor. Check the box marked "**Got it**" and click, "**Next**".
8. Type "**Closed**" for exam mode, check the box below that to confirm and click, "**Next**"
9. At this point Exam4 will indicate "**Wait!**" in the lower right side of the screen.

WAIT!

10. The proctor will tell you when to click "**Begin Exam.**"
11. A "**Security Check**" to scan your computer will run. Please be patient. It should disappear within a short period of time. If not, please exit the room and see a proctor.
12. Use the Tools menu above and select "**Insert Answer Separation**" for a page break.

All Exam Takers

If you have any questions or feel the need to explain/clarify your interpretation/understanding of the question being posed by the professor, please write them on the exam and do not sign your name.

If you have an emergency, procedural question, or issue that may occur during this exam period, **do not contact the professor**, please contact the Proctor or the Registrar.

You may **not** make/keep a copy of this exam! You are required to return this exam with your answer.

A **five-minute warning** will be given prior to the conclusion of the examination. When time is called, **STOP** immediately.

Bluebook (Writers): At this point immediately stop writing, close all blue books and gather up any materials. If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Laptop (Typers): At this point immediately stop typing and proceed to save the exam. Select **End Exam, End Exam Now** from the menu bar. Confirm that you want to end the exam. Select **Submit Electronically** and follow either the Mac or Windows user directions below:

Mac users only:

- Wait for the airport icon to indicate you have reconnected to the wireless network.
 - If the “Check Network Connection” screen displays, select OK.
 - Use your Airport to connect to Lobo-Guest, Lobo-WiFi, or Lobo-Sec.
 - Authenticate using your browser as appropriate.
- Return to Exam4 and select **Exam4 Save Options**, then **Submit Electronically**.
- You will receive a confirmation that your exam has been saved successfully. Click **I understand** and **OK**.
- Exit the exam by selecting **Exam4 Save Options, Exit**.
- If the exam **did not submit electronically**, reconnect to either Lobo-Guest, Lobo-WiFi, or Lobo-Sec network, making sure you authenticate as appropriate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
 - If the exam still did not submit electronically, contact an IT proctor

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Windows users only:

- If the Status” window indicates a problem with submitting electronically (usually Error 12: No response), close the window with the Red X and select File and Save Options. Select Exit (don’t worry...the completed exam is saved to your hard drive). Check Network Connection” screen displays, select OK.
 - Exit the exam by selecting **File and Save Options, Exit**.
 - Connect to either Lobo-Guest, Lobo-WiFi, or Lobo-Sec network, making sure you authenticate as appropriate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
- Click the verification options and/or OK until you return to Exam4. Select **File and Save Options, Exit**.
- If the exam still did not submit electronically, contact an IT proctor.

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

[Exam begins on the next page]

Question 2
(45 points)

In 2012, the United States experienced several horrific incidents of mass violence. Among them: the December 14, 2012 shooting in Newtown, Connecticut, in which twenty-seven individuals, including twenty children, were killed. In response to these tragedies, Congress has been exploring a number of legislative initiatives, including bills that would curb access to high caliber weaponry, increase dispute resolution mechanisms in public schools and workplaces, and facilitate a broader culture of conciliation and respect in our communities.

In January of 2013, Congress passed, and the President signed into law, the first such initiative: the Mature Video Game Act of 2013 (the "Act"). The Act contains six relevant provisions:

Sec. 101. Covered Entities. This Act applies to any private company or governmental body that develops, produces, or otherwise creates a video game for sale or use in the United States.

Section 102. Licensed Professional. All covered entities shall hereby include, on paid staff, a child psychologist or psychiatrist licensed to practice in the United States.

Section 103. Certification. The licensed professional shall review all video games developed, produced, or otherwise created by a covered entity for sale or use in the United States, and shall certify as "unfit for sale or use" any such video game that a) contains violence, blood, or gore that may tend to desensitize the user as to the effects of violence, or b) simulates an act of gun violence in a school, place of public accommodation, place of work, or place of worship.

Section 104. Prohibition. It shall be unlawful for any covered entity to make available for sale or use in the United States any video game that the licensed professional has certified as "unfit for sale or use."

Section 105. Enforcement. Any covered entity that does not comply with Sections 102, 103, or 104 of the Act shall pay a penalty to be enforced by the U.S. Department of Justice. ← TAX

Section 106. Earmark. All monies derived from this penalty shall be assigned to the U.S. Department of Health and Human Services for the purpose of developing informational materials to educate families and schools on the warning signs of video game addiction or violent anti-social behavior. ← TAX

Congress acknowledged that the Act was based on and inspired by similar legislation proposed by a Connecticut state representative whose district includes Newtown. Congress also found important the fact that the perpetrator of the Newtown shootings, Adam Lanza, "regularly played violent video games."

The State of Caroline produces educational video games that are used in its public elementary school classrooms. Caroline's video games are designed to help students improve their math, reading, and spelling skills. Caroline credits its innovative curriculum and its use of technology in particular as reasons why its public school students routinely score very high on nationwide standardized tests. }

After the passage of the Act, Caroline state legislators expressed concern that the Act would impose significant costs on Caroline's modest budget at the expense of this demonstrated educational success. Accordingly, Caroline's legislators voted overwhelmingly to refuse to comply with the Act. Accordingly, Caroline continues to produce educational video games for use in its public elementary schools, but Caroline has not hired a licensed child psychologist or psychiatrist, and it has not paid the associated penalty. In providing legal support for this decision, Caroline's Attorney General points out that Caroline is not in the market of making mature video games, its video games are not sold but are given free of charge to its public elementary school students, and its video games are only used in the state. intrastate

Seeking judicial approval of its decision to refuse to comply with the Act, Caroline, on May 1, 2013, filed a lawsuit against the United States, challenging the constitutionality of the Act. Specifically, Caroline asserts in its complaint that Congress did not have the constitutional authority to pass this Act, and that the Act violates the Tenth Amendment. The U.S. Department of Justice, defending the Act against this attack, argues that Caroline lacks standing, that Congress has the authority under its Commerce power and its Taxing power to pass the Act, and that the Act does not offend the Tenth Amendment.

You are the federal district court judge assigned to this case. Write an opinion, limited to 2,250 words, resolving whether:

- 1) Caroline has standing to contest the constitutionality of the Act (10 points);
- 2) Congress has the authority under its Commerce power to pass the Act (15 points);
- 3) Congress has the authority under its Taxing power to pass the Act (10 points); and
- 4) The Act is consistent with the Tenth Amendment (10 points).

Question 3
(10 points)

Pursuant to the Act's "enforcement" provision, the United States (through the U.S. Department of Justice) has filed a countersuit against Caroline for the unpaid penalty. All parties agree that the Act does not abrogate Caroline's sovereign immunity, and that Caroline has not consented to any lawsuit under the Act. Caroline claims that it is entitled to sovereign immunity "because the Act does not abrogate its immunity and because it has not consented to suit."

Meanwhile, Caroline passed a state law regulating the advertising of mature video games. The United States argues that this Caroline law is preempted by the federal Act. Caroline responds, and the United States concedes, that the federal Act does not contain any language expressly preempting state laws related to the advertising of video games. Caroline therefore contends that the United States' preemption argument must be dismissed because "the only way a state law may be preempted is if Congress expresses its intent to do so in the text of its statute."

The Caroline law further requires "any private company or governmental entity that develops, produces, or otherwise creates a mature video game for sale or use in Caroline to place, on the front cover of each such game, a warning label describing the possible mental health risks associated with the regular playing of mature video games." The parties stipulate that this warning label requirement is the most stringent of any state's laws pertaining to the labeling of mature video games. A neighboring State has filed suit against Caroline, claiming that the Caroline warning label requirement impermissibly burdens interstate commerce. The parties agree that the warning label is non-discriminatory. Caroline therefore argues that any Dormant Commerce Clause ("DCC") challenge to the Caroline warning label requirement must be dismissed because the DCC "does not prohibit non-discriminatory state laws."

Citizens of the neighboring State have joined this lawsuit against Caroline and are positing that the Caroline law impairs out-of-state video game producers' abilities to earn a livelihood. The citizen-plaintiffs concede that the law is not discriminatory. Caroline therefore argues that any Article IV Privileges and Immunities ("P&I") challenge to its warning label requirement must be dismissed because P&I "does not prohibit non-discriminatory state laws."

You are the federal district court judge assigned to these consolidated cases. Write an opinion, limited to 500 words, briefly explaining whether:

- 1) Caroline is entitled to Eleventh Amendment sovereign immunity (2.5 points);
- 2) Caroline's preemption argument is correct (2.5 points);
- 3) Caroline's Dormant Commerce Clause argument is correct (2.5 points); and
- 4) Caroline's Privileges and Immunities argument is correct (2.5 points).

Bonus Question
(1 point)

The Loving Story documentary follows the plaintiffs and plaintiffs' lawyers in the landmark case of *Loving v. Virginia*, 388 U.S. 1 (1967). On the eve of the oral argument before the Supreme Court of the United States, Bernard Cohen, the lead attorney for Richard and Mildred Loving, asks Mr. Loving if there is anything that he would like to say to the justices.

What does Mr. Loving say in response?

Your answer must be no more than 20 words.

End of Exam