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526-003 Constitutional Rights
Fall Semester 2006

UNM School of Law
Final Examination
Three Credits

Professor Gomez
Thursday, December 7 2006
9:00-12:00 p.m.(3 hours)

Examination Format
Essay Answers

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of 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.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Instructor's Instructions

1. Read through these instructions and the entire exam before beginning your answers.
2. Exams are graded anonymously (by number). Be sure to avoid, prior to the posting of grades, making any written remarks (e.g., do not sign your name on the blue book) or verbal remarks that will jeopardize your or anyone else's anonymity, either on the examination or in any other context.
3. This is a limited open-book exam. During the exam, you may consult **only** your own outline (e.g., an outline you prepared).

References to the Constitution or constitutional provisions are to the U.S. Constitution and its amendments.

This exam has two equally-weighted parts. Part I is an issue-spotting essay question worth 50 percent of your exam grade; part II consists of short-answer questions. Before you begin writing either part of the exam, I suggest you read the instructions for both sub-parts.

If you believe you need any additional information to answer a question, explain what information you need and why you need it. In your answer, clearly state any assumptions you feel are necessary to answer the question.

FINAL EXAM

I. Issue-spotting Essay Question (50% of exam grade)

The Supreme Court has consolidated the following two cases, in which mentally retarded plaintiffs have challenged state laws as unconstitutional. Write an essay evaluating the various constitutional issues presented by these developmentally disabled plaintiffs. Assume the U.S. Constitution as currently written applies and that the governing law is Supreme Court doctrine as it exists today. Do not consider claims under state constitutions. Do not consider any statutory claims the plaintiffs might have (such as under the Americans with Disabilities Act).

Jane Jetson v. Maine: Maine law prohibits certain people from marrying, including blood or adopted relatives, same sex couples, parties of more than two persons, and certain disabled persons. The provision relating to disabled persons reads as follows:

"A person who is impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage. For the purposes of this section:

- 'Mental illness' means a psychiatric or other disease that substantially impairs a person's mental health;
- 'Mental retardation' means a condition of significantly sub-average intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period."

Jane Jetson was first identified as mentally retarded when she was in elementary school. Currently she is a high-functioning, 30-year-old adult who lives in a group home for developmentally disabled adults. For two years, she has dated 29-year-old Harry Hatfield, whom she has known almost all her life (their families lived across the street from each other when they were growing up) and who is not developmentally disabled. Jetson and Hatfield were denied a marriage license in Portland, Maine; Jetson subsequently filed this lawsuit against Maine.

Andrea Archuleta & Enrique Espinosa v. Arizona: Arizona law does not limit the right of mentally retarded persons to marry. However, Arizona's rules regarding social security disability state that, when a person receiving disability elects to marry, the state must automatically reduce their monthly disability benefits by two-thirds. (The federal Social Security Administration allows Arizona to do this under a special "local experimental innovation" program. In your answer, proceed as if Arizona actors alone are responsible for the policy.)

Andrea Archuleta is a high-functioning, developmentally disabled, 35-year-old woman who lives alone in the condo she has owned for five years. For three years, she has been dating Enrique Espinosa, who also is developmentally disabled, whom she met at a community center that serves the needs of mentally retarded adults. Archuleta and Espinosa each receive \$600/month in social security disability benefits. They would like to marry, but, were they to do so, each

would see their benefits cut to \$200/month, and their combined resources would be considerably less than their separate benefits. They have filed a lawsuit challenging the law.

* * *

II. Short Answer Questions (50% of exam grade)

*Instructions for Part II: For each of the following assertions, do the following: (1) state whether the assertion is **true or false** (worth half credit for each question), and (2) provide a one sentence explanation for your answer (worth half credit for each question). There is no in-between: if the assertion is not true in every instance, then it is false; a statement that is true but that "doesn't tell the whole story" is nevertheless true. Your explanation may include reference to a case or constitutional provision; it may include an example or counter-example; or it may consist of a simple statement of why you believe the assertion is true or false. Each question will be worth six points, 0 or 3 points for the true/false portion, and 0-3 points for the explanation.*

1. A frequent criticism of *Dred Scott v. Sandford* is that it revealed an extreme judicial activism, with the Court reaching out to decide several issues it did not have to reach.
2. The Thirteenth Amendment, ratified by Congress in 1865, applies equally to private and government actors.
3. In *Plessy v. Ferguson*, the Court interpreted the Equal Protection Clause to emphasize the Fourteenth Amendment's legislative history and intent.
4. The idea that racially segregated institutions were constitutionally permissible so long as they were equal (the holding in *Plessy v. Ferguson*) was good law until 1954.
5. In a prominent critique of *Brown v. Board of Education*, Herbert Wechsler argued that the more appropriate constitutional outcome in the case would have been to rule in favor of the Black children seeking admission into all-white schools on the basis of the First Amendment's guarantee of freedom of association.
6. In a footnote in *Minnesota v. Clover Leaf Creamery*, the Court says: "In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" This notion applies equally well whether the Court is using rational basis review or strict scrutiny to evaluate a government classification.
7. The central holding of *Adarand v. Peña* is that all government racial classifications, whether they are intended to harm or help racial minorities, are subject to strict scrutiny.
8. A reasonable explanation for the Court's use of intermediate (rather than strict) scrutiny when reviewing government classifications based on sex or gender is that, unlike race

and national origin, sex and/or gender are sometimes highly relevant to genuine differences among classes of people.

9. The notion of procedural due process only governs rights expressly enumerated in the Constitution.
10. The three-part test enunciated in *Mathews v. Eldridge* is objective and easy to apply.
11. In the following excerpt, Robert Bork provides an analysis grounded in the "marketplace of ideas" rationale for free speech: "Advocacy of law violation is a call to set aside the results that political speech has produced.... There should, therefore, be no constitutional protection for any speech advocating the violation of the law."
12. The context of widespread opposition to World War II and concomitant congressional action to limit that opposition was the source of an important line of First Amendment decisions by the Supreme Court.
13. The Supreme Court never has taken the position that freedom of speech is absolute, and its application of the "clear and present danger test" has served as a tool for identifying constitutionally valid limits on dangerous speech.
14. In *Brandenburg v. Ohio*, a case in which the defendant was a KKK leader, the Supreme Court overruled *Dennis v. U.S.*, a case in which the defendants were leaders of the Communist Party.
15. Under the so-called fighting words doctrine, state actors can attempt to prevent or later punish words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."
16. Concerns about "prior restraint" that were expressed in the various concurrences in *New York Times v. U.S.* (the Pentagon Papers case), have strong support in originalist approach to interpreting the Constitution and, specifically, the First Amendment.
17. The "actual malice" requirement first enunciated in *New York Times v. Sullivan* applies to public officials and public figures.
18. Under the so-called "secondary effects" analysis, the Supreme Court treats a content-neutral law as if it were content-based for the purposes of assessing its validity under the First Amendment.
19. Like most constitutional provisions, the Fourteenth Amendment does not apply to conduct by private actors.
20. Under the facts of *Shelley v. Kraemer* (1948), an argument could be made that "state action" existed in the form of the application of state common law governing real estate covenants to racially restrictive covenants.

THE END. HAVE A TERRIFIC BREAK!