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526-002 Constitutional Rights

Fall 2012

**UNM School of Law
Take-Home Final Examination****Professor: D. Sidhu
W-Th: December 5-13, 2012
24 hours****Examination Format: Essay****Professor's Instructions**

This examination culminates our formal exploration of the issues and cases within the Constitutional Rights course. Students have twenty-four continuous hours within which to complete this "take-home" final examination. Students must comply with the instructions provided by the Registrar's Office as to signing-out and returning the examination below.

This examination must be completed and submitted to the Registrar's Office within 24 hours of check-out. This examination must be returned **no later than by Thursday, December 13 by 3:00 p.m.** You may pick-up the examination from the Registrar's Office (Rm: 2518), at your convenience, any time beginning Wednesday, December 5th through Thursday, December 13, 2011. **WARNING:** Students picking-up the exam on December 13th may not have the full twenty-four hours available to them. The Registrar's Office operating hours are Monday-Friday: 8:00 AM – 5:00 PM and Saturday, December 8, 2012, 9:00 AM – 12:00 PM.

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 charts, as made available on TWEN;
- Notes that the student has personally prepared; and
- The class outline developed by the course tutor, Victor Hernandez.

The use of any other materials for purposes of the examination is strictly prohibited.

The examination consists of three essay questions. As to formatting, students' essays must comply with the Registrar's "technical instructions" on page two below. Please include case names where necessary, and do so in the body of the document, not as footnotes. The 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?

In completing this examination, students are reminded of their obligations to adhere fully to the UNM School of Law Student Code of Conduct (Honor Code).

Good Luck, and best wishes for an enjoyable and productive winter break.

NOTE: The exam answers must be submitted as a printed copy to the Registrar's Office or as an electronic file submitted to the TWEN site entitled "**Exam-Constitutional Rights**" by the deadline. Electronic submissions need to be readable by MS Word or a pdf.

Essay Technical Instructions

Laptop/Computer for typing: answers are to be typed and are to be printed single-sided in Times New Roman, 12 pt. font, double-spaced, with 1" margins at tops, bottoms and sides of pages. Create a "footer" and record the page numbers using the "X of Y" format. Print out your exam answer and return it along with this exam to the front desk, room 2518, of the UNMSOL no later than 24 hours of check-out.

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 (x of y). **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

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's Office (William or Ernest) at 277-2146/2147 or jackson@law.unm.edu or tafoya@law.unm.edu

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

[Exam begins on the next page]

Question 1

(10 points)

Write a concurrence or dissent to any case from the casebook that we discussed in class. Please note: a student may not write a concurrence or dissent on a pending Supreme Court case, or on a topic that was the subject of his or her group essays. The concurrence or dissent must be no more than *two, double-spaced pages*.

Question 2

(35 points)

The Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, defines, for purposes of federal law, the word “marriage” as “a legal union between one man and one woman as husband and wife,” and the word “spouse” as “a person of the opposite sex who is a husband or a wife.” The operative effect of DOMA is not to prevent same-sex marriage where it is permitted under State law, but to deny certain federal benefits (*e.g.*, tax and social security benefits) to same-sex couples who have been married in States authorizing such marriages.

The U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the Second Circuit have ruled on whether DOMA comports with the Equal Protection Clause of the Fourteenth Amendment. In reviewing the constitutionality of DOMA, these circuit courts have identified several general justifications for the statute, for example, that DOMA will save money for the federal government by limiting tax breaks and avoiding social security and other payments to spouses; that DOMA seeks to preserve traditional marriage and conversely reflects moral disapproval of homosexuality; and that DOMA recognizes biological couples’ unique ability to procreate.

The First Circuit and Second Circuit did not agree on the standard of review that should apply to DOMA. In fact, the circuit judges advanced three separate views on this question: first, that “DOMA is subject to intermediate scrutiny;” second, that while “extending intermediate scrutiny to sexual preference classifications is not a step open to us,” a form of rational basis review that “call[s] for closer scrutiny of government action touching upon minority group interests” is appropriate; and third, that DOMA deserves traditional rational basis review.

Assume that the Supreme Court has granted certiorari and has decided to resolve the inconsistency among these opinions. You are a newly-appointed Supreme Court justice. Write an opinion that 1) determines what standard of review should be applied to Equal Protection challenges to DOMA, 2) applies your standard to DOMA, and 3) briefly explains why an Equal Protection claim is a better route, compared to Substantive Due Process, for plaintiffs to assert that DOMA is unconstitutional. The opinion must be no more than *four, double-spaced pages*.

Question 3

(20 points)

This fall, the powerful winds and heavy rains of Hurricane Sandy resulted in over one-hundred deaths, caused significant property damage, and left millions without power. Those in New Jersey and New York were among the hardest hit. While Hurricane Sandy swept through New York, a Twitter¹ user writing as @comfortablysmug posted the following “tweets,” which were widely-read and even reported by major news outlets, such as CNN:

“BREAKING: Confirmed flooding on the New York Stock Exchange. The trading floor is flooded under more than three feet of water”; and

“BREAKING: New York Governor Andrew Cuomo is trapped in Manhattan. He has been taken to a secure shelter.”

As it turns out, neither of these posts was true. Indeed, several other Twitter users subsequently discredited these posts and a web site identified the person behind the @comfortablysmug Twitter account as Shashank Tripathi.

A New York statute, N.Y. Pen. L. § 240.50, which attempts to ensure that first-responders are not diverted to bogus calls, makes it unlawful for someone to knowingly “circulate[] a false report or warning of an alleged occurrence or impending occurrence of a crime, catastrophe or emergency under circumstances in which it is not unlikely that public alarm or inconvenience will result.” Tripathi was arrested for violating this statute. Tripathi claims, however, that his “tweets” are protected speech and consequently that his arrest must be invalidated under the First Amendment. In support of his argument, Tripathi points out that no first-responders were dispatched because of these “tweets.”

Sensing that social media may complicate relief efforts, the New York legislature added this provision to N.Y. Pen. L. § 240.50: “It shall be unlawful for anyone in the State of New York to use social media, such as Twitter and Facebook, to publish messages that are false or that may be disruptive to government response efforts to a natural disaster or crisis during a declared state of emergency.” Subsequent to the enactment of this new provision, Ryan Callahan of New York City logged on to Facebook and visited Tripathi’s Facebook page. Tripathi copied all of his “tweets” on his Facebook page. While on Tripathi’s Facebook page, Callahan clicked the “like” button associated with the two posts enumerated above (*i.e.*, that the New York Stock Exchange was flooded and that the Governor was trapped).² During Tripathi’s prosecution, the district attorney investigated Tripathi’s Facebook page and noticed that Callahan “liked” the discredited posts. Callahan was arrested for violating the amended New York statute. Callahan objects to his arrest on the grounds that a “like” is protected speech and that the arrest accordingly must fall under the First Amendment.

You are the federal district court judge assigned to these cases. Write an opinion that resolves 1) whether Tripathi’s “tweets” are speech and, if so, whether they are categorically excluded from First

¹ Twitter is a social media platform which describes itself as “a real-time information network” in which users may post “small bursts of information called Tweets” that may be no longer than 140 characters.

² According to Facebook, it is a social media platform that serves as a way for users to “share and make the world more open and connected.” A Facebook user who “likes” a Facebook post is listed as someone who “likes” that post. A “thumbs-up” icon appears either on or next to a “like” button.

Amendment protection, and 2) whether Callahan's "likes" are speech within the meaning of the First Amendment. The opinion must be no more than *four, double-spaced pages*.

[End of Exam]