



Exam Number _____

FINAL EXAMINATION
IN
CONSTITUTIONAL LAW

April 26, 2004
2:00-5:30 P.M.

Professor Shanor

This is a **three and one-half hour exam**. It contains **five fact patterns** with one question related to each fact pattern. The amount of time and number of lines for answers allocated are provided at the beginning of each question.

The exam is **open book** and may be taken only in **rooms assigned** for taking this exam. The exam is governed by the **Honor Code**. If you believe additional information is needed to analyze any question, state what you think is needed and why it makes a difference.

Read, think, and organize before you write!

Handwritten answers must be written in the **space provided**.

Computer written answers must be typed using not more than **the number of lines allocated next to the question** using **12-point or larger type** and **side margins of at least 1"**.

WRITE YOUR EXAM NUMBER ON EACH PAGE OF THE ANSWER SHEETS AND ON THE COVER OF THIS EXAM. YOU MUST RETURN BOTH THE EXAM AND THE ANSWER SHEETS TO RECEIVE CREDIT FOR THE COURSE.

GOOD LUCK AND HAVE A WONDERFUL SUMMER!

I.
(30 minutes/60 lines)

Assume that there is a terrorist attack in Chicago, Illinois in which 200 people are killed. The next day, President Rice sends a message to Congress. She cites evidence that the terrorist attack in Chicago was sponsored by Libya and that Libya is harboring some of those involved in planning the Chicago attack. President Rice requests that Congress authorize military action against Libya, and she requests a special appropriation of \$50 billion to fund the military action.

Public opinion polls show that people in the United States overwhelmingly support air strikes against Libya. The polls show a much lower level of support for the sending of ground troops. The polls indicate that people are concerned that a ground invasion may lead to high casualties for United States forces.

Ten days after the attack, Congress enacts the Defense of America Act ("DOA"). The DOA authorizes the President to use "all necessary force" against Libya. The DOA also appropriates \$50 billion to fund the military action. However, the DOA specifies that up to \$45 billion of the appropriated money may be used to support air strikes against Libya and that up to \$5 billion of the appropriated money may be used to support a ground invasion. The DOA further provides that, with the approval of the Majority Leader of the United States Senate and the Speaker of the United States House of Representatives, the President may redirect funds between air and ground operations.

President Rice believes that a ground invasion is necessary to root out terrorists from Libya; she believes that \$5 billion is not adequate to fund the ground operations; and she does not wish to ask permission to redirect the funds. She requests advice about her options.

May President Rice, without violating the United States Constitution, redirect these funds unilaterally?

II.
(30 minutes/60 lines)

Assume that the European Union adopts a comprehensive “human rights” policy. Under that policy, European countries will give favorable trading privileges only to nations that guarantee “human rights” to their own citizens. According to the European Union, “human rights” include a right not to suffer governmental discrimination on the basis of sexual orientation, including a right to officially recognized same-sex unions, with benefits similar to those of marriage.

In an attempt to ensure favorable trade status, Congress passes and the President signs the following legislation:

HUMAN RIGHTS CONFORMITY ACT

1. Findings:

- (a) Discrimination based on sexual orientation imposes a burden on the economy of the nation.
- (b) Official recognition of committed partnerships offers substantial economic benefits to a couple and to society. Because of personal obligations of support, partners in a committed relationship are less likely to become economically dependent on public assistance.
- (c) Providing employment-related benefits to committed partners of employees enhances the economic security of the employee and the partner.
- (d) No person should be deprived of the economic benefits of forming an officially recognized partnership with another person.

2. Therefore:

- (a) No state shall discriminate in its employment practices based on sexual orientation.
- (b) No state shall refuse to recognize civil unions of two persons of the same sex if the persons otherwise meet the requirements set forth by the law of the state for marriage.
- (c) In conferring economic benefits, including tax exemptions and property rights, no state may discriminate between a couple in a civil union and a couple married under the laws of the state.

Is the Human Rights Conformity Act (“HRCA”) a valid exercise of congressional authority to regulate commerce?

III.
(30minutes/60 lines)

Gloria Gregg, the Governor of Georgia, received a call one day from Adam Smart, the president of the Georgia Association of Supermarkets. Smart told Gregg that an important source of revenue for supermarkets in Georgia is the sale of cigarettes. However, Smart informed Gregg that the revenue was declining because of competition from internet and other direct mail sellers, who sell cigarettes directly to consumers. Finally, Smart told Gregg that Georgia could crack down on direct mail sales of cigarettes without any political problems because the direct mail sellers were located out of state.

Accordingly, Gregg introduced the following legislation, which was duly enacted by the Georgia state legislature.

SAVE OUR CHILDREN ACT

1. Findings:

- (a) Cancer caused by cigarette use leads to millions of premature deaths each year and hundreds of millions of dollars in health care costs.
- (b) The Georgia cigarette tax reduces the overall use of cigarettes in the state and provides funding for cancer prevention programs.
- (c) Smoking by those under age 18 presents an especially serious health threat and can lead to a lifetime of tobacco addiction.
- (d) The direct mail sale of cigarettes to consumers makes it very difficult to enforce the state law prohibiting the sale of cigarettes to individuals under the age of 18.
- (e) The direct mail sale of cigarettes to consumers makes it very difficult to enforce the state's tax on cigarettes.

2. Therefore:

- (a) Only licensed retail establishments may sell cigarettes to individual consumers in Georgia.
- (b) It shall be illegal for an individual consumer to purchase cigarettes in Georgia, unless the seller is a licensed retail establishment.
- (c) In all cigarette sales to individual consumers in Georgia, the purchaser must appear in person at the licensed retail establishment.
- (d) Violation of this statute shall constitute a felony punishable by imprisonment not to exceed 5 years and a fine not to exceed \$100,000.

Does the Save Our Children Act ("SOCA") violate the Dormant Commerce Clause?

IV.
(45 minutes/90 lines)

The fiftieth anniversary of *Brown v. Board of Education* generated many public and private discussions about the education of racial minorities in the United States, as well as a large number of academic studies concerning that topic. As a result, Congress held hearings on the topic and passed the following legislation, which was signed by the President.

The Promise of Brown Education Act of 2005

1. Findings.
 - a. *Brown v. Board of Education* in 1954 properly removed state-imposed barriers to the education of African-American students wishing to attend public elementary and secondary schools with White students.
 - b. Congress provided federal financial support in the Civil Rights Act of 1964 for racially integrated public schools and denied such support for single-race or segregated public schools.
 - c. Despite the foregoing decision and statute, African-American students continue to receive educational opportunities inferior to the educational opportunities of White students.
 - d. Educational experts are overwhelmingly of the opinion that there are two causes for this educational disparity: (1) unequal funding for nominally integrated but predominantly African-American public schools compared to nominally integrated but predominantly White public schools and (2) subtle and overt inequality of classroom treatment whereby White students receive preferential treatment in mixed race classrooms.
 - e. The courts have failed to address adequately the inequality of funding, and virtually no lawsuits have been filed challenging the inequality of classroom treatment.
2. Remediation. To remedy the continuing problems of educational inequity in the United States, Congress hereby provides as follows:
 - a. The states are hereby required to create, in any urban area exceeding a population of more than 500,000 persons, magnet elementary schools for African-American students who choose to enroll in such schools.
 - b. Funds are hereby appropriated to equalize funding of any public elementary school attended predominantly by African-American students, including the magnet schools mandated by section 2a of this Act, so that the per-pupil funds available to such school are equal to the per-pupil funds available to the best-funded predominately White public elementary school in the state.

Does the Promise of Brown Education Act of 2005 (“PBEA”) violate the constitutional guarantee of equal protection?

V.
(45 minutes/90 lines)

Ellen DeGenerous and her beloved, Alexandra LeBeckon, were thrilled when they were issued a marriage license in March 2004 by the newly-installed mayor of San Francisco. The certificate, said DeGenerous, a wealthy socialite, gave permanence and recognition to the love they had shared for many years. She told a gaggle of giddy reporters “Now that we are married, Alexandra and I plan to adopt a baby as soon as possible.”

DeGenerous and LeBeckon soon found what they considered to be the perfect child, a baby girl put up for adoption by a teenage mother who turned the child over to the custody of the California Department of Family Services (“CDFFS”). Because of DeGenerous’ extensive contacts, the couple was permitted to assume temporary foster care of the baby for a period of up to six months.

Unfortunately for DeGenerous and LeBeckon, California law provides that “homosexual couples may not permanently adopt children in CDFS custody unless CDFS certifies that there is no heterosexual couple available to adopt the child.” Additionally, the statute requires CDFS certification that prospective homosexual couples seeking to adopt children be certified as fit parents. This certification must specifically address whether the prospective adoptive parents “would be discrete in not displaying their sexual orientation to impressionable young children, including the adoptee.”

This statute was enacted during the 1950’s. In this era, the American Psychiatric Association classified homosexuality as a mental disease and most homosexuals were “in the closet” with respect to their sexual preferences because of general societal disapproval. In more recent years, California Attorney General Ashcrafty has opined that the statute is justified because heterosexual parents, where available, are “in the best interests of the child” and the state “has a strong interest in not promoting homosexuality.” His “best interests” and “no promo homo” arguments, needless to say, have been subject to criticism by gay rights groups and numerous commentators. Academic studies concerning the relative fitness of homosexuals and heterosexuals as adoptive parents are inconclusive, though all studies agree that quality of parenting varies greatly within both groups.

Because there is a heterosexual couple that has expressed an interest in adopting the baby girl, Degenerous and LeBeckon have been notified by CDFS that they will have to return the child. Heartbroken, they have come to you for legal advice on the following question:

Do California’s adoption standards violate their federal substantive due process rights?