

EXAM NUMBER \_\_\_\_\_

FINAL EXAMINATION  
IN  
CONSTITUTIONAL LAW I

May 2, 2007  
2:00-5:30 P.M.

Professor Shanor

This is a **three and one-half hour exam**. It contains **two fact patterns** with **three** questions related to each fact pattern. You should allocate approximately 90 minutes for each question, leaving you with a total of 30 minutes to plan your answers at the beginning and edit your answers at the end.

The exam is **open book** and may be taken only in **rooms assigned** for taking this exam. No electronic devices are allowed, including cell phones, PDA's, Blackberries, iPods, etc.

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 or type your answers!

**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.**  
**(90 minutes)**

The shooting at Virginia Tech of 32 students in April 2007 by a mentally disturbed student led to extensive discussions nation-wide about what could be done to prevent such tragedies from happening in the future. Some colleges implemented additional security measures such as installation of sirens and text-message warning systems and some states modified components of their systems for reporting persons with serious mental illnesses to data-bases used in checking on purchases of firearms. Systematic reforms, however, proved elusive until a bipartisan coalition of Senators running for President agreed on a federal statutory reform. Sponsored by Senators Thompson, Obama, McCain, and Clinton, the following legislation passed both houses of Congress and was signed by a lame duck President Bush in late 2007.

**THE CAMPUS SECURITY ACT OF 2007 (“CSA 2007”)**

**§ 1. Findings:**

- a. The Virginia Tech shootings indicate a grave lack of attention to campus security measures by college administrators and state and local authorities.
- b. Large state universities are more vulnerable to such incidents than private colleges and universities.
- c. The sale of weapons and ammunition to a mentally deranged Korean immigrant responsible for the Virginia Tech massacre demonstrates systemic problems with enforcement of the Brady Handgun Violence Prevention Act of 1993.
- d. Fear of future campus violence has caused some parents to withdraw their sons and daughters from state universities, particularly universities located in states remote from the parents' homes.
- e. The post-Virginia Tech educational fear factor burdens interstate commerce and has increased incidents of discrimination against Korean immigrants and persons with mental illnesses, including discrimination in admissions and hiring by state universities.

**§2. Therefore:**

- a. Every state university president shall provide to the Secretary of Homeland Security proof that the university has an operable campus-wide siren warning system, an operable text-messaging system for broadcasting warnings of threats of violence to students, staff, and faculty, and an adequate system for random checks of firearms on campus on or before December 31, 2008.
- b. In addition to other punishments that exist under state or federal law, any student or employee found with a firearm on a state university campus shall be expelled or discharged from the university.

- c. All federal student loan guarantees and research funding shall terminate at any state university which fails to comply with the provisions of § 2a and 2b.
- d. All state and local mental health authorities shall post to an online database, updated weekly and in readily searchable form, the names of each individual who, in their professional judgment, would be a risk to self or others if sold a firearm.
- e. Each state shall administer a mental fitness check to resident aliens within its jurisdiction to identify those who would be a threat to themselves or others. The mental fitness check shall be first applied to immigrants from Korea so the people of the United States will no longer be fearful of or discriminate against such individuals.
- f. No university may discriminate in its admissions decisions against any applicant with a history of mental illness, where such mental illness is not of a type associated with a risk of violence.
- g. Aliens who fail such mental fitness checks shall be removed to the now-vacant Guantanamo Bay terrorist detention facility until arrangements can be made for return to their countries of origin. No court shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by any person removed or detained under this paragraph.

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- 1. Does Congress have the power under Article I of the Constitution to enact the provisions of the CSA 2007?**
- 2. Does Congress have the power under § 5 of the 14<sup>th</sup> Amendment to enact the provisions of the CSA 2007?**
- 3. Is an alien removed to Guantanamo Bay under § 2g eligible for habeas corpus?**

In your answers, discuss possible arguments and counter-arguments in light of existing Supreme Court precedent but do not consider arguments concerning the Second Amendment.

**II.**  
**(90 minutes)**

Gambrell is a fictional state in the U.S. In April 2006, the state legislature of Gambrell overwhelmingly passed the following statute:

**THE SEXUAL MODESTY AND UNWANTED TITILLATION ACT OF 2006**  
**(“SMUT Act”)**

**§ 1. Findings and Purpose:**

(a) Lack of sexual morality and increased rates of sexual activity outside of marriage are immoral, psychologically harmful, and lead to increased rates of unwanted pregnancy, abortion, and the spread of venereal disease.

(b) Any item that fosters sexual gratification will have a tendency to encourage teenagers and others to engage in illicit sexual behavior (sex outside of marriage).

**§2. Therefore:**

(a) It shall be unlawful for any person to purchase, sell, import, or possess any device designed or marketed as useful primarily for the stimulation of human genital organs.

(b) Individuals convicted of violating this law shall be subject to the following punishments: Males convicted of violations shall be imprisoned for up to 30 days; females shall be fined up to \$500.

\* \* \*

In legislative discussions preceding the passage of the SMUT Act, State Representative Crabbe – who co-sponsored the legislation – stated: “We need to protect our young women and girls from these guys who get all whipped up with sex toys and then go out prowling for sex. Most girls are good girls; it’s the boys who need to be reined in and punished.” In addition, State Representative Gontoria stated, “our neighboring states are selling sex toys and causing moral turpitude in Gambrell. We must stop these fornication-pushers from infiltrating the borders of our good State.” Factories in two of Gambrell’s neighboring states manufacture 99% of the “sex toys” in the United States.

Richard Peters, arrested and charged under the SMUT Act, has challenged the constitutionality of the Act. In litigation, Gambrell asserted that the differential punishment of males and females is justified because only women can become pregnant, which serves as a natural disincentive for sex outside marriage, and therefore that the heightened punishment for males is designed to equalize the consequences of sexual activity.

Analyze the constitutionality of the SMUT Act under **(1) the Equal Protection Clause, (2) the Due Process Clause, and (3) the Dormant Commerce Clause**. In your answer, discuss possible arguments and counter-arguments, and evaluate these in light of existing Supreme Court precedent.

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I. 18  
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II. 14  
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A

1(1)

Congress's most important power is the power to regulate interstate commerce through Article 1 §8 cl.3. The question is whether regulation of security measures that must be taken by public universities is within the scope of this power.

The power to regulate interstate commerce generally allows Congress to regulate four categories of interstate activities: channels including highways and waterways, instrumentalities including airlines and railroads, articles moving in interstate commerce, and activities that substantially effect interstate commerce. Since safety in schools does not fall into one of the three traditional categories of regulatable interstate commerce activities, we must determine if safety in schools substantially affects interstate commerce, thus making the CSA constitutional.

First, we must consider whether campus security warnings are a commercial activity. Commercial activities are defined as those that are economic in nature or are essential to the larger regulation of an economic activity. Economic activities are defined as those regarding the production, distribution, and consumption of commodities. These campus security measures including mental fitness checks, warning systems, and databases of at risk people doesn't fall into this very traditional definition of economics, therefore the Gonzalez test probably doesn't apply and this provision will probably have to withstand a higher level of review, than mere rationality.

Since this activity is not commercial, the Lopez standard should apply. The Lopez standard is less deferential to Congressional findings and represents a shifting

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standard. Since the activity being regulated is tenuously connected to interstate commerce its effects to interstate commerce need to be more substantial.

The first step in applying the Lopez formula is to look at the legislative findings by Congress on the impact of the activity on interstate commerce. Here, Congress has said that large state universities are more vulnerable to such incidents than private colleges and universities and that parents have withdrawn their children from state universities particularly out-of-state universities. This legislative finding does not seem significant enough to withstand the Lopez analysis. For example in Morrison Congress had express and detailed findings on the cost of violence against women including hospitalization, rehabilitation, and lost productivity. The Court in Morrison found these findings to be unpersuasive, and since here the Congress merely stipulated facts rather than backed up the finding with details it would be unlikely that these legislative findings would be sufficient.

The second step is to see if there is a legislative hook in the legislation, which would limit its application to those activities effecting interstate commerce. The CSA speaks in broad generalizations: "any student or employee found with a fire arm." So it does not appear that this has a limitation that would limit the reach of the statute to the scope of the interstate commerce power. It doesn't limit any provisions to out-of-state students attending state universities, so that requirement isn't met. It is possible that the limitation of mental health checks to aliens, might be some sort of jurisdictional hook, which would bring the law back within Congress's scope, since it has the power to enact

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naturalization legislation. Overall, it does not appear that CSA is limited enough to have a jurisdictional hook.

The third step is to determine the link between the local activity and the activity being regulated. This case is factually similar to Lopez, in which the court overturned a congressional enactment which made it a federal crime to possess a firearm in or around a school, because there was not a substantial relationship between the activity and commerce. Finding a relationship between increased crime rates and interstate travel was far too attenuated a relationship to warrant Congressional legislation under the commerce clause, as it would require inference piled on inference to find a relationship. The court made a similar finding in Morrison in striking down federal legislation allowing any woman who was the victim of gender-based violence to file suit in federal court, because the impacts of increased crime on travel and worker productivity was not a substantial relationship. Here, Congress is again arguing the impact of increased crime on interstate movement. Based on the precedents of Morrison and Lopez, it is unlikely that the court would find the necessary relationship between school violence and interstate movement to warrant the enactment.

The final step is to look at the nature of the activity regulated and whose responsibility it usually is to regulate it. Here, the issues are education and crime. Both of these items are traditionally left to the states, as was reiterated in Morrison and Lopez. However, school violence is an increasing problem in this country. In Raich the court allowed the federal government to regulate marijuana uses because drug regulation is part of a broad congressional scheme. A national solution is needed to the gun problem,

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so the court upheld the cultivation of marijuana laws even though crime is usually left to the states because the problem was significant enough to warrant a national solution under Congress's necessary and proper clause. Here, violence in schools may be becoming an issue like drugs that needs a broad, national regulatory scheme.

In conclusion, it does not appear that Congress has the power to enact CSA under the commerce clause because the regulation does not regulate a commercial activity and does not meet the strict standard of Lopez for Congress to be able to regulate non-commercial activity under the commerce clause.

Congress could also try and justify the enactment as under its Article I §8, cl. 1 ability to tax and spend. Here, Congress has said that it will withhold student loan guarantees and research funding for any state which doesn't comply with the provision. The question is whether this condition is constitutional or whether it becomes a regulation which must be valid under the commerce clause analysis. Since we concluded that this act, probably didn't comply with the commerce clause requirements it is important to determine the viability of this act under the T&S power.

Congress is allowed to make expenditures for the general welfare. In general, the court will defer to Congress on what is in the general welfare. As exemplified by South Dakota v. Dole in which Congress said safe highways, reducing drunk driving, and increasing interstate travel were all interests which made the expenditure pursuant to the general welfare. Here, the Court would also find that the expenditures for student loans and research were for the general welfare, because they related to education which is definitely within that scope.



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Congress is allowed to condition funds but there are requirements that the Congress must comply with:

Congress is allowed to condition funds as long as the state knows the condition before it accepts the funds. It is questionable whether CSA meets this standard because it is taking money away from the universities and when they initially accepted these funds and made capital commitments. Congress could argue from a perspective position that going forward states know that student loan money and research grants are conditioned on meeting these requirements. The former position is a better one because it allows Congress to change course, and going forward states know funds are conditioned and have to plan accordingly.

The condition placed on the funds needs to be rationally related to the expenditure. The expenditures are for student loan moneys and research are probably rationally related to school safety. Because this standard is very low, and both have to do with the quality of education this standard is probably met, though there are much narrower ways for Congress to have achieved this goal they are not required to enact the best measure.

Finally, the condition can't be a compulsion. In *Butler*, the court struck down a provision which placed farmers at a significant disadvantage when they didn't comply with a regulatory framework because they fined overproducers and then gave the money from the fines to the underproducers. One could envision a similar situation here where Congress takes federal money from state universities that don't comply and gives it to those who do thus making it impossible for the non-compliers to compete. One could

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argue that this is more similar to South Dakota v Dole where the court held that a 5% reduction in highway funds for non-complying states. CSA doesn't take away all federal funding, only federal funding for research and student loans. This financial inducement is probably a compulsion because of the student loan component. Schools that can't give federal money for student aid, probably don't exist. That amount of money and its importance, probably push this toward being compulsion.

Since this is compulsion and Congress is regulating, it can't be enacted under the tax and spending power and must be enacted under the commerce clause or another power. We have already established that the act doesn't meet that standard. However, if the court did decide that the need for a national solution allowed Congress to act under the N&P clause, then we must determine whether the regulation infringes upon the powers reserved for the states in the 10<sup>th</sup> amendment.

Congress is allowed to regulate the states, but it can't trump federalism in the process. CSA appears to infringe upon the 10<sup>th</sup> amendment rights of the states. States can enact general legislation which affects the states. For example in Garcia the court could require states to meet minimum wage requirements that were already applicable to private parties. CSA is differentiable from Garcia, because this was not a generally applicable law. It only applies to state universities. So it is not similar to Garcia.

CSA actually requires state employees to do certain acts, which is ~~not~~ <sup>not</sup> unconstitutional under Printz. CSA requires states to administer mental health inspections. Even though this maybe easy for the states to do, Congress can't require state employees to do anything.

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It appears that CSA is Congress's attempt to commandeer the states into adopting the school safety regulations that it enacted. Thus it is similar to New York and Printz, and differentiable from Garcia. Therefore the CSA, even if enacted pursuant to an article 1 power, infringes upon the states rights and would not pass constitutional muster.

*very good 18*

1(2)

Under §5 of the 14<sup>th</sup> amendment congress has the ability to enact legislation to enforce §1 guarantees. Initially under Morgan, the court allowed congress to enact remedial legislation to under section 5 even if the state laws hadn't yet been held unconstitutional. Under this line of thinking, the court upheld a Congressional provision which forbid states from imposing literacy tests as a requirement for exercising the right to vote. This was a very broad view of the section 5 power which allowed Congress to increase the substantive guarantees of section 1.

Since Morgan the prevailing Court view is articulated in Boerne. In Boerne, the court held that congress can enact remedial or preventative legislation if there is congruence and proportionality between the injury to be prevented and the means adopted to meet that end. However, in accordance with Marbury vs. Madison, the court and not Congress must decide the scope of the substantive guarantees of the 14<sup>th</sup> amendment. Applying these principles in Boerne, the court held that RFRA requiring a compelling state interest and narrow tailoring for a state to enact legislation that infringed upon the exercise of one's freedom of religion. It was unconstitutional because it was disproportional and incongruent because there had been no cases of religious

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discrimination in the forty years before the RFRA was enacted. Since *Boerne*, the proportionate and congruent standard has been applied in *Garrett* and *Hibbs*. In *Garrett* the court held that Congress couldn't seek additional protections for employees with disabilities because there were no findings to support irrational discrimination against the disabled. In *Hibbs*, the court held that congress could enact remedial legislation under the family leave act because it was based on gender classifications and that remedy was proportional and congruent because there was a known history of discrimination and stereotyping based on gender. *Hibbs* and *Garrett* make it clear that the congruent and proportional standard, really just means that Congress has more authority to enact remedial legislation to secure the rights of groups that have been discriminated against in the past, and who trigger strict scrutiny from the court on EP issues.

CSA requires states to perform mental illness examinations on Korean immigrants. This classification is based on ethnicity or race, which is a classification which has triggered strict scrutiny from the courts in the areas of substantive due process and equal protection. The question is how broadly the court will define the classification. If it classifies based on race, there is a history of racial discrimination in this country, therefore under *Hibbs* Congress can enact remedial legislation if the government is trying to protect a class that was historically protected by the 14<sup>th</sup> amendment. It would be within the section 5 power because the past history of discrimination would make the required health inspections proportionate and congruent to remedy discrimination. If the class is defined as Koreans, there is not as long a history of discrimination against Koreans as other groups so it may not allow the government to act pursuant to section 5.

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This case would then be read closer to Garrett, where a non-historically protected group was implicated and therefore because there is no history, the act is not proportional and congruent because there were no findings of past systematic discrimination. The rather scant findings in the legislative report would not be sufficient here. Congress would have to do more than just stipulate that there was discrimination.

12

1(3)

Congress has the ability to shape the jurisdiction of the Supreme Court under Article III §2, which states that the jurisdiction of the court is limited by such provisions that Congress shall make. This textual grant is backed up by the case law as well. In *Ex parte McCordle* the court held that Congress had the power to limit the appellate jurisdiction of the court. In this case, the court repealed an act which gave the court the ability to hear a writ of habeas corpus filed by a prisoner. Congress was able to take this grant away, in part because there was another mechanism through which McCordle could have filed a writ. There were two possible writs and Congress eliminated his access to one. CSA is differentiable from McCordle because this takes away the prisoner's right to have his case heard in any court. A provision which would completely deprive an alien of access to the courts such as CSA, invokes separation of powers issues.

There are two ways to approach separation of powers issues. One could look at the text of the constitution alone or one could look adopt a structural argument. Here the text of the Constitution under Article III doesn't not specify an outer limit to the ability of Congress to limit the jurisdiction of the courts. A strict textual approach would not

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prohibit Congress from removing writs of habeas corpus from the jurisdiction of the courts. Under the plenary view, Congress can enact whatever limitations it wants on the court's jurisdiction. From a textual perspective one could also argue that the court has to have some mandatory jurisdiction. Under Article III the court has judicial power over all cases and controversy's. This language could require that some Federal court in the United States have jurisdiction over a claim. St. Cyr seemed to want to leave open the option that a case could leave open the possibility of habeas review.

Since the text is inconclusive, lets look at the question from a structural perspective. While Congress is not directly aggrandizing its own powers, it is encroaching on the powers of the court by limiting its jurisdiction. Marbury v. Madison made it clear that judicial review is a vital part of our constitutional system which serves as a check on the powers of the other two branches. If Congress could remove writs of habeas corpus from the courts jurisdiction what is to prevent it from removing all of the court's jurisdiction? Congress already has the power to change the law while cases are pending, does it also need to have the ability to remove the jurisdiction of all courts.

In conclusion, it appears that the alien might have a right to a writ if the Court takes a holistic structural approach to the question. Since their powers are being infringed, on I would expect that they would find a complete removal of jurisdiction to be unconstitutional.

good 10

2(1)

I. (1) EP

The equal protection clause of the 5<sup>th</sup> and 14<sup>th</sup> amendment guarantee that the government can't engage in arbitrary or invidious discrimination. The legislation enacted by Gambrell is state legislation so the 14<sup>th</sup> amendment guarantee, which requires that similar people must be treated the same and different people must be treated differently, applies.

The SMUT Act is a facially discriminatory statute. On its face it gives different punishments to men and women for the same crime. The difference in the punishment was not accidental. In fact, legislators stated that the reason for the act was to protect women from men and to punish the men for their wild exploits. Since the statute is facially discriminatory and has a discriminatory purpose a prima facie case of discrimination has been met.

The SMUT Act discriminates based on gender, so the appropriate level of review is intermediate scrutiny. The court will use intermediate scrutiny to evaluate this Act because under *Craig v. Boren* all classifications based on gender are subject to intermediate scrutiny. It doesn't matter that a law might be benign, or intended to help woman a historically disadvantaged group. Intermediate scrutiny always applies to gender classifications. Intermediate scrutiny requires that a classification be substantially related to an important governmental objective. In evaluating the governmental objective, the court will give some deference here to the objectives profered by the enacting body. The key to deciding this case, is how far the Court will go to look at the objectives offered by Gambrell.

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If the court looks at the findings of the SMUT act, the court will likely uphold the ACT. The courts have allowed states to make laws that take into account the biological differences between men and women, if they are attempting to further an important governmental objective. In Michael M, the court upheld a California law which made statutory rape a crime that only men could commit. The court stated that the biological differences between men and women allowed the state to discriminate based on gender to pursue important government interests like lowering teen pregnancy and teen sex. The SMUT act could be read similarly, in that Gambrell wants to punish men and women differently for the use of sex toys because they increase sexual activity and the cost of increased sexual activity is born by women, as they are the individuals that can become pregnant. These justifications are nearly identical and under this line of reasoning the court is likely to allow the gender based classification, because of biological differences and the state interest in lowering teenage sexual activity and pregnancy. In an additional case, Nyguyen, the court allowed Congress to use biological differences as an important governmental objective, such that it could justify different naturalization laws for illegitimate children based on whether their mother or their father was a US citizen. This additional case just demonstrates how much the court will allow governments to use biological differences to justify.

If the court goes beyond the stated findings, and looks at the comments by the legislator doubts maybe cast on the true intent of the Act and the court will likely strike it down. Courts are not likely to allow states to classify based on gender if the state is trying to propulgate traditional gender-based stereotypes. The statements of the legislator



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seem to support the notion that Gambrell is trying to reinforce traditional male/female gender roles. She stated that the Act was at least in part enacted because girls are good girls and men are out prowling for sex; men are the sexual aggressors. They are the ones causing the problems. In *US v. Virginia* the court struck down a regulation which would prevent women from attending VMI because VMI was trying to keep women out of the school to reinforce old stereotypes of men as the citizen-warriors and women as the unable to pursue that lifestyle. The SMUT act is simliar to the VMI case because both were focused on keeping men and women in their traditional gender roles, and the Court will not find this to be an important government interest.

Since intermediate scrutiny only requires that the court give deference to the stated objectives of the legislation, the court could look to statements by the legislator outside the official findings. If it did it would find that the true reason for this legislation (or at least a major contributing reason) was the reinforcement of old stereotypes. Therefore, the SMUT ACT did not meet the intermediate scrutiny standard because reinforcing old gender-roles is not an important government objective justifying classifying punishments based on gender.

*very good 14*

2(2)

The due process clause states that no person shall be deprived of life, liberty or property without due process of law. While the SMUT Act appears to meet all the procedural due process requirements, we must determine whether the substance of the law itself is reasonable and fair.

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The SMUT Act impacts one's ability to buy and use sex toys. There is no textual provision in the constitution which explicitly safeguards one's ability to buy and/or use sex toys. Without a clear constitutional mandate, we must consider whether this right might be included as a liberty interest protected under the 14<sup>th</sup> amendment. There are two major approaches to determining whether a liberty interest exists. Justice Harlan, advanced a traditional approach in his opinion in Griswold stating that those interests which are rooted in our history and traditions get protection as liberty interests. The second approach was advanced by Justice Kennedy in Lawrence in which he suggested defining liberty interests through the emerging consciousness of liberties, such that new liberties could be added to the historical ones or there maybe new liberties which we are just becoming aware of. These two approaches also differ on how broadly they define the liberty interest at stake. Harlan adopting a narrow view of the liberty interest and Kennedy urging a broader interpretation. Since the outcome of this analysis is determined by how the interest is classified, in accordance with Harlan or Kennedy, I will examine the question both ways.

Harlan would define the right at stake in the SMUT act as the right to use sex toys. This is not a fundamental right, therefore it doesn't trigger strict scrutiny and the rational basis test would apply. Someone challenging the SMUT act would have the burden of demonstrating that there was no legitimate government objective furthered by the regulation and that the regulation was not rationally related to that objective. This is a very difficult standard for the challenger to meet. The government in its findings has offered a decrease in sexual activity outside of marriages, a decrease in the spread of

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venereal disease, and a decrease in number of abortions (states can enact persuasive legislation to discourage abortion: Casey) as reasons for enacting the legislation. These items certainly meet the very low standard of legitimate government interest and they could rationally be related to the use of sex toys. While this correlation certainly isn't direct, the government doesn't have to prove that it was the best mechanism or even that it actually serves those interests; only that it rationally could. Under Harlan's formation of liberty interests, the SMUT act would be subject to mere rationality and would withstand a due process challenge.

If Kennedy's approach was adopted, the interest at stake would be more broadly defined as the interest in sexual expression. The SMUT Act could be read that generally, however, it would be interesting to see if the court defined the liberty interest this broadly, as courts have shown a reluctance to allow "deviant sex." However, in Lawrence the interest of consenting male adults to have sexual relations triggered strict scrutiny, because the right to sexual expression is a fundamental right and a similar formation of the SMUT Act is possible.

To withstand a strict scrutiny challenge the government must demonstrate that there is a compelling government interest which the regulation is necessary for achieving. Implicit in this requirement is that the government must prove that there are no less restrictive means to secure the compelling interest.

In the Harlan analysis, the government interests were summarized. These interests seem like they reach the level of being compelling government interests. Let's assume that there is a compelling government interest in decreasing sex outside of

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marriage, decreasing abortion, and decreasing the spread of venereal disease. Now we must determine if the SMUT act is necessary to pursue those interests. The court would find that it is not necessary, as there are less restrictive means that could be used to achieve these objectives. The SMUT act is overinclusive. It applies to people who are married, sterile, & who don't have sexually transmitted diseases. These people are effected by the act, but the governmental purpose for the act is not being served by applying it to these individuals. This act may infringe upon the rights of married couples to conduct their sexual relations as was articulated in Griswold. While that case dealt with the right to birth control, the larger issue was the right of married individuals to structure their sexlife. Additionally, in Eisenstadt the court extended the right to use contraceptives to single individuals, so a law that gave the right to use sex toys to married couples and not to single couples may not withstand equal protection attacks. If the true goal was to limit the spread of STDS and avoid teenage pregnancies the state could enact legislation concerning birth control devices, condoms, and STD testing. In short regulation of sex toys is not necessary to achieving the government objectives. The SMUT Act is not narrowly tailored, therefore it would not withstand a SDP attack under the Kennedy approach.

*good 13*

2(3)

The dormant commerce clause is triggered when a state attempts to regulate interstate commerce. Because that power is expressly given to Congress, the negative collary is that state's may not regulate interstate commerce.

*not quite!*

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First, we must determine if the regulation is rationally related to a legitimate state end. This is a very low standard that mirrors that in the SDP analysis under Harlan approach. The sex toys prohibition is rationally related to preventing the spread of STDs and pregnancy because a legislator could conceivably see a relationship between the two. Therefore the DCC is not violated per se.

Second, the SMUT Act is not discriminatory on its face. It doesn't subject out-of state businesses to regulation that doesn't effect in-state businesses. All sellers of sex toys are effected the same.

Third, since it is not discriminatory on its face does it have a disproportionate impact on out of staters. The answer to this is no. In fact, it probably effects in-state sellers more because they can't sell in the state; therefore that market should be crased. Even if sex toy sellers are disproportionately located out of State, that is not enough to show disproportionate impact. It must be the result of more than mere numbers.

Since the act is not discriminatory, the court would try to determine if it burdens out of state commerce. To determine this the court would use the balancing test outlined in Kassel. In Kassel the court balanced the state's interest in limitings its highways to 55 foot trucks instead of 65 foot trucks against the interstate interest being served by allowing those trucks to use the highway. The court struck down the regulation because there was a trivial interest being served by the regulation in terms of increased highway safety because truck size doesn't impact highway safety. Here, there is probably more than an illusory interest in wanting to protect the health and safety of its citizens by prohibiting sale of sex toys. Interstate commerce is burdened to the extent that they can't

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sell their toys in Gambrell, but that doesn't seem significant, since it looks like that could still travel through the state to transport their goods to other markets. When there is more than an illusory state interest the court tries to avoid balancing the interests. So the court may not even balance the interests, but if it does it would probably conclude that the state interests outweigh the interstate burden.

Gambrell is not a buyer or seller of sex toys, therefore a DCC Market Participant Exception doesn't apply here.

In conclusion, the DCC is not violated here because Gambrell is not regulating interstate commerce.

State Privileges and Immunities might be implicated here since it makes it a crime to possess or sell a sex toy in the state of Gambrell. State P&I states that the citizens of each state shall be entitled to all the P&I of the citizens of the several states. Under Camden, when state P&I are implicated there is a two-step analysis. 1.) Is a fundamental right discriminated against here? There is a fundamental right to do business in a state. So a fundamental right could be implicated if the seller of sex toys was an individual and now can't earn a living because of the SMUT Act. 2.) Is there a substantial state interest justifying the discrimination? The interest of the state in limiting teen pregnancy and limiting the spread of STDs is probably a substantial interest, such that the state could enact the legislation even though it infringes on P&I rights.

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