

CONSTITUTIONAL LAW
FINAL EXAMINATION
Spring 2016

MICHELLE A. WELSH

EXAM INSTRUCTIONS

This is a three hour exam. There are two essay questions to be answered, and two short answer questions plus 15 Multistate-type questions. Each essay question will count for 1/3 and the short answers plus 15 Multistate-type questions for 1/3 of your exam grade. The midterm exam represents 1/3 of your grade. The final exam plus credit for the 2 quizzes and the practice exam represent a total of 2/3 of your grade for the course.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Question No. 1

During a contentious presidential election year, the United States Congress held hearings and made two findings: 1) That the Framers of the U.S. Constitution did not intend subversive speech critical of the U.S. government or speech advocating overthrow of the U.S. government by force or violence to be protected as free speech under the United States Constitution; and 2) That political strife caused by such subversive speech substantially affects interstate commerce. Based on these findings Congress enacted the "Protect the U.S. Government Act" which provides as follows:

No federal Court of the United States and no Court of any State of the United States shall allow a person charged with a crime based upon subversive speech or expressions of advocacy to overthrow the United States Government by force or violence to assert a defense that such speech or expression is within the protection of the First Amendment to United States Constitution.

A candidate for president of the United States who openly identified himself as a Socialist held a rally in the state of Columbia where Whitney, an invited speaker for the campaign, sang a song from the Socialist "Little Red Songbook", first published by the International Workers of the World ("Wobblies") in 1909. She sang into the loudspeaker:

Come on, you fellows, get in line! We'll fill the boss fears! Red's the color of our flag, it's stained with blood and tears..! When we hit their pocketbooks we'll spoil their smiles of mirth - we'll stop their dirty dividends and drive them from the earth!

The excited crowd began to cheer and to chant "We'll drive them from the earth!" The police tried but failed to stop the crowd. Whitney, the speaker, continued chanting. She was arrested by Columbia police and charged with violation of a Columbia state statute which states as follows: "No person shall disturb the peace by incitement of violence or unlawful conduct". Whitney asserted the First Amendment to the United States Constitution as a defense, but the Columbia state Court disallowed her defense in compliance with the federal Protect the U.S. Government Act. She was convicted and appealed.

What Constitutional arguments can Whitney reasonably make on appeal to support her First Amendment defense, and how should the court analyze and rule on each of them, considering the arguments likely to be raised by the State of Columbia? The U.S Attorney General intervened in her case. What arguments can the U.S. make? Discuss.

MCL CONSTITUTIONAL LAW FINAL EXAM 2016

Outline Answer

Question 1

- I. Introduction: e.g. Whitney's appeal to challenge constitutionality of the U.S. "Protect the U.S. Government Act" and the denial of First Amendment defense by the State of Columbia is likely/unlikely to succeed because . . .

- II. U. S. Government's "Protect the U.S. Government Act":
 - A. Congress' power to enact the "Protect U.S. Government Act":
 1. Interstate Commerce: Art. I Section 8:
 - a. Apply *Lopez* and *Morrison* Criteria and conclude
 - b. Can Congress make "findings" about founders' intent? Effects on Commerce?
 2. Within Commerce Power or violate 10th Amendment states rights?
 - a. Does Congress "Commandeer" states (*U.S. v. Printz*)?
 - b. Does congress direct state Judiciary?
 3. Remedial Powers 14th Amendment section 5:
 - a. Current evidence of Constitutional Violations? *Shelby County v. Holder*;
 - b. Is remedy congruent and proportional? (*City of Boerne v. Flores*)
 - B. Separation of Powers:
 1. Congress has no power to overturn Constitutional decisions of the U.S. Supreme Court (*City of Boerne v. Flores*).
 2. But Supreme Court has held incitement is not protected speech (*Brandenberg v. Ohio*).
 - a. Apply incitement test to the Act.
 - b. Is the Protect US Gov't Act consistent? Constitutional?

- III. State of Columbia v. Whitney
 - A. Violates Whitney's right to Freedom of speech:
 1. Is statute vague: reasonable person cannot understand "disturb the peace".
 2. Is statute overbroad: note exception to standing even if violated; "disturb the peace" overbroad? "incitement"?
 3. Incitement: meets *Brandenberg* test or violates Whitney's right to free speech?
 - B. Violates Whitney's 14th Amendment right to procedural due process:
 1. Was there a deprivation of liberty or property? Yes, criminal conviction.

2. Was state's due process sufficient notice and opportunity to be heard? Apply *Matthews v. Eldridge* Test.

C. Preemption by Protect US Government Act:

1. Express preemption: yes, state courts "shall not allow" 1st Amendment defense. Or no since no words expressly say consistent state laws are preempted.
2. Implied preemption:
 - a. Conflicts with Federal law? Can state comply with both?
 - b. Impedes federal purpose? (Analyze)
 - c. Federal law occupies the field? (Analyze)

IV. Conclusion: conviction affirmed or reversed?

1)

===== Start of Answer #1 (2570 words) =====

Whitney's First Amendment defense *is this the issue?***General analysis**

General analysis of first amendment freedoms examines (1) whether the regulation is content-based or content-neutral, (2) the forum that the speech is occurring in, (3) whether there is an infringement on the freedom of speech, and (4) whether the regulation is vague or overbroad. For purposes of W's First Amendment defense, two provisions of the statute implicate speech -- the "incitement to violence" provision, and the "unlawful conduct" provision. Both are discussed below.

1. Content-based or content-neutral

"Unlawful conduct" defines a category of conduct that is prohibited, which can be considered speech under the Spence test where there is intent to communicate, and the statement is understood by the audience. In this case, W's act of singing into the loudspeaker may be considered "unlawful conduct" under the Columbia statute, which *speech?* *not* *advice* *was intended to communicate the words that W sang, and which was understood by the crowd as evidenced by the crowd's reaction.* Under the O'Brien test, a state may regulate communicative conduct under intermediate scrutiny, where there is an important government interest unrelated to the suppression of speech, and the regulation does not burden substantially more speech than necessary to accomplish that interest (discussed further below under infringement).

not *speech* *statement* Incitement of violence is by nature a content-based regulation, because it defines by its terms a category of speech that cannot be made. While incitement is a content-based regulation, the normally applicable strict scrutiny does not apply. In order to determine what level of scrutiny to apply, it is therefore necessary to determine whether W's

speech constituted incitement.

root
starts?
asked you
text
Incitement: Incitement is a category of unprotected speech so long as it poses imminent harm, with a likelihood of producing illegal action, and intent to cause the illegal action.

as
did challenge?
lawful
not
1. Imminent harm: the state would argue that the crowd and police officers were imminently threatened by W's chant, because the crowd became excited and began to cheer to the point that the police could not successfully intervene. in fact, the crowd was so riled up that the police could not even stop W from chanting. Such a frenzy could be likely to produce harm in the form of a riot. Furthermore, the crowd was continuously repeating the phrase "We'll drive them from the earth," which could indicate imminent harm to whoever "their" refers to, and which indicated that the crowd wanted to take immediate action. *What?* *Bosses?* *Word me g, fear*

W's
W would argue that there was no indication of imminent harm, as demonstrated by the fact that there was no actual violence. Even the words of the phrase the crowd was shouting contemplate future action "We'll drive" as opposed to an immediate call for action, and were so vague they could not possibly have been considered a real threat of producing violence. The court is likely to agree with W that there was no imminent harm.

How?
2. Likelihood of illegal action: The state would raise other references in the song to "We'll fill the boss fears", "we'll hit their pocketbooks," "spoil their smiles of mirth," "drive them from the earth," as very likely to illegally disturb the peace at the very least, and more likely produce more serious illegality such as assault, theft, bodily harm, and potentially murder. The words cited in the song seem to refer to veiled injurious and violent actions taken against a group of people who constitute an opposing political party, and instead of espousing political ideology ask the crowd to commit crimes. Since the entire text of the song is focused on action capable of physical harm, rather than political theory, the state would argue that likelihood of illegal action was indeed

imminent. W would disagree, again on the grounds that the words of the song were vague and do not specifically call for violence. In fact, the song includes metaphors connecting the red of the flag to blood, which does not call for any illegal action. Similarly, words such as hitting their pocketbooks could indicate a desire to merely not vote for those in power, which could result in a financial defeat for the opposing party. Due to the lack of clarity and multiple possible meanings in the song, the court is likely to agree with W that illegal action is not imminent.

3. Intent: The state will again point to the words of the song to indicate intent to produce illegal action, and will also argue that W's continued chanting even after the police tried to stop the crowd demonstrate intent to incite the crowd to violence. W will argue that she merely intended to support the presidential candidate, who invited her to speak, and for which speech she chose to sing a well-established song. Although it is often the intent of speakers at a rally to excite the crowd, such intent does not indicate intent to cause violence or other illegal acts, and should not be used as a basis for labeling a category of political speech as incitement. The court will likely agree with W on this point.

Fighting words: Similarly, the state could argue that W's song constituted fighting words, which are those that are either likely to produce injury to the speaker, or cause immediate emotional harm. There is no evidence either that W was in danger of harm, as evidenced by the fact that the crowd was supporting her and she continued chanting with them. Nor do the facts support a finding of emotional harm to anyone, since the crowd was supporting W's song and did not appear offended by it in any way. Finally, fighting words are often challengeable by vagueness and overbreadth, which W has successfully proven above.

Conclusion: It is unlikely that the court will find W's speech constitutes incitement or fighting words, therefore maintaining its protection under the first amendment. Since the statute at issue defines a specific category of prohibited speech, and since W's speech does not fall under the unprotected category of incitement, the court should

apply strict scrutiny to determine the level of interference with W's free speech rights.

2. Forum

The facts do not say specifically where the rally was held, other than that it was in the state of columbia. Presumably, since there was a large crowd and this was at a rally (most of which are held on public property), this rally was conducted in a public forum, which is government property that the government is constitutionally required to make available for speech. Content-based restrictions on public forums are usually protected by strict scrutiny, unless there is a valid time place or manner restrictions which must satisfy the intermediate scrutiny standard set forth above. W could argue that the statute under which she was charged was used to punish the content and viewpoint of her speech, therefore requiring application of strict scrutiny.

How? /
from /
test based / viewpoint

3. Infringement

If such scrutiny were applied to a public forum as discussed above, the state would have to show that it had a compelling government interest in preventing disturbance of the peace, and that the only way it could accomplish this would be to prohibit W from chanting and exciting the crowd with her song. Although the state's interest is important, it is unlikely the court will find that the only way to prevent disturbance of the peace is to arrest anyone who causes a crowd to chant at a rally. W would argue that the purpose of a rally is to excite a crowd and get them to chant, and that most people show up to a rally in order to vocally support the candidate and the candidate's position. Preventing people from cheering in such a situation is not sufficiently tailored to preventing a breach of the peace, because if this were so, then it would be impossible to hold political rallies which are clearly protected activities under the constitution. The court is likely to find in W's favor on this issue.

with
regard

If intermediate scrutiny were applied under the O'Brien test for regulating conduct, W

would acknowledge that the government does have an important interest in regulating "unlawful conduct." However, preventing disturbance of the peace through punishing unlawful conduct in this case has not been achieved by a means that does not burden substantially more speech than necessary to accomplish that interest. Disturbance of the peace could be achieved through all manner of conduct, including conduct that is not unlawful. For example, someone could kick a ball into a crowd, causing the crowd to become frantic. More importantly, there is no indication that W's speech or her act of singing into the loudspeaker -- although both forms of speech -- constitute unlawful conduct. No statute prohibits singing, nor are the words that W sang specifically prohibited. There is therefore very little indication that preventing incitement or unlawful conduct is related to the government interest in preventing disturbance of the peace without substantially interfering with more speech than necessary. Accordingly, the statute under which W was convicted constitutes a substantial impairment on her freedom of speech

not
regain

good
return

4. Vagueness/overbreadth

Vagueness results when a reasonable person cannot understand from a statute what speech or conduct is prohibited, and what is permitted. W will argue that "incitement of violence" and "unlawful conduct" are so vague as to fail to inform her what speech and actions she is allowed to make and what she isn't. For example, it is likely that the presidential candidate also spoke in favor of his socialist platform at the rally, and may have received similar chants and cheers. Would the mere fact that a crowd is chanting in support of an alternative political platform constitute "incitement of violence" or "unlawful conduct"? There is no indication either that there was violence, or unlawful conduct produced by or resulting from W's song. Additionally, the song has been published in a book since 1909, the content of which W merely repeated into a loudspeaker. Under the columbia statute, does the song itself constitute incitement of violence, or does such incitement result instead from W singing the song and the crowd repeating one line? Similarly, there is no definition of unlawful conduct - i.e.. no reference to what existing laws define what is unlawful, whether this is a reference to

rule

just
point

word
relies
relation

criminal conduct under the penal code or entails something broader (particularly since "unlawful" is used instead of "illegal"). Since none of these questions can be answered by either the text of the statute or by a reasonable person reading the statute, the court will mostly likely find this statute unconstitutionally vague.

word
analysis

Overbreadth invalidates a statute when the regulation chills substantially more speech than is constitutionally permissible. Although the government may have a legitimate interest in preventing violence, arresting W for chanting a song that has been published for 100 years and that was merely repeated by the crowd does not appear to have produced violence. In this specific case, the statute has therefore reached overbreadth in chilling speech that should otherwise be permitted as an expression of a political viewpoint or artistic rendition of a song. As discussed above, if causing a crowd to chant at a rally is considered incitement of violence, then no political rallies would be permitted under this statute, which clearly prevents an entire category of speech that has historically received great protection under the constitution. Unlawful conduct similarly is capable of chilling an entire category of speech defined by the Spence test as communicative conduct. While certain people may consider burning a flag to be unlawful, Texas v. Johnson has held that it may constitute protected communicative conduct. Since the Columbia statute does not define specifically what is considered unlawful, it has the capacity to reach far beyond defined illegal conduct to regulate and chill expressive conduct that has been protected by the Supreme Court. W will be successful in demonstrating that the Columbia statute is overbroad.

Conclusion: W's best argument in support of her First Amendment defense is that the statute under which she was convicted was vague and overbroad and is therefore unconstitutional on its face. Good general conclusion based on sound analysis

Overall conclusion: W will be successful in her first amendment defense against the state statute.

U.S. arguments

The U.S. may make several arguments to prevent W from even raising her first amendment defense in the first place. *Good issue here.*

Jurisdictional issues

The U.S. could potentially argue that the federal statute preempts W's First Amendment defense. However, there is no state statute regulating the first amendment at issue here, and federal regulations cannot abridge first amendment freedoms absent satisfying the appropriate level of scrutiny. Preventing "subversive speech" is subject to the same vagueness and overbreadth issues decided in W's favor above, as there is no clear indication of what is considered subversive. Expressions of advocacy to overthrow the government by force or violence are the equivalent of prohibiting incitement (because the prohibition is directed at preventing incitement of illegal activity), and incitement has also been decided above in W's favor. Since the court will already have determined that W's speech is protected by the First Amendment, it will at the very least find that U.S. regulation unconstitutional as applied to W's case, because it burdens speech that is protected by the First Amendment. Furthermore, the court will be very hesitant to allow Congress to regulate how the constitution may be used as either a sword or as a shield. Interpretation of the constitution is a power reserved to the Supreme Court by the constitution, and the separation of powers doctrine prevents Congress from dictate what standards to apply in determining constitutional issues.

The court would most likely invalidate this statute, at least as applied to the states, as it did for the Religious Freedoms Restoration Act, which similarly attempted to dictate how a certain area of constitutional law should be decided.

good points

work again

good

good analogy

Commerce Clause

The government will also argue that it had the right to bar W's first amendment defense due to its plenary power to regulate interstate commerce. This is an enumerated power

in the commerce clause that allows Congress to pass legislation affecting channels of interstate commerce; instrumentalities, persons, and things in commerce; and activities that substantially affect interstate commerce. Charging someone with a crime for subversive speech or advocacy to overthrow the government does not relate to a channel or instrumentality of commerce, but the government would argue that it substantially affects commerce. Case law has established that regulations involving economic or commercial activity will be upheld if there is a rational basis to find that in the aggregate they affect interstate commerce. The government may try to argue that regulating first amendment freedoms to prevent subversion crimes is rationally related to the economic vitality of a stable country. However, this argument is so attenuated that the court will likely dismiss it. There is no evidence showing the connection between subversion and the economy or commerce, and under Lopez, noneconomic activity regulated under the commerce clause must have a jurisdictional nexus connecting the activity to commerce. None has been provided here. Our country originated from political strife, upon which the First Amendment freedoms were largely based, and regulating speech to prevent such strife damages the political activity of the nation without any indication that it affects interstate commerce. The court will reject the government's argument

Conclusion: The PGA will be held unconstitutional and a not within the power of Congress to enact. The Columbia statute will similarly be held unconstitutional and W will succeed in raising her First Amendment defense.

=====
 ===== End of Answer #1 =====

Excellent work! You identify the issues, correctly state the rules and analyze well to support your conclusion.

+ Additional issues: ① 10th Amendment violation for "commandeering" States to enforce federal law + directing states' courts;
 ② Due process violated by disallowing criminal defendant to assert a constitutional defense.

Question No. 2

The State of Columbia, which had legalized the sale and use of medical marijuana, enacted a statute requiring labeling of all food products containing cannabis or medical marijuana produced or sold in the State of Columbia. The statute further required that the label clearly identify all components and ingredients used in the production of the food product, and include the exact quantity of cannabis in each recommended serving.

One year before Columbia enacted its cannabis labelling statute, the U.S. Senator from Columbia had introduced identical legislation in a bill she presented to the United States Congress. The bill was defeated and Congress members expressly declined to enact any legislation concerning labeling of cannabis food products because cannabis is a drug prohibited by federal law. Responding to the enactment of the labelling law in Columbia and the statements made by Congress, the President of the U.S. issued an Executive Order prohibiting any state legislature from imposing restrictions on the production, distribution or sale of cannabis food products.

Agco, a nation-wide producer of cannabis food products, was prohibited from distributing or selling its products in the State of Columbia because the products were not labeled as required by Columbia state law. Agco filed suit against the State of Columbia for violation of its rights under the U.S. Constitution. The state of Columbia filed suit against the United States to enjoin enforcement of the President's Executive Order. The two cases were consolidated for hearing by the U.S. Supreme Court.

1. What Constitutional arguments, if any, can Agco raise in its lawsuit against the State of Columbia and how should the Court analyze and rule on each issue, considering the defenses likely to be raised by the Attorney General for the State of Columbia? Discuss.
2. What Constitutional arguments, if any, can the State of Columbia raise in its lawsuit against the United States and how should the Court analyze and rule on each issue, considering the defenses likely to be raised by the U.S. Attorney General?

2016 Constitutional Law Final Exam Outline Answer: Question 2

- I. Columbia Statute violates Dormant Commerce Clause?
 - A. Is law discriminatory against out of state actors?
 1. On its face: no. Applies to in-state and out of state producers.
 2. Purpose or effect: no. Applies to all producers equally.
 - B. Nondiscriminatory but burdens interstate commerce: yes. Apply *Pike* balancing test: does state's interest outweigh burden on interstate commerce?
- II. Privileges and Immunities clause:
 - A. Applies only to citizens, not to corporations. If Agco is a corporation does not apply.
 - B. State law does not discriminate against out of state citizens since it applies equally to in-state citizens.
- III. Preemption by President's Executive Order:
 - A. Is executive order a valid exercise of President's power?
 1. President acting within which zone under Jackson dissent in *Youngstown Sheet and Tube*: Zenith (consent of congress), Twilight (no action by Congress) or lowest cbb (against will of congress)?
 2. President lacks inherent power under Constitution since Congress is granted plenary power to regulate interstate commerce under Article I section 8 (commerce clause).
 - B. Conclusion: Executive Order preempts/does not preempt state statute.
- IV. State's Rights under 10th Amendment:
 - A. State's police power included regulating for health and welfare: Cannabis product labeling is necessary for state resident's health.
 - B. Congress has not enacted regulation of cannabis labeling so state has right unless violates dormant commerce clause.
- V. Other possible Issues:
 - A. Free speech: compelled speech violates Agco's First Amendment rights. Apply *Central Hudson* test for commercial speech.
 - B. Contracts Clause: State statute impairs Agco contracts in state of Columbia by prohibiting sale without labeling.
- VI. Conclusion

2)

===== Start of Answer #2 (1253 words) =====



Agco v. State of Columbia (SC)

Article 3 Justiciability Requirements

Article 3 of the United States Constitution has justiciability requirements that must be satisfied in order to bring a constitutional challenge. First, moving party must have standing because they have suffered an actual or imminent injury. The injury must be caused by government or state action. And the a favorable court ruling for the plaintiff would redress the injury.

Agco has standing because they are going to suffer actual or imminent injury if there products are not allowed to be sold in the SC. The injury sustained by Agco is caused by The SC's law. A favorable ruling for Agco would redress their injury because they would be allowed to sell their products in the state.

As a result, Agco has standing to bring the lawsuit, even though they are a nation-wide producer.

The Dormant Commerce Clause

Under Article 1 of the US constitution, Congress has the plenary power to regulate interstate commerce between states, indian tribes, and foreign nations. A state law may be found to violate the dormant commerce clause and

unconstitutional if the law has a substantial affect on interstate commerce. *or Discriminatory*

First: Analyze if Discriminatory - Pike type test.

Under the Pike Test, a state that has neutral law of general applicability that affects commerce must demonstrate that the states interstes are important and the impact on interstate commerce is incidental and that the state's interests outweigh the impact on interstate commerce.

*ord
u
TMT*

Here, The SC has enacted legislation that requires cannabis food producers to label their products and clearly identify all components and ingredients used in the production of the food product, and include the exact quantity of cannabis in each recommended serving of medical marijuana food products.

Agco is a nation-wide producer of cannabis food products and was prohibited from selling their products in the SC because of the restrictions placed on cannabis food products sold within the state of Columbia. The State of Columbia has an important state interest in by looking out for the welfare of its citizens and producing them from potentially dangerous drugs. Medical cannabis is a new medicine and it is an important interest to preserve the medical intergity of the new industry and protect its citizens from overdosing and abusing the medicine. The regulations are important for the state's need in this matter.

*ord
analysis*

Furthermore, the burden on interstate commerce may be de minnimis because most likely other states have similar requirements on labeling of medical marijuana. Again, it is a new industry and it is in a states interest to label what and how much marijuana is in the edibles being sold in its borders.

Most likely, the court would find that the SC law does not violate the Dormant Commerce Clause.

Good Conclusion Statement

The Privileges and Immunities Clause

The privileges and immunities clause of the 14th amendment guarantees the rights of the citizens to work and travel in any state and that a state may not discriminate against out of staters by denying them the privileges and immunities it grants in-staters.

Since the law that SC has enacted is not facially discriminatory, and but is facially neutral to any and all producers of cannabis, both in state as well as out of state. Furthermore, Agco is a either a corp or someother business entity. In any event, the privileges and immunities clause only applies to united states citizens and not corporations or aliens. *Good application of Rule*

As a result, the court would find that Agco has not been denied its privileges or immunities. *Good conclusion*

First Amendment / Commerical Speech

The first amendment guarantees the right to the freedom of speech will not be infringed. However, the right is not bottomless and some speech may be regulated. Commerical speech may be regulated under intermediate scrutiny

Under the Central Hudson test, commercial speech may be regulated if the speech is false or misleading, the state has a substantial interest in the regulation, the regulation is not related to the suppression of speech, and the regualtion furtheres the state's interest.

Here, Agco is being required or compelled to engage in commerical speech by labeling their products. However, the Agco is being required to label medical

marijuana, it is unclear what their current labels contain but the state has an important interest in protecting the health of its citizens from dangerous drugs and the purpose of the labeling law is not suppress Agco's speech but to further the important interest of the health of its citizens. *Good Analysis*

Most likely a court would conclude that Agco's first amendment rights to commercial speech have not been infringed. *Good conclusion*

Preemption

rule Article 6 of the US constitution states that the constitution is the law of the land. A state law will be found to be unconstitutional if it is in direct or implied conflict with federal law. *Good rule statement*

issue Here, Agco might argue that the SC law is unconstitutional because it is preempted by federal law. The president issued an executive order prohibiting any state from imposing restrictions on the production, distribution, or sale of cannabis food.

However, Congress has the plenary power to enact laws that are valid under the US constitution. Article 2 grants the executive branch certain powers but it is the executive branch's duty to faithfully enact laws that congress writes. Congress was actually silent, and refused to enact legislation that would have made it legal for a state to enact regulations on cannabis food producers.

As a result, the president over stepped his executive powers by going against congress and writing law.

Most likely, Agco would lose on its various challenges.

The SC vs. The US

Standing

Under *Massachusetts v. EPA*, the court will grant leeway to a state who brings suit against the federal government. Here, SC is in danger of suffering an injury because the law they enacted may be in conflict with the president's executive order. The executive order is the source of the imminent injury to be sustained by SC. A favorable court decision in favor of SC would redress the injury.

on the other hand, this may be a non-justiciable political question between the executive branch and the legislative branch.

Most likely, the court would hear the case because this deals with the power of the president and his/her ability to issue executive orders.

Breach of the Separation of powers

The president does not have the plenary power to write law. The president is commander and chief of the military, and may engage in treaties with foreign nations by ratification of the senate.

However, the president's job is to lawfully execute the laws written by congress. Under *Youngstown Sheet*, there are three zones of presidential power (1) the president's power is strongest when he/she acts according to the will of congress, (2) the zone of twilight, when the president acts and congress is silent on the issue, and (3) when the president acts in direct violation of the will of congress.

Here, The SC would argue that the executive order is invalid under the third prong of *Youngstown Sheet* because congress has already spoken on the issue of whether the federal government would enact regulations pertaining to labeling medical marijuana. Congress concluded that cannabis is a drug prohibited by federal law. As a result, Congress spoke and chose not to label medical marijuana. The president has decided after hearing comments made by Congress to order an executive order prohibiting states from enacting laws requiring labeling. This law has no bicarmelism, did not go through the house and senate and is a breach of the separation of powers. *Good Analysis*

Good job - you address the issues. organize well and select facts & inferences to support your analysis.

=====
===== End of Answer #2 =====

Question No. 3

Please write a short answer to the following two questions. Each question is worth 25 points.

A. After the Founder of the California Missions, Father Junipero Serra, was declared a saint by a Church, Suncity permitted a nonprofit organization, the Serra Historical Society, to place a large statue of Father Junipero Serra in a prominent place on top of a hill in a City-owned park near the Mission. The next day a group of Native American people who opposed the statue held a peaceful protest rally in the City park to highlight the historic mistreatment of early Native American people and to request that the City remove the Serra statue. Late during the night after the protest, unknown persons placed a statue of a Native American religious leader in the City park next to the Junipero Serra statue. The City promptly removed both statues and placed them in storage. The Serra Historical Society and a group of residents of the City threatened to sue, demanding that the City remove the Native American statute permanently and restore the Junipero Serra statue to the City park property. What advice should the City Attorney give to the City Council concerning the constitutional issues raised, and how is the Court likely to rule on them if the City is sued?P

B. Based on reports that persons under the age of 40 suffer discrimination in exercising their right to vote, Congress enacted a law pursuant to section 5 of the 14th Amendment to the U.S. Constitution requiring all persons voting in a presidential election to identify their date of birth on the ballot so that data could be gathered to monitor age discrimination in voting. What constitutional issues can be raised in a lawsuit by a voter who was not allowed to vote after refusing to identify his age, and how is the court likely to analyze and rule on them?

C. Please answer the Attached 15 Multiple choice Multistate-type questions on the separate Answer Sheet provided.

2016 Final Exam Outline Answer: Question 3. Short Answers A and B

A. First Amendment freedom of religion: establishment clause:

placement of a religious statue by itself on public park property violates the establishment clause per *Lynch v. Donnelly*. But:

Freedom of speech: government speech:

a government entity may select religious expression and even choose among religions in decisions to place stationary objects on public property. *Pleasant Grove City v. Summum*; *Van Orden v. Perry*;

B. Remedial power of Congress under section 5 of the 14th amendment:

Requires current data per *Shelby County* and congruence and proportionality per *City of Boerne*; neither is present here.

Equal protection: age is not a suspect class; subject to rational basis scrutiny. Therefore age discrimination does not violate the U.S. Constitution unless it fails to relate to a legitimate state interest. Therefore Congress lacks power to remedy in the absence of a constitutional violation.

Violation of fundamental right to vote:

Government action which significantly burdens a fundamental right is subject to strict scrutiny. Analyze whether requiring identification of age is necessary to serve a compelling government interest.

Right to Privacy:

Voter may assert that disclosing age violates the Fundamental right to privacy in securing one's personal information, requiring strict scrutiny.

3)

===== Start of Answer #3 (952 words) =====

Short Answer Questions

A.

good
from

The City Attorney should advise the Council that the City must oppose any potential lawsuit and leave both statues in storage rather than erecting either of them on City property. By doing so, the court is likely to rule that the City has performed its duty to maintain free exercise of religion without violating the Establishment Clause. Under the Establishment Clause (EC), government may not act to promote or establish religion. The EC has historically been interpreted strictly (requiring a "wall of separation" between church and state), neutrally (state laws or actions implicating religion are analyzed according to the reasonable observer standard), or deferentially (state actions or laws only violate the EC if they involve coercion or establish a state-sponsored religion). The three-part Lemon test is used for (neutral laws that are generally applicable), and therefore does not apply here since there is no state-enacted

is this?
nee
more - not Est. Cl.)

legislation. *But there is state action so it will apply*

Under the neutral or reasonable observer standard, the City would argue that restoring the Serra statue as requested by residents would appear to a reasonable observer that the city is sponsoring a Christian point of view, particularly since the statue was erected in the first place to commemorate Serra's sainthood. Even if both statues are restored, there is no context indicating that they represent more general historical statements about the founding of California. City residents who are Jewish, Muslim, or observers of any number of faiths other than a specific sect of Christianity and Native American religious group would find that either or both of the statues are expressing the city's preference for those limited religions. *Good point*

City residents will attempt to raise the deferential standard requiring either coercion or a

Voting is considered a fundamental right as established by several constitutional amendments. Interference with a fundamental right requires application of strict scrutiny. Preventing someone from voting constitutes vote denial, which is a severe type of voting infringement. The voter would argue that while the government has a compelling interest in preventing age discrimination that interferes with the right to vote (since again, voting is a fundamental right that is just as available to the 40-year-old as to the voter refusing to reveal his age), requiring voters to identify their age is not narrowly tailored to achieving this interest. First, age identification at the ballot is more likely to result in age discrimination. If such discrimination is really occurring, then the votes of those voters under 40 will be explicitly identified and can be more easily diverted or destroyed. Since there is no indication of how the discrimination is occurring, such an obvious means of identification is more likely to exacerbate the problem than help it. Rather than occurring at the polls, it is more likely that such discrimination is the result of campaign platforms or other targeted discriminatory behavior that discourages young voters from even going to the voting booths to begin with. Requiring voters to disclose their age will therefore do nothing to assist voters who feel too intimidated to attend the polls in the first place. If the government is instead more interested in researching the extent of the discrimination issue, it could implement other measures such as surveys filled out in the home, or review county voter registries to analyze age groups. The weight of this argument showing that the narrowly tailored element has not been met would be sufficient to defeat the identification law. *Good Analysis*

Good point

Enforcement Clause

Section 5 of the 14th amendment is the enforcement clause, which has historically only been used to remedy equal protection violations. The courts have been very clear that this requires evidence of actual discrimination, since the Enforcement Clause gives congress a power to enact legislation that it otherwise wouldn't have. Since the law has

good

END OF EXAM

Multiple Choice Questions (1-15)

Question 1

State A, State B, and State C are adjacent to each other. States A and State C permit the use of automobile radar-detection devices, but State B strictly forbids them in order to discourage speeding and reduce auto accidents. A resident of State C is interested in purchasing an auto radar device. He drove to State A to purchase a new improved automobile radar-detection device from a manufacturer there. While driving back across State B to return to his home, the State C resident stopped to purchase gas in State B. A State B police officer who happened to be at the gas station saw the radar device visible on the front seat of the State C resident's car. The officer charged the State C resident, pursuant to the State B statute, with illegal possession of a prohibited radar device.

A valid federal administrative rule, adopted under a federal consumer product safety act, regulates the design of radar devices. The rule was issued to prevent the devices from causing injury to human beings by electrical shock while persons were installing the devices. No other federal law applies.

Which of the following best states the effect of the federal rule on the State B statute?

- A. The federal rule preempts the State B statute, because the federal rule regulates the same subject matter, radar devices.
- B. The federal rule preempts the State B statute, because the federal rule does not contain affirmative authorization for continued state regulation.
- C. The federal rule does not preempt the State B statute, because the State B statute regulates traffic safety, a field of exclusive state power.
- D. The federal rule does not preempt the State B statute, because the purposes of the federal rule and the State B statute are different.

Question 2

New scientific research suggests there is a good chance that life exists in other solar systems. Consequently, the Federal Government has decided to use satellite technology to transmit messages to extraterrestrials concerning the importance of preparing for the Judgment Day. Representatives of each of Earth's major religions are allowed to prepare a ten-minute message which would be broadcast into space 24 hours per day.

What is the most likely result if a proper challenge is made to the expenditure of \$50 million on this program?

- A. This action by the Federal Government will be upheld as a valid exercise of the spending power.
- B. This expenditure will be upheld as a proper extension of Congress's power to regulate commerce with foreign nations.
- C. This expenditure will be invalid under the First Amendment.
- D. This expenditure will be struck down because there is no rational relationship to any federal power.

Question 3

The state had a statute that prohibited "all speech making, picketing, and public gatherings of every sort in front of the main entryway to any government building during high traffic periods while the government building is being used for official government business."

Which of the following possible plaintiffs would be most likely to be able to obtain an adjudication on the merits in a federal court on the validity of this statute?

- A. A state taxpayer in the highest tax bracket.
- B. A school administrator who intends to make a campaign speech at the administration building entryway during a prohibited time.
- C. A legislator who voted against the statute because he thought it unconstitutional.
- D. An organization whose purpose was "to seek judicial invalidation of unconstitutional laws."

Question 4

The strongest constitutional basis for the enactment of a federal statute requiring state and local police departments receiving federal funds to hire enough officers so that every community would have two police officers for every 1,000 residents is the:

- A. Police Power.
- B. War and defense power.
- C. Power to tax and spend for the general welfare.
- D. Power to enforce the Privileges and Immunities Clause of the Fourteenth Amendment.

Question 5

A small local organization is limited to people who can prove that they are at least 75 percent Polish, and that they are first-, second-, or third-generation Polish-American. The purpose of the group is for members to discuss and implement ways to preserve their Polish heritage and improve working conditions for Polish-American citizens. Many politicians are members of the group and help the group with its legislative and charitable work. The members meet regularly in the conference hall of a local business and new members are admitted once per year on recommendation of current and past members. As part of the initiation ceremony, each new member takes an oath to uphold the standards and mission of the organization and to refrain from seeking membership for individuals who are not at least 75 percent Polish-American.

A state legislator of Russian descent, with a majority of his constituents of Polish descent, believes membership in the Polish organization would allow him to gain insight into the values of his constituents, thereby enabling him to better represent them. He applied but was denied membership.

If challenged in court, which of the following is the best constitutional argument the organization can make in defense of its exclusion of the state legislator?

- A. The exclusion is permissible under the Fourteenth Amendment equal protection principles.
- B. There is no state action.
- C. Forcing admission of the state legislator would violate existing private contract rights.
- D. Forcing admission of the state legislator would constitute a bill of attainder.

Question 6

In order to reduce a mounting deficit and be able to pay its workers, State Green cut several of its programs. A number of families who had been receiving food vouchers were terminated from the food voucher plan. The notification letter stated no reasons why these particular families' benefits were being terminated. The letter simply announced that effective immediately, food vouchers were discontinued. All the families had moved to State Green from State Orange within the last two years with the intention of collecting benefits. The letter also provided that the families could request a hearing on the issue and that such a hearing would be held within 30 days after the termination of benefits.

The families filed suit, claiming that the discontinuation of their benefits was unconstitutional.

Who should prevail?

- A. The families, because discrimination against a person from another state violates the Fourteenth Amendment privileges or immunities clause.
- B. The families, because a hearing is required before the property interest in continued welfare benefits can be terminated.
- C. The state, because a post-termination hearing is adequate due process.
- D. The state, because welfare payments are a governmental benefit, not a right.

Question 7

A new law enacted by a state legislature requires every couple applying for a marriage license in the state attend a one hour video presentation before the wedding. The video presentation was created by psychologists and relationship counselors to enlighten couples planning on marriage about the growing problem of domestic violence between spouses. A couple decided that they did not want to watch the video and the state denied them a marriage license. The couple filed suit to challenge the statute.

Who will have the burden of persuasion?

- A. The couple, because there is a strong presumption that elected state legislators acted properly and the burden is incidental.
- B. The couple, because the Tenth Amendment authorizes states to determine the conditions on which they issue marriage licenses.
- C. The state, because the statute has a substantial impact on the fundamental right to marry.
- D. The state, because there is a substantial impact on the discrete and insular class of young adults, who are the ones most likely to be burdened by this requirement.

Question 8

Concerned that same-sex couples are being discriminated against in their ability to find hotels while traveling by road between states, Congress passes an amendment to existing federal civil rights laws. The new law requires that all hotels within five miles of an interstate highway that discriminate on the basis of sexual orientation be subject to damages actions by any person harmed by the discrimination. A hotel trade association has challenged the law as unconstitutional on the grounds that it is not justified by Congress's Commerce Clause power.

Can the trade association bring a successful constitutional challenge to the statute?

- A. Yes, because the statute regulates wholly intrastate activity.
- B. Yes, because the purpose of the law is not commercial.
- C. No, because the law is justified under the Commerce Clause power as an activity that substantially affects interstate commerce.
- D. No, because the trade association lacks standing to bring the claim.

Question 9

Defendants, members of a white supremacist group, intentionally burned a cross in the woods on property they jointly own. They were not observed by any third parties. After burning the cross, they headed into town to have a drink. A bartender overheard defendants boasting about what they had done, and reported them to the police. Defendants were arrested and charged under a state law that punished any burning of a cross as one of a number of forms of hate speech.

Can defendants be punished for the act of cross-burning consistent with the First Amendment?

- A. Yes, because the cross burning constituted fighting words and was unprotected by the First Amendment.
- B. Yes, because the cross burning constituted hate speech and was unprotected by the First Amendment.
- C. No, because the cross burning was speech protected by the First Amendment.
- D. No, because the cross burning did not constitute advocacy of lawbreaking.

Question 10

A public school has a tradition of selecting its annual graduation speaker through a vote of the graduating students. This year, the students have elected a local minister to deliver the graduation address. The minister has announced that he plans to begin his graduation speech with a nondenominational prayer. A group of students has sued the school, seeking an injunction against the minister's delivery of the prayer at graduation.

Is the students' request for the injunction likely to be successful?

- A. Yes, because nondenominational prayers at graduation violate the Establishment Clause.
- B. Yes, because prayers by religious leaders on public property are always a violation of the Establishment Clause.
- C. No, because the prayer is nondenominational.
- D. No, because the election of the minister as speaker is a private choice.

Question 11

For the past 125 years, a state has operated a teachers' college which has only admitted women. The teachers' college is the only publicly supported teaching college in the state. The state justifies its policy on the grounds that the program: (1) supports the advancement of women in society; and (2) remedies past discrimination against women in employment. Men wishing to train as teachers in the state must attend universities in other states. The state teachers' college is a highly sought-after credential among teachers in the state; 85% of the women who teach in the state are graduates, and the college maintains an active alumni network. A group of young men seeking admission to the teachers' college brought an action challenging the women-only admission policy.

Is this policy constitutional?

- A. Yes, because affirmative action policies that remedy past discrimination are constitutional.
- B. Yes, because the advancement of women in society is a legitimate government interest
- C. No, because the requirement is not narrowly tailored to a compelling government interest.
- D. No, because the requirement is not substantially related to an important government interest.

Question 12

Concerned with high verdicts in common law tort cases, especially defamation actions, the state legislature has passed a statute that attempts to limit the perceived problem of juries awarding high damage awards. The statute provides that jury trials are not available in defamation actions brought under state law.

Is the elimination of the right of trial by jury in state defamation cases constitutional?

- A. Yes, because states are not required to guarantee jury trials in civil cases.
- B. Yes, because the Sixth Amendment has not been made applicable to the states, and private tort actions do not constitute state action under the Fourteenth Amendment.
- C. No, because the Seventh Amendment requires that jury trials be provided by states in all civil cases in which the amount in controversy is over twenty dollars.
- D. No, because the First Amendment places limits on the ability of the states to authorize excessive liability in defamation actions.

Question 13

State Y's legislature enacted a law requiring residents to have lived in State Y for one year before being permitted to enroll their children in any of State Y's public schools.

The law violates:

- A. The Establishment Clause.
- B. The Sixth Amendment.
- C. The Supremacy Clause
- D. The Privileges and Immunities Clause of the Fourteenth Amendment.

Question 14

A state passes a law that provides that no one over the age of 55 may be employed in the state as a sanitation worker.

In order for this law to be upheld against an equal protection challenge, it must be:

- A. Rationally related to a legitimate governmental interest.
- B. Rationally related to an important governmental interest.
- C. Substantially related to an important governmental interest.
- D. Necessary to achieve a compelling governmental interest.

Question 15

Congress has passed a new law that consists of five sections. The President, while agreeing with most of the provisions of the new law, decided to veto the final section, while signing the first four sections into law.

The President's action is:

- A. Valid, because it is a line-item veto.
- B. Valid, because it is a pocket veto.
- C. Invalid, because it is a line-item veto.
- D. Invalid, because it is a pocket veto.

Constitutional Law Final Examination
Spring 2016
Michelle A. Welsh

Student ID# _____

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

11. _____

12. _____

13. _____

14. _____

15. _____