CONSTITUTIONAL LAW Anonymous #_____
Section C
Spring 2013
Professor McManamon

Final Examination
Friday, May 10, 2013

INSTRUCTIONS:

1. Be sure to write your anonymous number in the place provided at the top of this page. You are required to turn these test questions in at the end of the examination. Failure to return the test questions will result in a grade of **F** for this examination.

2. This is an open-book examination.

3. There are one short answer question and three essays. They will be weighted in proportion to the time suggested for each, so watch your time carefully.

4. Unless you are using ExamSoft, use the "blue" books provided to write your answers. Be sure to put your anonymous number on each "blue" book. In addition, you MUST number each book, e.g., "1 of 1" or "1 of 3," "2 of 3," "3 of 3."

5. If you are handwriting your exam, write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor!

6. This is a 3-hour exam.

7. If you wish to leave the room during the examination, you may do so. You must, however, leave your test materials in the classroom. Moreover, you may not speak with any member of the class while outside the room.

8. All the examinations at the law school are conducted under the Student Code of Conduct, which forbids cheating or collaborating on examinations. If you witness anyone cheating in any form, it is your responsibility to report this to the Registrar or the Dean of Students. You are required to sign the form indicating compliance with the Student Code of Conduct at the completion of your examination.

9. All students are required to have a Widener University School of Law picture ID card with a validation sticker for spring 2013 on the desk in front of them during the examination.

SHORT ANSWER QUESTION (5 minutes)

Where in the Constitution does it provide that the President may veto congressional enactments?

ESSAYS

QUESTION I (25 minutes)

The Fifteenth Amendment to the Constitution provides as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Pursuant to this Amendment, Congress enacted the Voting Rights Act of 1965. According to Wikipedia,

> Echoing the language of the 15th Amendment, the Act prohibits states from imposing any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." Specifically, Congress intended the Act to outlaw the practice of requiring otherwise qualified voters to pass literacy tests in order to register to vote, a principal means by which Southern states had prevented African Americans from exercising the franchise. The Act was signed into law by President Lyndon B. Johnson, who had earlier signed the landmark Civil Rights Act of 1964 into law.
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> The Act established extensive federal oversight of elections administration, providing that states with a history of discriminatory voting practices (so-called "covered jurisdictions") could not implement any change affecting voting without first obtaining the approval of the Department of Justice, a process known as preclearance. These enforcement provisions applied to states and political subdivisions (mostly in the South) that had used a "device" to limit voting and in which less than 50 percent of the population was registered to vote in 1964. The Act has been renewed and amended by Congress four times, the most recent being a 25-year extension signed into law by President George W. Bush in 2006.

Before the most recent renewal, Congress spent 10 months studying the issue, including holding 20 hearings. The record produced is approximately 15,000 pages. It cites about 2,400 attempts by state and local authorities in covered jurisdictions to make discriminatory voting changes since the last renewal (in 1982). In addition, the record notes that there were 650 successful suits under the Act in that time. The vote in Congress was overwhelmingly in favor of extension of the Act: 99-0 in the Senate and 390-33 in the House.

Shelby County, Alabama, has challenged the constitutionality of the Act, arguing that current conditions no longer justify the preclearance requirement. The case is now before the Supreme Court, and oral arguments were heard in February. During the hearing, Justice Scalia made the following remarks:

> Now, I don't think [the overwhelming congressional support of the Act is] attributable to the fact that it is so much clearer now that we need this. I think it is . . . very likely attributable[] to a phenomenon that is called "perpetuation of racial entitlement." It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.
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> I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless . . . a court can say it does not comport with the Constitution. You have to show, when you are treating different States differently, that there's a good reason for it.
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> That's the . . . concern that those of us who . . . have some questions about this statute have. It's . . . a concern that this is not the kind of a question you can leave to Congress. . . . Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?

First, describe the jurisprudence exhibited by these comments. Second, say whether it comports with Justice Scalia's jurisprudence in other cases. Discuss at least two opinions written by him that support your conclusion.

QUESTION II (1 hour)

Kansas has just enacted a law entitled "The Second Amendment Protection Act." Section 6 of the act provides as follows:

> (a) Any act, law, treaty, order, rule or regulation of the government of the United States which violates the second amendment to the constitution of the United States is null, void and unenforceable in the state of Kansas.

The law does not recognize the decisions of the Supreme Court as defining the meaning of the Second Amendment. Instead, the statute declares, in Section 2, how the Second Amendment is to be interpreted:

> (c) The second amendment to the constitution of the United States reserves to the people, individually, the right to keep and bear arms as that right was understood at the time that Kansas was admitted to statehood in 1861, and the guaranty of that right is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

In other words, as one report on the law noted, "any federal regulation or restriction passed by Congress and recognized by the courts after 1861 would be deemed null and void because those actions are not in line with what Kansas agreed to when it petitioned to join the Union as a state in 1859."

The statute also defines congressional power under the Commerce Clause, in Section 4:

> (a) A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. . . .
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> (b) Component parts are not firearms, firearms accessories or ammunition, and their importation into Kansas and incorporation into a firearm, a firearm accessory or ammunition manufactured and owned in Kansas does not subject the firearm, firearm accessory or ammunition to federal regulation. . . .

Finally, Section 7 provides the following:

> It is unlawful for any official, agent or employee of the government of the United States . . . to enforce or attempt to enforce any act, law, treaty, order, rule or regulation of the government of the United States upon a firearm, a firearm accessory, or ammunition that

is manufactured commercially or privately and owned in the state of Kansas and that remains within the borders of Kansas. Violation of this section is a . . . felony.

Senators Joe Manchin (D-WV) and Pat Toomey (R-PA) recently introduced a federal bill to expand background checks to prevent dangerous criminals and the seriously mentally ill from purchasing firearms. As I am writing this examination, the bill is being filibustered. But assume for the purposes of this test that a similar version of expanded background checks is passed by Congress. Assume also that you work for the U.S. Attorney for the District of Kansas. She has asked you to write a memorandum to be sent to the Kansas field offices of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives on the constitutionality of the new Kansas law. The agents are concerned that they may face state felony charges if they attempt to enforce the federal background check law.

QUESTION III (1½ hour)

In May 2008, the California Supreme Court held that, under the California constitution, "statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny" and that existing "California legislative and initiative measures limiting marriage to opposite-sex couples violate the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying." In November of that year, the California ballot contained Proposition 8, which was entitled, "Eliminates Rights of Same-Sex Couples to Marry. Initiative Constitutional Amendment." The ballot summary declared that the measure "changes the California Constitution to eliminate the right of same-sex couples to marry in California." Proposition 8 passed, and the California constitution was therefore amended to overrule the California Supreme Court's opinion.

A lesbian couple who was denied a marriage license pursuant to the new law filed a federal case against various California officials. The suit, in the U.S. District Court for the Northern District of California, challenged the new California constitutional provision as violating the U.S. Constitution. The district judge struck down the California law, holding that it was invalid under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Ninth Circuit, in a 2-1 decision, affirmed. The dissenting judge urged judicial restraint. He pointed out that states legitimately may prohibit sexual relationships condemned by society, such as incest, bigamy, and bestiality, and may impose other restrictions on marriage, such as age limits. He argued that "gays and lesbians are not a suspect or quasi-suspect class" and are thus not entitled to the courts' increased scrutiny of laws that affect them. He wrote, "The family structure of two committed biological parents–one man and one woman–is the optimal partnership for raising children." He also stated that governments have a legitimate interest in "a responsible procreation theory, justifying the inducement of marital recognition only for opposite-sex couples" because only they can have children. He thus would have upheld the California law.

The U.S. Supreme Court has granted certiorari in this case. You are a newly-appointed Justice who has been assigned to write the Court's opinion. Write your opinion on the merits; i.e., ignore any possible standing issues that may have been raised in the case. In addition, identify one Justice who has sat on the Court in the twenty-first century who would dissent from your opinion and write a summary of his or her rationale.