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FINAL EXAMINATION
Federal Courts § O
Professor McManamon
Spring 2005

This examination is an open-book test. You are allowed to refer to any written materials in answering the questions. You may not, however, use a computer for research while taking this test. And, of course, no discussion about the examination is allowed with anyone else – except for me -- during the test.

There are two questions in this exam. They will be weighted equally.

Please put the answers to each part in a separate blue book. Be sure to label your blue books “Question I” and “Question II.” Write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor! (If you are using ExamSoft, be sure to mark the two parts clearly.)

Do NOT identify yourself as a graduating senior. All papers will be graded as if you are a graduating senior.

Good luck to all.

QUESTION I (1½ hours)

You are a staffer for a newly-elected congresswoman. One of her colleagues has asked her to support the bill following this question. She wants you to advise her on the legality and wisdom of this bill, based on the concepts you studied in your Federal Courts class.

A BILL to limit the jurisdiction of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE. This Act may be cited as ‘We the People Act’.

SEC. 2. FINDINGS. The Congress finds the following:

(1) Article III, section 1 of the Constitution of the United States vests the judicial power of the United States in ‘one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish’.

(2) Article I, section 8 and article 3, section 1 of the Constitution of the United States give Congress the power to establish and limit the jurisdiction of the lower Federal courts.

(3) Article III, section 2 of the Constitution of the United States gives Congress the power to make ‘such exceptions, and under such regulations’ as Congress finds necessary to Supreme Court jurisdiction.

(4) Congress has the authority to make exceptions to Supreme Court jurisdiction in the form of general rules and based upon policy and constitutional reasons other than the outcomes of a particular line of cases. (See Federalist No. 81; *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)).

(5) Congress has constitutional authority to set broad limits on the jurisdiction of both the Supreme Court and the lower Federal courts in order to correct abuses of judicial power and continuing violations of the Constitution of the United States by Federal courts.

(6) Article IV, section 4 of the Constitution of the United States guarantees each State a republican form of government.

(7) Supreme Court and lower Federal court decisions striking down local laws on subjects such as religious liberty, sexual orientation, family relations, education, and abortion have wrested from State and local governments issues reserved to the States and the People by the Tenth Amendment to the Constitution of the United States.

(8) The Supreme Court and lower Federal courts threaten the republican government of the individual States by replacing elected government with rule by unelected judges.

(9) Even supporters of liberalized abortion laws have admitted that the Supreme Court’s decisions overturning the abortion laws of all 50 States are constitutionally flawed (e.g. Ely, ‘The Wages of Crying Wolf: A Comment on *Roe v. Wade*’ 82 Yale L.J. 920 (1973)).

(10) Several members of the Supreme Court have admitted that the Court’s Establishment Clause jurisdiction is indefensible (e.g. *Zelam v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J., dissenting); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399, (1993) (Scalia, J. concurring); and *Committee for Public Ed. And Religious*

Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

(11) Congress has the responsibility to protect the republican governments of the States and has the power to limit the jurisdiction of the Supreme Court and the lower Federal courts over matters that are reserved to the States and to the People by the Tenth Amendment to the Constitution of the United States.

SEC. 3. LIMITATION ON JURISDICTION. The Supreme Court of the United States and each Federal court--

(1) shall not adjudicate--

(A) any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion;

(B) any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction; or

(C) any claim based upon equal protection of the laws to the extent such claim is based upon the right to marry without regard to sex or sexual orientation; and

(2) shall not rely on any judicial decision involving any issue referred to in paragraph (1).

SEC. 4. REGULATION OF APPELLATE JURISDICTION. The Supreme Court of the United States and all other Federal courts--

(1) are not prevented from determining the constitutionality of any Federal statute or administrative rule or procedure in considering any case arising under the Constitution of the United States; and

(2) shall not issue any order, final judgment, or other ruling that appropriates or expends money, imposes taxes, or otherwise interferes with the legislative functions or administrative discretion of the several States and their subdivisions.

SEC. 5. JURISDICTIONAL CHALLENGES. Any party or intervener in any matter before any Federal court, including the Supreme Court, may challenge the jurisdiction of the court under section 3 or 4 during any proceeding or appeal relating to that matter.

SEC. 6. MATERIAL BREACHES OF GOOD BEHAVIOR AND REMEDY. A violation by a justice or a judge of any of the provisions of section 3 or 4 shall be an impeachable offense, and a material breach of good behavior subject to removal by the President of the United States according to rules and procedures established by the Congress.

SEC. 7. CASES DECIDED UNDER ISSUES REMOVED FROM FEDERAL JURISDICTION NO LONGER BINDING PRECEDENT. Any decision of a Federal court, to the extent that the decision relates to an issue removed from Federal jurisdiction under section 3, is not binding precedent on any State court.

QUESTION II (1½ hours)

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.” § 12132. The question presented in this case is whether Title II exceeds Congress’ power under § 5 of the Fourteenth Amendment.

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief. The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed. The United States intervened to defend Title II’s abrogation of the States’ Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

In *Garrett*, we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. *Id.*, at 360, n. 1, 121 S.Ct. 955. Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State’s failure to accommodate his disability in a child custody proceeding. *Popovich v. Cuyahoga County Court*, 276 F.3d 808 (C.A.6 2002). A divided court permitted the suit to proceed despite the State’s assertion of Eleventh Amendment immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. 276 F.3d, at 811-816. The minority concluded that Congress had not validly abrogated the States’ Eleventh Amendment immunity for any Title II claims, *id.*, at 821, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims, *id.*, at 818.

Following the en banc decision in *Popovich*, a panel of the Court of Appeals entered an order affirming the District Court’s denial of the State’s motion to dismiss in this case. Judgt. order reported at 2002 WL 1580210 (C.A.6 2002). The order explained that respondents’ claims were not barred because they were based on due process principles. In response to a petition for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due

process violations, the panel filed an amended opinion. It explained that the Due Process Clause protects the right of access to the courts, and that the evidence before Congress when it enacted Title II “established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause.” 315 F.3d 680, 682 (C.A.6 2003). Moreover, that “record demonstrated that public entities’ failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes.” *Id.*, at 683.

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA’s enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. Central among these conclusions was Congress’ finding that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” 42 U.S.C. § 12101(a)(7).

Invoking “the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,” the ADA is designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” §§ 12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II, §§ 12131-12134, prohibits any public entity from discriminating against “qualified” persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term “public entity” to include state and local governments, as well as their agencies and instrumentalities. § 12131(1). Persons with disabilities are “qualified” if they, “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” § 12131(2). Title II’s enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U.S.C. § 794a, which authorizes private citizens to bring suits for money damages. 42 U.S.C. § 12133.

The United States Supreme Court has granted certiorari in this case. You are the clerk to a Supreme Court justice. She has asked you to advise her of the law governing the State’s Eleventh Amendment challenge and how she should vote in this case.