Constitutional Law Examination
May 13, 2016
6:00 p.m. - 9:00 p.m.
Josh Blackman

Instructions:

You will have three hours to complete this exam. There are two essay questions. Each question is worth 50% of the final score. Each question has a 1,000-word limit. Anything you write past 1,000 words will not be read. Both answers combined should not total more than 2,000 words. Please use the word-count feature to check the length of each answer. (Be sure to do a **word** count, and not a **character** count by clicking "Stats" in the Navigation Bar on the right hand side of the screen). If you hand-write the exam, or can't utilize the word-count feature, please do a manual word count.

The exam is completely open-book. You can use anything you wish, so long as that it was printed *before* the distribution of this exam. Obtaining any new information from anyone or anything *after* the exam is prohibited.

Please don't turn the page until the proctor signals that the exam has begun.

Good luck!

Part 1 (50%)

Instructions: The year is 1905. You are a law clerk to Justice John Marshall Harlan. Justice Oliver Wendell Holmes has circulated a draft majority opinion in the case of *In Re Puerto Rico*. This case considers a number of constitutional challenges arising from four ordinances enacted by the Governor of the newly-created U.S. Territory of Puerto Rico. (There are no jurisdictional defects that would prevent the Court from hearing these appeals, and the Governor has the necessary statutory authority to enact the ordinances in the federal territory). Justice Harlan has announced that he will not join the majority opinion, and asked you to prepare a memorandum that will assist him with writing the dissent. The memorandum should be no more than 1,000 words, focusing on 5 specific issues you are asked to address. Please number each section separately to make it easier for Justice Harlan to review your answer. (For purposes of this exam, please assume that Congress by statute has extended the protections of the entire Constitution to the federal territory of Puerto Rico. In reality, Congress to this day has not extended the entire Constitution to Puerto Rico, and the Supreme Court has held that the Constitution does not "follow the flag." *See* the *Insular Cases*).

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October Term, 1905

SUPREME COURT OF THE UNITED STATES

In Re Puerto Rico

MR. JUSTICE HOLMES delivered the opinion of the Court.

Following the conclusion of the Spanish-American War in 1898, the United States acquired Puerto Rico from the Kingdom of Spain. The federal territory was placed under the rule of a Territorial Governor. This case arises from constitutional challenges to four ordinances enacted by the Governor. The Court finds these claims are without merit, and the appeals are dismissed.

I

Prior to the Spanish-American War, Spain only allowed male citizens over the age of 21 who were born in Spain to run for office in Puerto Rico. This policy excluded all native-born Puerto Ricans from being on the ballot.

After the war, the Governor enacted **Ordinance #1**, which provided that all people who have already been on the ballot before 1905 would remain eligible for life to run for future offices. However, new candidates for office would face "severer tests," including examinations to ensure English literacy and general knowledge of civics. The Court

acknowledges that these new criteria may exclude, perhaps, a large part of Puerto Rican candidates for office.

Martin, a native-born Puerto Rican seeks to run for a seat in the legislature. However, he only speaks Spanish, and is unable to pass the English literacy test. He files suit, seeking an injunction to place him on the list of approved individuals who can be on the ballot, and run for office.

It seems eminently reasonable to the Court that a Legislator in an American territory must possess a minimal competency in the English language, and be familiar with our customs and systems of government.

Furthermore, an alternate holding would require the federal courts to closely supervise this government, and all governments over what are political wrongs. If indeed this system is unconstitutional, how can we make the court a party to the unlawful scheme by accepting it and adding another candidate to its fraudulent lists. It is impossible simply to shut our eyes, put Martin on the ballot, be it honest or fraudulent, and leave the determination of the fundamental question for the future.

Martin's appeal is dismissed.

II

The Governor determined that the birth rate on Puerto Rico was too high, and that families were growing too quickly for the economy to sustain. There were already food shortages, and foreign investments in the Island were plummeting. He decided to take decisive action to promote the general welfare. He issued **Ordinance #2**, providing that all men who had already fathered at least one child were required to use condoms whenever they engaged in sexual intercourse. The failure to use a condom, which the government distributed at no cost, would result in a $100 fine and 6 months in prison. Shortly after the ordinance is issued, Cary—the father of two children—is arrested, and convicted for engaging in unprotected sexual intercourse with his wife.

Cary challenged his conviction on the ground that it deprives him of liberty without due process of law. The attack is not upon the procedure, as a fair trial yielded a lawful conviction, but upon the substance of the law.

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. However, the Fifth Amendment does not enact the Kama Sutra. A constitution is not intended to embody a particular social theory, whether of promiscuity or of chastity. A reasonable man might think the ordinance a proper measure on the score of health and general welfare.

The principle that sustains compulsory vaccination is broad enough to cover compulsory contraception. *Jacobson v. Massachusetts* (1905) (Harlan, J.). Three generations of aboriginals are enough.

Cary's conviction is affirmed.

III

The Governor of Puerto Rico determined that racial tensions between Whites and Hispanics on the Island were contributing to a dangerous society, as race riots were breaking out in integrated neighborhoods. In response, he enacted **Ordinance #3,** titled "An ordinance to prevent conflict and ill-feeling between the white and colored races."[1] The ordinance made it "unlawful for any colored person to move into any house upon any block upon which a greater number of houses are occupied by white people than are occupied by colored people." Likewise, the ordinance also made it "unlawful for any white person to move into any house upon any block upon which a greater number of houses are occupied by colored people than are occupied by white people." However, the ordinance does not prohibit "colored servants" from moving into houses on so-called "white blocks."

Daisy, who was Hispanic, attempted to sell her house to James, who was white. There were no other white people living in Daisy's neighborhood. The Governor intervened and blocked the sale, citing the authority of Ordinance #3.

James, who was unable to buy the house, challenged Ordinance #3 as a deprivation of his liberty and property interests without due process of law. He sought specific performance to allow him to purchase the house. (James did not challenge Ordinance #3 as a violation of the 14th Amendment's Equal Protection Clause).

As we have seen, this Court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. This ordinance is consistent with those precedents.

Because the 5th Amendment's guarantee of due process concerns only procedural rights, and does not affect a liberty interest in conveying property, the Constitution affords James no grounds of relief.

IV

After the enactment of Ordinances #1, #2, and #3, the natives of Puerto Rico began to rise up in opposition to the Territorial Governor. Leaders of the movement distributed pamphlets advocating for Puerto Rican independence from the United States. Wide-spread riots broke out, and the Governor declared martial law to maintain peace and order in the Territory. He then enacted **Ordinance #4**, which made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States." Eugene, one of the movement's leaders, is convicted for distributing pamphlets calling for secession from the United States. Eugene now appeals his conviction to this Court.

[1] Nota Bene: With slight alterations, this is a verbatim reproduction of an actual ordinance that the Supreme Court reviewed during this time period.

We admit that in many places and in ordinary times the defendant in saying all that was said in the pamphlet would have been within his constitutional rights. But the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Governor has a right to prevent. It is a question of proximity and degree. When a territory is gripped by revolutionary fervor, and there are riots in the streets, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endorsed, and that no Court could regard them as protected by any constitutional right.

The venerable Latin maxim provides our rule of decision today: *Intra armes silent leges*. Eugene's conviction is affirmed.

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It is so ordered.

Justice Harlan has asked you to prepare a memorandum that will assist him with writing the dissent. The memorandum should be no more than 1,000 words, focusing on 5 specific issues you are asked to address. Please number each section separately to make it easier for Justice Harlan to review your answer.

1. With respect to Part I, please address the constitutionality of Ordinance #1, and explain what equitable relief the Court should afford Martin.
2. With respect to Part II, Justice Harlan would like you to discuss whether Ordinance #2 violates the Due Process Clause of the 5th Amendment.
3. With respect to Part III, Justice Harlan would like you to discuss why Ordinance #3 violates the Due Process Clause of the 5th Amendment. (Please note that James did not challenge Ordinance #3 under the 14th Amendment's Equal Protection Clause).
4. With respect to Part IV, Justice Harlan would like you to point out the weaknesses of Justice Holmes's majority opinion, and explain how the First Amendment should be applied to Ordinance #4.
5. As you know, Justice Harlan dissented in *Plessy v. Ferguson*. He has asked you to address *both* the pros and cons of writing in his dissent that *Plessy* ought to be overruled. When writing your analysis, please keep in mind the state of affairs in 1905.

Part 2 (50%)

Instructions: You are a law clerk for Chief Justice John Roberts. He has asked you to prepare a memorandum addressing five issues about a case arising from the 2016 Presidential election. Four of these questions will be based on issues from *before* the case is argued, and the fifth question arises *after* the case is argued. Please be sure to answer all five questions with no more than 1,000 words. Suspend your disbelief.

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Today is November 9, 2016. Yesterday, in the presidential election, Republican Ted Cruz defeated Democrat Hillary Clinton, by an anticipated electoral-college majority of 287 to 251. (A candidate needs 270 electoral votes to win the election). However, there is a constitutional crisis. Katherine, the Secretary of State of Pennsylvania, refuses to certify any votes cast for Cruz. She asserts that Cruz is ineligible to become President because he is not a natural born citizen. Ted Cruz was born in a Canadian hospital to a U.S. Citizen mother.

Katherine cites Article II, Section 1, Clause 5, which provides:

> No **Person except a natural born Citizen**, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.

Katherine, a Democrat, announced that she would only certify the votes for Clinton. As a result, Clinton would receive all of Pennsylvania's twenty electoral votes. This decision would flip the outcome of the election, with Clinton receiving 271 votes, and only 267 for Cruz. Clinton would then become the 45th President.

Cruz immediately protests, claiming that he is eligible to be President, and his votes should be certified. Cruz argues that a person born abroad to a U.S. citizen parent is a U.S. citizen from birth with no need for naturalization. And the phrase "natural born Citizen" in the Constitution encompasses all such citizens from birth. Thus, an individual born to a U.S. citizen parent — whether in California or Canada or the Panama Canal Zone — is a U.S. citizen from birth and is fully eligible to serve as President if the people so choose. And the people of Pennsylvania so chose.

With the transition of power in flux, the House and Senate quickly vote on, and pass the *Natural Born Citizen Act of 2016* (NBCA). The act has five sections:

> Section 1: For purposes of Article II, Section 1, Clause 5, a person who is born to a U.S. Citizen is a "natural born citizen," regardless of where the person is born.
> Section 2: This Act shall apply to all presidential candidates who received votes prior to November 9, 2016.
> Section 3: The interpretation of the Constitution offered in Section 1 shall be binding on all federal courts.

> Section 4: All executive officers of the several states shall be bound by this Act.
> Section 5: All constitutional challenges to this Act shall be heard before a three-judge panel in the U.S. District Court of the District of Columbia. The judgment from this court shall be reviewable by appeal directly to the Supreme Court of the United States.

President Obama, who has had his own experiences with the Natural Born Citizen clause, vetoes the bill. Publicly he states that he has doubts about the law's constitutionality, because Congress cannot impose its interpretation of the Constitution on the other branches. Privately, however, he admits that he wants his former Secretary of State to become President over Cruz. To the surprise of many, in a rare act of bipartisanship, the Senate and House override the President's veto. (Suspend your disbelief). The NBCA becomes law.

Katherine announces that Section 4 of the NBCA is unconstitutional, and states that she will not certify Cruz's votes. Pursuant to Section 5 of the NBCA, Cruz files suit against Katherine before a three-judge panel of the U.S. District Court for the District of Columbia. Cruz is seeking a declaratory judgment of whether NBCA is constitutional. Clinton, who has a concrete injury in the outcome of the case—the presidency—intervenes, and argues that the act is unconstitutional in its entirety.

The three-judge panel hears arguments on November 19—exactly one month before the electoral college must vote on December 19. The oral arguments are fiercely divided, and the next day the three judges jointly issue a stunning, one-sentence order: "With this court unable to reach a timely resolution of the claims, pursuant to 28 U.S.C. § 1254, we certify this case to the Supreme Court of the United States for a final resolution." Through this arcane procedural move, a decision in the lower court is bypassed, and the case is sent directly to the Supreme Court.

On November 24, the Supreme Court agreed to hear the certified case, limited to the questions of whether sections 1, 2, 3, and 4 of the NBCA are constitutional. Following a brutal briefing schedule, oral arguments are scheduled for December 1.

Before oral arguments, the Chief Justice asks you to prepare a memorandum that answers the following four questions:

1. Under what authority can Congress enact Section 1 of the NBCA?
2. Is Section 2 of the NBCA constitutional?
3. Is Section 3 of the NBCA constitutional?
4. Is Section 4 of the NBCA constitutional?

After arguments, the Justices hold their private conference the morning of December 2. The meeting usually takes an hour. However, that day the Chief Justice returns to chambers twelve hours later. He tells you, "The Court has divided evenly, 4 Justices to 4 Justices. With Justice Scalia's absence, there is no way to cobble together a majority opinion." You ask, "Can't you reach a compromise?" The frustrated Chief Justice replies, "We tried for twelve hours. No one is willing to budge." (Suspend your disbelief).

Under the Court's normal practice, when the Justices deadlock on a 4-4 tie, the judgment of the lower court is affirmed. However, due to the fact that the three-judge panel did not render a decision—they certified the case to the Supreme Court—there is no judgment to affirm. A tied vote before the Supreme Court would leave unresolved the constitutional crisis.

The electoral college is scheduled to meet in two weeks, and Katherine still refuses to certify the votes for Cruz.

The Chief Justice asks you to answer a final question. In answering this final answer, put aside your personal preference of which candidate you support. Remember, your answer for all five parts must total no more than 1,000 words. Think carefully about your answer.

5. What happens next?