

Constitutional Law Examination

May 5, 2017

6:00 p.m. - 9:00 p.m.

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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 2017. You are an intern for a criminal defense attorney in Houston representing Bert and Ernie. They are facing felony charges in both state and federal court. Your supervisor has asked you to prepare a memorandum of no more than 1,000 words addressing five important constitutional questions presented in their cases.

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Bert and Ernie, residents of Houston, have been in love for over a decade. Leading up to the Supreme Court's decision in *Obergefell v. Hodges*, the couple launched an internet reality show to teach the people of Texas that gays and lesbians should be given the ability to marry. The show, which gained a sizeable following, was live-streamed twenty-four hours a day as Bert and Ernie went about their lives. After *Obergefell* was decided, the couple proudly streamed their wedding online, as millions celebrated along with them.

In 2017, Bert and Ernie submitted their DNA for testing. Both were adopted, and they wanted to learn more about their ancestry. The results were not what they expected: Bert and Ernie were fraternal twins, from the same mother and father. They soon learned that their parents abandoned Bert and Ernie when they were toddlers. Soon, parents in Dallas and San Antonio, respectively, adopted the brothers, keeping them apart. Bert and Ernie met by chance while attending college in Houston, and had no idea they were related. Indeed, they struck up their first conversation over the fact that they shared the same birthday.

The revelation that they were brothers was at first shocking to the couple, though after some reflection, they came to terms with the fact that they still loved each other, and wanted to stay together. Bert and Ernie had spent years trying to remove the taboo from same-sex relationships, and now sought to do the same for same-family relationships. They decided to continue live-streaming their show, demonstrating to the world that brothers could love each other. That evening, with an audience of millions, the two brothers kissed, and announced their commitment to stay together.

The program outraged millions across the country. Pundits on cable news and talk radio hosts called on the government to prohibit such morally repugnant conduct, and prevent Bert and Ernie from livestreaming obscene conduct. Government, at both the state and federal level, took swift action.

First, the House of Representatives and Senate promptly vote on, and approve a new bill, titled *Scrutinizing Internet Broadcasts because Livestreamed Incest is Not Good*, commonly known as SIBLING.

Section 1: Congress finds and declares all the following:

- (a) that depictions of incestuous relationships are obscene, because they appeal to a prurient interest in sex, portray sexual conduct in a patently offensive way, and which, taken as a whole, lack any serious literary, artistic, political, or scientific value;
- (b) that depictions of incestuous relationships among consenting adults increase the likelihood of incestuous relationships between adults and children, thus leading to a rise in sexual abuse of minors;
- (c) and criminalizing the depiction of incestuous relationships will both promote traditional notions of morality and decrease sexual abuse among children.

Section 2: In this section, “incestuous video” means any photograph, motion-picture film, video or digital recording, or electronic image that depicts sexual intercourse between a person and his or her biological brother or sister;

Section 3: It shall be unlawful for any person to knowingly record an incestuous video.

The President promptly signed SIBLING into law.

The Governor of Texas convenes an emergency sessions of the Legislature, and proposes the enactment of a statute criminalizing incestuous relationship, titled *Texans Reject Incestuous Couples because won't somebody please think of the Kids*, commonly known as TRICK.

Section 1: The Texas Legislature finds and declares all the followings:

- (a) it is both appropriate and necessary for Texas to do what it can to defend the institution of traditional non-incestuous relationships;
- (b) both moral disapproval of incest, and a moral conviction that non-incestuous relationships better comport with traditional morality;
- (c) and criminalizing incestuous relationships will both promote traditional notions of morality and decrease sexual abuse among children.

Section 2: A person commits a felony if he engages in sexual intercourse with his or her biological brother or sister.

Both houses of the Texas legislature approve TRICK, and the Governor promptly signed it into law.

Bert and Ernie are incensed at these incest laws, which they claim Congress and Texas enacted to disapprove of their loving relationship. In an act of civil disobedience, the couple engage in sexual intercourse during their livestreamed program. They broke the internet. Millions of Americans called their members of Congress and the President, demanding they prosecute Bert and Ernie for flooding the internet with obscene materials. Likewise, Texans demanded the Attorney General prosecute the incestuous couple.

The next day, Bert and Ernie were arrested by the Texas Rangers, and charged in Harris County Criminal Court for violating TRICK. The following week, the United States Attorney for the Southern District of Texas secured an indictment for Bert and Ernie for violating SIBLING.

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The criminal defense attorney you work for filed motions to dismiss the indictments in state and federal court, arguing that both SIBLING and TRICK are unconstitutional. She has asked you to prepare a memorandum of no more than 1,000 words addressing five questions affecting the case. In doing so, please prepare an objective analysis of the legal issues, rather than advocating for your clients' cases.

1. Assess the constitutionality of TRICK under the Due Process Clause of the Fourteenth Amendment.
2. Assess the constitutionality of SIBLING under the Free Speech clause of the First Amendment.
3. Assess the constitutionality of SIBLING under the Due Process Clause of the Fifth Amendment.
4. Assess whether Congress has the authority under Article I to enact SIBLING.
5. Discuss how the courts should consider Section 1 of both TRICK and SIBLING in assessing the constitutionality of these laws.

Part 2 (50%)

Instructions: The year is 1917. The United States is on the brink of war with Germany. You are a legal adviser for the Governor of Texas. He has asked you to prepare a memorandum of no more than 1,000 words addressing five legal questions facing the Lone Star State. For purposes of this analysis, presume that the first eight Amendments to the Constitution apply to the states, by virtue of the Fourteenth Amendment.

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The year is 1917. The European Continent is divided by a brutal world war. To date, the United States has managed to stay out of the conflict with Germany. However, Germany has other intentions. British intelligence intercepts the *Zimmerman Telegram*, an encrypted cable sent from Germany to Mexico. The *Telegram* proposed that Mexico should fight the United States, alongside Germany. In exchange, Mexico can “reconquer the lost territory in Texas, New Mexico, and Arizona.” The *Zimmerman Telegram* is made public in March 1917. One month later, the House of Representatives and the Senate declare war on Germany.

Hobby, the Governor of Texas, becomes outraged when he learned about the *Zimmerman Telegram*, and proclaimed “Don’t mess with Texas!” He didn’t trust President **Wilson** to keep the Lone Star State safe. As a result, Hobby issues *Executive Order #1*, which provides:

As Governor of Texas, I direct the Texas National Guard to construct a 20-foot wall along the southern border with Mexico, to repel the imminent Mexican invasion, and protect the homeland.

Wilson is furious at Hobby, and argues that the wall would obstruct American foreign policy interests. With Wilson’s support, Congress promptly enacts the *Only Congress Can Exclude Act* of 1917 (“ONCE”). ONCE has three sections:

Section 1: It is the finding of Congress that the federal government, and not the state governments, should have sole control over the Southern border with Mexico.

Section 2: All state executive-branch officials are prohibited from assisting in the creation of a wall, barrier, fence, or any form of separation along the Southern border with Mexico.

Section 3: All state judges are hereby prohibited from assisting in the creation of a wall, barrier, fence, or any form of separation along the Southern border with Mexico

Undeterred, Hobby proclaims that the federal government does not have authority over Texas soil, and orders the Guard to build the wall.

The Governor initiates eminent domain proceedings to allow the state to take *Blackacre*, a ranch along the border in Brownsville. However, **Judge Andy**, a state court judge in Brownsville, dismisses the eminent domain proceeding for *Blackacre*, stating that Section 3 of ONCE divests his court of jurisdiction to hear the case.

Soon Hobby learns that building a wall along the 1,200-mile border with Mexico is harder than he had planned. There are not nearly enough Texas National Guard troops to perform the labor. To address the shortfall, he issues *Executive Order #2*, which provides:

As Governor of Texas, I determine that the construction of the border wall is of the utmost necessity for our homeland security. Accordingly, all able-bodied males between the age of 18 and 40 are required to enlist with the Texas National Guard. Enlistees will serve for a period of six months, with a salary of \$1 per day.

Tens of thousands of Texans rushed to voluntarily enlist in the National Guard to help construct the wall, although many resisted. **Jake**, opposes the draft for two reasons: first, he does not want to be compelled to serve in the National Guard; second, his Quaker faith is pacifist, and he opposes all war.

Hobby, frustrated that his people oppose the Great Wall of Texas, issues *Executive Order #3* to stir up some patriotism. It provides:

All students in Texas public schools, without exception, shall be required to recite this pledge at least once a day: “Honor the Texas Flag; I pledge allegiance to thee, Texas, one and indivisible.”

After the United States declares war on Germany, Mexico formally repudiates the *Zimmerman Telegram*, and announces that it will not invade Texas. In a private letter to his wife¹ sent by a carrier pigeon named *Tweet*, Hobby writes that he knows Mexico has no plans to invade Texas, but he still wants to build the wall to stem the flow of migrant workers from Mexico. A reporter from the *Houston Chronicle* intercepts *Tweet*, and publishes the message in the newspaper. Hobby disavows the personal message because the letter to his wife was not the Governor’s “official” position. Hobby stands by *Executive Order 1*, and maintains that the wall is essential for the homeland security of Texas.

¹ Governor William P. Hobby’s wife was Oveta Culp Hobby (1905-1995), who attended, but did not graduate from, the South Texas College of Law. In 1953, President Eisenhower appointed Culp as the first female secretary of the Department Health, Education, and Welfare.

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You are a legal adviser for the Governor of Texas. He has asked you to prepare a memorandum of no more than 1,000 words addressing five legal questions facing the Lone Star State. For purposes of this analysis, presume that the first eight Amendments to the Constitution apply to the states, by virtue of the Fourteenth Amendment.

1. Assess the constitutionality of Executive Order #1 and Section 2 of ONCE, as applied to Governor Hobby.
2. Assess the constitutionality of Section 3 of ONCE, as applied to Judge Andy.
3. Assess the validity of Jake's two objections to the draft imposed by Executive Order #2 under the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment, respectively.
4. Assess the constitutionality of Executive Order #3 under the Free Speech Clause of the First Amendment. (Do not address the Free Exercise Clause of the First Amendment in this analysis).
5. To what extent should courts scrutinize the Governor's reliance on national security interests, when evidence outside the record suggests that those interests are pretextual, and indeed the Governor is acting based on different motives.