**Constitutional Law Final Exam -- Spring 2017 – A+ Paper**

**Question #1**

1. Awkward. If the principles of Obergefell (with its emphasis on dignity, choice of partners, and the fear of reaching out to find no one answering) is to be strictly followed, TRICK will be struck down as unconstitutional on the same substantive due process grounds as Lawrence (the on-point precedent), because it cannot survive strict scrutiny for an infringement on fundamental rights - but it is unlikely that the Court will do so. Incestuous relationships have heretofore never been recognized under substantive due process - but the Supreme Court found other rights hidden in the penumbra, such as the right to sodomy in Lawrence, gay marriage in Obergefell, birth control in Griswold, etc. Being unrecognized prior to recognition was no barrier for many cases, and sexual autonomy is one of the continual themes of these cases. The plaintiffs can argue that (per Lawrence, "the issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law." Texas can claim that it is a valid use of the state's police powers to protect morality, and that incest - as distinct from mere sodomy - is a bridge too far. Texas can also argue that incestuous individuals are not a discrete and insular minority, as contemplated by Footnote 4 of Carolene Products, and thus the correct standard of review is rational basis, as articulated in Williamson. Ultimately, TRICK's constitutionality (i.e. the discovery of an undiscovered substantive due process right) will probably come down to public sentiment, as occurred in Obergefell. If the public pressure exists, the Court may strike down TRICK as an extension of Lawrence. If it does not, TRICK will be upheld, as occurred in Bowers. The Court was not ready to recognize a right to sodomy at the time, citing the ancient roots of such proscriptions. Proponents of TRICK can argue that the proscription against incest is considerably older and even more established than proscriptions against incest; in Texas law, it predates TRICK by many years. It is unlikely to pass muster under political grounds.

2. SIBLING will likely be struck down as an infringement on the First Amendment. While the government still technically has the right to regulate prurient, obscene materials under Miller (decided in 1973) if they lack social redeeming value, obscenity laws are almost never upheld. The law does not concern private possession, as Stanley did, but it does concern the same sort of free speech interests analyzed under Ashcroft v. Free Speech Coalition. That case struck down a prohibition on the simulated child pornography, on the grounds that it was considerably overbroad. This is an overbroad prohibition as well. The prohibition is further weakened by the fact that the government has no vital interest in protecting a victim, as it does in cases of child pornography. Like in Ashcroft, the prohibition on the depiction of incestuous acts would sweep up movies that do have artistic or social value. Even some adaptations of certain Bible stories would be banned, as would any film about the Borgias. The First Amendment bears the burden of showing constitutionality, and it is too heavy a burden to sustain an overbroad law.

3. SIBLING could be struck down on Fifth Amendment substantive due process concerns. The federal government is bound by the Fifth Amendment in the same manner that the states are bound by the Fourteenth by Bolling. The thrust of the substantive due process cases of the 1960s were that individuals have a right to privacy. Griswold cited the privacy of the marriage bedroom. Roe built on this right, placing invasions of the right to privacy under (effectively)

strict scrutiny. The law prohibits the mere recording of such videos. As incestuous adults can claim that no individual is harmed, the government does not have any compelling interest in prohibiting its recording (assuming the recording is done in private) that would override the right to privacy. This case is most similar to Lawrence, in that it criminalizes private, consensual behavior (in this case, siblings recording themselves). As Justice Kennedy wrote in Lawrence, the law touches upon private human conduct in the most private of places.

4. Congress does not have the power to enact SIBLING under Article 1, Section 8. Congress has enumerated powers, and all laws passed by Congress must flow from those enumerated powers. The clause that grants Congress the most power is the Commerce Clause. SIBLING does not fit into the Commerce Clause, even after it was expanded many times over by Laughlin Steel and Wickard. Congress could try to argue that the recording of incestuous videos is an economic activity that has a substantial effect on interstate commerce, but the economic activity cannot be speculative, per the doctrine outlined in Lopez. Like gun possession in Lopez or family violence in Morrison, the activity is too attenuated from economics; the recording is neither a channel, an instrumentality, nor an economic activity. Even with the Necessary and Proper Clause stretching its powers, Congress cannot link the recording directly to interstate commerce or any other enumerated power. Congress would be limited to using the power of its Spending Clause, by pressuring the states through intermediary spending, to achieve its desired aims.

5. Section 1 of both laws gives the courts illumination into the purpose and goals of the respective laws, but they are non-operative clauses. Section 1(a) of SIBLING gives some ammunition for a Miller analysis and some cover from Ashcroft, in that it claims that (as a matter of statutory law) incestuous depictions lack social value; however, the legislature cannot simply deem it so and override the judgment of the courts. Per Federalist 78, it is the court that reserves such judgment. Per Federalist 51, each branch should jealously guard its powers. SIBLING infringes upon the court's powers. Section 1 of TRICK defends Texas's police powers and describes morality. The courts should consider both statements, but give them otherwise no operative power of law.

**Question #2**

1. The state and federal governments are co-sovereign. The Tenth Amendment reserves to the state all powers not delegated to the federal government by the Constitution. As recognized almost a century later in Arizona v. U.S., one of the federal government's enumerated powers is that of regulating immigration and protecting the nation from war. The source of this power is Article I, Section 8, which grants Congress the ability to establish rules of naturalization and to pay for and maintain armies, the corresponding Necessary and Proper Clause that expands the other enumerated powers, and Article II, Section 1, which vests the executive power in the Presidency, including waging war. Even in 1917, when the vertical tension between states and the federal government were stronger, Texas cannot lay claim to this power. When laws between the sovereigns are in tension, the Supremacy Clause of the Constitution grants the greater power to the federal government and allows federal law to preempt state law. Protection of the borders, like waging war, is a plenary power exclusively held by the federal government, and the states cannot usurp or even supplement this power without the consent of Congress. Texas can claim that the federal government is shirking its Article IV requirement to protect each individual state from invasion, or that Wilson is failing to faithfully execute the laws in order to bolster its claim, but ultimately Texas will lose to the Supremacy Clause. Texas can also claim that its police powers give it the right to enforce immigration law, but it runs into the same problem. The Principle of Commandeering, as it was understood in 1917, does not apply here, because Congress is requiring inaction and penalizing inaction, not the other way around, and doing so pursuant to its enumerated powers. Legally speaking, Texas is bound to stop its actions. However, if Texas does not comply, it may spark a constituional crisis, forcing Wilson to use his executive authority to enforce the law through force, as Eisenhower would have to do 40 years later.

2. As established above, ONCE is a lawful exercise of Congress's power. While Judge Andy's power derives from the state's independent sovereignty, he is bound by the Supremacy Clause of Article VI to accede to federal law when it applies. He is bound by oath to support the Constitution and federal law. State law cannot preempt federal law, which is what Hobby is asking Judge Andy to do. Cooper v. Aaron is not yet decided, so Judge Andy could declare himself not bound by federal law and Article VI, but it would likely result in the same outcome. Congress has the power to bind state judges to respect and obey federal law.

3. In 1917, Jake is unlikely to win a case opposing the draft, but he can put up a good argument. The National Guard is authorized by the sovereign powers of the federal government, as the Constitution bars individual states from maintaining an army. However, it is by Texas order that he is drafted. Jake could rely on Lochner-era private liberty rulings. Substantive due process would not evolve for several decades, so Jake cannot rely on that as an argument. Jake can argue that Lochner protects the right to contract - including the right to refuse contracts. The draft is a coerced contract placing him in mandated labor without his consent. Texas can counter by pointing out that Lochner was about the state's police powers, not the individual. Texas can also claim that he received procedural due process, which was all that was needed to satisfy the clause; by the progressive standards of the time, the individual was subordinated to the needs and interests of society. His First Amendment claim is not likely to succeed; it predates Sherbert by almost 50 years, which is the case that established strict scrutiny for imposition on free exercise.

Both the Establishment and Free Exercise Clause largely lacked teeth at the time. By 1917 standards, the requirement that Jake go to war did not violate the prohibition on free exercise of religion. However, considering the rulings made by the substantially similar 1919 Supreme Court in Schenck and Debs upholding convictions on those who speak out against the draft, it is unlikely that Jake will succeed.

4. Free speech protections were much weaker in 1917 than today. In just two years, the Supreme Court will uphold a significant restriction on content-based speech in Schenck, in which the Court upheld the conviction of someone speaking against the draft. The courts are unlikely to strike down Order #3 as a violation of free speech principles, and are likely to uphold it on national security and loyalty grounds. Speech protections will evolve in the future, but they are quite limited in this era. The culture of free speech was also much weaker at the time. The Free Speech Clause would not gain significant teeth for several decades.

5. The motivations, as adduced solely and literally by both official and unofficial statements, should be fairly considered to give full context to any law. However, the courts should not go so far as to speculate as to motivation beyond stated intentions or assume bad faith, as doing so would replace Congress's and the President's judgment with their own, as warned against in Federalist 78. In 1917, as substantive due process jurisprudence was not evolved, literal reading and acceptance of face-value arguments was common, as occurred in the Slaughterhouse cases. Many laws of the era were inspired by animus. However, under Yick Wo, facially-neutral laws could still be struck down if applied and administered with an evil eye and an unequal hand, to prevent disproportionate impact. However, Yick Wo was weakened by Plessy v. Ferguson, which allowed "reasonable uses" of state power to result in unequal outcomes, so long as they were applied equally. The courts should look to Judge Harlan's dissent, and judge the law in its full context, fairly and without applying a spreading taint on Hobby's actions.