

UNIVERSITY OF MARYLAND
FRANCIS KING CAREY SCHOOL OF LAW

CONSTITUTIONAL LAW I: GOVERNANCE

THREE (3) HOURS

Day Division
Professor Percival

April 30, 2014
9:00 am – 12:00 pm

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes____ **No**____

INSTRUCTIONS:

1. **Honor Code.** Student conduct, during exams and at all other times, is governed by the Student Honor Code.

2. **Your Name, Your Exam Number and Exam Submission.** Sign and print your name in the blanks above. Put the exam number, course title and instructor name on the examination envelope. Indicate whether you are submitting this exam electronically. Submit these examination questions at the conclusion of the examination; do not put the examination questions in the examination envelope.

3. **Time.** Submit your examination answers within the announced time for the examination. If you submit your answers late, you likely will be subject to penalty.

4. **Computer Exams.** Computers [*may / may not*] be used on this exam. (If *may not*, the rest of instruction 4 need not be included in your examination instructions; continue on with instruction 5. If *may*, continue with one of the options below)

- Option 3 - Open Mode – access to Exam4, student computer-based notes and Internet access

If you use a computer on this examination, you must use the Exam4 examination-taking software provided by the law school. You must provide your own computer and must have downloaded a copy of the Spring 2012 version of the Exam4 software to your computer. You should have completed this download, tested the software, and be sure the computer is in working order well before the date of this exam.

At the end of the examination, choose the "Submit Electronically" function on the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name

on your answer as instructed in the handout, but do not put your name anywhere on your answer. Submit your answer within the time limits for the examination; no allowance for additional time will be given for equipment failure. After submitting your answer electronically, note on the envelope the name of the course, your exam number, check "Submitted Electronically," and turn in the exam envelope and your examination questions to the proctor. (The administration will print your Exam4 answers and insert them in the exam envelope.)

Technological Problems: If you experience a technological problem during the examination period, consider the amount of time remaining and decide whether you should continue (or restart) the examination in blue books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the number found above on each of your blue book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. Do not put your name anywhere on the envelope or on the blue book answers.

Upon completion of the examination, put your answers in the envelope and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope—you will be graded on only what is inside the envelope. Do not put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Exam Question Clarity. In response to the recommendations of the Ad Hoc Committee to Review Exam Administration, faculty are encouraged (but not required) to include one of the following statements, another variation or may decide not to include such a statement, in their exam instructions.

- A) "If any facts are not clear, or if there is information you deem critical that is not stated explicitly, identify those facts or missing information and explain how they affect your legal analysis."
- B) "If in reading any of the questions you reasonably believe there is an ambiguity, error, or inconsistency, please identify this issue in your answer and specify any reasonable assumptions you are making in answering this question, and then proceed to answer the question. This approach should be used with caution. The mere assertion of an ambiguity, error, or inconsistency, if not well justified, particularly if it appears that such assertion might have been intended to justify your avoiding difficult and/or significant substantive issues in the examination, will not excuse your failure to address such issues."

QUESTION ONE (30 Points)

As we discussed in class, retired U.S. Supreme Court Justice John Paul Stevens has written a new book entitled *Six Amendments: How and Why We Should Change the Constitution*. Three of the six amendments he proposes (amending the First Amendment to provide that political contributions are not protected speech, amending the Second Amendment to limit the right to bear arms to members of the militia, and abolishing the death penalty) are relevant to Con Law II. The other three – the “anti-commandeering” rule, political gerrymandering, and sovereign immunity – are relevant to Con Law I.

1. (6 points) What are the various mechanisms specified in the U.S. Constitution by which these amendments could be adopted? Specifically what actions would have to be taken for the amendments proposed by Justice Stevens to become part of the Constitution?

2. (6 points) Justice Stevens proposes to add the words “and other public officials” to the second paragraph of Article VI so that it will read: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges **and other public officials** in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” How would this change existing law? Specifically, what decisions by the Supreme Court that we read would be reversed by the adoption of this amendment and why?

3. (6 points) Another amendment that Justice Stevens proposes reads as follows: “Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of contiguous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as natural, political, or historical boundaries or demographic changes. The interest in enhancing or preserving the political power of the party in control of state government is not such a neutral criterion.” How would this amendment change existing law? Would it alter the Court’s *Baker v Carr* decision in any way? If it were adopted, would constitutional challenges to gerrymandering be considered to be nonjusticiable political questions?

4. (6 points) Another amendment proposed by Justice Stevens reads as follows: “Neither the Tenth Amendment, the Eleventh Amendment, nor any other provision of this Constitution, shall be construed to provide any state, state agency, or state officer with an immunity from liability for violating any act of Congress, or any provision of this Constitution.” (A) How, if at all, would this amendment change existing law? (B) In light of *City of Boerne v. Flores*, why are employers challenging the Affordable Care Act’s mandate that health insurance include free contraception able to challenge it under the Religious Freedom Restoration Act?

5. (6 points) In his book *Framed* constitutional law professor Sandy Levinson makes an argument about how the U.S. constitution should be interpreted and the relevance of the provisions of state constitutions to this task. Based on Professor Lawrence Friedman’s book review of *Framed* what is the nature of Professor Levinson’s argument? Do you agree or disagree with him and why?

QUESTION TWO (30 Points)

In *NLRB v. Canning*, the U.S. Supreme Court is hearing a challenge to the constitutionality of President Obama's recess appointments of members of the National Labor Relations Board (NLRB). This was the case that was the subject of our optional field trip to the U.S. Supreme Court to hear oral argument on our first day of class. While many of you were unable to attend the field trip, you all were assigned to read the decision by the D.C. Circuit that is the subject of the Supreme Court's review.

1. (6 points) Why did Noel Canning have standing to bring his lawsuit challenging the constitutionality of President Obama's recess appointments to the National Labor Relations Board?
2. (6 points) In *Canning v. NLRB*, the decision by the U.S. Court of Appeals for the D.C. Circuit that is being reviewed by the Supreme Court, under what circumstances is it constitutional for the president to make recess appointments?
3. (6 points) Compare and contrast how the following theories of constitutional interpretation would apply to resolving the controversy over the constitutionality of recess appointments: (a) originalism and (b) aspirationalism.
4. (6 points) The NLRB is an independent agency whose members may only be removed for cause. Does the President have the constitutional authority to require the members of the NLRB to decide the issues before it in a way that reaches a particular result that the President desires even if the members of the NLRB do not? Why or why not?
5. (6 points) Would it be constitutional for Congress to pass a bill that becomes law because the President neither signs nor vetoes it within ten days of it being presented to him, that requires, notwithstanding any other provision of law, that before any decision the NLRB makes takes effect it must specifically be approved by Congress in legislation submitted to the President for his approval or veto?

QUESTION THREE (30 Points)

As you know, California has enacted legislation called AB 32, also known as the Global Warming Solutions Act, requiring that emissions of greenhouse gases in the state be reduced by 29 percent by the year 2020. Pursuant to this legislation, the California Air Resources Board (CARB) adopted a regulation known as the Low Carbon Fuel Standard (LCFS) to reduce the quantity of greenhouse gases emitted in the production of transportation fuel. Beginning in 2011, the LCFS establishes a declining cap on the average carbon intensity of California's transportation fuel market. This standard was upheld by a panel of the U.S. Court of Appeals for the Ninth Circuit by a 2-1 vote in the *Rocky Mountain Farmers Union* case.

1. (6 points) What were the rationales of the majority and the dissenting judge in *Rocky Mountain Farmers* for why the LCFS violated, or did not violate, the dormant commerce clause?

2. (6 points) Suppose that it becomes apparent that, contrary to expectations, the LCFS is actually placing California fuel producers at the disadvantage to out-of-state fuel producers. If California's congressional delegation then convinces Congress to enact legislation preempting the LCFS and replacing it with a new program designed to discriminate against out-of-state fuel producers, would this violate the dormant commerce clause?

3. (6 points) Would Congress have the power under the commerce clause to require motorists to purchase gasoline containing ethanol in order to promote "renewable" energy? Why or why not? Would it have the power to impose a heavy tax on non-ethanol transportation fuels to accomplish similar goals? Why or why not?

4. (6 points) Who, if anyone, would have standing to challenge the constitutionality of a tax on non-ethanol transportation fuels and why?

5. (6 points) U.S. airlines have complained that the European Union (EU) has sought to require them to pay an emissions charge based on the amount of greenhouse gases their flights to and from the EU generate. In November 2012, Congress passed and President Obama quietly signed into law legislation that gives the Secretary of Transportation the authority to prohibit U.S. airlines from paying these emissions charges to the EU if he finds that such a decision is in the "public interest." Does this legislation violate the non-delegation doctrine? Why or why not?