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ConLawI\_LSH1\_Christiansen\_SP09

Christiansen

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Exam Name:

ConLawI\_LSH1\_Christiansen\_SP09\*

Instructor:

Christiansen

Grade:

28 / 20

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TO: The Honorable Eric Christiansen, U.S. Senator

FROM: Congressional Aide

**Chihuahua Legislation****1. Constitutional Bases for Chihuahua Legislation, Article I, section 8****A. Commerce Clause**

The U.S. Constitution grants express powers to the federal government and also limits the federal government's powers. The Tenth Amendment states that any powers not granted to the federal government and not prohibited to the states are reserved to the several states and to the people. Article I, section 8 gives Congress the power to "regulate commerce among the several states." In McCullough the Supreme Court expanded Congresses authority under the Commerce Clause when it stated that the Necessary and Proper Clause gave Congress the ability to regulate commerce with whatever means necessary and proper to fulfill that power.

The breadth of Congresses Commerce Clause authority has changed throughout our Nation's history where the Court has expanded (pre-1890s), limited (1890s-1937) and expanded again(1937-1990s) the authority of Congress. The current test to use for Commerce Clause analysis is the Lopez triad, where the courts look to what Congress is *actually* regulating, despite what it says it is.

**i. Uses of Channels**

This is the first of three of Congresses authorities to regulate commerce.

Channels are the roads, highways, and waterways. In the Chihuahua legislation you are proposing, it does not appear that you are regulating any use of roads or highways, etc.

**ii. Instrumentalities (people and things) moving in interstate commerce (ISC)**

Congress may regulate people and things moving in ISC under their Commerce Clause authority. Here, it looks as though you *might* be regulating the dogs moving in ISC, but it seems as though you are really trying to regulate *who* owns the dogs. Therefore, it does not appear that this legislation would be regulating instrumentalities.

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**iii. Substantial relationship/effects on ISC**

This category of Congressional legislation is tricky because Congress must show a substantial relationship with ISC or a substantial effect on ISC in order to regulate under this category. To determine if there are substantial effects on ISC we can look at whether Congress has comprehensive legislation in an area. In Raich the Court upheld a federal ban on marijuana over CA medical marijuana laws because of the comprehensive legislation under the CSA that Congress was enforcing. Here, there does not seem to be comprehensive legislation on who may own certain types of dogs.

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We also ask whether this is an economic activity or non-economic. Regulating who may own a certain breed of dog does not seem to be economic activity. Although a lawyer must buy a dog, it seems that this legislation is really trying to protect a certain breed of dog from a certain profession. If the legislation is economic in nature, we can use cumulative effects (Raich/Wickard) to evaluate the legislation and economic activity usually is evaluated under rational basis scrutiny, which is favorable to Congress here

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because it only requires a legitimate government interest (protecting dogs from neglectful lawyers) which would probably pass muster here. However, when we have non-economic legislation, we cannot use cumulative effects and therefore it would be hard to show a substantial relationship with or effect on ISC here.

A jurisdictional hook (Lopez) is another way that the Court has indicated would help to show a connection with ISC. If the legislation required the prosecutor to prove that the dog moved in ISC or the person traveled in ISC to purchase the dog, that might be helpful. Although a jurisdictional hook is helpful, I am not sure that it would rise to the level of substantial relationship/effect needed. /

Finally, the Court will look at whether there are Congressional findings in the area proving a substantial relationship/effect on ISC. In Morrison the Court struck down the Violence Against Women Act even with substantial findings on the affect that gender based violence has on women. Therefore, including the statistics from the PPPC PAC about lawyers improperly caring for the dogs might be helpful, but I do not think it would rise to the level necessary to give Congress Commerce Clause authority here. (1)

#### iv. Tenth Amendment

We also cannot forget the Tenth Amendment where the states hold their Police Power to regulate health, safety, welfare and morality of its citizens. Although there is not "zone of authority" for the states (Darby), they do retain police powers. The federal legislation here seems to be regulating the health and safety of Chihuahuas and maybe the morality of lawyers who treat these dogs poorly. The federal government can not commandeer the states (NY/Prinz). The federal government also can not force the

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states to do something (adopt this legislation).

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It seems that this is an area of traditional state sovereignty where the federal government should not step in to regulate because Congress would not really be able to satisfy the Lopez triad.

**B. Tax and Spend**

Congress's power to tax and spend (holding the purse strings) is a separate justification for Congress to regulate and affect state behavior. Here, if the legislation wanted to tie any federal funding to prohibiting lawyers from "owning or regularly possessing one or more Chihuahuas," that might be possible. However, in order to regulate state behavior, as was upheld in Dole, Congress must be (1) pursuing the general welfare, (2) states must have notice of the regulation/ties to the money must be expressly stated, (3) the money must relate to a federal interest in a national project, and (4) the federal government can not compel the states to do something, leaving the states with no other choice.

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Protecting the dogs from bad lawyer owners would fall within the category of general welfare, so far we are ok. If this law had some tie to federal funds, such as states won't get funding for dog-catchers unless they adopt this legislation (highly unlikely because dog-catchers would be a state funded program), states would simply have to be on notice of this attachment to federal funding. Also, the money must relate to a federal interest in a national project. It seems here that a comprehensive scheme to protect animals from cruelty would help here. Otherwise, it does not seem that there is a legitimate federal interest/project to relate to. Lastly, the money would have to be ~~in~~substantial so as not to compel the states to have to act, such as the money for

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highways in the Dole case which was only 5% of the budget.

Although tax and spend would be an option, it does not seem to be a legitimate one here.

Therefore, Senator Christiansen, the best basis for this legislation would be Commerce Clause with Congressional findings, a jurisdictional hook and comprehensive animal protection legislation.

**2. Can Congress constitutionally require or pressure the state legislatures to pass this bill in their own state?**

As Stated above in the Tenth Amendment discussion, the federal government can not compel the states to adopt certain legislation, although the federal government may prohibit the states from doing something (Condon). The federal government may not commandeer the states, such as in Prinz where the Court would not allow Congress to require the states to enforce the federal Brady Handgun Bill while the federal government was setting up its background check system. The federal government may not put on the state gloves and act in their place. The states do not retain a "zone of authority," but the states still retain their police powers and it is the Executive that is supposed to enforce federal legislation, not the states. Therefore, Congress cannot require the state legislatures to pass this bill in their own states.

As stated above in the tax and spend analysis, the federal government may encourage or pressure the states to act with the power of the purse and attach money to encourage the states to enact legislation. One thing that might be tied to this legislation is practicing law in the federal courts. Perhaps Congress could require that the State Bar only allows practice in the states, and not federal courts, unless the states

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adopt this legislation, because Congress does not want immoral lawyers (those who treat their dogs badly) to practice in federal court. If there is federal money that goes to the states to administer the bar, this *might* hold up, but not likely.

Therefore, it would be difficult to pressure the states pass this legislation and Congress may not require the states to pass this.

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**3. Would individual states be permitted to pass such legislation or would it violate federal constitutional law?**

One basis for violating the federal constitution is the dormant Commerce Clause, if a state regulation unduly burdens ISC, even when Congress has not acted, the state regulation might be invalid. If the states prohibited lawyers from "owning or regularly possessing one or more Chihuahuas" the lawyers might claim that the states are placing an undue burden on ISC because lawyers cannot participate in ISC for the certain dogs. Here we look at whether the law is discriminatory. If the law is based on economic protectionism the law is virtually per se invalid. Here, the law would not be such. If the law is non-discriminatory, it is generally valid if it regulates even-handedly a legitimate local interest and the burdens on ISC are incidental, unless the burdens on ISC outweigh the local benefits. Here, burdening Chihuahua breeders from selling the dogs to lawyers (which there are a lot of us in a given state!) would seem to be more burdensome than beneficial to state in protecting one breed from one profession. Therefore, on DCC grounds, the law would be invalid, even if Congress had not acted.

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Another basis that the federal constitution would be violated is based on fundamental rights, substantive due process grounds. These apply to the states through the word "liberty" in the Fourteenth Amendment. The Court has upheld certain

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economic liberties and privacy interests to be fundamental and protected by the U.S. Constitution. When evaluating a substantive due process issue we ask four questions:

**A. Is it a fundamental right?**

The word liberty in the 14th Amendment is vague and has been interpreted to include certain privacy rights (marriage, purchase and use contraceptives, right to raise one's children, personal autonomy). Originalists would look to the four-corners of the Constitution and interpret the meaning of the time of adoption. If the right is not expressly stated or clearly implied, the originalists would stop and leave the issue up to the states. Non-originalists would look at history, tradition and the social and moral conscience of the people to infer certain rights through the 9th Amendment and penumbras and ~~emissions~~ <sup>that</sup> to find a right to privacy <sup>that</sup> would restricts the government's ability to infringe on a person's privacy. Here, the level of abstraction is important. Justice Scalia would say that we look at the most narrow right we can (Michael H.) which does not leave us with much room to find fundamental rights. Justice Brennan, however, would look more broadly to find fundamental rights of privacy, etc. In our situation, we could ask (1) whether the right to own a dog is fundamental (probably falls within privacy and fundamental) or (2) whether a lawyer has a right to own a Chihuahua and treat it how it wants is fundamental (probably not, there are other dogs out there...) If we find a fundamental right we apply strict scrutiny but if the right is not fundamental we would use rational basis scrutiny.

I will evaluate both.

**B. Is the right infringed?**

Under either right, it seems that a right to own the dog would be infringed because lawyers are not allowed to own or possess Chihuahuas.

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**C. Is there a <sup>sufficient</sup> substantial justification for the law?**

If we are using strict scrutiny to evaluate a fundamental right to own a dog, the state would have to have a compelling government interest in prohibiting ownership or possession of the dog. Here, the state would be trying to use its police powers to regulate the safety and welfare of the dogs from the immoral treatment and neglect of the dogs by lawyers. Compelling interests must be pretty good reasons. Here, I do not think that the state would have a compelling interest in stopping lawyers from owning the dog and treating it bad. If we were to apply rational basis, the state would only need to show a legitimate state interest, and the above stated reasons would qualify as legitimate.

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**D. Are the means sufficiently related to the ends?**

Under strict scrutiny the regulation must be narrowly tailored to carry out the ends. Here, the state would not have to prohibit the dog ownership altogether, the state could require doggie treatment classes or impose a criminal penalty on any specific lawyer who treated his Chihuahua (or any other animal they own) badly. That would seem to be more narrowly tailored to fulfill the state goal of protecting the dogs from neglectful owners.

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Under rational basis the regulations need only be rationaly related to its ends. here, there is rational relationship between lawyers and being neglectful and prohibiting them from owning the dogs. Therefore, the law would pass rational basis and would fail

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strict scrutiny.

Finally the states might violate federal constitutional law on preemption grounds, but that is if we have a valid federal law on point. Since Congress has not yet passed a federal law on the issue, this is hypothetical. If Congress has expressly prohibited the states from passing legislation regulating dog ownership then the states would be preempted. Congress may also have impliedly preempted the states from regulating a specific area if they occupy a field of law (immigration), if there is a conflict between the two laws which would cause a physical impossibility to complying with both (avocado case), or if there states impede on a federal objective. Here, we have none of these.

Therefore, Senator, it will be difficult to pass this law throught the fedearl govenment. States may pass this but it might violate substantive due process or the dormand Commerce Clause.

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**END OF EXAM**