

**PART II: Essay Question**  
**Recommended Time: 75 minutes**

**MEMORANDUM**

**To:** My (Exceptionally Talented) Congressional Aide for Constitutional Issues  
**From:** The Honorable Eric C. Christiansen, President Pro Tempore of the U.S. Senate

I am concerned for Chihuahuas.

Since the movie *Legally Blonde* too many lawyers have bought Chihuahuas and recent studies report that lawyers make awful pet owners—they are neglectful and unaffectionate toward their animals—especially clever, adorable toy-sized dogs. The PPC PAC (People for the Protection of Pet Chihuahuas Political Action Coalition) recently informed me of a study they conducted revealing that more than 40% of all Chihuahuas owned by lawyers are improperly cared for. Shocking.

I need your help in addressing this problem. I would like to present legislation to my Congressional colleagues that would protect Chihuahuas. It is important to me that we are not seen as over-stepping the bounds of our federal legislative authority; but I find the constitutional principles about federal legislative power to be somewhat confusing. Please help me understand Congress' options in this matter and if—and why—a court will uphold or strike down each option.

I would like to pass a federal law that states, more or less, "Any lawyer, i.e., a person legally licensed to practice law in any state, is prohibited from owning or regularly possessing one or more Chihuahuas, as the breed is recognized by the American Kennel Club." If there are other elements that should be added to the law, please let me know as you discuss its constitutionality. I have other interns working on this same issue, so for your memo to me, please focus exclusively on the topics in your most recent semester of Constitutional Law.

Please discuss:

1. What constitutional bases can Congress rely on to directly legislate such a bill? What basis will the federal courts use to determine if our authority is valid for the Chihuahua Protection Bill?
2. Can Congress constitutionally require or pressure the state legislatures to pass such bills in their own states?
3. Would individual states be permitted to pass such legislation or would it violate federal constitutional law?

**END OF PART II**

**END OF EXAM**

**CONSTITUTIONAL LAW I (HLP) – Spring 2009**

Prof. Eric C. Christiansen

*Final Exam Comments*

*In the past I have found it helpful to give you some information about your final exam—particularly an idea of what I was looking for in your essay. Feel free to contact me if you have specific questions. And feel free to come by my office hours during the first three weeks of the Fall semester if you want to discuss your essay individually. You must re-read your essay, read the posted sample answer(s), and read through this document as well. Mark them all up and compare them and then come see me (bringing the mark-ups with you). Our meeting will be much more productive if you do that, so I require it.*

*On your essay exams, numbers ["1"] are points earned; numbers in parentheses ["(1)"] are weak points—too many points in parentheses and I roll the score down one or more points; check marks, plusses and minuses are extra good or bad elements that can raise or lower points if numerous. Other marks (other than the comments themselves) are just to help me find my way around the essay. I do not do extensive on-paper comments because of this memo and because you can come meet with me.*

*I tried to give a fairly straightforward exam (albeit a fun one—chihuahuas!) and one that involved multiple issues. This could easily have been a bar exam type essay problem. Many of you acquitted yourselves admirably and had interesting things to say. The total essay scores ranges from 15-28 out of 30 possible. For each of the three questions there are a set number of points I am willing to give but because there are multiple ways for you to answer the question, there are more possible points than the maximum I will give, e.g., there were 7 points possible on Q2 but no one was permitted more than the 5 point max for that question. As a consequence, even 5/5 was not necessarily a perfect answer. Additionally, when I finish reading all three answers there are up to two additional points for Argument, Organization, Vocabulary or "Mastery" (clear and exceptional grasp of one or more of the topics) that I may award.*

*MCQ range (out of 15 questions) was 9-14.*

*Your success is important to me—now, next year and in your future careers. Please let me know if I can help in any way.*

*¡Viva la Chihuahua!*

*--Prof. Christiansen*

**Q1) What constitutional bases can Congress rely on to directly legislate such a bill? What basis will the federal courts use to determine if our authority is valid for the Chihuahua Protection Bill [CPB]?**

*This was a fairly straightforward federal legislative authority question and most of you did a good job with the core analysis—especially those of you who remembered there was more authority than commerce clause only. Some of you also failed to make suggestions for how to increase the chances of survival and a few of you forgot to apply the Tenth Amendment (to CPB).*

*Total points possible: 12 (Range:4-12 )*

1. Source of powers (Art I, 8) and definition/overview
  - Congress has only powers granted in Con (or Nec & Prop for powers)
  - Options: Commerce / Tax & Spend / Post CW Amends**
  - + others: non-expansive powers granted in Art. I, Sec 8
  - Most likely: Commerce Clause
  - Third Era of CC: nearly everything is ok ("substantial economic effect")
  - Fourth Era? Slow application of limits on CC authority
  
2. Which of the three kinds of permissible CC regulations?
  - a. Channels of interstate commerce (ISC)
    - e.g. Heart of Atlanta & Katzenbach (implied ok by *Lopez*)
    - not here
  - b. Instrumentalities
    - Means of ISC AND persons or things in interstate commerce
    - seems easy to find compliance if Chihuahuas are things in ISC
    - \*\*but no clear post-Lopez cases (no clear definition)**
    - Add jurisdictional hook ("Chihuahuas that move in ISC")**
  - c. Substantial Effect
    - Congressional findings?
    - are necessary, but not sufficient (Morrison) – **PPPC PAC report**
    - but report is about harm to Chihuahuas (not econ affects)
    - Economic or Non-Economic?
      - Economic – Wickard / Raich
      - Non-economic – Lopez / Morrison**
      - More like this
      - Congress cannot regulate based on cumulative effects
    - Raich: Economic (cumulative ok) + very regulated industry
    - Part of comprehensive legal profession law? (helps)**
  
3. Is CPA an affirmative obligation imposed on state governments? [Amend X]
  - Not here; not if federal law directly affecting pet owners.

**\*\*If it fails CC analysis, will it always be an invalid law?**

**NO. May be another basis for authority.**

**Tax and Spend?**

Unrelated to taxation or spending.

Re-write to tax lawyer-owners?

### **Section 5 of the Fourteenth Amendment?**

**What is the scope of Congressional power (§5, 14<sup>th</sup> Amend)?** Narrow

Congress may only "enforce" the right in the 14<sup>th</sup> – Ct decides those rights  
--not independent grounds for federal legislation in absence of court-identified rts

**Other Federal Legislative powers? (Other legitimate bases for legislation?)**

**YES.** See Art. 1 § 8. Post Office, Naturalization, Etc.

(Regulation of legal profession left to states; Limit federal court practitioners...? Unclear)

**\*\*If there is a valid basis for federal legislative authority, is it always constitutional?**

**NO, might violate another area of Con rights.** You either had to do a Fifth Amendment SDP analysis here or (more easily) just reference the similarity with Q3.

**Q2) Can Congress constitutionally require or pressure the state legislatures to pass such bills in their own states?**

*This was a fairly straight-forward examination of the Tenth Amendment—distinct from the Tenth Amend issue that are always part of CC analysis.*

*Total points possible: 5 (Range: 2-5 )*

**Tenth Amendment: reservation of state power**

During 3<sup>rd</sup> Era: 1937 – 1990s: *Darby*: federalism is a truism

Tenth Amendment is currently resurgent

Is it a valid affirmative obligation imposed on state governments?

**Require?**

**NY v US: Congress cannot compel states to adopt laws / regulations**

If Fed has authority, it must use it directly

(Possibly some creative ways but ONLY if valid federal authority: Q1)

*Printz v. US (Brady Handgun Bill): UnCON: commandeers state government  
(here: commandeering legislature—clearly even worse)*

*Condon (distinguishable): in Condon there was no affirm duty on states*

**Pressure?**

**Spending power: "general welfare clause" (Art I, Sec 8)**

Concern: May extend to areas congress may otherwise be unable to regulate.

**SD v Dole requirements (must be met by any funding-based pressure)**

1. serve the general welfare (defer substantially to Congress) (prob Yes)
2. unambiguously stated condition
3. related to the fed interest in particular projects of programs

**US v. Butler (1936)**

--separate substantive power limited only by 'general welfare' reqt

--General welfare + not otherwise in conflict with the constitution = OKAY

**Are *Butler / Dole* from resurgent 10<sup>th</sup> Amendment (*New York / Printz*)?**

Open issue, but Court has hinted at "no" (NY)

**Q3) Would individual states be permitted to pass such legislation or would it violate federal constitutional law?**

*This allowed you to apply the what you learned about Substantive Due Process in both its economic and personal autonomy components. It also allowed some of you to reference other limits placed on the states (which not everyone remembered in their excitement over Chihuahua rights).*

*Total points possible: 13 (Range:6-13)*

14<sup>th</sup> Amendment Substantive Due Process – state law limiting Chihuahua ownership  
[Note: 5<sup>th</sup> Amendment Substantive Due Process – CPB (discuss her or in Q1)]

### **Economic Substantive Due Process**

Nearly "unprotected" post 1937: easiest of rational basis standards

- 1. freedom of contract no longer part of 'liberty' in DP clause**
- 2. state can act to further any non-forbidden (con) purpose**
- 3. Any reasonable means (econ) will survive con scrutiny**

(Can review separately—as here--or and Q1 below.)

### **[Modern] Substantive Due Process**

**Is the government's *interference with a right* justified by a sufficient purpose?**

**\*\*depending on whether right is fundamental, strict or rational basis is applied**

#### **1) Is it a fundamental right?**

Most important issue – mostly will decide the issue

Right to autonomous pet decision? / personal lifestyle?

(very personal, home-related but mostly unimportant decision)

--Level of Abstraction issue

Predict the right that would be identified.

#### **2) Is the right infringed?**

"directness and substantiality" of the interference

Prohibition is always an infringement

#### **3) Is there a sufficient justification for the law?**

*This and the next question apply the appropriate level of scrutiny.*

"legitimate" if non-fund right

"compelling" if fund right

Pet protection? Other state interests?

Is this a legitimate governmental interest?

#### **4) Are the means sufficiently related to the ends?**

"Rational" if non-fund right

"Necessary" if fund right

Govt must show: no alternative, less intrusive means

Does it matter that only one breed is protected?

(Govt can move incrementally)

***Other possible considerations:***

**DORMANT COMMERCE CLAUSE: PROB NO**

**State /local laws that place an undue burden on interstate commerce are unconstitutional**

**1) Is it discriminatory?** (facially discriminatory / discrim purpose / discrim effect)

Here, no. Strong presumption of validity.

**2) Analysis** if non-discriminatory (balancing test):

“Upheld unless the burden imposed on ISC is clearly excessive in relation to the putative local benefits”

[Plus: minimal burden on ISC – less than different bar exams, for example]

[And, Congress could grant exception at will (if it really cared).

**Contract Clause issue: PROB NO**

**Art 1, § 10: "No State shall... pass any... Law impairing the Obligation of Contracts."**

1) Substantial Impairment of existing contract?

2) Does it serve a significant and legitimate public purpose?

3) Reasonably related to achieving the goal

[higher standard if relieves state of its obligations – not relevant here]

**Privileges & Immunities (Article IV, §2 not ignored Amend XIV clause): NO**

no discrim based on **constitutional right / important economic activities** against out of states

--no discrimination here

**Preemption: a valid federal law voids a state law: NO**

No federal law here.