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HOWARD UNIVERSITY SCHOOL OF LAW  
CONSTITUTIONAL LAW I SECTION 2

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## Spring 2011 Final Exam Instructions

May 2, 2011

### General Instructions

1. You have three (3) hours for the exam.
2. Times noted for the questions reflect the amount of time I estimate it would take to answer each question. Please note that although the time noted for each question does relate somewhat to the points for that question, it may not do so in a strict one-to-one fashion.
3. The exam is just over two (2) pages long, excluding this instructions page.
4. There are two (2) questions worth 180 points and 60 points respectively, for a total of 240 possible points.
5. Write legibly and clearly in blue or black ink.
6. Use headings as appropriate.
7. Respond to the question asked, not to questions that might have been asked. Even though the fact pattern may be based on one of the hypothetical problems given during the semester, the call of the question may be different and the facts have been revised. In your responses, do not spend time on matters that are not relevant just to show me how much you know. This exam tests professional judgment as well as knowledge of the material we covered in Constitutional Law I.
8. One or more of the matters you are asked to assess for constitutionality may have a clear answer. For such matters you should provide as complete an explanation as is appropriate so that the reader will understand your analysis and why the matter is not a close one. Other matters may be less certain of outcome and may depend upon filling a gap in the current legal doctrine. For such issues policies and principles at stake are particularly appropriate to discuss.

### Permissible exam materials

The exam is closed book. No materials other than the exam itself, blank scratch paper, and bluebooks are allowed.

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**Question 1. 180 points. Estimated time: 110 minutes.**

Assume that in fall 2010 Congress enacted (and the President signed) a comprehensive health care reform law (HCRL), which has, among many others, the following provisions:

1. All residents of the United States with an income above the poverty level are required to obtain health insurance starting in 2013.
2. Starting in 2013, to fund an expansion of Medicaid for those who can't afford insurance, to help reduce the deficit, and to help put Social Security on more secure long-term footing, Social Security and Medicare payroll taxes (FICA) are increased by eliminating the current cap of about \$106,000 after which the federal government at present does not collect social security taxes from wage earners. In addition, a Medicare/Medicaid/Social Security tax is placed, for the first time, on non-wage income including capital gains, interest, rental income, and royalties. The rate is 3% of that income.
3. By 2013, all states are required to create and administer insurance pools for people who do not qualify for Medicaid or Medicare or who cannot obtain insurance at reasonable rates due to their high risk or for other reasons enumerated in the statute. The insurance pools are to be funded primarily through the federal government by a tax on all health insurers. The proceeds from the tax will be distributed to the states to administer and fund the health insurance pools at a level sufficient to fund 80% of the costs necessary to provide a base level of insurance. States are required to fund the remaining 20%.

You are a 2011 summer intern with a law firm that represents the Health Insurance Group (HIG), a single company providing health insurance. A partner has asked you:

- (A) To assess the constitutionality of each provision of the law summarized above; and

(B) To advise her whether there are any constitutional or prudential procedural bars to HIG suing now to stop the law or any portions of it from coming into effect.

DO NOT consider claims of individual liberty, privacy, equal protection, etc.

Even if you consider one issue to be dispositive, consider other constitutional aspects as well.

**Question 2. 60 points. Estimated time: 45 minutes.**

The State of Michsylvania is bordered by two of the Great Lakes. Its main port is Misago. Michsylvania recently passed a law that requires all ships that bring in goods to be inspected by Michsylvania inspectors to insure that the ships are in compliance with all federal statutes and regulations regarding ship safety and conditions for storage of goods, especially foodstuffs (e.g., refrigeration).

Michsylvania law also requires that all ships not dump their ballast (water taken on to keep the ship safely balanced, especially as it offloads cargo) and not dump refuse (e.g., ordinary garbage generated from normal living for days or weeks at sea) in state waters (within 3 miles of shore), and especially not in the harbor of Misago.

Assume that in 1975 the United States became a party to a treaty (1) which explicitly permits dumping refuse in the high seas (international areas outside of territorial waters), and (2) prohibits countries from banning the dumping of ballast in territorial waters. When the Senate ratified the treaty, it explicitly stated the treaty was not self-executing, meaning for purposes of this exam, no one received rights enforceable within the U.S. court system merely by USA ratification of the treaty and Congress would need to pass implementing legislation to give such rights.

Assume that in 1990 Congress enacted a law that bans ships from dumping refuse in U.S. territorial waters (assume the U.S. territorial waters includes all of the state waters, including the Misago harbor). However, assume that the federal law is silent about dumping ballast.

The State of Michsylvania has sued the good ship *Inara* (under admiralty law one often sues the ship itself), a Liberian-flagged freighter (i.e., not a U.S.-flagged ship), accusing it of dumping both ballast and refuse into the Misago harbor in violation of state and federal law and seeking damages and fines for that activity.

*Inara* defends asserting (1) that the State of Michsylvania cannot regulate *Inara's* activities in navigable waters because only the federal government has the power to do so, and (2) that the state law is preempted by federal law which, *Inara* claims, includes the treaty which *Inara* interprets as prohibiting the United States from prohibiting ships from dumping refuse and ballast in territorial waters. (The harbor constitutes "navigable waters" for these purposes.)

Please address only *Inara's* first defense to Michsylvania's attempt to fine it for dumping ballast and refuse into the Misago harbor.

**End of Exam**