

Assignments: Write a detailed, properly-cited analysis of the constitutional questions posed by each of the following three hypothetical cases. Each one should be between 6 and 14 double-spaced pages of text, not including the cover or works cited pages. The due dates for the three cases are Sept 28 for Question 1, October 26 for Question 2, and November 30 for Question 3. Refer to the texts and assigned cases from POLI 5302 (see syllabus), but feel free to bring in additional sources and cases as needed.

**Question # 1: *California v. MacKinnon* (Evaluating a Federal Antipornography Statute)**

**Facts of the Case**

Suppose that the following law is passed by Congress and then signed into law by the President:

**Equal Protection Enforcement Act of 2018**

**Section 1. Findings of Congress.**

1. Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women. The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment.
2. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, injury and degradation such as rape and battery; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the First and Fourteenth Amendments.

**Section 2. Definitions.**

1. "Pornography" means the graphic, sexually explicit subordination of women through pictures and/or words that also includes one or more of the following:
  - a. women are presented dehumanized as sexual objects, things or commodities; or
  - b. women are presented as sexual objects who enjoy humiliation or pain; or
  - c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault.
2. The use of men, children, or transsexuals in the place of women in the above definition is also pornography for purposes of this law.

**Section 3. Criminal Offense.**

1. Coercion into pornography. It shall be a felony offense to coerce, intimidate, or fraudulently induce (hereafter, "coerce") any person into performing for pornography.
2. Proof of one or more of the following facts or conditions shall not, without more, preclude a finding of coercion:
  - a. that the person knew that the purpose of the acts or events was to make pornography; or
  - b. that the person showed no resistance or appeared to cooperate actively in the photographic sessions or events that produced the pornography; or
  - c. that the person signed a contract, or made statements affirming a willingness to cooperate in the production of the pornography; or

- d. that no physical force, threats, or weapons were used in the making of the pornography; or
  - e. that the person was paid or otherwise compensated.
3. The sentencing range for this crime shall be not less than 5 years nor more than 10 years in prison, forfeiture of all illicit financial or other material gains, and restitution to the victim of the crime.

#### **Section 4. Causes of Civil Action.**

Congress hereby permits victims of the following torts to bring civil claims for damages and injunctive relief in federal court:

1. Coercion into pornography. The maker(s), seller(s), exhibitor(s) and/or distributor(s) of said pornography may be sued for damages and for an injunction, including to eliminate the product(s) of the performance(s) from the public view.
2. Forcing pornography on a person. It is sex discrimination to force pornography on a person in any place of employment, education, home, or any public place. Complaints may be brought only against the perpetrator of the force and/or the entity or institution responsible for the force.
3. Assault or physical attack due to pornography. It is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography. Complaints may be brought against the perpetrator of the assault or attack, and/or against the maker(s), distributor(s), seller(s), and/or exhibitor(s) of the specific pornography.

**Section 5. Severability.** Should any part(s) of this law be found legally invalid, the remaining part(s) remain valid.

#### **Appellants:**

1. The State of California, which argues that the statute amounts to a ban on intra-state commerce and an area traditionally regulated by the states in excess of the powers delegated to Congress under the Commerce Clause.
2. Filthy Productions, which lost a suit by a woman victimized by a man who had just watched the pornography produced by the company. It argues that Section 4, subsection 3 of the statute unconstitutionally abridges the freedom of speech guaranteed by the First Amendment.
3. Jane Doe, who wishes to make pornographic films for private viewing and argues that her rights to privacy and free speech are being violated by the ordinance.
4. Paul Little, who was sentenced as a repeat offender to 10 years in prison for producing a pornographic film as defined by Section 1a, in violation of Section 3, despite the fact that the actresses involved were all adults who signed contracts under no physical duress and were compensated for their performances. He argues that the statute is void under the First (speech) and Fifth (substantive due process of law) Amendments.

**Respondent:** Attorney General Catharine MacKinnon defends the statute on behalf of all respondents. She argues that the statute is within Congressional powers to regulate commerce, to enforce the 13<sup>th</sup> Amendment prohibiting involuntary servitude, to enforce the 14<sup>th</sup> Amendment's guarantee of equal protection of the laws, and to serve the compelling state interests of reducing the harms named in Section 1 of the bill.

#### **Question(s)**

Which appeals, if any, should succeed – and on what grounds? Conclude by summarizing what is left of the statute after any unconstitutional provisions are voided.

## Question # 2: The North Carolina Orgy Cases (*Meese v. Johnson* and *Doe v. Clevername*)

### Facts of the Cases

While scanning for a fugitive on the run, a municipal police helicopter equipped with an infrared camera passes over a small building. The infrared camera briefly reveals what appears to be a crowd within the building, a potential fire code violation. Aided by the helicopter, the police soon locate the fugitive several blocks away. After the fugitive is apprehended, the helicopter returns to the small building and hovers over it, revealing the heat signatures of several dozen people inside. Suspecting that a “rave” was in progress and that illicit drugs might be present, the police decide to immediately enter the (locked) building, breaking down the door.

Oh, dear – they weren’t dancing. The police have just interrupted a massive orgy. The only drugs located are lawful prescriptions for Viagra. Nevertheless, in the belief that an 1850 state law against “unnatural” sexual relations prohibits sex between more than two people, ranking Officer Clevername orders everyone to get dressed and arrests them. The incident immediately makes the news, the names and mugshots of those arrested are released, and the arrestees are briefly detained as potential sexual offenders before most post bond. The state judge in the case rules the statute to be unconstitutional given the reasoning of *Lawrence v. Texas* and dismisses the charges before trial, but many participants’ reputations are ruined.

The prosecution appeals the court’s dismissal, arguing that as applied to orgies, the statute prohibiting “unnatural carnal copulation” remains constitutional. It has lost in the lower courts, and appeals to the Supreme Court. Meanwhile, the arrestees have sued the officers involved, alleging that the infrared search of the building was unconstitutional, that the police failed to knock and announce their presence, and that any reasonable officer should have known that the 1850 statute was no longer valid law after *Griswold v. Connecticut*, *Lawrence v. Texas*, and other right-to-privacy decisions. They seek damages from violation of these of their rights, including but not limited to the damage the entire incident inflicted on their reputations. Lower courts have provided all officers involved with qualified immunity.

### Appellants and Respondents

In *Meese v. Johnson*, the Attorney-General of North Carolina (Meese) defends the 1850 statute as constitutional when applied to orgies, noting that recent court decisions in two other Circuits have upheld these statutes as applied to situations involving more than two persons. Arrestees Johnson and others challenge the statute as a violation of the right of privacy, as unconstitutionally vague, and as a restriction on their First Amendment association and expressive freedoms.

In *Doe v. Clevername*, the plaintiffs appeal the decision of lower courts to grant qualified immunity to all officers involved. They also urge the court to overrule its earlier decisions on qualified immunity, contending that 42 USC Section 1983 of the 1871 Ku Klux Klan Act *was* intended to overturn earlier common law immunities enjoyed by law enforcement personnel.

### Questions

1. Is the 1850 North Carolina statute constitutional?
2. Assuming the Court does find the statute constitutional, would the evidence obtained by the police be admissible at trial or would the exclusionary rule apply?
3. Can the officer directing the helicopter be sued under the doctrine of qualified immunity?
4. Can Officer Clevername be sued under the doctrine of qualified immunity?
5. Should the Court overrule one or more of its earlier decisions on qualified immunity?

**Question # 3:** *Blumenthal et al v. Trump* (a case that has yet to reach the discovery phase, let alone trial)

**Facts of the Case (Plaintiff's Version)**

Because President Trump has failed to seek and obtain the consent of Congress before allegedly accepting benefits from foreign states (required under the Emoluments Clause), Senator Richard Blumenthal (D-CT) and 200 other Members of Congress are asking the United States District Court for the District of Columbia to compel the President to comply with the Constitution.

Plaintiffs allege that Trump has violated the Clause in at least three respects:

*Foreign States Giving Regulatory Benefits to Trump Organizations*

Since Trump became President, the Chinese government has approved 40 new trademarks to Trump and his companies. Circumstances suggest that these trademarks were approved or expedited as a result of Trump's status as President of the United States; the director of a Hong Kong intellectual property consultancy, for instance, "said he had never seen so many applications approved so expeditiously," and the approvals closely followed Trump's abrupt decision to honor the one-China policy, in contrast to his earlier statements.

*Foreign States Paying for Rooms and Events at Trump Hotels*

In January and February 2017, a lobbying firm working for Saudi Arabia paid for rooms at Trump International Hotel Washington, D.C., payments that were funded by the Saudi government. [Politico, Feb. 9, 2017]

On February 25, 2017, the Embassy of Kuwait held its National Day Celebration at Trump's Washington, D.C. hotel. The estimated price of the celebration was between \$40,000 and \$60,000. [Reuters, Feb. 27, 2017]

*Foreign-Owned Entities Paying for Space in Trump Tower*

These include the Industrial and Commercial Bank of China, which is owned by China and the Abu Dhabi Tourism & Culture Authority, which is owned by the United Arab Emirates.

In addition to the alleged emoluments that have been publicly reported, there are almost certainly many more that are not yet known about — that, in fact, it is impossible to know about absent judicial process to compel Trump to provide information about his businesses and the benefits he has received from foreign states.

**Questions**

- (1) Do the plaintiffs have standing to challenge President Trump's alleged violations of the Emoluments Clause?
- (2) Under the Court's political question doctrine, does this case represent a purely political question exclusively vested in Congress and the Executive Branch?
- (3) Do President Trump's alleged actions actually constitute violations of the Emoluments Clause?
- (4) What remedy, if any, should this Court adopt if it does find standing and jurisdiction and President Trump is found to be in violation of the Emoluments Clause?