
HOWARD UNIVERSITY SCHOOL OF LAW
CONSTITUTIONAL LAW II SECTION I

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Fall 2014 Final Exam Instructions

December 12, 2014

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 does not do so in a strict one-to-one fashion.
3. The exam is three (3) pages long, excluding this instructions page.
4. There are three (3) questions worth 60 points, 60 points, and 40 points respectively, for a total of 160 possible points.
5. If you are not typing your exam, write legibly and clearly in blue or black ink.
6. Use substantive 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 or more of the hypothetical problems discussed or distributed during the semester, the call of the question may be different and the facts may 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.
8. One or more of the issues or sub-issues may have a clear answer. For such items you should provide a brief explanation that is sufficiently complete such 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 analogizing to other cases and the use of relevant policies and principles are particularly appropriate to discuss.

Permissible exam materials

The exam is closed book. No materials other than the exam itself, blank scratch paper, the laptop with the exam software, and (for those not using the exam software) bluebooks are allowed.

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Question 1. 60 points. Estimated time: 60 minutes.

Assume the University of Georgia (which is owned and run by the State of Georgia) expelled a white student, Mark Macon, for displaying the battle flag of the Confederacy outside his window whenever the Georgia football team was playing.

Georgia had a student code of conduct that prohibited hate speech and which defined hate speech as follows:

“Hate speech” is (a) any speech that denigrates any person or group based upon that person or group’s race, gender, ethnicity, religion, or sexual orientation; or (b) any display or other communication of racially or ethnically divisive symbols.

Macon argues that the displaying the flag was an expression of pride in the school, pride in his southern heritage, and pride in his state’s traditions.

The school argues that regardless of Macon’s subjective intent, the battle flag of the Confederacy communicates to many students racial hatred and contempt and that therefore it qualifies as hate speech under the rule. The school notes that the purpose of the school is education, including teaching students tolerance for others and others’ points of view as well as understanding that one’s own speech should be moderated in public in civil society as a matter of courtesy in many social and community settings.

For about two years before Macon was expelled, the school had experienced many instances of racial confrontation among individual and groups of students. Many of the incidents had been sparked by displays of confederate symbols or by graffiti paintings of swastikas and “KKK” near or on doors of African American and Jewish students and at other places around campus. In response to these incidents and others, the university adopted the anti-hate speech code.

Macon has sued claiming (1) that the policy on its face is unconstitutional and (2) that the policy as applied to him is

unconstitutional. Your judge has asked you, her new law clerk, to analyze the problem and recommend a disposition. Be sure to explain your reasoning fully. Do not consider any potential procedural due process issues.

Question 2. 60 points. Estimated time: 50 minutes.

The city of Migray in the state of Shun was confronted with a problem in the shape of legal immigrants from the country of Shigala. The Shigala people had been displaced from their homes by war in their native land. Part of the solution to the refugee problem caused by their displacement was relocation in various cities around the world, including Migray, Shun, U.S.A. All of the Shigala had arrived in Migray during the previous two years as a result of the humanitarian relocation.

Most of the Shigala students did not speak English and so were tracked into an English as Second Language (ESL) program. As part of that program students were given extra instruction in courses in their native language, Shiga, until they achieved proficiency in English at which time they were to be mainstreamed. After mainstreaming, the Shigala students would continue to receive special support in the form of bilingual tutors for all of their subjects for as long as needed.

Wanna Gettin complained to the school authorities that this extra support was unfair since similar support at school expense was not available to her and to other ordinary students like her. The school explained that the school provided the special programs only to the Shigala because the school had limited resources. The school also explained that the Shigala needed the help more because of cultural dislocation as well as language difficulties. Accordingly, the school made the judgment that getting everyone to have an opportunity for an education was a compelling interest and that this was the only way to do it, given the handicaps the Shigala immigrants faced in language and culture.

Wanna Gettin responded saying, "I'm disadvantaged too! I come from a poor family with both parents gone most of the time working two jobs to make ends meet. Why don't you care about me!" Gettin and other students in her economic class (family income in the bottom 20% of the population of the city of Migray) were disproportionately underperforming in terms of getting lower grades than the general student body. Not all economically

disadvantaged students performed poorly or below the school average, but Gettin was performing poorly as were about 80% of such students.

Consider the likelihood of Wanna Gettin prevailing in a suit against the school board in which lawsuit Gettin claims her constitutional rights have been violated. Do not discuss any possible justiciability issues; assume Getting has standing and the school board is a proper defendant.

Question 3. 40 points. Estimated time: 40 minutes.

Consider the reasoning used by the court in the case of *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (Jamar/Francois Chapter 16, *Freedom of Association*, pp. 22-31 (2014)) from the perspectives of both formalism and functionalism.

End of Exam