

Final Examination In  
CONSTITUTIONAL LAW II  
(Course No. 6380-20; 3 credits)

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Instructions:

1. Time. The period for taking this examination begins on April 27, 2021 at 6:30 p.m. (EDT) and ends on April 28, 2021 at 6:30 p.m. (EDT). You may choose when to begin the examination during this period but you must submit your answers within three hours after beginning it and before the period ends.
2. Word limit. Your answers may not exceed a total of 4500 words.
3. Weight of the problems. The examination consists of 5 problems of equal weight (i.e., 20 percent each). Each problem includes several specific questions. Points will be allocated among the questions within a problem according to their difficulty.
4. Use of Outside Materials. This is an open-book examination. In completing the examination, you may use any materials.
5. Ambiguities. You should make reasonable assumptions about any facts not stated in the problems. If you find aspects of the problems ambiguous, describe the ambiguity in your answer, and explain why the ambiguity matters.
6. Grading criteria. Answers will be evaluated based on how well they: (a) identify the constitutional doctrines at issue; (b) present and discuss reasonable arguments and counter arguments about the application of these doctrines to the specific facts of the problems (with special emphasis on comparing the facts of the problems to the precedents considered in the course); and (c) provide supporting explanations and examples as appropriate.
7. Retention of the Examination. You may keep this copy of the examination but you may not share it or discuss it with anyone until after the examination period is over.

Good luck!

**PROBLEM I.****(20 percent)**

The following edited excerpt comes from Gustavo Solis, Coronado Replaces Church Directory Display, San Diego Union-Tribune, Mar. 3, 2019:

More than a year after Coronado was threatened with possible legal action, the city on Friday replaced a church directory sign that had been displayed on public property for decades. The directory, which prominently featured names of 10 Christian churches in Spreckles Park, was replaced with a larger sign that lists the same churches alongside civic organizations, such as the Rotary Club and Girl Scouts San Diego, and at least one non-Christian group, Chabad of Coronado.

Coronado decided to remove the sign after getting a letter from the Freedom From Religion Foundation. The group has sued multiple cities for having religious displays on public property. The letter stated that the public church directory "raises serious constitutional concerns." [A Coronado resident who also complained about the sign] told the Union-Tribune that he never pushed for the sign to be removed and would have been happy if the city simply made the sign more inclusive by removing the word "church."

The city first tried to have another organization take the sign. The Coronado Resurrection Lutheran Church and the Masonic Lodge No. 441 both declined. With no place to call home, the city paid a design firm \$6,900 to come up with a new sign that features 36 different organizations.

On the basis of this excerpt, answer the following questions and thoroughly explain your answers:

- A. Was Coronado's display of the original church directory sign unconstitutional?
- B. To what extent would removing the word "church" from the directory or having a private organization take the directory have addressed possible constitutional concerns?
- C. Did including a non-Christian group in the new directory have any constitutional significance?

**PROBLEM II.****(20 percent)**

The following edited excerpt comes from Oralandar Brand-Williams, Freed Prisoner's Sons Sue Detroit, Detroit News, Apr. 6, 2021:

The sons of a Detroit man who spent three decades behind prison walls for a slaying in which he was wrongfully convicted have filed a federal lawsuit against a Detroit police officer and the city of Detroit.

The men are the children of Danny Burton, who was exonerated in December 2019 for the 1987 slaying of 20-year-old Leonard Ruffin. The key witnesses who testified at Burton's trial subsequently provided affidavits recanting their trial testimony and stating that they gave false statements at trial because of threats and intimidation by [a Detroit police officer], according to the lawsuit.

Burton's attorney said the sons' lawsuit is novel. "Children have a substantive due process right to be with their parents," he said. "In this case, the father was torn away from the children. The children were forced to grow up without their father. The father was labeled a murderer and he didn't kill anybody."

On the basis of this excerpt, answer the following questions and thoroughly explain your answers:

- A. What arguments, based on precedent, should the parties make regarding the existence or non-existence of a substantive due process right of the kind asserted?
- B. What arguments, based on precedent, should the parties make regarding the level of generality at which the asserted substantive due process right should be defined?
- C. To protect the asserted substantive due process right, could Congress use its power under Section 5 of the Fourteenth Amendment to enact legislation aimed at preventing false testimony in state courts?

**PROBLEM III.****(20 percent)**

The following edited excerpt comes from Rick Karlin, Who Should Pay for Recycling?, Times Union, Mar. 27, 2021:

Under the [proposed] Extended Producers Responsibility Act, companies that produce waste packaging, such as food processors, clothing retailers or others would have to help municipalities pay part of the cost of recycling those wrappings. Local recycling programs, either through municipal governments or contractors, are perpetual money losers that have grown more costly in recent years due to cutbacks in the waste that goes to China for re-purposing.

Newspaper and magazine publishers would be impacted, since their products are viewed as recyclable for the purposes of this bill. Members of that industry were loudly protesting this week, saying it would hit them in an era of shrinking circulations and declining revenues. Some publishers have calculated that the recycling payments could cost them hundreds of thousands of dollars or maybe even millions per year. That, they feared, could kill off some of the state's smallest local papers or force layoffs at others.

Senate Sponsor Todd Kaminsky said he is continuing to develop ideas for newspapers to be in the program without it being so costly. One possibility outlined in the legislation would be to allow newspapers to give ad space to help publicize and explain municipal recycling programs rather than having them pay a fee. But [Diane Kennedy, president of the New York News Publishers Association] noted that raises First Amendment issues.

On the basis of this excerpt, answer the following questions and thoroughly explain your answers:

- A. Does the possibility that the Act might drive magazines and newspapers out of business affect its constitutionality?
- B. Could the legislature require newspapers to give ad space to help publicize and explain municipal recycling programs?
- C. Could the legislature exempt some newspapers and magazines, but not others, from the requirements of the Act?

**PROBLEM IV.****(20 percent)**

The following edited excerpt comes from Erin Beck, Session Is Over. Here's What Passed, What Didn't, The Register-Herald, Apr. 13, 2021:

In response to President Biden's announcement Thursday that he would pursue executive action on gun control, West Virginia lawmakers amended [a bill] to expressly prohibit West Virginia police officers from enforcing those executive actions and other federal guns laws that aren't in state law.

After mass shootings in Georgia and Colorado, Biden instructed the Justice Department to create a template that states can use to enact "red flag laws," which allow courts to order guns be seized from those deemed a threat to themselves or others.

As amended, the bill now states "red flag" laws are "an anathema to law-abiding West Virginians, who cherish their natural rights and liberties which are guarded by both the Constitution of the United States and the West Virginia Constitution." The legislation says no court in the state may issue an order to seize firearms under any "red flag" law.

Such laws may reduce suicide risk, and are supported by most Americans, according to surveys. Critics have raised objections about due process. In West Virginia's bill, a red flag law is defined as "a law under which a person may petition for a court to temporarily take away another person's right to possess a firearm which it is otherwise lawful under the law of West Virginia for the respondent to possess."

On the basis of this excerpt, answer the following questions and thoroughly explain your answers:

- A. How might red flag laws violate substantive "rights and liberties which are guarded by . . . the Constitution of the United States"?
- B. How might red flag laws violate due process?
- C. Do the facts that red flag laws (1) may reduce suicide risk, and (2) are supported by most Americans, affect an analysis of their constitutionality?

**PROBLEM V.****(20 percent)**

The following edited excerpt comes from Mateusz Perkowski, Oregon Irrigators Fear Legislation Would Erode Due Process, Capital Press, Feb. 19, 2021:

Irrigators would no longer be able to automatically block certain water shut-offs under a bill that Oregon farm groups claim would endanger due process rights. Under the "automatic stay" provision of [current] Oregon water law, an irrigator can file a lawsuit to immediately stop the enforcement of a government order against pumping or diverting water. House Bill 2244 would prevent irrigators from invoking the automatic stay against shut-offs specifically intended to preserve in-stream water rights owned by tribal governments and state agencies.

Proponents argue that HB 2244 makes a nuanced change to the automatic stay provision rather than eliminating it altogether, but opponents say it simply creates unfair preferences for specific types of water rights holders. The bill's supporters say revising the automatic stay process is necessary to correct the injustice suffered by the Klamath Tribes, who've been prevented from enforcing their water rights by the provision. Ed Goodman, attorney for the Klamath Tribes, said Oregon's automatic stay provision is an anomaly that turns due process on its head, since senior water rights holders aren't even notified that their enforcement action has been blocked.

Defenders of the automatic stay provision counter that it ensures irrigators have a chance to challenge potentially incorrect enforcement orders before they can take a steep economic toll.

On the basis of this excerpt, answer the following questions and thoroughly explain your answers:

- A. Do the allegedly "unfair preferences for specific types of water rights holders" make the bill unconstitutional?
- B. Can Oregon limit the amount of money that individual and corporate proponents and opponents of HB 2244 can spend in efforts to support or defeat its enactment?
- C. Does the proposed "nuanced change" eliminate the alleged due process problems? Might other changes address them better?

END OF EXAMINATION

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This examination quotes lengthy excerpts from recent news articles to ensure that the problems are current and realistic. Please note that words, sentences, and paragraphs were omitted from the quotations without indication by ellipses. Text appearing in brackets was added to the quotations for clarification or other purposes. The facts stated by the authors of the articles are not necessarily true.