

## FINAL EXAMINATION

CONSTITUTIONAL LAW-II  
Section M  
PROFESSOR KOBIL

SPRING, 1990

Page 1 of 6

TIME: THREE HOURS

### GENERAL INSTRUCTIONS:

1. Be sure that your examination number appears on all bluebooks which you use.
2. Please do not use pencil to write the examination. If you use a felt-tip or fountain pen, please write only on one side of each sheet of paper in the bluebook.
3. Leave a margin on the left-hand side of each page for me to use in grading.
4. Do not take the bluebooks or the examination copy out of the room in which you are writing.
5. When you are finished with the examination, please place your bluebooks on the instructor's table at the front of the room announced at the beginning of the examination. If you use more than one bluebook, place one inside the other and number each bluebook. Sign the sheet provided indicating you have turned in your examination.

### SPECIFIC INSTRUCTIONS:

1. Do not assume facts not given, and do not change the facts. For example, do not assume the existence of statutes unless they are referred to in the question. However, if you are convinced that a question cannot be answered completely without making certain assumptions, please state clearly the nature of any assumptions on which you are relying.
2. There are six questions on the examination, which are weighted unequally. You therefore are advised to budget your time according to the weight given to each question.
3. In the first two questions, the facts are cumulative; e.g., in discussing the issue or issues raised in Question 2, it may be necessary to refer to the facts given in Question 1.
4. Discuss each issue fairly raised by a fact pattern, even if your conclusion on one issue within the fact pattern seems to make discussion of another issue unnecessary. For example, if you conclude that the requisite state action to support a constitutional claim is lacking, it would nevertheless be prudent to discuss the merits of the substantive issue raised by the fact pattern.
5. In answering all of the questions, please discuss each issue raised by the question separately. Complete in full your discussion of one issue before discussing another issue.
6. **ADHERE TO THE PAGE LIMITATION ESTABLISHED AT THE BEGINNING OF EACH QUESTION.** A "page," as I define that term, is one side of a leaf of a bluebook, leaving customary margins at the left and top of each page. Number the pages of your bluebook before beginning to answer each question to assure that you do not exceed the limitation. **I WILL READ NO FURTHER THAN THE STATED PAGE LIMIT.**
7. Once the ordeal of exams is behind you, have a great summer.

SHORT ESSAYS (ONE PAGE LIMIT PER ESSAY: 10 POINTS PER ESSAY)

1. Walker Overton was incensed by the Petty City Police Department's policy of regularly ticketing pedestrians for crossing city thoroughfares at places other than the legal crosswalks. It's ridiculous, he believed, for the city's finest to be wasting their time ticketing jaywalkers when there were plenty of more serious crimes with which the police should be concerned.

One day on his lunch hour, Walker rented a bullhorn and began an impromptu harangue directed at the luncheon crowd of lawyers and office workers who were lunching at a downtown park. In the course of his diatribe, Walker argued that the policy branded Petty City as a "cowtown" and asserted that the mayor and the chief of police "evidently have cow pies for brains.

As Walker spoke, a crowd gathered around him, including several police officers. A few members of the crowd heckled him, calling him a "malcontent" and a "Communist-subversive-pinko-liberal-nutpuck," though most of the listeners seemed to approve of the sentiments he expressed. Toward the end of his speech, Walker told his audience that the best way to protest enforcement of the jaywalking laws was to flood the city with violations.

Motioning toward a four-lane street which ran alongside the park, Walker exhorted his "brother and sister pedestrians" to walk across Rhodes Road now and let them arrest us all." At that point, Walker strode purposefully toward the street and was followed by several members of the crowd of listeners. Before Walker could cross the street, he was arrested by two police officers and charged with violating P.R.C. section 2923.13 which prohibits any person from "advocating . . . crime . . . as a means of accomplishing industrial, economic, or political reform." Walker may be fined up to \$1,000, and sentenced to one to ten years in jail for violating the statute. The penalty for jaywalking is a \$50 fine for the first offense and \$100 for each subsequent violation.

PLEASE DISCUSS THE CONSTITUTIONAL ISSUES RAISED BY THESE FACTS.

2. The facts set forth in the preceding question are incorporated by reference. Please assume, in addition, the following facts.

One of the police officers who arrested Walker was Hiram Snood. Snood was a social acquaintance of Walker's and was widely rumored to have made a cuckold of Walker by fooling around with Walker's wife, Faith.

Shortly after Walker was arrested, a reporter from the Daily Sneer interviewed him. Walker, still incensed over his arrest, told the reporter that Officer Snood was an "adulterous fascist" and was a "member of the Klu Klux Klan." He also said that the Mayor was "an incompetent boob who is making a national laughing-stock of Petty City." Walker did not know whether his statements were true but in the heat of the moment, it sure felt good to say them. In truth, Walker's factual allegations were not accurate. The reporter called the mayor's office for a comment, but was given neither an interview or a statement from the mayor.

Assuming that the Daily Sneer publishes Walker's statements, what federal constitutional issues would arise if the mayor and Snood sued the newspaper for libel, and how would those issues probably be resolved?

3. As a result of the growing number of traffic fatalities caused by alcohol consumption, as well as extensive findings about the other societal costs related to alcohol, the legislature of the State of Abstinence banned all consumption of the drug. The sale, possession, or consumption of alcohol was deemed a criminal offense, punishable by a fine of no more than \$5,000, and imprisonment of up to two years.

Shortly after the new law banning alcohol went into effect, Father Tip O'Few, a Catholic priest serving the largest parish in Abstinence, was arrested for possessing and consuming wine as part of a church service he was conducting. It is a well established tenet of the Catholic faith that small amounts of wine and unleavened bread must be consumed at each Mass in remembrance of the Lord's supper by those who wish to be in communion with God. There is no question that Father O'Few's religious beliefs are sincerely held.

Please discuss whether the law prohibiting the possession and consumption of alcohol is constitutional as applied to Father O'Few.

4. The legislature of the State of Bliss employs a chaplain for the primary purpose of opening each legislative day with a prayer. The prayer typically amounts to a request that God assist the legislators in carrying out their tasks with dispatch and integrity. The current chaplain, who is Baptist like most of the population of Bliss, has occupied the position of legislative chaplain for the past sixteen years. The legislature's practice of employing a chaplain dates back to 1824, when Bliss was admitted to the union as a state.

Please analyze the constitutionality of the state practice outlined in the preceding paragraph.

5. The Ames Board of Education (Ames is a political subdivision of the State of Ignorance) was concerned about the racial composition of its teaching force. Consequently, it conducted an extensive-investigation into past hiring and promotion decisions, and concluded that previous school administrations had engaged in racially discriminatory employment practices. As a result of these practices, about 95% of the teachers in the Ames city public schools were white.

The Board adopted a policy intended to remedy the past discrimination. First, the Board stated that until the racial composition of the teaching force mirrored, to within three percentage points, the racial composition of the general population of Ames, 50% of all new teachers hired would come from minority races. Second, the Board decided that if layoffs were required in the future, such layoffs would be accomplished based strictly on seniority. However, if laid-off teachers were recalled to work, minority teachers would be the first teachers called back, regardless of seniority.

Please discuss the constitutional issues raised by the Board's new employment policy.

#### 11. LONGER ESSAY (4 PAGE LIMIT. 50 POINTS)

The legislature of the State of Liberal, in response to an increase in the number of racial incidents, passed the Ethnic Intimidation Act of 1990 ("the Act"). The Act provides an enhancement of the penalty imposed on someone who commits the crime of "menacing," for racially-inspired reasons. The crime of menacing is defined under the Act as follows:

No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such person or member of his immediate family. Whoever

violates this section is guilty of "menacing".

The official comments to the menacing statute which were adopted by the legislature, state:

The offender need not be able to carry out his threat, or even believe himself capable of carrying it out. It is sufficient if the offender knowingly causes the victim to believe that the offender will carry his threat into execution. The rationale for this is that regardless of whether the offender is bluffing or in earnest, the victim may be impelled to violence to counter what he believes to be a real threat. If the victim of a threat is not in fact intimidated, the offender's conduct would constitute attempted menacing, if his purpose was to intimidate.

Menacing is punishable by up to one year in prison. The Act goes on to provide that if any person commits the crime of menacing for racial reasons, the penalty is increased to imprisonment for up to three years. The Act provides:

No person shall (commit the crime of menacing as defined above) by reason of the race, color, religion, or national origin of another person or group of persons. Whoever violates this section is guilty of "ethnic intimidation".

One day, shortly after you have passed the Bar Examination, you are asked to defend Charles Barkley, a black youth who is being charged with menacing and ethnic intimidation. It seems that Charles was engaged in a pick-up basketball game with several other young men, both black and white, at a local park.

The game became very heated, and shoving and shouting broke out between the players. In the course of the altercation, Charles yelled at one of his opponents, a white player named Bill Lambieer, "I'm going to kick your white ass, and bust the windows out of your Yugo." According to witnesses, he raised his fist at Lambieer, who jumped into his automobile and sped off (to the extent that his automobile could accomplish such a feat). The prosecutor intends to offer evidence that Charles' actions were racially motivated. He will produce witnesses who will testify that Charles has gotten into fights with other white basketball players at the same park, and that he once said, "Let's run all the honkies off of this court."

Please discuss the constitutional issues raised by these facts and indicate how these issues will probably be resolved.

## APPENDIX - Page I

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Amendment II

A well regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

#### Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in a Court of the United States, than according to the rules of the common law.

#### Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

#### Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

#### Amendment X

Any powers not delegated to the United States by the Constitution, nor prohibited by it to States, are reserved to the States respectively or to the people.

#### Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

## Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

## Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## APPENDIX - Page 2 Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.- Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.