

Constitutional Law

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Wednesday, April 23, 2014
2 p.m. – 5 p.m.

“I ♥ Honor Code” acknowledgment

I acknowledge that in this, as in all other law school activities, I am bound by the Professional Conduct Code.

“Sign” with your exam number:

This exam is 4 pages long (including this cover sheet) and has three parts, each equally weighted.

You have 3 hours.

The “suggested” time of 1 hour marked for each part is merely the result of mechanically dividing 3 hours by three, and doesn’t necessarily reflect how much time you should actually spend on each part.

The first two sections of the exam are issue-spotters. You’re rewarded for being broad and shallow, so try and hit as many issues as possible. Even if you think a particular argument is dispositive, continue to analyze the issue as though you may be wrong. That means you should err on the side of discussing even losing arguments if they’re even a bit plausible.

You may use any printed materials (books, notes, outlines) but no electronic materials (computers, cell phones, iPods). Remember to check “Blocked” in the exam software.

You shouldn’t need to hand anything in aside from your electronic exam. But if you do want to draw a chart, a graph, a picture, or anything else, you may do so in a Bluebook. Either hand it in to the professor when you leave or, if the professor isn’t available, follow the instructions on the red cover sheet of the Bluebook.

Please return these exam questions, together with anything else you may be handing in, when you leave. (You don’t need to write anything on these pages except your exam number above.)

Question 1 (1/3, 1 hour)

For the last decade, the state of Gambrell has been charging all couples \$100 for marriage licenses. This turned out to be insufficient to finance the administrative business of the state marriage license office, and the people of Gambrell didn't want to dip into the general fund to make up the shortfall. Also, there had recently been some instances of food poisoning at weddings catered by out-of-state caterers—perhaps because the food spent too much time riding in the truck from their out-of-state kitchens. Finally, Gambrell legislators were eager to promote Gambrell's new wine industry. Therefore, the Gambrell legislature and governor passed the Gambrell Marriage Revenue and Safety Act:

- § 1. The fee for a marriage license shall be \$100 if both parties reside in the state of Gambrell, and \$1,000 otherwise. All fees shall go to fund the operations of the state marriage license office.
- § 2. No wedding party in the state of Gambrell may be catered by any caterer whose principal place of business is outside the state of Gambrell.
- § 3. State marriage license offices may give out complimentary bottles of wine when they grant marriage licenses, but only if the wine comes from a winery based in the state of Gambrell.

National reaction to the Gambrell statute (particularly § 1) was negative. People didn't like the differences in license fees. They sympathized with the revenue need to a very limited extent, but even the low prices seemed high to them. And they also had their own ideas of what industries to favor. Congress passed the Federal Marriage Financing Uniformity Act:

- § A. Congress finds that states have a history of irrationally disfavoring its residents who seek to marry out-of-state residents. This discrimination distorts people's marriage and residence decisions and has a substantial effect on interstate commerce. [Substantial statistical support omitted.]
- § B. State officials shall grant marriage licenses to couples that include an out-of-state resident on the same terms on which they grant marriage licenses to in-state couples.
- § C. State officials shall charge no more than \$50 for each marriage license.
- § D. State officials shall hand out Chick-fil-A menus with every marriage license.

Peter Plaintiff is a Gambrell resident who owns a winery in the neighboring state of McMillan. He sues the state of Gambrell in federal court. Peter has a girlfriend living in McMillan, whom he might want to propose to at some point, and he seeks a declaratory judgment that he only owes \$50, or, in the alternative, \$100 (but not \$1,000!)—and that in any event he can use any caterer he wants. He also challenges the state's refusal (based on § 3) to buy wine from his out-of-state winery. The state also counterclaims, asserting that the whole federal statute is invalid.

How should the court rule?

Question 2 (1/3, 1 hour) — more marriage, sorry!

In the 19th century, many Mormons practiced polygamy, but U.S. popular sentiment was against the practice, and polygamists and the Mormon church were persecuted by federal authorities. A federal statute forbade polygamy in U.S. territories, and the Supreme Court upheld a prosecution under the statute against a freedom-of-religion challenge in *Reynolds v. United States* (1878). Congress refused to admit Utah as a state unless its constitution banned polygamy, and to this day, the Utah Constitution provides that “polygamous or plural marriages are forever prohibited.” The Mormon church repudiated the practice around 1900, and as of 2014, plural marriage is practiced only by a tiny splinter minority of Mormons.

In 2020, when Mitt Romney’s son Tagg was elected President, sympathy toward plural marriage surged, and many people called for an end to the “long and shameful history of discrimination against people with a plural-marriage orientation.” The governor of Utah launched an effort to remove the state constitutional prohibition; a referendum doing so passed with an overwhelming majority. The Utah legislature then enacted, and the governor signed, the Utah Marriage Law:

- § 1. A lawful marriage may be entered into by at least two and up to twelve adults. In the case of three or more persons, the proportion of females to males must be at least 2:1 (there must be two or more females for every male in the marriage).
- § 2. To qualify for a marriage license under § 1, all applicants must swear or affirm that they will consummate their marriage by physical intimate conduct (which may include opposite-sex or same-sex sexual intimacy) with at least one of their partners. Failure to consummate shall be grounds for annulling the marriage.

The state legislator who introduced this bill explained: “Why should plural marriages have multiple wives for each husband? First, this is the relationship that has suffered the most discrimination and stigma throughout our history. By validating the intimate relationship between one husband and many wives, we want to give these marriages same dignity as other marriages. Second, this arrangement promotes procreation, which is a basic purpose of marriage. A woman can only have one baby at a time, so a wife with many husbands will still have the same number of children. But one man can father many children at the same time if he has lots of wives. Finally, it is just the way things were intended to be—the husband should provide for his wives and children, and the wives should keep the home and the children.”

After the law went into effect, Polly Andry, a woman who lives in Utah, along with her five male intimate partners, sought a Utah marriage license. They were denied because they did not satisfy § 1. Polly Andry sued in federal court, challenging both sections of the law under the Fourteenth Amendment.

Assume that the U.S. Supreme Court has not addressed this issue under the Fourteenth Amendment. The Supreme Court’s 2017 decision holding state bans on same-sex marriage unconstitutional included the following footnote: “The Dissent’s argument that this decision spells the end of bans against bigamy and polygamy is noted. In *Reynolds v. United States*, this Court was not presented with—nor did it decide—any Fourteenth Amendment challenge. Thus, that case is not relevant to any future Due Process or Equal Protection challenge to such laws.” Otherwise, assume that Supreme Court precedent is as it was in 2014.

Analyze the constitutionality of the statute under Equal Protection and Due Process. Ignore any questions of standing or other aspects of constitutional law that don’t relate to the Fourteenth Amendment.

Question 3 (1/3, 1 hour)

Constitutional law scholars have long grappled with the issue of where federal judges get their authority to reverse acts of the democratically accountable political branches: Once confirmed, federal judges are politically unaccountable. Federal judges have no particular expertise in policy analysis. And the countermajoritarian rights found in the Constitution—as well as separation of powers and federalism provisions—were mostly adopted by past generations of dead, white males.

This concern goes by the name of the “countermajoritarian difficulty.”¹

What do you think about the countermajoritarian difficulty? Do you think it’s really a difficulty? Why, if at all (or under what circumstances), is judicial review appropriate? Do you agree with the way that the Supreme Court, over time, has justified its practice of judicial review?

General notes about this essay question:

The precise content and organization of this essay is up to you, but please produce an organized essay with a thesis. Concrete answers are better than abstract ones: give examples as much as possible rather than abstract generalizations. Illustrate your points by citing cases, arguments we’ve seen or talked about in class (or that you’ve encountered elsewhere), specific hypotheticals, etc.

Though you’re free to regurgitate *my* views, to the extent you know or can guess them, I would tend to find that boring; therefore, I prefer that you give *your own* independent views. You will not be penalized for disagreeing with me, as long as you defend your position cogently. Moreover, I can tell when someone’s heart isn’t really into an argument—so, while you’re not required to argue what you truly believe, I find that arguing what you believe is often a good essay-writing strategy.

¹ These arguments are particularly used in the context of *federal* judges, since state judges are often elected and stand for reelection, and state constitutions are typically much easier to change than the federal Constitution.