

MASSACHUSETTS SCHOOL OF LAW

STATE CONSTITUTIONAL LAW  
MR. CLAY

MAY 1992  
CLOSED BOOK EXAM  
7 PAGES  
6 QUESTIONS

I recommend that you read the entire examination first in order to determine what information is sought in each question, and to schedule your time. Please plan to answer each of the questions. No two questions, or parts thereof, seek the same information.

I will pay particular attention to your familiarity with the material at issue, your ability to analyze the situations presented, and your efforts to express yourself clearly and succinctly.

1. "The language of our double jeopardy clause is substantially the same as the federal double jeopardy clause. [I]t seems appropriate, in the interest of establishing a common construction for linguistically similar provisions in the two constitutions, that we hold that the standards and principles applied in this case (regarding the double jeopardy clause of the Fourteenth Amendment) have equal application in cases where only Section 22 of our Constitution has been invoked."

Sanders v. State  
429 So. 2d 245, 251-252 (Miss. 1983)

You have been asked by the editors of a law review to prepare a commentary on this portion of the opinion. Please -

- a) mention the benefits, if any, to a common construction;
- b) discuss whether and why the Sanders approach may not be an appropriate one for courts to follow as a general rule whenever provisions of the state and federal constitutions are "linguistically similar". (Note: not the same as question 4a).

OUTLINE:

2. The editors have reviewed your draft, and have asked that you expand it. Please -

- a) identify and briefly discuss each consideration (such as a difference in text) which any court could evaluate in attempting to develop an independent interpretation of a provision of its state constitution;
- b) briefly describe the models a court might use in structuring an opinion based on a provision of the state constitution;
- c) mention the advantages and disadvantages of each model;
- d) state which you recommend a court use, and why.

OUTLINE:

3. "I write separately to call attention to a problem in the majority opinion which merges without analysis the federal and state constitutional questions ...."

Durham, J. concurring in State v. Parsons,  
781 P. 2d 1275, 1286-87 (Utah, 1989)

Please discuss -

- a) Why you think the judge considered the merger to be a "problem".
- b) For whom might it be a problem?
- c) If the opinion were still in draft form and you were J. Durham, what would you recommend that the majority do about what you consider to be a "problem"?
- d) If a trial judge issued a decision containing such a "problem", would you seek to do anything about it if the decision favored your client? Why or why not?

OUTLINE:

4. In an article reproduced, in part, in the text, Prof. Williams states:

"The decisions (of the U.S. Supreme Court) should not be followed merely because of the United States Supreme Court's institutional position as the highest court in the land for the resolution of federal constitutional claims."

Please -

- a) indicate briefly whether you agree or disagree with the statement, and then explain why; (Note: not the same as question 1b).
- b) identify and evaluate criticisms of the practice of relying on state constitutional law and describe any disadvantages or dilemmas associated with the practice;
- c) discuss the reasons, pragmatic and conceptual, why you might rely on state constitutional law when representing a client.

OUTLINE:

5. The inmates of the Commonwealth's maximum security prison ask you to represent them in their effort to prevent the opening of a new disciplinary unit at the prison.

Please indicate what factors you would consider in deciding:

- a) whether to bring the action in state or federal court;
- b) whether you would do so under the state or federal Constitution, or both.

OUTLINE:

6. Philip Kurland has announced that "Federalism is dead" and has stated that "[t]here is no substantial governmental power that states can call their own."

Using only material from this course (including, but not limited to: the Supremacy Clause; U.S. Supreme Court decisions on federal-state relations; and judicial federalism), comment on his remarks.

OUTLINE:

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I will pay particular attention to your familiarity with the material at issue, your ability to analyze the situations presented, and your efforts to express yourself clearly and succinctly.

You are encouraged to supplement or illustrate your answers with specific references to, or examples from, the assigned reading, and from any independent research project (without identifying yourself by reference to "my" project).

1. A private university in Massachusetts has just adopted an allegedly "politically correct" fair speech code applicable to all students, and intended to prohibit the use of racial, sexist, or ethnic epithets; and the use of other offensive or derogatory language on campus. Some undergraduates who think that the code may not be legally correct, but who do not have much money, ask you (now admitted to the bar) to represent them in challenging the code in court. Please discuss:

a) the factors you would consider in deciding whether to bring the challenge in state or federal court, or both;

b) whether and why your decision might, or might not, be different if your clients were students at the University of Massachusetts and the code had been imposed by the Governor; and,

c) whether and why you would base your challenge on state or federal constitutional law, or both.

2. A partner in your law firm is aware of your interest in the renaissance in reliance on state constitutional law and asks that you explain:

a) whether state courts occupy a different institutional position than federal courts;

b) whether state courts might perform their judicial functions somewhat differently;

c) whether state constitutions might be different from their federal counterpart and, if so, in what ways; and,

d) what practical advice (what steps to take to "avoid traps for the unwary") would you give to members of the firm to keep in mind, from preparation of the pleadings to initiate a case through writing the brief on appeal, in order to obtain and protect a decision based on state constitutional law.

3. The Supreme Judicial Court stated, in Michaud v. Sheriff of Essex County, 390 Mass. 523, 533 (1983):

"We have never decided whether the phrase 'inflict cruel or unusual punishments' in art. 26 [of the Declaration of Rights of the Massachusetts Constitution] has the same prohibitive sweep as the phrase 'nor cruel and unusual punishments inflicted' in the Eighth Amendment." (emphasis added).

a) Please list, and discuss, every consideration (such as difference in text) which you, as a member of the Supreme Judicial Court, could review in attempting to develop an independent interpretation of art. 26 of the Declaration of Rights. Include those considerations which might not be helpful in this situation, as well as those which would be useful.

b) Please describe any models which you could use for structuring an opinion based on this provision of the Massachusetts Constitution; discuss the advantages and disadvantages of each; and, indicate which you would use, and why.

4. Now that you have identified the considerations and selected the model for structuring the interpretation referred to in the previous question, please explain your concept of what should constrain judges of state supreme courts in the exercise of the power of judicial review, so that they may contribute to developing a body of state constitutional law which is intellectually honest, theoretically sound, and which does not reflect, or appear to reflect, their personal values.

5. The renaissance in reliance on state constitutional law can be both a principled process or a result-oriented device. Please discuss:

a) the values which are promoted and threatened by this renaissance;

b) the reasons (conceptual and pragmatic) for, and the advantages to such reliance; and,

c) the disadvantages, dilemmas and risks generated by reliance.

6. Tomorrow, you and your colleagues on the United States Supreme Court will hear oral argument in a case in which the petitioners claim that the Age Discrimination in Employment Act preempts provisions of state constitutions and laws governing the tenure of state judges. You were not on the Court when it issued its prominent decisions involving abstention, its decisions in Usery and in Garcia, or its decision in Michigan v. Long. Please discuss your concept of:

a) the role, if any, of the Court in shaping and/or monitoring the relationship between the authority of Congress and that of the states; and,

b) the relationship between the Court and the state courts, as currently reflected in the doctrines of abstention and adequate and independent state grounds.