

ST. MARY'S UNIVERSITY SCHOOL OF LAW

AMERICAN LEGAL HISTORY

Professor Michael Ariens

FINAL EXAMINATION

FALL 2001

INSTRUCTIONS

1. This examination consists of one (1) page, excluding this page, and two (2) equally weighted questions. Please write your examination number on your bluebook immediately.
2. This examination must be completed within three (3) hours. If you do not hand in the examination when I inform you that the examination period is completed, I will leave without collecting your examination, and you will receive a failing grade.
3. If you identify yourself in any way in your examination, you will receive a failing grade, and you will be in violation of the Code of Student Conduct.
4. You may use your assigned or recommended texts, your notes, any outline and any other materials you believe may be helpful, except things that make noise. You must use black or blue ink when writing your answers, and your answers must be contained in one (1) sixteen (16) page bluebook, which is provided to you. You may write on every line on one side of the page, or every other line on both sides of the page. If you are typing this examination on a computer or otherwise, you are limited to no more than five (5) single-spaced pages. After you have completed typing your answers, it is your responsibility to have your examination answers *printed and returned to me* within your allotted time.
5. At the end of the examination, please return your bluebook and this cover page, both signed with your secret number, to the proctor. You may keep your examination if you wish.

I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

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QUESTION I

“One of the most curious aspects of constitutional history is the perception that nothing in constitutional law existed before *Marbury v. Madison*. In fact, the true basis for understanding the dilemma of governing in a constitutional republic (that is, given the constraints of the Constitution) is found in the seriatim opinions in *Calder v. Bull*, which both encapsulate the dilemma and prophesy the future of constitutional interpretation. This is made perfectly clear in Marshall’s opinion in *Fletcher v. Peck*, which is a final attempt to solve the dilemma of rulers and ruled in the American republic.” Discuss.

QUESTION II

“In 1906, in the Harvard Law Review, a Harvard Law Professor and legal formalist named Joseph Beale wrote, ‘The function of changing the law has never been committed by the sovereign to the judge, and consciously to make a change in the law would be a usurpation on the part of the judge.’ Two years later, Roscoe Pound, who would become Dean at Harvard in 1910, wrote an article attacking “mechanical jurisprudence.” Pound claimed that mechanical jurisprudence ‘regarded artificiality in law as an end,’ and those engaged in such a jurisprudence forgot that the purpose of law was the administration of justice. It was to be replaced by sociological jurisprudence. Sociological jurisprudence meant the following: ‘The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.’ Even so, Pound wrote, law remained scientific ‘in order to eliminate so far as may be the personal equation in judicial administration to preclude corruption and to limit the dangerous possibilities of magisterial ignorance.’ The problem is that, as Beale recognized, once you eliminated the distinction between ‘law’ and ‘judicial decisions,’ the most important criterion for determining whether something constituted law was not whether it was just, but whether it could be enforced.” Discuss.

END OF EXAM