

**UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
EXAMINATION COVER SHEET**

Student Examination Number: _____

**Law 6060-2
Constitutional Law I
Professor Matheson**

Spring Semester 2006

April 25, 2006, 8:30 a.m.

⌚ Time Allowed: Three (3) Hours and Fifteen (15) Minutes

Authorized Materials: You may use any written materials. You may not consult with other people.

Special Instructions: You will be graded on six of the seven questions. You may answer all seven questions and have your lowest score excluded, or you may choose simply to answer six questions. The six answers that determine your grade will all be weighted equally.

If your answers require additional facts, state what they are and their significance.

Do not type or write your name anywhere on this cover page, the exam, or your exam answers. Do put your exam number on your exam answers and on this page.

GENERAL INSTRUCTIONS FOR ALL EXAMS:

1. Exams do not leave the exam room! Write your exam number on your copy of the examination questions, and returned it to the proctor at the end of the exam.
2. Students may NOT take any blue books or scratch paper from the examination room, whether blank or used. Return to proctor.
3. If you are using a bluebook print your exam number, the title of the course and the instructor's name on the front of each bluebook.
4. Number each bluebook (1 of 3, 2 of 3, 3 of 3, etc.) and place all blue books and examination questions inside the first numbered bluebook.
5. If the examination utilizes a computer answer sheet (Scantron):
 - You must use **BLACK** or **BLUE INK** only; no pencils
 - You may use **CORRECTION TAPE** only; no liquid paper
 - Print your examination number in the box found in the lower left-hand section of the form. Write the number in the first 4 spaces, and zero-fill any remaining spaces.

For example, if your examination number is 2983:

IDENTIFICATION NUMBER

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Fill in the bubbles corresponding to the numbers written.

Examination Questions

I.

In 2004, voters in Utah approved the following new provision for the Utah Constitution:

Article I, Section 29. [Marriage.]

- (1) Marriage consists only of the legal union between a man and a woman.
- (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Scalia wrote in his dissent: “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”

- (A) If you were representing plaintiffs who challenge the Utah provision, what would be your argument?
- (B) If you were the state assistant attorney general assigned to defend the Utah provision, what would be your argument?
- (C) If the case makes it to the United States Supreme Court, how is Justice Scalia likely to vote and why?

II.

A 2002 memorandum prepared by the Department of Justice's Office of Legal Counsel regarding presidential power and the treatment of prisoners reached the following conclusions:

Even if an interrogation method arguably were to violate [the federal statute implementing the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply [the statute] in a manner that interferes with the President's direction of such core war matters as detention and interrogation of enemy combatants thus would be unconstitutional.

Does the President have authority to override statutes or treaties prohibiting torture if he or she decides that doing so is needed to wage the war on terror? What are the arguments for and against recognizing such presidential authority? How do these arguments differ from the arguments in the various military detention cases?

III.

Section 504 of the federal Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The Act further provides that “[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504.”

Assume a student sues a state university in federal court for money damages and alleges disability discrimination based on violation of Section 504. The university receives federal funds to support its programs. There is no state statute or state constitutional provision that waives sovereign immunity. The state claims that the Act quoted above is unconstitutional insofar as it attempts to waive state immunity.

- (A) If you were representing the university, how would you argue that the federal law purporting to waive state immunity is unconstitutional?
- (B) If you were representing the student, how would you argue that the federal law establishes a constitutionally valid waiver of state immunity?

IV.

Following the *Elk Grove* decision in the fall of 2004, the House of Representatives passed a bill with the following language: “No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation.”

- (A) What are the arguments for and against the constitutionality of this bill?
- (B) Did the plaintiff, Newdow, have Article III standing in *Elk Grove*? Why or why not?

V.

In *Kassel v. Consolidated Freightways Corp.*, a Dormant Commerce Clause case, the Supreme Court split three ways and failed to produce a majority opinion. Briefly summarize the approaches taken by Justice Powell’s plurality opinion, Justice Brennan’s concurrence, and Justice Rehnquist’s dissent, and give your critical assessment of each. Which approach do you find most persuasive? Why?

VI.

When the Kennedy Administration was preparing its legislative proposal that eventually would become the Civil Rights Act of 1964, the newspapers reported that the Administration would rely on the Commerce Clause power as the constitutional basis for the bill. Stanford Law School Professor Gerald Gunther sent a letter to the Department of Justice that included the following:

I was happy to note that the Administration has put off for a few days the submission of its new civil rights proposals to Congress. I hope that the additional time will permit the Justice Department to reexamine its reported decision to rely exclusively on the commerce clause. [My] basic difficulties with the proposal in light of our constitutional structure may be briefly stated. If a federal ban on discrimination in such businesses as stores and restaurants is to be enacted, it should rest on the obviously most relevant source of national power, the Fourteenth Amendment, rather than the tenuously related commerce clause. The proposed end run by way of the commerce clause seems to me [ill-advised].

Why did the Administration choose to rely on the Commerce Clause? Were the grounds for Professor Gunther's concerns resolved through the testimony presented to Congress, as recounted in the Supreme Court's opinions in the *Heart of Atlanta* and *McClung* cases, and through the reasoning of those opinions as well?

VII.

President Bush recently sent the following message to Congress:

TO THE CONGRESS OF THE UNITED STATES:

In my State of the Union Address, I asked the Congress to give the President a line item veto. Today, I am sending the Congress a legislative proposal to give the President line item authority to reduce wasteful spending. This legislation will help to limit spending and ensure accountability and transparency in the expenditure of taxpayer funds.

Although the Congress achieved significant spending restraint this past year, appropriations and other bills that are sent to my desk still contain spending that is not fully justified, is a low priority, or is earmarked to avoid the discipline of competitive or merit-based reviews. When this legislation is presented to me, I now have no ability to line out unnecessary spending. In 1996, the Congress gave the President a line item veto – an important tool to limit wasteful spending – but the Supreme Court struck down that version of the law in 1998.

My proposed legislation, the "Legislative Line Item Veto Act of 2006," would provide a fast-track procedure to require the Congress to vote up-or-down [(by majority vote)] on rescissions proposed by the President. There has been broad bipartisan support for similar proposals in the past. Under this proposal, the President could propose legislation to rescind wasteful spending, and the Congress would be obligated to vote quickly on that package of rescissions, without amendment. The same procedure would apply to new mandatory spending and to special interest tax breaks given to small numbers of individuals.

Forty-three Governors have a line item veto to reduce spending. The President needs similar authority to help control unjustified and wasteful spending in the Federal budget. I urge you to promptly consider and send me this legislation for enactment to reduce unnecessary spending and help achieve my goal of cutting the deficit in half by 2009.

GEORGE W. BUSH

THE WHITE HOUSE,

March 6, 2006

Assume that you are the legislative assistant to member of Congress. You are asked to prepare a memo analyzing the likelihood that this proposal, if passed, could be successfully challenged on constitutional grounds. Please draft a memo that makes the best case for a court to uphold the law as constitutional and the best case for a court to strike down the law as unconstitutional. Then provide your own assessment of the constitutionality of the proposal.

