

Exam Number: _____

University of Utah S.J. Quinney College of Law

FINAL EXAMINATION

Constitutional Law I

Professor Matheson

**Spring Semester 2003
Friday, May 2, 1:00 to 4:00 p.m.**

Instructions

This examination is “**open book**” -- there are no restrictions on materials you may consult during the test. The exams-on-computer policies apply. Do not write or type your name anywhere on your examination paper. Do type or write your exam number on your exam and on this page.

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.

You have **three hours** to work on this exam. If your answers require additional facts, state what they are and their significance.

I.

Answer the following in brief, one-paragraph responses:

A. What is the countermajoritarian difficulty?

B. How does wheat consumed on a farm affect interstate commerce?

C. If Congress wishes to order the President to disengage from military action, should it use a joint resolution or a concurrent resolution? Why?

D. Why was Roe v. Wade (1973) justiciable when plaintiff Roe had already delivered a child and was not pregnant when the Supreme Court heard and decided the case?

E. What is the role of the “political safeguards of federalism” in constitutional analysis?

II.

Assume that in Grutter v. Bollinger, the affirmative action case involving the University of Michigan, the U.S. Supreme Court decides this summer that the Equal Protection Clause of the Fourteenth Amendment prevents Michigan from relying on any consideration of an applicant’s race in deciding whether that individual should be admitted to the law school or any other

undergraduate or graduate degree programs.

Assume further that you are a legislative assistant to a member of the U.S. Congress. After the Grutter decision, she asks you to prepare a memorandum that analyzes whether the Congress could enact legislation that authorizes state colleges and universities to consider an applicant's race in the admissions process to achieve racial diversity in their student bodies or to remedy past discrimination against racial minorities. Your memo should include discussion of both the pertinent case law as well as the factual information that would be relevant to congressional action.

III.

Suppose that the state legislature enacts a statute making it unlawful for a doctor to perform an abortion if the physician knows the abortion is motivated by the gender of the fetus. Under this law, it is a misdemeanor to perform such an abortion before the fetus is viable and a felony if the doctor knows the fetus is viable outside the mother's womb. The law does not impose a duty on the doctor to ask about the patient's motivation in seeking an abortion, but there is a requirement that the pregnant woman seeking an abortion be informed that she is not to consider the gender of the fetus in making the choice about abortion.

Suppose you have the following case: Jane and John Doe

are married and have four daughters. Dr. O. B. Gyn has been the obstetrician for the Does and has delivered all of their children. After their fourth child was born, the Does were very happy but commented in the delivery room that it would be nice to have a boy in the family. During the second month of Jane Doe's next pregnancy, Dr. Gyn was conducting an ultrasound procedure and asked the Does if they wished to know the gender of the fetus. They did, and were informed that the fetus was female. Several days later, the Does informed Dr. Gyn that they wished to abort the pregnancy. After meeting all disclosure and other requirements under state law, Dr. Gyn performed the procedure.

Shortly thereafter, the district attorney filed criminal charges against Dr. Gyn based on the statute described above. The defense attorney for Dr. Gyn then filed a motion to dismiss the charges. The motion argues that (1) the statute should be held unconstitutional on its face; and (2) the prosecution under this statute is unconstitutional as applied to the facts of this case.

You serve as a law clerk to the judge, who has asked you to write a memorandum analyzing the arguments that would support and would oppose both points in the motion. Prepare the memorandum.

IV.

In light of the U.S. Supreme Court's diminished deference to congressional enactments in cases such as Lopez, Boerne,

Printz, and Morrison, what do you think will happen to the South Dakota v. Dole precedent? Is your analysis different from what you think should happen? Consider that almost 30 percent of state budgets come from federal funding. Consider also the role of stare decisis. Finally, discuss whether Dole can be limited without being overruled and how the Supreme Court could do so with a standard that lower courts can apply with predictability.

V.

In United States v. Nixon (1974), the White House Tapes Case:

A. Identify and support the arguments for and against justiciability and then explain why one side of the argument should prevail over the other.

B. What type of constitutional analysis was used to find an executive privilege?

C. It has been suggested that in the Tapes Case, President Nixon lost the battle but the presidency won the war. Why?

VI.

Answer the following in brief, one-paragraph responses:

A. In A.L.A. Schechter Poultry Corp. v. United States (1935) - the Sick Chicken Case - the Supreme Court invalidated the Live Poultry Code, which was promulgated under the National Industrial Recovery Act of 1933, on two constitutional grounds. What were they?

B. Is there any textual or structural basis to treat federal judges differently from presidents when it comes to determining what rises to an impeachable offense?

C. From the standpoint of power to remove someone from office, what distinguishes Myers and Bowsher from Humphrey's Executor, Weiner, and Morrison?

D. In the Dormant Commerce Clause context, why is judicial review sometimes regarded as allocating the burden of overcoming congressional inertial?

E. What was the Supreme Court's holding in Barron v. Baltimore (1833)?

VII.

Syria allegedly has been harboring terrorists for many years and allegedly is providing a haven for former leaders of Saddam Hussein's Iraqi regime. Assume that Syria rebuffs the United States' demands to turn over both terrorists and Iraqi leaders and that the United States bombs Damascus and sends troops into Syria.

The Joint Resolution enacted in October 2002 authorizes the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”

The Joint Resolution enacted following the September 11, 2001 terrorist attacks authorizes “the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons.”

Assume Senator Robert Byrd contends that the President lacks authority to take military action against Syria. He wishes to block such action through a lawsuit in federal court. Prepare a legal brief for Senator Byrd making the strongest case for how and why a lawsuit against the President and other executive branch officials could result in a court order instructing the President to withdraw from military action in Syria.

