

Final Examination
Thursday, May 6, 2010

INSTRUCTIONS:

1. Be sure to write your anonymous number in the place provided at the top of this page. You are required to turn these test questions in at the end of the examination. Failure to return the test questions will result in a grade of **F** for this examination.
2. This is a limited open book examination. You are permitted to have with you the casebook and supplement.
3. There are three questions. They will be weighted equally.
4. Unless you are using ExamSoft, use the “blue” books provided to write your answer. Be sure to put your anonymous number on each “blue” book. In addition, you **MUST** number each book, e.g., “1 of 1” or “1 of 3,” “2 of 3,” “3 of 3.”
5. If you are handwriting your exam, write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor!
6. This is a 3 hour exam.
7. If you wish to leave the room during the examination, you may do so. You must, however, leave your test materials in the classroom. Moreover, you may not speak with any member of the class while outside the room.
8. All the examinations at the law school are conducted under the Student Code of Conduct, which forbids cheating or collaborating on examinations. If you witness anyone cheating in any form, it is your responsibility to report this to the Registrar or the Dean of Students. You are required to sign the form indicating compliance with the Student Code of Conduct at the completion of your examination.
9. All students are required to have a Widener University School of Law picture ID card with a validation sticker for spring 2010 on the desk in front of them during the examination.

QUESTION I (1 hour)

Below are six opinions written by various members of the Supreme Court on when to declare a statute unconstitutional. Write an essay discussing the following:

1. Which view is closest to your own?
2. Identify two cases you studied this semester that follow this approach.
3. Identify two cases you studied this semester that failed to follow this approach, and tell how they should have been decided.

Be sure to explain your answers fully.

* * * *

a. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."

b. The declaration that an act of Congress is unconstitutional "should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

c. "The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial. And liberty regulated by law cannot be permanently secured against ... the tyranny of a majority, if the judiciary must be silent when rights ... acquired under the law, are at the mercy of legislative action taken in violation of due process of law."

d. "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice."

e. "[W]e always have treated stare decisis as a principle of policy and not as an inexorable command. When governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action

is practically impossible.”

f. “The Court today reverses a uniform course of decision established by a dozen cases Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court’s ‘judicial Power’ ... may well impair the Court’s position as the ultimate organ of ‘the supreme Law of the Land’ in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”

QUESTION II (1 hour)

Justice Kennedy has been identified by many Court watchers as the key vote in today's constitutional decisions, which are frequently decided by a 5-4 margin. He has been in the majority on virtually every modern case you have read this semester. Yet the majority has not always been composed of the same justices: sometimes Justice Kennedy voted with the bloc led by the Chief Justice and sometimes with that led by Justice Stevens. Understanding Justice Kennedy's jurisprudence, therefore, is important in predicting how the Court will rule on a constitutional case. Following is a table listing most of his cases that you studied. It is categorized according to who was the senior justice with whom he voted and notes if he wrote an opinion in a case.

What can you tell about Justice Kennedy's jurisprudence from his positions in these cases?

Senior justice: the Chief	Senior justice: Stevens
<i>U.S. v. Lopez</i> (conc. op.), p. 214	<i>Gonzales v. Raich</i> , p. 227
<i>U.S. v. Morrison</i> , p. 224	
<i>N.Y. v. U.S.</i> , p.336	<i>Gonzales v. Ore.</i> (maj. op.), p. 351
<i>Printz v. U.S.</i> , p. 346	<i>U.S. Term Limits v. Thornton</i> , p. 353
<i>Medellin v. Tex.</i> , p. 375	<i>Hamdan v. Rumsfeld</i> (conc. op.), p. 389
<i>Hamdi v. Rumsfeld</i> , p. 381	<i>Boumediene v. Bush</i> (maj. op.), p. 391
<i>Gonzales v. Carhart</i> (maj. op.), p. 883 (not assigned, covered in lecture)	<i>Planned Parenthood v. Casey</i> (maj./plurality op.), p. 864
	<i>Lawrence v. Tex.</i> (maj. op.), p. 912
<i>Adarand Const. v. Pena</i> , p. 558	<i>U.S. v. Virginia</i> , p.637
<i>Grutter v. Bollinger</i> (diss. op.), p. 571	<i>Romer v. Evans</i> (maj. op), p. 666
<i>Nguyen v. INS</i> (maj. op.), p. 648 (note: Stevens, J., also joined this opinion)	
<i>City of Boerne v. Flores</i> (maj. op.), p. 307 (note: Stevens, J., also joined this opinion)	
<i>Bd. of Trustees v. Garrett</i> (conc. op.), p. 314	

QUESTION III (1 hour)

Plácido Perez is a citizen of New Mexico; that is, he is a U.S. citizen domiciled in Santa Fe, New Mexico. He is very proud of his heritage and can trace his ancestry not only to the Pueblo people who preceded the European settlers of New Mexico, but also to the Spaniards who founded Santa Fe in 1608.

Mr. Perez's sister and her family moved some years ago to Phoenix, Arizona. While visiting them on the occasion of his niece's First Communion, he was arrested under ARIZ. REV. STAT. § 13-1509 (reproduced on the next page). As he was taking a walk late on a Friday afternoon, he was stopped by two Maricopa County sheriff's deputies who demanded to see his alien registration card. (Maricopa is Phoenix's county.) He naturally did not have one, and so the deputies demanded proof of U.S. citizenship. He had left his sister's home without his wallet, and so had nothing to show the officers. They arrested him and took him to a Maricopa County jail. Because it was the weekend, he was unable to secure his release until Monday morning. While in the jail, he suffered abuse, both physical and emotional, at the hands of county employees and other inmates.

Mr. Perez has contacted a partner at your law firm about bringing suit, and she has asked you for your help. Part of Mr. Perez's law suit will involve a federal § 1983 claim against the County for violations of his civil rights; someone else in your firm is handling that aspect of the case. The partner wants *you* to work on the feasibility of suing the State of Arizona, seeking to have § 13-1509 declared unconstitutional. She has asked you to write a memorandum addressing the following:

1. What arguments that the Arizona statute is unconstitutional can Mr. Perez make?
2. What are the State's likely responses to those arguments?
3. Are there any defenses that the State might raise, and, if so, is there a way to avoid them?
4. If (or when) this case reach the U.S. Supreme Court, how do you predict the Court will rule? Why?

Discuss only those issues you studied in Constitutional Law I. Another associate at your firm is researching the criminal procedure aspects of this case, such as "probable cause" and "double jeopardy."

* * * *

S.B. 1070

Be it enacted by the Legislature of the State of Arizona:

Section 1. Intent

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

....

Section 3. Title 13, chapter 15, Arizona Revised Statutes, is amended by adding section 13-1509, to read:

13-1509. Trespassing by illegal aliens; assessment; exception; classification

A. In addition to any violation of federal law, a person is guilty of trespassing if the person is both:

1. Present on any public or private land in this state.
2. In violation of 8 United States Code section 1304(e)*

B. In the enforcement of this section, the final determination of an alien's immigration status shall be determined by either:

1. A law enforcement officer who is authorized by the Federal Government to verify or ascertain an alien's immigration status.
2. A law enforcement officer or agency communicating with the United States Immigration and Customs Enforcement or the United States Border Protection pursuant to 8 United States Code section 1373(c).**

C. A person who is sentenced pursuant to this section is not eligible for suspension or commutation of sentence or release on any basis until the sentence imposed is served.

D. In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs and an additional assessment in the following amounts:

1. At least five hundred dollars for a first violation.
2. Twice the amount specified in paragraph 1 of this subsection if the person was previously subject to an assessment pursuant to this subsection.

....

*"Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him"

**"The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."