CONSTITUTIONAL LAW I (LAW 508), SECTIONS A-D

FINAL EXAMINATION

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MAY 8, 2008

9:00 a.m.

TIME: 2.5 HOURS

OPEN BOOK

This examination consists of three questions. You are to answer all three.

This is an open book, open notes examination. You may bring into the examination room and consult any written/printed matter you wish. You will not be credited for citing cases not included in the assignments or discussed in class. The Chemerinsky treatise is not to be cited as authority for the state of the law.

Recommended times are as follows: fifteen minutes to read all questions (approximately 9:00-9:15 a.m.); 20 minutes to answer question 1 (approximately 9:15 to 9:35); 25 minutes to answer question 2 (approximately 9:35-10:00); and 1 hour 20 minutes to answer question 3 (10:00-11:20 a.m.). This leaves ten minutes for you to allocate as you see fit. (Although, on most examinations, it is wise to allocate your time in accordance with the point value of each question, I would strongly recommend that, on this examination, you stick to the recommended times.)

Be sure to complete the specific task assigned. If you believe that your answer depends on any facts or legal information not provided in the question, specify the facts or legal matters clearly and explain how they would affect your answers.

Write your answers to Questions 1, 2 and 3 in separate examination booklets, or print them separately. (You may use more than one examination booklet per question. Label each examination booklet with its sequence in your answer, and the number of the question, e.g. “Question 2: book 1 of 2.”) WRITE OR PRINT – LEGIBLY – ONLY ON ONE SIDE OF EACH PAGE AND EVERY OTHER LINE. If your writing/printing is difficult to read, write on every third line.

YOU MUST STOP WRITING WHEN INSTRUCTED TO DO SO BY THE PROCTOR. FAILURE TO DO SO WILL BE CONSIDERED A BREACH OF ACADEMIC DUTY AND WILL BE REPORTED TO THE DEAN’S OFFICE BY THE PROCTOR.

DO NOT LIFT THIS COVER SHEET UNTIL INSTRUCTED TO DO SO BY THE PROCTOR.

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QUESTION 1: Short-answer questions
20%. Suggested time: 20 minutes

Identify and explain the significance of the following cases, rules or concepts in constitutional law (10 questions x 2% each):

1. badges and incidents of slavery  
2. but-for causation  
3. dual sovereignty  
4. Eleventh Amendment  
5. Federalist Papers  
6. freedom of contract  
7. “more searching” rational basis review  
8. preemption  
9. presumption of constitutionality  
10. unitary executive

QUESTION TWO: Essay question
20%. Suggested time: 25 minutes

In his influential book, Law’s Empire, Ronald Dworkin sets out an argument for legal stability that he describes as “historicism,” as follows:

Law serves its community best when it is as precise and stable as possible, and this is particularly true of foundational, constitutional law. That provides a general reason for tying the interpretation of statutes and of a constitution to some historical fact that is at least in principle discoverable and immune from shifting convictions and alliances. ... [This form of constitutional interpretation will] provide more stability than any interpretive style that disregards concrete historical intentions altogether. No statute or decision will be overturned if it can be shown on historical grounds that the framers expected that it would not be.

How accurately does historicism, defined as above, describe the Supreme Court’s approach to constitutional interpretation? Which modes of constitutional analysis are consistent, or inconsistent, with historicism? Would it be desirable for judges to adopt a more “historicist” approach than they do? In what kinds of cases?

In addressing this question, substantiate your arguments by reference to cases, commentary and examples drawn from the assigned readings.
After a close contest, the John McCain-Condoleezza Rice ticket wins a surprise victory in the 2008 Presidential election against Democrats Barack Obama and Kathleen Sebelius. The newly elected Republican congressional majority views all race-based quotas, preferences and other race-conscious affirmative action as unconstitutional forms of race discrimination. Congress holds hearings, during which it hears expert testimony and reviews economic and sociological data about racial disparities and race-conscious ameliorative measures in the United States.

The hearings reveal considerable disparities between white and nonwhite Americans in educational and economic achievement. The evidence before Congress also establishes that ostensibly benign race-conscious practices are widespread among federal and state governments and agencies, as well as in schools, colleges and universities, private and public housing, and in private companies.

Congress also hears conflicting data and testimony about the source of the racial disparities affecting certain nonwhite ethnic minorities. Many studies tend to show that certain ethnic minorities, including African-Americans, Arab-Americans, Asian-Americans, Latinas and Latinos, and Native Americans, face substantial and continuing systemic barriers to employment, housing and education. These studies indicate that, in the absence of affirmative race-conscious measures, these barriers are not corrected by existing market forces and anti-discrimination laws. While this research is conducted and funded independently, many of the authors of these studies have publicly acknowledged that they consider these racial disparities to be unjust and that, as a policy matter, they support affirmative race-conscious measures.

Other studies, funded by conservative and anti-affirmative-action groups, find that discrimination does not account for the lower educational and economic attainment of certain racialized groups. These studies attribute educational and economic disparities to “cultural differences,” including, purportedly: a lower cultural value placed on education, a greater willingness to work long hours at strenuous jobs for low pay, the use of languages other than English in the home, and a tendency to blame misfortune on perceived race discrimination by whites. The authors of these studies take the view that quotas or other race-conscious affirmative action fails to address the real, cultural causes of such disparities.

After these hearings, Congress enacts the Equal Opportunity Act of 2009. In it, Congress makes the following findings:

- Our Constitution is color-blind;
- Special treatment on the basis of race or ethnicity is demeaning. It is inconsistent with individual freedom, and offends the basic human dignity of all Americans;
• Since 2000, a number of African-Americans and Latinos, including two Secretaries of State and a Vice-President, have served in the cabinet, and, in 2008, an African-American candidate came very close to winning the Presidency;
• Since the Supreme Court’s decision in *Brown v. Board of Education* and the enactment of the Civil Rights Act of 1964, extensive social and economic changes have put an end to invidious racial inequality;
• Any contemporary inequalities of employment, educational or housing outcomes among racial groups are not attributable to racism;
• Nonetheless, certain governments, government agencies and private entities continue to discriminate on the basis of race, using both overt and pretextual means to favor African-Americans, Arab-Americans, Asian-Americans, Hispanics and Native Americans in employment, education and accommodations;
• Since the decision of the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), many public and private schools, colleges and universities have engaged in covert race discrimination by using race-neutral proxies such as geography and neighborhood to mask racialized objectives that, in practice, aim to afford special treatment to racial minorities, or to enforce racial mixing; and
• The best way to end discrimination is to stop discriminating on the basis of race.

The Equal Opportunity Act of 2009 begins as follows:

*An Act*

*To enforce the constitutional right to equal protection of the laws, to confer jurisdiction upon the district courts of the United States to afford equal opportunity to everyone regardless of race or ethnicity, to provide relief against race discrimination in public and private employment, education and accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public and private employment, education and accommodations, and for other purposes.*

Section 1 of the Act defines “race discrimination” as “any quota, preference or other favoritism to any individual or group on the basis of minority race or ethnicity.”

Section 2 of the Act provides:

*No special privileges based on race discrimination.*

(a) Neither the federal government, through any of its branches or departments, nor any state, shall enact, adopt or enforce any statute, regulation, ordinance or policy that requires, authorizes or permits race discrimination.

(i) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, or any of its branches, departments or agencies, any of its political subdivisions, municipalities, school districts, public universities, community colleges, public school districts, or any other governmental instrumentality of the state.

(b) It shall be an unlawful practice for any individual or business, including but not limited to any employer, labor organization, employment agency, landlord, realtor, school, college, or university, to grant any quota preference or other favoritism to any individual or group on the basis of minority race or ethnicity.
(c) The remedies available for violations of this section shall be the same, regardless of the injured party’s race or ethnicity.
(d) This section shall invalidate any court order or consent decree which is inconsistent therewith.

Section 3(a) of the Act makes violations of sections 2(a) or (b) enforceable by a fine of up to $100,000. Section 3(b) authorizes any “injured party” who alleges that he, she or it has been harmed by “race discrimination” to sue the federal, state or private entity responsible for the discrimination in the federal courts. Section 3(c) authorizes the federal Attorney General to initiate lawsuits against “states” or private parties which violate the Act.

Although President McCain supports the aims of the bill in general, he wants to ensure that the bill does not hamstring the police, military or intelligence services in their investigation and suppression of crime and terrorism. He is particularly concerned that the bill may restrict the ability of these agencies to engage in racial profiling or racially targeted recruitment of undercover operatives. He vetoes the bill, saying that it unduly restricts his powers as Commander-in-Chief to direct the investigation and suppression of crime and terrorism.

Congress overrides his veto, and the Equal Opportunity Act becomes law.

You are a nonpartisan lawyer with the Department of Justice. You have been asked to write a memorandum anticipating all constitutional challenges that might be brought against this legislation, setting out the government’s rebuttal arguments, and providing an objective assessment of the strength of those arguments. In doing so, you should consider the constitutional basis for these potential challenges, the factors which a court is likely to consider, and the degree of skepticism with which a court is likely to address these claims.

The Department of Justice expects that constitutional challenges may be brought against the legislation from at least three potential groups of litigants: state governments or agencies that might be sued by the Attorney General or by “injured parties” who claim to be affected by “race discrimination”; companies whose affirmative action programs have been made unlawful, or which face lawsuits from “injured parties”; and individuals or groups of individuals who might allege that their constitutional interests are affected by the Act.