CONSTITUTIONAL LAW I (LAW 508) §AB

FINAL EXAMINATION

PROF. DAVID B. CRUZ

SPRING 2002

May 16, 2002
9:00 a.m.

Part II (Essay)

Time: 2½ (i.e., two and one-half) hours
(75% of exam grade)

OPEN BOOK

INSTRUCTIONS FOR PART II

Part II of the exam consists of two (i.e., 2) essay questions. You are to answer both questions. Recommended times are as follows: fifteen minutes to read both questions (approximately 10:00 to 10:15 a.m.); one hour 20 minutes (approximately 10:15 to 11:35) to outline and answer Question 1; 40 minutes (approximately 11:35 a.m. to 12:15 p.m.) to outline and answer Question 2. This leaves 15 minutes (approximately 12:15 to 12:30 p.m.) extra for you to use as you see fit.

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.

Part II is an open book, open notes examination. You may bring into the examination room and consult during Part II of the examination 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.

Write your answers to Question 1 and Question 2 in separate bluebooks or print them separately. (You may use more than one bluebook per question; label each bluebook with its sequence in your answer and the number of the question, e.g., “Question 1, 2 of 3 books” and “Question 2, 1 of 2 books.”) 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.
QUESTION 1:

Following the 2002 elections, the composition of Congress became more politically conservative. As it held fact-finding hearings, the Senate Education Committee (or at least a majority of its members) grew concerned that colleges, universities, and other higher educational institutions (hereinafter “colleges”) were continuing to make admissions decisions on the basis of race on the basis of “diversity,” which they regarded as constitutionally inadequate to justify such use of racial classifications.

Although Justice Powell approved of the goal of diversity in his opinion in *Bakke v. Regents of the University of California* (1978), the Committee emphasized that no other Justice joined in the part of his opinion discussing the diversity rationale, and indeed that in *Bakke*, the word “diversity” is mentioned nowhere except in Justice Powell’s solo opinion. Moreover, the Committee felt that the framework of *United States v. Marks* (1977) could not be applied to a case like *Bakke*, where the various Justices’ reasons for concurring in the judgment are not merely different by degree, but are so fundamentally different as to not be comparable in terms of “narrowness.” With respect to *Bakke*, the Committee thought, it is nonsensical to ask which opinion—Justice Powell’s or the Brennan group’s—offers the “narrowest grounds” in support of the judgment reversing the lower court’s holding that race may never be considered in university admissions. The diversity rationale articulated by Justice Powell was in the Committee’s view neither narrower nor broader than the societal-remedial rationale articulated by the Brennan group; they are completely different rationales, neither one of which is subsumed within the other.

The Committee cited the 1996 *Hopwood* case from the Fifth Circuit as well as the 2002 *Grutter* case from the Sixth Circuit (which was decided by a bare 5-4 vote in favor of the University of Michigan and its law school in May 2002) as illustrating the ongoing unconstitutional use of race by colleges. The Committee was also concerned that allowing higher educational institutions to use race in any fashion other than to remedy unlawful racial discrimination by those very institutions against specific applicants would leave it too easy for colleges to mask (in their view) improper diversity-based use of race under the guise of remedial efforts.

Accordingly, the Committee recommended, Congress passed, and the President signed the *Honesty And Fairness In Education Act* (“HAFIEA”). Some members of Congress had believed and argued that race-based admissions decisions by public colleges, even pursuant to carefully crafted affirmative action plans that only took race into account as one factor among many, were simply unconstitutional, violations of the Equal Protection Clause or the equal protection component of the Fifth Amendment, which in their view dictated a policy of race-blindness by government. Some members argued, as had the Committee, that Justice Powell’s position that diversity was a compelling interest was not a binding holding of the Supreme Court—no other Justices joined his opinion—and was at any rate mistaken. Some members of Congress thought that there might be some permissible remedial justifications for race-conscious affirmative action (besides situations where you knew the precise victims of discrimination and thus didn’t need to use race-based classifications to give them a remedy), but that it was nonetheless necessary to prohibit all consideration of race to preclude diversity-based discrimination that would in their view be unconstitutional. And some members felt that race-based affirmative action was bad policy that
ultimately cost the nation in terms of the educational productivity of its citizenry (when “more qualified” applicants were passed over because of their race).

Section 1 of HAFIEA contained Congress’s findings. Among these were the following:

- The United States spends more per higher education student than any other G-7 nation, more than twice that spent by France, Italy, and the UK.
- Higher education expenditures in the U.S. typically amount to approximately 2.3% of the Gross Domestic Product (GDP).
- Counting branch campuses separately, there are over 4,000 degree-granting institutions in the United States, and almost 15 million students enroll annually in higher education; Enrollment in degree-granting institutions is projected to increase from 14.8 million in 1999 to 17.7 million by 2011, an increase of 20 percent.
- The vast majority of these institutions accept at least some students from other states.
- Approximately three times as many families where the head of the household has no college education live below the poverty level as where the head of the household has some college education.
- Every state in the union has a positive or negative net migration of students entering and leaving the state to attend college.

Section 2 of HAFIEA, which was modeled on California’s Proposition 209, provides:

No public or private college, university, or other institution of higher education within the United States, or any State or Territory, that admits any out-of-state student, shall discriminate against or grant preferential treatment to any individual or group on the basis of race, color, ethnicity, or national origin.

Subsequent subsections made clear that this provision prohibits any race-based affirmative action, even using race as a “plus-factor,” in higher education admissions by any college that admits even one out-of-state student. (If a college can identify specific individuals who it racially discriminated against, the statute makes clear that the college need not use race but can simply name those persons and admit them as a remedy for that unlawful discrimination.)

Section 3 of HAFIEA, inspired by anti-trust law, puts some teeth into the Act’s restrictions. It provides:

(a) Any college, university, or other institution of higher education with the United States, or any State or Territory, whether public or private, that violates Section 2 of the Act may be sued civilly in federal district court by any person who is discriminated against on the basis of race, color, ethnicity, or national origin, as well as by any person rejected by any college, university, or other institution of higher education that grants any preference in admissions to persons of a race, color, ethnicity, or national origin other than that of said plaintiff.
(b) Sovereign immunity will not be a defense to any such suit.
(c) If found guilty, the college, education, or institution of higher education shall be liable for a civil judgment in the amount of three times the actual damages suffered by the plaintiff or, in the case of plaintiffs who would not have been admitted even
had the school or program not taken race into account, three times the amount of the application fees the plaintiff paid to the school or program.

(d) Plaintiffs prevailing in a suit pursuant to this Act are entitled to reasonable attorney’s fees.

(e) Nothing in this section limits the availability of injunctive relief that a plaintiff might seek to enforce the restrictions of Section 2.

Following an unsuccessful application to the public (i.e., state-run) University of Oregon School of Law (“UO”), rejected Caucasian applicant and accomplished saxophonist Sam Smith (“SS”) sued UOSL for violating HAFIEA by giving Asian-American, Mexican-American, and African American students a “plus” in the admissions process for contributing to the School’s diversity. At the close of trial, the district court rejected UO’s arguments that Congress did not have the power to enact HAFIEA under the Commerce Clause or under Section 5; the court also rejected UO’s arguments that Congress could not override Oregon’s sovereign immunity (with otherwise would have protected UO from SS’s suit for money damages). UO proved that, even though it had given extra favorable consideration to SS’s musical skills in the admissions process (due to their contribution to the student body’s diversity), it would not have admitted SS even if it had not considered race at all. The court therefore awarded SS only $150 (three times his application fee) plus attorney’s fees at the going market rate.

Following a similarly unsuccessful application to the private (i.e., non-governmental) Willamette University College of Law (“WU”), rejected Caucasian applicant and polio victim Pat Paulk (“PP”) sued WU for violating HAFIEA by giving Asian-American, Mexican-American, and African American students a “plus” in their admissions process for contributing to the College’s diversity. The district judge presiding over this case also rejected WU’s arguments that Congress did not have the power to enact HAFIEA under the Commerce Clause or under Section 5. While not counting against PP, WU did not consider PP’s disability from polio to contribute appreciably to the diversity of the student body. Yet WU too proved that it would not have admitted PP even if it had not considered race at all, and the district court here also awarded PP only $150 (three times his application fee) plus attorney’s fees at the going market rate.

On appeal to the Ninth Circuit, the two cases were consolidated. Counsel for the plaintiff rejected applicants argued that HAFIEA did fall within Congress’s power under the Commerce Clause. They then argued in the alternative that, because diversity was not a compelling governmental interest (Justice Powell’s Bakke opinion notwithstanding), HAFIEA was a proper Section 5 measure protecting SS against violation of his equal protection rights through “reverse discrimination.” Counsel further argued that HAFIEA clearly and constitutionally overrode UO’s sovereign immunity.

Counsel for the defendant law schools contended that Congress did not have power to enact HAFIEA under either the Commerce Clause or Section Five of the Fourteenth Amendment. In particular, they argued that the holding of Bakke was in fact that diversity provided a compelling state interest sufficient to constitutionally justify careful race-based affirmative action policies for higher education admissions; because Powell and the Brennan group agreed in the judgment that some use of race was permissible in higher education admissions, and because Powell’s strict
scrutiny rationale allows for less use of race than the Brennan group’s broad societal remediation approach, counsel concluded that Powell’s was the narrowest rationale and thus provided the holding of Bakke. Accordingly, counsel argued, HAFIEA could not be regarded as a proportional and congruent Enforcement Clause statute because it prohibited too many constitutional affirmative action policies. They also argued that although Congress clearly meant to, it could not constitutionally override UO’s sovereign immunity with HAFIEA.

Following your successful law school career and graduation, and in recognition of your excellent command of the law, you were hired to clerk for Judge Syfer of the Ninth Circuit. Your co-clerks and the Judge have already determined that the record below supports the district courts’ conclusions that the defendant schools did in fact violate HAFIEA; the issue, then, is whether that statute is valid federal law. **Please write a memo to the Judge Syfer addressing (1) whether Congress has the power to enact HAFIEA under the Commerce Clause; regardless of your conclusion to that question, (2) whether Congress has the power to enact HAFIEA under the Fourteenth Amendment’s Enforcement Clause (i.e., Section Five); and (3) assuming Congress has power to adopt HAFIEA under one or the other of those clauses, whether Congress can override UO’s sovereign immunity with HAFIEA.** Be sure your memo takes and argues a position on these issues and that it addresses reasonable arguments that oppose your position.

**QUESTION 2:**

In *Washington v. Glucksberg* (1997), Chief Justice Rehnquist wrote for a five-member majority of the Court:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” “so rooted in the traditions and conscience of our people as to be ranked as fundamental”, and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. [Certain citations omitted]; *Cruzan v. Director, Missouri Dep’t of Health* (1990). Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause. . . .

Scholars and judges have divided over the relevance and proper treatment of tradition in due process analysis. Drawing upon material from the course (assigned readings and/or class discussion), write a brief commentary evaluating the Court’s use of tradition in substantive due process cases and the soundness and significance of passage above, giving primary emphasis to the “second” “feature” mentioned.

**END OF PART II (ESSAY)**

**END OF EXAM**