Constitutional Studies Comprehensive Exam Questions

Field 1: American Constitutional Law and Judicial Politics

1. Alexander Bickel argued that judicial review suffers from a counter-majoritarian difficulty because, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive…it exercises control, not in behalf of the prevailing majority, but against it. Robert Dahl disagreed; he claimed that, “[e]xcept for short-lived transitional periods…the Supreme Court is inevitably a part of the dominant national alliance… [and] of course supports the major policies of the alliance.” Based on modern empirical scholarship, which of these views is more accurate? In forming your response: (1) consider alternative definitions of the “majority” and (2) consider the theoretical reasons why the Court might support or undermine the majority and the empirical evidence to support those theories.

2. Justice Robert Jackson once said of the Supreme Court, "We are not final because we are infallible, but we are infallible because we are final." Use a set of Supreme Court decisions and/or a body of scholarly literature to argue for or against the validity of Justice Jackson's statement.

Field 2: Philosophy of Law and Constitutional Interpretation

1. Apply Michael Moore's theory of legal interpretation to the evolution of Supreme Court doctrine regarding the meaning of liberty in the gay rights cases Bowers to Romer to Lawrence to Windsor. Your answer should evince your understanding of Moore's distinction between realist and conventionalist theories of (1) word meaning and (2) precedent. You should also show how the opinions of the individual justices manifest these different theories of word meaning. While keeping the focus on the gay-rights series of cases, you should cite cases outside the gay-rights series (e.g., Planned parenthood v. Casey) as needed to illuminate the different positions in the gay-rights debate.

2. Is the legal philosophy of John Finnis Thomistic, Hartian (as in H.L.A. Hart), neither, or both? Explain, with special reference to Natural Law and Natural Rights.

Field 3: Comparative Constitutional Systems and Law

1. Make the case for and against the American Supreme Court’s use of the foreign constitutional case law of other advanced democracies in the interpretation of the United States Constitution. (Another way of putting the question is whether the U.S. Supreme Court should seek to bring its constitutional law into harmony with the comparable jurisprudence of other western democracies.) Be as detailed as you can and illustrate with examples from at least two areas of constitutional case law.
2. Sources of substantive as well as procedural law differ greatly across domestic legal traditions. First, elaborate on the main sources of law in the Islamic legal tradition, drawing on their historical development and using modern examples. Secondly, explain what are the main differences between Islamic legal tradition and the Western legal traditions in their approach to dispute resolution mechanisms?

Field 4: International Law and Human Rights

1. The emergence of international human rights norms in the last 65 years represents enormous challenges to an international system based on Westphalian notions of state sovereignty. How does it still make sense today to speak of state sovereignty as the foundation for international law? What does it mean? Can it be reconciled coherently with the international supervision and enforcement of human rights norms regulating the relationships between states and their citizens?

2. Current international law constitutes largely a secular legal system. Using historical as well as contemporary examples, elaborate on the role that religion/religious legal systems (for example ecclesiastical law, Islamic law) played and continue to play in the development of substantive international law. What are some of most important points of contention between religion and secularism on the international arena?
International Law and Human Rights

1. There are several methods that states can resort to while peacefully resolving their disputes. Elaborate on main procedural and normative features of at least two venues for interstate peaceful resolution, linking their design to domestic legal systems. What factors shape states’ choices of peaceful settlement venues?

2. The norms and institutions of international human rights seem in some ways to reinforce democratic constitutional systems, and in other ways to be in deep tension with democratic constitutionalism. Explain this apparent paradox, and discuss what it implies regarding the sources of legitimacy of human rights law within a democratic constitutional order.

Philosophy of Law and Judicial Interpretation

1. Describe the change of the Supreme Court's thinking from Brown v. Board of Education (1954) to Parents Involved v. Seattle School District (2007) in terms of (1) competing theories of the Constitution's basic normative properties and (2) different theories precedent. Your answer to this question must focus on these two specific issues, not on other issues like competing approaches to constitutional interpretation, competing theories of judicial review, or competing conceptions of the framers' intentions.

2. Compare and critically assess TWO of the following four legal theorists on the question of the relationship between law and human nature OR on the relationship between law and morality: Aquinas, Hart, Finnis, and O.W. Holmes.

American Constitutional Law and Judicial Politics

1. Abraham Lincoln once described the relationship between the Declaration and the Constitution as “an apple of gold” in a “picture of silver” Explain Lincoln’s understanding of the relationship between the Declaration and Constitution. Compare his understanding with at least two other American statesmen or scholars who take a different view.

2. Judicial review has become a near universal practice in the world. Is this a good development?
Constitutional Studies Comprehensive Exam 5/21/13
Answer one from each of the following three sections

Section 1: American Constitutional Law and Judicial Politics

(1) Sketch an opinion for the Supreme Court for or against a right of gay marriage, citing all key precedents.

(2) Identify and discuss the different “originalist” interpretations of the Establishment Clause that have been offered by the Supreme Court justices in the Establishment Clause cases. Also discuss Justice Brennan’s critique of originlist approaches to the Establishment Clause. Explain either (1) which version of Establishment Clause originalism you find most persuasive and why, or (2) what you find persuasive/unpersuasive in Justice Brennan’s critique.

(3) The anti-federalist Brutus warned about the judiciary in the new constitution. Explain his concerns. Has the judiciary lived up to his fears or has it been a kind of blessing in the system? Explain why.

Section 2: Philosophy of law and Constitutional Interpretation

(1) What role has ideas of natural law played in American constitutionalism? What role should such ideas play in an ideal constitutional system?

(2) Compare the interpretive approaches in John Roberts’s opinion in NFIB v. Sebelius (the health care case) with John Marshall’s opinion in McCulloch v. Maryland as they relate to the scope of national power vis-a-vis the states.

Section 3: International Law and Human Rights

(1) The concept of jus gentium originated in the laws of the Roman Empire. Throughout the history, scholars have struggled to provide an exact definition or derivation of this concept. Elaborate on the origins and historical development of this concept.

(2) Customary law constitutes one of important sources of international law. Elaborate on at least two important international customary norms, focusing on their substantive content as well as historical development. How does custom relate to other sources of international law, such as treaties and general principles of law?
Constitutional Studies Comp, January 2013

Subfield I: American Constitutional Law and Judicial Politics

1. In Sherbert v. Verner (1963), Justice Stewart wrote: “And the result [of the Court’s First Amendment religion precedents] is that there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's . . . construction of the Establishment Clause.” To what extent was Justice Stewart correct in 1963 and to what extent is he correct today?

2. In Parents Involved in Community Schools v. Seattle School District No. 1 (2007) Chief Justice Roberts and Justice Breyer held different theories of Brown v. Board of Education (1954). (1) Describe the theories of (a) Roberts and (b) Breyer and (2) show how they reflect different theories of the Constitution as a whole. Show also (3) which theory (of Roberts or Breyer) conforms to the understanding of the Constitution as a whole that one finds in The Federalist. Answer each part of this question. References to The Federalist should give the edition in a footnote with paper and page numbers in parentheses in the text of your answer, separated by a colon, e.g., (10:63).

Subfield 2: Legal Philosophy and Constituion Interpretation

1. “Concrete originalists claim that a moral realist (or natural law) theory of constitutional interpretation frees judges to impose their personal values on the country and abandons the rule of law. For their part, moral realists claim that their approach is the only approach that really constrains judges in a manner consistent with the rule of law.” Explain every part of this statement: why the originalists say what they say; why the moral realists say what they say. Your answer should display your knowledge of the difference between realist and conventionalist theories of (1) word meaning, (2) precedent, and (3) value.

2. John Hart Ely in Democracy and Distrust has put forward a theory to justify a certain kind of judicial review meant to be compatible with and legitimate in democratic systems as such. Does his theory solve the so-called counter-majoritarian problem? Is judicial review as he defends it not only compatible with democratic legitimacy but necessary for it? Is his account the best or at least an adequate or defensible theory of judicial review? Are there better defenses and thus better accounts of the scope of judicial review?

3. Compare and critically assess TWO of the following four legal theorists: Aquinas, Hart, Finnis, and O.W. Holmes, on the question of the relationship between law and human nature, OR on the relationship between law and morality.
Subfield 3: International Law and Human Rights

1. Human rights law constitutes an important part of the law of nations. Elaborate on the genesis and historical development of international human rights law paying a particular attention to the natural law doctrine influences. Your answer should include a discussion of at least two natural law thinkers/philosophers.

2. Several concepts, doctrines and principles of international law have developed from the civil domestic legal system, as well as from the ecclesiastical law. Choose at least one example from each legal system and elaborate on their substantive content, historical development, and influences on the law of nations.
Comparative Constitutional law Comp Questions 1/21/13

Answer One of the Following:

(1) Some Supreme Court justices sternly resist citing foreign constitutional case law as a guide to interpreting the U.S. Constitution. Other justices just as sternly engage the decisions and reasoning of foreign constitutional courts in deciding cases arising under the Constitution. Under what circumstances would it be appropriate for a justice to adopt a posture of resistance to the use of foreign law in American constitutional decision-making? Under what circumstances, if any, would it be appropriate to adopt a posture of engagement? Identify two areas of constitutional analysis in which comparative constitutional reasonings would yield a significant payoff.

(2) Have civil and common legal systems converged over time? Give examples of at least two areas of substantive or procedural law where convergence has occurred.

(3) During the latter half of the 20th Century the practice of judicial review has spread far and wide. Briefly explain (1) what the causes of this institutional spread have been, (2) how much and in what ways the practice differs from the American original in two or three countries, and (3) how effective it has been in achieving better governance, being sure to specify what you and/or the countries involved mean by good governance.