Constitutional Studies Comprehensive Examination

Winter 2015

This is an open book exam. You have six hours to complete the exam. Please return your answers to Professors Michael Zuckert and Geoff Layman within six hours of beginning the exam.

I. Philosophy of Law and Judicial Interpretation (answer one):
   1. 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*.
   2. "Originalism" continues to be the dominant method of constitutional interpretation, at least among jurists who trouble to proclaim a method. You are to:
      A. Describe the following varieties of originalism: (1) abstract originalism; (2) concrete originalism (a) definitional variety, and (b) applications variety.
      B. Connect each of these three varieties of originalism to a specific theory of language meaning.
      C. Sketch at least one argument for both (1) abstract originalism and (2) concrete originalism.

II. American Constitutional Law and Judicial Politics (answer one):
   1. For decades, the judicial politics literature has been preoccupied with a debate between the “attitudinal” and “legal” models of judicial decision making; yet, as early as 1994, prominent judicial politics scholars declared the legal model to be a “straw man” argument that no judge or scholar actually believes. What is the status of the “legal model” today? That is, what is the current state of empirical evidence regarding the role of “law” in American judicial decision making? In forming your response: (1) consider alternative perspectives on what it means for judges to follow the “law” and (2) consider strengths and weaknesses of the “legal model” and its modern incarnations.
   2. For its jurisprudence of freedom of speech, equal protection, or no religious establishment, answer the following questions:
      A) Has the Supreme Court articulated a clear and consistent doctrine?
      B) To what extent does that doctrine(s) reflect the actual text of the Constitution?
      C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

III. International Law and Human Rights (answer one):
   1. The principle of sovereignty constitutes a paramount principle of international law. Elaborate on genesis and historical development of the principle of sovereignty paying a particular attention to the Western and Islamic understanding of this concept. In your analysis, make sure to refer to the jurisprudence of the International Court of Justice.
2. "One of the persistent challenges of constructing an effective system of international human rights law has been to manage the tensions between universal norms on the one hand and the fact of enormous diversity (whether ethical, political, religious, ethnic, etc.) among the many different societies within the human family, on the other hand. Describe how the global human rights system has sought to reconcile these tensions, using specific examples from international human rights law and institutions. Do you think that the international human rights project has been successful at accounting for and accommodating legitimate claims of pluralism among different human societies? Justify your answer with specific examples."
Subfield 1: Philosophy of Law and Constitutional Interpretation

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

2. Since the New Deal, the scope of regulation by the United States government has expanded significantly. At the same time, the Supreme Court continues to describe the Constitution as establishing a system of "dual federalism." How, if at all, does it make sense to describe the constitutional structure today as one of dual federalism? What is the appropriate role of courts and other governmental actors in defining the relationship between the United States government and the States?

Subfield 2: American Constitutional Law and Judicial Politics:

1. There seems to be general agreement that John Marshall was the greatest Justice in the history of the Supreme Court. Do you agree with this? Does it even make sense to make judgments like that? Are there objective factors that would go into making such an assessment? If so, what might they be? If not, why not?

2. 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 on 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 the discussions of majoritarianism and the role of the Court in the Federalist Papers, how would Madison and Hamilton respond to these claims?

Subfield 3: International Law and Human Rights

1. The International Court of Justice (ICJ) constitutes the main judicial organ of the United Nations. Throughout the Court’s history, it has struggled to establish high levels of authority/legitimacy among all states in the system. Identify three structural or functional weaknesses of the ICJ and elaborate on how these weaknesses may shape states’ views of the Court.

2. Human Rights Law is embodied in several international treaties and conventions. Depending on specific issue area, these international instruments experience varying levels of support from states in the system. Elaborate on the history and theoretical underpinnings of the international human rights law, linking it to the natural law doctrine. Can we truly say that contemporary international law provides a “universal system of human rights?”