Con Studies
Past Comprehensive Exam Questions
(Note: you may see duplicate questions)

Fall 2011

Constitutional Studies Comprehensive Exam and Reading List
(Effective Fall, 2011)

The Constitutional Studies Comp is an open-book, written exam, to be completed and submitted no later than 8 hours after the exam is emailed to the student. The 8 hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies only for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. Failure to meet the deadline means failure on the exam.

The exam will consist of three questions. No answer can be longer than 1,700 words. Answers must be the student’s own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Exam answers must be doubled-spaced.

The field of Constitutional Studies is divided into six subfields: (1) American Constitutional Law and Development; (2) Comparative Constitutional Systems and Law; (3) International Courts and Human Rights; (4) Judicial Politics and Institutional Behavior; (5) Legal and Constitutional Philosophy; and (6) Constitutional Interpretation. Questions for any one comp will reflect those subfields from which graduate courses or graduate-eligible courses have been offered the preceding three semesters. If, for example, no course in constitutional interpretation has been offered the preceding three semesters, then no question from that subfield will appear on a given comp. Students should note carefully that this policy does not excuse the student from his or her responsibility for the reading list in each subfield beyond what may be offered in courses over the preceding three semesters. The faculty recognizes its obligation to teach courses in the comp areas, but graduate students will be treated as emerging professionals with independent responsibilities. Information on the readings to be emphasized and the subfields represented in a given comp will be available from the Constitutional Studies field chair.

Students must answer one option in each of two subfields: Either (a) American Constitutional Law and Development or (b) Legal and Constitutional Philosophy, and (c) Judicial Politics and Institutional Behavior. The student’s third answer must be taken from one of the remaining four subfields, leaving a distribution of three subfields for the comp. The specific distribution of required and elective options may be adjusted to reflect course offerings over the preceding three semesters. If, for example, no course has been offered in Judicial Politics and Institutional Behavior over the preceding three semesters, then no question from that subfield will appear on the exam, and the comp mandate relative to that subfield won’t apply. In this case the student would answer questions from one required field and two elective fields.

The field faculty will grade the comps within three weeks of completion, and grades will reflect the judgment of the field faculty as a whole.

Constitutional Studies Subfields and Courses, with Selected Readings

(1) American Constitutional Law and Development

Courses:

The American Founding
American Constitutional History

The Constitution and Public Policy

Civil Rights and Civil Liberties

Constitutional Institutions (seminars/lecture courses in federalism, Congress and the Court, Judicial Review, etc.)

The Constitution and the Civil War

Big Government and the Constitution

Religion and the Constitution.

The American Judicial System

Representative Readings:

Landmark Decisions of the U.S. Supreme Court

Alexander Hamilton, James Madison, and John Jay, *The Federalist*

James Madison, *Notes of Debates in the Federal Convention of 1787*

Henry Abraham, *The Judicial Process*

Akhil Reed Amar, *America’s Constitution: A Biography*

Alexander Bickel, *The Least Dangerous Branch*

Harry Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*

Ronald Kahn and Ken Kersch, eds, *The Supreme Court and American Political Development*

Martin Diamond, *The Founding of the Democratic Republic*

Walter Berns, *The First Amendment and the Future of American Democracy*

Sanford Levinson, *America’s Undemocratic Constitution*

Philip Munoz, *God and the Founders: Madison, Washington, and Jefferson*


Bernard Siegan, *Economic Liberties and the Constitution*

Michael Zuckert, *The Natural Rights Republic*

Herbert Storing, “The Problem of Big Government,” and *What the Antifederalists Were For*

(2) Comparative Constitutional Systems and Law

Courses:
Comparative Constitutional Law

Comparative Judicial Systems

**Representative Readings**

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the new Constitutionalism*

Gary Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context*

Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*

Walter Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*

(3) **International Judicial Systems and Human Rights**

**Courses:**

International Courts

International Human Rights

**Readings:**


Eric Posner, *The Perils of Global Legalism*

(4) **Judicial Politics and Institutional Behavior**

**Courses:**

Judicial Power in Institutional Context

Public Opinion and the Judiciary

Judicial Strategy and Voting Behavior

Judicial Power and Social Change

**Representative Readings:**

Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior*

Cornell Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutionalist Approaches*


Lee Epstein and Jack Knight, *The Choices Judges Make*

Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments*

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*
Walter Murphy, *Elements of Judicial Strategy*

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

Jeffrey Segal and Harold Spaeth, *The Attitudinal Model Revisited*

Martin Shapiro, *Law and Politics in the Supreme Court*


(5) Legal and Constitutional Philosophy

Courses

The Nature of Law

The Philosophy of the American Founding

Varieties of Liberal Constitutionalism (Positive, Negative, and Procedural Constitutionalism)

Liberal Constitutionalism and its Critics (Burke, Schmidt, Strauss, Sandel, etc.)

The Rule of Law and Emergency Power

The Constitutional Thought of American Statesmen

Models of Constitutional Leadership and Responsibility

Constitutionalism: Ancient and Modern

The Logical Structure of Constitutional Rights, Powers, and Institutions

Metaethics and Constitutional Thought

Liberal Constitutionalism and the Welfare State

Constitutionalism, Justice, and Property

Legal Reasoning

Legal Research

Representative Readings:

Bruce Ackerman, *We the People: Foundations*

Sotirios Barber, *Welfare and the Constitution*

H.L.A. Hart, *The Concept of Law*

Ronald Dworkin, *Justice for Hedgehogs*
John Hart Ely, *Democracy and Distrust*

Clement Fatovic, *Outside the Law: Emergency and Executive Power*

Charles McIlwain, *Constitutionalism: Ancient and Modern*

Richard Posner, *How Judges Think*

Michael S. Moore, “Law as a Functional Kind”

Neil MacCormick, *Legal Reasoning and legal Theory*

Joseph Raz, *The Authority of Law*

Michael Sandel, *Democracy’s Discontent*

Amy Sloan, *Basic Legal Research: Tools and Strategies*

Michael Zuckert, *Launching Liberalism*

(6) Theories of Interpretation

Courses:

Constitutional Interpretation

Textual Interpretation: Legal, Literary, and Scriptural

Representative Readings:

Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions*

Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*

John Hart Ely, *Democracy and Distrust*

Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*

Stanley Fish, *Is There a Text in This class? The Authority of Interpretive Communities*

Michael S. Moore, “A Natural Law Theory of Interpretation”

Gary McDowell, *The Language of the Law and the Foundations of American Constitutionalism*

Leo Strauss, “On the Interpretation of Genesis”

Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*

January 2012
Ph.D. Comprehensive Exam in Constitutional Studies, January 21, 2012

In 3 essays of no more than 1,700 words each, answer three of the following questions, choosing at least one question from Part I and one question from Part II. You may elect to write your third essay on a question from Part III or on another question from either Part I or Part II.

I.

A. Compare and critically assess the legal philosophies of Thomas Aquinas, H. L. A. Hart, and John Finnis, focusing on one of the following two themes: (1) the nature (or concept) of law; (2) the existence, character, and import of natural law.

B. Distinguish “abstract originalism” from “concrete originalism,” name theorists associated with each, and show how these understandings of “originalism” reflect different theories of (1) what legal-moral words like “liberty” refer to and (2) the American Constitution’s basic normative character (i.e., whether the American Constitution is (a) a contract among entities with different interests or (b) a charter for pursuing public goods like national security and the general welfare).

C. According to Robert Dahl and some others, many of the chief features of the Constitution (e.g., bicameralism, separation of powers, federalism, the Electoral College, the scheme of representation) were placed into the constitution in order to thwart democratic majorities. What do you think of Dahl’s claim? On the basis of your knowledge of the American founding how would you defend or critique Dahl’s claim?

D. Compare and contrast the place of the Founders and the Founders’ political and constitutional theory in the political thought of Lincoln, on the one hand, and of two Progressives (e.g., Croly, Wilson, F.D. Roosevelt, LBJ, Brennan) on the other.

II.

A. Has the American Supreme Court articulated a clear, consistent, and coherent Establishment Clause jurisprudence? Your answer should include a discussion of at least three First Amendment Religion Clause cases.

B. Citing the appropriate cases and the voting records of the Supreme Court’s current members, defend your prediction of how the court will decide whether same-sex couples have a constitutional right to marry.

C. Citing the appropriate cases and the voting records of the Supreme Court’s current members, defend your prediction of how the Court will decide the “individual mandate” provision of the Affordable Care Act of 2010 (“Obamacare”).

III.

A. What are American scholars doing when they “compare” the decisions of the U.S. Supreme Court with the decisions or opinions of foreign constitutional courts? In short, why do they read and analyze the constitutional opinions of foreign courts of judicial review? And what do they expect to learn or take away from this enterprise?

   B. A committee of the House of Representatives of the U.S. Congress recently held hearings on a bill providing that U.S. courts “may not rely upon” laws, rules, or judicial decisions of foreign countries in deciding constitutional cases. Give a detailed and critical response to this proposal.
May 2012

Con studies comp 5/23/12

1

Con Studies Comp 5/12

Answer one question from each of the following three subfields
Philosophy of Law and Constitutional Interpretation

1. Compare and contrast the place of the Founders and the Founders’ political and constitutional theory in the political thought of Lincoln, on the one hand, and of two Progressives (e.g., Croly, Wilson, F.D. Roosevelt, LBJ, Brennan) on the other.

2. The 100th anniversary of Charles Beard’s An Economic Interpretation of the Constitution is soon to come. It is a good time to assess his thesis that the Constitution was written to protect property and stymie democracy, with institutions like federalism, separation of powers, and the extended republic meant to prevent or nullify majorities in the interest of the wealthy.

On the basis of your study of the founding, what ought to be said about Beard’s thesis?

Comparative Constitutional Systems and Law

1. “Some Supreme Court justices sternly resist the use of foreign constitutional 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?”

2. Judicial review was once regarded as a unique feature of the American governmental system. Since the end of World War II, however, many of the world’s advanced democracies have created courts of judicial review modeled after the U.S. Supreme Court. What accounts for this remarkable postwar constitutional development around the world?

American Constitutional Law and Judicial Politics

1. Explain the following statement as fully as you can, taking care to discuss (1) each of the three cases, (2) the meaning of “departmentalism,” and (3) the reason conservative justices give for denying that they are judicial activists.


Dissenting in Planned Parenthood v. Casey (1992) Chief Justice Rehnquist said the majority had left Roe v. Wade “a mere façade.” What subsequent Supreme Court decisions tend to (1) confirm and (2) disconfirm Rehnquist’s view of what Casey accomplished?

September 2012

Constitutional Studies Comp, 9/29/12
Subfield 1: American Constitutional Law & Judisial Politics: Answer one of the following.

A. Describe how judicial doctrine from Brown v. Bd. of Ed (1954), through Swann v. Charlotte-Mecklenburg (1971) and Milliken v. Bradley (1974), to Parents Involved v. Seattle (2007) evolved from a concern for equal educational opportunity to an insistence that state governments avoid racial classifications, invidious or benign. (2) Explain how this development reflects two different understandings of the functions of constitutional government, namely, an “educative function” and a “coordinating function.” You must answer both parts of this question; no partial credit.

B. Has the American Supreme Court articulated a clear, consistent, and coherent Free Exercise Clause jurisprudence? Your answer should include a discussion of at least three First Amendment Religion Clause cases.

Subfield 2: Philosophy of Law and Constitutional Interpretation: Answer one of the following.

A. Illustrate the meaning of the following statement by discussing the differences between the Supreme Court’s opinions in Plessy v. Ferguson (1896) and Brown v. Bd of Ed (1954).

“To rely on judicial precedents for determining what the Constitution means is inevitably to falsify the facts of life or to imagine a world ‘for constitutional purposes’ that conflicts with the world in which we actually live.”

B. Thomas Aquinas and John Finnis offer two theories, arguably not identical, of natural law and its relationship to positive law. Oliver Wendell Holmes and H.L.A. Hart offer critiques of natural law theory in their work, though they may also incorporate it in some way into their positivist theories of law.

Choose either (1) Aquinas’s or Finnis’s theory of natural law and (2) either Holmes’ or Hart’s critical appraisal of natural law. What can be learned from each that matters for the study of philosophy of law? Does the critique you select do justice to the substantive natural law theory you select? Why or why not?

Subfield 3: International Law and Human Rights: Answer one of the following.

A. The natural law doctrine has played an important part in the development of international law. Elaborate on the genesis and historical development of international law paying a particular attention to the natural law doctrine influences. Give examples of at least two concepts/principles of international law that stem directly or partially from the natural law doctrine.

B. Several concepts, doctrines and principles of international law have developed from domestic legal systems, especially from civil and common law. Choose at least two examples of such principles/concepts/doctrines, elaborate on their substantive content, and historical development. Islamic law, as the third largest domestic legal tradition has impacted international law to a much smaller extent. Explain why.

January 2013

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 Con 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.

*September 2013*

**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?

January 2014

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 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?

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.

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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?

Constitutional Studies Comprehensive Exam Questions

Field 1: American Constitutional Law and Judicial Politics

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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?

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January 2015

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 the 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."

January 2016

To the Student:

Answer a total of 3 questions: one question from Field 1, one question from Field 2, and one question either from Field 3 or Field 4. Each answer must be 1700 words or less, double spaced, PDF. Save a PDF of each answer for later production if requested by the DGS. Time limit for the exam: 6 hours from the time sent to you.

Field 1: Philosophy of Law and Constitutional Interpretation

1. The history of constitutional doctrine that culminates in Obergefell v. Hodges (2015) features debate among the justices over what the Supreme Court decided in Griswold v. Connecticut (1965), Eisenstadt v. Baird (1972), and Loving v. Virginia (1967). Describe this debate in terms of different theories of (1) the holding and (2) the weight of precedent in constitutional decision. Your answer should employ the categories set forth in Michael Moore’s “A Natural Law Theory of Interpretation.”
2. How does Ronald Dworkin’s theory of constitutional interpretation (1) compromise the distinction between the rule of law and the rule of men and (2) undermine the idea that “checks and balances” can obviate the need for cultivating a competent and public-spirited leadership community? Your answer must contain a full description of Dworkin’s theory.

Field 2: American Constitutional law and Judicial Politics

1. Alexander Hamilton famously described the Supreme Court under the U.S. Constitution as possessing "neither FORCE nor WILL, but merely judgment." Decades later, in evaluating the American constitutional system, Alexis De Tocqueville argued that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Setting aside the normative and theoretical issues behind these perspectives, what insights can empirical social science lend to this debate? In answering this question, be sure to cite the relevant literature addressing (1) the Court's propensity to attempt to alter social and political outcomes, (2) the likelihood of the Court's decisions prevailing over the preferences of other social and political actors, and (3) whether the Court's rulings actually influence the long-term patterns of social and political behavior.

2. “When Garcia v. SAMTA (1985) overruled National League of Cities v. Usury (1976), Justices Powell, O’Connor, and Rehnquist pledged that they would continue to fight for the idea of Tenth Amendment limitations on Congress’s power. Success for the Garcia dissenters came in New York v. U.S. (1992), Printz v. U.S. (1997), and NFIB v. Sebelius (2012).” Explain this statement in a way that describes (1) what is meant by Tenth Amendment limitations of Congress’s power and (2) what the Court held in each of the five cases.

3. Brown v. Board of Education (1954) can be read either as (1) proscribing racial classifications in the law (except for “remedial purposes”) or (2) mandating racial integration as a means to an equal-opportunity society. In Swann v. Charlotte-Mecklenburg (1971), the Supreme Court implicitly rejected the second interpretation of Brown. Explain how the Court’s choice in Swann reflects the framers’ choice for a constitution of “checks and balances.” Your answer should describe the decisions in Brown and Swann together with the alternative to “checks and balances” and why the framers rejected that alternative.

Field 3: Comparative Constitutional Law

1. Is it useful to group domestic legal systems into broad categories? What are the main characteristics of these categories and is there a difference between the concept of a domestic legal system and a domestic legal tradition? Elaborate on the inherent link between culture, laws, norms, and history to defend your position.

2. Fundamental characteristics/features of a domestic legal system may be enshrined in constitutions or laws of lower status. Elaborate on the relationship between law and religion in the context of Islamic constitutionalism, referring to the constitutions and laws of specific Islamic law states.

Field 4: International Law and Human Rights

1. Modern international law with its institutions 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 important points of contention between religion and secularism on the international arena? Does this contention play a role in international courts?

2. Do international courts have authority over states? What does it mean for an international court to constitute an unbiased adjudicator? Furthermore, is it possible for international courts to reach high levels of authority over all states, regardless of their domestic legal traditions and other specific contextual stat-level characteristics? Elaborate on the differences between domestic and international adjudicators in the context of
To the student: You have six hours to answer one question from Field I, one question from Field 2, and one question from either Field III or Field IV. Your answers may not exceed 1700 words. You must avoid plagiarism and the appearance of plagiarism. Accompany all quotes, paraphrases, and copied materials with full references. Double space your answers and send them PDF. Save a PDF copy of your answers for later production should the DGS request. Failure to comply with any of these instructions will mean failure on the exam.

Field I: Legal Philosophy and Constitutional Interpretation

1. The varieties of “originalism” have been described as (a) concrete originalism and (b) abstract originalism, with concrete originalism applying either the founding generation’s (i) definitions or (ii) applications of constitutional words and phrases. Show how each of these three approaches to constitutional interpretation reflects a different theory of word meaning. Use the word ‘liberty’ for your example.

2. Make a case either for or against the U.S. Supreme Court’s use of the case law of other advanced western democracies in interpreting the U.S. Constitution. Illustrate your answer with cases from at least two areas of constitutional law, and identify the metaethical position that your answer implies.

Field II: American Constitutional law and Judicial Politics

1. “RFRA” is the acronym of the Religious Freedom Restoration Act, enacted by Congress in 1993, in response to the Supreme Court’s decision in Employment Division v. Smith (1990). Though overruled as applied to the states in Boerne v. Flores (1997), RFRA was upheld as applied to federal agencies in Gonzales v. O’Centro (2006), a decision that was reaffirmed in Burwell v. Hobby Lobby (2014). Some 21 states (mostly red but some blue) have enacted “little RFRA”s of their own. Write an essay that describes the RFRA as a type of legislation and traces its judicial evolution. Your account of this development should (1) give a clear definition of RFRA as a type of legislation, (2) distinguish the Court’s constitutional holdings from the Court’s statutory holdings, and (3) identifies the ends for which the RFRA as a type of legislation was originally deployed and the ends for which it is now deployed.

2. It has been said: “The main thing at stake in the debate between Federalist and Anti-Federalist over the Constitution was the legacy of the American Revolution, with each side claiming to be the true preserver of the Revolution.” Is this a true estimate of what was going on in the debate over the Constitution? How so? If not, what is a better way to understand the debate?

Field III: Comparative Constitutional Systems and Law

1. Is it useful to group domestic legal systems into broad categories? What are the main characteristics of these categories and is there a difference between the concept of a domestic legal system and a domestic legal tradition? Elaborate on the inherent link between culture, laws, norms, and history to defend your position. Is there something inherently different between various domestic legal systems/domestic legal traditions that make these categorization necessary?

2. Suppose you were asked to organize and teach a course in comparative constitutional law. What would be the purpose or purposes of such a course? What countries would you choose for comparisons and why? What
questions would the course address? What topic areas would you cover and why?

Field IV: International Law and Human Rights

(1) 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 important points of contention between religion and secularism on the international arena? Does this contention play a role in international courts?

(2) A major part of the legal world environment has become human rights. Provide a brief sketch of (a) how human rights have risen to such prominence and (b) whether these rights should be conceived as grounded in nature or in evolving social convention. Sketch a defense of your answer to (b).

(3) Custom is one source of international law. Elaborate one important international customary norm, focusing on its substantive content and its historical development. Describe how the International Court of Justice has contributed to the recognition of customary law.

September 2016

CONSTITUTIONAL STUDIES COMPREHENSIVE EXAMINATION.

Answer one question from each set of questions below. Please answer the question actually asked.

American

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 that understanding with at least two other American statesmen or scholars who take a different view.


Comparative

3. Suppose you were asked to organize and teach a senior undergraduate course in comparative constitutional law. What would be the purpose or goals of such a course? What countries would you choose for comparison and why? What leading questions would the course address? What topical areas would you cover and why? And what materials, judicial and non-judicial, would you have the students read?"

4. Islamic law has a specific understanding of property that sharply contrasts with the way that Western legal traditions see human dominion over land and other types of property. Elaborate on these differences, referring to constitutions and laws of lower status of specific Islamic law states.

Philosophy and theories of Interpretation.

5. Assume that the following statement is true and explain it to undergraduates in a first course in constitutional studies: "The interpretive debate in American constitutional law is not really a contest between ‘originalism’ and ‘non-originalism’; at bottom it’s a contest between the ‘moral reading’ (or ‘philosophic approach’) and ‘pragmatism.’ The outcome of this debate will determine whether one can advocate ‘the rule of law’ with intellectual honesty.”
6. In which respects is John Finnis' *Natural Law and Natural Rights* a continuation of H. L. A. Hart's project in *The Concept of Law*? In which respects is Finnis' book a critique of Hart's legal theory? How successful do you find his critique, and why?

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**January 2017**

**Constitutional Studies Graduate Comprehensive Examination: (Spring 2017)**

(Answer one question from each group below).

**Philosophy of Law and Jurisprudence**

1. In which respects is John Finnis' *Natural Law and Natural Rights* a continuation of H. L. A. Hart's project in *The Concept of Law*? In which respects is Finnis' book a critique of Hart's legal theory? How successful do you find his critique, and why?

2. Assume that the following statement is true and explain it to undergraduates in a first course in constitutional studies: "The interpretive debate in American constitutional law is not really a contest between "originalism" and "non-originalism"; at bottom it's a contest between the "moral reading" (or "philosophic approach") and "pragmatism." The outcome of this debate will determine whether one can advocate "the rule of law" with intellectual honesty.

**American Constitutional Law and History**

1. In Federalist 78, Publius contends “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” Craft an essay that evaluates Publius's claim. In your essay, refer to at least one subject area of Supreme Court cases (e.g. speech, press, privacy, equal protection) as well as relevant the relevant secondary literature to substantiate your answer.

2. Numerous empirical studies of American judicial politics agree that U.S. Supreme Court justices are constrained in their decision making by the preferences of external actors (e.g., the public, Congress, or the president). However, these studies differ with regard to how and why the justices are susceptible to external influence. Describe at least three explanations for how and why Supreme Court justices are influenced by external actors, evaluate the evidence supporting/contradicting each explanation, and make an argument for which explanation is most persuasive. You may focus on the influence of public opinion, other elected officials, or both.

**Comparative Constitutionalism and Law**

1. The relationship between secular law and religious law constitutes an important reality in the context of the Islamic legal tradition. Constitutions as well as laws of lower status reflect – albeit imperfectly – this relationship. Elaborate on the nexus between the “secular” law and the religious norms in the context of Islamic constitutionalism, focusing on the diversity of constitutional approaches within the Islamic world. Provide examples of constitutions and laws of lower status in specific Islamic law states, focusing on at least two countries where this relationship is regulated in a distinct way.

2. How can the explosion of the practice of judicial review around the world be explained? Is there a basic uniformity in how judicial review is practiced in the many constitutional systems that now deploy it? Is it effective? Effective for what?
The End