

YALE LAW SCHOOL

Spring Term 2002 Examination

Advanced Constitutional Law

May, 2002
(Self-Scheduled)

Professor Balkin

Instructions

1. This examination consists of two essay questions. Each has equal weight in determining your grade. Your answers to the two questions *combined* should total no more than 6,000 words. The exam is due no later than Friday, May 24th, 2002 at 4:30pm. When you are finished, please hand in your examination to my secretary, Debbie Sestito, Room 333. Her phone number is (203)-432-4830. Her e-mail address is deborah.sestito@yale.edu
2. Please read each question carefully and pay attention to what you are being asked to do.
3. If anything about a question is ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized. If you need to assume additional facts in order to answer a question, state what those facts are and how they affect your answer.
4. If at all possible, please type your exam. The easier your answer is to read, the more appeal it will have when it is viewed at 2:00 in the morning.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You get penalized for an answer which is disorganized and confusing.
6. This exam is open book.
7. Good luck.

Question One
(One Half)

In this course we have repeatedly noted the use of narrative arguments as a way of explaining and justifying constitutional arguments and decisionmaking. Narrative arguments often describe American history in terms of progress toward an undetermined future, or regress from an earlier golden age that must be restored. They offer accounts of the American people, their hopes, deeds, wishes, goals, desires, and failings. They provide implicit or explicit moral and political lessons to be garnered from American history, or implicit or explicit justifications or criticisms of the status quo.

1. Select a few examples of narrative argument from the thinkers we have studied in the course and describe the strengths and weaknesses of their approaches.
2. Do you think that narrative argument is importantly different from originalist argument or from other uses of history in constitutional law? If so, is it more or less legitimate or persuasive as a form of constitutional reasoning?

Question Two
(One Half)

In this course we have considered an account of judicial review that asserts that judicial review involves judicial mis-recognition of constitutional politics as constitutional law. This judicial mis-recognition, the argument goes, is a major source of constitutional change in addition to the methods of constitutional amendment prescribed in Article V of the Constitution.

1. What are the strengths and weaknesses of this formulation, both normatively and descriptively? (“Normatively” means how you think the system should work; “descriptively” means how you think the system actually does work in practice).
2. What role do political parties and social movements play in your analysis, both normatively and descriptively?
3. Given the variety of ways that courts interact (or fail to interact) with the political process, is “mis-recognition” the best word to describe that relationship?

END OF EXAMINATION