

**CONSTITUTIONAL LAW III**

**Final Examination**

**December 13, 1997**

**9:00 a.m. to 3:00 p.m.**

**Autumn Quarter, 1997**  
**Prof. Obama**

## Instructions

1. This is an open book exam. You may use any materials or notes used in our class. You may not refer to cases, articles, etc. that were not used in class.
2. You will have six hours to complete the exam. The exam is designed, however, to be completed in approximately three hours. Feel free to use the extra three hours as you wish.
3. The exam consists of two Parts. In grading the exam, I will treat each Part as roughly equal in weight. The numbered questions within each part will be accorded roughly equal weight, although they are obviously interrelated and will be graded as such. In other words, don't worry if your answer to one numbered question is longer or shorter than another. Just make sure that you have answered all the questions in each Part.
4. **I would greatly prefer that your answer be typed or word-processed. Assuming you type, you must double-space, use a 12-point font, and provide for at least one inch margins all the way around the page. This works out to roughly 435 words per page (five characters per word). Your answer must be no more than 12 pages (or roughly 5,200 words); I will stop reading after 12 pages.**
5. If you really truly cannot type, or lack access to a word processor, then you may use a bluebook. Please write on only one side of each bluebook page, put your exam number on each bluebook, and remember to skip lines. The rough 5,200 word limit still applies.
6. Read each question carefully and think before you write. **Please do not feel obliged to make use of the 12 page maximum in formulating your answers. Precision and imagination, rather than volume, is what counts.**

Good luck, and have a fine holiday.

After careful deliberation and consultation, Mary and Joseph have decided to remove Dolly from life-support. They have also decided that, prior to removing Dolly from life-support, they would like to take a healthy cell from Dolly's body and have her cloned. They have based their decision in part on the belief that Dolly would want her genetic line continued, and in part on their feeling that a new child will help fill the void cause by Dolly's imminent death. (Mary has already experienced menopause, and hence can no longer provide her own eggs for either natural conception or in vitro fertilization; technology does permit her to carry to term a cloned embryo implanted in her womb.)

Technically infertile!

Mary's and Joseph's decision is also influenced by the fact that prior to the accident, Dolly expressed an interest in becoming an infertility specialist, and had stated to her parents on several occasions that she saw nothing ethically wrong with the use of cloning either to help infertile couples conceive, or to facilitate a decision by grieving parents to reproduce a terminally ill infant or child. Dolly shared this view with a number of her friends, who are prepared to testify to that effect.

fact: nothing wrong w/ doing for infertility

According to the doctors at Bethlehem Medical, there is nothing related to Dolly's medical condition that would prevent her from being cloned. Moreover, the technology required to carry out the procedure already exists in the infertility wing of the hospital. There's only one problem: Futura is one of the 10 states that has banned human cloning. According to the hospital's lawyer, the state defends the ban on the grounds that i) human cloning violates "the sanctity of life and the bonds of family that lie at the very core of our ideals and our society"; ii) human cloning "makes our children objects rather than cherished individuals," and therefore opens the door to such potential abuses as the cloning of individuals solely for organ harvesting; and iii) children conceived through the cloning process "may experience psychological damage, ostracism or even discrimination as a class, outcomes which the state has an deep interest in preventing."

justifications: - sanctity + family bonds - abuse - discrimination

Moreover, the hospital lawyer has indicated that even if Mary and Joseph were willing and able to incur the additional expense and risk of transporting Dolly to another state in order to perform the cloning procedure, those states which permit human cloning all require proof of voluntary and informed consent from the individual who is to be cloned. An exception to this consent requirement exists where the individual to be cloned is a terminally ill minor, an exception that does not apply in Dolly's case. In the hospital lawyer's view, neither Dolly's "living will" nor her general statements regarding cloning constitute sufficient proof for the purpose of meeting this consent requirement.

consent required

Mary and Joseph come to your law office to discuss their options. Specifically, they ask you to answer the following two questions:

1) First, they would like to know whether the State of Futura's indiscriminate ban on cloning violates either Dolly's constitutional rights, or their own constitutional rights, under the "substantive" component of the Fourteenth Amendment's Due Process Clause. You do not need to arrive at a definitive conclusion regarding these issues. Instead, make the strongest possible argument for each claim, then explore the weaknesses of each

## Part One (ninety minutes)

Mary and Joseph, a married couple in their early fifties, are residents of Bethlehem City, which is located in Futura, a state in the United States of America. Last year, their 23 year old daughter, Dolly, a second-year medical student at Futura State University, was in a serious car accident. Dolly sustained severe head injuries as a result of the accident, and was already unconscious when removed from the wreck. Despite the best efforts of the doctors at Bethlehem Medical Center, Dolly has been in a persistent vegetative state for the past year. She survives only with the assistance of respiratory, feeding and hydration tubes, and shows no sign of brain function. Doctors have indicated to Mary and Joseph that Dolly has no prospects whatsoever for recovery, and that the removal of the life-support system currently in place will cause Dolly's death.

Cruzan

Perhaps due to her interest in medicine, or perhaps due to a natural morbidity, Dolly had the foresight to draft her own "living will" prior to the accident. The will grants Mary and Joseph joint authority "in making any and all decisions regarding medical treatment" on Dolly's behalf in the event she becomes comatose, "including the decision to terminate life-sustaining treatment." It is uncontroverted that the "living will" constitutes "clear and convincing" evidence of Dolly's informed and voluntary wish to delegate authority to her parents regarding the decision to terminate life-sustaining treatment, and that such a conferral of authority is valid under Futura state law.

proxy

Grief-stricken at the imminent loss of their only child, Mary and Joseph have been following with considerable interest the rapid advances taking place in the field of human cloning. It seems that over the past five years, several hundred happy, healthy infants have resulted from the process, which involves taking a cell from a living person (so far, these cells have all come from infertile couples seeking to conceive) and slipping the cell into an egg cell whose genetic material has been removed. The emergent embryo, which will be a genetic copy of the adult cell donor, is then transferred to a woman's womb, where it will develop in the usual fashion until birth.

cloning -  
CCE for  
this.

Despite the controversy that surrounded the initial batch of cloned infants and the continuing opposition of most religious groups to the new technology, the U.S. Congress has thus far declined to ban the practice. Congress has established a limited set of federal guidelines regulating the medical practices and technologies to be used in the cloning of humans, but has otherwise chosen to leave the decision regarding the regulation and/or permissibility of human cloning in the hands of state legislatures. So far, 10 states have instituted an outright ban on the practice; another 10 have no laws at all pertaining to the practice, while the remaining 30 have a patchwork of regulations with varying degrees of intrusiveness. Medical ethicists remain divided on the issue, but all agree that there is no scientific evidence that the hundred or so "clone babies" currently in existence experience rates of illness, behavioral disorder, psychological difficulty, or abuse at the hands of parents, that are demonstrably higher than children conceived in the traditional fashion.



claim. Be sure to consider the possibility that Futura's ban on cloning does in fact encroach on some constitutionally recognized rights, but is nevertheless constitutional.

2) Second, assuming Mary and Joseph decide to transport Dolly to a state that already permits human cloning, they would like to know whether they can mount a successful constitutional challenge to a possible state ruling that neither Dolly's "living will" nor her general statements regarding cloning are sufficiently indicative of Dolly's consent to permit the removal of her cells for cloning purposes. In answering this question, assume that under both the common law and statutory law of all states, Dolly's general statements regarding cloning would not constitute "clear and convincing" evidence of her consent to be cloned, but might be considered evidence of consent under a "preponderance of the evidence" (that is, a "more likely than not") standard.

outlaw  
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std

### Part Two (ninety minutes)

Splitsville is a large Northern city in the State of Wazoo, with a population that is approximately 45 percent black, 40 percent white, and 10 percent Latino, and 5 percent Asian. Like many urban centers, Splitsville has major problems with its public schools.

Specifically, although the Splitsville school district has never operated a system of de jure racial segregation, the school district did enter into a federal consent decree in the early seventies, in response to a lawsuit alleging that it intentionally maintained a de facto system of segregated schools. Under the terms of the federal consent decree, the district was required to create a system of selective magnet schools throughout the city, with voluntary busing for those students interested in attending the magnet schools. The magnet schools were designed to both enhance opportunity for minority students and to promote an integrated learning environment for those students wishing to attend such schools. The school board was also required to institute a range of remedial education and counseling programs targeted at predominantly minority schools.

In 1992, the school district was released from the consent decree after a finding that it had achieved unitary status. The magnet schools have been maintained, and the remedial programs first instituted under the consent decree have been folded into a more general remedial plan, whereby schools with high concentrations of poverty receive additional federal and state aid.

These programs have not been sufficient to overcome segregated housing patterns and white flight from the public school system, however, and the goal of a genuinely integrated public school system remains elusive. More than half of all black public school students in Splitsville attend schools that are at least 90 percent black, and more than one third of all Latino students attend schools that are at least 90 percent Latino. The majority of students in the Splitsville schools perform well below national norms on standardized test, and the drop-out rate system-wide hovers at around 35 percent. Performance is even more dismal in the largely all-black and all-Latino schools, where only 10 percent of the students read at the national norm, and 45 percent of the students

performance

drop out before graduation. Statistics also reveal slightly higher drop out rates and lower test scores for minority boys than for minority girls.

In response to this on-going educational crisis, two black members of the Splitsville School Board two years ago proposed the creation of a pilot all-black, all-male, career academy, to be called "Ujamaa School." The mission of the school, according to the proposal, would be to "foster a spirit of discipline, self-respect, cooperation, and academic excellence among those youth most likely to underachieve." The school would run from grades one through twelve, and would operate on an "immersion" model of "African-centered education": while the curriculum would consist of the usual elementary and secondary school fare (i.e. reading, math, social science, etc.), these subjects would be taught using material that emphasize black history and culture in general, and black male achievement in particular. Extra-curricular activities would also be "African-centered," and would include a mandatory "Rites of Passage" program for older boys that integrated physical education, spiritual training, and community service.

The school would aim at staffing itself entirely with black male teachers, a cohort that constitutes a small minority (15 percent) of the system-wide Splitsville teaching core. No affirmative action would be employed in hiring of these teachers, however; indeed, hiring would be subject to all existing union rules regarding seniority and teacher assignment. On a per pupil basis, Ujamaa would not receive any more money from the school district than other non-magnet schools with a large percentage of poverty students. No teacher would receive any additional salary or benefits for teaching at the school, despite the fact that Ujamaa teachers would be expected to volunteer additional time and energy in order to staff and organize the school's extensive extra-curricular program.

Only fifty students per grade level would be admitted to Ujamaa, in order to assure small class sizes and personalized attention. Students from anywhere in the city could apply for admission, but Ujamaa would make special efforts to recruit students currently enrolled in those schools that are over 90 percent black and contain a large number of low-income or underachieving students. Admission would be non-selective; if the school was oversubscribed, students would be chosen by lottery. And, according to the proposal, admission would be non-discriminatory: that is, female and non-black students would be free to apply, and would be placed in the same pool -- with exactly the same chances of being selected -- as their black male counterparts. On the other hand, the proposal made it clear that the curricular emphasis on black culture and black male achievement would not be modified to accommodate female or non-black students.

After a lengthy series of public hearings, during which large numbers of black parents and community leaders voiced support for the plan, the Splitsville School Board passed the Ujamaa proposal. Of the six member who supported the plan, four were black, one was white, and one was Latino. Of the three members who opposed the plan, one was black and two were white.

*discrim against Latinos?*

*US v VA*

*really wild bc harmful to ♀*

*no extra \$*

Ujamaa School has been operating for over a year now, largely in accordance with the original proposal. All the students at the school are black males; indeed, no female or non-black students have thus far applied to the school. Only five of the thirty members of the faculty and administration at Ujamaa are women, and all are black. Again, no non-blacks have applied to teach at the school; the women who did express an interest in teaching at Ujamaa, and who were eventually hired, did so only after Ujamaa announced that the goal of an all-male faculty would not be met. Because the total number of students at Ujamaa is small, the race and gender composition of the student population at the other Splitsville schools has been largely unaffected. On the other hand, Ujamaa has soaked up a disproportionate number of the district's black male school teachers.

So far, students, parents, teachers and neighborhoods affiliated with Ujamaa are enthusiastic with the school's results. Attendance at Ujamaa is much higher and tardiness much lower than at other majority black schools in the district; the drop-out rate is negligible. On last year's standardized tests, Ujamaa students outperformed (albeit modestly) students at other majority black schools, although it is too early to tell whether these test results represent a trend.

You are legal counsel to Mayor Muddles, the recently elected black mayor of Splitsville. Reporters have been asking her to respond to commentators from the left and the right who have criticized Ujamaa School as either a) an unconstitutional rejection of Brown v. Board of Education; b) a multiculturalist plot that puts education at the service of sectarian ideologies, or c) an exercise in patriarchy. The Mayor has called on you to help formulate a response. In particular, she asks you to answer the following questions:

1) Is Ujamaa School subject to challenge as unconstitutional racial discrimination under the Equal Protection Clause of the Fourteenth Amendment? In formulating your answer, you should discuss separately the strengths and weaknesses of possible claims brought by Splitsville's black, white, Latino and/or Asian public school students. You do not need to discuss possible claims by Splitsville's teachers. [students only]

2) Is Ujamaa School subject to challenge as unconstitutional gender discrimination under the Equal Protection Clause? Does it matter, in evaluating such gender claims, whether the students bringing the challenge are black or of some other race? Again, in answering this question, ignore possible claims by teachers.

3) Even if Ujamaa can survive a court challenge, is it good public policy? Put somewhat differently, in light of what you know about equal protection law and the history of race and gender discrimination in America, is the Ujamaa School a worthy attempt to promote long-term equality, or does it instead represent a dangerous betrayal of the American ideal? In answering this question, feel free to argue both sides of the issue, but end by stating your considered opinion. Where appropriate, refer to cases you read way back when you were in Professor Obama's Con Law class. Brown - goal oriented

## END OF EXAMINATION