
HOWARD UNIVERSITY SCHOOL OF LAW
CONSTITUTIONAL LAW II SECTION I

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Fall 2017 Final Exam Instructions

December 4, 2017

General Instructions

1. You have three (3) hours for the exam.
2. Times noted for the questions reflect the amount of time I estimate it would take to answer each question. Although the time noted for each question does relate somewhat to the points for that question, it does not do so in a strict one-to-one fashion.
3. The exam is three (3) pages long, excluding this instructions page.
4. There are two (2) questions worth 70 points each for a total of 140 possible points.
5. If you are not typing your exam, write legibly and clearly in blue or black ink.
6. Use substantive headings as appropriate.
7. Respond to the question asked, not to questions that might have been asked. Even though an exam question may be based on one of the hypotheticals discussed or distributed during the semester, the call of the question may be different and the facts may have been revised. In your responses, do not spend time on matters that are not relevant just to show me how much you know. This exam tests professional judgment as well as knowledge of the material we covered in Constitutional Law II.
8. One or more of the issues or sub-issues may have a clear answer. For such items you should provide a brief explanation that is sufficiently complete such that the reader will understand your analysis and why the matter is not a close one. Other matters may be less certain of outcome and may depend upon filling a gap in the current legal doctrine. For such issues analogizing to other cases and the use of relevant policies and principles are particularly appropriate to discuss.

Permissible exam materials

The exam is closed book. No materials other than the exam itself, blank scratch paper, the laptop with the exam software, and (for those not using the exam software) bluebooks are allowed.

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Question 1. 70 points. Estimated time: 80 minutes.

Pat is genetically female (xx chromosomes, not xy), but has always identified as a male. Pat has not yet had any hormone treatments or surgery to make physiological changes, but for a number of years has dressed and “acted” like a man.

Pat’s employer, the Audio Visual Office (AVO) of Moorebama State University, does audio-visual work for the university. AVO teaches students to use AV equipment, including editing equipment. It also makes instructional films for university employees on various matters including films on sexual harassment and other non-discrimination topics. AVO has a few regular employees involved in making AV works. They do directing, video recording, editing, obtaining copyright clearances if necessary, and so on. Sometimes AVO hires outside independent contractors, especially actors, for some projects when the demand for its services exceeds its ability to provide the requested AV services in a timely fashion.

Pat is employed full time by AVO as an AV technician. Pat’s duties mainly involve support work for faculty and administration. A few times each year Pat also acts in AVO productions, performing male roles. Pat has done this since she was hired four years ago without incident or complaint from other actors, directors, or customers. Indeed, no one at AVO or Moorebama State University knew that Pat was genetically not male.

Ang Ziety, Moorebama State University’s Vice President for Administration (which oversees AVO), recently learned that Pat identifies as a male but is genetically female. Upon learning that Pat was about to be used as an actor on an AVO project on the topic of transgender and gender identity issues, Ziety fired Pat. Ziety said that Pat was fired on the grounds that the people of the state of Moorebama would not support the state university in hiring “such a person,” by which he later said he meant, “a person who acts as something other than what she is.”

Pat went through the university grievance process and the matter has come to the state-appointed Administrative Law Judge, Strate N. Narro, to decide the issue.

You are a legal intern for Narro who has asked you to advise him on how he should decide. Do so. Explain your reasoning.

Question 2. 70 points. Estimated time: 70 minutes.

Fo Tagraf is the owner of Tagraf Art, a company that takes photographic portraits of people and families and takes photos of weddings and other family events. Tagraf herself is a photographer of some renown in Artiston, Libertana, with some of her clients being local and statewide celebrities. Tagraf does all of her photographic work through her business.

Perhaps a secret to Tagraf's success is that she has always treated each photograph she takes as a work of art. To Tagraf, a good photograph is one that captures the essence of the person being photographed as well as reflects the photographer's intellectual and emotional response to that person. For the most part Tagraph succeeds in capturing something unique about each person, much as Annie Leibovitz has always been able to do. The extent to which Tagraf's photos succeed in reflecting her response to the person being photographed is a matter of subjective judgment for each viewer.

Tagraf is a member of the Evangelical Church of the Savior which believes, among other things, that homosexuality is sinful, that transgender identification is sinful, and that actions that would constitute complicity with homosexuality or transgender identification is a sin. Heretofore, this has never been a problem for Tagraf or any of her photographic subjects.

Trans G. Ender approached Tagraf specifically to request that Tagraf capture, in a series of portraits over the next two years, Ender's change from a he to a she. Pictures would be taken every week starting two months before Ender started hormone treatment and continuing until about a year after Ender had the sex change operation.

Tagraf had done similar series of photos previously to capture people changing from adolescence into adulthood, from middle age to old age, and the like, so Tagraf was experienced at making this sort of record. Indeed, Tagraf is recognized as one of the foremost experts in the country at exactly this sort of work.

Tagraf refused Ender's request on the grounds that for her to document for all to see something that goes against her religion, i.e., a person changing their physical gender to match their personal sexual identity, would make her (Tagraf) complicit with sin. She also said that she felt she could not do

the subject justice because her response to Ender would be so negative as to ruin the pictures. To Tagraf the photos would thus not properly express the sorts of positive sensibility that Tagraf tries to express in her pictures. If she succeeded in her aim of having photos show both the person in the photo and Tagraf's response to that person, the pictures would inevitably show Tagraf's dislike of what the person was doing.

Libertana state statute prohibits any place of public accommodation and employees of such places from discriminating on the basis of race, gender, age, disability, national origin, color, religion, sexual orientation, and sexual identity. Tagraf Art qualifies as a place of public accommodation and thus it, and Fo Tagraf personally (as owner and employee), are subject to the law.

After the refusal, Ender was so offended that she sued Fo Tagraf and Tagraf Art for violating the statute.

Evaluate Fo Tragraf's potential federal constitutional defenses to Ender's suit.

End of Exam