
HOWARD UNIVERSITY SCHOOL OF LAW
CONSTITUTIONAL LAW II SECTION I

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Fall 2018 Final Exam Instructions

December 4, 2018

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 four (4) pages long, excluding this instructions page.
4. There are three (3) questions worth 60 points for each of the first two and 30 points for the third for a total of 150 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 from the hypo 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. 60 points. Estimated time: 70 minutes.

The City of Bletchley in the State of Equitania has an ordinance that requires all places of public accommodation not to discriminate against people on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, or sexual identity.

Jake's Cakes is a bakery in Bletchley. Jake's Cakes was started and is owned and run by Jake Stratton as a sole proprietorship. Under the ordinance, Jake's Cakes is a place of public accommodation and thus subject to the nondiscrimination law.

Alan Turing and Bayard Rustin are gay men who were planning their wedding together when they walked into Jake's Cakes to order a wedding cake. Jake himself was behind the sales counter that day and greeted them politely. Jake has sold many ordinary cakes to customers without knowing or caring about their sexual orientation.

Alan and Bayard told Jake, "We want a custom, special wedding cake with two grooms instead of bride and groom figures on top and the words 'Love and Pride' written around the bottom layer of the cake."

Jake said, "I'm sorry. I've got nothing against you guys or your type, but I just can't do that."

Alan and Bayard were surprised and disappointed but held out hope that they could change Jake's mind, so they asked, "Why not?"

Jake answered, "Homosexuality is against my religion."

Bayard pressed the issue and said, "We're not trying to make you gay and not trying to change your religion. All we want is a special cake for our special day!"

Jake again refused saying, "I consider what you are doing to be a sin and to be evil and it would be sin for me to be connected to such evil."

Alan jumped in and said, "You know the law requires you not to discriminate against us right?"

Jake replied, “Yes. Of course. And if all you wanted was any of our regular baked goods, you’re welcome to buy them. But not a special, custom-made cake for your wedding day, especially one that all but shouts ‘Gay Pride.’ I just can’t say something like that.”

Alan then said, “Well, how about you making the cake without the words?”

Jake still refused saying, “Really the same problem with those two grooms on top, isn’t it?”

Bayard then jumped in again and said, “We can put those on ourselves. Just make us the damn cake!” Bayard then added, “Just to be clear, here, all we want is special wedding cake and we’ll take care of adding the words and the two grooms.”

Jake again just said, “No. I can’t be complicit with sin so I just can’t do that.”

Alan impatiently sneered, “Can’t or won’t? Let’s go, Bay.”

Later that month, Turing and Rustin sued Stratton, dba Jake’s Cakes, for violating the statute when Stratton refused to make them the wedding cake.

Identify and evaluate the potential constitutional defenses available to Stratton.

Question 2. 60 points. Estimated time: 60 minutes.

The State of Wisbama is ethnically diverse with a population that breaks down as about 40% White, 25% African American, 20% Latino, 5% Native American, 5% Asian, and 5% unknown or undeclared.

The State of Wisbama Department of Natural Resources (DNR) administers the state programs governing logging, mining, and recreational exploitation and preservation of state lakes and rivers, parks, and natural resources in general. People use the state’s natural resources for recreational purposes in about the same proportion as their general statewide demographics for fishing, camping, visiting state parks, hiking, biking, and so on.

The Wisbama DNR has a Park Ranger Division. The Park Rangers are a cadre of highly dedicated employees who love working outdoors and love their jobs. They are responsible for staffing state parks, guiding visitors, and performing a variety of other front-line tasks out in the field. Consequently, Park Rangers directly interact with people on a regular basis when state residents and others from out of state visit state parks and other areas staffed

by the Park Rangers. They also interact with state residents in the off season (which varies with the particular property or function involved, but generally happens in the winter) when the Park Rangers conduct outreach programs including going to schools and civic centers to meet with children and other state residents to teach about ecology, to explain the mission of the DNR, to teach about the scope of state recreational resources in the state, and to discuss the various roles of park rangers in those programs.

Because of the statewide growing population and because of greater interest in general in outdoor recreation, the DNR has seen a significant upsurge in demand on use of DNR-administered programs and properties over the past decade. Consequently, two years ago the state authorized the Park Ranger Division to increase the number of Wisconsin park rangers by 25% from the 800 then employed to a total of 1000 employees.

Before the increase from 800 to 1000 employees, The Wisconsin Park Rangers were 90% white (720 employees), 5% African American (40), 3% Latino (24), and 2% Native American (16). For the expansion of the number of employees, the Park Ranger Division decided to hire as many African Americans and Latinos as possible to try to make the DNR Park Rangers better reflect the state ethnic demographics. The Park Ranger Division also believed that having a more diverse workforce would make the public respect them more. They also believed that if employees were ethnically diverse, the rangers, while on the job, would be exposed to people of different ethnic backgrounds on a regular basis just by interacting with co-employees. This exposure would result in the rangers knowing more about and being more comfortable dealing with ethnic differences (and similarities). This knowledge and familiarity, in turn, would benefit the state and the customers by having rangers provide better service because of the better knowledge.

Over the past two years, the Park Rangers Division hired 200 new park rangers of whom 90 were African American (45%), 90 were Latino (45%), 10 were White (5%), and 10 were Asian (5%). All were fully qualified for the positions by training, skills, and temperament. They were selected from 2000 applicants. Among the applicants 1000 were White, 500 were African American, 400 were Latino, 40 were Asian, 40 were Native American, and the remaining 10 did not disclose their ethnicity. After the hiring, the demographic breakdown of Park Rangers was: 730 White (73%); 130 African American (13%); 114 Latino (11%); 16 Native Americans (2%); and 1% Asian.

Bob, who is white, really wanted this job, but did not get it. His qualifications were essentially the same as 999 other applicants – and were essentially the same as the 200 hired. Of the 1000 applicants with essentially equivalent credentials, 380 were White, 280 were African American, 260 were Latino, 60 were Asian, and the remaining 20 did not identify their ethnicity.

Has the Wisbama Park Ranger Division violated Bob's constitutional rights under the Equal Protection Clause of the 14th Amendment? Explain.

Question 3. 30 points. Estimated time: 30 minutes.

Assume the *Washington v. Glucksberg* (1997) test for recognition of a liberty interest as a constitutionally protected substantive due process right is adopted by the Court as the proper test. Write a brief thesis-based essay, not to exceed 500 words, about the potential impact of such a change on one or more substantive due process rights or on substantive due process analysis generally.

End of Exam