
HOWARD UNIVERSITY SCHOOL OF LAW
CONSTITUTIONAL LAW II SECTION I

Prof. Steven D. Jamar

Fall 2019 Final Exam Instructions

December 3, 2019

General Instructions

1. You have three and one half (3.5) 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 three (3) questions worth 60 points each for a total of 180 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.

Specialty Printshop prints business cards and announcements for life's special events like graduations, weddings, and births. Like other printshops, Specialty Printshop has designed sets of cards around various themes like space, nature, and romance. Unlike other printshops, Specialty Prints sells sets of themed cards on unusual themes like "Emo," "Goth," "Steampunk," and "SciFi."

Specialty Printshop is a small business owned and operated by Alora (a woman who describes herself as "goth") and Hugo (a male steampunk fan). Both Alora and Hugo were members of a local druidic religious group comprised of an eclectic group of wiccans, nature-worshippers, atheists, agnostics, and others with idiosyncratic religious beliefs. Alora and Hugo print cards for any and all customers from any and all religious backgrounds. For the most part they print any message, religious or secular, that customers want on the cards, but they will not print messages that are evangelical or that denigrate others.

Ashley and Ben are fundamentalist, evangelical, born again Christians who want steampunk-themed wedding invitations. The only store they could find that would give their cards the look they wanted was Specialty Printshop. They wanted the wedding announcement to read as follows:

**"WE ARE DELIGHTED TO INVITE YOU TO OUR STEAMPUNK-
THEMED WEDDING TO CELEBRATE THE VICTORY OF CHRIST
OVER ALL THINGS. ONLY GROWING CHRISTIAN FOLLOWERS OF
THE ONE TRUE GOD AND ONE TRUE FAITH MAY ATTEND. IF
YOU ARE NOT YET A GROWING CHRISTIAN, WE URGE YOU TO
COME TO CHRIST!"**

Alora and Hugo refused to print the invitations on the grounds that the requested language violates their policy against evangelical religious messages and, on the grounds that, as they read it, the message implicitly denigrates anyone who does not agree with Ashley's and Ben's religious convictions.

Specialty Printshop is a place of public accommodation under the state law, which prohibits any place of public accommodation from discriminating on the basis of religion (among other things). Alora and Hugo concede that they are subject

to the state non-discrimination statute, but assert that their actions with respect to Ashley's and Ben's wedding invitation are protected by the First Amendment.

Evaluate the assertion of Alora and Hugo.

Question 2. 60 points. Estimated time: 50 minutes.

The populous State of Florina established a statewide serious crimes forensic department (Florina Criminal Forensics Department aka FCFD) in 1978. For forty years, its staff of 20 crime scene investigators was predominately male with 80-90% of the investigators being male while its staff of 60 lab workers was predominately female typically with 45-50 lab workers being female. In that time, not a single director of the FCFD was female and only one director of the FCFD lab was female.

In 2019, the State of Florina Department of Public Safety, of which the FCFD was a part, investigated the FCFD's hiring practices in response to complaints from women employees in the FCFD. The investigation revealed that the FCFD had, for its entire existence, intentionally excluded women from supervisory positions and from crime scene investigator positions. The Department of Public Safety (DPS) also found that the FCFD's reputation for not hiring and not promoting women into leadership and supervisory positions and as crime scene investigators had discouraged women from applying for jobs at the FCFD, particularly in the past 15 years during which time the number of women qualified for the investigator positions and leadership and supervisory positions had, in the state of Florina, reached parity with men.

You are the general counsel for the DPS and have been charged by the director of the DPS, Ree D. Ress, to advise her, under the facts sketched above, about constitutional constraints on developing and implementing an affirmative action program to hire more women into leadership and supervisory positions as well as to hire more women investigators. Do so.

Question 3. 60 points. Estimated time: 70 minutes.

Assume that the federal government properly adopted a regulation that requires everyone in the country to have a federally-issued health identification card ("Health ID"). Every natural person is required to have one, like a social security card. The purposes of the Health ID are (1) to make the provision of health care at all levels more effective and efficient generally, (2) to provide the government with better and more complete health care information for public health planning, and (3) to help the government provide better, more efficient, and more effective medical services through the federal governmental medical care programs of

Medicare, Medicaid, the Veterans' Administration, as well as the health care benefits the government provides to its employees.

All health insurers and health care providers are required to use the card for all health-care related transactions and for the provision of health care. All of a person's medical records, including surgeries, prescriptions, doctor visits, dental visits, vision care, x-rays, CAT scans, ultra-sounds, and the like, are to be stored electronically on the card as are all of the person's health and health care transactions, including financial transactions.

"Health care provider" is defined to include physicians, nurses, psychologists, pharmacists, physical therapists, and all others who provide medical and health related services including advice, consultation, prescriptions, medical equipment and supplies, surgery, and other health-related services.

"Health insurer" is defined to include all insurers and others, e.g., governments or self-insured entities, who pay for or may be called upon pursuant to statute or contract to pay for some or all of a person's health care, excluding parents and other family members or legal guardians.

The Health ID is to be presented to all health care providers who are then to read the information on the card and, after the service is provided, add information about the service provided including who provided the service, when and where it was provided, what service was provided, and other health-related information such as diagnosis, prognosis, lab tests, lab results, and advice given. All information on the card is to be sent through the internet to the national Federal Health Care Database (FHCD) immediately after a health care-related activity occurs. The information is analyzed and used for the purposes noted above. The information on the FHCD, with individual identifying information redacted, is available to qualified researchers.

Pria Vacy objects to being required to have and use the Health ID.

Assume that the Supreme Court in *Whelan v. Roe* (1977) had specifically decided that a substantive due process right to privacy extends to health care information and to financial information concerning health care, and assume further that the result in *Whelan* was not changed, i.e., the program of the State of New York did not violate the substantive due process rights of the plaintiff in that case.

Evaluate Vacy's chances of prevailing on a substantive due process challenge to the federal government's Health ID requirements.

End of Exam