

CONSTITUTIONAL LAW III

Final Examination

December 12, 1996

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

**Autumn Quarter, 1996
Barack 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 (anxiously flipping through the casebook for that one last citation, or heading over to the gym for a good workout - your choice).
3. The exam consists of two Parts. In grading the exam, I will treat each part as roughly equal in weight. Part Two contains two separately numbered questions: I will accord roughly the same weight to each question.
4. **I would greatly prefer that your answer be typed (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. Your answer must be no more than 15 pages; I will stop reading after 15 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 the bluebook, and remember to skip lines.
6. Read each question carefully and think before you write. **Please do not feel obliged to make use of the 15 page maximum in formulating your answers. The exam can be answered magnificently in half that number.**

Good luck, and have a good holiday.

Part One (one and a half hours)

Helen, a forty-year old registered nurse, comes into your office seeking your best legal advice regarding possible constitutional claims against the State of Wazoo. Wazoo is a state in the United States. Helen informs you that she is a lesbian, and that she has been involved in a monogamous relationship with - and has shared a household with -- her partner, Rachel, for the past seven years. The two of them moved to the State of Wazoo just six months ago, in part so they could be closer to Rachel's ailing mother.

Since their arrival in Wazoo, Helen has worked at Wazoo State Hospital, a state owned and operated facility. Although the subject of her sexual orientation did not come up when she was interviewing for the job, Helen has made no attempt to hide her relationship with Rachel from her co-workers at the Hospital, and most them, including her supervisor, are aware that she is a lesbian. Helen maintains that she has suffered no harassment or discrimination on the job, and has received excellent performance reviews.

For some time now, Helen and Rachel have wanted to start a family. Rachel cannot bear children for various medical reasons. Before moving to Wazoo, Helen attempted to become pregnant by way of artificial insemination, using sperm donated by Rachel's brother, Jim. These attempts were unsuccessful, and Helen's doctor subsequently advised her that due to blockage in her fallopian tubes, Helen's best - and perhaps only -- hope of becoming pregnant would be through the process of in vitro fertilization (the procedure would involve removing Helen's eggs from the uterus, fertilizing them with Jim's sperm in a laboratory, and then transferring them back into Helen's uterus). Moreover, Helen's doctor informed her that because she is nearing the end of her childbearing years, the likelihood of in vitro fertilization resulting in a successful pregnancy would drastically diminish within the next two to three years.

Helen and Rachel are therefore anxious to move forward with in vitro fertilization; they see it as their last chance at having a child of their own. Because Rachel's work provides no health benefits, and given the expense of in vitro fertilization, Helen and Rachel will not be able to afford the procedure unless it is covered under the health care plan Helen receives as a state employee.

Unfortunately, when Helen went in to talk to her benefits officer at the Hospital, she learned that the Wazoo state legislature passed a law last year, titled the "Preservation of Family Values Act" (PFVA), that, inter alia, prohibits any doctor or health care professional, whether in private practice or employed by the state, from providing infertility services to any unmarried person within the State of Wazoo. The statute further prohibits the use of any hospital, clinic or health care facility, whether public or private, from providing such services to any unmarried person within the State of Wazoo. PFVA goes on to read that "in the event a federal or state court finds these general prohibitions against the provision of infertility services to unmarried persons to be unconstitutional,

then the prohibitions shall apply only to the provision of infertility services to homosexual couples.” Finally, PFVA mandates that coverage of infertility services under the health care plan for state employees shall apply only to married, heterosexual couples.

The benefit officer at Wazoo State Hospital went on to tell Helen that in a highly publicized case last year, a single woman and her male partner obtained infertility services from a private clinic, in direct violation of PFVA. The Attorney General of Wazoo declined to prosecute the woman’s doctor in that case, and stated publicly (although not in court) that his office understood the primary purpose of the law to be the prevention of childbearing by homosexual couples. As a consequence of this failure to prosecute on the part of the Attorney General’s office, private doctors and clinics throughout the state have continued to provide infertility services to those persons who can pay their fees, without inquiring into the patient’s sexual orientation. Public institutions like Wazoo State Hospital, on the other hand, have felt obliged to abide by PFVA, and the benefit officer knows of no instance where unmarried state employees have been able to obtain coverage for infertility services under their state health plan. Helen’s attempt to obtain coverage for the in vitro fertilization procedure through her health plan has therefore been denied.

Assume that everything the benefit officer has told Helen turns out to be true, and that there are no state action or standing problems involved in Helen’s case. Assume further that 1) PFVA does not define homosexuality; 2) PFVA defines marriage in the traditional fashion (i.e. a state-sanctioned, legally binding contract into which persons of the same sex cannot enter); and 3) PFVA’s stated purpose is both brief and vague - namely, “to preserve the integrity of marriage as an institution,” and “to curb the steady increase in out-of-wedlock births” (the legislative record contains summary findings that out-of-wedlock births frequently result in economic hardship for both mother and child, and that such hardship eventually places a unsustainable strain the state’s social service budgets).

Please analyze the possible claims Helen may have under both the Equal Protection Clause of the Fourteenth Amendment, and under the “substantive” component of the Due Process Clause of the Fourteenth Amendment. Given that this is a preliminary memo for your file, you do not need to arrive at any definitive conclusions regarding Helen’s claims; rather, your analysis should include any arguments that seem plausible, and should then identify any potential weaknesses in these arguments. In framing your analysis, you may find it useful to discuss the constitutionality of each component of PFVA separately. You should also consider the constitutionality of these various clauses in the statute not only as applied to Helen, but also as potentially applied to unmarried persons generally.

Part 2 (one and a half hours)

Two years ago, Mayor Dudley Duright was elected as the first African-American mayor of Wazoo City. Wazoo City is the largest city in the State of Wazoo, with a population that is roughly 50 percent African-American and 50 percent white. The population is remarkably segregated, with almost 80 percent of all African-Americans residing in the city's South Side, and almost 90 percent of whites residing in the city's North Side. In winning the election, Mayor Duright garnered almost 95 percent of the African-American vote, and less than 15 percent of the white vote.

Since the election, the Mayor has been under great pressure from some of his supporters to open up economic and employment opportunities to Wazoo City's African-American population. These supporters identify two areas of particular concern: city contracting, and the racial composition of the city's Fire Department. You have been appointed as the city's corporation counsel, and he calls you in to discuss these issues.

1) Contracting. The Mayor first refers you to studies showing that only 5 percent of the contractors certified by the city to obtain public works projects are African-American, and that only 1 percent of all city contracts actually awarded go to African-American owned firms. These same studies also show that African-American contractors are much more likely to hire African-American workers: less than 5 percent of the workers employed by white contractors are African-American, compared to 50 percent of the workers employed by African-American contractors.

The Mayor's supporters find the paucity of city work going to African-American contractors particularly galling given that poverty and unemployment in the city's African-American neighborhoods is almost three times higher than it is in the city's white neighborhoods. Moreover, under a federal program called Project HOPE, the city has just received \$1 billion, to be allocated over a period of ten years, for the rehabilitation of Wazoo City's low-income housing projects. Seventy-five percent of these housing projects are located within the city's South Side; however, if current patterns continue, the lion's share of Project HOPE contracts will go to white contractors.

The majority of scholars who have studied the issue conclude that the lack of representation among African-Americans in the construction industry is the result of long-standing discriminatory practices at a number of different levels: a history of segregation and unequal resource allocation at the elementary and secondary school level; past zoning practices that have encouraged residential segregation; the continued inability of African-Americans to gain entry into trade unions that serve as the training ground for many successful contractors; the unwillingness of banks to finance African-American concerns (most of which are small and undercapitalized); the unwillingness of established white contractors to take on African-American firms as subcontractors; and finally, the well-established, albeit covert, practice in previous administrations of giving contracts only to their political friends, the vast majority of whom were white. Despite the wealth

of historical and anecdotal evidence, however, there is no concrete evidence that the city has engaged in systematic discrimination in the awarding city contracts at any time during the past fifteen years.

The Mayor is aware that the courts have struck down a number of affirmative action programs involving contracting in recent years, and is sensitive to accusations that he cares only about Wazoo City's African-American population. The Mayor is also concerned that affirmative action programs too often benefit only a select group of African-Americans, and do not address the severe problems of unemployment and disinvestment in Wazoo City's poorest neighborhoods.

The Mayor has therefore asked his staff to prepare a plan that he believes will address his supporters' concerns and survive challenge in the courts. The plan involves only those contracts related to the \$1 billion, ten-year Project HOPE program. The plan would give a significant preference (a "plus" factor) in the awarding of Project HOPE contracts to any firm whose principle place of business is in a "low-income community" or whose owner is a resident of a "low-income community." The plan would provide this same preference to any firm that meets particular goals in hiring workers who are residents of a "low-income community." Under the plan, the term "low income" would be defined on the basis of such objective measures as median income and unemployment; the boundaries used to define particular "communities" would be identical to those that the city has used in the past for various planning purposes. Because the majority of Wazoo City's low income communities are located in the South Side, the net result of the plan would be to give a substantial preference to contractors that are either owned by African-Americans or who hire African-American workers. Nevertheless, the Mayor's staff has indicated that even if the plan is implemented, the majority of Project HOPE work will still go to established white contractors.

The Mayor expects his plan to be challenged in the courts by the Wazoo City Contractors Association. He asks you to prepare a memo evaluating the legality of his plan under the current law established by the United States Supreme Court. You should argue both sides of the issue for him, but end by giving him your considered opinion on how the courts might come out, and how he might best frame his proposal so as to survive constitutional scrutiny.

2) Fire Department Hiring. The second major area of concern for the Mayor involves the method by which new firefighters are hired by the Fire Department. At the moment, only 15 percent of the city's fire-fighters are African-American, despite the fact that the pool of applicants largely mirrors the general population of Wazoo City (50 percent African-American). It is well-established that up until 1980, the Fire Department engaged in discriminatory hiring practices; indeed, getting a job as a firefighter was based largely on your political connections to party ward bosses. As the result of several lawsuits brought by African-American plaintiffs, and a federal consent decree subsequently entered into by the city in 1980, the Fire Department now hires new firefighters exclusively based on each applicant's ranking on a written exam that is

administered once a year. The examination is prepared and graded by a well-reputed testing firm that screens for any potential cultural bias in the examination, and all applicants are provided the necessary materials to prepare for the examination.

Despite claims by some of his supporters that the fire-fighter examination is rigged, the Mayor believes that the difference in test performance between African-Americans and whites is primarily the result of the inferior schooling that African-American applicants have received in the past. At the same time, the Mayor is skeptical that the existing written exam accurately measures aptitude for the job of being a firefighter. He therefore plans to announce that starting next year, Fire Department hiring will no longer be based on the applicants score on an extensive written examination. Instead, the Department will administer to each applicant a short basic aptitude test; all applicants who pass this simple test and meet other basic qualifications (physical examinations, etc.) will be deemed qualified for hire, and will then be selected to fill available job openings on the basis of a lottery. The Mayor's staff predict that as a result of this change, the makeup of the Fire Department, over time, will come to more closely resemble the racial makeup of the city.

The Mayor has a major political problem brewing, however: the Firefighter's Union has learned of the Mayor's plan, and is adamantly opposed to any change in existing hiring practices. The Union argues that the Mayor's plan represents nothing more than a disguised affirmative action program, and a return to old-fashioned patronage. The Union therefore plans to mount a major petition drive to place a binding referendum on the ballot in the next statewide election. The referendum would essentially require that all applicants for government employment in the State of Wazoo, including municipal employees, be hired on the basis of their ranked performance on state approved written examinations (the referendum would exempt the filling of certain "political appointees" from the requirement).

The Mayor points out that for the better part of this century, the city has had exclusive power to determine the manner in which it selects its employees. It is clear, however, that under the Wazoo State Constitution, a majority of voters may transfer this power to the state through the referendum process. The Mayor also believes that the referendum is likely to pass, particularly because it is phrased without reference to race or gender, but will be packaged solely as a "good government" measure.

The Mayor asks you to write up a brief analysis regarding the possibility of challenging the referendum, should it come to pass, as unconstitutional racial discrimination violative of the Equal Protection Clause. As before, you should make the strongest argument that you can for bringing such a challenge, and then indicate the weaknesses in your argument. In considering this question, however, feel free to present to the Mayor any broader policy issues or theories of racial justice that are raised by his plan and/or the referendum.