

Sexuality, Gender, and the Law
Final Examination
Fall 2008

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Distributed: Wednesday, December 10, 8:00 a.m.
Due: Wednesday, December 10, 5:00 p.m.

INSTRUCTIONS

1. This is an open-book examination. You may refer to anything you want. You do not need to refer to anything beyond the materials provided to you during the course. You may not discuss the exam with anyone at any time until the conclusion of the exam period.
2. The exam includes two questions. The second question has two parts. You must answer both questions, including both parts of the second.
3. You must type your answer. Your answer should be double-spaced, singled-sided, in a 12-point font, with 1-inch margins on all sides, and page numbers on every page.
4. Each question has a word limit of 2,000 words. Taken together, the word limits add up to 4,000 words, approximately 14 pages. Any violation of the word limits will be penalized in grading.
5. At the end of each answer, you must indicate the number of words in your answer. You may calculate the number of words in each answer by highlighting the answer and using your word processor's "Word Count" in the "Tools" menu.
6. Your name may not appear anywhere on your answer. You must put your exam number (not your name) on the top of every page.
7. The two questions will be equally weighted in grading, so you should spend approximately the same period of time working on each one.
8. If you believe that additional facts need to be assumed for the purpose of answering any question, you should clearly state your assumptions in your answer.
9. You may use shorthand references to refer to cases, statutes, rules, constitutional provisions, and other sources, so long as I can clearly understand your references.
10. You must hand in a paper copy of your final answer to the law school's front office by the end of the exam period.

Please remember to save your work early and often – and good luck!

QUESTION I

(2,000 words)

The year after you graduate, you begin work as an attorney in the state of Lovu, the 51st State in the United States. You are employed by Equality Lovu, an organization founded to improve the legal situation of lesbian, gay, bisexual, and transgendered people in the state.

Several years ago, a Lovu couple brought a case challenging the state's ban on same-sex marriage. Equality Lovu did not think the case was a good idea and was not involved in filing it. The case was quickly dismissed by the district court, but to your dismay, the plaintiffs have appealed directly to the Lovu Supreme Court.

Notwithstanding Equality Lovu's original opposition, your organization has now taken control of the case before the Lovu Supreme Court. Your supervisor has asked you to write a memorandum to help her prepare for briefing and oral argument. She wants you to identify the plaintiff's strongest constitutional claims. Specifically, she instructs you to: (1) present the strongest arguments that the plaintiffs can make to challenge the law; (2) identify the strongest arguments that the state is likely to make in defense of the law; (3) assess the relative strengths and weaknesses of each argument; and (4) briefly explain why other arguments are less likely to prevail.

After a few hours of research, you confirm that Lovu's marriage statute provides that "Marriage consists only of the legal union between a man and a woman" and "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Lovu does not have any anti-discrimination laws that protect gay men and lesbians.

The Lovu state constitution contains both an explicit right to privacy ("the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest," Art. I) and an equal protection guarantee ("no person shall be denied the equal protection of the laws, nor be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on the basis of race, religion, or sex," Art II). The Lovu Supreme Court has held that in interpreting the state constitution it will follow federal constitutional jurisprudence unless a litigant can demonstrate that the federal precedents were wrongly decided and/or should not be followed.

If you attempt to show that the federal precedents were wrongly decided or should not be followed, you need not worry about external documents like historical records about the "original intent" of the framers of the Lovu state constitution (none exist) or other precedents interpreting the state constitution (other than the decision described above, none yet exist). Rather, you can confine your arguments to demonstrating why the federal cases were wrongly decided and/or why the texts of your constitutional provisions require a different result.

Write the memorandum.

QUESTION II

(2,000 total words)

Imagine that you could go back in time and re-write the majority's opinion in either *Romer v. Evans* or *Lawrence v. Texas*, but not in both cases. Imagine further that you would be casting the swing vote, so a majority of the Court would sign off on your revised draft, whatever it says.

In re-writing the opinion, you may change anything you want, aside from the facts -- the claims presented by the parties, the reasoning employed by the Court, and/or the result reached by the Court.

A. (500 words)

Identify which opinion you would rewrite and explain why you chose it. Demonstrate the wisdom of your choice by explaining why it is better to re-write one opinion than the other. Support your argument by explaining your reasoning and your goals. Include specific examples of what you hope to achieve by re-writing one case instead of the other.

B. (1,500 words)

Re-write the key legal passages of the opinion itself. When you re-write the opinion, you may jump directly into the legal analysis. Do not bother to present the background facts unless doing so is important to your revisions. You may rely on any legal claims or theories that are relevant and defensible, even if they were not originally a part of the opinion that you are re-writing.

END OF EXAM