

Constitutional Law – Greabe
Final Examination (180 Minutes)
May 8, 2009

DIRECTIONS -- IT IS VERY IMPORTANT THAT YOU READ THESE DIRECTIONS CAREFULLY AND UNDERSTAND THEM FULLY!

These questions are "open book." You may use any of the course materials (including materials posted on the course website), handouts, and notes you have taken in class in preparing your answers to the following questions. You also may use any hornbooks, treatises, or commercial outlines which you have brought with you. The only limitation is that you work independently. If you have a question, please direct it to the examination proctor. Under no circumstances should you speak with, or look at the materials of, a fellow classmate.

If you type your answers, please double space. Your student identification number should be placed at the top of the first page of your submission. **DO NOT PUT YOUR NAME OR OTHERWISE SUGGEST TO ME WHO YOU ARE ANYWHERE IN YOUR ANSWER.** Any adjustment to your final grade for class participation will be made after I complete the grading of your examination answers.

Question 1 (50 points) (120 minutes)

The estate of a deceased involuntarily committed resident of New Hampshire's state psychiatric hospital and his widow have filed three-count complaint in federal court against the State of New Hampshire, the New Hampshire state psychiatric hospital, individual state employees of the hospital, and a private mental health facility to which the deceased was transferred for the last several weeks of his life. Underlying all three claims is an allegation that the inmate suffered from an acute case of Parkinson's disease that was not competently treated or accommodated at either institution at which the deceased resided.

Count I alleges that all of the named state defendants (including the individual defendants) violated the federal Mental Health Parity Act of 2008 ("MHPA"); Count II alleges that the private facility at which the deceased passed away also violated the MHPA. The MHPA was enacted pursuant to Congress's Section 5 and Commerce Clause powers after months of congressional hearings that led Congress to find, without

further elaboration, that (1) the States are systematically discriminating against physically disabled residents of public mental health institutions by failing to provide them with "a quality of life befitting the Twenty First Century," and (2) private mental health facilities also are discriminating against their physically disabled residents. The MHPA directs public and private mental health facilities and their employees "to provide reasonable accommodations to the known physical limitations of residents with physical disabilities" and authorizes those discriminated against to sue for money damages and injunctive relief. The MHPA defines a "reasonable accommodation" as, among other things, (1) "making all public facilities readily accessible to and usable by residents with disabilities," and (2) providing physically disabled residents with "timely access to necessary prescriptions."

In support of the claims set forth in Counts I & II, the complaint alleges that employees of the state hospital and private facility at which the deceased passed away, knowing that the deceased was suffering from a serious physical disability, failed to provide him with a motorized wheelchair despite his need and request for such a device; regularly made him stand in lines and climb stairs; and regularly failed to provide him with his medications for Parkinson's disease in a timely way. Counts I and II are brought by both the estate and the deceased's widow.

In Count III, the estate alone sues the State of New Hampshire for "violating the United States Constitution" in having enacted a statute known as the Medical Device Price Control Act of 2008 ("MDPCA"). The statute directs mental health institutions within New Hampshire "wherever and whenever possible" to purchase medical supplies from companies that employ New Hampshire residents or that provide discounts to New Hampshire state employees. Count III alleges that the effect of this statute was to cause the state hospital and private facility at which the deceased passed away to purchase substandard medical devices that were used in the deceased's care from manufacturers domiciled in New Hampshire or with substantial New Hampshire connections. Count III seeks a declaratory judgment that the MDPCA violates the federal constitution and an injunction prohibiting its enforcement.

You are an assistant attorney general for the State of New Hampshire. Recognizing that the private mental health facility defendant will retain its own counsel, your supervisor nonetheless has asked you to write her a memorandum outlining (1) possible constitutional defenses to the claims set forth in Counts I & II and the likelihood that those defenses will succeed, and (2) the theory you understand the vaguely worded Count

III to be alleging and the likelihood that Count III will succeed if the complaint's factual allegations are true. Please write the memorandum.

Questions 2-6 (25 Points) (60 minutes)

Answer the following questions IN NO MORE THAN ONE PARAGRAPH.

2. Explain why some would say that the Supreme Court has moved away from a purely categorical or tiered approach in scrutinizing statutes challenged under substantive due process and equal protection theories. Cite at least one substantive due process and one equal protection case to support your explanation.

3. One of your study questions asked whether *Stanley* (CB p. 827) is reconcilable with *Michael H.* (CB p. 829). Explain the tension between the two cases and whether you think the tension has been resolved in subsequent cases.

4. Explain the difference between a "facial" challenge to a statute and an "as-applied" challenge to a statute. Give an example of a case striking down a statute facially and a case striking down a statute as-applied. Then, state your understanding of the recent trend in the Supreme Court's jurisprudence in this area.

5. Explain the counter-majoritarian difficulty and its connection to substantive due process jurisprudence.

6. Identify the opinion in *Lawrence v. Texas* – Justice Kennedy's, Justice O'Connor's, or Justice Scalia's – with which you are most comfortable and explain your answer.

HAVE A GREAT SUMMER!