

CONSTITUTIONAL LAW
FINAL EXAMINATION
Spring 2022

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EXAM INSTRUCTIONS

You will have three hours to complete this exam. There are two essay questions to be answered in Questions 1 and 2; Question 3 consists of two short answer questions and 15 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

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Question No. 1

The Suncity Council amended its nuisance abatement ordinance to declare that overnight sleeping or camping in a City park is a nuisance subject to abatement by the City. The ordinance also authorized City employees to designate a restricted area to create a zone around any public property where an abatement is taking place. No person is authorized to enter the restricted area without authorization from a City employee at the site, and unlawful entry is punishable as a criminal misdemeanor.

Suncity Employees set up a 100 foot “restricted Zone” in a City Park around a wooded area that was used as an encampment by homeless people. The Employees proceeded to remove the encampment as an abatement of a nuisance authorized under the City’s ordinance.

Anna, a local advocate for unhoused people, organized a protest at the site, but Police prevented her from entering the “restricted zone” surrounding the camp and from accessing or contacting any of its residents. Also, Anna could not view the City’s abatement activity from outside of the restricted zone, nor could the people on site see her, because of the distance and the woods surrounding the Camp. Anna asked a City Employees at the site for permission to enter and speak with those in the camp, including Ben, a camp resident who she knew from prior visits; the permit was denied. Anna brought a lawsuit against Suncity alleging that the Ordinance is unconstitutional on its face for violating her rights to free speech and association under the First Amendment.

Ben, a resident of the encampment, refused to leave and remained in his tent in the Camp. Police were called and arrested Ben. He was charged with a misdemeanor for violating the City’s ordinance by being inside a restricted abatement zone.

The court determined that both Anna and Ben have standing, so standing need not be addressed.

1. Analyze the Constitutional issues that Anna will raise in her lawsuit, and Suncity’s response. State how the Court will rule.
2. Analyze the Constitutional issues Ben will raise in defense in his criminal prosecution and District Attorney’s response. State how the Court will rule.

Question No. 3

Please write a short answer to questions A and B. Each question is worth 25 points.

A. A State enacted a statute authorizing only non-profit agencies to advertise on programs televised on the community access cable channel. The statute was challenged as unconstitutional by a local for-profit home care agency which televised a weekly program on home healthcare alternatives which included advocating hiring home health aides from its agency. What arguments will be made by the parties and how will the court rule?

B. The legislature of State X passes a law to improve declining student test scores and standardize curricula for K-12 students. The law provides that all students must receive an "acceptable" primary and secondary education, and sets standards for that curriculum for all students. The law provides that parents may homeschool their children or enroll them in private school, but that to do so they must demonstrate to the County Superintendent of Schools Office curriculum director that the education to be provided meets the state's criteria. If it does not do so, the director may deny their application to homeschool or enroll their children in private school, and require them to be enrolled in public school. The director's decision is final and not subject to any review.

Several parents whose applications to enroll their children in private school have been denied sue the curriculum director, asking the court to overturn the decision and allow them to enroll their children in private schools. What constitutional issues will they likely raise in their lawsuit, and how do you believe the court should rule? Briefly discuss.

C. Please answer the 15 Multistate Bar Exam (MBE) embedded in Exemplify. Read each question carefully and choose the best answer even though more than one answer may be "correct". Review your answers for accuracy before you finish.

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M.Welsh/D. Zulfa/ B. Schrier

Question 1:

Question 1 addresses freedom of speech issues in a public forum (arguably content based and directed at speech, requiring strict scrutiny, and if it is content neutral, arguably not reasonable time, place and manner regulations) as well as a "buffer zone" issue, and denial of public access to view government activity, plus the denial of a permit for access under the ordinance which gives total discretion to a City employee at the site to grant or deny permits. Also, freedom of association issues are raised by denying public access to residents of the homeless encampment (and vice versa) and denying protesters' rights to associate to effectively express their views inside the zone. The homeless party, Ben, also raises the possible collateral bar rule for violating the ordinance rather than challenging it first, which could prevent his raising free speech and association violations as a defense; but the ordinance is arguably overbroad and vague on its face and violation may not be a bar. He may also raise due process issue by having to leave the area without notice or a hearing (but that is really a first semester subject, so will be just for extra credit). Let me know if you think edits are needed for clarity or substantively.

Question 2 but it addresses freedom of speech issues in a public forum (arguably content based and directed at speech, requiring strict scrutiny, and if it is content neutral, arguably not reasonable time, place and manner regulations) as well as a "buffer zone" issue, and denial of public access to view police activity, plus the denial of a permit for access under the ordinance which gives total discretion to a City employee at the site to grant or deny permits. Also, freedom of association issues are raised by denying public access to residents of the homeless encampment (and vice versa) and denying protesters' rights to associate to effectively express their views inside the zone. The homeless party, Ben, also raises the possible collateral bar rule for violating the ordinance rather than challenging it first, which could prevent his raising free speech and association violations as a defense; but the ordinance is arguably overbroad and vague on its face and violation may not be a bar. He may also raise due process issue by having to leave the area without notice or a hearing (but that is really a first semester subject, so maybe just for extra credit).

Outline Answer Question 3

- A. Commercial speech: Agency proposes a business transaction (hiring their employees), therefore the ad is arguably commercial speech even though it contains other content. Apply *Central Hudson* test: Advertisement for lawful activity can be regulated under *Central Hudson*, but here is it legal for the state to ban all ads by for-profit agencies? Government has (or has no) substantial interest in ads regulating legal activities; ban on ads directly advances that interest (or not), and regulation by total ban in state is (or is not) more extensive than necessary, though not required to be the least restrictive alternative. If agency's advocacy of hiring its employees is not found to be commercial speech, strict scrutiny applies.
- B. Parents will challenge the curriculum director's decision and the mandatory curriculum on the grounds that they violate their right to due process of law under the 14th Amendment, for both substantive and procedural reasons. The court hearing the claim will first need to determine whether a fundamental right is involved. This is important because it controls the applicable standard of review. If the right involved is fundamental, strict scrutiny applies, and State X must show that a compelling state interest justifies requiring that curriculum, and that this requirement is narrowly tailored to achieve the state's compelling interest. If no fundamental right is involved, the law and the denials must only survive rational basis review, requiring the state only to show that the requirement is necessary to a legitimate governmental objective. In this case the court will likely find that a fundamental right is at stake; the right of parents to exercise care, custody and control of their children in raising them. The Supreme Court has held this to be a fundamental right on several occasions, and has also held that it applies to educational decisions. State X will likely argue that it has a compelling interest in making sure that children are educated well enough to be good citizens and support and care for themselves as adults. This likely will be found by the court to be a compelling interest. However, the government will also have the burden of showing that the mandatory curriculum requirement is necessary to achieve this interest. The question lacks sufficient detail as to the specific requirements of the curriculum to say with certainty; however, unless the curriculum of the private schools in which the students would be enrolled is totally inadequate to prepare them to be responsible adults, the court will likely find that the law is not narrowly tailored and rule in favor of the parents. Even if the court is persuaded that State X has met strict scrutiny, it may well rule in favor of the parents on procedural due process grounds. Although the requirements of procedural due process vary with the situation, the touchstones are notice, the right to a meaningful hearing, and an impartial decisionmaker. The details of the process are not fully laid out, but it appears to lack a meaningful hearing and the right to any form of even administrative review. Under these circumstances, the court will likely find that the law and denials violate procedural due process as well.

1)

Issues that Anna will raise in her lawsuit against the City

I. Content Based restriction

A restriction of free speech is content-based when it restricts either the subject matter or the viewpoint. If a content-based restriction is presumed to be unconstitutional and will only survive if it can pass strict scrutiny. Under a strict scrutiny the state has the burden a showing that the restriction advances a compelling government interest and that it is the least restrictive means of achieving that interest.

In this case, Anna will likely argue that the restriction is a content-based restriction because it restricts her ability to protest making it a viewpoint restriction that should be analyzed under strict scrutiny.

The city will likely respond that the law is content-neutral because it restricts all people from sleeping or camping in the city overnight. Since the law applies generally and is not aimed at restricting either a specific topic or ideology from being expressed it only needs to survive intermediate scrutiny. In this case, the ordinance does survive strict scrutiny because it serves the important government interest of maintaining the peace and tranquility of the area and night. Further, while there may be less restrictive means available the government only needs to narrowly tailor the law. The law is narrowly tailored because it establishes the size of the restricted zone as being only 100 feet around the wooded area. The law therefore leaves adequately places for Anna to protest the nuisance ordinance meeting the requirement of strict scrutiny.

The Court will likely find that the law is content-neutral and meets intermediate scrutiny.

Unconstitutional limitation on a public forum

Public forum's are defined as government properties that must be made accessible for speech. While a public forum must be accessible, a city may restrict which parts of the public forum are accessible and available so long as the restriction is not a content-based. As discussed above, Anna will likely argue that the restricted zone is content-based. However, since the restricted zone is only 100 feet the city will likely argue that the restriction is a proper Time, Place, and Manner restriction

because it leaves adequate channels for the speakers message to be heard. The court will likely side with the city.

Free Association

Anna will likely argue that when city employees denied her the ability to speak with the residents the employees unconstitutionally denied her the right to freely associate with who she chooses. While it is true that the city would not allow Anna to enter the campsite to speak with the residents that does not rise to level of a denial of free association because the city did not deny here the right to ever associate with those people. It simply her restricted her ability to do so in that specific time and place. She could still associate with Ben, or any of the other unhoused people, in places outside of the restricted zone. The city further did not deny her the ability to associate with the organization that was advocating against the ordinance

The city would likely argue that this restriction was a proper time, place, and manner restriction because it allowed for adequate alternatives for her message to be heard.

Symbolic Speech

Anna will likely argue that the ordinance was an unconstitutional restriction on symbolic speech because the protest could not be seen or heard from inside the restricted abatement zone. Since it could not be seen or heard from within that zone it was an improper restriction on her ability to deliver her message.

The city will likely argue that this restriction is not improper because the purpose of the restriction was the abatement of nuisance and not the restriction of speech. Further, the restriction of speech that occurred was one that was incidental and did not deny her the ability to adequately deliver her message. Although they could not see or hear her within the abatement zone, the city is not required to make sure that the message can be heard or seen from ALL vantages points, but only that it can be seen or heard from an adequate vantage point. Since the restriction was one that did not completely bar the message nor detract from her ability to adequately deliver her message it was not an improper restriction.

Invalid Licensing Scheme

A licensing scheme is unconstitutional if it does not provide for a swift determination, and leaves discretion for who gets permitted.

Anna will likely argue the restricted zone is an unconstitutional license scheme because the City Employee's have discretion to determine who will be authorized to enter the restricted zone and who does not. The city will likely respond that the permit is not invalid because authorization leaves no discretion to the employees. A person may not enter the abatement zone without the proper permit. City employees have no discretion to exclude or include people based on any subjective criteria. Further, the decision to allow someone to enter is made at the time of the request. Therefore, it cannot be invalid. The court will likely side with the city and find that ordinance does not violate her rights.

Issues Ben will raise

Restriction on Symbolic Speech

Symbolic Speech is considered protected speech under the First Amendment. A law which results in the restriction of symbolic speech is unconstitutional unless the law is unrelated to the suppression of speech and the suppression is incidental to the purpose of the law.

Ben will likely argue that the ordinance restricts his ability to protest the law through the symbolic speech of refusing to leave the premises. The DA will likely respond that the ordinance is constitutional because it's purpose is to abate a nuisance and not restrict speech. Further, the restriction of Ben's speech is incidental to the purpose of the law. The law's purpose and the resulting suppression of speech do not flow from the abatement itself. While Ben's symbolic speech is intended to show displeasure, since the law is not related suppression of speech it would be still be valid and meet the necessary scrutiny requirements.

The court will likely find that the law is not an unconstitutional restriction on symbolic speech.

2)

I. Content Based Restriction

Camp Constitution will likely argue that the law is an unconstitutional content-based restriction because it seeks to limit religious groups from expressing their viewpoints. A law is content-based if it limits speech of a specific topic or if it limits one viewpoint from being expressed over another. In this case, the law is not viewpoint-neutral because it is specifically limiting religious groups from expressing their viewpoints through denying all religious groups access. Since the law is not content-neutral it must survive strict scrutiny which requires the government to prove that the law's actual purpose is one that advances a compelling government interest and is the least restrictive way to achieve that interest. There does not appear to be any sort of compelling government interest that is being advanced through the application of the law. Further, even if the government were to establish a compelling interest there are most certainly ways to achieve that interest which are least restrictive. For example, if the government were to convince the Court that it had a compelling interest in not violating the Establishment Clause, the government could achieve that goal through limiting what is advocated at the flag pole. The government could, for example, choose to make the the flag pole a limited public-forum and not allow any groups to speak about their religious (or lack of religious) beliefs while not restricting entire religious movements groups from having access.

II. Designated Public Forum versus a Limited Public Forum

A designated public forum is government property that is not required to be made available to the public, but that the government decides to make available. When the government designated property as a public forum they may not restrict the use of the forum if that restriction is a viewpoint based restriction. Further, when the government designates a property as a public forum and makes it available to some groups it must make it available to all groups. A limited public forum, is a forum where the government limits the types of speech that are allowed.

In this case, the City Flag-Pole is a designated public forum. This is because the government has not created any separate criteria outlining the specific limits to the use of the City Flag-Pole. The restriction is merely a "practice" of the city and not one that has been established through any type of city ordinance. Since the flag pole is a designated public forum the city cannot deny the use of the forum to the church.

III. Licensing Scheme

The denial of the use of the forum is an invalid licensing scheme because the discretion to deny has been left to the Commissioner with not clear criteria that they must apply. The law provides that the Commissioner will be allowed to determine what constitutes inappropriate, or offensive speech. This licensing scheme is unconstitutional because of the central tenets of any valid licensing scheme is that it leaves no discretion for determining when a license can or cannot be issued. Under this scheme, the exact opposite is the case. There are no separate or specific guidelines as to what is considered inappropriate or offensive and is left entirely up to the discretion of the commissioner.

IV. Vagueness

Camp Constitution will likely argue that the law is unconstitutionally vague. The law states that the city will not fly flags that are inappropriate, offensive, or in support of a religious movement. This is unconstitutionally vague because no reasonable person would be able to know exactly what types of flags the law applies to since the law does not provide adequate definitions for what constitutes inappropriate or offensive. Without having a clear definition of what the criteria is for how something is determined to be inappropriate or offensive the law makes it impossible for a reasonable person to determine what types of speech can or cannot be used. Since the law's restrictions cannot be reasonably determined from the text and context of the law it cannot stand as a constitutional law.

V. Overbreadth

Camp Constitution will also likely argue that the law is overbroad in its application. While the government can regulate certain types of speech in limited public forums, this law is specifically overbroad because it limits the ability of organizations to participate in public discussions regardless of whether the organization's message is related to their religious beliefs or not. The law does not distinguish between speech related to a religious movement's belief and speech that is unrelated to those beliefs. In its denial of the Camp's application the city specifically stated that it was denied because the flag was a "Christian" flag. This ignores that the purpose of the speech was not to advance any particular religious beliefs but to celebrate religious contributions to the growth and development of the United States.

VI. Establishment Clause

A city violates the establishment clause if it advances or hinders one religious belief or practice over another. This includes secular beliefs over religious beliefs. In this case, it violates the establishment clause because it specifically targets religious beliefs which inhibits a religious practice over a

secular practice. Further, a law under the current rule must have a secular purpose, a secular effect, and not excessively entangle the government with religion;

In this case, the law does not have a secular purpose or a secular effect because it bars religious groups from participating even in secular discussions of the history of the United States and the Constitution. The law bans religious movements from participating even if their participation has a secular effect. Thus, the purpose of the law is not to advance a secular purpose because to inhibit religious groups. The law would not excessively entangle the government with religious groups through its application but the excessive entanglement portion likely would go in favor of the city, however since the religious groups purpose is not primarily a religious one but rather a historical one the excessive entanglement portion question would likely not be met because it violates the establishment clause on the first two prongs of the test.

VII. Free Exercise Clause

The Free Exercise Clause will be violated if the law specifically targets one religion. A neutral law of general applicability does not violate the free exercise clause if it applies to only to a specific group but not other groups. In this case, while the law does apply religious movements it applies to *all* religious movements and not specifically to only Christian religions. Therefore, it likely does not violate the Free Exercise Clause.

The court will likely find that the law is constitutional under all of the Camp's raised issues except being a violation of the free exercise clause.

3)

A. A State enacted a statute authorizing only non-profit agencies to advertise on programs televised on the community access cable channel.

Freedom of Speech

See supra.

Content-Based

Content-based laws must meet strict scrutiny. There are two ways to prove content-based: subject matter restriction and viewpoint restriction. A subject matter restriction is where the application of the law depends on the content of the message. A viewpoint restriction is where the application of the law depends on the ideology of the message. If there is one of these or both, then the law is content-based.

Here, a state enacted a statute authorizing only non-profit agencies to advertise on programs televised on the community access cable. This appears to be content-based as it only authorizes non-profit agencies to advertise on programs. For a law to be upheld under strict scrutiny, the law must be necessary to achieve a compelling government interest and narrowly tailored. Here, it is unclear what the government interest is. It could be to allow advertisement for non-profits. However, there are lesser restrictive means available for this, such as donations to non-profits or giving them air time on certain days of the week. Only allowing non-profits on that channel seems to be too restrictive.

Thus, strict scrutiny fails and the law may be considered unconstitutional here.

Commercial Speech

Commercial speech that is lawful and not misleading must meet the Central Hudson Test. The requirements for the Central Hudson Test include: (i) speech must be lawful and not misleading; (ii) the regulation must serve a substantial government interest; (iii) the regulation must directly advance the government's interest; (iv) the regulation must not be more necessary than needed.

(i) lawful and not misleading

Nothing in the facts indicate the speech to be unlawful or misleading.

(ii) regulation must serve a substantial government interest

Here, it is unclear what the government interest is. It could be to allow advertisement for non-profits to help them grow and prosper.

(iii) regulation must directly advance the government's interest

The regulation appears to directly advance the government's interest because more air time on the community access cable channel will allow many people to see these advertisements. Especially that the channel is free, this leads to more people able to watch the channel.

(iv) the regulation must not be more necessary than needed.

Here, the regulation appears to excessive. There are least restrictive means that are available such as allowing air time only for non-profits on certain days. But totally restricting for-profits all together from that channel is too excessive.

Since the last prong appears to not be met, it is likely the regulation will be held unconstitutional.

B. Law to improve declining student test scores and standardize curricula for K-12 students.

Fundamental Right

Although some may automatically think that education is a fundamental right, it is not. Since education is not a fundamental right, laws infringing education do not have to meet strict scrutiny. However, the right to upbringing your child is a fundamental right and must meet strict scrutiny. The parents will argue that a child's education is at the core of their upbringing. The parents will argue that being able to homeschool their child or choose if their child is homeschooled or not is significant in upbringing their child. Some families solely homeschool their children due to children's medical issues, wanting to travel, or just because. Here, the parents will argue that the law is impinging on their fundamental right to upbringing their children. Thus, strict scrutiny will be applied.

Under strict scrutiny, a law is upheld if it is necessary to achieve a compelling government interest, narrowly tailored, and no less restrictive alternatives available. The law provides that all students must receive an acceptable primary and secondary education adhering to certain standards. Further that parents may homeschool their children or enroll them in private school but must demonstrate that it meets the criteria. If it does not meet the criteria, their application for home school and private school may be denied. The government interest is to improve declining student test scores and standardize curricula for K-12 students. This interest seems to be compelling as improving declining test scores is crucial to a student's success. The law is narrowly tailored by serving specifically to improve these scores and providing set standards. However, the parents whose applications were denied will argue that there are less restrictive alternatives. These may be by providing home school programs so that the parents can just select and enroll their student in that program. It also seems highly restrictive that private schools are subject to approval. Private schools operate in their own manner. It could be burdensome for private schools to be denied and have to change all of their curriculum in order to stay in business and have students.

This law will likely fail the strict scrutiny test because there are less restrictive means available.

Due Process

Due process violation occurs when someone is deprived of life, liberty, or property.

Here, the facts indicate that the director's decision was final and was not subject to any review. This may be a violation of due process and because there was no opportunity for review. Thus, the parents may raise this issue in their lawsuits.

I apologize I ran out of time but there could also be an equal protection claim potentially.

Exam Name: ConLaw-KCCL-SPR22-Zulfa-R

END OF EXAM