

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.

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. 2

The City of Columbia designated its City Hall Flag Poles as one of several “public forums” for all applicants” and encourages private groups to hold flag raising events “to foster diversity and build and strengthen connections among Columbia’s many communities.” Over the course of twelve years, the City approved 284 such flag raisings by private organizations, with zero denials. Approved flag raisings include ethnic and other cultural celebrations, commemoration of independence or other historic events in other countries and the celebration of certain causes such as “gay pride.”

Camp Constitution is a Christian civic organization. The organization’s mission is to enhance understanding of the country’s Judeo-Christian heritage, the American heritage of courage and ingenuity, and the genius of the United States Constitution. Camp Constitution applied to the City’s Property Management Department to raise its flag to commemorate the historical and social contributions of the Christian community in connection with observance of Constitution Day and Citizenship Day. The City denied the request expressly because Camp Constitution’s proposed flag was called “Christian” on the application form, but other than the Latin cross on the flag itself, there is nothing to identify the flag as a “Christian” flag. The City stated that the application was declined because it was a religious flag and the City has a past practice of refraining from flying non-secular flags on the City Hall property.

The City’s Flag Raising Policy states “At no time will the City of Columbia display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements. A determination to be made at the Commissioner’s discretion and there are no separate guidelines or criteria for the Commissioner to use to make any such determination.”

Camp Constitution sued the City for preliminary and permanent injunctive relief, declaratory relief and damages on the grounds that the City’s denial of Camp Constitution’s flag raising request violated their First Amendment rights under the Constitution.

What arguments will Camp Constitution raise in support of their claim?
What will the Court decide?

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.

Answer Outline Constitutional Law

Spring 2022

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).

1)

Anna v. Suncity

1st Amendment

Good
intro.

Anna will argue that Suncity violated her rights of free speech and freedom of association, by creating the restricted zone in a public park and not allowing her access that was necessary to get into the restricted zone to help the homeless people in the camp.

Anna can argue that based on the 1st Amendment, the public park was a traditional public forum. The speech that the City was restricting was Anna's outrage at the treatment of the unhoused people by the city. The speech the city was restricting was content based because they were attempting to prevent Anna from speaking with the homeless residents of the camp. This requires the city's ordinance to pass strict scrutiny when it prevents Anna from exercising her rights in an area that is always available to the public for speech and association. The city will have to argue that their ordinance was based on a compelling government interest that is narrowly tailored to achieve that interest. [The freedom of association on an individual and private level cannot be determined or interfered with by the courts. *Why not?*]

But how
was this
interest based
on all
fact was
whibored?
viewpoint?

Defence
issue

Anna attempted to stage a protest at the camp site but was prevented by doing so by police, in a traditional forum. A traditional public forum like a park or a city sidewalk has always been protected under the 1st Amendment as a space where people can go to gather or communicate ideas. The City here, took a previous nuisance ordinance and reframed it to fit an agenda to dispel homeless persons from an area where they were previously allowed to stay. The facts do not indicate any compelling government interest other than the unhoused people might be a nuisance. There were no examples of complaints or a public welfare concern. The state alone with a public nuisance issue is not

Good
Analysis

compelling enough to justify restricting people's ability to stay in a city park or to enter the park or to restrict Anna's access to the residents of the camp and her attempt to stage a protest. The ordinance is also not narrowly tailored to advance or support the government's objective. They did not need to hide behind 100 feet of woods and fencing to remove the homeless people from the camp they have created. They could have simply asked the homeless persons to move to different locations without forcibly removing them or arresting them. Anna was a member of the community and a local advocate who frequently interacted with the unhoused population. While she was not a member from an outreach agency, she still had personal relationships with the residents that belonged in the camp and was prevented from being with them. *Intimate Association?*

good analysis
Had there been facts to give rise to the idea that the restriction was content neutral and not an attempt by the city and the police to prevent Anna from having access to the residents and preventing her protest for other government interest reasons, the court may have found that a time, place, and manner application would have applied. But even then the restrictions on Anna were not advancing an important government interest, there were not alternative channels of communication for her, no was this the least restrictive means to uphold the burdening on speech. Anna was prevented from protesting, accessing the camp, and from speaking to the residents.

good conclusion
The City's ordinance will fail strict scrutiny and the SC will find that the ordinance is Unconstitutional.

Licensing

Anna was prevented from accessing the camp because she was denied a permit that was required under the city ordinance.

you v
Mull
STAT

A license must have clear criteria, advance an important government interest, a deprivation of access and hold procedural safeguards for review.

good
Analysis

Here, it is obvious the the licensing/permit requirement violated Anna's 1st Amendment right. There was no clear or certain criteria given that would help people requesting access to satisfy, it seemed to be up to the discretion of the city employee that Anna may have come into contact with. There was no important or substantial government interest in preventing Anna or anyone else from accessing the camp, other than for the city to attempt to hide their efforts to disperse the homeless population from the area. Anna was deprived of her ability to access the camp because one employee said so with no reason to why or how she could receive the permit to enter There were also no procedural safeguards in place for Anna to appeal the decision of the employee or police she came into contact with that prevented her from accessing the camp. Suncity will argue that the restricted area was dangerous to non-city employees and that restricting outsiders from coming in was in the public interest so that no gets hurt while they clean up the area.

The Court will likely find that there was no clear or certain criteria laid out for potential permit applicants to follow and there were no procedural safeguards in place to prevent errors. *So ordinance is unconstitutional on its face. (Finish the conclusion)*

Ben v. Suncity

Due Process

Ben will argue that the City and the Police violated his due process rights when they forced him out of an area that he normally would be allowed in and cited criminally for being in the restricted area.

There is a due process violation when the government interferes with a person right to life, liberty, and property. The Due process violation requires more than just negligence; a legitimate personal interest, a risk of erroneous deprivation, and overly restrictive means.

Ben was removed from his encampment that he made on public property. The City had built the restricted zone around him and then was charged with a misdemeanor for not leaving the area. Ben was being ripped away from his home without any notice or opportunity to be heard prior to the city enacting its new ordinance and moving forward with it. Ben had a legitimate personal interest in his property and belongings being thrown in the trash and disposed of because he did not move when the city wanted him to. Ben did not enter the zone but was still arrested and charged with a misdemeanor for being in the restricted zone after the zone had already been built around his encampment. The ordinance states that entry was unlawful but Ben has already been there and refused to leave. Ben's arrest and then charge of violating the ordinance is a violation of his due process protections because the city used excessive and very restrictive means to remove Ben from the camp by having his liberty breached when he was arrested.

good point

The District Attorney will claim that when the fence went up, he should have known it was time to leave and to find a new camp. Ben staying in the encampment and in the restricted zone violated the ordinance because he did not have permission from the City employees to stay/be there.

The court will likely find that Ben's due process was violated. ^{e.g.} because he was deprived adequate notice = a hearing prior to removal

Good job! You organized well, state the issues clearly and cite & apply the rules. Be sure you reach all issues: here, Freedom of Association both intimate (Access to Friends A + B), and Expression (Right to access to audience to speak).

Also, argue "buffer zone" per Hill + a "collateral" : remember to limit 1st 2d?

Ben - collateral due rule may be raised to prevent his constitutional defenses since he violated the ordinance rather than challenging it first.

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4)

Camp Constitution v. City of Columbia

Establishment clause

The First Amendment states that Congress shall make no law respecting the establishment of religion. Because the wording leaves room for interpretation, there are three main theories that the court will consider when evaluating an establishment clause violation. The Lemon test states that the government regulation is permissible if it (1) has legitimate secular purpose, (2) does not advance or inhibit religion, and (3) has no excessive entanglement. Neutrality theory argues that a government regulation is permissible if it does provides equal benefit/regulation to all religious and non-religious parties. Finally, Accommodation theory argues that government regulation is permissible so long as it does not outright coerce or establish a religion. Accommodation theory is a currently a minority and carries the least persuasion in court. Here, the city will argue that it cannot raise the Camp flag without violating the Establishment clause because it would create an aire of government favoritism to the Judeo-Christian religions. The neutrality theory best supports the City's notion, as it considers the risks of sending the message that if someone is not a member of that religious, they are political outsiders. However, Camp will argue that the fact that the City Hall Flag Poles have traditionally been used to *temporarily* hoist 284 different flags, that reasonable members of the public are sufficiently aware that the government is not establishing a religious preference. Additional factors considered in the past case, Allegheny, include whether there is accompanying religious text or call to worship, and whether the public is in some way coerced to observe the religious item in a court of law where the're other rights are on the line. Here, the flag is called "Christian", but has no text, only a generic Latin cross, and is not in a courtroom.

good
Statement
of
Rules

maybe
not
low

good
Analysis

good
point

Good
Transition

The City's policy against displaying flags that support discrimination, prejudice, or religious movements intends to abide by constitutional guidelines. However, Camp will argue that religious flags are acceptable under the neutrality theory, and that banning religious flags unconstitutionally promotes secularism as a government preference. City will argue that their interest is in maintaining a religious neutrality, and that prohibiting a flag that supports Judeo-Christian heritage is necessary in furtherance of that interest. They will argue that their city past practice of refraining from flying non-secular flags on government property proves that this policy was not a reactionary retaliation against Camp. Additionally, City will argue that it has the right to use broad discretion about which messages they choose to display on or near their city buildings. Camp will counter by arguing that a reasonable person would view this as an targeted act since there have been zero denials in the past.

good analysis

Gov't speech?

Even if the court determines the policy to not violate the establishment clause, Camp will argue that it is also deficient for vagueness, as there are no separate guidelines or criteria for the Commissioner to make a determination. The city must have a set of criteria, however minimal, to meet its burden of proof that it is not acting to inhibit religion and thereby satisfy the Lemon Test.

In summary, the court will likely find that flying the Camp flag is not a violation of the Establishment clause. *because (Add a brief stat. reason)*

Free Exercise clause

The first amendment states that Congress shall make no law ... prohibiting the free exercise of religion. The courts have interpreted the word religion to include non-religious beliefs that are sincerely held and occupy the same position as a traditional religion. The members of the Camp contend that they hold sincere and deeply rooted beliefs that are tied to religion, but these beliefs are no different than those of members of other private

good point

groups. Therefore, Camp will argue that if City must determine that their flag is a religious flag, that they treat the other organizations as equally religious flags as well.

The right to freedom of religion is not absolute, and is subject to regulation. If the government actor is a State, and regulation is content ^{+ Generally applicable} neutral, it is subject to the Smith test, which follows rational basis. Federal law requires strict scrutiny under the Religious Freedom Restoration Act (RFRA). Here, the government actor is a City, so the Smith test applies. However, even with this lesser burden of proof, City may not be able to meet rational basis. *because ... (explain why or refer to prior analysis)*

Symbolic Speech

Camp will argue that its flag is a form of symbolic speech. Symbolic speech is protected under the first amendment free speech. To qualify for symbolic speech, it must (1) intend to convey a particularized message, and (2) have a likelihood that the speech would be understood by the listener. Here, Camp intends to convey awareness of the history behind Constitution Day and Citizenship Day. However, Camp may not be able to prove that its flag would be correctly understood by the listener. Since the flag is named Christian and depicts a cross, it is likely that the flag would be misinterpreted. Since the facts do not state that the organization is widely known or the flag is well-recognized, the court will likely find that raising the Camp flag is not protected symbolic speech.

Designated Public Forum

Since the city created a designated public forum for the flagpole, with the mission to encourage diversity and to strengthen connections among its many communities, the area is by definition open to religious demonstration. City cannot then create content-based limitation as they do in its Flag Raising Policy, regardless of the reprehensibility of the

*good
Analysis*

subject or viewpoint being expressed. Therefore, the court will likely find that the City's Policy unconstitutional.

Unconstitutionally overbroad/vague

The Flag Raising Policy prohibits "inappropriate" or "offensive" flags, yet offers no supporting definition. Because these terms are open to subjective interpretation, they are vague and there is a risk that the Policy will prohibit otherwise free speech. *+ overbroad?*

In summary, Camp will likely prevail in its suit for injunctive and declaratory relief and damages on the grounds that the City violated their First Amendment rights to Freedom of Religious Expression. The court will likely find that City violated the establishment clause under the second prong of the Lemon test and the neutrality test by prohibiting Camp to hoist its flag. Finally, the court will likely find that the City's Flag Raising Policy for a designated public forum to be unconstitutional for being content-based, overbroad, and vague. *Very good, thorough conclusion statement.*

Good job! You clearly identify the issues and organize well. Your Analogy is supported by facts, and shows your reasoning. Ideally your Analogy of the Free Speech issues would be expanded, but you do adequately address them and compare the applicable Rules.

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