

CONSTITUTIONAL LAW II – Spring 2008

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Final Exam Comments

In the past I have found it helpful to give you some information about your final exam—particularly an idea of what I was looking for in your essay. Feel free to contact me if you have specific questions. And feel free to come by my office hours during the first three weeks of the semester if you want to discuss your essay individually. You must re-read your essay, read the posted sample answer(s), and read through this document as well. Mark them all up and compare them and then come see me (bringing the mark-ups with you). Our meeting will be much more productive if you do that, so I require it.

On your essay exams, numbers ["1"] are points earned; numbers in parentheses ["(1)"] are weak points—too many points in parentheses and I roll the score down one or more points; check marks, plusses and minuses are extra good or bad elements that can raise or lower points if very numerous. Other marks (other than the comments themselves) are just to help me find my way around the essay. I do not do extensive on-paper comments because of this memo and because you can come meet with me.

I tried to give a fairly straightforward exam—this could easily have been a bar exam type essay problem. Many of you acquitted yourselves admirably and had interesting things to say. The total essay scores ranges from 18-30 out of 30 possible. For each of the three questions there are a set number of points I am willing to give (10, 13 and 7) but because there are multiple ways for you to answer the question, there are more possible points than the maximum I will give, e.g., there were 6 points possible on Q1 but no one was permitted more than the 5 point max for that question. As a consequence, even 5/5 was not necessarily a perfect answer. Additionally, when I finish reading all three answers there are up to two additional points for Argument, Organization, Vocabulary or "Mastery" (clear and excellent grasp of one or more of the topics).

MCQ range (out of 15 questions) was 7 -15 (1 each)

Your success is important to me—now, next year and in your future careers. Please let me know if I can help in any way.

--Prof. Christiansen

Q1) Are the adherents of HH protected under the Religion Clauses of the U.S. Constitution? What effect does that have on our enforcement of the law against them?

Total points possible: 10 (Range: 4-10)

This was a fairly straight-forward examination of the Religion Clauses, particularly the Free Exercise clause. The facts set up a facially neutral law that should be easily upheld even without an exception except that the absence of any sensible justification for the law and the clearly disparaging remarks required about the Holy Herbalist required an analysis of the possibility that the law was targeted at a disfavored religious practice.

1. Religion: Is it a religion?

[Statutory law not Con law: US v. Seeger / US v. Welsh]

1) Sincere and meaningful belief

2) Occupies a place in the life...parallel to that filled by orthodox belief in God

Truth cannot be tested / Orthodoxy of belief not relevant [U.S. v. Ballard]

2. Free Exercise analysis: Is as law limiting free exercise valid?

Free Exercise issue (government limit on private practice) not Establishment (government support)

Modern rule: *Employment Division v Smith*

No exceptions for a “valid and neutral law of general applicability”

Exception: *Church of the Lukumi Bablu Aye (1993)*

Targeting religious practices as such – requires STRICT SCRUTINY

[related Establishment issue: establishes if favors certain kinds of religions)

Discrimination between religions triggers STRICT SCRUTINY

Kiryas Joel (separate Hassidic school / school district –both uncon)

Q2) Is our arrest of the two leaders of the protest for violating the law against promotion of illegal activity constitutional? Do you think the judge will grant our injunction against them?

Total points possible: 13 (Range: 6-13)*

This question allowed you to talk about free speech generally in the context of a particular law used for arresting speakers in this fact pattern. Successful answers clearly stated the standards (to the extent they are clear) and applied these facts.

Free Speech: Amend I applied to state action through Amend XIV

Free Speech Issue 1: Incitement of Illegal Activity

1) likelihood of imminent illegal conduct (possibility)

likely / imminent / illegal

2) speech was directed at causing imminent illegal conduct (intent)

intent of speaker

Here: not very imminent and unclear intent.

(But, cases from early 20th Cent were far more permissive)

Free Speech Issue 2: Prior Restraint

administrative orders or judicial orders prohibiting certain communications when issued in advance of the expression.

Exactly the kind of censorship freedom of the press was created for.

Targeting core political speech

--subjected to most rigorous possible review

--exceptions for national security do not apply

Other Free Speech Issues

Vagueness

A restriction on speech is so ambiguous that a reasonable person cannot tell what speech is forbidden.

Unfair / No notice / Selective or biased enforcement

Due process requires that people know the meaning

Overbreadth

Regulates *substantially* more speech than the Constitution allows to be regulated

Who can challenge a law as overbroad? Anyone.

Even someone against whom a narrower law could fairly be applied.

Q3) Is our law prohibiting protesting on the steps permitted under constitutional free speech protections?

*Total points possible: 7 (Range: 3-7)**

The final element of the free speech examination required specific attention. At issue was a very typical time-manner-place restriction that was very likely to meet TMP's special kind of intermediate scrutiny so long as it was content neutral.

Free Speech Issue 3: TMP restrictions

Core political speech can be expected outside the capitol building but...

Content-neutral: TMP

- 1) content-neutral purpose / justification
- 2) narrowly tailored to serve significant government interest
- 3) alternative channels of communication remain available

Here: content neutral, safety-based law; likely to be upheld

** For some of you I combined this score so it was out of 20. It was still graded the same as described above.*