

KERN COUNTY COLLEGE OF LAW

CONSTITUTIONAL LAW

Final Examination

Spring 2020

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INSTRUCTIONS:

There are three (3) essay questions in this examination.

You will be given four (4) hours to complete the examination.

Your answer should evidence your knowledge of the law, your ability of apply the law to the given facts, and your ability to reason in a logical manner to reach a sound conclusion. State fully the reasons that support your conclusion and discuss all points as thoroughly as you can.

Question One

A county jail prominently displays posters in the inmate dining halls with quotations of good moral principles to assist prisoners in their rehabilitation. The posters cite quotations from religious texts such as the Bible (Christian), the Quran (Islam), and the Teachings of Buddha (Buddhism) which condemn theft, assault, and murder while also encouraging inmates to find inner peace.

The Jail also makes available copies of the Bible, the Quran, and the Teachings of Buddha to the inmates, but no other religious texts. Inmate Atreides belongs to a small and relatively unknown religious sect called the Fremmen which believes that humans can attain supernatural physical and mental abilities based upon the teachings in their holy book. Inmate Atreides requests a copy of the book which urges the use of a hallucinogenic drug cocktail referred to as "spice mélange" to attain supernatural powers as part of a monthly ritual.

Inmate Atreides' request for the book is denied on the basis that it encourages illegal drug use. His request for the spice mélange is also denied for the same reason.

- (1) What challenges under the United States Constitution, if any, can Inmate Atreides reasonably raise to the dining hall posters and what is the likely outcome?
- (2) What challenges under the United States Constitution, if any, can Inmate Atreides reasonably raise to the denial of his request for the book and spice mélange and what is the likely outcome?

Question One - ANSWER

(1) Constitutional Challenges to the Posters

- a. Establishment Clause: Prohibits government from engaging in actions that constitute an establishment of religion.
 - i. Government Action
 1. Applicable to the state and local governments through the 14th amendment
 - ii. Lemon Test:
 1. Secular purpose
 - a. Government's stated secular purpose is to assist in inmates rehabilitation with good moral principles and encouraging inner peace
 2. Advances or prohibits religion
 - a. Primary effect cannot advance or prohibit religion
 - b. Quotes are not from just one religion but from three different forms of religion: Christianity, Islam, and Buddhism
 - c. Primary effect is not to advance or inhibit religion but to rehabilitate inmates
 3. Excessive Entanglement
 - a. Government action cannot be excessively entangled with religion
 - b. Inmates arguments that the posters are inherently religious
 - i. Posting quotes from religious texts the
- b. Government Speech: 1st Amendment does not generally apply to government speech however government may not engage in conduct that appears to disproportionately favor one religion
 - i. Government may display in a city hall menorah and Christmas tree where multiple religions are recognized, not just one
 - ii. Posters do not favor one religion but have quotes from three different religions

(2) Constitutional Challenges to the Book and Spice Melange

- a. Religion: No actual definition of what is religion however:
 - i. Religion is that which occupies the place in life that religion does for a religious person (Seeger/Welsh)
 - ii. Government can only consider sincerity of belief not truth in evaluating whether it is religion (Ballard)
 - iii. Individuals can be recognized as having sincere religious beliefs even is different from the rest of the faith (Thomas)
- b. Free Exercise Clause
 - i. Government is prohibited from punishing someone on the basis of their religious beliefs

- ii. Strict Scrutiny test: Government action is necessary to achieving a compelling interest
- iii. Smith
 - 1. Free Exercise clause cannot be used to challenge neutral law of general applicability
 - 2. Free Exercise clause does not require exemption for religions
- iv. Interest: prohibit illegal drug use is a neutral law of general applicability *detrimental to health*
- c. Establishment Clause
 - i. See Above
 - ii. Jail provides for 3 texts but not texts for other religions
 - iii. Argument that it prohibits other religions than the three they provide for
- d. Due Process
 - i. Strict Scrutiny analysis for fundamental right to religion
 - ii. Bible, Quran, and Teachings of Buddha allowed but not Inmate Atreides religious text
 - 1. Fails Strict Scrutiny
- e. Equal Protection
 - i. Laws that discriminate against suspect class based on religion
 - ii. Strict Scrutiny
 - iii. Jail provides texts for 3 major religions but not for others

Question Two

Chani, a senior at Arrakis High School is an artist and an activist for LGBTQ+ rights. As part of a school art contest to paint a mural on the wall of auditorium, Chani submitted an art piece and was awarded first prize by a panel of judges consisting of students, teachers, and school administrators. Her art piece consisted of three nude women of different races engaged in an embrace and was entitled "Love is Freedom." Chani then painted the mural on the auditorium wall.

At a back to school event, Mrs. Leto, the mother of two students who attended Arrakis High School saw the mural and lodged a complaint about it. She alleged that the mural interfered with her family's religious faith, which prohibited them from viewing depictions of nude bodies, since her children would view the mural when attending school functions in the auditorium. She also alleged the school violated her family's religious exercise when her children would see the nude mural.

In response to the complaint, the Principal directed Chani to paint clothing on the nude figures in her mural based upon a school district policy which stated:

"No obscene or provocative expressions or speech shall be permitted on any school campus."

Chani refused to adulterate her mural as it would diminish her message. Chani's art teacher, Mrs. Mapes, organized a student protest held on school grounds after school hours. At the rally, Mrs. Mapes publicly accused the principal of censorship and stated to the crowd "Chani has the right under the Constitution to express herself through her art and anyone who tries to stop her should be beaten to an inch of their life. I will fight to the death to protect her right as should you."

The principal began receiving death threats after the rally. Despite the threats, the school painted over Chani's mural. Mrs. Mapes was immediately dismissed from her position for inciting violence.

- (1) What arguments can Chani make to challenge the school policy and the removal of the mural as a violation of her right to freedom of expression and what is the likely outcome?
- (2) What arguments can Mrs. Mapes make to challenge her dismissal and what is the likely outcome?

Question Two - ANSWER

(1) Constitutional Challenge to removal of mural and policy

a. Freedom of Expression/Speech

i. Infringement on Speech

1. Erasure of mural is infringement on speech

ii. Obscenity is not protected

1. Obscenity Test (Miller)

a. Whether the work taken as a whole, by contemporary community standards, appeals to the prurient interest

i. Prurient interest is shameful or morbid interest in sex

b. Speech must be patently offensive by contemporary community standards

c. The work taken as a whole must lack serious redeeming social value by national standard.

2. Not obscenity as nudity itself is not obscene and there is a social value to the message provided by the mural therefore protected speech

iii. Vagueness

1. Law that restricts speech is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted

iv. Overbroad

1. Law that regulates *substantially more* speech than the 1st Amendment allows to be regulated and a person to whom the law constitutionally may be applied can argue that it is unconstitutional as applied to others.

v. Content Based Regulation

1. Content based restrictions of non-obscene sexually explicit speech
Strict Scrutiny otherwise, Rational Basis

2. The policy is content based therefore Strict Scrutiny applies

vi. Location of Speech

1. However, school is authoritarian environment and courts defer to administrators acting with legitimate pedagogical interests especially (Hazelwood, Morse)

2. Pedagogical interest in ensuring that all students have an environment to learn

vii. Violation of Chani's right to expression

(2) Constitutional challenge to dismissal

a. Freedom of Expression/Speech

i. Infringement on Speech

1. Punishment in response to teacher's speech

ii. Incitement

1. Must be a likelihood of imminent lawless action and speaker must intend to cause imminent lawless action (Brandenburg v. Ohio)

- a. Likelihood
 - i. General statement without likelihood of actually beating the principal within an inch of his life.
- b. Imminence of lawless action
 - i. After school and no evidence of imminence
- c. Intent of speaker to cause imminent lawless action
 - i. No actual intent to cause harm to the Principal
- iii. Fighting Words
 - 1. Words directed towards another person likely to provoke a violent response (Chaplinsky)
 - 2. Must be directed at another person (Cohen)
- iv. Hostile Audience Reaction
 - 1. Person gives a speech that provokes a hostile audience to violence towards another
 - 2. Must have clear and present danger of causing violence by audience (Cantwell)
- v. Government/Public Employee Speech
 - 1. Court previously ruled that government employees speech is protected if it involves a matter of public concern and on balance it is more desirable to protect speech (i.e., employers interests in efficient operation of the office do not outweigh speech rights).
 - 2. This remains the law for speech off-the-job. But for speech on the job, the Court ruled that there is no First Amendment protection for speech on the job related to an employees job duties. (Ceballos)
- b. Procedural Due Process
 - i. A fair process (notice and a hearing) is required for a government agency to individually take a person's life, liberty, or property (ie job)
 - ii. Immediate dismissal without a hearing violates teacher's liberty by depriving her or her interest in public employment

Question Three

In 2002, research concerning chronic brain damage to football players addressed the rising incidents of brain and spine injuries to football players at the high school, college, and professional levels. In response, Congress held hearings to determine the risk to players and the feasibility of additional safety measures. Testimony during the hearings revealed that for the past two years the NFL has mandated helmet designs using state-of-the art polymers (which are lighter and designed to dissipate shock), additional padding (for comfort and protection), and inner shells to absorb blows to the head and reduce force from impact.

Based on the hearing testimony, Congress made findings that the lack of adequate helmet protection was endangering the health of student-athletes at the high school and college level, resulting in millions of dollars in additional health care costs to treat brain and spine injuries suffered by football players and interfering with the educational mission of those schools.

Based upon the hearings, Congress passed the Prevention of Head Injuries Act (PHIA) two years ago, which required that in order for a state to be eligible to receive federal funds from the U.S. Department of Education, the governor of that state must certify in writing that the state's legislature has enacted a statute that requires the use of football helmets in high schools and colleges that conform to the NFL standards. Failure to comply with this requirement will result in the forfeiture of all funding from the U.S. Department of Education.

The state of Orange did not require student-athletes at the high school and college levels to wear helmets with these safety design features and lost all funding from the Department of Education.

What claims can the state of Orange make under the United States Constitution and how should the court rule?

Question Three - ANSWER

(1) Justiciability

- a. Standing
 - i. Injury
 - 1. Economic damage from loss of funds
 - ii. Causation
 - 1. But for the requirement to comply with NFL standard equipment, state of Orange lost all funding from US Department of Education
 - iii. Redressability
 - 1. Court striking the law would result in resumption of funds
- b. Ripeness
 - i. Loss of all funding for the past two years
- c. Mootness
 - i. Not moot because still ongoing

(2) Commerce Clause

- i. Lopez/Morrison Factors:
- ii. Regulate the channels of interstate commerce?
- iii. Regulate the instrumentalities of interstate commerce and person and things in interstate commerce
- iv. Regulate activities that have a substantial relation to interstate commerce
 - 1. There must be a substantial effect on interstate economic activity
 - a. Possibly on families
 - b. Health Costs
 - 2. Congressional Findings? Yes and findings support law
 - 3. Effects on commerce too attenuated

(3) Taxing and Spending Power

- a. Generally Congress has broad powers to tax and spend under the Constitution. Power is not limited to powers solely enumerated in the Constitution.
- b. Congress may place conditions on grants even in areas where Congress might not have power to regulate.
 - i. (1) General Welfare Clause
 - 1. Congress has the power to spend for the General Welfare/any public purpose
 - 2. Federal government can spend for the general welfare, it cannot directly legislate for it.
 - 3. Purpose is for the general welfare
 - ii. (2) The conditions are expressly stated – Statute clearly expresses the conditions and unambiguous
 - iii. (3) Have some relationship to the purpose of the spending program
 - iv. (4) Are not unduly coercive
 - 1. 100% loss of funds (NFIB v. Sebelius)

1)

Justiciability

In order for a case to be heard in Federal Court there must be a case and controversy. Case and controversy are determined by a case meeting the requirements of the five justiciability doctrines: standing, mootness, ripeness, prohibition of advisory opinions, and prohibition of political questions.

Standing

In order to have standing, a plaintiff must have a concrete interest in the outcome of the case. The plaintiff must have a person, palpable actual injury, that injury must have been caused and directly traceable to governments wrongful conduct; and there must be redressability - a positive outcome in the plaintiff's favor is likely to redress the harm alleged.

Here, the state of Orange lost funding due to their refusal to abide by the PHIA. The government denied the funds based on their lack of compliance. A court finding the act unconstitutional and returning fund availability to the state would redress the injury. The state has standing.

Ripeness:

Plaintiff has been harmed or suffers and immediate threat of harm. The State has been denied funds and will continue to be denied funds as long as they don't obey.

Mootness:

A live controversy must exist at all stages of review. If the harm ceases, the suit must be dismissed until it is a wrong capable of repetition but evading review, voluntary cessation by defendant, or in class action lawsuits. Here, the harm continues until the state obeys. A live controversy exists.

Congressional Power:

Necessary and Proper Clause:

Congress has 17 enumerated powers given to them by the Constitution. Though not an independent power on its own, through the Necessary and Proper Clause, Congress and the other branches are given auxiliary power to pass whatever laws are necessary to effectuate those enumerated powers. (McCullough v Maryland)

Commerce Clause

Art 1, sec 8 in addition to the necessary and proper clause gives Congress plenary power to regulate interests commerce. (Gibbons v Ogden) Congress may regulate the channels of commerce, instrumentalities, and anything that has a substantial effect on interstate commerce. However, that substantial effect must be an economic activity (Lopez). Congress may also regulate intrastate commerce when it can be shown that an economic activity has an aggregate effect on interstate commerce (Wickard - wheat case). If it is a non-economic activity, there must be a direct and substantial effect on interstate commerce which is a harder burden to satisfy.

Here, Congress passed an act requiring football helmets to conform to the higher NFL standards. They did this for the purpose of preventing millions of dollars in health care costs needed to treat severe brain and spine injuries. They also did this due to the interference with the educational mission of those schools. Congress does not have the police power to protect the health and safety of the citizens like the states do. Also, they will have to show how the educational mission of schools are being affected by lack of these helmets. It is unlikely that the use of the commerce clause will pass muster. It may be too attenuated. However, they might be able to show that millions of dollars over years adds up and that if every school used these helmets, those millions of dollars would be back in the commerce stream, particularly season after season since schools only need to buy the helmets once and they will be good for quite some time. However, Congress also has the power given to them through the Tax and Spending Clause.

Tax and Spending Clause:

Art 1 sec 8 gives Congress the power to tax and spend for the common defense and general welfare. The tax must be uniform across the states and be reasonably related to revenue production; the court will look at the dominant intent of the tax to see if its purpose is to raise revenue and not an attempt to usurp power from the states.

Here, the government through the spending clause may spend for the general welfare. They will claim that preventing serious injuries and interrupting educational missions is sufficient. However, they are requiring a forfeiture of the funds if the state does not comply in writing.

Conditional grants:

Through its spending powers, congress may put conditions on the funds given to the states to encourage them to comply with a federal regulation. However, the conditions must be expressly stated and they cannot be coercive. In Dole, a 5% regulatory tax was considered constitutional,

however in NFIB where there was a 100% forfeiture of money already given, that was considered coercive and unconstitutional.

Here, Congress is requiring a 100% forfeiture if the states do not comply. The courts will find this unconstitutional.

Power under section 5 of the 14th:

Congress may not create new rights or expand scope of rights. Congress may only act to prevent or remedy violations of rights recognized by the courts as long as the acts are proportionate and congruent to remedying constitutional violations.

Here, this power won't apply since although they are claiming to remedy a harm, the act must be proportionate and congruent to a constitutional violation and there is none.

10th Amendment: Commandeering

The Tenth Amendment states that what powers are not given to the federal government through the enumerated powers given to them by the Constitution, and what is not prohibited by the States are given to the States or to the People States in their sovereignty are not allowed to be forced to follow a federal regulation, however they cannot prevent the federal government from enforcing their laws. Thus, the Federal government cannot commandeer a state to follow its regulations. (NY v US).

Here, the state will argue that they are being compelled to follow the regulation or else have to forfeit 100% of the funds provided by Congress. They will say Congress does not even have a rational reason for withholding the funds and it is the State's job to determine what safety measures and regulations schools must have in place to protect the safety and welfare of the students. The government will fail in any argument regarding conditioning of funds since they are forcing states to forfeit 100% of the funds, which clearly crosses the line from encouragement to full on coercion. Further, the government is forcing the state legislature to pass a law that requires the use of football helmets, which is an unconstitutional abuse of power.

Conclusion: The State will succeed in its suit and the court will deem PHIA unconstitutional.

2)

Chani v. Arrakis High

Whether Chani can challenge the school policy and removal of her art as violation of her 1st Amendment rights?

Freedom of Speech

The 1st Amendment provides that Congress shall make no law abridging the freedom of speech and no power to restrict expression because of its meaning, ideas, subject matter, or content. If there is a content-based restriction, it must survive strict scrutiny unless exception exists or is less or unprotected types of speech, in which it must survive intermediate or rational basis. 1st Amendment is applicable to the states through the 14th Amendment. The school is a government so this a state action. Chani will argue the school statutes violates of her freedom of speech under theories of the free speech doctrine, vagueness, over breadth, and symbolic expression.

Free Speech Doctrine

Content based restrictions target speech based on content (subject matter and viewpoint) and are presumptively invalid and must meet strict scrutiny. Under strict scrutiny, the burden is on the government to show that the legislative action is necessary to achieve a compelling government interest, that is narrowly tailored, and is the least restrictive means of furthering that interest. Content neutral restrictions regulate conduct without regard to content and are only required to meet intermediate scrutiny. Under intermediate scrutiny, the burden is on the government to show that the legislative action is substantially related to an important government interest and relates to less protected forms of speech such as commercial speech and defamation. After a parent complained about the nude mural Chani drew on the wall, the school instructed her to paint over it. This is a chilling of Chani's speech and expression. The school will argue that the statute, which states "No obscene or provocative expressions or speech shall be permitted on any school campus" does not burden her speech entirely, just on the school campus. The regulation on speech is content based because it targets expressions and speech. In order for the regulation to be valid, it would need to survive strict scrutiny. The school will argue there is a compelling interest in

regulating what can and can't be seen or heard at a public high school. However, just because Chani is a student, does not mean that she loses all of her 1st Amendment rights.

Vague

A law is unconstitutionally vague if a reasonable person of ordinary intelligence could not tell what speech is prohibited or permissible. Vague laws regulate speech by "chilling it" and they must be drawn with narrow specificity. Chani will argue that the school policy that states "No obscene or provocative expressions or speech shall be permitted on any school campus" is vague and has chilling effect on her freedom of speech as she was not able to because the school removed the art and . A reasonable person may not be able to determine what is obscene or provocative given that definition. The government will argue that obscenity has been defined and therefore the policy is not vague. They will argue that nude woman is obscene and does not belong in schools. While the schools do have a compelling interest in keeping obscenity out of schools, the policy is vague.

Overbroad

A law is unconstitutionally over broad if it regulates substantially more speech than the constitution allows. A government regulation that prohibits both protected and unprotected speech is considered over broad and facially void. The wording of a statute must be narrow and specific and not so overly broad as to have a chilling effect upon protected speech. For the same reasons as above, the school policy regulates more speech than necessary to achieve their interest in protecting the students. However, Chani will argue that the fact that the policy attempts to regulate more speech than necessary, it should be void.

Symbolic Conduct / Expression

Government can regulate symbolic speech (conduct that communicates a message) through the *O'Brien* test with incidental burden if it: (1) within constitutional powers; (2) furthers an important government interest; (3) government interest is unrelated to suppression of free speech; and (4) impact on communication is not greater than necessary to achieve that purpose. Chani has a 1st Amendment right to free expression. Through her art, she is communicating a message. Her message of "Love is Freedom" is communicated by the mural of the woman on the wall. In order for the school to regulate that message, the regulation must pass the *O'Brien* test. (1) The school does have the power to regulate

speech. (2) They have an interest in protecting the students and facility against dangers including incitement and violence. (3) The school policy is not necessarily intended to suppress speech, however, since expression and speech of obscenity and profanity are directly mentioned, the policy is directly related to speech. (4) the impact on the speech is high. The students are unable to express themselves in any manner than the school deems inappropriate. Therefore, the policy is a restraint on freedom of expression.

Obscenity

Obscenity is not constitutionally protected speech and can be regulated. Under *Miller*, obscenity is material that: (1) taken as a whole, appeals to prurient interests decided by reasonably accepted community standards; (2) is patently offensive; and (3) does not have artistic, literary, political, or scientific value decided by national reasonable person standards. Nudity is not automatically obscene. The school will argue that the material is obscene and therefore able to be removed and Chani's expressive speech suppressed. Chani will argue that the art piece is not obscene. She entered into a contest at her school (her community) and was awarded first prize. The depiction of three women, who happen to be nude, embraced in a hug would not be patently offensive. The teachers, students, and school administrators all believed her art had artistic value. While there is one parent who disagreed with the depiction because of her own religious beliefs, the mural itself does not meet the standard for obscenity. The three prongs of the *Miller* test would be satisfied.

Mrs. Mapes v. Arrakis

Whether Chani can challenge the school policy and removal of her art as violation of her 1st Amendment rights?

Freedom of Speech

See rule above. Mrs. Mapes will argue that her termination was invalid restraint on her freedom of speech. She held a rally at the school, after hours to protest the treatment of Chani by the school. The school will argue that she is a government actor and has a higher degree of speech that can be suppressed. As a public employee, there are other restrictions on freedom of speech that must be balanced to determine if the restraint is valid. If the speech was in her capacity as a teacher, not a private citizen, the restraint would have a higher degree of being able to be suppressed. The school will argue that

even though she was speaking after hours, she was on the school grounds where she works, where she invited the students, and where the students know of her as their teacher. Therefore, her speech would be a direct reflection of the school and her capacity as a teacher. Mapes will argue that even though she is a public employee, she still has the right to speak on matters of public concern. The court will apply a balancing test to determine whether she is acting in her official capacity and maintaining work place order or speaking as an individual whose speech is not be hindered. It is likely that the school suppressed her speech as it was after hours.

Forum

There is a 1st Amendment right to use government property for speech. Public forums are government properties that the government is constitutionally required to make available and can enact reasonable time, place, and manner restrictions. Designated public forums are areas that the government could close to speech, but voluntarily chooses to open. Limited public forums are places the government opens only to some speakers or topics. Nonpublic forums are government properties that the government can and does close to speech such as schools. Mrs. Mapes used the school grounds to hold a rally where she accused the principal of censorship. Even though the rally was held after hours, it was held on the school grounds.

Incitement

The 1st Amendment permits restrictions on content of speech on limited areas including incitement. The court use the Brandenburg test, which states that statutes limited free speech are generally not allowed unless: (1) risk of imminent harm; (2) substantial likelihood of producing illegal activity; and (3) intent to cause imminent illegality. The school will argue that Mrs. Mapes comments of "Anyone who tries to stop her should be beaten to an inch of their life" is incitement. While there is a risk of imminent harm by threatening to beat a person within an inch of their life, there was no other action done. Mapes did not call on anyone to actually beat anyone. She will argue that as a citizen, she has a right to make comments about things that she disagrees with and her speech was not meant to, nor did incite anyone to act. The school will argue that the death threats that the principal received after the rally would show her intent to incite violence. However, the threats were not

imminent and likely nothing more than other people's freedom of speech. Her speech is still protected as it does not meet the three prongs of the Brandenburg test for incitement.

Procedural Due Process

Procedural due process requires certain things be done prior to depriving a person of life, liberty, or property. Mrs. Mapes will argue a violation of her procedural due process rights. She was immediately terminated after the rally without notice or an opportunity to be heard. Her employment is a property right. The facts do not state whether she was an at will employee, however, government teachers usually have some sort of contract. It can be assumed that if she is the art teacher, she is going to be the art teacher for the entire year, unless she was given an opportunity to resign or fired for cause. The school will argue her behavior was the cause, however, she will argue that she was not working at the time of the rally and her private behavior allows for her freedom of speech and not allowed for termination without due process. The court will hold that she lost her property right without a hearing in violation of her due process rights.

END OF EXAM

3)

1. What challenges under the United States Constitution, if any, can inmate Atreides reasonably raise to the dining hall posters and what is the likely outcome?

First Amendment- Freedom of Religion

The First Amendment states, in part, that Congress shall make no law respecting an establishment of religion or prohibiting its free exercise. To make a claim against the Government for a freedom of religion violation, there must be state action.

State Action

The protections given under the Constitution apply only to Government action. Private actions are not protected unless an exception applies in the form of either the public function test where or the Entanglement doctrine.

Here, the inmate is filing suit against the prison for violating his freedom of religion rights. The prison is a government agency, being a county jail, and as such, state action is implicated.

Establishment Clause

The central purpose of the Establishment Clause is to insure governmental neutrality in matters of religion. The clause prevents the government from promoting or affiliating itself with any religious doctrine or organization, discriminating among persons on the basis of their religious beliefs, and involving itself too deeply in a religious institutions affairs or delegating governmental power to a religious institution.

Historical Theories of the Establishment Clause

Historically, three theories have been used to test whether there has been a violation of the Establishment Clause: strict separation, neutrality, and accommodation. In strict separation, Thomas Jefferson believed government and religion should be separated to the greatest extent possible or else inevitably coercion to participate in the faith would occur. Jefferson stated there should be a "high and impregnable" wall erected between the government and the church. However, this is

inherently impossible since the Establishment Clause and the Free Exercise Clause (discussed below) are so intricately entwined with one another, it is easy to violate one clause while trying to protect the other. In the neutrality theory, the government must be neutral between religion and secularism and also neutral amongst the various religions. When viewing a potential violation through the neutrality perspective, the government uses the symbolic endorsement test. The government violates the Establishment clause if it symbolically endorses a particular religion or if it generally endorses religion over secularism. Finally, in accommodation, the government essentially only violates the establishment clause if it literally establishes a religion or coerces religious participation or favoring of one religion over another.

The Lemon Test

Modernly, the courts use a combination of all three tests by applying the Lemon test to determine if the Establishment clause has been violated. A regulation will not be struck down if it is secular in purpose; the primary effect of the regulation does not advance nor inhibit any religion; and there is no excessive entanglement between government and religion.

1. Secular Purpose

The action must be secular in purpose. The courts look at the predominant, primary purpose in determining if it is religious or secular in nature. Here, the jail is displaying posters in the dining halls with quotations of good moral principles. The Jails's argument is that the quotes condemn a variety of crimes (theft, assault, murder, etc) and assign with rehabilitation. Atrides will argue that the quotes are there to indoctrinate him into religion. However, this argument is likely to fail since the primary purpose is not to indoctrinate him, but give him a variety of reminders of what a good moral compass should look like and how to behave since he is there for breaking a law. This prong will be satisfied.

2. Primary Effect

The primary effect must not advance nor inhibit any religion. The government cannot symbolically endorse a religion or a particular religion. (County of Allegheny) Here, the question is whether the posters from the three religions of Christian, Islam, and Buddhism promotes any or all of those religions against secularism or another unrepresented religion. The government will argue it does not because in County of Allegheny where Christian and Jewish displays were located on government property, the court found that because there was more than one religion being recognized, it was constitutional. Also, the government has some discretion as to what they choose

to display. Here, there is not just christian and Jewish quotes, but also posters representing Buddhist beliefs which is not a monotheistic religion. This prong will be satisfied.

3. Excessive Entanglement

The act or regulation must also not be an excessive entanglement between religion and the government agency. This is frequently seen where there is coercion or where there is difficulty in tangled funds and aid from government to a religious organization. Here, Atreides will argue he is being coerced into a religion by having to stare at posters in his dining hall while he eats for every meal. However, just like in the Cohen case - although it was a free speech case where he was wearing a jacket that said "F the draft," the court said a reasonable person could just avert their eyes. Here, too, the prisoners aren't being forced to stare at the poster. Therefore, this prong will also be met and in conclusion, any Establishment Clause claim will fail.

2) What challenges under the US Constitution, if any, can inmate Atreides reasonably raise to the denial of his request for the book and spice melange and what is the likely outcome?

Free Exercise Clause

The Free Exercise Clause gives a fundamental right to practice religion and prevents the government from punishing a person based on his or her sincerely held religious beliefs. Strict scrutiny will apply if this is violated. The court will look at whether the person sincerely holds his belief and whether the government action is targeting religious conduct.

Is the inmate's faith truly a sincerely held religious belief in determining if the book and spice should be allowed?

Religion is a sincere and meaningful belief that occupies a place in the life of the possessor. (US v. Seeger) The government can only consider the sincerity of the belief; they cannot consider whether the religion is true or what others in that faith might believe. (US v. Ballard; Thomas)

Here, the inmate claims to belong to a small and relatively unknown religious sect called the Fremmen which believe that humans can attain supernatural physical and mental abilities based upon the teachings in their holy book. The religion also urges the use of a hallucinogenic and evidently illegal drug cocktail to attain the supernatural powers. To determine a sincerely held belief, the courts look

case by case and it is very fact intensive. Nothing in the facts discuss how long he has belonged to this faith or what else he does to truly show that he holds this faith's belief system sincerely in his heart. There is nothing to show he does anything else to practice this faith in his daily life. He merely want to read a book and use some drugs to maintain a supernatural physical form. The court cannot weigh whether they believe it is a bunch of malarkey. They must simply judge the sincerity held by the individual. The jail would argue even if it were true, you wouldn't want them to have the ability to change physical shape. They could turn into a bat and fly out of the jail. However, that's unlikely. Further, in a jail setting, prisons and jails are given far more latitude than other agencies because of the penitential issues at hand, such as safety of the prisoners, maintaining control, and safety of the officers. And the facts do not show the prisoner even holds a sincere belief. If there were a sincere belief proven, then the inmate would be able to have access to the book since the harm would be minimal- assuming no bat morphing actually occurs. Also, he will argue that the jail offers some books but not other religions books. Since the book is not illegal and no neutral law of general applicability applies and there are books offered for some religions and not others, it is likely the book will be required to be offered to him or else a FE violation will occur. However, the inmate would argue denying the spice would be a direct burden to his practice of religion.

Smith Test

However, pursuant to Smith - a similar case regarding the use of Peyote- the court held that there can be no free exercise exemption claim neutral laws of general applicability and laws not designed to regulate or interfere with religion are valid. Here, the use of the hallucinogenic drug cocktail is illegal. It is not illegal because it is intended to stop a religious practice, but rather it is meant to protect the health and well-being and safety of the general public and applies to all. Therefore, the spice will not be allowed and any Free Exercise Clause violation claim is also likely to fail.

Equal Protection Clause violation in denial of the drug spice combo and book

The Equal Protection Clause protects people from being denied equal protection of the laws based on some classification. The EPC applies to the US through the Fifth Amendment and to the States through he 14th Amendment. To determine if a violation of the EPC occurred, the courts first determine whether discrimination occurred, if so, what level of scrutiny applies to the classification and finally, did the government's conduct rise to that level of scrutiny.

Did Discrimination Occur

To violate the EP clause the law must discriminate either facially, by its terms, or if facially neutral, then through discriminatory effects AND purpose.

Levels of Scrutiny

Rational basis: the challenger has the burden to prove the law is not rationally related to a legitimate government interest. Any rationally related purpose will suffice. This is a very difficult burden for a challenger to overcome. Any non-fundamental right, including wealth, age, and disability is viewed under this scrutiny.

Intermediate Scrutiny: The government has the burden to prove the law is substantially related to an important government purpose. Here, the court will look at the action purpose of the law. Illegitimacy, children of undocumented aliens, and gender issues are viewed under this scrutiny. However, for gender, the court also needs to see an "exceedingly justifiable" purpose behind the law.

Strict Scrutiny: strict scrutiny is also a very, nearly impossible, scrutiny to overcome. It is the government's burden to show that it is necessary to achieve a compelling government interest and there are alternative less discriminatory means available to achieve that interest. Strict scrutiny is applied to all fundamental rights.

Here, the rule is denying the prisoner access to a book and an illegal spice combo for use in a religious activity. Since practicing religion is a fundamental right, strict scrutiny is applied.

As to denial of the book, the government has to prove not only a compelling reason to deny the book, but also that there are no other less restrictive alternatives. They will have a very difficult time proving this since they offer other religious books already. So actually physically holding a book of some sort must be okay. They could still give access via computer or print out excerpts, both of which seem to be unnecessary since books seem to be available. Likely, just like the Free Exercise Clause, when it comes to the book, the government's arguments are likely to fail.

As to the illegal drug spice, that is different. There, the government can easily argue that it is illegal to everyone and they have a compelling need to keep hallucinogenic drugs out of the hands of potentially dangerous and unstable criminals. It is also unsafe to their health and well-being to smoke or have illegal spice drugs in their system. Also, prisons are unique in their significant needs to keep jails and prisons safe and orderly in general so more latitude and weight is given to their interests. For this reason, strict scrutiny will be met and the EPC claim will fail as to the drug.