

CONSTITUTIONAL LAW
FINAL EXAMINATION
Spring 2017

MICHELLE A. WELSH

EXAM INSTRUCTIONS

This is a three hour exam. There is one essay question to be answered in Question 1, four short answer questions in Questions 2, and 20 Multistate Bar Exam-type questions in Question 3. Each question will count for 1/3 of your exam grade. The credit for the 2 quizzes and the practice exam represent a total of 10% of your grade for the course and the final exam represents 90%. (Extra credit may be added for your class participation).

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.

*****1*****

MONTEREY COLLEGE OF LAW
Welsh, Professor
Final Examination Spring 2017

Question No. 1

Frida, a student at Columbia High school, painted a 5-foot- high mural on the wall of the art classroom as her school senior art project. The mural depicted three nude women dancing, which she entitled "Free the Body!". Frida's art teacher, Ms. Smith, an employee of the School District, awarded Frida first prize in the student art contest for her mural.

At a back-to-school night event, Ms. Jones, the parent of two Columbia High School students, objected to the mural stating that her family's religious faith prohibited them from viewing depictions of nude bodies, that her children were enrolled in art classes, and the School violates her family's religious exercise when her children see the nude mural. In response, the school Principal directed Frida to paint clothing on the nude figures in the mural, invoking a long-standing Columbia Public School District Policy which stated:

"No obscene, sexual or provocative expressions or speech shall be permitted at Columbia High School or at any event sponsored by Columbia High School."

Frida refused to modify her mural. The next day she organized a student protest held in front of Columbia High School after school hours. At the rally Ms. Smith, Frida's art teacher, publicly accused the principal of censorship, stating to the crowd, "Frida is a hero! She has the right under the Constitution to express herself through her art! 'Free the Body!' will remain in my classroom as long as I'm in it!" The next day Ms. Smith was discharged for insubordination.

If the parent, Ms. Jones, files a lawsuit against the School District, what arguments can Ms. Jones raise to challenge the school's mural as a violation of her fundamental rights and freedom of religion? Analyze them and the District's responses, and conclude.

If the Columbia School District removes Frida's mural from the classroom at Columbia High School, citing violations of the policy stated above, what arguments can Frida raise to challenge the constitutionality of the District's removal as a violation of her right to freedom of expression protected by the First Amendment? Analyze and conclude.

What constitutional issues can Ms. Smith raise to challenge her dismissal? Analyze and conclude.

For all issues, state how the U.S. Supreme Court should rule on them and why.

*****2*****

Question No. 2

Please write a short answer to these four questions. Each question is worth 25 points.

A. A state enacted a nondiscrimination law prohibiting discrimination in employment on the basis of race, sex, national origin, age, disability, sexual orientation and gender identity, but the statute included an exception for any employer making objections to compliance for religious reasons. Two employees filed suit to challenge the constitutionality of the statute: a disabled employee who was denied coverage for blood transfusions and a transgender employee who was denied coverage for gender reassignment surgery because the insurance coverage provided through their employment excluded such coverage for religious reasons. Analyze the constitutional issues the employees can raise. How is the court likely to rule on them and why ?

B. A city park regulation require an advance permit for all parades or assemblies of more than 10 participants, and prohibits granting any permits for events held after 9:00 PM. A group opposing the death penalty held a silent candlelight vigil at midnight, the time set for an inmate's execution, after they were denied a permit one day prior to the event. Analyze the constitutional issues group members can raise to defend against prosecution for violating the city ordinance. How is the court likely to rule on them and why?

C. A reporter for local newspaper interviewed three undocumented immigrants who agreed to be interviewed based upon the reporter's promise that she would not disclose their names or any identifying information about them. After the story was published, the reporter was served with a subpoena to appear before the County Grand Jury where she was asked to disclose the identities of the undocumented interviewees. The reporter refused and was held in contempt for violating a subpoena. Analyze the constitutional arguments the reporter can raise in her defense. How is the court likely to rule on them and why?

D. A city zoning ordinance prohibited all short-term vacation rentals anywhere in the city. When property owners continued to advertise online and rent their properties in the city to tourists for short-term rentals, the city amended the zoning ordinance to prohibit all online advertisements or offers for short-term rentals of property within the city limits. A property owner filed a lawsuit challenging the ordinance prohibiting advertisements. Analyze the constitutional issues the property owner can raise. How is the court likely to rule on them and why?

MCL Constitutional Law final exam outline of issues 2017:

Question 1:

Claims of Parent Jones:

1st Amendment Freedom of religion:

Free exercise: asserting right to religious accommodation at public school. Does presence of art seriously burden free exercise of parent's or child's religion? Is District policy neutral and generally applicable requiring rational basis review? (Empl. Division v. Smith). Does nude art violate policy, allowing censorship and accommodation of religion?

Fundamental right of parent to raise child: violated by presence of art conflicting with religious views? Was right infringed? If so, can School District meet strict scrutiny? e.g. compelling gov't interest in protecting 1st Amendment rights of student artist; narrowly tailored by District Policy to apply only to "obscene, sexual or provocative" expression which does not apply to art with serious artistic value (Miller v. CA), art won first prize, etc. Add: no fundamental right to public education, so not right of parent to control decisions by administrators given deference.

Establishment clause: will District's accommodation of religion by authorizing censorship of art constitute an establishment? Apply Lemon test; Neutrality (symbolic endorsement), or Accommodation of religion (coercion or establish a church)?

Claims of Student Frida:

1st Amendment right to free expression through art:

Students do not shed their constitutional rights at the schoolhouse gate (Tinker v. Des Moines). Nudity is not itself obscene and artwork is not sexual or proactive within the prohibition per District Policy. Policy may be vague, and/or overbroad. But school is an authoritarian environment and courts defer to administrators acting with legitimate pedagogical interests especially if dealing with school sponsored expression having imprimatur of gov't or if a school sponsored event or on campus (Hazelwood, Morse v. Fredrick).

Claims of Teacher Smith:

1st Amendment right to freedom of speech:

Public employee has the right to free speech on issues of public concern if employee's interests balance against the need of gov't to prevent disturbance in the workplace. (Pickering test). But public employee acts outside of 1st amendment if speech is within her job as teacher and not as a private citizen. (Garcetti v. Ceballos). Student rally? After school hours, but in front of school?

Violations of procedural due process:

Immediate dismissal without a hearing i.e. Notice and Right To be heard, violates public employee's liberty by depriving her of her property interest in her public employment

Question 2

A. 1st Amendment Freedom of religion:

Free exercise: asserting religious exclusion from nondiscrimination laws (Hobby Lobby), etc. Applies to corporate employers, to all religious views and practices? Or is law neutral and generally applicable per *Empl. Division v. Smith* as applicable to states. (rational basis)?

Establishment clause: violated by statute permitting employer's accommodation of religion by authorizing religious exclusion which violates employees' rights to equal protection under the Constitution and their protection under the nondiscrimination statutes. (Disabled, transgender classifications)?

B. 1st Amendment rights in a public forum:

Reasonable time, place and manner regulations must be content neutral, serve an important gov't interest, allow ample alternatives for communication. If permit meets this, then to require a permit gov't must show an important reason, with clear criteria leaving little discretion, with procedural safeguards. Here question if this is a prior restraint because requiring a permit for only 10 people in a public forum fails to serve an important interest and prohibition of events after 9:00 leaves no ample alternatives, plus denial of permit one day before the event does not provide procedural safeguards by opportunity to appeal or seek court order. If invalid on its face, no collateral bar applies and group may raise Constitutional issues after violating the ordinance. (And vice versa)

C. Freedom of the Press:

Reporter's rights are no greater than freedom of speech for all, so reporter is subject to subpoena and must disclose sources of information (*Branzburg v. Hayes*), and reporter can be sued for violations of promissory estoppel by the sources he promised not to disclose. (*Cohen v. Cowles Media*)

D. 1st Amendment Commercial Speech:

Gov't must meet *Central Hudson* test to regulate commercial speech which is lawful and not misleading. Here advertising for vacation rentals in the City is advertising unlawful activity and so may not require meeting *Central Hudson* test. But prohibiting only online ads and not other forms may be arguably underinclusive. If ordinance is not valid then City must meet *Central Hudson* criteria: directly advances a significant gov't interest, not more extensive than necessary.

Question 3 (MBE) attached

90

1)

Ms. Jones, the parent, would argue that the school is violating her fundamental right to educate her children as she sees fit and her free exercise of religion because she is forced to allow her children to observe material she objects too and her children are unable to maintain their religious prohibition against viewing depictions of nude bodies.

good
ESSW
STAT.

In order to determine if there is a fundamental right Originalists look at the text of the constitution, history, and tradition; while non-originalists believe that reliance on aged doctrine will ^{cause} ~~inhibit~~ the expansion of rights. Here, there is support for the right to educate your children as you see fit in the text, in history because public-education is not compulsory, and in tradition as well.

In order for this to have been a Substantive Due Process violation, the fundamental right must have been substantially burdened or infringed which constitutes a denial of the right. Here, the school has allowed the display of nudity. Ms. Jones does not allow her children to view nude depictions because it violates her families religious faith. Because Ms. Jones is unable to prevent her children from viewing material that violates her families religious faith which imparts the values she wishes to instill into her children, her fundamental right to raise her children as she sees fit is denied. However, the School District would argue that they have no obligation to adhere to her religious beliefs that impact her educational decisions because there is no fundamental right to a public education. This means that Ms. Jones, should she desire to adhere to her families' religious faith, could choose to have her children home schooled. Because there is no fundamental right to an education, the School District could tell Ms. Jones that they have not obligation to adhere to her religious faith because the right to raising your children as you see fit does not extend beyond the bounds of the home, and that she should home school her children in the alternative. The United

good
regimi

States Supreme Court would rule in favor of the School District because the right to raising your children does not dictate the public school process. *Good point: ^{Good} Analysis + conclude*

Free speech
The Free Exercise Clause prevents the government from interfering with the free exercise of religion. This means that the government is either prohibiting activity that the religion requires or requires activity the religion prohibits. Ms. Jones would argue that the activity the government is prohibiting is not viewing depictions of nude bodies. *(or requiring viewing them)*
Analyze Free exercise? Conclude?

NOT really → Frida, the student, would argue that the Constitution prohibits Congress from passing any law which inhibits free speech; however, no Supreme Court has ever ruled this strictly, the only member of the Court to support this strict interpretation is Justice Black. In the alternative, Frida would argue that the School District Policy is Content Based because the policy prohibits speech if the subject matter includes nudity. A regulation that is content based must pass a strict scrutiny analysis. Here, the government would argue that they have a compelling interest to keep obscenity out of the school, the regulation is narrowly tailored because it only addresses obscenity, and it is the least restrictive method available because it limits no other subject matters of speech. *(+ Sexual or protective) AN SUBJECT MATTERS*

Good rule statement
Furthermore, the School District would argue that because the mural was obscene and is therefore unprotected speech. In Miller, material is obscene if it appeals to the prurient interests (morbid sexual desires) which is determined by a contemporary community standard, depicts sexual conduct as defined, and has no redeeming literary, artistic, scientific, or political value. The School District would argue that three nude women appeals the prurient interests because the three women are engaged in nude dancing which appeals to morbid sexual curiosity and depicts a form of sexual conduct, an unprotected form of speech on its own, and the work as no redeeming artistic or political value because, *MEN'S RIGHTS?* "Free the Body," does not address contemporary political issues. Frida would argue that her mural is not obscene and not covered under the School District's regulation because there is

nothing morbid about simple nudity, the three figures are not engaged in sexual conduct, and its artistic value derives from her own act of painting it as an expression of high school self while the political value is apparent in the controversy it caused. The United States Supreme Court is likely to decide that the mural is not obscene under the *Miller* test because it does not depict sexual conduct and has a redeeming artist and political value.

Frida would also argue that the School District is regulating her free speech because the School District has censored her freedom of expression because she was asked to censor her artwork. Expression is an action that communicates a message that would be reasonably understood as a message. Since time immemorial human expression takes the form of art, and even today grad students sit and ponder Edvard Munch's screaming face while interpreting a message they can sympathize with; therefore, even if not an expressionist master, Frida is still an expressionist high schooler. Symbolic Speech can be regulated by the government if the regulation is not related to the message, an important government interest is furthered, and the regulation is no more than necessary to promote that interest. Here, Frida is likely to argue that because the message of her symbolic speech is sexual liberation, to regulate the use of nudity is related to the message because the message itself is regarding the very regulation of nudity in our society at large. The School District is likely to argue that her expression does not require the depiction of the naked form and their regulation does not prohibit a message regarding freeing the body. The United States Supreme Court would agree with Frida in this specific instance regarding the regulation of her message.

However, the School District is likely to argue that because a School is an Authoritative ^{arian} Zone and not a typical Public Forum nor even a Limited or Designated Public Forum; great deference should be given to the school in their decisions regarding education. The United

States Supreme Court is likely to agree with the School District that the District is the most suited to determine what regulations are required to promote the educational environment.

good
conclusion? state with reasons.

Ms. Smith can raise her right to free speech in order to challenge her dismissal because she was fired for insubordination in response to her assertion, after hours, that the mural would remain. The government would argue that because they can regulate the Time, Place, and Manner for speech and because she is a government employee have acted to regulate her speech as an employee. Under Pickering, a government employee's right to free speech must be balanced with maintaining workplace order, and if she is speaking out in the capacity of her employment she is a mouthpiece of the government and may be regulated. Smith is likely to argue that because she was speaking after school hours she was not within capacity of her employment and her declaration was unlikely to upset the workplace order, and even if it was, she was advocating for freedom of expression which outweighs the desire for workplace order. The School District would argue that because she was speaking outside the school, and spoke about what she would do in her official capacity, she was speaking as a mouthpiece of the government, and her refusal to remove the mural was insubordination, which is the refusal to obey orders which upsets workplace order. conclusion?

good rule state.

good analysis

excellent

Ms. Smith would also raise a Procedural Due Process violation because she was denied of Life, Liberty, or Property. Government employment is a property right so long as the government has created an expectation. Here, because Smith is a teacher with a contract, her expectation is at minimum through the end of the year. Because the School District discharged her prior to the summation of the semester, Smith has been denied a property right because the government created an expectation in the job when she was hired for the school year. In order for the Government to deny Life, Liberty, or Property, they must provide both notice and an opportunity for an impartial hearing. Here, Smith was provided no notice and was not granted an impartial hearing. To determine if notice and a hearing are required, the Matthews Factors apply. The importance of the private interest is weighed

good analysis

against the likelihood that the additional or altered procedure will reduce erroneous deprivation and the against the administrative or fiscal burden on the government. Here, because Smith has been denied a property right which is an extremely important private right because the integrity of our economic system relies on the sanctity private property, and granting her both notice and a hearing would have been likely to reduce this deprivation because it was spurred erroneously by religious concerns, and the administrative cost and burden is no greater than the already prescribed legal process for firing a government worker, to deny both notice and a hearing is a violation of Smith's right to Procedural Due Process. The Supreme Court is likely to agree with Smith that she was due both notice and a hearing because the government created an expectancy with her contract and because an important individual right has been denied and effective additional safeguards would come at little to no additional administrative or fiscal cost to the government.

good
analysis

END OF EXAM

Excellent! You identify the issues + rules,
And most importantly, you analyze well
using rules + facts.

Be sure you do analyze - Free exercise issue is stated
but not analyzed. Also, Be accurate: The School Policy
prohibits 3 types of content: obscene, sexual or provocative.
(may be vague).

Good job with Artistic merit + Public employee Speech + procedural
Due Process.

Blue Book

NAME _____

SUBJECT Con Law Final

INSTRUCTOR Welsh

EXAM SEAT NO. _____ SECTION Q2

DATE _____ GRADE 81

Question 2

A. The U.S. Constitution grants certain fundamental rights and due process rights to all persons. ~~some~~ ~~read~~. ~~rights~~ ~~that~~ when a fund. right is ~~denied~~ in issue, the petitioner must identify the right, there must be a deprivation or substantial burden to the right, there must be justification through strict scrutiny, and the ~~law~~ ^{law} must be supply that justification. The disabled employee will allege his right to make medical decisions was denied. The transgender student will allege his right to make medical decision was also denied. They could both also allege privacy issues. Then, they will argue the right has been burdened because they were both unable to get the particular medical procedure. The gout would argue they are not entitled to have the gout pay ^{employer?} for blood transfusion or gender reassignment surgery. They are still able to get the procedures if they pay themselves. The two employees will argue this is a substantial interference since the procedures are costly and should be covered.

If the ct finds a burden, then the gout will have to show the nondiscrim law and its religious exception is necessary to a compelling state interest and the law is narrowly tailored to that interest. The state will say the interest is protecting the employee's constitutional freedoms and religious beliefs.

The employees ~~will~~ ~~argue~~ ~~that~~ the exception is not necessary because there are alternatives. An employe

~~and provide another~~

The employees will argue that discrimination is never a compelling state interest. Here, the employer is discriminating based on disability + gender identity. Good point

The employees can also allege equal protection issues, as disability and gender are protected classes. What level of scrutiny?

The employer will say that under Hobby Lobby, a employer/corporation has religious freedoms and they cannot be compelled to provide coverage for things that violate their belief.

The blood transfusion for the disabled employee is not related to religion, so the court will likely find this denial discriminatory.

The gender-reassignment denial, however, may be upheld. because? (explain)

B. The first amendment to the const. prohibits the govt or state from making a law infringing on the freedom of speech. This right is not absolute, and the govt. may regulate speech depending on location, and whether the law regulates it is content based or neutral. Here, the location is a park, which is considered a public forum. A public forum is a place typically open for speech. The govt. can regulate speech in public forums so long as they are valid time, place, and manner restrictions. This means the regulation must have a valid govt purpose, the restriction must be no more restrictive than necessary, there must be adequate alternatives, and the regulation must be in furtherance of the purpose.

Here, the city prohibits permits for events in the park after 9 pm, and requires permits for parades or assemblies for more than 10 people. The govt will argue this is a reasonable time, place, and manner restriction because the city has an interest in keeping parks clean and quiet, since they are typically near residential ~~areas~~ areas. Also, cities want to regulate and monitor large gatherings to ensure they do not get out of control. The city will also argue 9 pm is a reasonable time to want the park to be quiet and assembly-free.

The group will argue that the permit requirement is a prior restraint to their freedom of speech.

Good
use of
facts &
inferences

good
issue

Prior restraints regarding licensing / permits are valid if there are clear criteria, no room for discretion, prompt response, and neutral review. These mean that there must be no room for ~~reasonable~~ different interpretations re the guidelines, the person granting or denying the license must be neutral, and the group must hear quickly enough to be able to appeal it.

The city will argue that 10 or more people is clear, and 9 p.m. is clear. So there is no room for discretion. The law defines a parade or assembly as anything with more than 10 people and expressly prohibits events after 9 p.m.

The group will argue that the license was denied one day prior to the event, so they were not able to promptly hear their side heard or appeal the denial. Conclusion?
Which argument prevails?

C. The first amendment to the constitution protects the freedom of the press.

The reporter will argue here that the right includes the right to keep source's identity confidential.

The govt will argue this right encompasses the right of the press to greater access to information and ability to broadcast it. However, it does not expect the press from having to comply with legal subpoenas. (as court has ruled)

The reporter will argue that her credibility is important to her right, and she gave her word to her sources for confidentiality.

However, the court will rule that the reporter must disclose the identities, as protecting source identities is not protected by the first amendment.

Cite Rule
as
reason for
conclusion

D. The U.S. Constitution under the first amendment, protects all persons freedom of speech. This right is not absolute. The state or govt can regulate speech depending on whether the law in question is content based or neutral. ~~and depending on the~~ Certain speech is subject to lesser protection. For commercial speech, the state can only regulate the commercial speech if the content is deceptive, they have valid, govt purpose, the law furthers that purpose, and it is not more restrictive than necessary.

Also:
illegal

Good

Here, the city zoning ordinance deals with commercial speech since it deals with advertisements.

First, the property owner will argue that nothing in their ads are deceptive.

The city will argue that they have a valid interest in prohibiting short-term vacation rentals because it crowds the city and brings in too many tourists. The property owner will argue that they have a right to earn a living by renting out properties and advertising for this service. The property owner will argue the law is too restrictive as it restricts rentals anywhere in the city. They could instead only restrict certain neighborhoods or areas.

Also, the govt purpose is not furthered by the restriction. The property owner will argue that vacation rentals do not cause any issues with the city, and instead brings more revenue to

the local tourist attractions and restaurants.
Vacation rentals provide income for families
and allow out-of-towners to experience the
town.

Because there is nothing deceptive in the ads
and the govt purpose is not clear, the law
then does not further this purpose.

The court is likely to find the ordinance
unlawfully regulates commercial speech. OK

But: Short-term rentals are prohibited
So Ad is for illegal activity.

Does this matter?

Are prohibitions on short-term rentals
themselves prohibited by the Constitution? Why?