

Constitutional Law II—Spring 2025
Monterey College of Law (Prof. Ruskell)

Final Exam

Instructions:

Read each question carefully. This exam tests your understanding of the material covered in Con Law II. You do not need to include any matter from Fall (Con Law I).

Question 1 is a 1-hour question, worth 100 points.

Question 2 is a 1-hour question, worth 100 points.

Question 3 consists of four short answer questions, each worth 25 points, and you should spend one hour on all four, that is, approximately 15 minutes each.

Be sure to discuss both sides of the argument—do not be conclusory.

Question #1

The Daley City Star newspaper reporter, Megan Kind, received a voice mail from a disguised voice, “Hey Megan, I know you cover the courts. You need to know that Charlotte Brown is hiding evidence that Winnie Adams killed Beau Diddley. I have proof.”

Charlotte Brown was the District Attorney, Winnie Adams was the owner of a well-known local restaurant, and Beau Diddley was a local rock ‘n roll guitarist and a member of Beau’s Backstreet Boys—the headliner every weekend at the biggest nightclub in town.

Beau’s body had been found days before in the middle of a downtown intersection at 2 a.m. and the coroner determined he had died from multiple stab wounds. Megan knew that Charlotte and Winnie were best friends and had been since kindergarten. Megan also knew that Winnie and Beau had been dating for several years, but the rumor was that Beau had a new girlfriend.

Megan was intrigued and saved the voicemail. The next day, she received another voicemail from the same disguised voice, “Hey Megan, if you’re interested in what I called you about, meet me at the city parking garage, level C-1 tonight at 10.” When she arrived, Megan saw a darkly clad figure riding a scooter, who drove toward her and tossed an envelope at her feet. Inside were investigation reports, including one reporting that Winnie had confessed to killing Beau in a fit of rage over his new girlfriend. Another report indicated Charlotte had read the confession but was discounting it. At a press briefing the next morning, the police chief and Charlotte agreed they had no suspects in Beau’s murder.

Megan immediately drafted a story for the front page. The editor was intrigued but concerned, so he sent the story, the envelope and its contents, and the two transcribed voicemails to you—the attorney for the Daley City Star.

What constitutional concerns arise, if any? What legal advice do you give the editor and Megan? Discuss.

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Question #2

Mary is a devout Roman Catholic. She attends mass every day and believes the Roman Catholic Church, headed by the Pope in Rome, is the only true Christian church. She refuses to go to weddings, baptisms, funerals or any other activity in any church but a Catholic church.

Debbie and Darrell are high school sweethearts who married while in college. Both are seeking theology degrees and upon graduation will become licensed United Methodist ministers.

Mary owns a bakery and makes cakes for all occasions. Debbie and Darrell and their extended families have always purchased baked goods from Mary, including beautifully decorated cakes for many family events, including Debbie and Darrell's wedding.

The state in which Debbie, Darrell, and Mary live and in which Mary does business has an anti-discrimination statute, which among other things, covers religion: "All persons within the jurisdiction of this state are free and equal, and no matter what their ... religion... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Debbie and Darrell are planning a large reception to celebrate their ordinations. The party will be for friends and family, as well as their parishioners at the local United Methodist Church where they currently serve as youth ministers.

Debbie went to Mary's bakery and discussed having elegant cake prepared for the celebration. When Debbie told her the Bible verse she wanted on the cake and gave Mary a picture of the "Cross and Flame"—the United Methodist Church logo—to pipe onto the cake, Mary refused the order. She told Debbie, "The only true church is the Roman Catholic Church. If you do not follow the Pope, it is a sacrilege. I cannot support anyone who supports any reform ideology. I will not support the United Methodist Church."

Mary's words stung Debbie. She left the bakery, went to another bakery and placed the order. When she got home, she told Darrell about her experience. They agreed she should sue Mary for religious discrimination.

What are Debbie's claims? Discuss

What are Mary's defenses? Discuss

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Question #3

#3-A.

Beth suffers from an incurable disease that will cause her death within the next two years. A new drug could provide a cure. The drug is currently in animal testing; if those tests are successful, human testing will begin, but not for at least three years. Beth has petitioned the various federal agencies responsible for the testing protocols to obtain permission to receive the drug now. She is willing to waive all legal rights and provide informed consent. The agencies have all denied her request because of safety concerns. She sued the federal government for permission to take the drug. What is Beth's best constitutional argument? What result?

#3-B

In response to a series of studies in federal prisons showing that prisoners who engage in weekly worship are less likely to re-offend, the Attorney General sends an administrative order to the wardens that they are not to burden religious worship or practices by inmates in any way. Several wardens are troubled by this order because of certain religious practices they see in the institutions including a group who claims White Supremacist views are a religion. The wardens fear prison violence as a result. The wardens ask the Attorney General to repeal the order. What should the AG do and why?

#3-C

City has a series of municipal ordinances. One restricts loud music that interferes with peaceful enjoyment anywhere in City. And yet another restricts speeches in the business district to between 6:00 p.m. and 8:00 p.m. David opposes the mayor of City. He decides to paint a sandwich-type sign reading, "The Mayor is a dumb fraud. Kick him out!" with a caricature of the mayor as an elephant being kicked in the rump as he rolls down a hill. Can the mayor stop David's protest (in whole or in part, why or why not), if David protests by wearing his sign, while singing "The Times They Are a' Changin'" and playing his electric guitar and harmonica on the street in front of city hall during business hours?

#3-D

For many years, during the month of December City Hall has hosted a 20 foot tall Christmas Tree (sponsored by the local interfaith council), a similarly sized Menorah (sponsored by the local Jewish temples), and a 6 foot diameter Earth with a banner reading "Mother Earth Fellowship wishes you a happy Winter Solstice" (sponsored by the Mother Earth Fellowship, a neopagan religious group). The newly elected Mayor believes the symbols are all unconstitutional. The Mayor asks you, a prominent local attorney, if he should allow the symbols this December. What advice do you give and why?

ANSWER OUTLINE

CONSTITUTIONAL LAW Sec 1– HYB

Prof. Ruskell

Note: same exam as SLO & KCL

Q1:

- I. **Students may be tempted to run directly to Times v. Sullivan, but they need to explain why they get there. The first issue is what is the editor's concern? It is truth or falsity of the story and what happens if it is false.**
- II. **Libel**
 - A. ***False and unprivileged; writing, printing, other fixed representation; exposing someone to hatred, contempt, ridicule, or causing them to be shunned or injured in their occupation.***
 - B. ***Application***
 1. *Don't know if it is false but intended to be printed in newspaper.*
 2. *Shunned or injured in occupation (Charlotte)—can anybody trust this DA. Hatred, contempt, or ridicule (Winnie)—murderer.*
 3. *Real issue is privilege*
- III. **First Amendment issue is "privilege"**
 - A. ***Why is there possibly a privilege?***
 1. *Freedom of speech and press*
 2. *Matter of public concern (murder)*
 - B. ***About a public figure or private figure?***

Students need to discuss NY Times v. Sullivan.

 1. **Charlotte—is she a public figure?**

Charlotte is the District Attorney, typically an elected official, therefore a public official (public figure). This affects the Burden of Proof.
P must prove "actual malice" by clear and convincing evidence—knowledge of falsity or reckless disregard of its truth or falsity.
What facts tend to show malice? No evidence it is actually false.
Reckless disregard: Unverified reports received from an anonymous source, not from police or DA's office. Charlotte and police chief say no suspects, which contradicts reports.
 2. **What should Megan do to avoid actual malice—advice re Charlotte?**

Call Charlotte and report consequences: Charlotte's denial or her failure to respond
 3. **Winnie—is she a public figure?**

Winnie is a business owner. Popular restaurant. Girlfriend of local celebrity guitarist. Does that make her a public figure—no. So what's her burden of Proof
P must prove negligence in publishing the false statement, meaning D failed to use reasonable care to determine its truth or falsity.
What facts tend to show Negligence: Unverified reports received from an anonymous source, not from police or DA's office. Charlotte and police chief say no suspects, which contradicts reports.
 4. **What should Megan do to avoid negligence—advice re Winnie?**

Call Winnie and report consequences: Winnie's denial or her failure to respond. Might take more than that because negligence is a lower standard than recklessness. May need to seek corroboration.

Q2:

- I. This question requires the students to grapple with competing first amendment rights. Students should talk about the fact that the cake and website cases concern state statutes that protect fundamental, but unenumerated rights. Here, the statute is applied to protect an enumerated right.
- II. Debbie's claim is violation of discrimination act.
- A. *Debbie cannot make a 1st A claim—Mary is not a government actor.*
- B. *State prohibits businesses from discriminating on the basis of religion*
1. *Mary expressly said she would not accept the order because of Debbie's religion*
 2. *Students might discuss that Debbie, as a minister, should be conscious of 1st A issues, not want to burden another person's free exercise.*
- III. Mary's defenses
- A. *1st A – Congress shall make no law respecting establishment of religion or interfering with the free exercise thereof.*
- B. *14th A – applied to the states*
1. *State antidiscrimination statute interferes with Mary's free exercise rights*
Mary has a right to practice her religion as she sees fit
Smith test
Court is moving away from Smith test – Masterpiece, 303—Strict Scrutiny?
 2. *State antidiscrimination statute interferes with Mary's free speech rights*
Freedom to avoid speech
Freedom from compelled speech
 3. *But isn't Mary's refusal interfering with Debbie's rights of religion and free speech? How should the court handle the direct competition between enumerated rights?*

Q3-A:

Is there a fundamental Right? What is the fundamental right? Is there sufficient justification for the infringement? (animus, state's interests). Is the infringement sufficiently related to the state's purpose? No court case has ever concluded that people have a fundamental right to medical care, a particular form of medical care, or a right to take any drug they desire.

Q3-B:

While government may not interfere with free exercise absent a legitimate governmental interest, the government has a legitimate interest in the safety of prisons. The AG's order is too broad ("in any way")—oversteps what the cases say about free exercise. The Wardens have raised a legitimate concern about what that might mean for safety. The AG should rescind the order. Rescinding the order would not change the inmates' rights to freedom of religion.

Q3-C:

1st A, through the 14th.

- A. *Are the restrictions content based?*
1. *Music-no, doesn't matter what kind of music or where and not outlawed.*
 2. *Speeches—maybe, why that restriction in the business district? Maybe legit for businesses to operate, but also restricts political speech to a time when not very many people are around.*
- B. *If content neutral, is it legit time place manner restriction?*
1. *Loud music at anytime, probably because of the injury to persons that can result—hearing, can't think or function. No rule against music, only how loud it is. So maybe the Mayor can make him stop playing the guitar?*
 2. *Speeches during business hours? Make him come back at 6? But if not neutral?*

Q3-D:

- I. Students should recognize the Lemon Test would apply but for Kennedy and discuss both.
- A. *Under Lemon: 1. secular purpose; 2. neither advances nor inhibits religion; 3. avoids excessive entanglement.*
1. *Secular? Traditional with both religious and secular interpretations (tree & menorah), earth is secular. All put up together, similar size, no focus on particular dogma/doctrine.*
 2. *Neither advances/inhibits: Nothing tells people to go to a particular church nor believe anything in particular.*
 3. *Entanglement: Administrative support/government location. Admin may constitute excessive entanglement, so maybe unconstitutional. But case where creche was included with other symbols met the test. So unlikely.*
- B. *Under Kennedy: Does conduct conform to historical practices and understandings?*
1. *Conforms to historical practices: city has historically included all 3; similarly sized;*
 2. *question whether celebration of Winter Solstice is historical practice/understanding, but the*

symbol and message are secular. So unlikely to be unconstitutional.

1)

FIRST AMENDMENT

The First Amendment of the United States Constitution grants the freedom of religion, press, association and speech.

FREEDOM OF THE PRESS

The First Amendment allows a newspaper or publisher to freely express themselves about their thoughts and opinions without government interference. Megan is able to publish whatever speech she wants to as long as its not known to be false or misleading. Here, the DA will argue that it can be reasonably inferred that the article would be misleading especially if its published subsequently to the press conference. The article would be published on the front page of the city's daily newspaper where there is an intended target. Megan will argue that the audience that wants to know more will read the article, the speech is not forced on anyone, as opposed to having the speech on the radio or television- whereby a passerby would be privy to the information.

5
not really part
of it

DEFAMATION OF A PUBLIC FIGURE ON A MATTER OF PUBLIC CONCERN

For defamation to be proven, the DA must establish that both Megan and the Editor knew or reasonably knew of the falsity of the article and acted with malice. Here, the DA is being accused of suppressing evidence of the murder suspect who killed her best friend. Any reasonable person would question the authenticity of this just given the relationship between the two. Moreover, Megan also could have done her own fact-checking before submitting an article for printing.

Because the DA is an elected official, the DA will likely be held out to be a public figure. However, the DA would argue that he is a private person so he does not have to prove the malice element. The court will likely rule that the DA is a public figure.

The matter entails the DA allegedly suppressing evidence in a high profile murder case. This is a matter of public concern because the community members are the ones who elected the DA into office and elected officials should be transparent since they are a representative of that community. Here, Megan will argue that is a matter of public concern, especially since the DA and the chief of police conducted a press conference to give a status on the murder investigation. The DA will argue that it is not a matter of public concern because it is an internal investigation and they are only sharing specific details due to the victim being well-known in the community.

The malice element is one where the DA will have trouble with. Megan will argue that there is no malice or ill will towards the publishing of her article, she is simply giving the community a story. There is no proof to depict that Megan has ill will toward the DA. thus, the DA will not be able to prove the malice element.

CONCLUSION

Megan and the editor can run the article because the malice element will be difficult to prove in order for a successful defamation suit.

2)

1st amendment freedom of religion

In order for a belief to be religious, in its holder's life, it must have the same role as the role of God in traditional religions. It must also be sincerely held meaning that plaintiff cannot use the belief for misrepresentation. ✓

Here, Mary is a devout Roman Catholic who believes the Roman Catholic church is the only true Christian church. This shows that she believes in God and her belief is religious. She goes to church everyday and has her particular belief about the Roman Catholic Church which infers sincerely held belief.

Debbie would argue that Mary's belief is not sincerely held because it doesn't match the beliefs of a reasonable Roman Catholic. However, this argument is going to fail.

Free exercise clause

Congress shall make no laws respecting an establishments of a religion or prohibiting free exercise thereof.

Neutral laws: Laws that are general and neutrally applicable would be enforced even if they accidentally infringe upon a person's religious beliefs. These laws must pass rational bases test meaning they must be rationally related to a legitimate gov interest. If the law is not neutrally applicable, strict scrutiny must be applied meaning gov must show a compelling interest and the law must be narrowly tailored. However, the court in Creative 303 case concluded that the anti-discriminatory laws must be enforced neutrally and not coercive. ✓

Here, the statute is generally applicable because it does not target any specific religion and is applicable to everyone regardless of their religion. Therefore, the rational bases test must be satisfied. Debbie would argue that the law is rationally related to a legitimate gov interest which is to protect the citizen of the state from being discriminated against while acquiring services. This law is narrowly tailored to all businesses and states the list of actions that could not be taken against customers solely due to their religion.

Mary would argue that mere purpose of gov not wanting to infringe establishment clause is not enough to satisfy rational bases. She would argue that this law is targeting people like her who do not want to provide services to people with different religions. She would argue that this statute is not narrowly tailored and is vague because it mentions all businesses but does not clarify what services. Mary has provided a lot of services to Debbie's family without any problem but the statute does not call for personal services including custom cakes. Mary would argue that in *Creative 303* case, court allowed the business owner to not custom design a website for LGBTQ members stating that anti-discriminatory laws must be enforced neutrally and not coercive. Just like *Creative 303*, here, Mary is forced to perform a service with personal nature that would compel her speech and religious beliefs. Mary would argue that there are so many other bakeries in town that are willing to create this cake without being coerced to infringe upon their religious beliefs or freedom of speech. The fact that Debbie was able to order the exact cake at another bakery proves Mary's argument.

Therefore, the court is likely going to conclude that the anti-discriminatory statute should not be enforced on Mary.

Establishment clause

Congress shall make no laws respecting an establishments of a religion or prohibiting free exercise thereof. Historically lemon test would apply to determine whether the establishment clause was infringed but modernly historical practice and understanding and setting is analyzed.

Lemon test: The statute would have 1.a secular purpose,2. its effect will not advance or inhibit a religion, 3. will not cause excessive entanglement.

Here, the statute has a religious purpose because it wants to allow people with all religion be welcomed and prohibit discriminatory action based on religion. However, the statute does not advance or inhibit one religion over another. It has an equal effect on all religion by allowing them to be served at business. This statute will not cause excessive entanglement because it does not favor one religion over another and is preventing discrimination against anyone. Therefore, establishment clause is not violated.

However, under the modern approach, gov/Debbie would argue that the cake represent a historical practice of every religious celebration and is symbolic and the statute is set to protect people form discriminatory actions by the business owners. The statute does not advance nor establish any specific religion. Mary would argue that the statute is coercive and there is no historical practice surrounding the action and the whole set-up for the cake is religious. The court is likely going to conclude that the statute does not infringe the establishment clause.

1st Am freedom of speech

compelled conduct: freedom of speech protection also include freedom from compelled speech. A conduct may constitute speech is it's intended to be conveyed as a message and understood by viewers. A conduct could be prohibited if government can show an

important reason, regulation is narrowly tailored, directly effect gov's interest, accidentally suppresses speech.

Here, Mary could argue that the statute is compelling her to provide bakery services to everyone including the Methodist which would violate her belief. She could argue that the conduct of anti-discrimination statute is a form of speech since it tells her buyer that people with different religion should still be provided services. There is no important gov interest since people could shop from other bakeries. This statute is not narrowly tailored because " full accommodation and privileges of every kind" is vague. This statute is intended to burden Catholics like Mary who believe that the Roman Catholic church is the only true christian church.

Debbie/gov would argue that the gov has an important interest in creating an anti-discrimination statute to prevent business from discriminating against shopper with different religions. Gov has an important interest in keeping citizens safe and allow them to practice different beliefs. This regulation is narrowly tailored by targeting businesses from discriminatory actions against shoppers. Gov would claim that this statute directly effect its interest and was not meant. The court is most likely going to conclude that the statute does not infringe upon Mary's freedom of speech.

3)

3A. BETH V. FEDERAL GOVERNMENT

Substantive & Procedural Due Process

Substantive Due Process is a judicially constructed doctrine that the Supreme Court has interpreted from the Fourteenth Amendment, which stands for the proposition that some rights are so fundamental, the the government may not substantially burden or deny them. These rights have included the right to vote, to travel, child rearing and education, privacy, and the right to deny medical treatment. Procedural Due Process asks not what the government is taking, but how the government is taking it. A deprivation of life, liberty, or property will trigger a substantive and/or procedural due process claim.

If a fundamental right is being substantially burdened or infringed upon, then the government must prove that it the law at question is necessary for a compelling government interest and is narrowly tailored to achieve that goal. If there is a procedural due process question, the courts will balance the interest of the private party against the interest of the government, but the government must give notice, and a fair trial.

Here, although the courts have established that the right to refuse medical treatment, mean decline to take what would otherwise be life saving medicine, the courts have not found that parties have a right to treatment altogether. Beth could certainly argue that the converse should be true, and because people have the right of bodily autonomy, that they can choose whether or not to take an experimental drug. From Beth's perspective, the government has a potential cure that would save her life, which will not be available by the time that she needs it. The government then, by not allowing Beth to take the drug, is essentially taking her life from her. One of the three categories enumerated in the Fifth and Fourteenth Amendments.

Should the court accept that argument, and find that they should in fact treat it as a fundamental right, then the government would need to pass strict scrutiny. Prove that its decision to deny Beth is necessary for a compelling government interest and narrowly tailored to such. Here, the government could in fact meet this heightened burden by showing the potential detrimental, and setback, that the decision to give Beth the treatment could have on the cure's future. If the drug is administered to Beth, and it does not go well, then not only does Beth die anyway, but the drug could find opposition from the public. This is true, even though additional and ongoing R&D is necessary to completely verify the drug.

In short, even if Beth is able to consider the court to treat this as a fundamental right, or a deprivation of life, the government will likely be able to meet the standard of strict scrutiny.

3B. DOES AG ORDER VIOLATE FREE EXERCISE OR ESTABLISHMENT

Free Exercise of Religion

Under the First Amendment, the government is prohibited from requiring someone to do something their religion requires or conversely to require them to do something their religion prohibits. In short, the government may not interfere with an individual's right to free exercise of religion. In order to bring a claim under the Free Exercise clause, the individual must have a sincerely held religious belief. The court has made it practice not to question whether someone's religious beliefs are sincere, but has held that the person must exhibit the practice in their life and it must parallel the place of some traditional or orthodox religion, even if it does not have a supreme being or God.

Here, if the AG does repeal the order, then there is a possibility that the White Supremacist will not be able to practice their religion and will bring a claim against him or the prison. Now, even as low a bar as sincerely held has been, the court has at times criticized individuals whose religious beliefs are obviously not sincerely held. A White Supremacist group, who views discrimination and racism may not even get past this first bar. If they do, then the Smith or Sherbert Test will apply.

Smith Test

Under the Smith Test, which has come under scrutiny after its holding, specifically through RFRA, the government may incidentally burden someone's religious practices with a neutral law of general applicability.

Here, should the AG repeal the order, he could draft a neutral law of general applicability that would only incidentally burden the White Supremacist's religious practice. If he does not, then the AG will be required to pass the Sherbert Test.

Sherbert Test

Under the Sherbert Test, if the law in question is not neutral, or generally applicable, or if it substantially burdens someone's religious practices, then the law will need to pass strict scrutiny.

Here, if the AG repeals the order and does not issue a new order consistent with Smith, then the Sherbert Test will apply and he will be forced to prove that the law is necessary for a compelling government interest and is the narrowest means of achieving that goal.

Establishment Clause

Under the First Amendment, the government may not promote, advance, favor, or prohibit, or inhibit, any particular religion or create an excessive entanglement between the government and the state. The courts have gone through various tests to determine whether the establishment clause has been violated. From the rigid strict separation test, to the three part lemon test, and more modernly to the more lenient accommodation doctrine. These are discussed in turn below.

Lemon Test

Under the Lemon Test, when assessing whether the establishment clause has been violated, the court will review whether (1) the law in question has a secular purpose, (2) whether it promotes, endorses, advances, or prohibits, or inhibits a particular religion, and (3) whether it creates an excessive entanglement between the government and the religion. Most recently, the Lemon Test has fallen out of grace in favor of more modern approaches.

The AG's law seems to pass the first element, because its order seeks to deter repeat offenders, it may promote religion generally, but not any one particular religion, but it does create excessive entanglement between government and religion. By not burdening any religion **in any way**, the AG may be giving too much discretion to the prisoners in exercising their religion in a prison setting.

Strict Separation

The strict separation theory is just as it sounds, the government should not involve itself in any way with religion. As was in the eyes of Thomas Jefferson, the two should be distinct and completely separate.

Here, if the court uses the strict separation test, then the AG's order will likely need to be repealed. The prison is a state actor, a government entity, and the AG, by his order, is allowing, and potentially even promoting the exercise of religion.

Neutrality

The neutrality asks whether a reasonable observer could find bias in the government's conduct, meaning that they are not neutral to a particular religion and are promoting, endorsing, advancing, prohibiting, or inhibiting a religion.

Accommodation Doctrine

The accommodation doctrine is more lenient towards religion and looks to the role it has played in our nation's history and tradition. If the religion in question, or the religious conduct, has roots in our nation's history and tradition, and is not being used coercively, then the court is likely to allow it and not find that it violates the establishment clause.

In conclusion, it depends on which route the court takes in determining whether the AG's order violates the establishment clause. Under strict separation yes, under the lemon test and neutrality, possibly, and under the accommodation doctrine, it would be fine if that were historically the prison's practice, although that does not seem to be the case here.

3C. ARE DAVID'S FIRST AMENDMENT RIGHTS BEING INFRINGED

First Amendment

Under the First Amendment, Congress shall make no law abridging the freedom of speech. Practically, this means that the federal government may not restrict an individual's right to freely express and communicate their ideas and beliefs. Because the First Amendment has been incorporated to the states, the states, nor their local governments may infringe on the right to free speech either. This right is not absolute and may be restricted in certain circumstances, discussed in more detail below.

Unprotected Speech Categories

There are certain categories of speech, including incitement to immediate violence, fighting words, defamation, false or deceptive advertising, and obscenity, that are not as protected as general free speech. Anything that falls within these categories is only protected by rational basis standard. This means that the party whose speech is being restricted will have to prove that the law in question is not rationally related to a legitimate government interest.

Here, David's speech does not seem to fall within one of these categories. Obscenity is something prurient, something that has no artistic, political, or religious quality, something that falls short of the contemporary community standards. David's speech here seems political in nature.

Less Protected Speech Categories (David's Sandwich Sign)

Sexual Language and Profanity are typically considered semi-protected, and to restrict them, the government must prove that the law restricting speech is substantially related to an important government interest, and that it does not restrict more speech than is necessary.

Here, the City will not have a hard time proving that the ordinances

Time, Place, and Manner (Content Neutral) (City Ordinances)

If the government is not regulating the content, or viewpoint, meaning what is being said, but rather how, when, or where it is being said, then the restriction will be considered viewpoint neutral and will likely be assessed under the time, place, manner lens. If this applies, then the government must prove that the restriction is substantially related to an important government interest and that the law is narrowly tailored, meaning that it does not restrict more speech than is necessary.

Here, the City will not have a hard time proving that the ordinances are reasonable time place and manner restrictions and substantially related to an important government interest, keeping people from interfering with the peaceful enjoyment in the city.

Symbolic Speech (David's Bob Dylan Sign)

Symbolic Speech is that which intends to convey a message, with a substantial likelihood that it will be understood. If the government attempts to restrict symbolic speech, than the O'Brien test will apply and the government will have to pass intermediate scrutiny. Show that the law restricting speech is substantially related to an important government interest.

Here, the City will not have a hard time proving that the ordinances are reasonable time place and manner restrictions and substantially related to an important government interest, keeping people from interfering with the peaceful enjoyment in the city.

Prior Restraint (Mayor Stop Protest)

A prior restraint is advanced censorship. It is trying to stop what is being said before it even happens. The court has found this to be one of the most serious, and least tolerable, forms of free speech restriction. There are procedural safeguards in place for prior

restraints, that look to the timing of the decision and the discretion being given to the authorities.

Here, these appear to be longstanding ordinances which have given plenty of warning to citizens and give no discretion to local authorities, about the time of speech that is allowed.

3D. ARE THE SYMBOLS UNCONSTITUTIONAL

Establishment Clause

Under the First Amendment, the government may not promote, advance, favor, or prohibit, or inhibit, any particular religion or create an excessive entanglement between the government and the state. The courts have gone through various tests to determine whether the establishment clause has been violated. From the rigid strict separation test, to the three part lemon test, and more modernly to the more lenient accommodation doctrine. These are discussed in turn below.

Lemon Test

Under the Lemon Test, when assessing whether the establishment clause has been violated, the court will review whether (1) the law in question has a secular purpose, (2) whether it promotes, endorses, advances, or prohibits, or inhibits a particular religion, and (3) whether it creates an excessive entanglement between the government and the religion. Most recently, the Lemon Test has fallen out of grace in favor of more modern approaches.

Here, under the Lemon Test, it would depend on what action the Mayor takes in seeking to take down the statutes and symbols. Does the law that he enact have a secular purpose or is it only to disavow the religious symbols? Additionally, would the law or order he

enacts prohibit any and all religion, or only one or the other? What if he allows what are perceived as secular symbols, like Christmas trees, but removes the others? If the Mayor's law has a secular purpose, and as long it does not promote or inhibit any particular religion, then it would seem that the Mayor may remove all religious symbols, and only all, under the Lemon Test. This is because, if there is a secular purpose, and it does not promote any religion, then removing all religion would not create an excessive entanglement - it would do the opposite.

Strict Separation

The strict separation theory is just as it sounds, the government should not involve itself in any way with religion. As was in the eyes of Thomas Jefferson, the two should be distinct and completely separate.

Under the strict separation theory, the Mayor would be right to remove all symbols from City Hall. Under the strict separation theory, there should be no symbols there in the first place.

Neutrality

The neutrality asks whether a reasonable observer could find bias in the government's conduct, meaning that they are not neutral to a particular religion and are promoting, endorsing, advancing, prohibiting, or inhibiting a religion.

Under the neutrality theory, if the Mayor removed all the symbols could be seen as inhibiting religion, or any one individually, depending on which course of action he decides to take. If he were to remove the symbols, which have been in use for many years, than the Mayor's actions could certainly be seen to violate the establishment clause.

Accommodation Doctrine

The accommodation doctrine is more lenient towards religion and looks to the role it has played in our nation's history and tradition. If the religion in question, or the religious conduct, has roots in our nation's history and tradition, and is not being used coercively, then the court is likely to allow it and not find that it violates the establishment clause.

Under the more modern approach, the it would not be unconstitutional to keep the symbols. The accommodation doctrine would give credence to the fact that the symbols have been on display for many years. There are rooted in the city's history and tradition. And, because it is a collection of religious and secular beliefs, the city is not favoring any particular religion, or coercing anyone to practice in that way.

END OF EXAM