

## **FIRST AMENDMENT REVIEW EXAM**

Attached is a copy of the final exam for First Amendment from Spring 1996, along with a set of sample answers. The answers are actual (unedited) student answers. They do not represent the only way to answer the question, and not even necessarily the best way, but merely one good way.

Please keep in mind that although last year's class and this year's class covered much of the same material, the material covered and the manner in which it was covered were not identical.

**FINAL EXAM**

**Question I.**

*Please answer all four questions. Each answer is worth up to 13 points, for a total of 52 points for Question I. I suggest that you allot approximately 90 minutes to answer all of Question I (or 20-25 minutes for each of the four questions).*

*State how you think the United States Supreme Court would rule in the following cases, and explain why. Assume that the only relevant precedents are those that have been assigned and/or discussed in this course. Assume further that the Court will hear and decide the cases in the 1996-97 term.*

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1. S.B.W., a white minor, burned a cross on the property of his black neighbor. He was prosecuted under a state statute that classifies as a misdemeanor the act of burning a cross on another's property without the property owner's written permission. S.B.W. challenges his prosecution on the ground that the statute violates his rights to free speech. (He does not deny that he burned the cross and does not allege that he had his neighbor's written permission.)

The Supreme Court would uphold the prosecution of S.B.W.

The first step in the analysis leading to this conclusion is to eliminate the possibility of applying the "RAV/Hate Speech" analysis. Given that the facts of RAV and S.B.W. are so similar, the Supreme Court clerk may be inclined to advise the justices that RAV would be the correct analysis to apply. It is not the correct analysis, however, because RAV involved expressive conduct and a prohibition on fighting words. This case, however, does not involve fighting words nor does it involve a viewpoint based restriction because unlike RAV, nothing in this statute refers to the content of race or gender. Therefore, the correct analysis to apply is the expressive conduct analysis of Texas v. Johnson and O'Brien.

These are the correct analyses to apply because S.B.W. participating in something other than pure speech. He claims he used an action, or conduct as a mode of expression and this action falls under expressive conduct.

But how does the court determine what expression is? One way is by looking at whether or not this act furthers one of the three basic First Amendment theories. Of the three, democratic self-government, truth, and self-expression (each announced by Hand, Holmes and Brandeis respectively) the court would probably find this furthered self-expression because it was SBW's way of showing his feelings about his neighbor. The other way to determine whether or not this is expression is to see if it evokes an intellectual, emotional or physical response. Arguably, the Court could find such an action elicits all three responses and therefore this is expression.

This answers the first prong of the Texas test. Having determined that this is expressive conduct, the next question to ask is whether the regulation was related to suppression of free expression. It is not related to free expression, the Court would find because it does not speak to free expression, it simply outlaws burning a cross on someone's property (SBW would be best to use a Cohen type argument here by saying the law outlaws his chosen mode of expression - the cross - and that he should be allowed to burn the cross. The Court would react to this argument by distinguishing Cohen's use of a word on a button from an object set afire on someone's property.)

The next analytical step is to apply the O'Brien intermediate scrutiny test. (Had the answers to questions 1 & 2 been "yes" then strict scrutiny would apply.)

Applying O'Brien begs the question of whether or not it was in the constitutional power of the government to make this law. The answer here is yes. Since this law does not appear to infringe on any other constitutional rights, apparently, it was able to be passed by the government.

The next question is whether this law furthers an important or substantial government interest. The Court would likely find that preventing fire is an important or substantial government interest and that it satisfies this prong. (SBW may argue, however, that the Texas court allowed the burning of a flag so that avoiding fire is not a substantial interest. The court would distinguish this by saying that the Texas statute was more geared toward restricting expression, whereas this statute is more geared toward not setting other people's lawns on fire.)

The next question to ask is whether this government interest of avoiding fires is unrelated to free expression. Once again, it is arguably unrelated to restricting free expression because it is geared toward avoiding fires. It is likely that the government was more interested in avoiding fires than in suppressing SBW's right to free speech because it did not outlaw SBW's right to burn a cross in the middle of the street, just on the other person's property. Once again, property preservation seems to be the real aim of the statute.

The last question to be asked here is if the incidental restriction is no greater than it needs to be. Once again, the answer is yes because this law only prohibits cross burning on someone else's property. Arguably, this is a trespass and can be considered a misdemeanor. The law does not say SBW could not burn a cross on his own lawn. Therefore, the court would find this law was no broader than necessary to serve the government interest of preventing fires on other people's lawns or property.

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2. A dozen states statutorily permit producers of perishable agricultural products to recover damages against any person who disparages their perishable agricultural products.

Legislators in these states have found that the production of agricultural food products constitutes an important and significant portion of the states' economy and that it is imperative to protect the vitality of the agricultural economy for the citizens of the states.

The statutes tend to define disparagement as the willful or malicious dissemination to the public in any manner of any false information that a perishable agricultural product is not safe for human consumption. False information is further defined as information that is not based on reliable,

scientific facts and reliable, scientific data which the disseminator knows or should have known to be false.

Plaintiffs in one state are seeking to enjoin enforcement of the statute arguing that it violates their First and Fourteenth Amendment rights. The plaintiffs are 1) three individuals identifying themselves as fruit and vegetable consumers and 2) Online Healthwatch, a group that provides information about pesticides and other potential public health hazards to Internet users.

After considering Commercial Speech issues and applying the Central Hudson test and considering whether or not the law is reasonable, the Supreme Court would strike this statute as unconstitutional.

The first question to ask is why is this "false" information even deserving of First Amendment protection? It deserves protection because it could further a political or economic discussion, it is part of our system of capitalism and if it is false, that may be good because according to some Supreme Court jurisprudence, false is good because it helps bring forth the truth. Another question to ask is whether this speech can even be regulated. Generally, the government cannot suppress the speech just because of an economic interest. In this case, the dissemination of such information is not regarding an illegal activity, nor is it a time place or manner restriction. These are falsities constituting lies. This is an area that generally can be regulated. Because this is false information, it would seem that the First Amendment prong of Central Hudson would end the inquiry because this expression, which is a lie, is not protected by the First Amendment. However, the definition of "false" describes it as information not based on reliable scientific facts which the disseminator knows to be false. This part of the statute would be found to be unconstitutionally vague. Is information about perishable items true only if it comes from a reliable laboratory? Arguably not. Therefore, the first half of the statute satisfies the first prong of Central and should be upheld while the second part regarding what is false information should be struck because it is vague and could cause a chilling effect on otherwise important information.

Another important consideration here is whether or not this law has means that are reasonably tailored and that advance the government's interest in a direct and material way. Applying this to the law, the court would find that the law fails this test because there are several other alternatives to suppressing speech in order to preserve perishable products. The government could instead pass a law making it illegal to interfere with the transportation or refrigeration of such products or make labels on food containers mandatory. Suppressing online information is unconstitutional because it paternalistically keeps information away from the consumers (and the court has recognized that they have a right to information) and it keeps the Healthwatch group in a state of "chill" because they may not be able to put certain information that may or may not be true online. If they can't put it out, and it may actually be false, how would they ever find out if it was true or not?

While the government's economic interest here is great, the greater intrusion is on the suppression of speech. Under Virginia Pharmacy, speech cannot be banned for fear the public will misuse it.

For the aforementioned reasons, the Supreme Court would strike the

statute. (Also, if it violates the First Amendment, it also violates the Fourteenth because it denies the plaintiff's due process and First Amendment protection.)

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3. Real Crimes, Inc. produces various items relating to crimes. One product is a set of trading cards that depicts particularly famous, gruesome, or shocking crimes. The set depicts a variety of crimes, ranging from the assassination of President Kennedy to murders committed by Jeffrey Dahmer and other serial killers to the bombing of the World Trade Center. Each card contains a color illustration of some aspect of the crime on one side and text describing the crime on the other side.

A local law classifies the sale to minors of trading cards depicting "heinous crimes" as a misdemeanor. The law defines heinous crimes as "murder, assault, kidnapping, arson, burglary, robbery, rape or other sexual offenses." Real Crimes challenges the constitutionality of the local law on First and Fourteenth Amendment grounds.

Real Crimes would argue that this was a content-based restriction on speech because the law only prohibits cards depicting and telling about "heinous" crimes and not cards on any other subject.

The test the Court will apply to determine if this content-based restriction is unconstitutional might depend on whether this speech can be placed into one of the categories of speech that receives a lesser level of protection. Here this doesn't seem to apply because the cards aren't fighting words or obscene and just because the cards may be sold for profit does not make them commercial speech. Thus the law will be subject to strict scrutiny. The state must show a compelling purpose with narrowly tailored means.

The state would argue that it has a compelling interest in preventing minors from being exposed to depictions of crimes which might glorify the crimes or sensationalize them. Additionally the state might have an interest in preventing anyone from profiting from crime whether it be the criminal directly or someone who has bought the rights to depict the crime.

However this statute is not narrowly tailored to achieve this goal. In some ways the statute is underinclusive in that many other depictions of crime would have this effect on minors. They can read about such crimes in books or see a mini series about them on TV. Although the state tried to tailor the law by only applying it to sales to minors it is still underinclusive. It is also underinclusive if it was to prevent someone from profiting because there are other ways to profit besides publishing these cards.

It should be struck down as an unconstitutional content restriction.

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4. In the course of the investigation of Theodore Kaczynski, the prime suspect in the notorious Unabomber case, the government has submitted a number of affidavits in support of search warrants. Relying on the First Amendment, various members of the press have moved the court to unseal the affidavits so that their contents may be made public. The judge has denied the motion and

the press has appealed to the Supreme Court.

The Supreme Court would grant the motion to disclose the documents.

The first important consideration here is why disclosure of these documents would be important. Disclosure to the public is valuable because it helps to prevent injustices in the court systems and provides closure to the public. It also benefits the government in its dual role as judge and State because it maintains the legitimacy of the system, and the press benefits because it helps to maintain its "watchdog" function. The problem lies with the defendant. Generally, a defendant can benefit from a public trial because speculation as to his/her guilt will usually be accompanied by speculation regarding his/her innocence. However, disclosure of important documents could prejudice the defendant in some way and affect his/her right to an impartial jury. These are affidavits regarding search warrants. They are not regarding attorney's files or the attorney-client privilege. They are merely affidavits stating the probability cause of police officers.

While one could argue that unsealing these documents does not serve the press' purpose, it can also easily be said that it does because the press is in effect reporting on the police's investigation of the Unabomber. The public has a right to know that the police are doing their job effectively. If this information would prejudice anyone, it would more likely be the police than the defendant. A restraint on this information is not likely to prevent any potential prejudice that may come to the defendant and it should be discussed and the motion should be granted. As Justice Brennan said in Nebraska press, there is always a way to correct a 6th Amendment infringement, but not always a way to correct a First Amendment infringement.

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## Question II

*The following question is worth up to 18 points. I suggest you spend approximately 30 minutes answering the entire question (including sub-parts).*

The lower house of the Pennsylvania legislature approved a bill designating the first Thursday of each May as 'Commonwealth Day of Prayer.' The law would direct the governor to mark the observance with a proclamation.

1. *Analyze the constitutionality of this bill (if it became law) under*
  - a) *the Lemon test,*
  - b) *the endorsement test, AND**conservative) the coercion test.*
2. *State which test you believe the Supreme Court should use in reviewing this law, and explain why.*

The Lemon Test - does this bill/law violate the establishment clause?

The first prong under Lemon is to ask what is the actual, dominant purpose of

this law. The purpose must be secular. There is no secular purpose whatsoever in a Commonwealth Day of Prayer. Supporters of the law may claim O'Connors ceremonial deism theory (invoking God at ceremonies) as the purpose behind this bill/law, but generally the purpose is, as the title says, to pray. Praying is a religious activity, not a secular one. Therefore, this law/bill doesn't even get past the first prong of Lemon. If a law/bill violates any of the Lemon prongs, it is unconstitutional. Therefore, the law/bill does not make it to scrutiny under the effects or entanglement test.

In order to get past the endorsement test, something needs to neutralize this law/bill. Endorsement means (according to the Court) that to a reasonable person, it appears as though the government is making adherence to a religion relevant in any way to a person's standing in the community. The problem with this test is that the Court has never truly defined the reasonable observer. While it did say this observer was informed as to the circumstances, it did not give a clear definition.

Under this test, a reasonable observer (whatever religion they are) would find that the government is making religion relevant to anyone's standing in the community. There is no need to pray on the first Thursday of May. The only thing that could save this, again, is ceremonial deism. However, other neutralizing factors that the Court relied on in Allegheny are missed. For instance, the Day of Prayer is not accompanied by a "Day to Celebrate Religious Diversity" or anything truly secular (like the Reindeer in Allegheny). Nor is there any historical context to neutralize this bill/law. It would be, in fact, a new law in Pennsylvania. What's more non-neutralizing is the government's overt involvement in the law. The governor, the state's sole leader, is an integral part of the law. That is clearly endorsement of religion by the government, no matter how ceremoniously deistic supporters claim the law may be. Under the endorsement test, this law is invalid per se due to its endorsement.

This law doesn't fair too well under the coercion test either. This test, designed to keep people from infliction of psychic injury, merges both clauses together and asks if the viewer or observer felt coerced to participate or suffer from feeling stigmatized or like an outsider if they don't. Generally, States get more leeway with this test. In any event, an observation by a non-religious person of the governor announcing the State's day of prayer could easily inflict psychic injury because he/she may feel that the government is participating in a religious activity and that they are not included and will feel that they should pray because if they don't, they will feel stigmatized by other Pennsylvanians.

I believe the Court should use the endorsement test because it best serves the First Amendment and what the Framers intended. This test is the best of the three because it compacts the Lemon test into one test that is easier to apply and focuses on the government's actions, unlike the coercion test. The Establishment Clause was designed to keep the government from establishing a national church. If the focus is on the government, and not the viewer (which the court can't really figure out who that is anyway) then the intent of the Framers' will be fulfilled. The important thing is to keep an eye on the action of the government and by seeing if the government is being neutral in its laws, not whether someone feels left out, because no matter what the law is, someone will always feel left out and so "coercion" is not the best test. More laws will be struck down under endorsement than coercion but again,

that's the purpose of the Establishment Clause - to keep laws that endorse religion from passing.

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### Question III

*Evaluate the following hypothetical commentary. Your answer is worth up to 30 points. I suggest you spend approximately 50 minutes on this question.*

*In the course of your answer, please discuss:*

*Abrams v. United States,*

*New York Times v. Sullivan,*

*Whitney v. California, AND*

*at least 2 other cases that were assigned this semester. You may discuss the 5 cases in any order.*

"Liberals have favored government intervention in the economic marketplace but pressed for laissez-faire in the intellectual marketplace. Conservatives have done the reverse. Liberals and conservatives have one thing in common: inconsistent positions."

In my view, when one considers the relative position of "liberals" and "conservatives" ostensibly inconsistent positions can be made understood if one takes the perspectives that liberals, all things being equal, prefer individual liberty over government control; conservatives prefer to establish the soundness of government, with the recognition that there would be no personal freedoms without the government to be able to step in to support core, traditional values. Conservatives look more to history, liberals to purpose of constitution.

A liberal may prefer government intervention in the economic marketplace, but it is because of the perceived entrenched inequities that exist that prevent a poorer person's entry to, and success in, the economic marketplace. Conservatives might suggest that the reason the economy is strong enough to support what it does is the motive of profit and the tenets of capitalism. The inequities that result may be deemed an unpleasant consequence of a system that works.

The market of ideas presents the liberals with a podium from which to speak to the inequities and offer solutions. However, the solutions may often be threatening to a conservative who might argue "if it ain't broken, don't fix it."

I believe the above views are deeply rooted in history, and hark back to the days when one might literally not be able to survive unless some type of community/government was there to render protection.

However, as communications, technology, medicine and other fields have made early death a little less likely, more attention, and less fear, could be paid to ideas. Conservatives, more rooted in history, are less likely to accept new ideas, or ideas from "unproven" thinking; conservatives will prefer what has proven to "work". Liberals might argue that there could never have been progress, absent new ideas, and there could never have been generally accepted ideas unless they withstood the

competition in the "marketplace" of ideas.

At the time of Abrams, even the liberals may have feared the potential onslaught from Europe, and would have been more inclined to suppress speech that was even remotely threatening. It was more likely that one would unquestionably accept the government's position. The government's survival was paramount, and it was often at the expense of the individual. In times of danger one feels safer taking the conservative approach because to react with new ideas may lead to unforeseen consequences.

The same feelings of security were raised by the Whitney case. The old order represented by the industrialists who benefitted by the criminal syndication law in question was that which was building the country. The law was designed to maintain content by the industrialists. Liberals would rail against the holding as a restriction on thoughts that would further benefit change.

Ironically, conservatives who would not want government to restrict their economic actions, benefitted by government's intervention.

In Times v. Sullivan, liberal speech, even false speech, was found to be protected as a way to advance social goals supported by the liberals, i.e. Civil Rights. This represented a clear threat to the conservatives who thought that speech that attacks politicians, especially true speech undermines the democratic system by fostering radical and untested change. Again, if the system "works", don't fix it.

Texas v. Johnson was a case that surely upset the conservatives as the historical value of the flag as a symbol of the nation did not seem to be enough to cause the Court to protect the flag in the face of the punishment's impact of free speech rights. The liberals would argue that the flag is a symbol of the nation founded upon the Constitution and relied upon the marketplace of ideas to promote progress. Sometimes only by focusing on the freedoms (e.g. to "speech" by burning the flag) can one truly focus attention on the underlying rationale for the freedom.

One need look no further than to the history of First Amendment jurisprudence to see that as times got better, personal freedoms were expanded, and, arguably, nothing catastrophic happened.

The pendulum may be swinging back toward a more historical analysis, as the Court in Lee v. Weisman, while upholding a lower court that struck a ceremonial prayer at a public school, has indicated that more deference should be given the historic value of tradition, secular and non-secular.

\*\* END OF EXAM \*\*