

Grading Guide For Final Examination In

CONSTITUTIONAL LAW II

(Course No. 6380-20; 3 credits)

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As explained in the examination instructions, I graded answers to this examination based on how well they: (a) identified the constitutional doctrines at issue; (b) presented and discussed reasonable arguments and counter arguments about the application of these doctrines to the specific facts of the problems (with special emphasis on comparing the facts of the problems to the precedents considered in the course); and (c) provided supporting explanations and examples as appropriate.

The following guide briefly identifies the issues that the best answers addressed. The most complete answers received full credit. But all answers could receive partial credit, even if they did not discuss all of the listed issues, addressed other issues, or were incomplete or not wholly correct. In awarding points, I focused on the discussion and analysis rather than on specific conclusions. Each question within each problem was worth a total of 7 points.

PROBLEM I.

(20 percent)

A. Was Coronado's display of the original church directory sign unconstitutional?

The best answers (1) recognized that the display might violate the Establishment Clause; (2) explained how the Supreme Court uses several different tests in assessing Establishment Clause issues; and (3) discussed the possible application of the differing tests in Lemon v. Kurtzman (1971), Zelman v. Simmons-Harris (2002), and Am. Legion v. Am. Humanist (2019). Some answers also considered the application of Marsh v. Chambers (1983).

B. To what extent would removing the word "church" from the directory or having a private organization take the directory have addressed possible constitutional concerns?

The best answers addressed three distinct issues: (1) whether removal of the word "church" from the directory affected the application of the tests under the precedents cited above; (2) whether the city's act of giving the directory to the Coronado Resurrection Lutheran Church and the Masonic Lodge No. 441 would violate the Establishment Clause; and (3) whether display of the directory by the church or lodge would violate the Establishment Clause. On the second issue, the best answers noted that even the dissent in American Legion thought it would be permissible for a government to give a religious monument to a private owner.

C. Did including a non-Christian group in the new directory have any constitutional significance?

The best answers discussed two issues: (1) whether the new directory, as described in the article, violates the Establishment Clause; and (2) whether the new directory would violate the Establishment Clause if it did not include a non-Christian Group. As with question A (above), these answers discussed

the possible application of Lemon, Zelman, and Am. Legion.

PROBLEM II.

(20 percent)

- A. What arguments, based on precedent, should the parties make regarding the existence or non-existence of a substantive due process right of the kind asserted?**

The best answers: (1) attempted to identify the substantive due process right being asserted; (2) cited precedents announcing different criteria for identifying substantive due process rights, included those announced in Obergefell v. Hodges (2015); Lawrence v. Texas (2002); Michael H. v. Gerald D. (1989); Griswold v. Connecticut (1965); Skinner v. Oklahoma (1925); Pierce v. Society of Sisters (1925); and Meyer v. Nebraska (1923).

- B. What arguments, based on precedent, should the parties make regarding the level of generality at which the asserted substantive due process right should be defined?**

The best answers: (1) described disagreement in the precedents, such as Obergefell and Micheal H., about the level of generality at which to define substantive due process rights; and (2) presented arguments that the parties might make about the level of generality at which to define the right at issue in this case (e.g., the right of children to grow up with their father vs. the right of children to grow up with a father who has been convicted of a crime and imprisoned).

- C. To protect the asserted substantive due process right, could Congress use its power under Section 5 of the Fourteenth Amendment to enact legislation aimed at preventing false testimony in state courts?**

The best answers: (1) explained that when Congress uses its power under Section 5 to enact legislation to enforce the Fourteenth Amendment there must be "congruence and proportionality" between the potential constitutional violation and Congress's remedy, City of Boerne v. Flores (1997); and (2) discussed the application of this standard to the issue of whether Congress can pass a general law punishing false testimony in state court in order to address the very specific problem of a possible wrongful deprivation of a child's right to grow up with his father through an improper criminal conviction.

PROBLEM III.

(20 percent)

- A. Does the possibility that the Act might drive magazines and newspapers out of business affect its constitutionality?**

The best answers: (1) explained that the government may impose regulations on conduct that incidentally affect speech, if the regulations further an important or substantial governmental interest that is unrelated to the suppression of free expression, and the incidental effects on speech are no greater than is essential to the furtherance of that interest, see United States v. O'Brien (1968); and (2) discussed the application of this test to the facts of the problem.

- B. Could the legislature require newspapers to give ad space to help publicize and explain municipal recycling programs?**

The best answers considered whether such a requirement, by forcing newspapers to publish messages that they might prefer not to publish would violate the principle that "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all,'" Janus v. AFSCME (2018) (quoting Wooley v. Maynard (1977), and citing Miami Herald Publishing

Co. v. Tornillo(1974)). Some good answers also considered whether regulation of ad space should be evaluated according to the test for regulation of commercial speech in Central Hudson v. Public Service Comm'n (1980).

C. Could the legislature exempt some newspapers and magazines, but not others, from the requirements of the Act?

The best answers: (1) considered whether the exclusion of some newspapers and magazines, but not others, would prevent the Act from being considered "generally applicable" for the purpose of the O'Brien test (discussed above); and (2) considered whether strict scrutiny would apply if the selection of the exempt newspapers was based on the content of the speech in the newspapers, Reed v. Town of Gilbert (2015). In addressing these questions, the best answers considered whether the law would be (3) necessary to serve (4) a compelling state interest that is (5) narrowly drawn to achieve that interest.

PROBLEM IV.

(20 percent)

A. How might red flag laws violate substantive "rights and liberties which are guarded by . . . the Constitution of the United States"?

The best answers: (1) recognized that the Second Amendment "guarantees an "individual right to possess and carry weapons," District of Columbia v. Heller (2008); (2) recognized that the Supreme Court has not determined what kinds of laws and regulations would violate this right but has stated in dicta that "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" do not violate the individual right, see id.; and (3) considered whether red flag laws (defined in the problem as laws "under which a person may petition for a court to temporarily take away another person's right to possess a firearm") might violate the individual right.

B. How might red flag laws violate due process?

The best answers: (1) recognized that the Due Process Clause of the Fourteenth Amendment generally requires the government to provide a person an opportunity to be heard before the government deprives the person of life, liberty, or property, Cleveland Bd. of Educ. v. Loudermill (1985); and (2) considered whether red flag laws might violate due process if they do not afford a gun owner notice and an opportunity to be heard before the gun is temporarily taken away.

C. Do the facts that red flag laws (1) may reduce suicide risk, and (2) are supported by most Americans, affect an analysis of their constitutionality?

The best answers considered (1) whether a reduction of suicide risk means that the state laws served a legitimate, important, or compelling state interest that might justify a restriction on the right to possess and carry weapons (as similar interests have justified restrictions on other constitutional rights); and (2) whether the popularity of a law every has any relevance to the constitutionality of the law.

PROBLEM V.

(20 percent)

A. Do the allegedly "unfair preferences for specific types of water rights holders" make the bill unconstitutional?

The best answers: (1) recognized that laws that prefer one group over

another may violate the Equal Protection clause; (2) recognized that the bill at issue favors state agencies and tribal agencies over others who hold water rights; (3) considered whether rational basis review or heightened scrutiny should apply to such laws (recognizing that heightened scrutiny applies only when fundamental rights or suspect classes are involved); and (4) considered whether the bill violated the Equal Protection Clause based on the applicable level of scrutiny. New York City Transit Authority v. Beazer (1979)

B. Can Oregon limit the amount of money that individual and corporate proponents and opponents of HB 2244 can spend in efforts to support or defeat its enactment?

The best answers (1) recognized that the First Amendment's guarantee of the Freedom of Speech prohibits limitations on the amount of money a political candidate or campaign may spend, but permits reasonable limitations on contributions to a political candidate or campaign, Buckley v. Valeo (1976); (2) recognized that these limitations apply equally to individuals and corporations, Citizens United v. FEC (2010); and (3) discussed how Oregon therefore can limit contributions but cannot otherwise limit spending.

C. Does the proposed "nuanced change" eliminate the alleged due process problems? Might other changes address them better?

In addressing the first question, the best answers: (1) recognized that the Due Process Clause of the Fourteenth Amendment generally requires the government to provide a person an opportunity to be heard before the government deprives the person of life, liberty, or property, Cleveland Bd. of Educ. v. Loudermill (1985); (2) discussed the application of this standard to the alleged due process violation, which is that water rights holders "aren't even notified that their enforcement action has been blocked"; and (3) discussed how the so-called "nuanced change" alleviated this due process problem for state agencies and tribal agencies but not for others.

In addressing the second question, the best answers considered whether (1) eliminating the automatic stay for all; or (2) requiring notice and an opportunity to be heard for all would eliminate the due process problem and any equal protection problem.