

SECTION

EXAM NO

CONSTITUTIONAL LAW II
Sections A and B
Instructor: Mr. Freeman

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MIDTERM EXAMINATION
Spring 1994

TIME LIMIT: FIFTY MINUTES

INSTRUCTIONS:

1. Please do not use pencil to write this examination. If you use a felt-tip or fountain pen, make sure that your answer does not "bleed" on to the next sheet of paper.

2. WRITE ONLY ON THE LINES AND IN THE SPACE PROVIDED. WRITE ONLY ONE LINE OF SCRIPT ON EACH LINE. DO NOT WRITE IN THE MARGINS. DO NOT WRITE ON THE REVERSE SIDE OF THE PAGE. DO NOT WRITE IN A BELOW AVERAGE SIZE OF SCRIPT.

3. Do not take the examination from the room in which you are writing.

4. When you are finished with this examination early, place it on the instructor's table at the front of the room announced at the beginning of the examination.

5. Do not assume facts not given, and do not change the facts. In particular, do not assume the existence of statutes unless referred to in the question.

6. Discuss each issue fairly raised by a fact pattern, even if your answer on one issue makes discussion of another issue unnecessary. Complete in full your discussion of one issue before discussing another issue.

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A. On December 1, 1991, the Mayor of Capital City, State of Franklin, ordered that a Christmas tree, a nativity scene, and a menorah be exhibited on the lawn in front of City Hall. A group of taxpayers brought suit in federal district court to enjoin the display. The case finally was resolved on the merits by the United States Supreme Court. What result, and why?

BEST ANSWER

This is primarily an establishment clause case. The court has used a test where a statute must have a secular purpose, a primary effect that neither aids nor inhibits religion, and no excessive entanglement of government and religion. In this case, the court will probably hold that the purpose is secular, that of celebrating a holiday. Also, the primary effect is not to aid religion but to celebrate the holiday and tradition. The fact that the scene includes a X-mas tree indicates that it relates to the holiday. Also, because the scene includes a menorah and a nativity scene, there's no preference of one seat over another. The entanglement is de minimus. The court has also employed a test where there must be no excessive entanglement and no endorsement of a religion, no indication to other believers that their religion is disfavored. Employing this test the entanglement is de minimus and there is no endorsement of a particular religion because both a Jewish and Christian symbol are present. Thus, using either the purpose effect entanglement test or the entanglement endorsement test the taxpayers should lose. Government must be neutral to religion, but not hostile.

B. Assume, irrespective of your answer above, that the United States Supreme Court granted the injunction. In 1992 the City Council of Capital City enacted an ordinance prohibiting all religious symbols on the lawn outside the City Hall, but permitting other symbols. During the first week of December 1992, local religious groups were denied permission to erect a cross and a menorah on the grounds of City Hall. The religious groups brought suit to compel Capital City to permit them to erect their privately-owned religious symbols on the City Hall grounds. The case finally was decided by the United States Supreme Court. What result, and why?

BEST ANSWER

This is a time, place, manner reg. Depending on the type of forum, the government may exact a reasonable reg. In a designated public forum, if the reg. is content-neutral then it will apply the 3-part Heffion test. If the reg. is content based the court will apply strict scrutiny. The lawn of City Hall may be a traditional public forum or a designated public forum. This will depend on the history and tradition of uses the lawn has been put to. Whether its traditional or designated, a content based reg. will be subject to strict scrutiny. The reg. must be necessary to serve a compelling interest. This reg. is definitely content based because it allows some symbols but not others. Therefore, because there probably isn't a compelling interest, the reg. will likely be struck. The city may claim that its merely abiding by the religion clauses, however, the religious clauses merely require neutrality with religion and not hostility to it.

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C&D. Assume, irrespective of your answer above, that the religious leader prevailed in the litigation. The City Council of Capital City thereupon repealed the 1992 ordinance and enacted an ordinance in 1993 permitting private individuals and organizations to display all political religious, and other symbols on the lawn in front of City Hall for maximum of seven days, if they had a permit for such display. The permit section of the ordinance provided that permits would be granted on a first come, first served basis up to a maximum of 20 displays any one time, and permitted the denial of permits to groups whose display would constitute "fighting words," defined as "words tending to provoke a breach of the peace or likely to create an atmosphere of hostility or feeling of inferiority on the part of any class of persons because of race, religion, or gender." The seven-day requirement and the limitation of 20 displays at one time were challenged in a single suit brought by several groups that wanted to display symbols for month at a time. The "fighting words" provision was challenged by the Ku Klux Klan, which was denied a permit to display a K.K.K. cross on the grounds that such a symbol would constitute "fighting words." Both cases ultimately were decided by the United States Supreme Court. What results, and why? Discuss each case separately.

BEST ANSWER

In the first case, the issue is one of a time, place manner reg. Although a permit is a form of prior restraint, the city may have a reasonable permit system that does not give arbitrary discretion to the public officials to censor. There must be specific standards, otherwise the ordinance will be void for vagueness. This is because vagueness deters protected speech and allows government to arbitrarily censor. The court will apply the 3 part time, place, manner test where the reg must be content-neutral, narrowly-tailored to serve an

important government purpose and leave open other channels of communicative activity. There are specific standards here, thus there's no danger of arbitrary discretion. The court will likely find that the statute is not void for vagueness. Applying the 3 part test the reg is content neutral. First come first serve and 20 max displays applies to all groups. Also the reg is narrowly-tailored to serve an important government interest.