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UNM School of Law
Final Examination

Professor James Ellis
Thursday, May 4, 2000
Take-Home Examination

526 CONSTITUTIONAL RIGHTS
INSTRUCTIONS

This is an eight-hour, open-book final examination.

Your eight hours begin when you open this question for the first time. You should not pick up the question until you are ready to begin, or as close to that time as practical. Similarly, you should return your answer to the staff as soon as possible after your time has elapsed. Working on the exam past the eight-hour deadline will constitute a violation of the Honor Code.

The exam question will be available to be picked up after 9:30 on Thursday, May 4th. Answers must be returned by 4:00 on Friday, May 12th.

In preparing your answer, you may consult your textbook, published and photocopied supplements, any notes prepared by you (either alone or in conjunction with your classmates), treatises and other primary or secondary materials to be found in the law library. Please note that this exam is not a research project. It is my belief and anticipation that you can prepare a successful answer based solely on the course materials and your notes alone, but I have no objections if you want to consult the full text of a relevant case or check your understanding against a secondary source. You may not discuss any aspect of this exam or your answer with any other student or any other individual.

Your answer is limited to 3,500 words. Please count the words in your answer and write the total on the first page of your exam answer. No credit will be awarded for anything past the 3,500 words of your answer.

You have eight hours to write an exam answer that is no longer than that expected of a four-hour, in-class, ambush-style exam. This gives you the opportunity re-read a case or two and any notes or materials you might deem relevant to the question, and consider your answer. It also gives you the opportunity to read over what you have written to determine whether it makes sense to you.

GOOD LUCK!

QUESTION

The State of Enchantment has been the scene of a number of disputes regarding gay rights recently. Following a long debate, the Legislature passed a bill which represented a compromise between the Human Rights Fund and other advocates for gay rights, on the one hand, and the Family Preservation Society, which opposes such rights, on the other. Neither side found the resulting legislation totally satisfactory, but the Legislature enacted it (and the Governor signed it) in the hopes of forestalling action by the State Supreme Court, which had hinted recently that it was about to make pronouncements in this area.

The product of the compromise was the "Gay Rights and Protection of Marriage Act of 2000" (GRPMA). A copy of this legislation is included in the Appendix to this examination.

Adam and Stephen are a gay couple who are committed to one another and wish to have their relationship recognized as a marriage, although they do not wish to adopt children. They went to their local County Clerk with the requisite blood tests and \$25.00 fee, and asked for the application form for a marriage license. The Clerk, Bayh T. Booke, instead handed them an application for Civil Union Status. They responded that they were not interested in becoming "domestic partners," but instead wanted the full recognition and rights of married couples. Booke still refused to give them the marriage application, and as a result they sued for a writ of mandamus (please assume that such writs are provided under state law) from the Enchantment Supreme Court ordering Booke to give them a marriage license, and declaring the relevant portions of GRPMA to be unconstitutional under the Federal and State constitutions.

By contrast, Ellen and Ann were eager to be recognized as domestic partners, and as a result, they applied for, and were granted, a Civil Union Status certificate. Ellen had previously been married to Harry, and they had a son together. But Ellen and Harry had divorced once Ellen had become more fully aware of her sexual orientation, and they had joint custody of the child, Gerald. Shortly after Ellen and Ann's certification as a civil union, Harry died. Ann filed a petition in state family court seeking to adopt Gerald so that she and Ellen could share equal status as parents. The Family Court denied her petition, citing the relevant portion of GRPMA. Ann has appealed from that ruling to the State Supreme Court.

Gerald, who is now twelve years old, has for years had his heart set on becoming a member of the Boy Rangers. The Boy Rangers of America is a national organization of three million members, organized in troops of twenty boys, which proclaims as its purpose, "To assure that America's boys receive training in citizenship, morally correct behavior, and the responsible use of semi-automatic weapons." Gerald's application to

become a member was turned down by the Enchantment Division of the Boy Rangers, who informed him that his status in living with openly gay parents would undermine the organization's mission of promoting morally correct behavior and would be disruptive of the troop to which he might belong since he could become the object of teasing, ridicule, and possible violence by the other Rangers. Heartbroken yet litigious, Gerald filed a complaint with the State Human Rights Commission, which is authorized by statute "to prevent invidious discrimination against any group or person in the enjoyment of any public accommodation in Enchantment." The Commission ruled that because of the size of the national organization and because of its commercial activities in conducting an annual Easter Candy Sale (as a fundraiser for each troop's local activities), the Rangers were covered by the public accommodations law, and ordered the organization to accept Gerald's application. Claiming that this ruling violated the Federal and State constitutions, the Rangers have petitioned the state Supreme Court for a writ of prohibition voiding the Commission's order. (Again, assume that such writs are within the jurisdiction of the Court.)

As a seasoned examination-taker, you will not be surprised to learn that the churches have also gotten into the act. In particular, the Church of the Holiness of All Persons (CHAP), a break-away sect which had been part of the Religious Society of Friends (commonly known as Quakers) until six months ago, is deeply offended by certain provisions of the GRPMA. (Indeed, the schism had been occasioned by the increasing militance of those Quakers who later became CHAP organizers on the issues of gay marriage and civil disobedience.) The official creed of CHAP, adopted in October of 1999, pronounces, in part, that "all men and women, regardless of sexual orientation, are children of God and are equally entitled to participate in Her sacraments, including the sacrament of marriage." CHAP took out a paid advertisement in The Daily Enchanter, the largest newspaper in the state, which appeared on the same page of the Saturday edition which contained paid ads by other churches announcing the times of religious services and sermon topics. The CHAP advertisement read, in relevant part:

**WHY SETTLE FOR A CIVIL UNION?
GAY MARRIAGES PERFORMED**

(Neither party need be a Member of the Church)

Just Bring a Marriage License from the County Clerk and We Will Certify It After the Ceremony

(Couples are advised that if one partner uses a gender-ambiguous first name on the application, such as Pat, there is a higher likelihood of obtaining a license from the dimwitted County Clerk, who is Hell-bent on carrying out this Fascist and Godless law.)

Following publication of the ad, the indignant yet humorless Boone filed a criminal complaint against the Church and the members of its Ministry and Marriage Committee, which had written the copy for the ad and paid for it with Church funds. The District Attorney sought and obtained an indictment of the Church and each member of the committee for violating section 2 of the GRPMA. The attorney for the Church and its members has filed a writ with the State Supreme Court seeking to have the indictment quashed on constitutional grounds (and you have already figured out the drill regarding writs in this state).

You are a law clerk for Justice Gwendolyn Hoyt of the Enchantment Supreme Court. She has asked you to prepare a memorandum analyzing the Federal and State constitutional issues raised by each of these cases, recommending a ruling on each issue. (For purposes of discussion of State constitutional issues, discuss only those provisions of the Enchantment constitution included in the Appendix.)

APPENDIX

ENCHANTMENT STATE CONSTITUTION (1777)

Article I, Section 1. That all persons are born free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs or the like.

Article I, Section 3. That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Article I, Section 7. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the common weal.

Article I, Section 13. That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

Article I, Section 20. That the people have a right to assemble together to consult for their common good – to instruct their Representatives – and to apply to the Legislature for redress of grievances, by address, petition or remonstrance.

ENCHANTMENT REVISED STATUTES

Gay Rights and Protection of Marriage Act

Section 1. Legislative Findings. The Legislature finds that :

- Marriage under Enchantment's marriage statute consists of a union between a man and a woman. This has been universally recognized for over two centuries of statehood.
- Maintaining our State's traditional concept of marriage promotes fundamental family values, and assures that children will be raised in traditional families, as evidenced by the State's longstanding practice of refusing to permit adoptions by unmarried individuals.
- Although the vast majority of our State's citizens deplore the gay lifestyle, in the tradition of our state's spirit of tolerance, it is appropriate to provide homosexual couples the opportunity for recognition of civil unions, so long as those unions do not portray themselves as marriages, and so long as children are not involved.

Section 2. Marriage Protected. Any attempt to register a union of two men or of two women as a marriage under Enchantment law shall constitute a misdemeanor. Counseling, encouraging, or aiding and abetting any such attempt shall also constitute a misdemeanor. Violations of this section shall be punishable by a fine of \$500, or confinement in jail for 90 days, or both.

Section 3. Civil Unions—Eligibility. For a civil union to be established in Enchantment, it shall be necessary that the parties to a civil union satisfy the following requirements

- (a) Not be a party to another civil union or marriage.
- (b) Be of the same sex and therefore excluded from the marriage laws of this state.
- (c) Not be blood relatives to one another.
- (d) Satisfy other relevant requirements in the state's Domestic Relations Code.

Section 4. Civil Unions—Benefits and Protections. Parties to a civil union shall have all the same benefits, protections, and responsibilities under law as are granted to spouses in a marriage, except that they cannot adopt children. Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed by law for married persons. The provisions of the Domestic Relations Code, including annulment, separation, divorce, alimony, and property division and maintenance shall apply to parties to a civil union.

[end of examination]