Practice Essays — Possible Answers

Note: I wrote these answers under simulated conditions, i.e., in a short period of time, without access to outside materials. They are therefore highly fallible.

I

Ash v. Robarts

This is an action for unfair competition under the law of Cineplex in Cineplex state court. The elements of unfair competition are not given, but they presumably include conduct by the defendant whereby the defendant improperly holds his or his products or services out as those of the plaintiff, thereby misappropriating the plaintiff’s trade name or trademark. The theoretical underpinning for this cause of action arises largely from the law of property, in the sense that the defendant is essentially “using” the plaintiff’s property and violating the plaintiff’s exclusive right to use that property. As a practical matter, this cause of action arguably protects consumers from confusion, by enabling them to rely on the integrity of a mark.

There’s no indication in the facts that Ash or his church has “registered” the names “Church of the Holy Grail” or “Sacred Sips,” but perhaps that is not necessary. Perhaps the mark and name have legal status without registration, as long they’re not common words, and registration is only helpful, not required. Belt and suspenders.

If this were a case about spring mattresses or mouse-traps, it would probably be easy. The courts would not be entangling themselves in religious doctrine by resolving it on the merits. Thus, if one adhered to a strict, formally neutral, approach to the case, one would simply ignore the fact that Ash and Robarts are religious leaders, and one would resolve the case as if they were competing purveyors of spring mattresses. One would most likely then say that Ash has established the elements of a cause of action for “unfair competition” through misappropriation of a trade name or mark. The Church of the Holy Grail has been around for at least some time. It has “about a dozen churches,” many adherents, a seminary, a doctrine and even a “primate,” who seems to be the rough equivalent of a bishop. More importantly, it has used these two names for what appears to be a fair amount of time. Thus, it would seem to have a valid proprietary claim to the names. In addition, drawing upon the practical grounds for this cause of action, Ash has plausibly argued that “consumers” — congregants — are not getting what they seek when they attend services at Robarts’ church.

But this is not a case about spring mattresses, and the court would probably grant Robarts’ motion to dismiss. Although the modern jurisprudential trend in the area of law and religion has been toward formal neutrality, courts will — and even must — avoid formal neutrality when using it would entangle them in religious affairs. And this would seem to be the case here. Ascertaining whether Robarts’ “Church of the Holy Grail” is (or is not) orthodoxyically connected with Ash’s “Church of the Holy Grail” would require examining the doctrinal and theological principles of one or the other churches, and probably of both, and courts will not (and cannot) do that. Ash, after all, is making an essentially ontological claim about the nature of “sacred sips” at his church, and Robarts is essentially denying that claim. A secular court could
not resolve this dispute on the merits. And neither could the court adhere to a principle like the Rule of Deference to resolve the case, because Robarts does not appear to be part of, and therefore does not appear to subject himself to, the hierarchical adjudicators of Ash’s church, whatever they might be.

This case is reminiscent of cases in which courts have refused to interpret and enforce trusts in favor of specific religious doctrines, such as predestination, even though they would interpret and enforce trusts in favor of secular doctrines, such as Keynesian monetary theory. This is because they believe they would improperly entangle themselves in religious doctrine if they were to attempt to interpret and enforce such principles. Avoiding excessive entanglements is the third prong of the Lemon test. Presumably, enforcing the state’s general law against “unfair competition” by “misappropriation” would be a secular purpose, thus satisfying the first prong of Lemon, and the overall effect of allowing this cause of action would be secular as well, because virtually all of its applications would be secular. Thus, the second prong of Lemon would be satisfied.

II

Zell v. Harding

To resolve this case, I would need to know whether Cineplex has a mini-RFRA, or whether its Constitution, as interpreted by its courts, adheres to the regime of Sherbert v. Verner and Wisconsin v. Yoder. If so, Ms. Zell’s action against Ms. Harding may be subject to strict scrutiny. If not, the applicable test would presumably be that of Employment Division v. Smith, minimum rationality. This is because the Supreme Court of the United States struck down the federal RFRA, as applied to the states, in City of Boerne v. Flores.

If the court applied some form of strict scrutiny, Ms. Harding might prevail, although this is not entirely certain. First, allowing Ms. Zell’s action to proceed against Ms. Harding would appear to impose a substantial burden on Ms. Harding’s free exercise of religion, given her church’s clear scruple. Moreover, although the state certainly has a compelling public interest in ensuring that all of its citizens have access to groceries, clothing and hardware, it might have the less restrictive alternative of making sure that every citizen has access to at least one store in his or her area that sells these things, even if he or she does not have access to every one. One could also, however, define the state’s compelling public interest as preventing the stigma that arises from being denied business anywhere. Arguably, the state could only serve this interest by allowing Ms. Zell’s action to proceed. Of course, one could respond to this claim by arguing that the stigma that arises from shunning, as here, is not the same as the stigma that arises from racial exclusion. There is also the potential wrinkle here that at least some states have interpreted their mini-RFRAs not to apply to actions between private parties.

If Smith or some version thereof were to apply, Ms. Harding would almost certainly lose her motion. Cineplex’s statute appears to be a neutral rule of general applicability that makes no exceptions. In addition, the legislature does not appear to have had someone like Ms. Harding in
mind when it enacted this law. This law probably emanates from the days when general stores were the rough equivalent of common carriers. That is, it emanates from when such stores were the only place in town where one could buy food, clothing, and such things as a box of nails. The state certainly has a legitimate interest in ensuring that its citizens have access to general stores, and this statute rationally serves that interest.

III

*Smith v. Johnson*

In this case, Mr. Smith would be using free speech, freedom of the press, and equal protection as swords, and Mr. Johnson would be using establishment as a shield. That is, Mr. Smith would be arguing that Mr. Johnson’s refusal to sell his books would regulate speech (and the press) according to content, thereby violating the First Amendment, and that his refusal would make an inappropriate distinction between similarly situated books, thereby denying equal protection. Mr. Johnson, meanwhile, would argue that he has a reasonable interest, and even a compelling one, in not establishing religion.

One would need to begin by determining what kind of forum the state has created. The bookstore is not a traditional public forum, like a street, sidewalk or park, where “from time immemorial” people have gathered to express themselves. Although this may be true of some parts of the park itself, this would not be true of the interior of a building. Nor is this a “designated public forum,” like a public auditorium, that courts would treat like a traditional public forum as long as the government chose to keep it open. Instead, this would appear to be a limited public forum, or a “non-public forum” (forgive the oxymoron), where the government may restrict the subject-matter of speech as long as the restriction is reasonable and independent of the speaker’s point of view. Thus, Mr. Johnson could probably refuse to sell books about badminton, or deep-sea fishing, on the ground that they have nothing to do with the gorge and that, therefore, no one would want to buy in this particular store.

But even if this is the test, Mr. Johnson might be running afoul of it. That’s because his refusal arguably does turn on Mr. Smith’s point of view. He already sells two different books that appear to speak to the origins of the gorge — a book that sets forth the conventional scientific explanation of its origin, and the book that sets forth the Native American explanation of its origin. Excluding Mr. Smith’s book would therefore appear to constitute discrimination on the basis of point of view, which would provoke strict scrutiny. Of course, Mr. Johnson could then argue that excluding Mr. Smith’s book is necessary and narrowly tailored to serving the compelling public interest of not establishing religion, but query whether selling the book would establish religion. Perhaps it would, but the state has arguably opened itself up to selling any book that purports to explain the gorge’s origin, without reference to whether it relies on conventional science.