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1) Violation of the Equal Protection Clause

"No state shall deny any person within its jurisdiction the equal protection of the laws" under the 14th Amendment of the US Constitution. This restriction on government applies at the state level according to the text of the Amendment. It has been incorporated to restrict the federal government, as well, via the 5th Amendment. In order to bring any constitutional Equal Protections claims, there must be action by the state. Here, the local government passed an ordinance, the Immoral Business Statute, which the government has the authority to do.

Any time a law is passed based upon a group classification, it must pass constitutional muster to be valid. Classifications that demand heightened scrutiny are those where the group has immutable characteristics, suffers from a history of discrimination, or has a relatively weak ability to protect itself. Here, the classification under Clause A of the statute requires that "no men under 23 years-of-age and no women under 25 years-of-age are permitted" in "adult-oriented" stores described in the ordinance. This classification is based on gender and age. Gender, because of the history of discrimination against women and the biological differences between the sexes, is granted a slightly higher level of protection. Age, because of relatively neutral treatment and lack of permanency, is granted minimal protection under the 14th Amendment.

Although the 14th Amendment requires "equal protection," the Court has gradually parsed these protections into three levels: rational basis review, intermediate scrutiny, and strict scrutiny. Strict scrutiny is typically reserved for classifications based upon race, color, national origin or alienage. None of these classifications are present here. Intermediate scrutiny is where

gender falls, although there has been movement on this level of protection for gender in recent years toward a higher level of protection. Intermediate scrutiny requires that the classification be substantially related to an important governmental purpose. Rational basis review, the lowest level of constitutional protection, is the level of protection granted to age classifications. Rational basis review requires that the classification be rationaly related to a legitimate governmental purpose. This is a very permissive standard, and allows for over- and under-inclusiveness. Any legitimate governmental purpose will suffice, and is easy to satisfy as falling under the state's police powers, unless animus is evidenced toward the classified group.

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Gender Classification

True, but this is application of Fed Con

**** California does not apply a level of intermediate scrutiny for gender classifications, and instead applies strict scrutiny. As analyzed in the following paragraph, intermediate scrutiny (used by the Supreme Court) would fail, therefore strict scrutiny would fail as well, yielding an unconstitutional gender distinction in this ordinance.**

In order for a court to find the ordinance constitutionally valid here, the classification of men and women must be substantially related to the important government interest desired (intermediate scrutiny). No express justifications have been put forth by the government here as support for an important government interest. The previous statute prohibited children from entering such facilities, suggesting that the important government interest is protecting the locality's youth from what may be immoral or "adult" media. This is certainly an important governmental interest and falls under the government's police powers, as it is a method of protecting the safety, welfare, and morals of the community's young people. This ordinance runs into trouble when analyzing its substantial relation to the important governmental interest, however. There is no evidence to show that men of a younger age than women may be exposed to the material

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inside the prohibited stores. This is similar to the case of a law that increased the minimum age for men to drive after consuming small amounts of intoxicating alcohol. The Court found the law to be unconstitutional on Equal Protection grounds because, although significant mathematical data was put forth to show increased statistics of young men involved in wreckless driving or car accidents, there was no substantial relationship between the age limitation and the governmental interest of making the road a safer place for drivers, passengers, and pedestrians. Similarly, a court would likely find that this gender distinction is unconstitutional under the 14th Amendment because the classification is not substantially related to the important government interest of keeping the community's youth pure.

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Age Classification

Clause A of the Immoral Businesses Statute will pass constitutional muster on the age classification if the classification is found to be rationally related to a legitimate governmental interest. As previously discussed, a distinction between men and women will likely be unconstitutional, so the age limits will be altered to be uniform between the sexes. Moving forward on this assumption, the figure of age 23 or 25, or even age 24 as a compromise, may be used to examine the ordinance's constitutionality. Because age is not highly suspect, it is subject to rational basis review. The legitimate governmental interest, as discussed above, is in protecting the community's young persons and eliminating their exposure to "adult" content at young ages. This is a legitimate governmental interest, as it falls under the municipality's police powers. The age limit here, age 23-25, is not clearly rationally related to that interest here. No justifications have been enumerated in the ordinance itself, and one may only guess as to its significance. Rational basis review is very permissive and over- and under-inclusiveness do not determine the outcome, but here they are of significant value. When Olivia, the owner of Womanspace, was "busted" for having underage customers it was because a heterosexual

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married couple, each 22 years old, was inside the store. This illustrates the vast over-inclusiveness of the ordinance and its undesirable consequences. The government does not seek to monitor the activities of heterosexual married couples, which become legal at age 18, so the government should arguably be prohibited from meddling in the sexual affairs of unmarried persons over the age of 18. Although rational basis review rarely yields an unconstitutional restriction, this time it may. If the government can provide no evidence supporting the arbitrary age limit, a court would likely strike down the ordinance as being overbroad and unconstitutional under the 14th Amendment, as it inappropriately draws a discriminatory distinction without rational relation to a legitimate governmental purpose. Alternatively, the ordinance could be modified to prohibit persons under age 18 from entering the store, as that is the legal age of an adult.

Because the gender classification is not substantially related to the important government interest of protecting the community's youth, the distinction between men and women will likely be stricken. Additionally, without evidence to support a rational relationship between the arbitrary age limit and the governmental interest in protecting the morals of the community's youth, the 23-25-year age limit will probably also be found unconstitutional under the Equal Protection Clause.

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2) **Violation of Freedom of Speech**

Under the 1st Amendment, and incorporated to apply to the states through the 14th Amendment, "Congress shall make no law abridging free speech." This protection was written into the US Constitution as a reaction to the tyranny the colonists had experienced in Britain and a desire to protect and encourage individual thought and expression. Because

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governmental pressures were of such importance to the colonists, core political speech is granted particular protection under the 1st Amendment. When analyzing a governmental infringement on speech, one must identify the state action, determine whether there is speech or protected expressive conduct, identify the restriction on speech, assign a level of protection, and decide whether the infringement is constitutional.

Clause A: Conduct that Communicates + Speech

The city of Calico, California has passed a local city ordinance, the Immoral Businesses Statute, under proper authority. Clause A of the Statute prohibits under-aged persons from entering "adult-oriented" stores that sell or display 'obscene material' or 'non-obscene but very vulgar or very dirty books, magazines, films, or other sexually-related items.'" Such a store qualifies for 1st Amendment protection as it is conveying a message. Additionally, such speech may be qualified as conduct that communicates. Under *Spence*, conduct that communicates is granted constitutional protection where there is (1) intent to communicate a particularized message and (2) substantial likelihood that message will be understood. Here, the operation of a local "adult books, magazines, movies and toys superstore" can be considered speech in its purest sense. If challenged, the operation of such a store also qualifies as conduct that communicates (symbolic expression) because the store owner intends to communicate a particular message and the substantial likelihood that message will be understood is evidenced by the fact that customers enter her store to do business and share thoughts on the message she is conveying. Because the operation of Womanspace is considered speech, Olivia's operation of the store will be granted 1st Amendment Free Speech protection. If it were categorized as conduct that communicates, the *O'Brien* test would find the regulation on such speech constitutional if: (1) there is an important government interest, (2) the interest is unrelated to the suppression of speech and (3) the incidental restriction is no greater than

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essential to serve the government interest. Here, the important government interest of protecting the morals of young persons in the community is important, and falls within the municipality's police powers. The government interest, however, is not unrelated to the suppression of speech because it is the belief of the local government that "adult-oriented" stores do not convey good messages to the community and its neighbors. Because this test fails on the second prong, the communicative conduct (speech) will be afforded 1st Amendment Free Speech protection.

infringement ✓

Restriction on Obscene or Sexually-Oriented Speech: The restriction here is in the form of criminal penalties, as Olivia has been fined \$500 per underage customer and has been warned that further violations could result in the closing of her business. The level of protection will be determined based on whether the restriction on speech is content-based or content-neutral, after a determination of whether it is afforded less or no protection based upon the category of speech. Unprotected categories of speech include obscenity, which is defined as speech (1) that as a whole, appeals to the prurient interest in sex, (2) where the primary depiction of sexual conduct is patently offensive and (3) the speech yields no substantial literary, artistic, political or scientific value. Evidence would need to be provided showing that, as a whole, Olivia's adult superstore appeals to the prurient interest in sex. This is a difficult standard to meet, and a very narrow one at that. Because there is likely material in Olivia's adult superstore that yields substantial artistic or political value and because the primary depiction of sexual conduct is not necessarily patently offensive, this speech is probably not considered obscene. If a determination were to be made at trial that the obscenity test is met, Olivia's speech would be granted no constitutional 1st Amendment protection, and the ordinance would be found constitutional. If Olivia's speech were not found to be obscene, it would fall into the category of sexually-oriented speech, which is granted less 1st Amendment protection.

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Restriction on Commercial Speech: Olivia's speech could also be categorized as commercial speech because it relates to the sale of the goods she advertises in her adult superstore. Such speech is granted less protection under the 1st Amendment and a restriction on the speech would be constitutionally sound if: (1) the speech is legal and non-misleading, (2) there is an important government interest, (3) the restriction directly advances the government interest and (4) the restriction is no greater than necessary to serve the interest (proportionality). Here, Olivia's speech is legal and is non-misleading. The important government interest identified above is the interest in protecting the morals of the community's youth. The restriction on speech here does not directly advance the government interest because the ordinance prohibits some underage persons from entering the store. The ordinance does not consider the moral fabric of the underaged persons who already have a desire to enter the store or who have shopped there or at other adult stores in the past. If anything, the ordinance may be infringing their constitutional rights, while failing to directly protect young persons from exposure to "adult" material. The restriction is also greater than is necessary to serve the government interest because it is not the place of the government to monitor the thoughts and fantasies of its people, and restricting entry to an "adult" superstore based upon an arbitrary age restricts more speech than is necessary to serve the important government interest. The interest, because it includes the safety and welfare of the persons targeted, is important, but its means are not sufficiently proportionate to its interest.

Content-Based Restriction: A restriction on speech will be subject to strict scrutiny if the restriction is based on the content of the speech. This is identified in two ways: viewpoint restrictions, which limit speech based upon an opinion it espouses, or subject-matter restrictions, which limit speech based upon its topic. Both of these are impermissible under the

1st Amendment, as freedom of expression is at the very core of the Amendment, in keeping with the intent of the Founding Fathers. Here, the restriction on speech prohibits exposure of young people to "obscene material" or "non-obscene but very vulgar or very dirty books, magazines, films, or other sexually-related items." Any time the government seeks to restrict speech based upon its content, strict scrutiny must be invoked in determining the constitutionality of the restriction. The restriction here must be necessary to achieve a compelling governmental purpose. No purpose has been set forth for the restriction on speech, except in the title of the ordinance: the Immoral Businesses Statute. As the Court has found in several other cases, restrictions on speech will rarely stand constitutional muster. Where a local law sought to restrict speech that put foreign figures in disrepute, the law was held to be invalid because it is not the place of the government to determine worthy and unworthy speech. Similarly, here, a compelling governmental purpose could purport to be the protection against lude and obscene media. However, this purpose will probably fail in court. Additionally, this restriction on speech cannot be held to be necessary to achieve the governmental purpose because there are other ways to achieve the purpose of protecting morals without restricting speech.

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Vagueness: Olivia will likely also bring a vagueness claim. A law is unconstitutionally vague if a reasonable person cannot tell whether particular speech would be permitted or prohibited. Here, the ordinance simply prohibits entry by young persons into "adult-oriented" superstores that sell or display "obscene material" or "non-obscene but very vulgar or very dirty books, magazines, films, or other sexually-related items." This ordinance is vague because a reasonable person would now know where to draw the line of what is obscene or not, and varying minds may interpret the word "vulgar" differently. Therefore, Olivia would likely succeed on a vagueness challenge, thereby invalidating the ordinance.

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Overbreadth: A law is overbroad if it prohibits substantially more speech than is constitutionally permitted. Such a claim would be asserted by Olivia, but may not be successful, as the targets of this ordinance (Olivia's adult superstore and others similar to hers) would likely be the sole victims of the ordinance, resulting in its appropriate tailoring because it does not chill other speech.

Time-Manner-Place Restriction: In response to the content-based restriction challenge, the government may argue that the restriction is a TMP restriction, where (1) the secondary effects are neutral, (2) there is an important government interest and (3) the restriction does not unreasonably burden alternate modes of communication. The government would likely argue that the ordinance seeks to minimize the secondary effects an "adult-oriented" superstore creates such as prostitution, illegal behavior, pedophilia, public nudity, drugs crimes and any other the government may state. Because the restriction purportedly is neutral on the issue of secondary effects, the government would then describe the important government interest as avoiding unsafe neighborhoods and protecting students at the local Calico Women's College from crime and immoral behavior. This would be an important government interest that falls within the police powers of the city. The government would then argue that the restriction does not unreasonably burden alternate modes of communication because Olivia would simply cater to an older crowd and could express herself in other reasonable ways. Under such an analysis, the restriction may be accepted by a judge or jury, and the ordinance found constitutional, as the ordinance in *Playtime Theatres* restricting live nude dancing was found to be.

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Clause B: Speech

The City of Calico, California has properly passed the local ordinance, the Immoral Businesses Statute, Clause B of which states that "such stores may not be located within 500 feet of any

school, college or other educational facility." This restriction on speech is subject to the same speech analysis as above. The restriction is in the form of criminal penalties. The identical analysis applies here for the category of obscene speech (which merits no constitutional protection), sexually-oriented speech (which merits less constitutional protection than other speech), commercial speech (which merits less protection), and content-based restriction. This ordinance is a content-based infringement on protected speech and subject, therefore, to strict scrutiny. The government will argue that the ordinance is a TMP (Time-Manner-Place) Restriction, thereby qualifying for a form of intermediate scrutiny.

TMP Test: (1) The secondary effects described above are neutral, satisfying the first prong of the TMP Test. (2) The important government interest here would be the interest in not exposing young persons (college-aged students) to "adult-oriented" media. This interest falls within the police powers for the municipality to regulate (health, safety, welfare, morals). (3) The ordinance may be harder to justify on this prong, which requires that the restriction on speech to not unreasonably burden alternate modes of communication. The ordinance restricts the operation of such a store to 500 feet or more from any school, college, or other educational facility. While this likely burdens alternate modes of communication for Olivia, the standard is unreasonably burden. During trial, maps of the locality would be provided as evidence to show whether or not this ordinance is an unreasonable burden. Because Olivia's store is a superstore, it is very large, and the possible venues in the city are probably very limited. Depending upon the location of every school or educational facility in the town, and the local zoning ordinances, Olivia may be unable to relocate, causing an unreasonable burden on her right to free speech. If this is the case, the ordinance would not pass the TMP Test and would be subject to strict scrutiny, which requires that the restriction be necessary to achieve a compelling governmental interest. A compelling government interest would be difficult to

establish, and the means likely would not be narrowly tailored to pass strict scrutiny, as the regulation is under-inclusive because it fails to consider other sources of immoral behavior and unsafe contributing acts. Under- and over-inclusiveness will never be tolerated under a strict scrutiny analysis.

Therefore, it is likely Clause B of the ordinance will be found to be unconstitutional, as the secondary effects are neutral, the government interest important, but reasonable alternative modes of communication may not be available.

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