

## HLP CONSTITUTIONAL LAW II – Summer 2009

Prof. Eric C. Christiansen

### *Final Exam Comments*

*In the past I have found it helpful to give you some information about your final exam—particularly an idea of what I was looking for in your essay. Feel free to contact me if you have specific questions. And feel free to come by my office hours during the first three weeks of the Fall semester if you want to discuss your essay individually. You must re-read your essay, read the posted sample answer(s), and read through this document as well. Mark them all up and compare them and then come see me (bringing the mark-ups with you). Our meeting will be much more productive if you do that, so I require it.*

*On your essay exams, numbers ["1"] are points earned; numbers in parentheses ["(1)"] are weak points—too many points in parentheses and I roll the score down one or more points; check marks, plusses and minuses are extra good or bad elements that can raise or lower points if numerous. Other marks (other than the comments themselves) are just to help me find my way around the essay. I do not do extensive on-paper comments because of this memo and because you can come meet with me.*

*I tried to give a fairly straightforward exam. This could easily have been a bar exam type essay problem.. Many of you acquitted yourselves admirably and had interesting things to say. The total essay scores ranges from 18-34 out of 36 possible. For each of the two questions there are a set number of points I am willing to give but because there are multiple ways for you to answer the question, there are more possible points than the maximum I will give, e.g., there were 18 points possible on Q1 but no one was permitted more than the 16 point max for that question. As a consequence, even 16/16 was not necessarily a perfect answer. Additionally, when I finish reading all three answers there are up to three additional points for Argument, Organization, Vocabulary or "Mastery" (clear and exceptional grasp of one or more of the issues).*

*MCQ range (out of 15 questions) was 9-15.*

*Your success is important to me—now, next year and in your future careers. Please let me know if I can help in any way.*

*--Prof. Christiansen*

### ESSAY QUESTION

Your small law firm has been approached by Olivia, the owner of "Womanspace," a local "adult books, magazines, movies and toys superstore" located in Calico, California. She has owned and managed the business in downtown Calico across the street from the Calico Women's College for more than a decade. The store serves men and women but its business model is focused on sales to women. The business has been very successful.

However, Olivia is very concerned about a newly passed local city ordinance, the Immoral Businesses Statute. Under Clause A of the Statute, no men under 23 years-of-age and no women under 25 years-of-age are permitted in "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." The previous statute only required that children be prohibited from

entering any such facility and Olivia has always kept out anyone, male or female, under 18 years-of-age. Because many of her customers are from the College the new statute will significantly harm her business.

Furthermore, according to Clause B of the Statute, such stores may not be located within 500 feet of any school, college or other educational facility. Olivia has continued business as usual, ignoring the Statute because she believes it is unconstitutional. (Of note, she knows a law suit had been filed claiming the new ordinance was an unconstitutional regulatory takings as it applies to pre-existing businesses. Since others are making those claims you may ignore any takings or other constitutional property right issues in your consideration.)

Olivia was recently "busted" for having customers under the new legal age minimum. A heterosexual married couple, each 22 years old, was spotted in the store by an undercover police officer. As a consequence, Olivia was fined \$500 for each underage customer and was warned that future violations could result in the closing of her business. She wishes to fight the fine as a violation of her and their constitutional rights.

Unfortunately, earlier today things got worse. Unrelated to the "bust," the City of Calico posted a notice that she must cease doing business as an adult superstore at the present location because she is within 500 feet of a college as prohibited by the Immoral Businesses Regulation Statute. They have given her one month to convert the business so that it conforms with the law.

**Q1) Does the Immoral Businesses Statute violate the Equal Protection Clause of the U.S. constitution and if so, what is the consequence of that violation? Please evaluate her and her customers' potential claims.**

*This was a fairly straightforward question about facial discrimination by a city. Most of you did well—although analysis was sometimes thin or confused. Don't be thrown off by the lack of explicit "purpose" from city—identify their most plausible government interests and then (separately) ask if the law is sufficiently related. Some of you also missed the on-going age discrimination that also exists: 22 year olds (of either sex) are treated differently from 26 year olds (as was true of 18 and 19 year old under the previous law).*

*Total points possible: 16 (Range:8-16 )*

**Fourteenth Amendment Equal Protection Clause:**

"No State shall... deny to any person within its jurisdiction the equal protection of the laws."

--applies directly (no incorporation or reverse incorporation needed)

**State Action?**

Yes, municipal legislation is quintessential state action.

**1) What is the classification?**

Two primary **facially discriminatory** (in text) classifications (could be others)

**Sex/Gender:** different age based on sex (enforced with significant fines)

**Age:** 22 and 26 year olds treated differently (for example; regardless of gender)

**2) What is the level of scrutiny?**

Intermediate scrutiny (IS): Gender  
-*substantially* related to *important* gov't purpose  
Rational Basis (RB): Age  
-*rationally* related to a *legitimate* government interest

**3) Is the classification justified by a sufficient purpose?**

***important* governmental purpose** (burden on gov't)

describe: more than legit, less than compelling

apply: identify possible purposes (and pick test most justifiable)  
protecting delicate "ladies"

discouraging visits to adult store:

maybe okay (but cannot use invalid means)

***substantially* related to**

describe: less than narrowly tailored / more than rationally related

apply: age difference if unrelated to identified purposes

plenty of non-discriminatory options would serve purpose

stereotypes/ "ladies" not valid (bio differences would be)

**Age: *legitimate* government interest** (burden on plaintiff)

describe: anything not prohibited to government (police powers, etc.) – nearly anything

apply: young are harmed; visits should be discouraged; morality (assume same for sexes)

***rationally* related to**

describe: not arbitrary and capricious / over- and under-inclusivity permitted

Calico "could rationally believe"

apply: (tough call—might be rare exception where fails RB)

all age distinctions are slightly arbitrary (driving, drinking, voting) and ok  
seems high ("adult" at 18 or 21) but RB is forgiving...

**Remedy?**

Invalidate portion of law creating differential treatment; fines also invalid

**Q2) As a separate issue, Olivia believes that the Immoral Businesses Statute violates the Free Speech clause of the U.S. Constitution? Does it? Please identify and evaluate all possible free speech claims she might bring that may result in the law being invalid or inapplicable.**

*This was a question about limits on sexually related speech. Most of you did well—although some struggled to analyze all the questions in a coherent way. Remember that secondary effects is a way to escape being content based (if focused on non-speech harms, content neutral applies) and unprotected or less protected speech avoids strict scrutiny despite being a content-based restriction.*

*Total points possible: 20 (Range:9-19)*

**First Amendment: "Congress shall make no law...abridging the freedom of speech..."**

**Incorporated** by liberty element of Fourteenth Amendment due process clause

**Is it State Action?**

Yes, municipal legislation is quintessential state action.

Is it **Speech**?

Books, magazines and films all have clear expressive content.

Is **Speech infringed**?

Obvious option: fines for violation; potential closure for non-compliance

**What is the correct level of scrutiny?**

**Content-based** (Viewpoint or Subject Matter): based on type of speech--subject matter

**Strict Scrutiny**: narrowly tailored to serve a compelling gov't interest

**BUT, Secondary Effects** (*Renton*)

If based on secondary effects, content-neutral: a kind of "Intermediate Scrutiny"

Tough here: title of statute seems to be focused on speech element.

**Time-Manner-Place (TMP) Restrictions** [best defense for city]

OK if: 1) Content neutral (not targeted at content of speech, but at harms)

2) serve substantial gov't interest (detrimental effects of adult stores); and

3) do not unreasonably limit alternative avenues of communication (if lots of other locations are available).

**Unprotected, Obscenity**: may be limited by state as wished

*RAV* problem here? No, no viewpoint discrim within unprotected

**Less-protected, (Non-obscene) Sexual Speech**: unclear, low standard; "low value speech"

--SCT allows greater restrictions

[Commercial?: not centrally, does not propose transaction, etc...]

**Concerns with all speech?**

**Vagueness** (*Coates v City of Cincinnati*): unclear standard, no notice, potential for biased or excessive implementation

--definitions are vague (option for invalidity; ok bec. sexual speech?)

**Overbreadth** (*Schad v Mount Ephraim*): includes protected speech

--both clauses are potentially overbroad

(option for invalidity; ok bec. sexual speech?)

Prior Restraints: Court Orders and Licensing

No, does not stop activity before it happens, punishes after.

Result?

Limits likely permitted under Free Speech because of deference for unprotected (obscene) and less-protected speech (sexually related).

If [FS] CON: secondary effects "escape clause" from content-based and survives TMP

If [FS] UNCON: vagueness

Overall result (likely):

Clause A: Unconstitutional under EPC (sex-neutral option might survive)

Clause B: Constitutional if targets secondary effects (will survive TMP analysis) unless too vague