

CONSTITUTIONAL LAW  
FINAL EXAMINATION  
Spring 2023

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EXAM INSTRUCTIONS

You will have three hours to complete this exam. There are two essay questions to be answered in Questions 1 and 2; Question 3 consists of two short answer questions and 10 Multistate Bar Exam-type (MBE) questions. Each question will count for 1/3 of your exam grade.

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Question No. 1

In its 2021-2022 term the United States Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that there is no fundamental right to an abortion under the U.S. Constitution and that *Roe v. Wade* and *Casey v. Planned Parenthood*, which confirmed that a Constitutional right to privacy includes abortion, should be overruled. Immediately after that decision, the Sunstate legislature enacted and the Governor signed a statute:

- a) Prohibiting all abortions, with no exceptions.
- b) Prohibiting the use, possession or sale of any abortion medications, devices, or methods.
- c) Prohibiting any person from leaving Sunstate with the intent to obtain an abortion or to procure abortion medications or devices.

The constitutionality of the statute was challenged by Doctor Anton, the Director of a Planned Parenthood clinic in Sunstate which performs abortions, dispenses medication for abortions and uses devices, and by her patient Betty who is seeking an abortion because she suffers from a condition in which a pregnancy endangers her life and there is no chance that her fetus will be born alive. If she cannot obtain services in Sunstate, Betty would leave Sunstate to obtain an abortion, but she is prohibited by the statute from doing so. The court determined that Betty has standing, but Sunstate has challenged the standing of Dr. Anton.

1. Analyze the Constitutional arguments that Dr. Anton will make in her lawsuit, including her standing, and Sunstate's arguments in response. How is the U.S. Supreme Court likely to rule and why?
2. Analyze the Constitutional arguments Betty will make in her lawsuit and Sunstate's response. How is the U.S. Supreme Court likely to rule and why?

\*\*\*\*\*2\*\*\*\*\*

Question No. 2

School Board meetings have become contentious affairs, and a recent school board meeting in Anytown proves the point. During “public comments” (this is the portion of the meeting in which the public may address the Board) Dan, an angry parent, called the Board President, Paul, a “pedophile” for approving a sex education curriculum for middle school students. There is no evidence that Paul is, or has ever been, a pedophile.

In response, Paul sued Dan for defamation under a recently amended State law, which provides the following:

“In an action for defamation, the fact finder shall presume actual malice when the defamatory allegation is inherently improbable or implausible on its face. Truth is an affirmative defense, and the burden shall be on the defendant to prove the truth of the allegation by clear and convincing evidence.”

Dan has moved to dismiss the complaint by challenging the law on First Amendment grounds. How should the judge rule?

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QUESTION 1 - OUTLINE ANSWER

- I. Does Dr. Anton have standing and will she prevail in her lawsuit against Sunstate for violation of the constitutional right to privacy?
- A. Standing:
- Injury: Loss of income from occupation, interference with right to practice profession;  
Causation: state statute prohibiting abortion and possession of devices/medication caused injuries to Dr. and patient;  
Redress: Court injunction can prevent injuries and redress harm  
Plus 3<sup>rd</sup> party standing on behalf of patients seeking abortion: close Dr. Patient relationship, etc.
- B. Conclusion re standing?
- C. Violation of Constitutional right to perform an abortion on a patient with life-threatening pregnancy and no surviving fetus: see below (same analysis as Betty)
- II. Betty v. Sunstate: (standing given in facts, no need to address)  
Constitutional challenges and Responses to Statute: Prohibition of abortion
- A. Violation of Right to an abortion
- 1) Plaintiff argues: fails rational basis test per *Dobbs* case:  
No legitimate state interest in prohibiting abortion of fetus not capable of being born alive; No rational relationship to any legitimate state interest;  
It is irrational to require patient (Betty) to endure risk of death, pain and further injury by carrying fetus to term only to die before birth.
- 2) Government argues: Legitimate state interest in preserving life of unborn fetus as long as possible, and in regulating medical procedures; prohibition of abortion is rationally related to interest in prolonging life of unborn, protecting woman from psychological injuries caused by abortion and injuries caused by abortion process.
- 3) Conclusion?
- B. Ban on Travel to obtain abortion: Violation of Betty's Fundamental Right

1) Plaintiff argues: Supreme Court has held that U.S. residents have a fundamental right to travel interstate (*Saenz v. Roe*). This is violated by Sunstate's ban on leaving the state to obtain an abortion. *Saenz v. Roe* should not be overruled based on *Stare Decisis*.

2) Government arguments: The Right to travel established in *Saenz v. Roe* should be overruled as applied to abortion restrictions based on *Dobbs* case: Criteria used in *Dobbs* leads to this result: *Saenz v. Roe* was egregiously wrong because....; the quality of its reasoning is exceptionally weak to obtain abortions because...., *Saenz* holding is unworkable because....; *Saenz* has negative effects on other areas of law because...; and there is insufficient evidence of reliance on the right to travel to obtain abortions because abortions are unplanned. Therefore, *Saenz v. Roe* should be overruled.

Rational basis test applies to the prohibition on leaving Sunstate to obtain an abortion.

C. Rational basis test analysis applied to Travel restriction:

1) Plaintiffs: No legitimate interest in banning travel outside of state for any purpose; Not rational to allow one state to restrict abortion access in another state where abortion is legal.

Furthering no legitimate government interest to ban travel.

2) Government: Legitimate interest in regulating abortion access to protect life of the fetus and safety and health of the mother. Rationally related to state's legitimate interest in banning all abortions and ensuring competent medical treatment for health of mother and baby.

Deference to Government is needed when legislature acts within states' authority .

III. Likely Rulings of Supreme Court?

## QUESTION 2 - OUTLINE ANSWER

1. **Issue:** does this statute violate the First Amendment Free Speech Clause because public officials have too low a burden to prove defamation?

0. **Rule:** Under *NY Times v. Sullivan*, public officials must prove actual malice by clear and convincing evidence to prevail in a defamation case, and presumed liability violates the First Amendment Free Speech Clause.

0. **Analysis:**

1. As a civil matter, not involving a challenge to state action, it would seem that the Constitution would pose no barriers. But the Supreme Court has held that torts between private parties may implicate the Constitution because litigation of these claims requires state action in the form of court involvement. (*See Shelley v. Kraemer*)
1. A school board president is a public official, so *Sullivan* applies.
1. Under the law, actual malice is presumed, so that violates *Sullivan* which requires that public officials prove malice by clear and convincing evidence.
1. There is also no intent requirement. "Inherently improbable or implausible statements" are presumed malicious. That, too, violates *Sullivan*, which requires a showing that the defendant knew or acted in reckless disregard of the falsity of the statement.
1. There's also a vagueness problem because what exactly is an inherently improbable or implausible statement? Even if the burden of proof is upheld, how can speakers assess whether what they're saying is inherently improbable or implausible? This will chill speech. (I see this as a tangential issue, but if a student addresses it and applies strict scrutiny, I would give credit here).
- a. *Sullivan* further rejects putting the burden on the defendant to prove the truth of the allegation because of the Court's insistence that the First Amendment be given some "breathing space." This statute flips that on its head, and it is even more likely to chill speech as a result.
- a. Furthermore, the burden on the defendant is to prove the truth by clear and convincing evidence. In *Sullivan*, the C&C burden is on the plaintiff, and that serves to protect speech. Placing this heightened burden on the defendant will further chill speech.

0. **Conclusion:** The Court should grant the motion and dismiss the complaint.

1)

1. DR. ANTON V. SUNSTATE:

STANDING:

A person has standing to bring a suit if they are reasonably <sup>injured</sup> affected by the regulations at issue.

Here, Dr. Anton will argue that as a medical provider who offers abortions, dispenses medication for abortions, and uses abortion devices within the state of Sunstate that they have standing to bring the case because they are reasonably <sup>injured</sup> affected by the new legislation that prohibits abortions. *because (e.g. loss of livelihood, profession, etc.)*  
*use facts & inferences to prove standing: + causation & redressability.*  
Thus, it is likely that Dr. Anton will have standing to bring a suit against Sunstate.

LAWS NOT GENERALLY APPLICABLE/OTHER FUNDAMENTAL RIGHTS

- SHERBERT TEST *Applies to Free Exercise of Religion - NOT*

Applies when the government burdens the fundamental right to freedom of religion by <sup>is that religion issue?</sup> laws that are not neutral or generally applicable. It will also apply when the government burdens other fundamental rights with laws that are not neutral or generally applicable. When a law is not neutral or generally applicable, it will be subject strict scrutiny which requires the government to show that the regulation is necessary to further a compelling government interest, the regulation is narrowly tailored to do so, and the law is the least restrictive means necessary.

Here, the abortion statute directly targets abortions, abortion medications, devices, and methods, and the right to travel to receive an abortion. Because these laws specifically target abortion related legislation, the statute is not a law that is neutral or generally

applicable. Therefore, strict scrutiny should apply to the law. However, laws surrounding abortion have recently changed. *(But there is no religious freedom issue here)*

#### FUNDAMENTAL RIGHT TO ABORTION:

Pre-Dobbs, there was a fundamental right to abortion that was subject to state laws regarding fetus viability. However, post-Dobbs, the rational basis standard will apply to abortion, which requires that a law be rationally related to a legitimate government interest and there is no less restrictive alternative.

*Good Issue Intro* { Here, Dr. Anton will argue that Sunstate has not presented any evidence to show that the new abortion laws are rationally related to a legitimate government interest. Sunstate may have an argument to prohibit state funded abortions because it would be rationally related to the legitimate government interest of not funding controversial medical procedures, but there are no facts to indicate that there are any funding implications under the new statute.

*Good Analysis* Dr. Anton can also argue that even if the statute was rationally related to a legitimate government interest, that the statute is too restrictive because it outlaws abortions without any exceptions. This will mean that women, such as Betty, will be forced to endanger their own lives to give still births to fetuses that will have no chance at viability. The law could very easily be written to include a clause for medically necessary abortions that would make the law less restrictive and more likely to pass the rational basis test while still allowing the Sunstate to greatly restrict access to abortions.

#### CONCLUSION:

The US Supreme Court will likely rule for Dr. Anton because even under the rational basis standard for abortion, Sunstate's law regarding abortion is too restrictive.

*Good conclusion statement*  
2. BETTY V. SUNSTATE:

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STANDING: can be assumed because the facts indicate Betty has standing. *OK*

LAWS NOT GENERALLY APPLICABLE/OTHER FUNDAMENTAL RIGHTS

- SHERBERT TEST *Ag 12 -- not a religious exercise issue here*

Applies when the government burdens the fundamental right to freedom of religion by laws that are not neutral or generally applicable. It will also apply when the government burdens other fundamental rights with laws that are not neutral or generally applicable. When a law is not neutral or generally applicable, it will be subject strict scrutiny which requires the government to show that the regulation is necessary to further a compelling government interest, the regulation is narrowly tailored to do so, and the law is the least restrictive means necessary.

Here, the abortion statute directly targets abortions, abortion medications, devices, and methods, and the right to travel to receive an abortion. Because these laws specifically target abortion related legislation, the statute is not a law that is neutral or generally applicable. Therefore, strict scrutiny should apply to the law. However, laws surrounding abortion have recently changed. *Fundamental rights are different from freedom of religion. Different tests apply*

FUNDAMENTAL RIGHT TO ABORTION:

Pre-Dobbs, there was a fundamental right to abortion that was subject to state laws regarding fetus viability. However, post-Dobbs, the rational basis standard will apply to abortion, which requires that a law be rationaly related to a legitimate government interest and there is no less restrictive alternative. *Strict Scrutiny NOT required*  
*JUST rationally related is needed*

Here, similarly to Dr. Anton's arguments, Betty can make an argument that Sunstate has not presented any evidence that these abortion laws are rationaly related to any government interest. Betty can also make the same argument regarding the restrictive nature of the abortion laws. As analyzed above, it would be very simple for the statute to

*Plaintiff has burden to prove rational basis analysis*

include a provision for medically necessary abortions. This would make it a lot more likely that the statute could pass the rational basis test.

Betty even has a further argument regarding her fundamental right to travel, which is also restricted by this statute.

### OTHER FUNDAMENTAL RIGHTS:

Voting, travel, and privacy rights (contraception, abortion, marriage, procreation, education and care of children, relations of the family, and sexual conduct) are fundamental rights that are subject to strict scrutiny. *Good Rule Statement*

### RIGHT TO TRAVEL:

All citizens of the US have the fundamental right to migrate from state to state and be treated fairly in the new state. Regulations regarding interstate travel are subject to strict scrutiny. There is no fundamental right to international travel and the rational basis standard applies.

Here, the statute directly violates Betty's right to travel to another state. In order for a regulation to restrict this right the regulation must show that it is necessary to further a compelling government interest. Again, Betty can challenge this portion of the statute because Sunstate has not presented any compelling interest as to why the statute is restricting Betty's right to travel between states. Sunstate is likely to argue that they do not want their citizens receiving abortions out of state, while traveling, but there is no compelling government interest to support why that is important to the state. In fact, if Betty were to travel to another State for an abortion, it would likely save Sunstate money on any medical procedures/complications Betty would have to undergo within Sunstate to risk her life to give birth to a still born fetus. Sunstate may argue that they are not restricting Betty's right to travel to other states, but only her right to travel with the intent to receive an abortion. However, Betty will argue that her right to travel is fundamental

*Good Analysis*

*Good point*

regardless of her intent behind the trip, so unless Sunstate can show a compelling government interest to restrict her right to travel, her intent is irrelevant. *good argument*

Thus, it is likely that Betty can also use her fundamental right to travel as a means of challenging the constitutionality of this statute. *Good conclusion*

#### CONCLUSION:

The US Supreme Court will likely rule for Betty because even under the rational basis standard for abortion, Sunstate's law regarding abortion is too restrictive as it pertains to medically necessary abortions and the statute cannot infringe upon Betty's fundamental right to travel to other state's regardless of her intent.

*very good analysis and issue-spotting.*

*You organize well and focus on the 2 main issues here :*

*Abortion regulations analyzed under rational basis test +  
Right to travel as Fundamental + requiring strict scrutiny.*

*Add Analysis of State's argument that right to travel*

*should also be analyzed in Abortion context under  
Public State Decision analysis.*

2)

### FREEDOM OF SPEECH:

The First Amendment prohibits Congress from abridging the rights to Freedom of Speech. This is applicable to the states by the 14th Amendment.

### CONTENT BASED REGULATIONS:

The government may not regulate speech based on its content unless the regulation is necessary to further a compelling government interest and the regulation is narrowly tailored to do so. However, not all types of speech are protected by the First Amendment.

Here, the State Law for defamation is an example of a content based regulation because it is based on the content of the defamatory allegations and whether or not the content of the defamatory statement is improbable or implausible. However, it is likely that the state has amended this law in order to further the compelling the government interest of discouraging defamatory speech. However, because defamatory speech is typically partially protected by the First Amendment, the rule for defamatory speech will be analyzed below. *Good Rule Statement*

### DEFAMATORY SPEECH:

The government may not regulate defamatory speech unless a public official can show by clear and convincing evidence that: 1) the alleged defamatory statement is false and 2) the speaker/Defendant acted with actual malice when making the statement (i.e. the speaker either knew the statement was false or acted with reckless disregard for the truth).

*Good rule stat.*

Here, the public official in question is the Board President, Paul. The main issue with the state law for defamation is that it has shifted the burden of proof from the public official

*Good Analysis*

proving the statement is false to the defendant having to show the statement is true. Because defamatory speech is partially protected by the First Amendment, it is likely that the recently amended state law for defamation would be deemed invalid because it does not align with the First Amendment protections against defamatory speech. The State Law also takes it upon itself to re-define malice as being presumed when the "defamatory allegation is inherently improbable or implausible." However, the constitutional protection for actual malice defines actual malice as, "the speaker either knew the statement was false or acted with reckless disregard for the truth." Again, because the State Law is re-classifying the rule for defamation, it is likely that Dan will be protected against this new definition because it does not accurately align with the First Amendment Constitutional protections for defamation. *Good conclusion*

*Good Analysis*

*Excellent Analysis*

*Good*

The only way that Paul, a public official, will be able to succeed on his claim against Dan for defamation is if Paul can show by clear and convincing evidence that: 1) the alleged defamatory statement is false and 2) the speaker/Defendant acted with actual malice when making the statement (i.e. the speaker either knew the statement was false or acted with reckless disregard for the truth). As to point 1, the facts clearly indicate that there is no evidence Paul is, or has ever been a pedophile, so he will likely be able to satisfy the first element. However, as to element 2, Paul will also need to prove that Dan either new Paul was, in fact, not a pedophile or that Paul simply acted with a reckless disregard for the truth. Under the current facts, Dan is angry that Paul approved a sex ed curriculum for middle school students, so it is likely that Paul may be able to show that due to his anger, Dan acted with a reckless disregard for the truth. However, there are no facts to indicate that Dan knew his statement was false, only that he may have contentiously shouted the defamatory statement due to his anger.

*Is This sufficient to show Dan knew or had reckless?*

*good Analysis*

#### CONCLUSION:

Thus, the State Law for defamation likely does not meet the constitutional standard for regulating defamatory speech. However, it is possible that Dan would still be liable for

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defamation based on the constitutional standard if Paul can prove by clear and convincing evidence that the statement is false and that Dan acted with a reckless disregard for the truth. *Good conclusion statement*

### CONTENT NEUTRAL REGULATION (TIME, PLACE, & MANNER):

Content neutral regulations do not regulate the content of the speech itself, but rather the conduct surrounding speech such as the time, place, or manner of the speech at hand. In order to determine the appropriate regulation, forum must first be determined.

Here, it is likely that School Board meetings would be considered a Limited Public Forum.

### LIMITED PUBLIC FORUM (LPF):

Public property that is held open for expressive conduct surrounding specific ideas, such as a school gymnasium for a public debate, constitutes a LPF. In order to regulate speech in a LPF, the regulation must be 1) viewpoint neutral and 2) rationaly related to a legitimate government interest. *+ likely alternative channels*

Here, School Board meetings likely constitute a LPF because they are meant for parents to express their ideas surrounding school policies and procedures. Here, Dan may be able to argue that the State Law regarding defamation would violate the rules for content neutral regulations, because although the law is viewpoint neutral when discussing what constitutes actual malice and the burden of proof, the law is not rationaly related to a legitimate government interest. The only interest the law is related to is limiting Defamatory speech, which, as analyzed above, is partially protected under the first amendment and cannot rightfully be limited under these facts. *Good point*

CONCLUSION:

*This is a bit confusing: intermediate scrutiny would apply - same result.*

Thus, it is likely that the State Law would not pass the test for being a constitutionally content neutral regulation.

### OVERALL CONCLUSION:

Because the State Law does not meet the constitutional standard for regulating defamatory speech as it pertains to Content Based Regulations and it does also not pass the (rational basis test) for being a Content Neutral Regulation, it is likely that the judge should grant Dan's motion to dismiss based on the fact that the state law violates the Dan's First Amendment rights to Free Speech. However, if Paul can prove by clear and convincing evidence that Dan acted with a reckless disregard for the truth, it is likely that Dan could still be liable for defamation against Paul.

-  
Intermediate  
Sentence

Good job overall!

Your organization is clear and logical, and your analysis of the statute and its non-compliance with the NY Times v. Sullivan rule is excellent.

Your limited public forum and content-neutral analysis was confusing but understandable.

Also address:

vagueness: terms "improbable or implausible" - vague?  
+ Presumption of malice by state law but could analyze differently