**Alternate Case Problem Answers**

*Chapter 2*

**Constitutional Law**

**2-1A. *Commercial speech***

The Supreme Court of Illinois had held that Rule 2-105(a) did not violate Peel’s constitu­tional right to free speech because the rule served a valid state inter­est—to protect the public from misleading advertising. The rule was also not overly broad in its restric­tions. It did not prohibit attorneys or firms from des­ignating areas in which their prac­tices were concentrated or to which their practices were limited; it only prohibited claims that might deceive or confuse the general public. The Illinois court had con­cluded that in the case of Peel’s letter, the pub­lic could be misled for all of the reasons cited by the Attorney Registration and Disciplinary Commission and affirmed Peel’s censure. On appeal to the United States Supreme Court, this decision was reversed. The United States Supreme Court held that the attorney had First Amendment rights—under standards applicable to commercial speech—to advertise the NBTA certi­fication. The Court pointed out that the attorney’s statement was neither actually nor inher­ently misleading—the facts were true and verifiable and there was no finding of deception or misunderstanding. The Court rea­soned that the public under­stands that that many certificates are issued by pri­vate or­ganizations and it is unlikely that certifi­cation as a “specialist” by a na­tional organization would be confused with formal state recognition.

**2-2A. *Commerce clause***

The court did not agree with Inland-Rome that the contract related to interstate com­merce. Therefore, the Federal Arbitration Act did not apply and the arbi­tra­tion clause was not enforceable. The court found that the contract between the parties did not in itself relate to the interstate shipment of any product. “To the contrary,” the court stated, “it re­lates solely to the sale of standing timber lo­cated exclusively in Georgia.” Interstate commerce was affected but only *after* Inland-Rome’s performance under the contract with the landowners was com­pleted. Therefore, federal law did not apply, and the con­tract was subject to Georgia law. The state of Georgia enforced arbitration clauses, but only if they were contained in construction contracts. Therefore, arbitra­tion of the con­tract could not be compelled.

**2-3A. *Freedom of speech***

The court dismissed Holland’s complaint, and he appealed. The state intermediate ap­pellate court affirmed the lower court’s decision. The state intermediate appellate court initially determined that, in playing a car sound system loud enough to violate the ordi­nance, Holland was not actually expressing himself. (He was only listening.) This meant that, as to Holland, the ordinance regulated only his conduct, not his expression. The court held that the First Amendment “protect[s] the communication and expression of someone attempting to broadcast music or another type of message, but that noise is subject to regulation.” The court concluded that Holland failed to show “a real and sub­stantial threat to expression in relation to the ordinance’s legitimate sweep.” The court also pointed out that “[t]his ordinance has clear guidelines. A person of ordinary intelli­gence knows what it means for sound to be ‘audible’ at more than 50 feet away.”

**2-4A. *Freedom of speech***

The court held that the state constitutional provision establishing English as the offi­cial language for state employees was invalid because it was overbroad and gave rise to sub­stantial potential for inhibiting constitutionally protected free speech rights. The court stated that “Article XXVIII, by its literal wording, is capable of reaching expres­sion pro­tected by the First Amendment, such as Gutierrez’s [a co-plaintiff’s] right to communi­cate in Spanish with his Spanish-speaking constituents.” To determine whether the Article XXVIII reached a substantial amount of constitutionally protected conduct, the court had to first interpret the meaning of Article XXVIII. The plaintiffs (Yniguez and others) claimed that it was a blanket prohibition on the use of any lan­guage other than English in the state workplace. The defendants, however, considered the article to be merely a directive for state and local governmental entities to act in English when acting in their sovereign capacities. The court held that the article’s plain language indicated that with limited exceptions, the article prohibited the use of any language other than English by all officers and employees of all political subdivi­sions in Arizona while per­forming their official duties. Given this inter­pretation, the court concluded that “there is a realistic danger of, and a substan­tial potential for, the unconstitutional application of Article XXVIII.” The arti­cle was therefore voided by the court.

**2-5A. *Equal protection***

The court agreed with Izquierdo. Mercado appealed to the U.S. Court of Appeals for the First Circuit, which reversed this decision. Under the rational-basis test, the question was whether there was any rational basis under which Mercado’s actions related to a le­gitimate state in­terest. Mercado’s ostensible objective was to replace Ms. Izquierdo with someone with greater audi­ence appeal. The court stated that “Mr. Mercado could have rationally believed that having ‘new [and young] faces’ would maximize audience draw­ing power.” The purpose of public television “includes serving the public by provid­ing in­creased access to information and enhanced opportunities for educa­tion. Benefit to the public as a whole is maximized the more people take advantage of the services pro­vided. Thus, to maximize viewership by making programs as appealing as possible is a legiti­mate ob­jective in the operation of government-owned television stations.”

**2-6A. *Freedom of speech***

Yes. The court denied the board’s motion for summary judgment. The court held that the library did not have to provide Internet access, but that if it did, it could not restrict its patrons’ access to sites on the Internet because the library “disfavors their content.” Ac­cording to the court, under the free speech clause of the First Amendment, the library could impose content-based restrictions on access to the Internet only on showing “a compelling state interest and means narrowly drawn to achieve that end.” The court ex­plained that even when a library, or any government entity, has a legitimate pur­pose—”whether it be to prevent the communication of obscene speech or materials harmful to children”—the means it uses to regulate must be a reasonable response that “will alleviate the harm in a direct and material way.” The court concluded that the plaintiffs adequately alleged a lack of such a reasonable means in this case.

**2-7A. *Due process***

The U.S. Court of Appeals for the Eighth Circuit held that “it would be fundamentally unfair to hold Ashland accountable on probation for actions beyond its control. Ashland maintains that it would violate its due process rights to punish it for probation viola­tions based solely on the future acts or omissions of MAP, which is a separate company not under Ashland's control. We agree.” The court reasoned that "a defendant may not be sentenced for the crimes of another .  .  . . We believe that the probation conditions challenged here similarly improperly conditioned Ashland's probation on the conduct of MAP.” The St. Paul Park Refinery “is no longer a business site of Ashland, but is owned, operated, and controlled by MAP, a third party that was not charged or sentenced in this case. As a minority stakeholder of MAP, Ashland has no control over or ability to di­rect MAP's day-to-day operation of the refinery, and is not in a position to ensure that continual access is granted to the probation office.” Ashland had upgraded the sewer at the St. Paul Park Refinery, but “it had to obtain MAP's consent in order to implement this project at MAP's facility.” The court “excise[d] the objectionable conditions” from the probation order, although finding it “reasonable that, to the extent that it can, Ashland should allow the probation office to monitor its compliance” with the sewer upgrade.

**2-8A. *Due process***

The court agreed with the Yurczyks’ reasoning, as regarded their substantive due proc­ess rights, that the on-site construction requirement did “not have a substantial bear­ing upon the public health, safety, morals, or general welfare of the community” and “was not based upon a le­gitimate governmental objective.” The county appealed this rul­ing to the Montana Supreme Court, which affirmed the judgment of the lower court. The state supreme court held that the on-site construction requirement was not ra­tionally related to a legitimate governmental interest. The court pointed out that county officials were “unable to identify any health and only minimal safety concerns that the on-site construction provision addressed. As to gen­eral welfare \*  \*  \* the preservation of prop­erty values may implicate legitimate government concerns in some zoning situations, [but] there is nothing \*  \*  \* here that demonstrates these concerns actually drove the formulation of the regulations at issue. Indeed \*  \*  \* the modular home would not have affected property values in the area,” according to one official, who “testified that homes built off-site ‘would have no real bearing upon market values at all,’ ” because District 17 “is a rural setting, and it’s spread out into large residential acreages.”

**2–9A. *The commerce clause***

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall’s indictment. On the government’s appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

**2-10A. A Question of Ethics**

**1.** According to the United States Supreme Court in this case, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), “Congress pre-empted state cigarette advertising regulations like [Massachusetts’] be­cause they would upset fed­eral legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the [U.S. Court of Appeals for the] First Circuit concentrated on whether they are ‘with respect to’ advertising and promotion, concluding that the FCLAA only pre-empts regula­tions of the content of cigarette advertising.” The Supreme Court did not agree: “There is no question about an indirect relationship between the Massachusetts regula­tions and cigarette advertising: The regulations expressly target such ad­ver­tising. The Attorney General’s argument that the regulations are not ‘based on smoking and health’ since they do not involve health-related content, but in­stead target youth exposure to ciga­rette advertising, is unpersuasive because, at bottom, the youth exposure concern is in­tertwined with the smoking and health concern.”

**2.** Regarding a state’s or a locality’s ability to enact generally appli­ca­ble zon­ing restrictions, the Supreme Court recognized that “state interests in traffic safety and esthetics may justify zoning regulations for advertising. Although [in the FCLAA] Con­gress has taken into account the unique con­cerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regu­lations of the location of billboards or large marquee advertis­ing, or that Congress in­tended cigarette advertisers to be afforded special treatment in that regard. Re­strictions on the location and size of advertisements that apply to ciga­rettes on equal terms with other products appear to be outside the ambit of the pre-emp­tion provision. Such restrictions are not ‘based on smoking and health.’ ” The Court noted that the pre-emption provision “in no way affect[s] the power of any State or politi­cal subdivision of any State with respect to the taxation or the sale of cigarettes to mi­nors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of ciga­rettes.” An argu­ment against local gov­ernments’ exercise of their zoning power to regu­late to­bacco products’ advertis­ing is that “states and localities also have at their dis­posal other means of regu­lating conduct to ensure that minors do not obtain cigarettes.”