

**JULY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Constitutional Law

QUESTION

To prepare herself for a spiritual calling to serve as a pastor at City's jail, Ada enrolled in a nondenominational bible school. After graduating, Ada advised the pastor of her own church that she was ready to commence a ministry and asked that her church ordain her. While sympathetic to her ambition, Ada's pastor accurately advised her that their church did not ordain women.

Ada began going to City's jail during visiting hours and developed an effective ministry with prisoners, particularly women inmates who increasingly sought her counsel. Ada noticed that ordained ministers who visited the jail received special privileges denied to her.

Dan, the jail supervisor, told Ada that ministers who were ordained and endorsed by a recognized religious group were designated "jail chaplains" and, as such, were permitted access to the jail during nonvisiting hours. He told Ada that she too could be designated a jail chaplain if she obtained a letter from a recognized religious group stating that it had ordained her as a minister and had endorsed her for such work.

Ada replied that her church was not part of any recognized religious group and would not ordain her anyway because she was a woman. She asked Dan nonetheless to designate her a jail chaplain because of the effectiveness of her work.

Dan refused to designate Ada a jail chaplain or to allow her the access enjoyed by jail chaplains. He acted pursuant to jail regulations adopted to avoid security risks and staff involvement in making determinations as to who was really a "minister."

Ada has brought suit in federal court to obtain an injunction requiring that she be designated a jail chaplain or be granted access to City's jail equivalent to those who have been designated jail chaplains. Ada's complaint is based on the grounds that the refusal to designate her a jail chaplain violates rights guaranteed to her and the prisoners by the First Amendment to the U.S. Constitution and also violates rights guaranteed to her by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

How should Ada's suit be decided? Discuss.

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ANSWER A

Standing - Federal courts are only empowered to hear cases involving real controversies, and a plaintiff has standing to bring a case only if he or she suffers, or will imminently suffer, an injury in fact that may be remedied by the court's action.

Here, Ada (A) alleges that she is being denied privileges that are afforded to others because of her particular religion, which is not "recognized," and because she is not ordained by her religion. Both, she argues, violate her constitutional rights under the first and fourteenth amendments to the U.S. Constitution. Thus, she has alleged an injury in fact sufficient to give the federal court the power to hear the case. Further, an injunction, if granted, directing the jail to grant her the additional privileges would remedy the injury. Thus, A has standing to bring the case.

Ada also appears to be raising the rights of prisoners in her action. A plaintiff may only raise her own constitutional rights, unless the persons she is seeking to represent are unable to vindicate their own rights, the proposed plaintiff has the same motivation to pursue the litigation as the rightholder, and the proposed plaintiff is capable of doing so. Prisoners are capable of raising their own rights, and A's motivations are not necessarily the same as the prisoners. Therefore, she will be precluded from raising the prisoners' rights in her lawsuit.

Eleventh Amendment - In general, the eleventh amendment prevents a private individual from bringing suit in federal court against a state government. However, this prohibition does not apply to local governments, nor to individual state officers. A is bringing her suit both against "City" jail and, apparently, against Dan, the jail supervisor. She is also seeking injunctive relief. For these reasons, the eleventh amendment is not a bar to this suit.

State Action - Generally where a plaintiff alleges violation of personal rights under the constitution, the violation must have been committed by a state or federal actor in order to be actionable. Here, A is primarily arguing that City Jail's actions violate her rights. City Jail is a political subdivision of state, and is therefore a state actor. However, Jail may argue that it is only implementing a classification (ordained vs. unordained) that is established by a private church, and therefore A's real injury is caused by a private, not state actor. However, the fact that Jail adopts the private entity's classification is enough to establish state action.

The fourteenth amendment clearly applies to the state. The first amendment only applies to the federal government, but the rights under the first amendment have been incorporated into the fourteenth amendment and are therefore applicable to the state as well.

First Amendment

A may argue that the jail's policy of granting special privileges only to ordained pastors of established religions violates both the free exercise of religion clause and the establishment clause of the first amendment.

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Free Exercise Clause - The state may not impose restrictions on the free exercise of religion unless the restriction serves a compelling state interest and is narrowly tailored to serve that interest. A law of general applicability, however, which merely incidentally burdens religious practices will not be subject to invalidation. A will argue that the jail regulation is not generally applicable, since it focuses directly on “established” religions, and singles out these religions for special privileges. She will also argue that the regulation inhibits her ability to preach to inmates who are interested in receiving her ministry, and therefore impairs her free exercise of religion. Therefore, the burden will be on the state to demonstrate the necessity of the regulation to serve a compelling interest.

The jail will argue that the regulation serves important security interests, and that if all self-proclaimed ministers were given security clearances, it would raise the risk that some ministers are falsely representing themselves. However, the jail has alternative means of determining the security risk of a person claiming to be a minister other than classifying them as “ordained” and from “established” religions. Since the regulation is not narrowly tailored, the regulation does not pass the strict scrutiny test.

No Inquiry into Legitimacy - Further, the regulation differentiates between established and non-established religions. This in effect amounts to an inquiry into the legitimacy of [sic]. The supreme court has held that the government may not inquire into the legitimacy of a religious belief. The regulation is invalid for this additional reason.

Establishment Clause - The first amendment also prohibits the government from establishing a religion. A will argue that by giving preference to established religions, the Jail is giving support to those religions, and in effect establishing them. The establishment clause is not violated, however, if the regulation or statute at issue serves a secular purpose, has primarily a secular effect and does not entangle the government in religious matters.

Here, the jail will argue the regulation has the secular purpose of increasing security at the jail by limiting the number and types of outside visitors allowed in. However, the regulation clearly does not have a secular effect - it impacts religious practice directly, by limiting the right of non-established religions to send their ministers, and it prevents unordained ministers from receiving privileges. Therefore, the second prong is not met.

The third prong is also not met. A will argue successfully that by allowing only established religions to send ministers to the jail, the state must get involved in determining what is an established religion. Although the jail has argued that it is limiting its entanglement with religious affairs by allowing the particular religion to determine who can be ordained, the mere acceptance of these decisions necessarily entangles the public entity in the religious organization’s decisions.

The regulation will be found to be a violation of the establishment clause because, although it may serve a secular purpose, it has a non-secular effect and entangles the state in religious affairs.

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In addition, as discussed above, the regulation is a violation of the free exercise clause.

Equal Protection - State and local governments may not discriminate against individuals on the basis of a suspect class unless the discrimination serves a compelling state interest and is necessary and narrowly tailored to serve that purpose. A classification based on a quasi-suspect class is subject to intermediate scrutiny - the state must show an important interest being served, and the regulation must be necessary for the purpose. Further, if the disparate treatment is in relation to the exercise of a fundamental right, the state must also meet the stricter scrutiny standard of review.

A will argue that the disparate treatment is based on her affiliation with a non-established [sic] religion, her status as a non-ordained [sic] minister, and, indirectly, on her status as a woman (since her church won't ordain her because she is female). Further she will argue that the disparate treatment relates to the exercise of a fundamental right (the free exercise of religion).

Non-ordained [sic] and Non-Established [sic] - Classifications based on religious titles or on membership in a particular religion are not suspect classes for purposes of the equal protection clause. Therefore, A must prove that the regulation serves no legitimate purpose and is not rationally related to this purpose.

The stated purpose is to increase security at the jail. This is a legitimate purpose. Further, limiting the ministers who are allowed to serve as chaplains to those who are endorsed by established religions tends rationally to limit these outside influences in a jail to those who are legitimately there for religious, and not ulterior, motives. Therefore, the regulation passes this low level of scrutiny.

Gender-Based Class - Gender discrimination is a quasi-suspect class (see above for standard of review). The jail's regulation itself does not on its face differentiate between male and female chaplains, but A will argue that since some religious organizations, such as her own church, refuse to ordain females, the regulation has a discriminatory effect on women. However, A will have to show that the discrimination by the state was intentional, and there is no indication of this here, unless the jail knew when it passed the regulation that no, or almost no, religions ordain female ministers. The regulation also allows "endorsed" ministers to be considered chaplains, and arguably even those religions that don't ordain women may at least "endorse" them.

A will also argue that the private church's discrimination, though not directly actionable under the equal protection clause, has been endorsed by the jail through the use of the religion's classification system. This argument will succeed, and the jail will therefore have to meet the midlevel scrutiny.

Although security is an important issue, as discussed above, the regulation limiting chaplains to those who are ordained or endorsed does not appear to be necessary to ensure security.

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Therefore, if the church's discrimination against women will be applied to the jail, the regulation will be struck down for this additional reason.

Exercise of a Fundamental Right - Because the classification involves the exercise of a fundamental right, the regulation is subject to strict scrutiny under the equal protection clause. However, the standard of review is identical to that provided under the first amendment, and therefore the discussion above is applicable here as well.

Thus, the regulation should be found invalid, and A should be given access to the jail as a chaplain (access during non-visiting hours) as requested in her injunction.

ANSWER B

Justiciability

For Ada's (S) suit to be heard in federal court, it must involve a case or controversy. The justiciability requirements ensure that the case or controversy requirement of Article III is met.

Ripeness

A plaintiff's suit must represent a case ripe for review by federal courts. A suit for a declaratory judgment or a pre-enforcement injunction against a regulation or law may present an issue as to whether a case is ripe for review.

Here, A has already sought to be named a jail chaplain or receive jail chaplain privileges. Thus, her suit is ripe for review, because A is not seeking either a declaratory judgment or pre-enforcement review. A's injury by being denied the privileges as a jail chaplain is ongoing and occurring now.

Mootness

Mootness doctrine prevents a federal court from continuing to hear a case when the case is no longer a live controversy, because the real world injury to the plaintiff has already ended. Here, A's case is not moot - she is still being denied the rights of a jail minister.

Political Question

Federal courts may not hear non-justiciable political questions. This case does not involve a political question.

Abstention

Federal courts will in general abstain from enjoining an ongoing state criminal prosecution. There is no criminal prosecution in this case - abstention does not apply.

Standing

To be able to sue in federal court, a plaintiff must have standing, which includes injury in fact, causation and redressability.

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Injury in fact

A plaintiff must have suffered (or be about to suffer with a significant likelihood) an injury in fact. The injury may be the denial of constitutional or statutory rights, economic injury, or even environmental or aesthetic harm.

Here, A is suffering an alleged denial of her first and fourteenth amendment rights. Her first amendment rights to freely exercise her religion and to not have state action force an established religion on her have been allegedly denied - her fourteenth amendment right to equal protection has also been denied. Moreover, A's desire to serve as a jail chaplain, and the denial of that by the jail, would alone probably qualify as enough of an injury in fact.

Causation

The plaintiff's injury must have been caused by the defendant's action. Here, the denial of A's rights was caused by the City's refusal to allow her to be a jail chaplain. Thus, City's action caused A's injury.

Redressability

The plaintiff's injury must be redressable by a court order. Here, an injunction from the court to require City to admit A as a jail chaplain would redress A's injury. Thus, there is redressability.

Third Party Standing

Generally, plaintiffs may not assert the rights of third parties in filing suit. However, there is an exception when either the relationship between the plaintiff and third party is close (e.g.) doctor - patient; buyer - seller) or where the third party would be unlikely to assert their rights on their own.

Here, A is attempting to also assert a violation of the prisoner's first amendment rights. A court might hold that this is not appropriate because it is third party standing.

However, a court might also hold that the exceptions apply. Here, A does have a close relationship with the prisoners, as she is effectively serving as a minister to them. Also, the prisoners might be unlikely to assert their rights to have A serve as a jail chaplain, since they may not even know this is an issue. Thus, a court might allow A to assert the prisoners' rights in this case.

State Action

The first amendment applies to states because it has been incorporated through the fourteenth amendment. The fourteenth amendment only applies to state action - action by state governments.

This includes branches of state governments. Here, City is the party allegedly denying A's rights by not allowing her to be a jail chaplain. City is a municipality, and so is a branch of state government. Thus, there is state action.

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First Amendment

Free exercise clause: Ada

The first amendment prohibits state action that interferes with the free exercise of religion. However, neutral laws of general applicability with no intent to infringe on free exercise, but which happen to prohibit religious activity, are allowed under the first amendment.

Here, A would argue that the City rule prohibiting her from being a jail chaplain violates her free exercise of religion, because it keeps her from expressing her religion by ministering to inmates after visiting hours.

The City might respond that the law is of general applicability because it restricts access to visiting hours to everyone who is not a jail chaplain.

However, A would respond that the law is not a neutral law, because only members of “recognized religions” can become jail chaplains. Thus, the law explicitly distinguishes among religions and is not neutral.

Strict Scrutiny

Since the law is not a neutral law of general applicability, and infringes on A’s free exercise rights, it will be only upheld if it meets strict scrutiny. This requires the government to show that the law is necessary to fulfill a compelling state interest, and is narrowly drawn to meet that interest.

Here, the state has two possible interests: avoiding security risks and not having staff determinations as to who is really a minister. Avoiding security interests in a jail is clearly a compelling interest. However, avoiding staff determinations as to who is a minister does not appear to be compelling, because there is no clear reason why it matters if someone is a minister - a non-religious psychiatrist, for example, might be just as helpful to the inmates. Thus, the security risk interest is the only compelling interest.

It also does not appear that the rule is narrowly drawn (and thus necessary) to serve the compelling interest of jail security. It is unclear that ministers from recognized religious groups would pose any less of a security threat than other ministers. Instead, background checks or the monitoring of visits would seem to serve the security interest much better.

Thus, the City policy would not meet strict security and should be struck down as violating free exercise.

Free Exercise Rights of Prisoners

The prisoners have a free exercise right to receive A’s ministry services, and to participate in those services after visiting hours.

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On the other hand, prisoners' rights in jail may be curtailed more than other individuals' rights for valid penological reasons - such as security.

However, again, the City policy is not neutral on its face, and thus strict security would apply. This is because inmates who share A's faith are denied A's help outside visiting hours, while others can receive chaplains at that time. The same analysis would be undertaken as above - security would be a compelling interest, but the policy is not necessary to that interest, and so it would also violate the prisoners' free exercise rights.

Establishment Clause

The first amendment also prohibits states from establishing any form of religion. The test as to whether a state action establishes a religion is whether it (1) has a valid secular purpose, (2) has a primary effect that neither inhibits nor advances religion, and (3) does not result in excessive entanglement of the state with religion.

Secular Purpose

Here, City's policy has a secular purpose of reducing security risks and of avoiding staff determinations as to who is a minister. Thus, there is a valid secular purpose for the "recognized religion" requirement.

Primary Effect

However, City's policy does have the primary effect of advancing some religions, and inhibiting others. Here, "recognized religion" chaplains may enter the jail after visiting hours, while non-recognized chaplains may not. Thus, some religions have considerably greater access to prisoners, which they might use to proselytize, etc. Thus, the state action advances some religions and inhibits others.

City might argue that City's effect is not "primary" because non-recognized chaplains may still visit during visiting hours, so the impact is minimal. This would depend on how large a difference in time there is between visiting and non-visiting hours - unless the difference is minimal (e.g., visiting hours last 20 hours/day), then this argument would probably fail and the effect would be primary.

Excessive Entanglement

The jail officers must determine what religions are "recognized." This is an excessive entanglement of the City with religion.

Thus, the City policy also is an unconstitutional establishment of religion.

Fourteenth Amendment

Equal Protection

Religion

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A might argue that the City policy classifies and discriminates based on religion, and this either involves a suspect class or fundamental right. If the court argues with this, the analysis would be the same as for the free exercise clause of the first amendment, above.

Gender

The equal protection clause requires states to grant equal protection of the laws to all citizens. If one state denies a fundamental right to some citizens, or distinguishes based on a suspect classification, then the state action will undergo a heightened level of scrutiny. Otherwise, the rational basis test applies.

If a state law improperly classifies on the basis of gender, then intermediate scrutiny applies. The state must show that the classification is substantially related to an important government interest (and also must provide an exceedingly persuasive justification).

Gender is only a classification for equal protection analysis if the law facially discriminates based on gender, or there is a discriminatory impact and a discriminatory intent to the law.

Here, the City policy does not facially discriminate against women, but only based on the type of religion.

A might argue that the city policy has a discriminatory impact - most organized religions (including A's) do not ordain women. Thus, it is much more difficult, if not impossible, for women to qualify as jail ministers. Thus, there is a discriminatory impact.

However, there does not appear to be any discriminatory intent to City's action – City's policy is instead based on staff and security concerns.

Rational Basis

Thus, no suspect class is involved, and only a rational basis test would apply. The burden is on the plaintiff to show that there is no conceivable legitimate state interest that could rationally be served by the policy.

Here, the City clearly has a legitimate interest in security. While City's policy may not be narrowly tailored to that policy (see above), it is certainly rationally related. Thus, any gender discrimination claims by it would fail.

Fundamental Rights

Strict security applies to any discriminatory denial of a fundamental right under the equal protection clause. Here, A's freedom of religion is allegedly denied because she is not part of an organized religion. Thus, strict scrutiny would apply under this claim - the same analysis as for free exercise (above) would apply and the policy would be struck down.