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Constitutional Law I
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I.

The Illanoise state legislature has recently investigated the state of scientific knowledge, as well as the social and moral implications of artificial means of human reproduction, including artificial insemination by donor, in vitro fertilization and reproduction through surrogate mothers. It has determined that while, technologically, babies can be reproduced with perhaps even less chance of defect than with natural means, and while the potential for fulfilling the desperate hopes of infertile couples is very appealing, moral and social implications including concerns with disposing of fertilized eggs and embryos, of interfering with the natural processes of reproduction, and of determining the rights of mothers, fathers and infants demand a halt to these methods in Illanoise. The legislature passes a law prohibiting (a) further experimentation in these areas and (b) the contracting or arrangement for, or the acquisition of a child or infant through the processes known as or closely related to, Artificial Insemination by Donor, In-Vitro Fertilization or Surrogate Mother arrangements. The law provides for extensive fines for violations by physicians, lawyers and others, including potential parents, and also provides that the Illinois Attorney General has authority to administratively halt and also to enjoin any clinic or other operations pursuing these methods.

Bill and Jane Playne, Illanoise residents recently engaged Dr. Ho Chi Han, also of Illanoise, in an in vitro fertilization of a donor's sperm with ova from Jane, to be surgically implanted in Jane. While Bill and Jane do not want to violate the law, they desperately want to proceed

with the procedure lawfully. They ask the senior partner in the law firm for whom you work if the firm can help. He suggests that they file a complaint in federal court seeking a temporary restraining order enjoining the Attorney General from enforcing the statute and asking the court for a declaration that the new Illanoise law unconstitutionally infringes upon the Playne's constitutional rights.

(1) He asks you, his law clerk, to thoughtfully articulate the best constitutional basis for challenging the provision and the analytical framework the court would likely employ in addressing the challenge.

(2) What jurisprudential problems might you encounter, or might the court encounter, with respect to protecting the rights asserted here? Discuss this in terms of the values, jurisprudential and otherwise, that might be implicated.

II.

Joe Taperno and John Pacaletti, two highly successful Pann State grads, enamored with the life they had led at, and the happiness associated with, that happy valley of college life and football in Central Pennsylvania, have recently founded Happy Valley, a privately owned 256 acre rural/residential living environment for Pann State people and people like them. Happy Valley would sell homes and condominiums to married couples, retired people and single women in a rural/residential environment with a high quality, privately financed, state approved education system. Several retail outlets to supply necessities including a Pharmacy & Sundries store, a small grocery/bakery, and a small household supplies store are in the community and owned by Happy Valley. The community also included a small unarmed security force, three practicing physicians, two dentists, an eye clinic, Mama Taperno's Pizzeria, and La coeur chaud, a French restaurant, a small

bank, parks, and recreational facilities including a health club. It also provides all residents with season tickets between the thirties to all Pann State football games. Happy Valley, now five years old does not describe itself as a community. It also contracts out for utilities, trash and garbage, and building and environmental maintenance from private companies in the area. For fire and serious law enforcement Happy Valley relies on the Nittany County Fire and Sheriff's departments.

Joe and John own 52% of the shares in Happy Valley, all residents share the remaining 48% of the shares. Happy Valley is run by a Board of Directors which includes Joe and John, two appointees of theirs, and five persons selected by the remaining shareholders. In order to be able to purchase a home or condo in Happy Valley, one must be interviewed and approved by the Board's Selection Committee, however under the Corporate Charter, no single unretired male may be accepted as a home or condo purchaser. While there is no exclusion of single women with children, none has been accepted for house or condo purchases though six to eight have applied in the past two years. The Charter further prohibits picketing, demonstrations, unauthorized signs, hunting, homosexuals, non-prescription drugs, and all activities that are incompatible with the Happy Valley way. Eight hundred largely white, affluent people presently live at Happy Valley. The Happy Valley Board intends to expand its environment to 500 acres and 1600 to 1800 residents over the next 5 to 8 years,

Recently two avid Pann State followers, Dirk Skwak, a 35 year old and a former Pann State football player, and Tessie Drivvel, a former cheerleader and mother of three children ages 4, 9, and 11, have been turned down for home purchases and memberships.

1) Dirk who is livid comes to Bernie Kovak of Kovak,

Kovak and Knickerbocker, attorneys at law. He wants to sue Happy Valley claiming that his constitutional rights are being violated. As Bernie's law clerk you are asked (a) what main constitutional right or rights of Bernie's might have been violated by Happy Valley's failure to accept them (b) what threshold issue or issues are apt to arise early in a federal suit by Bernie against Happy Valley, and (c) how and according to what standards will the threshold issue or issues likely be resolved?

2) Tessie addresses her problem differently. Elmo and Thelma Wart have agreed to sell their condo at Happy Valley to Tessie and her kids. As she was about to move in, Taperno and Pacaletti went to their lawyer, Nine Iacobucci, who obtained an injunction from the Nittany County Court of Common Pleas against the purchase and sale of the Condo to Tessie from the Warts. The injunction is issued because according to the Court the Warts sale violates the terms of a covenant in the Warts deed and contract which prohibits sales not in accordance with Happy Valley, Inc's Charter. Tessie then also goes to Kovak, Kovak, Kovak and Knickerbocher and wants, as a result of her treatment, to file suit against Happy Valley in federal court claiming that she has been unconstitutionally discriminated against. As Kovak's clerk you recognize that a certain essential threshold constitutional issue will also be necessary in Tessie's case. What threshold issue is apt to arise in a suit by Tessie claiming that Happy Valley's preventing her from buying the Wart's condo unconstitutionally discriminates against her? Provide a balanced view of what standards would likely apply to the consideration of this threshold issue, what the likely result would be?

3) Assume for the purposes of this part that Kovak now files a suit on behalf of Skawk and Drivvel versus Happy Valley, Inc. in the U.S. District Court for the Middle District of Pannsylvania, claiming that Happy Valley's

actions preventing Dirk and Tessie from buying homes there unconstitutionally discriminate against each of them? Assume for this part also that Dirk and Tessie's action survives the threshold issue in this case and reaches the merits of the constitutional provision that is implicated in their action. With respect to first Dirk, and then Tessie, discuss (a) the major basis of each challenge to Happy Valley's actions, (b) the analytical framework or frameworks which would likely apply to the constitutional issues raised by each, and (C) apply the facts of each situation in terms of the appropriate analytical framework.

III

The Fire Department of the City of Gayton, Ohio, has a written policy prohibiting the hiring of firefighters or staff who have a homosexual orientation. On the application form, a question asks whether or not the applicant is a homosexual. Recently George Bronson applied for a rescue squad position with the fire department. He did not answer the homosexual orientation question. When, in an oral interview, he was asked about this he said that he did not think that his sexual orientation was the public's business, but if the interviewer had to know, he was a homosexual. He was told that as a result of his sexual orientation he could not be hired for the rescue squad position. Shortly thereafter, George contacted an attorney who filed an action on his behalf in federal court claiming that the refusal to hire on the basis of his sexual orientation unconstitutionally discriminated against him.

(1) In terms of a U.S. Constitutional provision what claim should the attorney assert that would require the Court to impose a high degree of scrutiny in reviewing the fire department's policy? What reason would be advanced in favor of such a determination? What reasons and standards would be raised in opposition to such a determination?

(2)(a) If this case proceeded through the District Court and Court of Appeals, what is the analytical framework that the U.S. Supreme Court would likely apply in a case like this? (b) Apply the facts of this case to that likely analytical framework and draw your conclusions accordingly.