

A state statute prohibits any retailer of books, magazines, pictures, or posters from "publicly displaying or selling to any person any material that may be harmful to minors because of the violent or sexually explicit nature of its pictorial content." Violation of this statute is a misdemeanor.

A corner store displays publicly and sells magazines containing violent and sexually explicit pictures. The owner of this store is prosecuted under the above statute for these actions.

In defending against this prosecution in a state trial court, which of the following is the best defense for the corner store?

- A. Equal protection of the laws, because the statute irrationally distinguishes between violent and sexually explicit pictorial material that may harm minors and such material that may harm only adults.
- B. Equal protection of the laws, because the statute irrationally treats violent and sexually explicit material that is pictorial differently from such material that is composed wholly of printed words.
- C. First Amendment as it is incorporated into the Fourteenth Amendment, because a state may not prohibit the sale of violent or sexually explicit material in the absence of proof that the material is utterly without any redeeming value in the marketplace of ideas.
- D. First Amendment as it is incorporated into the Fourteenth Amendment, because the statute is excessively vague and overbroad.

Explanation:

The **First Amendment free speech** clause (applied to the states through the **Fourteenth Amendment**) protects the free flow of ideas with limited **exceptions**. A law that infringes upon this right can be challenged **on its face** and struck down in its entirety under either:

- the **overbreadth** doctrine – renders laws unconstitutional if they **restrict** a substantial amount of **protected speech** *or*
- the **vagueness** doctrine – renders laws unconstitutional if **ordinary persons** would have to guess the law's meaning because the law fails to provide notice of what speech is prohibited.

Here, the state statute regulates speech by prohibiting retailers from publicly displaying or selling *any* material containing violent or sexually explicit pictures that may be harmful to minors. Although some violent or sexually explicit speech is not protected by the First Amendment, a substantial amount is. Therefore, the overbreadth doctrine is a defense against the enforcement of this statute. And since this statute also requires ordinary persons to guess as to which materials may be harmful to minors, the vagueness doctrine is another valid defense.

(Choices A & B) The Fourteenth Amendment **equal protection clause** prohibits states from treating similarly situated persons (or classes of persons) differently without adequate justification. But here, there is no evidence that this law is being applied in a discriminatory manner—eg, had corner store owners, but no other retailers, been prosecuted under the statute. Therefore, an equal protection defense would likely fail.

(Choice C) A state *may* prohibit the sale of violent or sexually explicit material if (1) it falls outside of the First Amendment's protections—eg, material that incites crime or is obscene under the **Miller test**—or (2) this content-based restriction passes **strict scrutiny**. Neither requires proof that the material is utterly without any redeeming value in the marketplace of ideas.

Educational objective:

A law that interferes with the freedom of speech will be struck down on its face if it restricts a substantial amount of protected speech (ie, overbroad) OR fails to give ordinary persons notice of the prohibited speech (ie, unduly vague).

References

- Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165 (2002) (finding an ordinance overbroad since it prohibits all door-to-door, not just commercial, canvassing without a license).

- *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057–58 (1991) (striking down a law for vagueness since it tends to mislead attorneys about potential punishment for pretrial publicity of clients' criminal defenses).

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