

**Exam Post-Mortem**  
**Constitutional Law I – Spring 2009**  
**Professor Massey**

Below is a brief dissection of the examination. What follows is a repetition of the essay question and a summary indication of the issues and the approach to be taken in handling those issues. ***This is not a model answer.*** Rather, it identifies the principal issues, outlines the analytical approach to those issues, and provides some feedback with respect to common errors or omissions. A model answer would analyze these issues thoroughly and persuasively in grammatically correct, well-organized, even elegant, prose. Organizational defects, which blurred inexorably into analytical lacunae, were not uncommon. Many of you tried to deal with every conceivable issue, even when the issues were non-existent or irrelevant. Some of you belabored the obvious, to the detriment of space devoted to the real issues. Some of you provided essays on the law but failed to apply that law to the question at hand. The range of raw scores on the multiple choice portion was 20 to 42. Because each question was worth two points, the range of correct answers was 10 to 21, out of 24 possible correct answers. The median was 15 correct answers. The range of raw scores on the essay was 4 to 26. The range of total raw scores was 28 to 68. The median was 44. The median course grade was a B.

**PART TWO**  
***(Word Limit: 2000 words)***

The State of Minos, a state of the United States, has two fully accredited law schools: The University of Minos, a public institution, and Minotaur University, a private institution. Each of the two law schools offer a course of study that is quite similar in all respects to that offered by nearly all good quality accredited American law schools. There is no particular emphasis on Minos law in the curriculum of either the University of Minos Law School or Minotaur University Law School. The Supreme Court of Minos, which has statutory responsibility for setting the rules for admission to the Minos Bar, adopted a rule many years ago that, in pertinent part, states:

An applicant for admission to the Minos Bar who has been awarded a first professional degree in law from a fully accredited law school in this state shall be automatically admitted to the Bar of this state. All other applicants must take and pass the Minos Bar examination; provided that a lawyer admitted to practice in another state of the United States and who has practiced law for a minimum of five years shall be admitted to the Minos Bar upon submission of satisfactory proof of those facts.

Theseus, a recent graduate of Hastings College of the Law and native of Minos who wishes to return to Minos to practice law, has filed suit in the United States District Court for Minos, alleging that the Minos rule quoted above is not constitutionally valid. In his complaint he requests the court to strike the three words “*in this state*” in the third line of the rule to make the rule constitutionally valid. You are the newly hired law clerk for District Judge Cecil Kluliss,

to whom Theseus's case has been assigned. Judge Kluliss has asked you to prepare a memo addressing two questions: 1) Does Theseus's complaint state a claim upon which relief may be granted? 2) Assuming that the complaint does state such a claim, what is the proper resolution of the case on the merits? As always, Judge Kluliss wants you to include your reasoning to the conclusions you reach. Please prepare the desired memorandum.

*The first issue is whether Theseus has standing to bring the claim. There is some uncertainty about the immediacy of his intentions to return to Minos, but assuming that his plans are firm and can be shown to be more than a wish, he has an immediately threatened injury (the necessity of preparing for and taking the Minos bar exam) that is caused by the Minos bar admission rule. However, the relief he seeks is to strike the words "in this state" from the Minos bar rule. Theseus assumes that the result of that relief would be that he would be permitted to enter the Minos Bar without benefit of passing a bar examination. That implies that the injury he claims to be suffering is the requirement that he take and pass a bar exam in order to practice in Minos, while graduates of the U of M and Minotaur are not required to do so. But were this relief to be granted there is no assurance that it will redress Theseus's injury, because Minos might well react to such a ruling by requiring all law school graduates, including those who graduate from the University of Minos and Minotaur University, to take and pass the Minos Bar examination. But we cannot know how Minos would react. It might require all bar applicants, in lieu of passing a bar examination, to take and successfully complete a continuing education course focusing on Minos law. Were Minos to do so, Theseus would obtain most of the relief he seeks. The Supreme Court found that the redressability requirement of standing was satisfied in *Mass. v. EPA* even though the relief requested would have a tiny and quite uncertain effect on inundation of Massachusetts's coastline. So long as there is more than a mere theoretical possibility that the relief requested may redress the injury, that element of standing is satisfied. On the other hand, a plurality of four justices in *Lujan* thought that redressability was not satisfied without proof that the change in interpretation of the statute (the relief requested) would actually stop the internationally funded projects that were the immediate source of the alleged injury. But that was the view of a plurality. The better reasoned approach is that if it is plausible that the relief requested will assuage the injury to some degree, redressability is satisfied. The *Lujan* majority did not view redressability as a barrier to standing, and the Court's opinion in *Mass v. EPA* lends strong support to this view. Theseus has standing to assert the claim.*

*The next issue is whether the Minos bar rule violates the dormant, or negative, commerce clause. States surely have authority to regulate admission to their bars, but when a state creates differential admission standards for graduates of the state's law schools and for graduates of out-of-state law schools it has impeded interstate commerce. Interstate movement of lawyers and would-be lawyers is surely a channel of interstate commerce. The Minos bar rule might be seen as intentionally and overtly discriminatory because it protects the economic interests of the two Minos law school (by encouraging people who wish to become lawyers and to practice law in Minos to attend one of the two schools), but from the perspective of an aspiring law student the Minos bar rule might be seen as even-handed – it draws no distinctions between Minos residents and those from other states. Minos extends a benefit that is open to all persons, regardless of Minos residency, but the effect of the rule is to burden (to some degree) the free flow of embryonic lawyers into Minos. If the first view applies, the Minos rule must be presumed*

*to be void, and can be saved only if Minos can prove that it has adopted the rule for a legitimate reason and that there are no less discriminatory alternatives by which it can achieve that objective. If the latter view applies, the Minos rule is presumed to be valid, and the plaintiffs must prove that the burdens placed on interstate commerce by the rule are “clearly excessive” when compared to the putative local benefits of the rule. Each of these possibilities is explored below.*

*Minos will argue that its legitimate objective is to ensure that lawyers trained outside of Minos have the requisite knowledge of Minoan law to enable them to practice law competently in Minos, and that it can rely on the two Minos law schools to train its students sufficiently in Minoan law that it need not grill them on their mastery of it following graduation. That objective might be legitimate if there was any substance to it, but the facts suggest that neither the University of Minos nor Minotaur take any special pains to instruct their students in Minoan law. The curricula of the two schools place “no particular emphasis” on Minoan law. We are left with only the appearance of legitimacy, a Potemkin village façade. For an objective to be legitimate it must also be genuine. Otherwise, all a state need do to insulate protectionist measures from this element of the inquiry would be to articulate a plausible but hopelessly phony objective. In any case, even if this objective was genuine and legitimate, there are less discriminatory alternatives open to Minos. First, it could dispense with the bar examination for all law graduates who have taken and satisfactorily completed specified courses with a specified emphasis on Minoan law, no matter the location of the law school attended. It may be true that not many law school outside of Minos would offer such courses, but there are likely to be out-of-state law schools located in close proximity to Minos that would do so and, in any case, the failure of such law schools to make such courses available to their students does not deprive the hypothetical rule of its less discriminatory quality. Another alternative would be to require all candidates for the Minos bar to prove their facility with Minoan law, either by examination or completion of a course directed exclusively to Minoan law. But if this alternative were implemented it would still not explain why non-Minos law graduates must take and pass a general bar examination while University of Minos and Minotaur graduates need not do so. The only justification for that differential impact would be that Minos thinks its two law schools provide a general (non-Minos specific) legal education that is markedly superior to that provided by any other American law school. Fine as the Minos and Minotaur law schools may be, it is a dubious proposition that they are so markedly superior to Chicago, Yale, Harvard, Columbia, Berkeley, Stanford, Hastings, Emory, Duke, Virginia, or even Charleston or Thomas Cooley, that their graduates need not be examined on their legal acumen. If the Minos rule is subjected to rigorous scrutiny, it will be found wanting.*

*If the Minos rule is characterized as even-handed we may indulge in the presumption that it is valid unless Theseus can prove that the burdens it places on interstate commerce are clearly excessive when compared with its putative local benefits. The local benefits are dubious. Minos will argue that the bar admission rule ensures that locally trained law students are proficient in Minoan law and that requiring passage of bar examination for all other neophyte lawyers ensures a similar level of proficiency. But this supposed local benefit is illusory. Without evidence that the two Minos law schools actually emphasize Minoan law (or at least teach it more than do out-of-state law schools) there is no basis for claiming that this benefit exists. The burden on interstate commerce (preparing for, taking and passing the Minos bar examination) is not extravagant, but is not a trifle. It costs money and time to pass the Minos bar examination,*

two commodities that are precious and often in short supply. Time is a zero-sum game: What one chooses to do (or is forced to do) excludes other uses of time, and since time is finite and inexorably slips away, Minos's taxation of time exacts a cost on out-of-state applicants that is not trifling. In any case, given the lack of any local benefits produced by the rule, it should not take much of a burden to be clearly excessive in relation to zero benefits. Finally, this case bears some resemblance to *Hunt v. Washington State Apple Commission*. In each case a state has erected barriers that cause people from out-of-state who wish to offer a good in the state to comply with burdensome and costly regulations that do not affect in-state competitors. The fact that the good at issue in *Hunt* was apples, or Washington-graded apples, and the good in this case is legal representation, makes no difference. Unless there are some credible local benefits produced by the regulation, the presence of significant burdens on interstate commerce ought to be enough to flunk the regulation under the test of *Pike v. Bruce Church, Inc.* Thus, it does not matter whether the Minos bar admission rule is overtly discriminatory or even-handed; it fails the test applicable to either possibility.

Minos may argue that its bar rule is saved by the market-participation doctrine, but this argument will fail because the bar rule protects two Minos law schools and only one of them is operated by the State of Minos. Because Minos has chosen to extend the protection of its favorable bar admission rule to Minotaur University, a private school, it has skewed any contention that it might otherwise have that the state's action is merely that of a market participant. Insofar as Minotaur University is concerned, the rule operates as a protective regulation.

For similar reasons Minos will be unable to invoke the emerging "public function" exemption that is encapsulated in *United Haulers and Kentucky v. Davis*. If the bar rule was designed to aid a government-run business – legal education – the fact that it extends to graduates of Minotaur University destroys the possible applicability of the "public function" exemption.

Finally, in the event that the Minos rule does survive dormant commerce clause scrutiny, there remains the possibility that it would violate the provisions of Article IV, section 2's "privileges and immunities" clause. The practice of law may be a noble profession, but it is also an occupation. Thus, differential eligibility rules for in-staters and out-of-staters to practice law infringe upon a right fundamental to interstate harmony and national union. Minos may justify the rule by claiming that outsiders are a special source of harm to Minos, in that law students trained out-of-state will be less proficient with Minoan law than the home-grown students, so the out-of-state applicants must be tested to ensure their competence. But this argument should fare no better than when it is offered in defense of the dormant commerce clause objection. Without proof that the Minos law schools are actually teaching far more Minoan law than out-of-state schools the claim is a verbal mirage. The Minos rule should not survive scrutiny under the privileges and immunities clause of Article IV.

Some of you spent considerable effort on establishing peripheral issues, such as the absence of a political question, the presence of ripeness or absence of mootness. The 11<sup>th</sup> Amendment is not a bar here, and if mentioned at all it need only be said that the 11<sup>th</sup> Amendment is not applicable because *Theseus* is seeking only injunctive and declaratory relief. Some of you tried to cover every conceivable topic raised in the course, many of which are not applicable to this problem.