

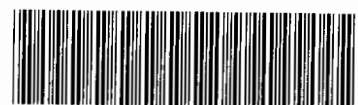
**EXCELLENT  
EXAM ANSWERS**

**CONSTITUTIONAL LAW**

**APRIL 2004**

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Professor Name: Shanor  
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## Question I

The question of whether President Rice can redirect these funds unilaterally raises various separation of powers concerns, between her own powers as President and Congress' spending and war powers.

As an introductory matter, while in this situation there has been no formal declaration of war, historically the President's war powers in "military conflicts" such as this one have been broad. An attack on American soil (terrorist or otherwise) requires defense by the nation—in this case, by striking Libya.

A formalist approach to Pres. Rice's situation here would look to the enumerated powers of the President and of Congress within the Constitution. Art II, section 2, clauses 1 & 2 grant to the President ("Pres") certain war powers—specifically, that the Pres shall be Commander in Chief of the Army & Navy, and that he shall have the power to make treaties. Art I, section 8, clauses 11-16 grant to Congress other war powers—specifically, the power to declare war and the power to raise & support armies (make expenditures).

Justice Black's formalist opinion for the majority in *Youngstown* would analyze Pres. Rice's enumerated powers as follows: First, there is a Constitutional grant of power in "wartime," because the President is the Commander in Chief. Second, there is a Congressional statute authorizing the President to use "all necessary force" against Libya, and to spend money as specified. However, Congress has not authorized the President to redirect the funds unless the Pres does so after seeking the approval of the Majority leader of the Senate and the speaker of the House. A formalist court/approach would therefore probably NOT allow President Rice to redirect the funds.

A functionalist approach to Pres Rice's situation would take into account a broader range of Presidential powers, including 1) her enumerated war powers under the Constitution; 2) her power to refuse to spend funds authorized by Congress or to withhold appropriate funds (*Clinton v. City of NY*), 3) her "emergency powers," implied to the President in times of emergency (discussed but rejected in *Youngstown*), and 4) her "inherent" pre-constitutional powers (*Curtiss-Wright*). The Pres historically has had greater authority with respect to foreign affairs than with respect to domestic affairs.

An analysis similar to Justice Jackson's functionalist concurrence to *Youngstown* would approach President Rice's situation in light of these "inherent powers." Justice Jackson outlined 3 "zones" of presidential power, to determine where the Pres acts with Constitutional authority and where he doesn't.

Zone 2: When Congress is Silent, and the President acts in absence of either congressional grant or denial of authority, the Pres can rely on his own independent powers "plus" some areas of concurrent authority with Congress. Since we have a Congressional statute here that specifically addresses the action Pres Rice wants to take, we cannot say that Congress has been "silent." Pres Rice is not acting within Zone 2 here.

Zone 1: When the Pres acts pursuant to an express or implied authorization of Congress, his authority is at its maximum (includes all he possesses in his own right plus all that Congress can delegate). We can compare Pres Rice's situation here to the Pres's situation in *Dames & Moore v. Reagan*. There the Pres had broad authority to act, based on his more expansive foreign affairs powers coupled with the national emergency of settling the Iran hostage crisis. Here, Pres Rice has similarly expansive foreign affairs powers and a similar national crisis. That would seem to imply that Pres Rice can

therefore redirect the funds as she sees necessary. However, Congress' specific provisions in the Defense of America Act ("DOA") would seem to place her actions in Zone 3.

Zone 3: When Congress says "NO," and the Pres takes measures incompatible with the express will of Congress, his power is at its lowest ebb. He can rely only on his own constitutional powers minus any constitutional powers of Congress. Since the DOA specifically says "no," the Pres cannot redirect funds without seeking permission, Pres Rice can only redirect funds based on her own constitutional powers. Even under a broad view of Pres Rice's "constitutional" powers, Pres Rice seems to be crossing a line here. Congress is the closest of the 3 branches of the federal government to the people, and the people seem to prefer that their money be spent on air strikes, not ground strikes. Congress asserted this preference specifically & expressly in the DOA.

From Congress's side, Congress has acted within its own enumerated powers—specifically, its wartime and spending powers. It has appropriately granted the Pres the authority to use "all necessary force" under its wartime powers. Congress is allowed, under its spending powers, to condition the use of funds it approves (*S.D. v. Dole*), and the Supreme Court will usually defer to Congress's judgment. Here, Congress has unambiguously conditioned the spending of funds for air & ground attacks, and has provided a mechanism for an exception to that condition—the Pres can spend in other ways if she first secures permission. Congress probably has acted within its own powers in conditioning the spending as it has.

Neither a formalist nor a functionalist justice would likely uphold Pres Rice's unilateral redirection of funds. Even under the broadest, functional view of what the Pres

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“should” be able to do “to make the Constitution work,” it seems she should not be allowed to redirect the funds arbitrarily. She should go through the proper channels and seek permission from Congress.

## Question II

In order to determine whether the HRCA is a valid exercise of Congress’s authority to regulate commerce, we must first ask whether Congress violates the 10<sup>th</sup> Amendment by regulating the states as it does with this statute.

The HRCA applies to 1) states as employers and 2) states as lawmakers. States as employers: Under *Garcia*, Congress can regulate the states as employers if it does so while ALSO regulating PRIVATE employers equally (so that the state is not singled out). The HRCA singles out the states only, and applies only to the states. This seems an invalid use of Congress’ authority under 10<sup>th</sup> Amendment jurisprudence. States as lawmakers: Under *NY v US*, Congress may not force a state legislature to enact a certain statute or to regulate in a certain manner. If Congress does so, it is commandeering the state and that’s an invalid use of Congressional authority. In *NY v US*, Congress attempted to compel the states to enact & enforce a federal regulatory program. That looks similar to what Congress is doing here with provision 2(c) of the HRCA—that is, forcing states to legislate by extending tax exemptions & property rights to married couples and to couples united in civil union. Under *Printz v. US*, Congress cannot compel a state or local govt’s executive branch to perform executive functions (that, like in *NY v US*, is commandeering). That looks a lot like what Congress is trying to do here with provision 2(b)—that is, force state & local justices of the peace to unite same sex couples

in civil union. Overall, Congress appears to be overstepping the limits placed upon it by the 10<sup>th</sup> Amendment with the HRCA. It appears to be commandeering the states' legislative & executive functions in violation of its constitutional powers.

Even if Congress wasn't overstepping the bounds placed upon it by the 10<sup>th</sup> Amendment, the activity they're trying to regulate, "discrim based on sexual orientation," doesn't look like commerce. First, it doesn't look like "discrimination based on sexual orientation" is a channel or instrumentality of commerce. Congress, with the HRCA, attempts to regulate discrimination based on sexual orientation. Traditional "channels" of commerce are highways, waterways, etc. Traditional "instrumentalities" of commerce are railroads, trucks, etc. The HRCA probably does not fit within either of these frameworks.

Second, it probably doesn't "substantially affect" commerce. Applying the Lopez framework: 1) Is it commercial or economic activity? If we look at the target of the legislation, same-sex couples, the discriminatory activity allegedly occurring in states might prevent same-sex couples from engaging in commerce (like discrimination at hotels kept minorities from engaging in commerce in Heart of Atlanta)). But Congress's findings as to discriminatory activity that would inhibit same-sex couples from spending money is weak. Same-sex couples could, in the aggregate, affect the economy (Wickard) if they spent more money once they're united in civil unions but it doesn't look like that's a probability. The statute actually requires states to confer tax EXEMPTIONS on them and other benefits that married couples get. Moving on—2) Did Congress make findings regarding the connection between this activity and interstate commerce? Yes, Congress did make findings, however findings are not always dispositive as to the proper exercise of Congress's authority (Morrison). 3) Is there a jurisdictional nexus between the activity

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regulated and Congress's authority to regulate? Maybe. The Supreme Court in *Lopez* indicated that Congress could have established a nexus there by limiting the guns they regulated to "guns that passed through interstate commerce." Here, Congress tries to tie "interstate commerce" in by saying that "discrim based on sexual orientation imposes a burden on the economy of the nation." This may or may not be sufficient for the Court (but it seems no). 4) How attenuated is the link between this local activity being regulated and federal commercial activity? In *Lopez*, the court held that gun control was trad'lly an area of state criminal regulation. Here, the benefits Congress seeks to confer on same-sex couples (keeping them off "public assistance" and giving them tax exemptions) are both federal and local. While Congress isn't treading on an area of exclusive state authority, it is infringing upon the state's ability to control its own treasury.

Overall, the HRCA seems to fail the constitutional test. By regulating the states in the way it has attempted to with the HRCA, Congress infringes upon the states' 10<sup>th</sup> Amendment protections. Further, the "discrimination" the HRCA regulates seems to fail the *Lopez* test for an activity that "substantially affects" commerce. Because Congress can only regulate commercial activity under its Commerce Clause power, the HRCA does not appear to be a valid exercise of congressional authority to regulate commerce.

Question III

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SOCA violates the dormant commerce clause only if it 1) regulates commerce; and either 2) discriminates against out of state (“OOS”) businesses [Protectionism]; or 3) unduly burdens interstate commerce (“ISC”).

First, the SOCA does regulate commerce. It regulates the sale of cigarettes through either retail stores or by direct mail, and “sale” of anything is commercial even under its most narrow definition.

Next, if SOCA facially discriminates against OOS businesses, it is per se unconstitutional, unless Georgia has a legitimate reason for the discrimination. The Court evaluated “facial discrimination” of a state law in *Philadelphia v. NY*. There, the state’s statute stated on its face that garbage coming from outside the state could not be imported into the state. Because of this facial “no OOS garbage” provision, the Court struck down the statute for being protectionist (also NJ did not have a legitimate reason for the discrimination). Here, the GA statute does not state on its face that it is prohibiting import of cigarettes from out of state. It only says that cigarette sales in GA must occur at retail establishments, not via the mail. It in fact will impact not only OOS direct mail cigarette sellers, but also in-state ones as well. SOCA mentions the state’s cigarette tax, implying that the state wants to control sales of cigarettes in order for the cigarette tax to apply & to deter smokers (and fund cancer prevention). While it would not be proper for GA to discriminate against OOS cigarette sellers *in order to collect taxes in-state*, SOCA’s broad effect on both in-state and OOS direct mail dealers means that in actuality the state will lose in-state *and* OOS tax revenues through SOCA (it will not collect taxes anymore from in-state dealers; it never did collect taxes from OOS direct mail companies).



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Because it discriminates equally against in state and OOS direct mail cigarette sellers, it cannot be said to be facially discriminatory, and therefore it is not per se unconstitutional.

Finally, if SOCA unduly burdens interstate commerce, it violates the dormant commerce clause. When a statute (like SOCA) is facially neutral, there's a strong presumption in favor of its constitutionality. Courts perform a balancing test (Kassel, Carbone) to weigh the state's local interests against the statute's impact on interstate commerce. Here, GA's local interest, as stated in the statute, is deterring its citizens from smoking, through 1) the GA cigarette tax and 2) controlling the sale of cigarettes to underaged individuals. Deterring citizens from smoking is a valid state interest—the health and safety of state citizens. Thus, GA's side of the “balance” seems heavily weighed favor of the SOCA. On the other side of the balance, the impact on ISC is not likely to be significant. Though we have no facts about the volume of sales between GA citizens and OOS direct mail cigarette sellers, consumers will still be buying cigarettes, and they will be doing so from retail establishments. These retail establishments may be interstate chains, and so the money from the cigarette sales will still be entering the flow of commerce. It would seem, therefore, that GA's local interest in SOCA outweighs the impact on ISC. However, as the court articulated in Kassel, if the state's local interests are only a facade, a pretext for protecting in-state businesses or revenues, then the statute does unduly burden commerce, is protectionist, and unconstitutional. Here, we know that the statute was really enacted to protect GA supermarket revenue. We also know that the direct mail sellers targeted really are OOS. Therefore it appears that GA's motives, like IA's in Kassel, are really NOT the health & safety of its citizens, but rather the money exchanged in-state.

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GA might still be allowed to exert these controls inside its own borders if it was a market participant. Here, however, GA is not a market participant—it does not run state cigarette stores, and does not otherwise participate in the cigarette sales market (as far as we know). GA is therefore not entitled to protection under the market participant exception.

Because this is not a valid state regulation of commerce, the SOCA probably does violate the Dormant Commerce Clause. Because the dormant commerce clause is a mechanism the COURTS use to overturn state legislation that affects interstate commerce, if SOCA is overturned, Congress might still be able to come back and make a decision as to whether SOCA (or statutes like it) is valid or not. Legislation by Congress would “trump” any decision a court made in this case.

#### Question IV

Legislation passed by Congress must satisfy the provisions of the 14<sup>th</sup> Amendment Equal Protection clause. Though the amendment originally applied only to the states, 14<sup>th</sup> Amendment jurisprudence has evolved to “incorporate” Congress’ responsibilities under the 5<sup>th</sup> Amendment into the 14<sup>th</sup> Amendment, holding Congress accountable just as states traditionally have been.

In order to analyze the PBEA under the 14<sup>th</sup> Amendment’s Equal Protection provision, we must determine first whether it contains a “suspect” classification. Race is the original “suspect” classification, dating back to the passage of the 14<sup>th</sup> Amendment to protect the former slaves, who were African-American. The PBEA contains racial

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classifications, providing remedies for only African-American students, to the exclusion of white students and/or other minorities.

Next, we must ask whether the PBEA's racial classification has a discriminatory purpose or intent. If the PBEA is facially discriminatory, that amounts to "invidious" discrimination and subjects the PBEA to strict scrutiny (*Strauder v. West VA*). If the PBEA is facially neutral but discriminatory in effect, that also amounts to invidious discrimination and subjects the PBEA to strict scrutiny (*Yick Wo v. Hopkins*; *Loving v. Virginia*). Only if the PBEA is facially neutral with a discriminatory *impact* may it be subjected to a lower level of scrutiny (*Washington v. Davis*). The PBEA is probably facially discriminatory. It singles out African Americans, as distinct from any other group in America, and confers benefits/remedies on them that it does not confer on the other groups. While in *Strauder* African Americans were singled out and *forbidden* to do something (serve on juries), and here African Americans are singled out and *given* something, the discriminatory nature of the statute in question is the same. The PBEA must survive strict scrutiny in order to be constitutional.

Congress attempts to create an "affirmative action" statute that protects African American children with the PBEA. Since *Croson*, however, the Supreme Court has made it clear that affirmative action statutes are no different from statutes that discriminate by depriving a race or group of benefits. *Adarand* extended this requirement to the federal government (where previously it had been thought to apply to states). Both *Croson* & *Adarand* establish standards for affirmative action statutes: they must be narrowly tailored to a compelling government interest. *Croson* specifies that redressing past

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discrimination might rise to the level of “compelling governmental interest,” but the past discrimination must be by a particular target of the legislation, not society at large.

Applying strict scrutiny to the PBEA: 1) Congress must prove it has a compelling governmental interest educational equality and 2) the remedies in the PBEA must be narrowly tailored to fulfill that interest.

First, Congress’ compelling governmental interest: Per Croson, while Congress may have a compelling governmental interest in redressing past discrimination, that discrimination must have been by an identifiable group and not by society at large. Here, therefore, Congress must show with clear evidence that specific discrimination in education against African American children has occurred at the hands of local school boards, or as a result of the states’ educational funding system. Congress’s findings, provided in the PBEA, do not seem to provide clear convincing evidence of this specific discrimination. The PBEA states generally that “African American students continue to receive educational opportunities inferior to the educational opportunities of white children” and that educational experts attribute this to unequal funding and subtle and overt inequality in the classroom. The PBEA does not point to specific instances of discrimination, or evidence aside from the experts’ opinions, that this discrimination has actually occurred. Congress does not seem to have satisfied its burden of proving a compelling governmental interest. In *Brown v. Bd of Education*, however, the Supreme Court accepted broad findings like these, and therefore it might do so again. Assuming that the Supreme Court does accept Congress’s argument that it has a compelling governmental interest in remedying this educational discrimination...

Second, PBEA's remedies must be narrowly tailored to remedy the educational discrimination described. Remedies that are arbitrary and/or overinclusive are not "narrowly tailored." Nor are remedies prescribed without consideration for race-neutral alternatives. Remedy 2(a), magnet schools for African-American students, appears to be pretty arbitrary. Congress does not state that other races can attend the magnet schools. Since Congress's findings detail only discrimination against African American students, however (and no others), this narrow, strictly defined remedy of magnet schools for African American students might satisfy the "narrowly tailored" test. On the other hand, it includes ALL African American students as those who can attend the schools, and does not specify who within that group has been discriminated against. This appears overinclusive. However, if discrimination truly affects every African American child, it may satisfy the test. Remedy 2(b), use of Congressional funds to equalize funding for African-American students, makes no pretense of consideration of race-neutral alternatives, such as increased funding for all underprivileged or minority students. It specifies per-pupil funding for ALL African American children, even those who might live in affluent school districts. It does not appear to be narrowly tailored, unless the group that is discriminated against truly is ALL African American children.

Because PBEA affects education, a discussion of whether education is a "fundamental right" protected by the 14<sup>th</sup> Amendment Equal Protection Clause, may be warranted. The Supreme Court stated in the Rodriguez case that there is no fundamental right to equality in public school education in the United States. As the law now stands, therefore, there is no fundamental right to the kind of equal education the PBEA purports to create. PBEA, like the TX statute in Rodriguez, seeks to equalize funding. The court

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struck that down in Rodriguez. Aside from any racial considerations, therefore, the educational rights the PBEA attempts to protect are not protected under the 14<sup>th</sup> Amendment.

On balance, the PBEA does not seem to meet the requirements of a strict scrutiny analysis. Congress probably does not have a compelling governmental interest in remedying the discrimination the PBEA describes (because Congress cannot link it to specific instances of discrimination), and the PBEA, at least as far as the magnet schools remedy is concerned, probably is not narrowly tailored to the end it seeks to achieve. As far as the equal-funding remedy, the PBEA is likewise probably not narrowly tailored. Though the Supreme court might make a statement with a PBEA case should it come before it (like it did with Brown), it will probably strike the PBEA down for the discrimination it establishes against not only white students, but other minority and underprivileged students as well.

#### Question V

Legislation, including California's adoption standards here, must satisfy the 14<sup>th</sup> Amendments Due Process requirements in order to be adjudged Constitutional.

In order to analyze CA's adoption law under the 14<sup>th</sup> Amendment's Due Process provision, we must determine first whether Ms. DeGenerous ("Ms. D") and Ms. Lebeckon ("Ms. L") have a constitutional right, as homosexuals, to adopt a baby. First, there is no specific textual provision in the Constitution granting the right to adopt. A

second, historical analysis, sheds somewhat more light on Ms. D & Ms. L's situation. Traditionally, adoption has been a right granted by law to couples, and later individuals, in the United States. A strict historical analysis will probably reveal that homosexual couples, as a distinct group, have not necessarily been granted the right to adopt. A broader historical analysis will take into account the more general "right to adopt," however, and extend it to anyone, homosexual or otherwise. A third, stare decisis/precedent analysis gets us nowhere within CA law (we have no facts about CA cases), but several Supreme Court cases address child-rearing and sexuality.

The Supreme Court recognized a "fundamental liberty interest" in child-rearing in *Troxel v. Granville*. In *Troxel v. Granville*, however, the parents were biological parents, and the right that was protected was the right to raise the child they already had. The Supreme Court in *Lawrence v. Texas* recognized a "liberty interest" in private consensual adult sexual conduct, which in that case meant that a homosexual couple could not be prosecuted criminally for that sexual conduct. These cases together lead us nowhere concrete, but do point to the court recognizing some interest in parenting, and some protection of homosexuals (for conduct if not as a group).


We must analyze Ms. D's & Ms. L's right to adopt, then, as a "new" right. The court in *Lawrence* indicated that an "emerging awareness" in the United States that liberty protects homosexual conduct. Applying this "emerging awareness" analysis to our facts here, there may well be an "emerging awareness" in the US that homosexual individuals, if not couples, should be able to adopt children if they can pass the same standards heterosexual couples must pass to adopt. Another possible analytical approach would be the "law of nations," where in *Lawrence* the court recognized that countries in

Europe did not criminalize homosexual behavior, and therefore we in the US should not either. Scalia's dissent in that case roundly criticized the "law of nations" approach, and it seems for our purposes the "emerging awareness" analysis is probably more useful.

If we recognize under an "emerging awareness" theory that Ms. D and Ms. L have a constitutionally-protected liberty right to adopt, we must analyze a deprivation of that right with rational basis scrutiny. CA must, under this standard 1) have a legitimate state interest in preventing homosexuals from adopting, and 2) the adoption law in question must be rationally related to that end. Morality is a legitimate governmental purpose under the rational basis test, and indications from the era in which the statute was passed show that it may have been passed with morality in mind (homosexuality= mental disease). The statute itself states that the homosexual couple must keep its sexual orientation discreetly concealed from impressionable children—again implying that homosexuality is immoral. The health & safety of its citizens is also a legitimate state interest, and the statements by CA Atty Genl Ashcroft point to the statute as in the "best interests of the child." It seems the state might well have a legitimate interest in preventing homosexuals from adopting, at least to satisfy the rational basis test. The adoption law in question is also probably related to that end, in that it keeps children away from "immoral" homosexuals and gives them to "better parents" like heterosexual couples. The statute might therefore survive rational basis scrutiny, and would NOT be a violation of Ms. D's & Ms. L's substantive due process rights.


On the other hand, we may be able to argue that homosexual couples' right to adopt is a "new" right by applying the Moore concentric circles test to Ms. D's & Ms. L's situation. We must assume from the facts that Ms. D's & Ms. L's marriage in San



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Francisco is legal, and therefore that they are a married, committed couple. If the “core” of the concentric circle is the nuclear family, a traditional, married, heterosexual couple who adopted a child, then the next ring in the circle could certainly be that of a married homosexual couple who also adopted a child. The outer rings would be divorced couples, orphaned children, single moms, etc. Viewed in this light, Ms. D’s & Ms. L’s right to adopt might even rise to the level of a “fundamental interest” on par with those protected under 1<sup>st</sup> amendment penumbra/right to privacy jurisprudence (like the nuclear family in Moore, the right to marry in Zablocki, and child-rearing in Troxel).

If the right to adopt can therefore be construed as a fundamental right, the CA adoption law must survive strict scrutiny in order to be adjudged constitutional. The state must then have a 1) compelling state interest; and the statute must be narrowly tailored to that interest. Morality is NOT a compelling state interest for purposes of strict scrutiny, therefore the state’s statements about protecting the morality of the children would not be enough. The state has asserted no other explanation for the discriminatory adoption law that would rise to the level of ‘compelling state interest.’ It would in fact seem to be the contrary—that the compelling state interest is in providing safe & stable homes for the children in CFDS custody. If Ms. D & Ms. L are married, safe & stable, they should be able to adopt. Even if the state had a compelling state interest in keeping homosexuals from adopting, this statute might not be narrowly tailored enough. It does not make a distinction between a married or unmarried homosexual couple, nor does it explain why a homosexual couple would have to keep its sexuality a secret where heterosexual couples might not. Judging by all these uncertainties, it’s unlikely that the CA law would survive strict scrutiny.

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The CA adoption standards might violate Ms. D's and Ms. L's substantive due process rights, depending on what kind of "right" they have to adopt a child. If they have a liberty interest in adoption, then the CA standards would probably survive the rational basis scrutiny that would be applied, and the CA law would not rise to the level of a violation of the women's substantive due process rights. On the other hand if they, as a married couple, have a fundamental right to adopt, then the CA law would have to survive strict scrutiny. It probably could not survive strict scrutiny and therefore the CA law would be a violation of their substantive due process rights.