

**MIDDLE OF CLASS
EXAM ANSWERS**

CONSTITUTIONAL LAW

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PROFESSOR CHARLES SHANOR

EMORY UNIVERSITY



200000031689

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Course: con law
Professor Name: Shanor
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I. May Pres. Rice redirect funds unilaterally w/o violating Const?

Under a formalist view, Pres. Rice would have trouble redirecting funds but could make a strong argument for it. The Constitution gives the Pres the powers of Commander in Chief of the US military forces and the power to make sure the laws are faithfully executed. It also grants Congress the power to declare war and appropriate funds. Because Congress can appropriate funds, a strong textual argument can be made that it can decide how those funds should be spent. However, because the President is the Commander in Chief, she should be able to run military operations as she sees fit. Limiting funding to only certain types of military functions restricts her power and ability to act as commander in chief. Congress is responding to public opinion rather than the true needs of the situation, so Pres R could possibly succeed in redirecting funds under this theory.

Under a functionalist view, likely Pres. Rice can probably redirect these funds without violating the constitution. Jackson's analytical model to Constitutionality of Exec Orders might have some bearing on Rice's options. When the Pres has the express consent of Congress, power is at its greatest. However, when the Pres acts in contradiction to the express or implied will of Congress (i.e. by spending more money in one area than appropriated) his power is at its weakest. Pres Rice redirecting funds would not be a law-making action but a discretionary action. In this situation, because the Pres would be operating against the express will of Congress, her power would be rather weak if this were a domestic affair.

However, because it is foreign affairs and a war effort at that, the President's powers are usually considered greater and granted more deference. In *US v. Curtiss-Wright*, the

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Court tolerated a greater delegation by Congress to the President in foreign affairs.

While that was a delegation of power rather than the President just using it on his own, that could still lend support to Pres. Rice's action. Furthermore, Dames and Moore stated that because Congress had acquiesced in similar presidential behavior, it impliedly authorized the conduct. Here, Rice could argue that past Pres power in directing troops during war efforts shows an implied authorization of Congress to use the funds as she sees fit.

The consultation requirement with the Majority Leader and Speaker could be considered reasonable b/c it would give Congress a chance to better do its job. This would allow a conference before letting the Pres just usurp Congress's dictates. This however, may look similar to a line-item veto in that it allows two members of Congress and the President to override the bill passed by the rest of Congress. ON the other hand, the Pres could argue that this is a legislative veto overriding her power to operate as Commander-in-Chief of the armed forces.

The Pres could likely redirect funds in this case under one of these theories also because the Court would not be likely to get involved. Determining whether the Pres can redirect funds would likely be a non-justiciable political question the Court would prefer to avoid. The court tends to leave foreign affairs and war issues up to Congress or the Pres. IT would also be an unsuitable policy determination clearly for non-judicial discretion. The Court would have to say whether or not to spend funds on certain military operations.


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Q II. Is the Human Rights Conformity Act a valid exercise of Congressional authority to regulate commerce?

No. Under the Commerce Clause (CC) Congress has the power to regulate commerce with foreign nations. Congress will argue that this law was created in order to improve commerce with the EU. In arguing for this law to be a valid exercise of its power, Congress could look to Heart of Atlanta, in which the motive behind the Civil Rights Act was not purely economic or commercial, but moral and social. However, that case can be distinguished because hotels were a commercial activity. Here, Congress is trying to regulate activities that have an effect on commerce, the most contentious and hardest area to reach with the CC power. It uses findings to support its legislation, but is trying to reach an area that is traditionally an area of state activity and state regulation. The findings are not specific enough of the effects on interstate commerce and are very conclusory. They do not support the remedy under a congruence and proportionality test.

In US v. Morrison, the Court struck down a law that focused on the victims rather than the perpetrators when it was based on the CC power. Here, the language does focus on the perpetrator, the state. However, even if a law is within Congress's powers, it can still be unconstitutional because it is treading too much on state authority. In Garcia, the court said that Congress had the power to regulate municipalities, but here, they are trying to regulate the states as a whole. Domestic affairs, marriage, and property rights are traditionally areas of state regulation. The conservative judges on the court would likely find this to be a usurpation of the states' authority in this area.

Here, a good case could be made that Congress is trying to commandeer the states. To determine whether the legislation is commandeering, one must look at whether the

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regulation is affirmative or negative, its applicability, accountability and choice involved. Here, while the act is worded as a negative regulation which is usually considered ok by the court, it acts to make the states DO things which is considered an affirmative regulation. Here, the states must recognize tax exemptions and property rights for same sex unions. Furthermore, in looking at the applicability of the statute, it is only applied to the states, not to private entities. State employers would have to recognize same-sex unions for benefits packages, but private employers would not be required to do so. In studying the accountability, if taxes go up to pay for benefits packages of same-sex families in state-employed jobs, people would want to hold their state accountable when the federal government is who made the law. The states have no choice in whether or not to follow this rule.

People discriminated against under this statute would have trouble enforcing it because of state sovereign immunity. Congress cannot take away the sovereign immunity of the states by allowing private suits in the states courts for violation of federal laws. Under the 11th amendment, individuals would not be able to sue for violations of this statute. The court might allow an agency to sue for enforcement of the law, but not for damages.

Congress might argue that there is a fundamental liberty interest in marriage, even between people of the same sex (Zablocki). Congress will also argue that European notions of liberty are very important based on the SC decision in Lawrence v. Texas in which the court looked specifically at the EU notions of liberty. The states could likely counter this argument by looking at comparative studies with other parts of the world; and pointing out that the Constitution is for the US and not other countries.


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Likely, the Act would be found unconstitutional if only based on Congress's commerce Clause power.

Q III. Does the SOCA violate the DCC?

No. In deciding whether a state action violates the DCC the Court has used two tests: the substantial burden test and the balancing test. Under the substantial burden test, the Court looks at whether an act imposes a substantial burden on interstate commerce. While not allowing sales of cigarettes by direct mail would have some effect on interstate commerce, this does not keep sellers from contracting with retail establishments in GA. There would still be other ways of reaching the market while still protecting the health and safety of the residents of GA. O'Connor would look at the aggregate effects of the legislation. If every other state did the same thing, would there be an effect on interstate commerce? Here, there is more than one beneficiary of the legislation, unlike in *Carbone*, and likely the legislation would be upheld under this test.

The more frequently used test, the balancing test would also go in favor of the legislation. In *Willson v. Black Bird*, the Court balanced the interstate commerce considerations and the local health and safety interest in building a dam across a creek. The court upheld the act because of the strong local interest involved. Here, the effect on interstate commerce is arguably minimal. The act only keeps people from ordering cigarettes through the mail or online. It does not stop them from buying them in stores or even crossing state lines and buying them elsewhere. The findings of the legislature demonstrate a strong local interest in protecting people under 18 from buying cigarettes and in receiving the sales tax used for funding cancer prevention programs.

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Even if the court found this act to be a protectionist measure, rather than a way of resolving a legitimate local concern, it could still uphold it if an extreme local interest existed and there was no reasonable alternative. Quarantine laws on the import of plants and animals have been held constitutional. The state could argue that importation of cigarettes via mail or online order forms could allow for purchase of cigarettes that did not meet the quality specifications necessary to be sold in a retail establishment. Secondly, because of the inability to determine the age of the online purchaser, there was no reasonable alternative to not allowing sales by this manner for keeping purchasers under the age of 18 from receiving cigarettes. Thirdly, there is an extreme local interest in the health of citizens and the possibility of having to provide healthcare for them in the future. Providing healthcare for those with cancer from cigarette addiction is very expensive, and a state has a valid interest in preventing such harm.

The statute here is not really facially discriminatory. It is only regarding sales of cigarettes in GA. It does not keep out-of-state people from purchasing cigarettes in GA or keep out-of-state companies from marketing cigarettes to GA retail establishments. Furthermore, it does not have a dozen exceptions like *Kassell*, and the Court has not overturned a neutral statute since *Kassell*. The court has held use of sales taxes for subsidies constitutional in many circumstances as well. Likely the act would be upheld under the DCC analysis.

Q IV. Does the PBEA violate the constitutional guarantee of EP?

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Congress has been given the power to enforce the Reconstruction amendments through appropriate legislation. The guarantees of the 14th amendment apply to state action and public education is a traditionally state action. 11th amendment sovereign immunity does not help the states in situations of racial discrimination because the 14th amendment was passed later. Congress has broad remedial powers in adopting legislation to enforce these amendments. In *Katzenbach v. Morgan*, Congress expanded the rights contained in the 14th amendment. This case allowed Congress to expand EP rights when fact-finding dictated that such expansion was necessary to give EP to everyone. Another theory developing from that case was that congress could expand but not limit rights. (Brennan's one-way ratchet). However, if the findings of Congress don't provide enough support for remedial legislation, then Congress cannot expand the rights so far. Such findings should support the action under the congruence and proportionality test.

Here, the findings of Congress in support of this act might support some type of remedial action, but not action to the extent given in the remediation section. The government has to show for a classification based on race that there is a compelling governmental interest and that the legislation is narrowly tailored to meet that goal, even if the legislation is beneficial to a group historically subjected to discrimination. Here, the legislation is not narrowly tailored, even though there is a compelling governmental interest in ending discrimination in schools.

The first remediation provision likely violates the EP clause of the US Constitution. First of all, *Brown v. BOE* found that separate but equal was inherently unequal and therefore unconstitutional. Separate schools were found to be inherently unequal as a matter of social stigma, liberty interest, and social integration. The act here is going back

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50 years to revive the idea of schools that are separate but equal are ok, as long as they are given equal funding.

Secondly, this Act is both over-inclusive and under-inclusive. It looks to highly-populated urban areas for places to create magnet schools, assuming automatically that all highly populated urban areas have a high concentration of black students and underfunded schools. Furthermore, the act ignores poor rural areas that also have high minority populations and little funding, leaving them to continue having lower quality education. All cases after Korematsu have stated that if a statute is over or under-inclusive, it is unconstitutional.

The Act is facially discriminatory. It creates publicly funded schools for only black children. Other racial and ethnic groups are also protected by the EP clause, so it is not fair to only allow magnet schools for black children and exclude hispanics, whites, asians, or indians. (City of Richmond)

The Act is not narrowly tailored in that there are other ways to reach the goals of Congress and provide for equal education. The Act ignores the possibility of race-neutral alternatives. In Grutter, the court found a compelling state interest in diversity in universities. The same state interest could probably be involved in elementary and secondary schools as well. In creating a racially based entrance into a school, Congress is thwarting that interest in diversity of the states.

In US v. VA, the Court held that publicly funded separate men's and women's colleges were unconstitutional b/c they did not provide the same type of advantages to each sex. In the same way, publicly funded segregated magnet schools do not provide the same opportunities to other children.

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Under the second remediation provision, Congress would have more weight in its proposal, but again it would likely be found unconstitutional. First of all, providing equal funding to predominantly black schools is a good idea, but Congress's method needs some work. Congress is establishing a presumption, like in Adarand, that all predominantly black schools are under-funded. While the purpose of this act is to equalize educational opportunities for black and white children, it again ignores other minority schools that are underfunded or even under-funded white schools in poor areas. This part of the act is still under-inclusive.

Furthermore, while it is targeted at race, this restriction is essentially a wealth classification. In Rodriguez, the court held that there was no fundamental right to an education and that the poor are not a protected class. The court did not allow differing funding in areas to be considered a deprivation of equal protection. Many areas can afford to supplement state funds with local taxes, and spending money to equalize funding only predominantly black schools is still unfair to other lower income school systems that are not predominantly black. These children have not been totally deprived of an education and therefore, the funding formulas cannot be subjected to a higher scrutiny.

Q V. Do CA's adoption stds violate Fed Substantive DP rights?

There are several ways to look at whether the adoption stds violate DP rights. Under the old and largely tossed away Bill of Rights Approach to substantive due process, the adoptions standards would not violate Substantive DP. Under that approach, only rights incorporated from the bill of rights would be protected by the DP clause. The second

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view would be the Fundamental rights view of DP. IN that view, DP protects fundamental rights of individuals. There are two schools under that theory: the conservative view that defines fundamental rights and traditions narrowly and the more liberal view that defines fundamental rights and traditions broadly.

Under the narrow fundamental rights view, the adoption standards would not violate DP. The traditional notion of family and marriage as limited to heterosexuals would carry into adoption procedures and allow the CA laws to stand. Ashcrafty's arguments of the best interests of the child and not promoting homosexuality would fit well into this view. However, these are just the type of arguments that the MA supreme Court denied in the Goodridge case allowing homosexual marriage in that state. The traditionalists would argue that the fundamental interest in marriage found in Zablocki was limited to heterosexuals because that case concerned only heterosexual marriage. They would further argue that there is a strong state interests in promoting the general welfare and morals of its citizens.

D and L have several arguments in their favor under the broad view of fundamental rights. First of all, there is a fundamental interest in marriage from Zablocki. While that case did only center on the rights of heterosexuals, it could be used in this context as well. By denying homosexual couples the right to adopt children unless no heterosexual couples are available, the state is creating a second-class type of marriage. The homosexual equal rights campaign would be stopped in its tracks at the question of adoption.

For those opposed to abortion, allowing homosexual couples to adopt would allow more children to be adopted rather than aborted. Since adoption and abortion are

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interrelated issues, adoption might be an area in which an undue burden test could be used. Requirements placing an undue burden on fit parents seeking to adopt children could be held unconstitutional under such a standard. The incidental effect of determining whether someone is a fit parent should be considered ok b/c children in the care of the state should not be given to unfit parents to raise.

If not adopting an undue burden standard, the court generally looks at discrimination against homosexuals under rational basis standard. If the state has a rational basis in choosing heterosexual parents over gays and in determining fit parents by their discretion in displaying their sexual orientation, then the statute could pass muster. However, the MA court did not find even a rational basis in not allowing homosexual marriage, and with the courts in CA, likely D and L could get the statute struck down even on that basis. They would however, have to overcome Ashcrafty's arguments on best interests of the child and not promoting homosexuality. The state could find an interest if it could show that children raised in such homes are subject to discrimination in school or later in life. It might also show a state interest if it had any findings regarding length of homo partnerships or income levels or other such aspects.

Defining a fit parent seems to be another problematic part of the CA statute. There are no studies showing that a homosexual person is more likely to be an unfit parent than a heterosexual person. There are plenty of unfit heterosexual parents in the world today, and this statute seems to assume that heterosexual couples are automatically fit parents.

Several arguments from Lawrence v. TX might help D and L. Under the emerging awareness argument, D and L could argue that there has been an emerging awareness of homo rights and that they should be allowed to adopt children just as easily as hetero

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couples. This argument allows the court to pick and choose the modern trends it likes. They could possibly use the history and tradition argument by looking at recent history and tradition rather than older history and traditions. D and L might also want to use the EU argument and point out what countries in the EU are doing about adoption by homo couples. Ashcrafty will argue that the court should look at other countries and not just the EU.

For these reasons, D and L could argue in a quite successful manner that the adoption standards violate their DP rights under the broad view of substantive DP and fundamental rights.