

**Exam Post-Mortem**  
**Constitutional Law II – Fall 2009**  
**Professor Massey**

Below is a brief dissection of the examination. What follows is a repetition of the essay questions 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. The range of raw scores was 15 to 41. The median was 28. The median course grade was a B+.

**Question One**  
***(Word Limit: 1200 words)***

*After many political skirmishes, Congress enacts and the President signs into law the Health Care Reform Act of 2009 (“HCRA” or the “Act”). The Act extends present Medicare coverage to all citizens and lawful residents of the United States, funds that coverage through increases in income taxes, provides covered medical care without additional charges to the recipients of the care, renames Medicare as “National Health,” and prohibits health care providers from providing their services to patients except through National Health. The Act authorizes National Health to make rules and regulations to ensure that adequate medical care is provided to all covered persons, but also to preclude medical procedures when the “cost of the care materially exceeds the benefits of the care in terms of extension of life or improvement in the quality of life.” Under that authority, National Health promulgates a regulation that denies bone marrow transplants to patients age 70 or greater who are suffering from blood cancers such as leukemia (“Regulation Dracula”).*

*Jane, age 75, has been told by her National Health physician that her leukemia will likely be fatal within six months if she does not obtain a bone marrow transplant. A suitable donor has been identified and Jane’s physician is confident that, consistent with the medical evidence, a bone marrow transplant will provide a 70% probability of extending her life by two years, a 50% chance of extending her life by five years, and a 20% chance of extending her life beyond five years. Jane’s physician would be willing to provide a bone marrow transplant privately at a cost of \$200,000 and Jane is willing and able to pay the high cost of such a transplant. Jane has filed suit in federal court, asserting two causes of action. In her first claim, she seeks a declaration that Regulation Dracula is unconstitutional as applied to her, and an injunction to prevent the enforcement of that regulation. In her second claim, she seeks a declaration that the Act’s prohibition of provision of private medical services is unconstitutional as applied to her, and an injunction to prevent the enforcement of that statutory prohibition.*

*You are the newly hired law clerk to District Judge Curt DeMeanor. He has asked you to*

*provide him with a memo analyzing the merits of these claims, including a conclusion about the constitutional validity of each of the challenged provisions. Please do so.*

Two of Jane's claims raise the question of whether the federal government has unconstitutionally infringed a substantive liberty interest of Jane. A third set of claims is based on an alleged violation of equal protection principles.

First Cause of Action. A "careful statement" of the liberty interest asserted by Jane is necessary. That requires that the liberty interest at issue be framed in terms of the actual deprivation of liberty that the plaintiff claims to suffer. Regulation Dracula, as applied to Jane, deprives her of a government funded medical procedure that her physician deems to be necessary for the preservation and extension of her life. The next question is whether that interest is constitutionally fundamental. In order to answer that question it is necessary to determine whether the claimed liberty is so deeply rooted in our national history and tradition as to be inherent in the concept of ordered liberty. The government has no obligation to fund medical procedures of any kind. Not only is a government funded medical procedure a discretionary benefit, there is no deeply rooted legal tradition of providing such a benefit. At most, a limited benefit has been available to Americans over age 65, in the form of Medicare, since 1965 or so. Moreover, standing alone, Regulation Dracula does not deprive Jane of the ability to use her own resources to obtain the care she and her physician desire.

Because there is no constitutionally fundamental liberty interest at stake, Regulation Dracula is valid unless Jane can prove either that the regulation lacks any legitimate objective or that, assuming such an objective exists, the regulation does not rationally serve that objective. Generally, the objective may be hypothetical, so long as it is plausible or conceivable that Congress might have had it as an objective. Here, Congress has declared that it wishes to preclude medical procedures when the "cost of the care materially exceeds the benefits of the care in terms of extension of life or improvement in the quality of life." National Health has determined that the cost of providing this expensive therapy materially exceeds the benefits for the entire group of patients over age 70. Assessment of costs and benefits and limiting government funded medical care to those procedures that deliver benefits at least commensurate with the cost of the care is surely legitimate. Here, Congress has even stated its objective. The regulation serves that objective rationally, if not optimally. The first cause of action is without merit.

Many of you treated Regulation Dracula as if it alone deprived Jane of the ability to seek life-preserving medical care. It does not do so. Many of you thought that Regulation Dracula implicated procedural due process. The regulation is authorized by the legislation and substantive legislative changes, including implementing administrative regulations, are immune from procedural due process inquiry. In order for Jane to be able to challenge the application of the regulation to her as a violation of procedural due process, she must have a life, liberty, or property interest that has been taken from her without adequate notice or opportunity to be heard. The regulation, by itself and as applied to her, simply states the government's refusal to provide subsidized care to certain patients, including Jane. Neither the statute, the regulation, nor any prior governmental action of which we are aware on these facts creates any bilateral expectation that Jane will receive subsidized medical care for her life-threatening condition.

Second Cause of Action. Again, we must start with a “careful statement” of the liberty interest asserted by Jane. Here, that interest is the liberty of seeking life-preserving medical care. The statute prohibits medical providers from providing care except through National Health, and Regulation Dracula prohibits National Health from providing the medical procedure she seeks. Not only is there a long-standing national tradition of permitting people to seek medical care from physicians and surgeons that is judged to be efficacious by patient and physician, this prohibition denies to Jane the ability to obtain care that may well extend her life. If there is a constitutionally fundamental liberty interest to refuse life-saving medical care surely there is a constitutionally fundamental liberty interest in obtaining life-saving medical care by using one’s own resources. Unlike *Maher* or *Harris*, the government’s ban on the provision of medical services except through National Health, coupled with Regulation Dracula, is a direct interference with a crucial and constitutionally fundamental liberty interest. Unlike *Maher* and *Harris*, the government ban directly alters her ability to seek life-saving medical care.

The government might contend that she remains free to seek medical care in other countries, and thus the government ban is little different than the regulations at issue in *Maher* and *Harris*. The problem with this argument is its extraterritoriality. The question in substantive due process cases is whether the government has, within its own jurisdiction, unjustifiably infringed a constitutionally fundamental liberty. The government’s hypothesized argument would permit all manner of such infringements so long as there remains a theoretical possibility that an American could travel to another country and find more liberty. This is an outrageous and obnoxious doctrine with no root in American constitutional law.

Accordingly, the government must prove that it has a compelling reason for its ban on the provision of medical services except through National Health and that the ban is necessary to the accomplishment of that objective. The government will argue that the reason for the ban is to prevent medical providers from refusing to treat National Health patients. Unless such a ban is in place, physicians might simply limit their practice to those patients wealthy enough to pay for their services. It is not clear that this is a compelling reason. National Health is a social program; while it is entirely legitimate it is not clear why barring physicians from opting out of National Health is of paramount importance. Without some evidence that the problem the government identifies is real or pervasive, it is difficult to assess whether the physician ban is of crucial importance. Assuming for the sake of argument that this objective is compelling, it is not clear that the total ban is necessary to achieve the objective. As applied to Jane, her physician (who has been treating her under National Health) is willing to provide the desired procedure outside of National Health. There is no indication that this will materially impede his or her ability or willingness to treat other National Health patients. A less-than-total ban (perhaps limiting the proportion of one’s medical services provided outside of National Health) would seem to be a reasonable and less restrictive alternative. Jane’s second cause of action is likely to succeed on the merits.

Third Cause of Action: Equal Protection. Equal protection applies to the federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*. This cause of action has two independent claims. First, Jane will contend that she has been denied equal protection because the private care ban infringes a constitutionally fundamental right – the right to seek access to life-preserving medical care. This claim is merely a repetition of the substantive due process claim, albeit framed in equal protection language, and will succeed or

fail precisely to the extent her substantive due process claim will succeed or fail.

The second equal protection claim is based on the contention that Regulation Dracula classifies on the basis of age. Age has not been recognized as a suspect or quasi-suspect classification. While age is immutable there is no lengthy history of prejudice against older people. Such governmental measures as Social Security, Medicare, property tax abatements for the elderly, and the like suggest that the elderly have been assisted by government, rather than disadvantaged. Moreover, voting patterns indicate that elderly Americans vote at a greater rate than younger Americans. There would appear to be no lack of political power held by the elderly.

Thus, Regulation Dracula does not violate equal protection if it is rationally related to a legitimate governmental purpose. The government's interest in adopting the regulation is to ration medical care by a form of financial and medical triage. That is a legitimate objective. While the regulation is a blunt instrument, being both under and over inclusive, those features, by themselves, do not prove that the regulation is an irrational means to achieve the objective. It is rational, though perhaps callous and crude, to deny subsidized care to the class of older Americans affected by Regulation Dracula.

## **Question Two** **(Word Limit: 1000 words)**

*In October of 1769, a detachment of Spanish explorers led by Don Gaspar de Portolà arrived at Monterey Bay, following a grueling overland march from San Diego Bay. They erected a cross on the beach as a marker to guide the San Jose, a Spanish ship bearing much needed supplies for Portolà and his men. These facts are known to history because of the surviving diary of Juan Crespi, a priest accompanying the expedition. On June 3, 1770, Portolà and his men began construction of the Mission San Carlos Borromeo de Carmelo and founded the Presidio of Monterey.*

*In 1969, to commemorate the 200th anniversary of Portolà's arrival, the city of Monterey, California erected a wooden cross on Monterey's Del Monte Beach, a spot thought to be close to the location of Portolà's original beacon cross. The Del Monte Beach cross was one of several commemorative events that surrounded the bicentennial of Monterey's founding and all of them were given considerable publicity in an effort to educate the community about the events of 1769. At the time, historians noted that Portolà used a cross as his beacon because it was certain that his Spanish colleagues would recognize it as being erected by fellow Spaniards. In September, 2009 vandals destroyed the commemorative Del Monte Beach cross. The City Council of Monterey is considering replacing the cross with a new wooden cross, of a size, shape, and construction as nearly identical to the 1969 cross as is possible. Before doing so, however, the City Council wants your advice on the constitutional validity of this replacement, and would value any suggestions you may have about ways to make the erection of the new cross more legally defensible, so long as those suggestions do not involve compromising the historical integrity of the commemoration. Please advise the Monterey City Council.*

The question is whether the city of Monterey's proposed action would constitute an establishment of religion, forbidden by the First Amendment and incorporated via the Fourteenth Amendment's due process clause to apply to the states and their political subdivisions, such as the city of Monterey. Under the *Lemon* test, Monterey has a secular purpose for the display – to commemorate a significant historical event that led to the founding of the city. Unlike the Ten Commandments display at issue in *McCreary County*, there is no historical context that suggests that the cross was erected because it is a symbol of Christianity. Instead, the 1969 cross was erected to commemorate the events that constituted the founding of Monterey. Because the original Del Monte Beach cross was but one part of other commemorative events that celebrated Monterey's bicentennial it appears that the purpose of the 1969 cross was to celebrate Monterey's history. Erection of a replica of the 1969 cross appears to be for the same purpose. A symbol of an historical event has been destroyed and Monterey wishes to replace it to keep intact Monterey's tangible celebration of its past.

The second prong of *Lemon* asks whether the principal or primary effect of the display is to either advance or inhibit religion. One way to answer this question is to examine the history of the display and thus to determine, from that context, whether the primary effect is to promote religion or civic understanding of Monterey's history. Given the considerable publicity of the bicentennial events, delivered with the intent of educating the public about Monterey's history, it is unlikely that the primary effect of the cross (at least in 1969) was to advance religion. It is at least as likely that its principal effect was to increase citizen understanding of Monterey's past. But forty years have elapsed and the restoration of the Del Monte Beach cross may have a different contemporary effect. To ensure that the restoration project is designed to increase the public's historical understanding it would be wise to publicize aggressively the historical significance of the cross and to disclaim any contemporary religious significance. Yet, a Latin cross inherently has religious significance.

Because the cross, even when used to commemorate a historical event, is an intrinsic Christian symbol, it is helpful to address the question of the principal effect of the display by using the endorsement test. Of course, the endorsement test might also be applied as an independent test such that, even if the display comports with the *Lemon* test, it must also survive the endorsement test to be constitutionally valid. Under the endorsement test, the question becomes whether a reasonable, fully informed, and objective observer would detect in the display a governmental endorsement of Christianity. The key here is the fully informed nature of the observer. An observer who is aware of the historical background would conclude that Monterey is honoring its past rather than endorsing Christianity. Of course, many observers in this age of historical amnesia will be unaware of Monterey's past and thus may well ascribe to the cross a pure message of endorsement of Christianity. While it may be tempting to dismiss these observers as ignorant of either Monterey's founding or its bicentennial celebration, and thus not fully informed, Monterey has the ability to inform viewers of the purpose of the intended display. A simple plaque or marker that describes Portolà's actions in 1769 and its later commemoration as part of Monterey's bicentennial, should be sufficient to clarify the reasons for the display. To the extent that the cross conveys an unintended message of Christianity, it is no more than an acknowledgment of the distinctly Christian nature of Monterey's founders. If a granite presentation of the Ten Commandments can be validly displayed on the Texas capitol grounds as part of a display of other historical events, surely the initial historical event in Monterey's history can be acknowledged. The Ten Commandments has considerably less to do with Texas history

than the Del Monte Beach cross has to do with Monterey's history. The Texas display lacked even an explanatory marker of the sort that is advisable to erect here along with the restoration cross.

Of course, Monterey could erect some other sort of monument to commemorate Portolà's founding of Monterey, but if the restored Del Monte Beach cross does not offend the establishment clause, there is no constitutional requirement that a less religiously symbol be used. To graft such a requirement onto Lemon or the endorsement test would deny to Monterey to recognize a historic fact when that fact involves a religious symbol.

With the additional steps outlined here (publicizing the historical significance of the cross and placing an explanatory marker near the restored cross), the restored Del Monte Beach cross will not offend the establishment clause. However, be prepared to spend money to defend its validity.

### **Question Three** **(Word Limit: 1750)**

*The city of Caliente, the largest city in the state of Torrido, a state of the United States, has four public parks: Primo, Secundo, Terza, and Quarta. Each of the parks is surrounded by a residential district. On a first-come, first-serve basis, Caliente has permitted bands to play in the parks in the evenings during the summer months. Recently, the city has received complaints from neighbors of each of the parks about the loud music from such concerts that has interfered with the residents' sleep and tranquility. In addition, the city has received complaints from residents adjacent to Terza Park about vandalism that occurs whenever rock musicians play in Terza Park. The only rock band to play in any of the city's parks is "Money Can't Buy Life." The city investigated these complaints and determined that the decibel level from rock concerts was uncomfortably loud. Caliente's police department investigated the vandalism incidents near Terza Park and concluded that "while vandalism has increased on dates that any kind of band plays in Terza Park, the increase is not significant except when the band is Money Can't Buy Life." When the city council pressed the police chief for an explanation of why vandalism increased the most when Money Can't Buy Life was the performer, the chief stated that the "band's followers are mostly druggies and petty criminals." Caliente's crime statistics reveal that petty crime, at any time or date, is higher in the district adjacent to Terza Park than in the districts adjacent to any of the other parks.*

*Caliente then adopted an ordinance that prohibited rock bands (defined as bands using any combination of two or more of (1) a drum set, (2) an electric guitar, (3) an electric keyboard, or (4) a vocalist) performing in the city's parks from using amplification equipment. As a consequence, no rock band has since played in the city's parks. The only publicly owned space in which such a band can now perform is the City Arena, a cavernous hall that must be rented at a very considerable cost to the performers. There are, however, a number of private clubs and bars that hire musical groups to perform, and Money Can't Buy Life is sometimes asked to perform at these venues. Money Can't Buy Life, an all-black Jamaican amplified reggae band consisting of a drummer, three electric guitarists (who also are vocalists), and an electric keyboard player, performs to audiences mostly composed of African Americans. The band has*

*consulted you, a newly admitted member of the Torrido bar, concerning the prospects of a suit challenging the constitutional validity of this ordinance. Please analyze the possible constitutional claims that Money Can't Buy Life may have and assess their likelihood of success.*

The band has two possible causes of action. The first is a claim that Caliente's speech restriction violates the free expression guarantee, made applicable to the states and their political subdivisions via the due process clause of the Fourteenth Amendment. The second is a claim that Caliente's speech restriction violates the equal protection guarantee.

First Cause of Action: Free Expression. Caliente's speech restriction applies to speech in the public parks – a traditional public forum. Speech restrictions applicable to such fora are examined in the same manner as speech restrictions that burden speech no matter where it is uttered. On its face, Caliente's restriction appears to be content-based; it only applies to amplified performances by rock bands in the city's parks. The restriction applies only to *live music* performed by rock bands. It does not apply to amplified dramatic performances, amplified lectures, amplified public address announcements at sporting events, or even amplified recorded music. However, the restriction is viewpoint-neutral and according to *Ward v. Rock Against Racism*, the “principal inquiry in determining content neutrality [is] whether the government has adopted a [speech] regulation ... because of disagreement with the message it conveys. The government's purpose is the controlling consideration.” Here, the government's purpose seems to be ensure the tranquility of residents adjacent to the city's parks. As the Court noted in *Ward*: “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” By this reasoning the Caliente ban is content-neutral and is valid so long as it is a reasonable restriction that is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. The government interest – residential tranquility – is significant. *Ward* so held on similar facts.

But is the ban narrowly tailored, that is, is the regulation substantially broader than necessary to achieve the government's purpose? Or, would the government's interest be less effectively obtained without the ban? A limitation on the noise level, or even a requirement that bands use city-prescribed sound technicians (as in *Ward*), would seem to achieve the tranquility objectives equally effectively. At the very least, the city is required to produce evidence that these alternatives will be less effective.

The ban does not limit the quantity of speech but may affect the content, if amplified and non-amplified versions of the same work convey different messages. Given the city's definition of rock bands, it is likely that Money Can't Buy Life would be required to shift from electric to acoustic guitars and from electric keyboards to a piano. The city's definition of rock bands is terribly broad; it includes a band consisting of a drummer and a vocalist. A required change in the instrument used to create the music – especially a distinct genre such as reggae – affects the expression. The notes might be the same, but they sound different, and the expressive quality of music is in its sound and the emotions that the sound produces.

Are there ample alternative venues in which the band can deliver its preferred message? Exclusion from the parks leaves open only one alternative public venue – the City Arena – and it is not a viable substitute for a park concert because of its cost, which will not only burden the

band but will likely decrease the audience because of the necessity of charging (possibly stiff) admission fees. However, there are a number of private venues, but their availability depends on private invitation. These may not be an adequate substitute for the parks; they are surely not fungible. The ban resembles, in effect, a total medium ban. Thus, it may not leave open ample alternative channels of communication of the band's musical message. However, the burden will be on the band to prove this proposition.

Caliente may argue that its restriction is intended to address non-communicative secondary effects of speech. Specifically, Caliente may contend that the purpose of the ban is to reduce the incidence of vandalism that appears to be associated with, but not caused by, the communicative impact of Money Can't Buy Life's speech. There does seem to be evidence in this record that vandalism is associated with the band's performances and that such vandalism is not produced by the message uttered by the band. The secondary effects doctrine appears to apply, but the effect of its application is simply to turn what would otherwise be a content-based regulation into a content-neutral regulation. The applicable test is either the *Ward* test (discussed above) or the *O'Brien* test. Under *O'Brien*, there is no doubt that Caliente has the raw authority to adopt the regulation. If Caliente's purpose is to address secondary effects of speech its purpose (curbing vandalism) is unrelated to the suppression of ideas, and that purpose is surely an important or substantial interest, as it is designed to protect private property from criminal mischief. The question is whether the incidental restriction on speech is no greater than essential to further that interest. That is debatable. This ban precludes the band from performing in any public venue except the expensive City Arena. Moreover, the band could perform in Terza Park (or any other park) if it did not use amplification and vocalists or drums. (It's hard to imagine reggae without drums.) While that would alter the musical message there is no indication that a non-amplified performance would have any effect on the vandalism that Caliente says is not produced by the message. Presumably, any appearance by the band might trigger these unwanted secondary effects. As with the hostile audience problem, the city could provide better police protection on nights that the band performs to prevent vandalism. There are less speech restrictive alternatives available to Caliente.

Moreover, the secondary effects doctrine has only been applied in the context of sexually indecent speech, and has never been found applicable to other types of speech. While this does not mean that the secondary effects doctrine may never be applied to other forms of speech, it does suggest that the Court has used it exclusively as a doctrine to deliver lesser constitutional protection to sexually explicit but non-obscene speech that inflicts negative externalities that are not produced by the message. The band's musical message is not the same sort of arguable low-value speech. The band has a good argument that the speech restriction is not a valid application of the secondary effects doctrine.

**Second Cause of Action: Equal Protection.** This cause of action has two independent claims. First, Money Can't Buy Life contends that it has been denied equal protection because its exclusion from the parks infringes a fundamental right – free expression. This claim is merely a repetition of the substantive free expression claims discussed above, cast in equal protection language, and will succeed or fail precisely to the extent the free expression claims succeed or fail.

The second claim is based on the contention that the speech restriction, even if it is a

valid regulation, classifies on the basis of race, is not a justifiable racial classification, and thus violates equal protection. On its face, the restriction is racially neutral, yet the only band affected by the restriction is composed entirely of black Jamaican reggae musicians, a band that attracts a mostly African-American audience. Disparate impact is present, but the band must prove that this disparate impact is intentional. The best evidence of this is the police chief's assertion that the band's audience consists mostly of "druggies and petty criminals." This is almost certainly a gross generalization. To the extent that the band can amass evidence that demonstrates that this charge is without much (if any) factual foundation it will become more likely that the chief's statement will be seen as rooted in pejorative racial stereotyping. Moreover, the Caliente city council appeared to act on this information, and the policy they adopted affects only Money Can't Buy Life. This may be enough evidence to establish that race was a motivating factor in the city's adoption of the regulation. The burden will then shift to the city to prove that it would have adopted the same regulation for race neutral reasons. Because the regulation only applies to rock bands and the noise complaints were directed at performances of other genres of music as well, it may be difficult for Caliente to discharge this burden. If Caliente is unable to do so, Caliente must justify its regulation by showing that it is necessary to accomplish a compelling governmental objective. While deterrence of crime may be a compelling interest, tranquility might not be. In any case, as noted above, the city has several less racially focused methods of accomplishing its objectives. Accordingly, Money Can't Buy Life has a fair chance of prevailing on its equal protection claim if it can establish that the policy was motivated by racial concerns.

The policy also discriminates against rock bands. Such a classification is neither suspect nor quasi-suspect, because it lacks any of the usual criteria for such characterizations: immutability, history of prejudice, or political isolation and lack of access to political power. This policy is valid so long as it is rationally related to a legitimate government objective. The government's interest is tranquility and reducing vandalism. These interests are legitimate. Are the means chosen rationally related to those objectives? The means are both over and under inclusive, as other performers could disturb residential tranquility and the ban on rock bands in city parks other than Terza Park does nothing to reduce vandalism around Terza Park. Usually, over and under-inclusion is insufficient proof of irrationality, but if there are other facts (perhaps the police chief's generalization) sufficient to indicate that the city's objectives are pretextual the policy may be subjected to a search for the city's actual objective. Caliente might still be able to prove that its actual objectives are tranquility and vandalism abatement but it might have more difficulty doing so under enhanced minimal scrutiny.