

Exam Post-Mortem
Constitutional Law II – Fall 2010
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 26 to 88. The median was 38. The median course grade was a B.

Question One
(Limit: 2500 Words)

Congress has just enacted and the President has signed into law the Resource Preservation and Climate Change Response Act (the “Act”). Among other objectives, the Act is designed to address the growing national problem of people moving to arid regions of the United States, taxing the supply of potable water to the point that, in the judgment of Congress, there will be insufficient water to ensure a decent life for the inhabitants of the region. To that end, the Act imposes a requirement that any person seeking to change their residence from one state to another must first obtain a permit to do so (the “Interstate Relocation Permit”) from the Department of Homeland Security. The Act provides standards by which the Secretary or his designee is to make the determination of whether to grant such a permit; in brief, the Secretary may grant an Interstate Relocation Permit only when the applicant has established that the requested move will not cause a net increase in consumption of water in the area to which the applicant wishes to relocate. The Secretary has promulgated regulations authorized by the Act that state that Interstate Relocation Permits will be granted only as necessary to replace any decline in population in the area to which the applicant seeks to move (attributable to the sum of out-migration and the excess of deaths over births within those areas). It is anticipated that a waiting list will exist for Interstate Relocation Permits to some areas (such as Phoenix), but that Interstate Relocation Permits will be routinely and quickly granted with respect to other areas (such as Detroit or Cleveland).

Eugene Torvildson, an elderly resident of Minnesota, has been advised by his physician that he needs to move to a warm, dry climate for the sake of his health. Because he has relatives in Phoenix, Arizona and his Minnesota physician has recommended a Phoenix physician, Torvildson desires to move to Phoenix. But preliminary inquiries to the Relocation Bureau of the Department of Homeland Security indicate that an Interstate Relocation Permit will likely not be forthcoming for some time. The Act makes no allowance for medical or other hardships. Torvildson has asked you to advise him whether a challenge to the facial validity of the Act is likely to succeed. Please provide your advice. In doing so, present the possible claims that

Torvildson may make, and analyze the prospect for their success.

The Act may violate the equal protection guarantee (made applicable to the Federal Government via the due process clause of the Fifth Amendment; *Bolling v. Sharpe*, 347 U.S. 497(1954)), and the substantive component of due process.

Equal Protection. The right to relocate from one state to another is a right implicit in federal union. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court noted that while “[t]he word ‘travel’ is not found in the text of the Constitution[,] ... the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” But this right has never been squarely tied to equal protection, perhaps because there have been few attempts to infringe this right. When California sought to restrict the entrance of new residents the Court concluded that California’s action violated the interstate commerce clause. *Edwards v. California*, 314 U.S. 160 (1941). But this Act poses a different problem. It is not a state that is erecting obstacles to interstate migration; it is the federal government.

Though *Saenz* did not address this issue it did note that the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), observed that any “citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.” In dissent, Justice Bradley asserted that a “citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.” That would suggest that the right to move from one state to another is a constitutionally fundamental right for equal protection purposes, because it is a right implicit in the Constitution and has long been so recognized. The Act creates a system by which some Americans will be denied the right to move interstate, or at least be severely impeded in the exercise of that right, while other Americans will be free to do so (at least after having obtained bureaucratic blessing, which appears to be readily available for at least some moves).

Thus, the Act should be subjected to strict scrutiny, and the federal government must prove that it has a compelling objective that cannot be accomplished by any less restrictive infringement upon the fundamental right of interstate migration. The Act addresses a national concern of the highest order – the need to assure access to water, a finite resource that is indispensable to human existence. This is not a mere abstract interest; rather, it has become apparent to Congress that, as population increases in places of the United States that are not endowed with much natural rainfall or abundant subterranean water tables, there is a pressing necessity to ration human access to this limited resource. Surely the preservation of human existence is a compelling governmental interest. Even stated at a more specific level of generality, the Government’s interest in preventing human demand for water to so outstrip the available supply as to endanger the health and welfare of the citizenry, is surely a compelling governmental interest.

But are there less restrictive means to achieve this interest? Congress could have

provided for the construction of extensive pipelines to ferry water from those regions amply endowed with it to the parched areas of the nation. Congress could have invoked its power to regulate interstate commerce to prevent the sale of all but ultra-low flow toilets and shower heads. It could also have used its conditional spending power to withhold federal funds to states that do not comply with federally mandated water conservation standards. While there are surely limits to these congressional powers, some valid use of these powers could be employed to achieve the objectives of the Act. It would thus seem that the means Congress has employed in the Act are not sufficiently tailored to the objective to overcome the federal government's burden of proof under strict scrutiny.

If a facial challenge were to be made, we would be forced to establish that there are no circumstances in which this law could be validly applied. There is a possibility that the Act could be valid if the alternative means to accomplish the law's objectives are shown to be impossible or much less efficacious than the chosen means. Conservation measures might be proven to be inadequate, or the construction of water pipelines to ship water around the country might be demonstrated to produce water shortages everywhere, instead of in more local circumstances. Accordingly, the challenge is more likely to succeed on an as-applied basis, where the government will be required to prove that it is necessary to infringe *Torvildson's* right to migrate to achieve its objectives. The government's objectives could be almost completely achieved if were to have provided an exception for medical need. It is unlikely that arid and thirsty regions of the country would be inundated by medically necessary migration. Thus, the law as applied to *Torvildson* is almost surely not narrowly tailored, even assuming the existence of a compelling objective.

Some of you thought there were additional equal protection claims, such as discrimination on the basis of prior residence (which is but another way to phrase the mobility claim, although less direct).

Due Process. The test of whether a claimed right is fundamental for purposes of due process is whether it is deeply rooted in our national history and traditions. Other formulations, though less commonly employed now, ask whether it is implicit in ordered liberty, or is a fundamental principle inherent in the very idea of free government and thus one of the inalienable rights of citizens of a free government. While all of these formulations are maddeningly vague and manipulable, inquiry into our national history and tradition is the least abstract and most used by courts.

The freedom to choose one's residence has a checkered historical pedigree. Following the French & Indian War, Great Britain forbade settlement west of the Appalachian spine, an edict that angered colonial Americans and that was widely ignored. Though morally repugnant, Americans imposed enormous residence restrictions upon African-Americans. Slaves, of course, had no personal freedom, but even free blacks faced such restrictions. Indians were repeatedly forcibly confined to reservation lands, or forcibly removed from their homes and involuntarily driven to new locations. The infamous "trail of tears" inflicted upon the Creeks, Cherokees, and Seminoles in Andrew Jackson's administration is the classic example of forcible removal. We have, of course, departed from such odious traditions. The second Justice Harlan sagely noted that the traditions from which we have broken are as critical to discerning constitutional fundamental rights as are the traditions to which we have steadfastly adhered. *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

Moreover, it is to the eternal shame of the United States that these interstate migration restrictions were visited only upon vulnerable minorities. When it comes to the majority population of America, the tradition to which have steadfastly clung has been one of fierce freedom to move. So ingrained was this tradition that it provided the basis for Frederick Jackson Turner's famous study, *The Significance of the Frontier in American History* (1893). Three years after the U.S. Census Bureau had announced the disappearance of a contiguous frontier line, Turner declared that "[t]he existence of an area of free land, its continuous recession, and the advance of American settlement westward explain American development." Turner's thesis has remained controversial, and has been hotly disputed over the years. Some historians argue that events and conditions other than the frontier have been more pivotal to American development; others contend that Turner's thesis unduly emphasized the triumphal individualism of the pioneer, overlooking the role of cooperation and community. These debates are beside the point that is relevant to this case, for whatever the role of the frontier in American history it is indisputable that free migration westward was the lodestar of the American psyche ever since European settlers set foot on the Atlantic strand.

If the migration right is constitutionally fundamental the question remains whether the government has a compelling reason to infringe it. Rationing access to an indispensable commodity may well be compelling, as indicated in the prior section, but it is also possible that the government's interest can be portrayed in a not-very-compelling fashion. To say that a government interest is not compelling is to say that we need not even assess the fit of the government's means to its end. Perhaps the reason the Court has never provided a test for determining which objectives are compelling, and which are not, is that ultimately this question is a value judgment. If it is a value judgment, that judgment is made by the pattern of American history: Free mobility has been at the center of the American experience. Given that fact, the Government's objective has to be so important that it trumps a central fact of our national experience. And what is that objective? To prevent people from moving to locales where water is scarce until there is room for them to drink and bathe without inconvenience to the residents who managed to get there before them. To articulate this objective is to reveal its pygmy stature when compared to the towering principle of free mobility that animated the first European settlers to this continent and that has propelled the American ideal for over four centuries thereafter.

Although courts insist that the claimed fundamental right must be phrased at a level of specificity that comports with the actual claim being made, they are far less likely to insist on the same level of generality for the government's objective. Courts should avoid comparing a right in isolation to a generalized governmental objective. All too often, rights are analyzed as a particular right asserted by a specific litigant in a fact-bound setting. In this case, the temptation is to consider whether Eugene Torvildson has the right to migrate to Arizona without the prior permission of the Secretary. On the other hand, the Government's interest is often phrased in highly general terms. Applied here, the Government asserts that its interest is to prevent serious harm to public safety and welfare due to water resources being overtaxed by new residents, leaving all residents of arid regions parched for essential water. But this comparison is inherently biased. If the Government's interest is phrased in general terms suitable to describing a legislative motive, the individual's right should be phrased at the same level of generality. It is not just Eugene Torvildson's right to move; it is the freedom of all Americans to relocate without begging their governing masters for leave to do so. When the right and the Government's reason

is compared at the same level of generality, it becomes easy to see that the Government's reason is predicated on the belief that the people are too stupid to realize that relocation to arid regions is fraught with peril. Already these areas are subject to stringent water rationing. Only a moron would ignore the inconvenience and danger inherent in moving to a locale that advertises its inadequate natural resources by rationing of those resources.

Finally, the Government has far less restrictive alternatives available to it. The Government has not demonstrated that it has done all that it can do to reallocate water resources from amply endowed regions to these arid zones. It has not been impossible for either business or governments to ship petroleum products in vast quantities from areas where they are found to those areas where they are desired. Indeed, much of the economic activity of the twentieth century was built upon this ability. The Government has advanced no reason why water is any more difficult to ship than oil. Nor has the Government explained why it has not chosen to use its regulatory power over interstate commerce to preempt state or local water allocation measures in order to impose federal standards of water rationing that may force even more draconian conservation measures upon all residents – old and new alike – in order to adhere to our tradition of unfettered freedom of migration. If the federal Government could achieve no more conservation than the states and municipalities have already achieved, it is essential that the Government establish that fact. In the absence of any showing of futility of such measures, courts should presume that the Government has available to it a less restrictive alternative that it has not chosen to employ.

Many of you identified additional substantive due process claims, such as the right to seek medical advice or treatment. That claim is fairly weak, either as a facial or applied challenge. The government is not depriving Torvildson of the right to seek or receive medical advice or treatment; it is preventing him from interstate relocation in response to such medical advice. Another claim mentioned by some of you was the right to live with or near family members. Although *Moore* implicitly recognized such a right, there is no indication that Torvildson seeks to live with his family in Arizona, only to relocate there (in part to be nearer to them). The invasion of the liberty interest identified in *Moore* is far more remote on these facts.

Question Two **(Limit: 3000 Words)**

The Michigan Legislature has enacted the Religious Law Recognition Act (the "RLRA" or the "Act"), in response to the expressed desire of a substantial number of its citizens who are members of religious minorities to permit them to govern their marriages according to the dictates of their respective religions. Many, but by no means all, of these citizens are Muslims. Under the Act Michigan courts are required to enforce religious law in marital disputes in which the parties have voluntarily agreed in advance that a specified religious law shall govern their conduct. The Act declares that any religious law chosen by the parties shall be enforced by the civil courts, except to the extent that such enforcement would conflict with the criminal laws of Michigan. The Act provides that the content of the religious law chosen by the parties shall be defined by the authoritative religious leaders of the religious organization that the parties select, or in the absence of such selection, by the authoritative religious leaders in Michigan of the religion to which the parties belong and which they have chosen to govern their conduct. After its enactment, a number of marriages have been contracted under the terms of the RLRA,

including marital partners opting for the application of the religious laws of Orthodox Judaism, Roman Catholicism, Eastern Orthodox Catholicism, various Fundamentalist Protestant sects, and Muslims, but about 70% of those who have done so are Muslims.

Aribah and Abdul Sharif were married in Dearborn, Michigan shortly after the RLRA became effective. Prior to their marriage and in accordance with Sharia, they executed a marriage contract in which they stipulated that the terms of their marriage would be controlled by traditional Hanafi scholars of Sharia. It is undisputed by the parties that under the branch of Sharia they have selected to govern their marriage, the marriage can be terminated by the husband at will (*talaq*) and that the wife can obtain a divorce either with her husband's consent (*khula*), by mutual consent (*mubaraat*), or by *tafriq*, a judicial ruling of the applicable Sharia authorities that she is entitled to divorce. No right of *talaq* was contained in the marriage contract and the parties have stipulated that petitioner is not entitled to *tafriq*. Within a year of their marriage, Aribah asked her husband for his consent to a *khula* or *mubaraat*. He refused. Aribah instituted a marital dissolution proceeding in Wayne County Circuit Court. Abdul sought and obtained dismissal of the action, citing the RLRA and the parties' voluntary marriage contract. Aribah appealed to the Michigan Supreme Court, which affirmed the trial court's dismissal. The United States Supreme Court has now granted her petition for certiorari. You are a law clerk to a Justice, who has asked you to prepare a memo presenting the constitutional issues posed and assessing their merits. Please do so.

The question presented is whether the RLRA (or "Act") is a violation of the First Amendment's prohibition of religious establishments, made applicable to the States via the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1 (1947). This is the only claim that petitioner makes. *Boddie v. Connecticut*, 401 U.S. 371 (1971), for example, is not applicable. *Boddie* held only that Connecticut could not close its courts to those seeking a divorce because they lacked the money to pay the filing fee necessary to gain access to the courts. Petitioner has access to Michigan's courts. She has not suffered any denial of due process of the sort that existed in *Boddie*; rather, her claim is that the substantive rule of law that Michigan employs to adjudicate her entitlement to a divorce is void as a prohibited establishment of religion. Nor is there any claim that she has been denied the fundamental right to obtain a divorce. Had petitioner made such a claim it would lack merit because she could have obtained a divorce under Michigan law had she not opted to be governed by religious law.

The RLRA incorporates religious law and requires the civil courts to enforce that law. In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), Massachusetts permitted churches and schools to veto liquor license applications made by applicants whose place of business was within a 500-foot radius of the church or school. The Court found the Massachusetts statute to be void under the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although the law had a secular purpose – to protect "spiritual, educational, and cultural centers from the 'hurly-burly' associated with liquor outlets," 459 U.S. at 123, "the mere appearance of a joint exercise of legislative authority by Church and State" conferred "a significant symbolic benefit to religion," thus constituting an impermissible advancement of religion. *Id.* at 125-126. Moreover, the Massachusetts statute created an excessive entanglement with religion because "the core rationale underlying the Establishment Clause is preventing a 'fusion of governmental and

religious functions,” *Id.* at 126, quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). The *Larkin* Court thought that “[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.” *Id.* at 127.

I. The Case for the Validity of the Act. While it might be argued that *Larkin* is controlling authority and requires invalidation of the RLRA, that contention overlooks important later qualifications upon *Larkin* and fails to appreciate the significant factual differences between the statute at issue in *Larkin* and the RLRA. The Massachusetts statute delegated to religious institutions the power to govern the secular community, at least insofar as liquor licensing in the proximity of churches was concerned. The RLRA does not grant any authority to religious institutions to govern non-adherents, and only empowers religious law (here, Sharia) to govern to the extent that all parties have voluntarily consented to the governance of religious law. This difference is of constitutional significance. The constitutional flaw in the Massachusetts law was its delegation of secular political power to religious institutions, a delegation that enabled religious institutions to govern the entire community. The *Larkin* principle of forbidden delegation is good law, but the RLRA effects no such delegation. It is an accommodation to religious groups which encourage or require its members to adhere to religious law in dealings with others of the faith, and even then the RLRA only permits application of religious law to the extent that all parties to the matter have voluntarily consented to governance by religious law.

Board of Education of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994), is not to the contrary. In the early 1970s the Satmar Hasidim, a Hasidic Jewish sect, settled within a 320 acre portion of the New York town of Monroe. A few years later, in accordance with a New York procedure available to any group of residents, the Satmar Hasidim proposed that the village of Kiryas Joel be carved out of Monroe. Neighbors of the Satmar Hasidim who did not wish to secede objected strenuously. To placate that opposition the boundaries of Kiryas Joel were carefully drawn to include only members of the sect. Because the Satmar reject assimilation into secular society they educated their children in private religious schools. These schools provided no educational assistance to handicapped children but, because federal law makes such assistance available to handicapped children, whether in public or private schools, the Monroe School District provided that assistance in an annex to one of Kiryas Joel’s religious schools. That worked well until the Court’s decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), caused the Monroe School District to terminate their assistance lest it, too, be found to be a forbidden establishment of religion. As a replacement, the Monroe School District offered education to special needs children in its public schools. That was unacceptable to the Satmar Hasidim, whose religious objections to such mingling with the outer world were sufficiently intense that they preferred to do without this help for their handicapped children than to subject them to the pervasively secular public schools. In recognition of the educational needs of these children, the Satmar Hasidim successfully implored the New York legislature to create a new public school district, the boundaries of which were precisely congruent with the village of Kiryas Joel. The public schools established under this authority provided only education to handicapped children, all of whom were Satmar Hasidim. After a tour through the New York courts the Supreme Court ruled that the legislation creating the Kiryas Joel school district was a forbidden establishment of religion. It is one of many historical ironies that *Aguilar* and *Ball*, which triggered the *Kiryas Joel* litigation, were repudiated by the Court three years after *Kiryas Joel* was decided. *Agostini v. Felton*, 521 U.S.

203 (1997). So, in the end the legislation creating the Kiryas Joel school district and the resulting *Kiryas Joel* litigation should have been unnecessary, and would have been, had the Court gotten *Aguilar* and *Ball* right the first time.

The nub of our decision in *Kiryas Joel* was that the New York law provided no assurance that governmental power had been employed in a religiously neutral way. Because the New York legislation was “anomalously case-specific” there was no certainty that “the benefit provided the Satmar community [was] one that the legislature [would] provide equally to other religious (and nonreligious) groups.” 512 U.S. at 702-703. The possibility that other religious (or non-religious) groups could seek and be denied similar aid left the Court sufficiently concerned that a fundamental principle of the Establishment Clause was in jeopardy: “[T]hat government should not prefer one religion to another, or religion to irreligion.” *Id.* at 703. The Court stressed in *Kiryas Joel* that the benefit provided by New York was provided to one sect alone, and that this benefit consisted in delegating to that sect the governmental power of organizing and maintaining a public school system.

The RLRA operates in a far more neutral manner. First, no single sect is the beneficiary of the Act. Among those who have availed themselves of the provisions of the RLRA are Orthodox Jews, Roman Catholics, Eastern Orthodox Catholics, Fundamentalist Protestants, and Muslims. While it is true that Muslims have taken advantage of the RLRA to a greater degree than those of other faiths, neither the design nor operation of the RLRA is focused upon extending a benefit to Muslims to the exclusion of other sects.

Petitioner argues that *Kiryas Joel* was based on a conclusion that any delegation of secular political authority to a religious group constitutes a forbidden establishment of religion. That is too expansive a reading of *Kiryas Joel*. While it is true that New York had delegated civil authority to the Satmar, albeit through the nominally neutral device of authorizing a separate public school district for the village of Kiryas Joel, the constitutional flaw in the arrangement was the favoritism that was exhibited toward the Satmar and no other religious group. And even if it were true that the crux of *Kiryas Joel* was the delegation of political power to the Satmar, that problem is not implicated by the RLRA in a manner that has constitutional significance. A delegation of civil authority of the sort at issue in *Kiryas Joel* is constitutionally suspect because it creates the possibility that a religious institution may exert state power over citizens who are not part of the religious institution. When the state places the scepter of sovereignty in the hands of clerics it has breached the wall of separation between civil and ecclesiastical authority. By contrast, when the state announces that it will recognize and enforce religious law in disputes that are entirely between parties who have consented to the application of religious law it has not given religious institutions the power to govern non-believers; rather, the state has chosen to accommodate religion.

Of course, some accommodations may constitute forbidden establishments of religion, but the precise circumstances in which religious accommodation becomes a religious establishment are not neatly defined. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in the course of upholding the Religious Land Use and Institutionalized Persons Act as applied to prisons, the Court observed that religious accommodations are valid if they “alleviate[] exceptional government-created burdens on private religious exercise,” require courts to “take adequate account of the burdens [that the] accommodation may impose on non-beneficiaries,” and are “administered neutrally among different faiths.” *Id.* at 720. Yet, the Court did not say that these are the minimum criteria which an accommodation must possess to be permissible. Indeed, in

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), a plurality of this Court noted that permissible accommodations either “did not, or would not, impose substantial burdens on non-beneficiaries while allowing others to act according to their religious beliefs, or ... were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause.” *Id.* at 18 n.8 (emphasis added). The triple test of *Cutter* may be an adequate statement of the sufficient conditions for a permissible accommodation but it cannot possibly be a statement of the necessary conditions. For example, the *Cutter* formula utterly fails to account for the accommodation upheld in *Zorach v. Clauson*, 343 U.S. 306 (1952). Public school administrators were permitted to release students early so that they could obtain “religious observance and education outside the school grounds.” This accommodation hardly alleviated “exceptional government-created burdens on private religious exercise.” Nor does the *Cutter* formula account for *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), in which the Court upheld an exemption from the ban on religious discrimination in employment contained in Title VII of the 1964 Civil Rights Act. That exemption applied to employment in the secular activities of religious organizations as well as to employment in their religious activities. The only government-imposed burden that the exemption relieved was the minimal burden of predicting which activities of the religious organization might be considered secular. It thus appears that burden alleviation is not required to support the validity of government measures that accommodate religion.

Of course, some accommodations may devolve into a forbidden establishment of religion, and the hoary *Lemon* test has remained as the starting point of analysis of when accommodations slip from the permissible into the impermissible category. Governments must have a secular purpose for their religious accommodations. Michigan’s purpose in enacting the RLRA was to recognize that its citizens hold a variety of beliefs about the marriage relationship, and that the default provisions of Michigan law on this subject frequently engender conflict and resentment between the government and its citizens. It is a permissible secular purpose to seek to dampen that conflict, and to recognize strongly-held beliefs about marriage, even when the source of the conflict and the beliefs that produce the conflict are religious in nature. Moreover, it is a function of government to respond to the concerns of its citizens, and governmental accommodation of a variety of deeply held views about marriage by providing a smörgåsbord of legally binding choices is surely a secular purpose of government. For example, Alaska provides its citizens the choice between common law and community property regimes. *See* Alaska Stat. § 34.77.030. Though the RLRA extends choice of law concerning marriage only to various religions, the reason for that is simple: It is the variety of religious belief about marriage that has engendered conflict. Michigan need not extend its choice of law options to cover imaginary secular choices to prove its secular purpose. If there were evidence that Michigan had ignored secular concerns similar to the religious ones to which it has responded in the RLRA this would be a far different case, but absent that critical element Michigan has a secular reason to respond to the actual concerns of its citizens.

Petitioner argues that the primary effect of the RLRA is to advance religion. Of course the RLRA promotes religion in the limited sense that it permits Michigan citizens to choose to subject themselves to religious law, but the actual application of religious law results entirely from individual choice. As the Court said in *Amos*, “[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the *government itself* has advanced

religion through its own activities and influence.” 483 U.S. at 338. Petitioner’s claim that Michigan’s enforcement of religious law is the type of forbidden *governmental* advancement of religion mentioned in *Amos* is mistaken. The RLRA allows religious *individuals* to advance their religion through their voluntary action, and even then this advancement requires the consent of both parties to a marriage. This is comparable to the permission provided to churches by Title VII of the Civil Rights Act of 1964 to discriminate on the basis of religion in their secular employment, a form of accommodation upheld in *Amos*. As in *Amos*, the ability of religious institutions to promote their creeds is neither helped nor hindered by the RLRA. Any advancement of religious belief after enactment of the RLRA results from the attractiveness of those beliefs to its believers, not from any encouragement by Michigan to believe.

Petitioner’s final contention is that the RLRA embroils Michigan in an excessive entanglement with religion. The gist of her argument is that Michigan must determine the substance of religious law, and that inquiry is a forbidden entanglement with religion. The leading authority for petitioner’s argument is *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). After a local Presbyterian church severed its ties to the national church, the latter claimed to own the local church’s property. The local church brought suit in the Georgia courts, which held that, with respect to hierarchical churches, Georgia law created an implied trust of local church property for the benefit of the national church so long as the national church adheres to the religious doctrine in effect at the time the local church affiliates with the national church. The Court concluded that this “departure-from-doctrine” aspect of Georgia’s law required civil courts to engage in a constitutionally forbidden inquiry: “to determine matters at the very core of a religion – the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Id.* at 450. The RLRA does not violate that principle. Under the RLRA, Michigan courts must accept the pronouncements of the theological authorities concerning religious law as final and determinative. The RLRA allows no role for the civil courts to engage in any independent inquiry into the substance of religious law. In this respect, the RLRA comports with the rule laid down in *Jones v. Wolf*, 443 U.S. 595 (1979), in which the Court held that civil courts must use “neutral principles,” *id.* at 602, 604, to resolve such controversies. Those neutral principles require that courts, whenever they confront an issue of religious doctrine in the course of deciding a civil controversy, “must defer to the resolution of the issue by the authoritative ecclesiastical body.” *Id.* at 604, citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). That is what the RLRA demands of Michigan’s civil courts. There is no impermissible entanglement with religion.

Nor is there any religious coercion in the RLRA. Believers in the religion of their choice are free to opt for either civil or religious law to govern their marriages. While those who believe in no religion do not have that choice, their constraint results from their initial choice not to believe in any religion. Thus, believers and non-believers alike are free from any governmental coercion with respect to religious belief or practice.

Between the Scylla of religious accommodations prohibited by the Establishment Clause and the Charybdis of those required by the Free Exercise Clause lies a broad strait of permissible accommodations. Within that strait legislatures are free to decide upon the amount and nature of such accommodations. This is the “play in the joints” between the Clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004), quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). Michigan has merely sailed safely within the strait.

II. The Case for Invalidity of the RLRA. By the RLRA Michigan has chosen to make religious law the law of the state of Michigan. It is no excuse to say that this applies only to those who consent to the application of religious law. A person's consent to his own enslavement does not nullify the Thirteenth Amendment. No more can a person's consent to the state's application of religious law nullify the Establishment Clause.

For government action to comply with the Establishment Clause it must have a secular purpose, produce primary effects that neither advance nor inhibit religion, and involve no excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Michigan's Religious Law Recognition Act (RLRA) fails on all three fronts.

Michigan's claim that its purpose is to "dampen" the conflict between the strongly-held religious views of some of its citizens and the secular laws of the State is but another way of saying that Michigan's purpose in enacting the RLRA was to embrace religious law for those people who wish to evade secular law. And a purpose to embrace religious law is not a secular purpose. The Act's purpose is to make religious law an available law of the State. There is nothing secular about such a purpose. Moreover, Michigan's claim that it has acted for the alleged secular purpose of dampening conflict between the State and its devoutly religious citizens is not its real purpose, and to comport with *Lemon* the government's purpose must at least be genuine and not a pretext for a hidden religious motive. *Edwards v. Aguillard*, 482 U.S. 578 (1987). The pretextual nature of the RLRA can be seen by the fact that the overwhelming proportion of Michiganders who have availed themselves of its benefits are Muslims. Although the RLRA is framed in terms that include all religious laws, the fact is that Michigan was confronted with a large minority of Muslims who wished to govern themselves by Islamic law. Michigan chose to do so, and while its decision may be an understandable policy judgment the Constitution's Establishment Clause forbids a State from expressly adopting religious law. The strong inference is that Michigan adopted the RLRA for the purpose of incorporating Islamic law, and that purpose is not secular.

The primary effect of the RLRA is to advance religion. Any other effect that it produces pales by comparison. There would be no occasion for individual choice if Michigan had not enacted the RLRA. Thus, it is the government itself that has produced the effects of the RLRA. Moreover, the Court's prior cases that have relied upon individual choice to vitiate what might otherwise have been an impermissible primary effect all involved laws that are facially neutral with respect to religion and which offered citizens the choice of channeling the governmental benefit created to religious or secular institutions. In *Mueller v. Allen*, 463 U.S. 388 (1983), for example, Minnesota offered tax deductions for tuition and non-religious book expenses incurred by its taxpayers. That tax benefit could be used for expenses incurred at either a religious or secular school. In *Zelman-Harris v. Simmons*, 536 U.S. 639 (2002), the voucher payments supplied by Ohio could be redeemed at secular or religious private schools, and parents were also able to choose among a variety of public school options. In *Zobrest v. Catalina School District*, 509 U.S. 1 (1993), the government benefit of a signer for deaf students was offered to all deaf students, regardless of the school they chose to attend. But the RLRA is markedly different; it is distinctly asymmetrical in the options it affords to Michiganders. The government benefit offered by the RLRA is a choice of which religious law one might like to govern. To say that the choice is neutral because it allows Michiganders to choose between secular or religious law is to ignore the manner in which Michigan has departed from its baseline of secular law. In *Mueller*, *Zelman-Harris*, and *Zobrest* the departure was itself facially neutral as to religion; here it is

anything but neutral. Another indication that the primary effect of the RLRA is to advance religion is that the RLRA does not extend its benefits to non-religious beliefs about marriage that may conflict with Michigan's default rules. For example, the RLRA does not permit same-sex couples to govern their marriage by either secular rules of their own making or by stipulating to be governed by Michigan's default rules on marriage.

In addition, the symbolic message sent by Michigan's enactment of the RLRA is an endorsement of religion. A reasonable well-informed observer would think that Michigan has embraced religious law because it believes religious law to be at least the equal of secular law. Michigan surely endorses its secular laws; after all, they were enacted because Michigan's legislators thought they were for the public benefit. By embracing religious law through the RLRA Michigan is sending the same message of endorsement. This it cannot do.

The RLRA also involves Michigan in a high and clearly excessive degree of entanglement with religion. The RLRA itself commits Michigan to accept the pronouncements of the authoritative religious leaders of the sect which the parties have selected as the content of the religious law. There are multiple problems with this arrangement. First, there can be no certainty that there will be only one set of authoritative religious leaders. In the event that there are rival bodies claiming to be the arbiters of religious law, Michigan courts will be forced to decide which body is the more authoritative, and that decision may well require Michigan courts to decide upon competing principles of religious doctrine. But secular courts may not do this. *Jones v. Wolf*, 443 U.S. 595 (1979). Second, even if there is only one authoritative religious body the secular courts will be required to apply that religious law, and there can be no certainty that the application will be mechanical. There must inevitably be times when the application of religious law requires some degree of judicial discretion, and the exercise of that discretion will involve the secular courts in an impermissible parsing of religious doctrine.

But assume that none of these problems exist. Even if religious law will be decided by a single religious body and that law is mechanically applied by Michigan's courts, there is an even more basic problem: The RLRA cedes sovereign authority to religious institutions, and that is forbidden. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). It matters not a whit whether the sovereign authority of a State is handed off to religious institutions to govern their own believers or non-believers. In either case, the State has transferred its sovereign authority to a religious institution. If *Larkin* forbids anything, it forbids this. Moreover, this principle is underscored by *Board of Education of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994), in which New York's creation of a public school district that encompassed only a religious enclave was struck down. The law would have fared no better had it permitted the creation of public school district for exclusively Catholic, Mormon, Muslim, or Lutheran communities in addition to the Hasidic community that was the actual beneficiary. Indeed, such a more ecumenical law would simply have increased the scope of the constitutional violation. The ineradicable point is that a State may not transfer its sovereign power to a religious institution. This is what Michigan has done by enacting the RLRA.

III. Conclusion. Even though the Court has increased the range of permissible accommodation of religion that government may make, this Act has a dubious secular purpose, delivers effects that strongly favor religion, potentially entangles the state with religion in a fashion that would require the state to decide the fine points of religious doctrine, expresses an endorsement of religious law, and hands over secular authority to clerical bodies. The Act should be invalidated.

IV. Other Possibilities. Some of you thought that this Act also involved a free exercise claim, but that is hard to justify given the generality of the law and its weak infringement on religious practice. Others thought that the Act might involve a disparate impact by sex, but there is no indication in the facts of any intent on the part of the legislature to produce this effect. Finally, many of thought that the Act infringes a fundamental liberty to obtain a divorce. Even assuming the existence of such a liberty, the Act does not deny access to a divorce, but conditions receipt of a divorce upon compliance with the parties' chosen religious law. That condition necessarily brings the establishment clause issue into play.

Question Three
(Limit: 2500 Words)

The City of Petrosia is a large metropolitan city in the County of Algonac, State of Hiawatha, a state of the United States. The Hiawatha Health Code requires "every person engaged in the business of tattooing to register with the county health department of the county in which that business is conducted," and requires these county health departments to inspect the registered tattoo parlors to ensure that the practices of the tattoo parlors are safe and will not contribute to the spread of disease by, for example, the use of non-sterile needles or other unsanitary practices. A person engaged in a tattooing business who fails to register is subject to a civil penalty of \$500 per violation. Hiawatha law makes it a crime "to tattoo or offer to tattoo a person under the age of 18 years." A tattoo is created by injecting ink into a person's skin by means of an electrically powered tattoo machine, or gun, that moves a solid needle up and down to puncture the skin between 50 and 3,000 times per minute. The needle penetrates the skin by about a millimeter and deposits a drop of insoluble ink into the skin with each puncture. The ink is deposited in the dermis, which is the second layer of skin. Because the skin has been punctured many times, the end result is essentially an open wound.

Peter Cooke owns and operates a tattoo business in the City of Nebula, also in the County of Algonac, State of Hiawatha. Nebula permits tattoo parlors, as do most other cities within the County of Algonac. Cooke has a thriving business as he creates his own designs for tattoos, usually in consultation with the customer, and taking into account the color, size, and shape of the tattoo, as well as its location on the body, literal and symbolic meaning, and emotional value to the customer. He wishes to open a tattoo parlor in Petrosia.

Petrosia Municipal Code §201.01 provides: "No building shall be erected, reconstructed or structurally altered, nor shall any building or land be used for any purpose except as hereinafter specifically provided and allowed in the same zone in which such building and land is located." Municipal Code §201.02 provides zoning for a wide variety of commercial uses, including movie theaters, restaurants, adult businesses, bars, fortune tellers, gun shops, and youth hostels. No provision of the zoning code, however, permits tattoo parlors, and as a result, these facilities are banned from Petrosia under §201.01. Moreover, Petrosia's Planning Commission adopted a resolution against amending the Code to permit tattoo parlors.

In considering that resolution the Planning Commission heard testimony from Carl Castle, the sole tattoo parlor inspector for the County of Algonac Health Department. Castle testified that there are over 250 tattoo parlors in the county and over 750 people applying tattoos. He stated that it is impossible to monitor all of these establishments continually with his limited resources, and that as a result there were always some tattoo parlors operating in an unsanitary

manner, thus producing infection and disease, and that he had received a number of complaints alleging that various tattoo parlors had engaged in underage tattooing.

Peter Cooke has brought suit in Federal District Court against the City of Petrosia, alleging that the provisions of the Petrosia Municipal Code that effectively ban tattoo parlors are invalid on their face. The parties have stipulated to the above facts and have filed cross-motions for summary judgment. You are the District Judge. Please rule on the motions and provide your opinion for that ruling.

Cooke alleges that Petrosia's Municipal Code is a facially invalid violation of the First Amendment's free speech guarantee, made applicable to the states and their political subdivisions by the due process clause of the Fourteenth Amendment. Petrosia denies that this is so.

The first task is to determine whether tattooing is (1) *purely expressive activity* or (2) *conduct* that merely contains an expressive component. Put differently, is tattooing more like writing (a purely expressive activity) or burning a draft card (conduct that can be used to express an idea but does not necessarily do so). Compare *O'Brien* and *Cohen*. If tattooing is purely expressive activity, then it is entitled to full First Amendment protection. If, on the other hand, tattooing is merely conduct with an expressive component, then it is entitled to constitutional protection only if it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974). If tattooing is conduct that is *not* "sufficiently imbued with elements of communication," then the only question is whether the City's zoning regulation is rationally related to a legitimate governmental interest. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

If tattooing is a purely expressive activity, the next question is whether the City's regulation is content based. If it is, strict scrutiny applies. If it is not content based, the City's regulation is constitutional only if it is a reasonable "time, place, or manner" restriction on protected speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If, on the other hand, tattooing is conduct with an expressive component that is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," the constitutionality of the ordinance is governed by the *O'Brien* test.

Is Tattooing Purely Expressive?

To determine whether an activity warrants First Amendment protection, the court must determine whether there was intent to convey a particularized message and whether there is a great likelihood that the message would be understood by those who view it. The City argues that the act of tattooing fails the first prong of this test because the act itself is not intended to convey a particularized message. The City says that the very nature of the tattoo artist is to custom-tailor a different or unique message for each customer to wear on the skin, and that the act of tattooing is one step removed from actual expressive conduct. The City likens tattooing to a sound truck, which is a "mode of speech" because it can be used to convey a message, but "in and of itself" is not speech protected by the First Amendment. Similarly, the tattoo artist's daily work may be used by customers to convey a message, argues the City, but it is not protected by the First Amendment in and of itself. Because the act of tattooing fails the first prong of the test for First Amendment protection, there is no "message" to be understood by viewers and tattooing must also fail the second prong.

The City's argument depends on a distinction between the *product* and the *process* of tattooing and a conclusion that the physical process of tattooing is conduct that itself is not intended to convey a particularized message, nor would a normal observer regard the process of injecting dye into a person's skin through the use of needles as communicative."

But is the premise correct? If not, the tattoo *itself*, the *process* of tattooing, and even (to some extent) the *business* of tattooing are purely expressive activity fully protected by the First Amendment.

Surely the tattoo itself is pure speech. The Supreme Court has consistently held that "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Various forms of entertainment and visual expression are recognized as purely expressive activities, including music without words, topless dancing, movies, parades with or without banners or written messages, and both paintings and their sale. As the Court said in *Hurley*: "A narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection. Tattoos can express a countless variety of messages and serve a wide variety of functions, including decoration, worship, magic, punishment, or as an indication of identity, status, occupation, or ownership. Tattoos may not be as readily understandable as Rembrandt or Robert Frost, but they convey messages.

The fact that a tattoo is etched in skin rather than drawn on paper or canvas is of no constitutional significance; a form of speech does not lose First Amendment protection based on the kind of surface to which it is applied. The government's health and safety concerns are relevant considerations when the government offers justifications for a speech restriction but not to the question of whether the speech is constitutionally protected.

The contention that the *process* of tattooing is non-expressive conduct rather than speech is a red herring. All of the cases that consider whether conduct is expressive involve conduct that is symbolic (and thus *may* convey a message), rather than conduct that produces pure expression. The difference is that the former conduct, whether it be flag-burning, draft-card burning, or black armbands, requires an interpretive step to determine the expressive elements of these processes, while writing or painting (the processes for creating a novel or graphic art) produce nothing more than pure speech. To disconnect writing from the product – the essay or the novel – and regulate the former as conduct would be to eviscerate the speech guarantee. Orwell would find rich irony in a doctrine that says; "Your novel is protected speech but it is illegal to write it." Tattooing is a process like writing or drawing.

Nor does it matter that the tattooist might merely be implementing the customer's desired design. An artist who is commissioned to create a portrait of the customer is also implementing the customer's desired design. Many of Bach's cantatas were written to discharge his duties as Leipzig's Kapellmeister. A commissioned biography is not unprotected speech because the subject has hired the biographer and, perhaps, shaped the biography by limiting access to records or providing a sanitized recollection of the past.

The fact that tattooing is also a business does not prove that it is unprotected conduct. The production and exhibition of motion pictures is a business, and to claim that the sale or

rental of the movie transforms speech into conduct is another Orwellian gambit: “Of course you may write your novel, but it loses its speech protection if you try to sell it.”

Tattooing – the tattoo itself, the actual process of creating the tattoo, and the sale of the service – is purely expressive. However, this is not to say that tattooing is always purely expressive. The tattoos that the Nazis affixed to concentration camp inmates would not be expressive, were Americans to engage in such a sordid practice. But because this is a facial challenge the court concludes that the City’s ban, in practice, would apply to a great many instances of protected expression

Content-Based? The City bans all tattoo parlors, not just those that convey a particular kind of message or subject matter. The City’s regulation is indifferent to the message of a tattoo, or what its communicative impact may be. While it is true that the City bans tattoo parlors and not art galleries or bookstores, the relevant analogue is not to those methods of distributing speech but to a hypothetical ban on all art galleries except those who display “representational art,” or a ban on all bookstores that stock pornography. The City has indeed chosen to ban a medium, but its ban is sufficiently broad that it is not based on the content of the speech in the medium. Thus, the City’s regulations need not be subjected to strict scrutiny.

Time, Place, or Manner Restriction. Because the City’s regulations are not content-based the court must consider whether they are a reasonable “time, place, or manner” restriction on protected speech. Governments may impose reasonable restrictions on the time, place, or manner of protected speech if they are (1) content-neutral, (2) “narrowly tailored to serve a significant governmental interest,” and (3) leave “open ample alternative channels for communication of the information.” As noted, the City’s ban is content-neutral.

Narrow tailoring is satisfied so long as “the means chosen are not *substantially broader than necessary* to achieve the government’s interest.” That means that a “regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” The City has a significant interest in regulating tattooing because of the health and safety concerns implicated by this process. The question is whether it is substantially broader than necessary. Cooke contends that the City’s interest could be achieved by regulations ensuring that tattooing is performed in a sanitary manner rather than outright prohibition of tattooing. The City retorts that it relies on the sole county inspector of tattoo parlors, a person who has insufficient time and resources to ensure that tattoo parlors are safe. Moreover, the city contends that because Hiawatha state law requires the county inspector to do the job, and he concedes he cannot perform his duties adequately, it has no alternative to the ban. But Hiawatha law does not prevent cities from performing their own inspections. All that the state does is require counties to perform such inspections, but it does not preempt cities from aiding in such inspections. Petrosia’s claim of inability is actually a claim that it does not wish to devote any resources to inspection. The First Amendment cannot be evaded so easily. If the City wants to ban unsafe tattoo parlors it can do so by stringent inspection; it need not ban the First Amendment to get the job done. A total ban might be convenient, but it is substantially broader than necessary to achieve the City’s objectives.

In considering whether the ban leaves open alternative channels of communication, the court is mindful that the Supreme Court has been particularly concerned about “laws that foreclose an entire medium of expression,” because a total medium ban can suppress a great deal of speech that might not otherwise occur. Some of those cases, such as *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), suggest that such laws are almost *never* reasonable “time, place, or manner”

restrictions. See also *Schad v. Mt. Ephraim*. But the court need not apply a *per se* rule, because there is other evidence that the City's ban fails to leave open adequate alternative channels of communication. The City argues that, although its regulation restricts tattooists' ability to apply images to human skin via the injection of ink, there are alternative means available for applying the exact same words, images, and symbols to skin, such as airbrushing or the use of natural henna paste to create temporary tattoos. The City also contends that the tattooist could render his designs on T-shirts. These arguments assume that there is nothing distinctive about a tattoo, but that is a fundamental misconception of tattooing. As in *City of Ladue*, Petrosia has "completely foreclosed a venerable means of communication that is both unique and important." Tattooing is an ancient form of human expression and is well-nigh culturally universal. Simple observation of our culture establishes that tattooing has become more widespread in our culture in recent years. But more important is the fact that a permanent tattoo conveys a message that is sharply distinct from a T-shirt or a temporary tattoo. A tattoo suggests that the bearer of the tattoo is highly committed to the message he is displaying: by its permanence the bearer of the tattoo suggests that the message is so important that he or she has chosen to display it for life. There might also be more subtle messages – about willingness to endure pain to make a statement, or about the bearer's symbolic claim that he or she owns the body on which it is displayed. But even putting aside such exotica, it is clear that a tattoo sends a very different message than a T-shirt or a henna design. Nor is the tattoo ban like the sound truck ban in *Kovacs*. Unlike a sound truck, a tattoo does not force unwilling listeners to pay attention or endure the message any more than Paul Cohen's rude jacket did in *Cohen*. As with Cohen's jacket, viewers may avert their eyes. The City's ban closes off such a distinctive channel of communication that it cannot be said that there are reasonable alternatives that remain.

Because tattooing is pure expression and the City's ban is not a reasonable time, place, or manner restriction of speech, Cooke's motion for summary judgment is granted and the City's motion for summary judgment is denied.

Some of you thought that this was an economic substantive due process issue. While that is a reasonable argument – the right to earn a living might be thought to be fundamental – it has been firmly rejected by the Court in the post-*Lochner* era, and was even rejected in the *Slaughter-House Cases*.