

Question #1

1. The executive maintains broad, inherent powers that are not enumerated powers. Where the president engages in a domestic act but under foreign policy authority he can exercise a higher level of control and discretion (Curtisswright). Despite this, the function of determining probable cause for this seizure has been held to exist within the judiciary and not solely in the executive and under the 5th amendment citizens must face a jury and cannot be seized without due process (4th). Also in CurtissWright, the president acted to prevent a good from leaving the US, rather than controlling people wholly within the borders.

While Korematsu has the ability to petition on behalf of the detainees as their attorney he might have issues stepping in to challenge the federal statute. The facts don't say he is Japanese and would suffer a cognizable harm. Despite that, the subsequent enactment should allow detention of these citizens. He is no longer acting solely under the executive power but rather under authority of congress that may in times of invasion of public safety suspend habeas. The problem with congress's statute is that it isolates a discrete group of people giving rise to the question of a bill of attainder. However, since the act doesn't criminalize but rather deals with detention it can read as a valid exercise of suspension of habeas. (Civil War Lincoln suspended, congress later ratified).

The statute will fail for stripping jurisdiction. Where courts are open, the congress cannot suspend the 6th amendment and must allow for a hearing and trial (Milligan). Even where the court directly stripped jurisdiction for one individual after the case was argued the court has held that there must be SOME form of appeal even if not to the supreme court to some court (McCardle).

2. Endo first will have a large uphill battle to convince the court that she does indeed have federally protected equal protection rights. She is challenging the executive and not a state so she must assert the right under the 5th amendment. Even though Adkins incorporated due process, no equal protection from federal laws is available. Furthermore, racial based classifications have held to be constitutional so long as they are made separately but equally (Plessy). While she is being treated differently based on her race she cannot be said to be treated unequally necessarily, following the logic from Cummings, where blacks could be denied access to schools even though there was a white school. Congressional approval of this order has no effect on Endo because there are no EP rights.

3. Congress's silence on the issue of seizure is significant. While not a fully enacted law the president at least operated under resolution in Curtiss-Wright and that was held to be significant in the president's prevention of shipping goods overseas. Here of course it is taken further, with actual seizure, and the 5th amendment provides that private property can't be taken for public use without compensation. The executive order makes no reference to compensation which makes it troublesome. Further, it is inherent that since there is compensation involved in taking of property that this power belongs to congress

which controls all appropriations. The effect of the treaty is also dubious, while in Holland the court held that a treaty with Britain was valid. The court saw no direct contradiction with a constitutional rights. The court viewed those rights only as radiations from the 10th amendment. Here the right is much more concrete, a property interest, taken without compensation, under a foreign treaty that only deals tangentially with aviation security cannot be upheld.

4. Bodily integrity rights have been held to be relegated to the lower tier of liberty interests (Buck). Further, where the protection of others is involved (Jacobson) or purity of an undesirable race or trait (Buck again) individual rights are subservient to the rights of the government to protect the population at large. Despite that, as it stands, Carrie should not be sterilized at this point. Buck is both illiterate and also subject to a statute that seeks to avoid the normal process for the deprivation of a person's liberty. While the provision may not necessarily violate on its face a constitutional provision it does certainly distort the political process but putting the executive in charge of both the charging and carrying out of the sentence (not a jury of peers). It further is dealing with a member of society that almost no ability to use her power to seek redress through the political process (Footnote4). Where the courts are open congress has no authority to force a citizen into a military court (Milligan). The right to a trial by jury is fundamental, as well as a public trial, and the assistance of counsel. The balance of powers provides that although the executive may prosecute, guilt is ultimately determined by a jury of one's peers. Because courts are still open, and she has not been before a court her procedural rights have been violated. Even Buck had her day in front of the supreme court.

5. The court does not want to be perceived as hindering the war effort. Lowering some barriers to allow efficiency in war is both desirable and necessary. The executive is well equipped to carry out war, and where the congress has supported him he is at his apex of power. We are also at the earliest stages of the war and by clearing early barriers for the president to carry out war it could lead to a quick ending of the war. Despite that, we cannot summarily allow the president overstep the inherent (although flexible) executive powers. Where ambition is no longer checking ambition and the effects are being felt against a small population that is easily demonized the court must remain steadfast to protect individual liberty.

Question #2

1. The federal government is creating a right that is not necessarily found within the 14th amendment. The supreme court has retained the sole authority to interpret the constitution (Marbury/Boerne). By giving both the ability to interpret what is in fact a liberty interest and then legislate upon that determination would give a seemingly endless and unenumerated power to congress (Boerne). Laws pursuant to 14 must be congruent, proportional, and prophylactic and remedial. This measure does not purport to do that. It seeks to create a liberty interest and then impose that on the states rather than protect infringement or provide a remedy. While states maintained an inherent police power, the power to regulate health and welfare of citizens, that power has been found subservient individual's privacy interests. The sanctity of marriage was held to be almost inviolable in Griswold and the court recognized the special sanctity of the relationship. Despite the statute creation of a new liberty interest, the police powers of Texas would not be the barrier to prevent the passage of this law, rather it is congress's definition of liberty interests that is fatal.

2. While Morrison held that a civilian could not seek remedy against a state for the action of an individual, the court here instead seeks to give action against the state for the state's actions. Despite this, sovereign immunity has been held to be a strong inherent protection that states have. It was further expanded in the 11th to preclude citizens of a state from suing, and despite the language being ambiguous about citizens of its own state from suing it was quickly held to apply in Hans. This statute also indirectly commandeers the state executive by forcing the state to defend against suits (Printz). Forcing a state to waive sovereign immunity and on top of that forcing the state to expend executive branch resources defending suit violates the sovereignty that Texas retained when it entered the union, and the 10th amendment argument here is valid.

3. The SC has long held that the right of free exercise is incorporated into the states. This law is one of general applicability and does not specifically target priests, all people who discriminate are subject to liability. The statute is further directed at conduct and not at thought or conscious, while that is a dubious distinction, conduct based legislation requires further analysis because if it is merely thoughts they cannot be restricted. Further the act here is not illegal, marrying people is not a crime, and this act only subjected people to civil liability. The priest would then have to show an undue burden on his religion. In Gillette going to war was a undue burden on his religion, in Yoder even forcing a child to go to school until 16 which seems like a valid state interest was too much of a burden and forcing someone to work on Saturday in Sherbet was an undue burden. The priest works for the catholic church, that has held as a fundamental tenet that a marriage exists only between a man and a woman. Forcing a priest to perform the service, support this act as a leader of his congregation, or suffer liability would be an undue burden.

4. Grandpa must first establish that his cakes are a form of speech. While during some periods of war

restrictions on free speech were stronger, SCOTUS has held more recently that speech in and of itself is a fundamental right. Taken literally, building a cake could not be a form of speech. However, the court has held that expressive actions can be a form of speech, even including flag burning. Since Grandpa makes elaborate and artistic cakes and expresses himself through that medium his conduct should be valid speech. The law itself is not regulating content of speech however and therefore will not receive strict scrutiny and become dispositive immediately, Grandpa can chose to make beautiful cakes still. Through intermediate scrutiny the court will consider if the government law is valid within the governments power. Here the only chance to save this law would be to use the commerce clause. The 14th amendment provides no protection against discrimination against individuals instead of states. While not mentioned in the statute the court could attempt to save this section 3 through the commerce clause as the prevention of discrimination being necessary to prevent harmful effects on interstate commerce (HeartsAtlanta). While this is only being challenged by one person, the effects of all beautiful cakes being taken off of the market could in the aggregate be a significant impact on interstate commerce (Wickard)The government must then prove that this act furthers an important government interest. The courts have held that regulation of commerce is an important interest (Katzenberg) and discrimination is a burden to it. Lastly, the burden on Grandpa's expression is not significant. Grandpa's cakes are already subject to the approval of his clients, and under intermediate scrutiny requiring to be made to make more artistic cakes does not constitute a significant enough burden to uphold that Grandpa's right to free speech has been violated.

5. Mr. Justice, the court is once again entering grounds where large shifts in social policy could affect the country's opinion of the court (Sebelius/Roe), and create further polarization of the people. Certainly the powerful majority should be always examined with scrutiny, but the concept of marriage is quite personal, individual, and ancient. People's moral beliefs on issues that are so hotly contested do not necessarily mean a hatred of others, but could be a desire for a more traditional view of marriage and society. The people might be best to determine when the time is right to allow marriage, and on a state by state basis. Lastly, an alternative to dismissing the case on a violation of liberty interests is to find it violates equal protection, determine the law is underinclusive because it only punishes discrimination against homosexuals, force the government to pass this legislation for all people. A priest must marry other religious sects. This will force the issue into the political process and out of the courts hands to avoid such a drastic determination.