

Spring 2015 - Constitutional Law - A+ Paper

Question 1

1. The argument against the President's actions comes from *Youngstown*. The president is acting inconsistent from Congressional intent and is in the lowest ebb of his power flowing only from his Article 2 powers. First, this only creates the presumption of unconstitutionality. The president's actions may still be justified if his powers fit within his Article 2 powers. Second, even if the President is only acting with Article 2 powers these powers are broad and allow for vast discretion in foreign matters. In *Curtiss-Wright*, the Court found that the president is the sole organ of the nation and the Court defers to the president in matters of foreign policy.

Further, the Constitution recognizes not only the president's powers in war but also the need for the president to act unhindered. In Art2§2 the president is the Commander and Chief of the Army and Navy. While Congress has the ability to declare war in Art1§8, this power is merely declarative. The substantive power is in the president as demonstrated by the 1941 Declaration of War by Roosevelt. Similarly in *Korematsu*, the Court upheld an executive order which the exiled Japanese citizens in relation war power discretion. Also, the Constitution vests all executive power in the president. The unitary theory of executive power and broad discretion the president is granted in times of war and foreign policy justify the President's declaration of war.

2. The President may discriminate based on race and gender because the president is acting to protect a national security interest. Under *Bolling*, the Courts incorporated the equal protection doctrine into the 5th amendment due process clause. This incorporated the decision under *Brown(1)*, that discrimination against race violates the equal protection of the law. However, *Brown* was decided based on educational interest so it is unclear whether discrimination is banned in all cases. Second, under *Korematsu*, the government may discriminate based on a national security interest. The governmental interest the president is trying to achieve is protecting America during the war effort. This is a national security interest which mirrors the war effort during *Korematsu*. The means the president is using, is choosing white men as spies to infiltrate the German army. This is tailored to the security interest, because only the classification being made, white males, would be accepted as legitimate members of the German army. If there was any exceptions to the classifications, this would threaten not only the national security interest but the person excepted. Lastly, there is no claim based on discrimination against gender because the Courts have yet to recognize gender as a quasi protected class.

3. First, the immigration law which Congress passed allows discretion by the executive. The number is capped at 100,000, but there is no mention of a minimum number of immigrants which must be accepted. The president is acting within the provided discretion granted by Congress is and executing the law according to the discretion granted. Second, this extends to the president's recognition duties of other countries. In Art2§3, the president is assigned with receiving ambassadors. This implicitly gives the president recognition powers of other countries. By denying foreign immigrants, the president is exercising his Constitutional duties. Third, this is again an extension of the president's broad discretion in foreign policy matters. Under Curtiss-Wright the president has broad discretion on foreign policy. While in Curtiss-Wright, the president halted an export of guns, here the president is halting an import of foreign people. Fourth, even if this is a bad faith discretion of the president, in times of war the laws fall silent. As the Americans are sending spies to Germany, Germany might send troops to America in the form of immigrants. The president may need to in bad faith ignore the law to protect the people during times of war.

4. In Art.2§2, the president has the right to make appointments, and specifically recess appointments. The appointment the president made was an intrasession recess appointment, or one occurring internal to a session of Congress. First, the clause doesn't specify whether the appointment must be made during an intersession or intrasession recess. There was a break in the session where the Senators went to eat lunch, which would be an internal break, and was when the president made the appointment. Second, although the appointment was made without Senate approval, the recess appointment clause does not require Senate approval. Third, even if this was a bad faith appointment by the president, this was only in response to bad faith from the Senate. The Majority leader refused to give advice or consent to the appointment, till an unrelated executive order revoked. Refusal to give advice or consent for appointments violates the Senate's Constitutional duties. Fourth, this was an emergency relating to national security. The Secretary of State position needed to be filled, which is a crucial seat during a time of war. For the national security of the state, the president may circumvent normal procedures.

5. The judiciary and legislative branch include many multiple members in order to ensure a representative opinion of the populus. These inefficiencies are valuable for these branches because power is meant to be dispersed. As stated in Federalist 10, the dangers of factions must be guarded against the influence of the few and the confusion of the multitude. The Constitution functions under a unitary executive theory purposefully. There are occasions when the nation must act swiftly in response to a legitimate threat to national security or civil rights. Lincoln acted unitarily and technically unconstitutionally by seizing the "property" of slave owners, but the action was done for the protection of civil rights. Likewise FDR, made sweeping changes which aided the crippled nation, but this was only possible when the Court recognized the president's broadened role and discretion during times of national hardship. During the war, the

president may be required to make unpopular and potentially unconstitutional decisions, yet this discretion is necessary for the protection of the country and its people

Question 2

1. Yes Section 1 preempts Ordinance 1. Section 1 protects free speech rights from the first amendment by banning restrictions on the transmission of 3D guns and related electronic files. The electronic files in Ordinance 1 constitute speech. In *Brown*, speech is the creation and dissemination of information. The electronic files are information based on the labor and creativity of Cody, and were disseminated on the internet to others. Section 1 assumes Ordinance 1 is based on the content of the speech in the electronic files (Johnson) and not the state's regulation of time, manner or place (Renton). The Ordinance reflects NY's fears about the dangers of 3D handguns and seeks to limit the distribution of the information in the files. Because the regulation is on conduct, the correct test under the first amendment is stated in Section 1(c).

Congress has the authority to pass this act under 14th amendment section 5 enforcement powers. Congress may infringe upon the state's police powers to protect rights in the 14th amendment including the due process clause. The framework for the rights listed in the due process clause are in Footnote 4, and include the first ten amendments in the bill of rights. By 2015, nearly every amendment including the first amendment has been incorporated into the 14th amendment's due process clause. The electronic files are speech, the law is on the content, and Congress may act according to its Section 4 powers

2. No Section 2 does not preempt Ordinance 2. Section 2 is based on the second amendment. In *Heller*, the operative clause of the second amendment reflects the true meaning of the second amendment, and the prefatory clause is merely an aspiration note. The operative clause allows citizens the right to bear arms meaning the right to have weapon commonly used. However this right is limited under *Heller* and does not include the carrying of dangerous and unusual weapon. Thus, the government can limit the type, conditions, and who may own a gun. *Heller's* decision was meant to apply mainly to handgun. 3D guns in the present are rare and unusual.

Congress does not have the authority to enact Section 2. Although *Heller* was incorporated into the 14th amendment's due process clause by *McDonald*, Section 2 seeks to change the meaning determined under *Heller*. *Heller* only extended to handguns and allowed the government to limit many other aspects of gun control. In *Marbury/Boerne*, it is the province and duty of the judiciary to decide the meaning of law, and Congress's reinterpretation of that meaning is unconstitutional and a violation of the separation of powers.

3. Yes, Section 3 preempts Ordinance 3 because Ordinance 3 is a direct violation of Congress's commerce power. Ordinance 3 gives NY control over transportation of goods between states. In Art.1§8 Congress has the power to regulate commerce among the several states. Even pre New Deal, in *Champion*, Congress could regulate the transportation of goods between states. Since *Darby*, *Wickard*, and *Hearts of Atlanta* this power has increased exponentially. In *Katzenbach*, Congress could regulate the activity of a restaurant because the restaurant used goods which came across state lines. Yet in *Lopez*, Congress could not regulate guns because banning guns in a school zone did not include economic activity. Yet, in *Lopez* the Court recognized that channels of commerce, such as commerce between the states is under the commerce clause. Still, the power is not prohibited by Art.1 §10 for the states. Yet concurrent power only exists when the powers of the state and federal government do not conflict (*McCullough*). Here, the Ordinance is directly conflicting with Section 3 of the act passed by Congress. Since, Congress's actions are based directly on Art.1§8 powers, the federal law is supreme because its foundation is the Constitution, the supreme law of the land (*Marbury*).

4. Section 4 is probably unconstitutional. The 14th amendment in section 5 allowed Congress to waive the state's immunity which was previously ensured in the 11th amendment and later expanded in *Hans*. As shown above, at least the first amendment right which was incorporated into the 14th amendment was violated by Ordinance 1. Congress may provide a remedy through the 14th amendment and waive the state's immunity. However, the remedy must be congruent and proportional to the injury trying to be prevented, and must be remedial and prophylactic in substance (*Morrison/Boerne*). In *Morrison*, Congress waived the state's sovereign immunity and allowed victims under VARA to bring suit against the state. However the Court ruled this was substantive, not remedial in nature, and lacked proportionality to the ends. Here, Congress is waiving the state's immunity for harm under the first amendment. Yet, this remedy is too broad a power and is not proportional to the injury trying to be remedied. Instead of waiving immunity of the entire state, Congress could allow suit against a state official (*Ex Parte Young*). This would limit the infringement on the state's autonomy and police power while still allowing a remedy for violation of the Congressional act.

5. As stated in Federalist 51, ambition must be made to counteract ambition. The premise of the Constitution and the enumerated rights of the federal government, is to protect the liberty of the states. Without the checks and balances, the bill of rights would be a useless letter of law. The constitution presumes the states and the people retain a large sea of rights occasionally excepted by the limited control of the federal government and several prohibitions of the state's powers. (9th/10th amendment/ Art1§10). However, history demonstrates even the states may violate the rights of their own citizens. A long history of slavery, and oppression based on gender and race necessitated the 14th amendment. While the 14th amendment infringes on the state's autonomy and police power, the 14th amendment also ensures the civil rights of the people are protected.

While the constitution recognizes the state's autonomy it also recognizes that both the states and the federal government derive their power from "we the people."