

**Constitutional Law Final Exam  
Fall 2015  
Top Paper**

**Question #1**

1) Article 1 of the The 14th Amendment states that no state shall deprive any person of liberty without due process of law. A protected liberty interest is defined by SCOTUS. Here, JERO is not attempting to define a liberty interest, it is attempting to prohibit discrimination against gays and lesbians. Windsor (2013) states that moral disapproval is not enough to pass a law, but is it enough to repeal an anti-discrimination law that was enacted by the County Council? Probably not. One could ask whether JERO established fundamental rights to the LGBT community, but it has been established that only SCOTUS can only define these rights. As the court held here, this right was not deemed a fundamental right, therefore not needs only rational basis review. Next, does repealing this law create an undue burden for the LGBT community to get married? If it was never a right afforded to them via the Constitution, it is unlikely that the repeal of this law presents an undue burden. Because the repeal of the law does not put the state at risk of making or enforcing a law abridging the citizens right, therefore it is likely a valid repeal of JERO.

2) The exclusion of all other students who are not lesbian, gay, bisexual or transgender is likely violates the guarantee of Equal protection. The creation of a "Safe space" is creating a classification on the basis of sexual orientation. SCOTUS held that classifications based on sexual orientation were quasi-suspect under the 14th amendment. Using that, the exclusion of someone based on sexual orientation must serve important government objectives and must be substantially related to the achievement of those. For something to be substantially related, there must be an exceedingly persuasive justification. Here, the ends was the perceived safety of the LGBT community on campus, but the means to get there was the exclusion of everyone else. Here, there is no persuasive justification, therefore the exclusion should not be allowed. Furthermore, In Brown (1954), the court determined that the psychological effects of segregation on black students significantly affect their learning. The same impact could be felt here for the exclusion of non LGBT members.

3) The University's expulsion of Nino likely violated his First Amendment rights. First we must determine whether we had speech. Here, Nino actually spoke words after not being allowed into the "safe space." Next we ask if it is protected. Libel/Defamation, True Threats, Obscenity, Child Pornography and Fighting words are considered protected. Chaplinsky upheld that fighting words were not constitutionally protected speech, however that is probably not good law anymore. Also, while his words may have offended nearby people, offensive speech is still protected. We must next determine whether he was punished for the content of his speech (content-based) or for the time/place/manner in which he spoke (content-neutral). Here while the University claims to have expelled Nino for engaging in "hate speech," it was actually the irate Dean who expelled him for engaging in speech that offended the nearby students. As a punishment based on the content of his speech, it is likely that his suspension violated his First amendment rights.

4) Any one person can read the Constitution and decide how they choose to interpret it. In 2013 (Windsor), SCOTUS rejected DOMA, which defined marriage as that between a man and a woman. Before the court made this ruling the President and the Executive Branch declared that they would not follow DOMA because they felt it was unconstitutional. The Supreme Court eventually agreed with its unconstitutionality and rejected the law. Similarly, Footnote 4 of U.S. v. Carolene Products (1938) states that when a law discriminates against "discrete and insular minorities" that Strict Scrutiny should apply. Here, the discrete and insular minority, being the LGBT minority, may bring case after case and attempt to have SCOTUS apply strict scrutiny to sexual orientation cases, or perhaps reverse its decision altogether. While this is not a traditional way to get a separate ruling (because courts do not like to reverse their opinions) it is an option. Abraham Lincoln's entire presidential campaign was run on the platform that he would ignore Dred Scott because he did not agree with it. When he was elected, and after a bloody civil war was fought, the Court eventually reversed course on its decision, and the Reconstruction Amendments promised equal protection of the laws for all. Here, if enough of the states agree, a Constitutional amendment could be proposed, ensuring that the 14th amendment applies to the LGBT community too. Similarly, the court goes through arcs of constitutional decisions. Many major injustices from prior years rulings have been corrected.

5) Federalist 51 states that people are ambitious, and ambition must be made to counteract ambition. That is why the Separation of Powers is built into our Constitution. The Legislative Branch has the power of the purse, having the ability to control funding for the laws passed, while the Executive Branch has the power of the sword, meaning the power to enforce the laws. The Judicial branch's role is to sit in judgment. They cannot enforce what they decide, the executive branch must do that. This brings us to the question of why do the people obey the courts? There are a few instance where they have not. The Arkansas school refused entry to the Little Rock nine after the Court's holding in Brown to desegregate with all deliberate speed. There the national guard was called in to escort the children to their classrooms. Thus, a judicial decision was enforced by the executive branch. People obey the courts because they choose to. If people decide to deny the Courts their role of sitting in judgment, chaos would erupt and the Constitution would be effectively invalidated. By agreeing to follow the roles established in the Constitution, the nation averts Constitutional crises and has allowed the nation to survive as long as it has.

## Question #2

1) Executive Order #1 was likely constitutional. The 10th Amendment of the constitution states that the powers not delegated to the U.S., are reserved to the States, or the people. This includes the states police power to the health, safety, morals and welfare of its citizens. The issue at hand is the distribution of state funds within the state. As this power is not granted to Congress, it is held by the states. Congress may not waive a states sovereignty unless the solution is proportional to the problem (Boerne). Here, the decision not to distribute money within the state would not warrant a Congressional waiver of Texas' sovereignty.

Also, *Printz v. United States* (1997) states that a congressional act commandeering state officials was outside of Congress's reach, and therefore could not be allowed. Here, state officials were essentially being commandeered to assist with the resettlement of the Syrian refugees. Similarly, *New York v. United States* (1992) holds that commandeering a state, by forcing them to do what the federal government wants is unconstitutional. Similarly, in *Butler*, the exercise of a constitutional tax on the citizens of the state, in an attempt to take over the state's police power was deemed invalid.

2) The Syrian Refugee Act (SRA) was a valid exercise of Congress's enumerated powers. Article I, Sec. 8 details the powers that Congress has, including the power to lay and collect taxes. In *South Dakota v. Dole* (1987), the attempt to withhold 5% of the federal highway funds was a permissible attempt to incentivize the state to change the drinking laws. Here, the jurisdictions that refuse to cooperate with the SRA will lose 10% of their federal financial assistance. The dissent in *Dole* argues that at some point pressure turns into coercion, however, 10% is not likely that point. Similarly, in *New York v. United States* (1992), the Court upheld this notion holding that you may incentivize, but not coerce.

3) Executive Order # 2 likely violates the Fourteenth Amendment's equal protection clause. The 14th Amendment states that no state shall deny to any person within its jurisdiction the equal protection of the laws. In order to determine whether EO2 violates the equal protection, we must determine if this is a classification on the basis of race. A classification on the basis of race must be evaluated with strict scrutiny. *U.S. v. Carolene Products* (1938) states that discrete and insular minorities are groups that have historically unsuccessful at protecting their interest in the political process, and thus when a law discriminates against these discrete and insular minorities, we must apply strict scrutiny. Here, as in *Korematsu*, there is a classification on the basis of Race. The Court held that with a compelling state interest of national security, the means of excluding Japanese are appropriately designed. Here, all refugees from the listed other nations who apply for state public assistance shall be made to take a loyalty oath to the Constitution. The means with which to achieve the states security must be congruent and proportional. Similarly, the court held that the California policy of segregating prisoners based on race to avoid gang violence was not allowed (*Johnson v. California* 2005). The court does not easily find that policies promoting racial discrimination are valid. Here, requiring a loyalty oath will likely be found unconstitutional, even though it is a much less invasive measure than was taken in *Korematsu* and *Johnson*.

4) EO2 likely violates the Free exercise clause of the First Amendment. The court held in *Church of Lukumi Babalu Aye v. City of Hialeah* that a law of general applicability must apply to everyone equally. As the law in *Lukumi Babalu* was written and effectively targeted only the Santeria faith, here the law blatantly states that the citizens from the listed countries are the ONLY ones this law applies to. Courts are not in the business of deciding what a religion is. If it potentially recognizes the Church of the Flying Spaghetti Monster, it is possible that religious beliefs under ISIS's organization may require recognition. These protective rights under the first amendment would not be extended to allow violent crimes, however if there is a specific religious aspects of ISIS that would forbid an oath of this sort, it would likely hold that this law does not have general applicability, and is therefore invalid. However, if the oath were to be administered to everyone equally, not only refugees, but also citizens, the law would may be valid as one of general applicability. *Employment Division v. Smith* (1990) holds that a law of general applicability which prohibits everyone from participating in the illegal consumption of drugs does not violate the free exercise clause of the first amendment. Here, the Court effectively ended the "carve outs" for religious groups that began with *Sherbert* and *Yoder*. Thus, as EO2 is written, it likely violates the Free exercise clause.

5) *Korematsu* allowed the classification on the basis of race when it was necessary for national security. However, *Korematsu* has been a blemish on the skin of the United States since it was decided. Since then, many cases have decided that this sort of classification is not permissible, even to stop violence (See *Johnson v. California*). Now, allowing these racial or religious classifications would be a dramatic step back for the United States, both in the eyes of its citizens and in the eyes of the foreign leaders. While some Syrian refugees MAY pose a threat to national security, it is unlikely that they all do. Taking such drastic measures as racial/religious classifications would be doing great harm to the Constitution and what it has evolved into. The Constitution may have started as a document that allowed slavery, but through time, by virtue of court precedent and Constitutional Amendments, it has attempted to do away with these injustices. We must continue to move forward.