ISSUE OUTLINE: FINAL EXAM

CONSTITUTIONAL LAW, 2013-2014

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QUESTION NUMBER ONE

Conflict escalated between the United States and China. A proxy war broke out between North Korea and Japan. The Chinese navy seized control of the Spratly Islands, as well as Okinawa and portions of the Philippines. A blockade of Taiwan commenced. For the past decade, the United States had steadily reduced the size of its military. A sluggish economy and high debt (owed mostly to China) rendered a military build-up virtually impossible. Additionally, the President had quietly dismantled most of the nation's nuclear arsenal, thus the ability to deter Chinese militarism by threats of a nuclear attack was significantly constrained. War seemed imminent. Uncertain about the outcome, the President negotiated a resolution. A formal treaty was presented to the Senate and ratified. Necessary enabling legislation soon followed, which the President signed.

The treaty called for the following. China was to withdraw from Okinawa and the Philippines and end the blockade of Taiwan. In return, the United States would annually transport 100 unmarried Americans, aged 18 to 22, to China, for purposes of "cultural exchange." Rumor had it that the young Americans were actually intended by the Chinese to become involuntary sex workers, serving the government elite. Evidence of this intention came in the form of documents leaked by anonymous American whistle-blowing diplomats.

In accordance with the treaty enabling legislation, selection for service in the "cultural exchange program" was pursuant to a draft of eligible persons, who were to register before-hand in a manner similar to the military draft. In accordance with the treaty and the enabling law, eighty percent of the draftees were to be women, with no preference as to race. Twenty percent of the draftees were to be men.

When the first draft was held, seventy-five percent of the draftees were *blond* women. *None* were Asian. Three percent were female African American and two percent were Latina. The remaining 20 percent of the draftees were men.

Officials claimed the outcome with respect to the female draftees was completely random.

Ariadne was a 20 year old blond woman, who was also a citizen of the United States. She received notice of her selection. She had no desire to go to China, in part because she was engaged to be married. She brought an action for injunctive relief in a Federal Court.

Theseus was a 20 year old male. He was *not* selected. Unlike Ariadne, he wished to go to China (his *secret* patriotic purpose was to gain the trust of Chinese leaders and then assassinate them). He sought a writ of mandamus in a Federal Court. He hoped for issuance of an order requiring inclusion of an equal number of men and woman in the cultural exchange program, or at least an injunction until Congress or the President corrected the disparity.

Discuss the following:

1. The constitutional rights violated by Ariadne's selection for inclusion in the "cultural exchange program."

2. The merits of Theseus' claim that the government's action violates the principle of equal protection.

OUTLINE OF ANSWER TO QUESTION ONE

I. Ariadne's Constitutional Rights.

A. Equal Protection: Sex Discrimination.

The Fifth Amendment to the Constitution contains a Due Process Clause, which in turn includes, by implication, a guarantee, to all persons, to equal protection of the laws. Equal Protection has been said by the Court to be a fundamental element of due process. (*Bolling v. Sharp* (1954) 347 U.S. 497, 74 S.Ct. 693). The Federal Government, like any State government, is prohibited from enacting laws that discriminate against persons on the basis of invidious classifications, and from enforcing facially neutral laws in a manner that is similarly discriminatory. Classification on the basis of race (of any kind) is presumptively invalid, as is a classification on the basis of sex. (*Regents of University of California v. Bakke* (1978) 438 U.S. 265, 98 S.Ct. 2733; *Craig v. Boren* (1976) 429 U.S. 190, 97 S.Ct. 451).

Here, Ariadne has received notice she is to be sent to China in accordance with the terms of a treaty. The treaty and its enabling law contain one obvious (or facial) discriminatory classification: a classification on the basis of sex. Consequently, Ariadne can argue that the treaty and law violate equal protection by imposing a significantly greater burden on women than men.

As a threshold issue, it is worth considering whether a treaty might overcome the Constitution, or amend it. It cannot. Though the treaty power is broad, the power remains constrained by the Constitution. (*De Geogroy v. Riggs* (1890) 133 U.S. 258, 10 S.Ct. 295). A treaty may effect any number of ends— even if those ends cannot be achieved by Congress directly through the normal legislative process— but it cannot exceed the limits of authority imposed by the Constitution. (*Missouri v. Holland* (1920) 252 U.S. 416, 40 S.Ct. 382). Should a treaty impair a constitutionally protected right, it will be subject to the same level of scrutiny as ordinary legislation.

1. Are Women Actually Disfavored? The government could argue first that the law is not truly discriminatory. Specifically, the government could assert that it is not unfair or discriminatory to women to require that more of them be drafted into national service. It is, in fact, an honor to represent one's country. In reality, it is men who should complain for not being given the same preference. As the law does not truly place women at a disadvantage, there is no injury.

Ariadne can counter the government's argument by pointing out that calling a burden a benefit does not make it so. She can assert that the purpose of the treaty and law is to placate a foreign power by granting ownership of American citizens to that foreign power, to do with as it sees fit. There is no honor in that at all. The total loss of liberty which inclusion in the program entails fall so heavily on women that it cannot possible be consistent with Equal Protection.

2. **Are Men and Women Similarly Situated?** The government can also deny the evidence of the likely fate of the female selectees, or seek to have it suppressed on national security grounds. It can also argue that no equal protection violation exists because men and woman are not similarly situated. Yes, women suffer more than men, but how different is that from men suffering more than women under the selective service law and military draft? In the context of the military draft, exclusion of women was historically justified on the grounds that women are less suited for combat rolls than men. In the context of the treaty and law, women are subject to a greater burden than men due to the special circumstances of the international crises. Under the present circumstances, women and men simply are not similarly situated, hence the Equal Protection Clause does not apply.

3. **An Important Governmental Interest?** Should the Court finds that the treaty and the law at issue are discriminatory, the burden will be on the government to demonstrate that the treaty and law containing the discriminatory provision are substantially related to an important government interest. (*Craig v. Boren*, supra).

The government will claim that the treaty and law were enacted in order to avoid a potentially devastating war wherein untold numbers of Americans might have died and the country's stability significantly undermined. The treaty was the result of negotiation, which the United States government, in the person of the President, is entitled to undertake, and the final form of the treaty was, in part, the result of demands made by the Chinese. But for the acceptance of the demand for no less than 80 women per year, the treaty would not have been signed and war would have resulted. The enabling law, while discriminatory, was in furtherance of the same important government interest informing the treaty. The fact that war was averted is evidence that the treaty and law actually advanced that interest.

B. Equal Protection: Racial Discrimination.

Ariadne can argue that the application of the law is racially discriminatory. She can argue that while the law is neutral on its face, the overwhelmingly Caucasian profile of the selectees could not possibly be accidental. In other words she could point out the existence of *de facto* discrimination, as opposed *de jure* discrimination. Perhaps she could show that Chinese men favor "exotic" white women over non-white women and that the government is attempting to placate this foreign interest.

The government can argue that truly it was a random result, and that discriminatory outcome, with nothing more, is insufficient to establish an equal protection violation. (*Washington v. Davis* (1976) 426 U.S. 229, 96 S.Ct. 2040). The government can point out that discriminatory outcome was not so overwhelming as to compel the conclusion that only a racially discriminatory intent explains it. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 1064).

If Ariadne is successful in making a case for a non-random result, the government would be required to demonstrate that the discriminatory outcome would have resulted even without a

discriminatory intent. In support of her opposition to the government's argument, Ariadne can assert that any effort of the government to justify the outcome is doomed because there really is no reasonable grounds to conclude that absent a discriminatory intent the government would have made the selection it did, or that the outcome was the result that occurred despite the government's discriminatory intent. Based on the facts, there really is no basis to conclude that the outcome was the result of something other than by design.

Perhaps the better approach for the government would be to *admit* it intended to discriminate and that the outcome was the intended result. This would subject the treaty and the law to strict scrutiny, but would enable the government to present a strong argument that acceding to the racial preferences of the Chinese was necessary to avoid armed conflict with China. What more compelling purpose could there be? Ariadne could argue that there is no purpose compelling enough to support the enslavement of citizens, and even if there was, it is hard to believe that the disproportionate burden placed on Caucasian women is not too broad to satisfy the second element of the strict scrutiny test.

With regard to that second element, she could attempt to show that the government could have offered the Chinese something else in place of women. The range of possibilities with respect to concessions during treaty negotiations must have been great. For instance, could not the government have sought a more equal split between men and women, or in place of people, offered land instead—such as permitting the Chinese to retain a foothold in the Philippines or Taiwan? Pursuant to the Political Question doctrine, the Court might shy away from questioning too deeply the policy choices of the President who negotiated the treaty and the Senate who ratified it, and might accept as entirely reasonable the exercise by Congress of its war powers (or powers closely related to the war powers) in enacting the enabling legislation. Or the Court might simply take the government's word for it that nothing but the sacrifice of the freedom of American women would have effected an end of the conflict with China.

C. Thirteenth Amendment.

The Thirteenth Amendment forbids slavery and other forms of involuntary servitude. Ariadne can argue that her selection has essentially placed her in a condition of servitude analogous to the slaves of old. She will lose, among other things, her power to remain in the Country, her option to marry and have children, and her autonomy over sexual matters.

The government can argue that regardless of the truth of the intentions of the Chinese, her selection by the United States is analogous to being drafted into the armed forces. Just as the government is entitled to forcibly draft soldiers for service in war, it is free to draft citizens for duties intended to avoid war. Yes, Ariadne loses her freedom. She becomes a virtual slave. But she is serving her country and helping to avoid a far greater burden upon her people's liberty. If the compelling purpose test is one that would apply in the context of the Thirteenth Amendment, is it not true that the government's argument would satisfy the test?

In an attempt to avoid that question, and its answer, Ariadne could simply argue that the Thirteenth Amendment is an absolute, and that the gravamen of the right it entails cannot be balanced against the government's purposes, however compelling those might be. That would be a difficult argument to prevail with. To date, the Court has not held a single right protected by the Constitution to be absolute.

D. Fourteenth Amendment: Rights of Citizenship.

The Fourteenth Amendment expressly guarantees that all persons born or naturalized in the country are citizens of the United States. The Fourteenth Amendment does not state what, if any, the privileges or rights of citizenship are. History and the Court's jurisprudence suggest, at the very least, that all the rights set forth explicitly in the Constitution belong to the citizen, in addition to such things as the right to come to the seat of government of the United States, to transact any business one may have with it, to seek its protection, share its offices, engage in administering its functions, and access the nation's seaports, sub-treasuries, land offices and Courts of Justice. (*Crandall v. Nevada* (1867) 73 U.S. 35, 6 Wall 35; and *In re Slaughterhouse Cases* (1873) 83 U.S. 36, 16 Wall 36). It could be argued without much controversy that a citizen of the United States also has a right to permanently reside in the United States. What would citizenship be worth if a citizen could be barred from the Country, or subject to exile? Here, Ariadne is not only facing the loss of the various privileges and rights of citizenship (whatever those might be), but also her right to remain in the United States. There is no limitation on the time she is to remain in service and no guarantee that her life will be safeguarded by the Chinese once she is in their control. On the face of it, she is to be in service indefinitely, thus outside the Country for just as long. Because the government cannot take one's Fourteenth Amendment first sentence citizenship away (*Afroyim v. Rusk* (1967) 387 U.S. 253, 87 S.Ct. 166), the government also cannot take away the necessary accoutrements of citizenship, save perhaps as a result of the commission of a crime. (*Thirteenth Amendment*, § 1). Here Ariadne has committed no crime. As for the argument that the burden she has been compelled to undertake is analogous to military service, it isn't. Military service is a duty of citizenship, and perhaps a right as well. Nearly every duty implies a corresponding right, as well as consent to bear it, even if the consent is only implied. The kind of service contemplated here is no duty in this sense; it is slavery, which is the equivalent of an absence of citizenship and all the rights which that status entails.

E. Fifth Amendment: Right to Marry.

The Due Process Clauses of the Fifth and Fourteenth Amendments contain implied substantive provisions that may be violated by the government only upon a showing that the violation furthers a narrowly tailored compelling purpose. Among the rights found by the Supreme Court to be protected by the Due Process Clauses is the right to marry. (*Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817). The right is one that predates the Constitution and has been said to be one implied by the Ninth Amendment. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct.

1678). Certainly the right was honored in every state in the Union from the earliest times onward, pursuant to statute as well as common law. Ariadne is planning a wedding, but now it must be postponed, perhaps forever, due to her mandatory inclusion in the "cultural exchange program." This, she could argue, is a violation of her fundamental right to marry.

In response, the government could argue that Ardiane lacks standing to pursue her claim— a lack traceable to absence of an injury. Specifically, it could argue that there is no certainty that she or her intended wouldn't suffer cold feet come the wedding day. The government, after all, hasn't stopped her from marrying, and wouldn't necessarily stop her now. The law itself is silent as to any prohibition on marriage once selection has occurred, and does not expressly indicate that marriage by selectees, following selection, would be deemed a nullity. Ariadne could respond either by going ahead with the marriage prior to the transport date and seeing what happened, or arguing that the mandatory nature of service, once selected, implies that marriage is unlawful. The argument would follow that because marriage is unlawful for someone such as her, she has suffered an injury, and thus can bring her claim.

What the Court would do with these arguments is unclear. The Court could interpret the statute strictly and (assuming the language is accurately summarized in the fact pattern) thereby conclude that nothing prevents a selectee, once selected, from marrying. If that is the Court's reading on the statute, marriage could become a way to avoid service once the draft occurred. Because such an interpretation would thwart the intent of Congress to transport women to China in accordance with the treaty, the Court might infer a prohibition on marriage once selection took place. If the latter approach was adopted, it would mean Ariadne suffered an injury, and thus had standing to bring her claim.

The government could also argue that lack of standing is evident in the absence of any prohibition on marriage *after* the date of transport, or after her term of service is over. Any impairment of her right that exists is merely temporary. Ariadne can counter the argument by providing evidence that the program she has been selected for renders marriage an impossibility. While it is called a "cultural exchange program," it may actually be sex slavery with no termination date. If history is a guide, she will likely die within a few years, or be killed or disabled and rendered incapable of a normal life, both physically and psychologically. She can also argue that whether sex slavery is her likely fate or not, once she leaves U.S. soil and comes under Chinese jurisdiction, her freedom to do anything (including marry and engage in married life) will be substantially circumscribed. If she can present evidence of the likely nature of her condition following transportation, she may be in a good position to demonstrate that her inclusion in the program is a real impairment of a fundamental right.

Once standing is established, the Court would have to consider the merits of Ariadne's claim, as well as the government's defenses. The government's case would be similar to what it presented in the context of Ariadne's other claims: that a compelling interest exists in preventing a devastating war, and that no less restrictive means was available to achieve that end. The

argument that Ariadne's sacrifice is justifiable in the face of a probable holocaust is easy to accept. The government's tailoring argument may be less convincing, but might well succeed if the government can demonstrate that the Chinese would accept nothing less than the annual shipment of unmarried American women in exchange for a termination of hostilities.

II. **Theseus' Constitutional Rights: Equal Protection**.

Many might question Theseus' sanity in bringing his claim— why not let the supposed slight lie? The readers of this question, however, know the truth: that he seeks entry into the program in order to perform acts of terror against the Chinese. Ignorant of his motives, the Court would consider first the government's important purpose, and then whether the law is substantially related to that purpose. We know what the government's purpose is: to placate a foreign enemy and prevent further escalation of armed hostilities. The government made the same argument contra Ariadne. There is no doubt that the purpose supporting the discriminatory treaty and law is important. But was there no way to avoid an 80-20 disparity among the sexes? The government would argue that it had no choice but to agree to the Chinese insistence on that split. Insistence on a more even sexual distribution may well have caused a breakdown in negotiations and an attack on the United States by China. Equal burdens and opportunities under the law should be bourn and enjoyed by persons who are similarly situated, but because the Chinese wanted more women than men, and wanted them for reasons all their own, it is clear that men and women were not similarly situated for all purposes, and that discrimination with respect to the burdens and opportunities here reasonably corresponded with the interests of the nation's partner in peace negotiations.

QUESTION NUMBER TWO

Omar is the head of a religious organization. His organization sells books, newsletters, cds and dvds covering various religious issues, with relevant commentary touching upon public policy and politics. Among the statements found in this material was the following: "*God made man, but Satan corrupted him by luring him into evil practices, including homosexuality. God calls on us to combat this evil, even to the point of raising a sword to those who encourage it*."

Roger was very interested in religion. He was what is known as a "seeker." He stopped into Omar's worship center. Looking over some of the printed materials, he ran across the above quoted passage. He turned to Omar and said, "isn't this a little harsh? Even if it were true that homosexuality is wrong, does God really want us to kill gay people?" Before Omar could respond, an organization member named Abe Baker yelled "Infidel sodomite, you shall pay!" Abe Baker had enthusiastically read many of Omar's books and attentively listened to the cds. Abe Baker knocked Roger to the ground, dragged him out of the building, and spit on him. Omar ran out, provided first aid to Roger and called an ambulance. While waiting for medics to arrive, he said to Roger, "I'm sorry this happened, but we'd never let anyone like you join our organization."

State law includes a Public Accommodation Law, which provides: "*all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all establishments of every kind whatsoever.*" The statute also permits civil suits when the law is violated.

State law also includes a Hate Crime Law, which provides: "*everyone who, by communicating statements in a public place, incites hatred against any identifiable group where such incitement could to lead to a breach of the peace is guilty of a crime*." The statute also permits civil suits by victims of "hatred."

In accordance with the State's Public Accommodation Law, Roger sued Omar's organization. He alleged he had been denied membership in the organization because of the organization's perception of "the kind of person he was."

In accordance with the State's Hate Crime Law, Roger sued Omar. He alleged that hatred incited by Omar caused Abe Baker to assault him.

The incident involving Roger and Abe Baker gained nationwide attention. In time, a Federal IRS audit was commenced. The non-profit status of Omar's organization was suspended pending the audit. In a letter to Omar, an IRS agent stated that "the spreading of hate is not entitled to taxpayer support." The letter made reference to the group's "denial of membership to homosexuals."

A group of civil rights protestors appeared outside of Omar's headquarters in support of Roger. They chanted "hey ho, hey ho, violent haters have got to go!" while burning a stack of Omar's books. Susie, the leader of the protest, was cited for violation of a local ordinance prohibiting fires without a burn permit. The ordinance had been enacted in 1896 following a city-wide fire. In the past 35 years, sixty-five percent of the citations for violations of this ordinance were issued to persons who conducted political protests that involved the burning of objects.

Discuss the following:

1. The merits of any First Amendment-related defenses to Roger's claim for violation of the State's Public Accommodation Law.

2. The merits of any First Amendment-related defenses to Roger's claim for violation of the State's Hate Crime Law.

3. The merits of any First Amendment-based arguments which Omar's organization could raise in response to the suspension its non-profit status.

4. Whether Susie's citation is consistent with principles set forth in *United States v. O'Brien*.

OUTLINE OF ANSWER TO QUESTION TWO

I. The Organization's Defense Against Roger's Claim for Alleged Violation of P.A.L.

The Fourteenth Amendment's Due Process Clause incorporates almost all of the provisions of the Bill of Rights, including the First Amendment. Implied in the First Amendment is the freedom of expressive association. The Supreme Court has held that organizations which engage in expressive activity are protected by the First and Fourteenth Amendments. (*National Association for the Advancement of Colored People v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163). Here, Omar's organization was apparently formed, in part, to publicize a particular viewpoint, which is rooted in particular religious concerns, beliefs and attitudes. Consequently, the organization can allege that Roger's action, and the law that permits it, burdens its members' right to expressive association.

A. Roger's Standing to Bring a State Civil Rights Action.

Even before the First Amendment issue is reached, there is an issue of standing that should be addressed. Standing to sue only exists if Roger is a member of one of the classes of persons the law protects. If he is not a member of a class of person protected by the law, he has suffered no injury. Without injury, there is no standing. The facts do not actually say that Roger was a member of a protected class. Roger himself does not even argue this. He said he was discriminated against *not because of his protected status*, but because he was perceived by Omar to be someone having such status. Textual support for Roger falling into the law's protective scope is weak at best. Abe Baker, for instance, accused Roger of being a "sodomite," which is a term often used in a derogatory way for a gay person. But is Roger actually gay? Apparently not. Roger's own comments suggest he distinguished himself from gay people, even while having sympathy for them in the face of Omar's alarming rhetoric. Another support, again weak, for the conclusion that Roger was discriminated on the basis of membership in a protected class is found in Omar's comment that the organization would never welcome "someone like him." The statement, however, is vague. It could merely mean that the organization doesn't welcome people who question its views, or that Omar simply didn't believe Roger was ever going to be anything other than a person who questioned.

Roger could point out that if Omar is correct regarding discrimination on the basis of sexual orientation, there remains the issue of denial of membership on the basis of Roger's religious views. His views apparently are quite different from those of the organization. Does that place Roger into a protected class of people who are subject to discrimination because of their particular religious views? It might, though it is not clear that Roger has any religious views. Instead, though interested in religion, he (as the song says) still hasn't found what he's looking for. He's a seeker only, which may suggest a *lack* of a religious viewpoint. If he wasn't discriminated against on the basis of his religious views, he suffered no injury, and thus has no standing.

To salvage his case, Roger could point out that his disagreement with the organization was rooted in his personal viewpoint, which is characterized by an interest in and inquisitiveness regarding religion. He did suggest a personal belief in God, and in what God's view on killing members of particular groups might be, which might well qualify as a religious belief or viewpoint for purposes of the statute.

The organization can also argue that Roger lacks standing because Roger never actually applied for membership in the organization. If he never actually sought membership in the organization, he couldn't have been denied membership. Without denial of membership, there is no basis for a claim that the denial was based on his membership in a protected class. Roger could argue in response that application would have been futile in the face of Omar's statement, but he'd still have to present evidence that he intended or desired to seek membership. The facts support only the conclusion that he was interested in many religions, was curious about Omar's organization, and had questions. There is no evidence in the facts to support his desire or intent to join the organization.

B. **Expressive Association**.

Assuming Roger was the subject of discrimination that violated the statute (and therefore had standing to sue), the organization can argue that inclusion in their midst of Roger (who presumably is gay or of a religious or social outlook at odds with its own views) would fundamentally contradict the viewpoint its members desire to publish to the world and act upon within their own ranks. The organization could argue that Roger's mere presence in the organization's ranks would alter the message it desires to convey, and thereby deprive it of its right to convey it. Assuming Roger is gay, or of a different religious viewpoint, his ability to overcome the organization's First Amendment-based expressive association argument is limited by such decisions as *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338; *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446).

C. **Free Exercise**.

The organization can also argue that its members are entitled to the protection of the First Amendment Free Exercise Clause. If the organization is punished for excluding persons who do not share the organization's religious views, the members' right to free exercise of their religious beliefs in the form of membership in a group of like minded persons is terminated. The organization itself is similarly at an end.

In response, Roger could argue that inclusion of persons of different views doesn't prevent members of the group from freely exercising their faith, nor does it impair the organization in any significant way. The organization can still publish material reflective of the views of the organization, and the members can continue to belong to the organization. The organization can also still teach that homosexuality is wrong. Such an argument would likely fail given the

importance, in any faith based organization, of controlling doctrine and establishing and enforcing criteria for membership. Without an ability to control such things, the organization ceases to exercise freedom over what is most essential to its existence, and its members lose the choice they freely made to belong to an organization committed to particular beliefs, comprised of people who share those beliefs.

In response to the organization's arguments, Roger can assert that the termination of rights here is hardly a tragedy. The end of various types of discrimination is what the law seeks to achieve. Such a policy objective is consistent with recent trends in Constitutional jurisprudence. (*Romer v. Evans* (1996) 517 U.S. 620, 116 S.Ct. 1620; *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472). Just like the all-white school that didn't want to enroll black children, Omar's organization must yield to the higher social value. (*Runyon v. McCrary* (1976) 427 U.S. 160, 96 S.Ct. 2586).

The organization could counter this argument by pointing out that *Romer*, *Lawrence*, etc. did not involve contrary constitutional protections. Instead, those cases involved mere statutes that ran afoul of Constitutional limitations on the States' lawmaking powers. There is no Constitutional bar per se on discrimination against homosexuals, though there is a right to freely exercise one's faith, even when that faith entails ideas and prompts criticism about the kinds of conduct that non-members support and endorse. Likewise, the case involving the all-white school (*Runyon*) dealt with racial discrimination, which the Constitution expressly outlaws. Freedom from discrimination for homosexuals (though reasonable and fair) does not fall into the same textually explicit category of Constitutionally protected rights as freedom from racial discrimination and impediments to the freedom of speech and the free exercise of one's faith— at least according to the Supreme Court.

II. **Omar's Defense Against Roger's Hate Crimes Suit**.

A. **Vagueness**.

Omar can argue that law is vague in that it fails to provide much in the way of guidance as to what kinds of statements might subject a person to punishment. The law states that utterances that "could lead to a breach of the peace" are subject to its punitive scope. The lack of precision with respect to the scope of the law suggests that virtually any statement could give rise to liability. It was to avoid uncertainty, and to prevent prosecution for unpopular viewpoints, that the Court required that laws aimed at inflammatory statements be permitted to target only those statements that are likely to cause an imminent breach of the peace. (*Schenck v. United States* (1919) 249 U.S. 47, 39 S.Ct. 247; *Brandenburg v. Ohio* (1969) 395 U.S. 44, 89 S.Ct. 1827; *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 62 S.Ct. 766). Though the statutory language here is imperfect, the Court might avoid striking the law down by adopting a narrow construction (that is, reading the Constitutional limitation into it). This would potentially preserve the action against Omar, but also set him up to mount an as applied challenge.

B. As Applied Challenge.

Assuming that the law was facially valid, Omar could challenge it "as applied" to him. Specifically, he could argue that while he wrote very pointed things, and that Abe Baker read what was written, there is a major causal break between Omar's writing and Abe Baker's assault of Roger. Omar never directed Abe Baker to attack Roger. He simply wrote that people must combat what he believed to be evil, even to the point of "raising a sword to those who encourage it." So-called "Fighting Words" and "Incitement" statutes require that a speaker address a particular audience and utter things likely to spark an imminent violent response, either because the listeners are outraged against the speaker, or because they believe that this is what the speaker intends them to do. (*Cohen v. California* (1971) 403 U.S. 15, 91 S.Ct. 1780; *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 112 S.Ct. 2538). Omar's books are not intended for any particular audience, the action called for is not aimed at a precisely identifiable group and, given the fact that words are printed on a page rather than delivered from a soapbox, are not reasonably calculated to cause a spontaneous riot, crusade or jihad. The more reasonable explanation for Abe Baker's behavior was his own uncontrolled passions. Moreover, Abe Baker wasn't so much as acting on Omar's words as he was responding to Roger's gentle critique. An argument by Omar that his speech is too remotely related to the attack on Roger will likely prevail.

III. The Organization's Defense Against IRS Action.

A. Viewpoint Discrimination.

Here, the IRS has commenced an audit of the organization and suspended its non-profit status. In its defense, the organization can argue that it is being singled out for adverse treatment on the basis of the viewpoint of its publications.

In response, the government can argue that while the viewpoint of the organization's publications are distasteful and did play a role in the suspension, that role was minor. The IRS could argue that the revocation of the non-profit status is primarily based on the obvious for-profit activity of the organization, in violation of the nation's tax code and that the audit was designed to determine how extensive the for-profit activity has been.

The organization can reply by wondering why, if this was the case, the IRS mentioned the organization's viewpoint in the letter notifying it of the loss of its tax-exempt status. Additionally, the organization could ask (rhetorically) that if the IRS was truly concerned about the lawfulness of the organization's non-profit status, instead of persecuting it for something unrelated to the IRS's mandate, why deprive it of that status before the investigation (in the form of the audit) has even commenced? The hasty punishment seems less indicative of normal administrative procedure, in accordance with uniform rules, than a politically motivated persecution.

B. **Expressive Association**.

Though the right of association for purposes of collective expression is not found in the text of the Constitution, the Court has inferred such a right from the First Amendment. (*National Association for the Advancement of Colored People v. Alabama*, supra). The organization here can argue that the attack on it by the IRS is an attack on the right of its members to engage in expressive association and to freely express their religious, social and cultural beliefs, and that the IRS actions are designed to and actually do chill otherwise protected liberty interests.

Regarding the free association claim the government can argue that its action against the organization is unrelated to any intent to impair expressive association, thus the strict scrutiny standard does not apply. The audit and suspension were triggered by concerns over the unlawful profiteering of a non-profit organization, not the content or viewpoint of its publications. This argument would be weakened by the IRS's letter to the organization, in which it seemingly linked its action against the organization to the organization's views. It wouldn't be difficult for the organization to establish that the suspension of the organization's non-profit status and the audit were, in truth, designed to thwart the members' efforts to publish their views. Availing themselves of their organization's non-profit status renders that effort all the easier. The IRS could respond by stating there is no right to be free from audits, and that the grant of non-profit status is a privilege not a right. The prosecution of the audit and suspension of the non-profit status do not prevent the organization and its members from publishing their views. The change in circumstances merely mandates that if they are to do so, they must do so without government assistance.

C. **Free Exercise**.

With regard to the free exercise claim, the arguments would be guided by one of two approaches: either a strict scrutiny approach, applicable when the government action is motivated by a desire to burden the free exercise of religion, or a more lenient approach (for the government at least) based on principles set forth in *Employment Division, Department of Human Resources v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595.

Where the government *intends* to burden religion, it must show a compelling purpose. Historically, examples of a compelling purpose might be to protect society from the degrading effects of bigamy or the devastating results of an epidemic. (*Reynolds v. United States* (1879) 98 U.S. 145, 8 Otto 145; *Jacobson v. Massachusetts* (1905) 197 U.S. 11). In the case at bar, the government could attempt to justify the suspension and audit as tools designed to punish and deter hostility to gay people. That attempt would like fail due to the express purpose of the audits and the power to suspend tax-exempt status: to ensure compliance with the tax code. The motive may be worthy, but the tools employed are the wrong ones for the job at hand.

If an intent to discriminate against religion per se is not shown, but a substantial burden is the unintended result, the government is more or less free from fault. Here, the IRS could argue that

its actions are rooted in generally applicable statutes and regulations which the IRS has discretion to apply, and that the IRS did so here based on the aforementioned concern: misuse of the organization's non-profit status and unjust diversion of tax revenues. Some uncertainty exists as to whether *Smith* bars consideration of the merits of an individualized exemption from a generally applicable law. *Smith* itself dealt with a criminal statute, not a civil one, and certainly not an administrative regulation. It may be that the rule of *Smith* extends no farther, and that older principles apply when the law at issue is not penal. (*Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526). If the exemption issue remains valid, the IRS would perhaps argue that it is not reasonable to exempt the organization from audits and the rules governing non-profits; for that would undermine the rule itself and render impossible the government's ability to prevent abuse of the tax code and do what the Constitution permits the government to engage in, which is to raise revenue. If religious organizations were exempt from such generally applicable laws, abuse would expand exponentially, religious organizations would become impervious shelters for otherwise unlawful activity and the benevolent purposes of the Congress (in providing exemptions) would be utterly subverted.

The organization could reply by pointing out that the statutory basis for the government's action is not at issue; the arbitrary application of the law is. The facts strongly suggest the IRS is motivated to act against the organization by speech it does not approve of less than is by suspected violations of the tax code. Merely *selling* books and cds is not violative of the laws governing non-profits. If that were the case, non-profits such as the National Football League would be prohibited from marketing the NFL logo, selling jerseys, or selling the rights to broadcast NFL games. There must be something more than profit-making to trigger suspicion of wrong doing. All the facts suggest in the way of a basis for the IRS's actions is the organization's anti-gay viewpoint, its religion-based outlook, and its exclusion of Roger from membership in its ranks. Consequently, the rule of *Smith* does not apply; the older presumption against burdening the free exercise of religion does.

D. Freedom of the Press.

Finally, the organization can argue that as it publishes books, cds, dvds, and magazines, it is protected by the Press Clause of the First Amendment. The government's arbitrary action is apparently based, in part, on the publication of ideas of which the government does not approve. To the extent that this is true, the First Amendment requires a compelling purpose narrowly tailored to prevent unnecessary curtailing of press rights

In response, the IRS could deny that it has impaired the Press right at all. It could argue that it hasn't stopped the organization from publishing its materials. Instead, the IRS is simply preventing the organization from sheltering its publication-related profits from Congress' tax power while it completes its investigation.

While the IRS's motivation is likely to punish unpopular speech, and while its summary revocation of non-profit status may also violate due process, the IRS is likely correct that it has not hindered the ability of the organization to engage in press related activities. Indeed, most publishing houses and newspapers operate on a for-profit basis and hardly complain that their liability to pay taxes and to be audited by the IRS impairs their ability to avail themselves of the Freedom of the Press protected by the Constitution. Engaging in press freedom, as with any freedom, does not exempt one from the obligation to pay taxes or from government scrutiny for the purpose of ensuring the regulations governing tax collection have been followed. If it is true that the right has not been impaired, no injury could have resulted, and the Court would determine the case to be non-justiciable for lack of standing.

To the extent that an injury is established, the IRS could argue that it has a compelling purpose in ensuring that the tax laws are not broken. If the merits of the case are actually reached, this argument would, as noted elsewhere, be impeded by the IRS's letter indicating that its motive was not enforcement of the tax laws, but retaliation for disfavored content and viewpoint. Admitting the truth, that it was attempting to punish and deter such content and viewpoint, would fare even more poorly, largely because the powers of the IRS are designed for employment for the narrow purpose of ensuring compliance with the tax code, not for lashing out and punishing those with whom the government disagrees.

IV. **Susie's Defense Against Citation For Book Burning**.

The First Amendment protects expressive conduct, as well as symbolic speech. There is no doubt that Susie and her group were engaged in expressive conduct, and/or symbolic speech, when they set Omar's books on fire outside of his headquarters. In order to determine whether the citation issued to her was consistent with the First Amendment, or violated it, it is necessary to analyze the facts in accordance with the so-called O'Brien Test, of which there are four prongs. (*United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673).

Did the government have the authority to enact the ordinance Susie allegedly violated when she set fire to the books? Local governments possess powers analogous to the powers of the State, often referred to as the police powers. Any limitation on the local government's police power would be set forth in the municipal charter or legislative act creating the municipality. Fire suppression ordinances are routine exercises of local government authority, and likely this ordinance was within the municipality's authority to pass.

Does the ordinance further an important or substantial government purpose? The facts indicate that the ordinance was enacted in the wake of a devastating city-wide fire. Protecting the populace from life-threatening disasters undoubtedly serves an important or substantial government purpose. Does this particular ordinance actually further that purpose? The facts are silent as to whether there have been city wide fires since the ordinance was enacted. This may mean that there have been so such fires. No news, after all, is said to be good news. If no fires

of note have occurred since the date of enactment, perhaps it is reasonable to conclude that the ordinance has furthered its purpose.

Is the government's interest in suppressing destructive fires, and in enforcing the ordinance, unrelated to the suppression of speech? This is where it gets tricky. In 1896, the likely intention of law makers was to prevent another devastating fire. More recently, however, the law, which has apparently not changed since its enactment, has become a vehicle for the suppression of speech. Does this mean that those applying and enforcing the law are motivated by a desire to stamp out expression they disagree with or disfavor? The correlation of citations with demonstrations involving ritualistic fire is interesting. However, coincidence alone is not enough to establish violation of individual liberties. The percentage of citations that are directed to political protestors may be high, but it likely would not be considered high enough to merit a judicial determination that the law has essentially become a means of suppressing speech, rather than fires. More than mere coincidence is necessary, such as admissions by the administrators that they are intentionally enforcing the law in a speech-suppressive manner. In support of the ordinance and its application it could be argued that political protestors, no less than people trying to dispose of their rubbish, are capable of sparking a dangerous blaze.

Finally, the Court would consider whether the ordinance, in that it prohibits speech, prohibits no more speech than necessary to further the government's important or substantial interest. Considering the fact that the ordinance does not prohibit making a fire in public, but simply requires one get a permit to do so beforehand, it seems that the impairment of speech in the form of burning books or anything else (within reason) is virtually non-existent. It is only unpermitted burns that are prohibited, not permitted one. Unless the permit requirements (which are unstated) disfavor expressive conduct using fire, the ordinance likely would pass Constitutional muster. Susie should have gone and got a permit before she set the books ablaze.