

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Issue Outline to Question No. 1

I. The Commerce Clause

The Federal Government is one of limited, enumerated powers. One of these powers is the power granted to Congress, in Article I, Sec. 8, to regulate interstate commerce. Regulation of interstate commerce includes the power to regulate the channels, products, persons and instrumentalities involved in interstate commerce, and to regulate anything of an intrastate nature that has a substantial affect on interstate commerce. The power has been found by the Supreme Court to be broad enough to permit Congress to ban products it finds to be harmful from moving in the channels of interstate commerce.

Here we have a product that Congress is regulating. It is a product moving in interstate commerce. The limitations imposed on the movement of the product are not absolute, but only partial. Congress need not exercise its full power in imposing regulations on interstate commerce. It can chose to exercise only part of its power. Since the Court is highly deferential to Congress when Congress exercises a legitimate power granted to it by the Constitution, it is not likely the Court will question what Congress has done here.

Frito can, of course, argue that what Congress is doing here is regulating gambling within the States. He can argue that Congress has no expressed authority to regulate gambling, that gambling remains an activity completely subject to the police authority of the individual States. This argument would probably not succeed. The Court has, in fact, upheld Federal laws to prohibit lottery tickets from moving in interstate commerce. Furthermore, the thing regulated here really isn't gambling, since gambling can continue in any manner a particular State wishes it to. The thing regulated here is Brondo, a product moving in interstate commerce.

II. Fifth Amendment Takings Clause

The Constitution does not expressly grant the Federal Government the power of eminent domain, which is the power to take private property for the public good. The Constitution does allude to the power, and certainly the power is one that has always been considered to be possessed by any sovereign nation. What the Constitution says, in the *Fifth Amendment*, is that any *Taking* of private property by the Federal Government must be compensated for. For a *Taking* requiring compensation to occur, the property at issue need not actually be taken. Courts have found that mere regulation of property can be so severe as to amount to a *Taking*.

Here, there is no question that Frito has a private property interest in Brondo. But it is clear too that the government has not actually taken this property. What it has done is regulate where the property can be sold. In some States it cannot be sold at all. In those

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

State where it can be sold he has to obtain a license from the State's Secretary of State and pay a licensing fee. Frito certainly can still sell Brondo in the United States, so long as it is sold in those States where lotteries are prohibited by State law and those States license him to sell the product. If only a few States ban lotteries, Frito may be able to prevail with the argument that the regulation by the Government for the purpose of benefiting the public has so diminished his opportunities to sell his property that the regulation amounts to a *Taking*. In other words, his property has been subject to a *regulatory taking*, for which he is entitled to just compensation.

III. Tenth Amendment.

The *Tenth Amendment* states what has been said to be a mere tautology: that all powers not granted to the Federal Government are reserved to the States. As was pointed out in Section I of this Answer, Frito can claim that the law is invalid because it is the exercise of authority by the Congress over gambling, which is not something Congress has been granted authority to regulate. Instead, regulation of gambling remains the sole responsibility of the States.

The Court has long abandoned any notion that the *Tenth Amendment* contains any substantive rights reserved to the States. With regard to the *Commerce Power*, the Court has held that as long as the thing regulated is something involving or affecting interstate commerce, it need not be a thing that Congress was expressly granted control over. Here, Congress is controlling a product in interstate commerce. Consequently, the law does not run afoul of the *Tenth Amendment*.

More significantly, Frito could argue that the provision of the federal Brondo Act requiring the Secretary of State to issue licenses to sellers of Brondo violates principles of federalism inherent in the Constitution and articulated in the *Tenth Amendment*. As determined by the Supreme Court, the Constitution prohibits the Federal Government from requiring State Governments or State Government officials to enforce Federal law (State Governments, of course, remain free to enforce federal policy if they chose to). If Frito made this argument, he would undoubtedly be correct. However, the victory would be purely academic, since he was not cited for selling Brondo without a license issued by the State of Maine, but for selling Brondo in a State (Maine) where Brondo sales were prohibited.

IV. Ex Post Facto Clause.

The Brondo Act imposes penalties in the form of fines on Frito for selling Brondo in States where lotteries are not permitted, and in States where lotteries are permitted when he fails to obtain a State license. The facts of the case indicate that one can be punished for a violation of the Act occurring *at any time*. This means that one can be punished

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

both before and after the law took effect. The *Ex Post Facto Clause* of the Constitution, found in Art. I, Sec. 9, prohibits Congress from passing criminal statutes that have retroactive application. Consequently, to the extent, if any, that the Federal Government seeks to punish Frito for pre-enactment violations of the Act, the Constitution protects him.

V. Presentment Clause.

The *Presentment Clause* of the Constitution, found in Article I, Sec. 7, requires that a majority of each House of Congress pass a law and send it to the President for his signature. Here, the President did not sign the Brondo Act. Nor did he *Veto* it. And yet the Federal Government was now enforcing the Act against Frito. Frito, of course, can argue that the law was never properly enacted, and thus is void. This will only be a sound argument if, before the passage of ten days following Presentment of the Brondo Bill to the President, the Session of Congress ended. If such is the case, the so-called *Pocket Veto* is said to apply. If not, the law would have taken automatic effect without the President's signature after the elapse of ten days.

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Issue Outline to Question No. 2

I. Dormant Commerce Clause

The Constitution grants expressed authority to Congress to regulate international and interstate commerce. This formal grant does not deprive the States of any authority to regulate such commerce. However, the Supreme Court has long held that the power of the States to regulate interstate and international commerce is greatly circumscribed by the power granted to Congress. The implied limitation on State authority in this area has been ascribed to the so-called Dormant Commerce Clause.

Whenever a State passes a law that regulates interstate or international commerce to the extent that some impairment of commerce arises therefrom, the regulation may become subject to Constitutional scrutiny. When it does, the Court will determine what the nature of the restriction is and, consequently, what level of scrutiny is to apply. Blatantly protectionist regulations are presumptively invalid and will be struck down with little or no compunction. Laws that discriminate against out of state commerce, in favor of local commerce, but do so for some allegedly valid reason, are also presumptively invalid, but will be given greater consideration by the Court. The Court will, in such cases, subject the rationale for the law to strict scrutiny. This means that the government must demonstrate that the law, and the discrimination it entails, are justified by some compelling governmental need. Finally, laws that only inadvertently discriminate against interstate commerce will be treated more deferentially, with the application of a rational basis test. Specifically, a determination will be made whether the end of the law is reasonably related to the inadvertent discrimination the law imposes on out of state commerce.

Here, Frito could argue that while the law does not completely prohibit importation of Brondo, the law facially discriminates against those from other States who wish to market their product in Florida. Consequently, it would be the government's burden to demonstrate a compelling reason for the discrimination. The government's ostensible purpose is to limit the influx into the State of a product the government has deemed to be unhealthy. However, the law itself imposes restrictions only on the non-native Florida sellers of the product, not on those who produce the product within Florida itself. If the health considerations supporting the law were so compelling, it is remarkable that Florida leaves untouched all persons growing and manufacturing the unhealthy product within the State's bounds. If production of Brondo was not possible due to climate in Florida, the law might make more sense: there wouldn't be many people growing Brondo. But Florida's tropical or semi-tropical climate is one that is more likely than not to favor Brondo cultivation. If non-Florida grown Brondo was demonstrably more dangerous to

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

public health than Florida grown Brondo, the law might make more sense, though the facts don't indicate whether there has been any legislative *finding* or legislative testimony on this point. In any event, whatever arguments are made either for or against the law, the burden will be on the government to justify the law. If the history of the higher level scrutiny commerce clause cases provide any guidance, it is not likely the government will prevail.

II. Treaty Power

Florida's Brondo Importation Act was passed in order to execute an agreement with a foreign nation. Article II, Sec. 2 of the Constitution vests the power to make treaties with foreign nations with the President of the United States and the Senate. Here, a State has entered into an agreement with a foreign nation. States are expressly prohibited from entering into any treaty of alliance with a foreign nation. (Art. I, Sec. 10). The agreement here is not of that kind. Agreements regarding matters of concern between States and foreign nations may be permissible Constitutionally, but only so long as the agreement receives the approval of Congress. (Art. I, Sec. 10). The Constitution is silent on the manner in which approval is to be granted, though, presumably, a simple majority vote in both Houses would suffice. The facts presented do not indicate that Congress granted its approval to the agreement between Florida and Brazil. Frito could argue that since the law is premised on an impermissible treaty, it is void.

However, even if no Congressional approval was obtained by Florida for its treaty with Brazil, Florida retains sovereign or police power to regulate activity within the State's boundaries, including matters touching upon the health of the people of the State. Thus, even if the agreement on which the Act was premised was invalid Constitutionally, the State Brondo Importation Act might nevertheless survive as a law passed pursuant to the State's police power.

III. Privileges and Immunities.

Article IV, Sec. 2 of the Constitution entitles the citizen of any State to the same Privileges and Immunities of the Citizens of any other State that citizen happens to be in. Specifically, a person coming into a State from another State must be treated the same way by the laws of the State he comes into as that State treats its own citizens. Here, Frito, a resident of Alabama, is subject to treatment different from that afforded to residents of Florida. While Floridians are allowed to sell as much Brondo as they wish, Frito and other out-of-State persons cannot bring to Florida for purposes of sale as much Brondo as they are allowed to sell in other States. Consequently, Frito could assert that his rights under the *Privileges and Immunities Clause* have been violated.

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Frito's argument will only succeed if he satisfies *two* requirements. *First*, if the privilege of State citizenship he claims he has been deprived of by the State of Florida must be a *fundamental* one. What is fundamental Constitutionally is determined in large part by history. Certainly there is no fundamental right of State citizenship to sell Brondo. But Brondo is a product, and certainly persons have a right to sell products in any State. Of course, the State would argue that Frito and other non-Floridians have not been discriminatorily deprived of the right to sell Brondo in Florida. He can, after all, sell as much Brondo as he wishes. If Frito or anyone else, Floridian or non-Floridian, wants to grow Brondo in the State and sell it there, they can certainly do this. They just can't import as much as they wish into the State.

Second, if selling Brondo, or products in general, is a fundamental right, and the Court finds that Frito is being treated differently than citizens of Florida, the law prohibiting Frito from importing for sale as much Brondo as he wishes into the State will only be upheld if it can be shown that there is a substantial reason for the difference in treatment between Frito and citizens of Florida who grow and sell the product in Florida. The primary way the Court will determine this issue is to consider whether the importation of Brondo is the peculiar source of the evil to be avoided. The evil to be avoided is ill-health, caused by Brondo. Since Brondo can still be grown and processed in Florida and sold in as much volume as the seller wishes, it does not seem like Frito and other importers are the peculiar source of the evil to be avoided or that the evil in fact will actually be diminished by the law.

IV. Contracts Clause

Article I, Sec. 10 of the Constitution prohibits States from passing laws impairing obligations on contracts. Historically, contracts have been defined very broadly. Here, it is clear there is a contract involved. Frito has a contract with Nacho to sell him one ton of Brondo every month. The law passed by Florida now prevents Frito and Nacho from availing themselves of their rights under their Contract. Frito is no longer able to deliver Brondo to Nacho and receive money from him, and Nacho is no longer able to receive delivery of Brondo from Frito.

In recent years, the Contracts clause has ceased to be viewed as a source of absolute right. Certainly, State laws that are designed to do nothing but relieve persons of their contractual obligations are presumptively invalid. A law, for instance, passed by a State legislature permanently abating all payments on mortgages would be prohibited by the Constitution. However, here, there was no thought on the part of the Legislature to relieve anyone of any contractual obligations. Any impairment was inadvertent, resulting from the State's exercise of its police powers to affect a legitimate legislative end, which is the health of the people. Furthermore, the law does not relieve anyone of paying for

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

any product or service they have received. It simply prevents Frito and Nacho, among others, from any further transactions in violation of the law. Since public health is a legitimate State objective, and since no actual money debt has been erased by the law, it is likely a Court would either find the Contract Clause had not been implicated, or it would apply a rational basis level of scrutiny and the law would be found permissible.

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Issue Outline to Question No. 3

I. Frito's Defamation Suit Against Congressman Ragoo.

Art. I, Sec. 6 of the Constitution is known as the *Speech and Debate Clause*. It provides a privilege for all members of Congress against arrest or even prosecution for anything said within the walls of the Houses of Congress. A member of Congress can say whatever he wants while speaking on the floor of the House. If he repeats the same thing outside of Congress, he might be held to account for that. The facts indicate that Ragoo limited his comments to speeches in session. C-Span's broadcast of the speeches and other medias reporting on the speeches did not breach the privilege. If, however, Ragoo had given an interview, and repeated the allegations made in his speech, such comments would not be privileged, and would have opened Ragoo up to suit for defamation.

II. Frito's Defense Against "Frito Act" Charges.

A. *Art. I, Sec. 10* imposes a prohibition on States passing what are called *Bills of Attainder*. Bills of Attainder are acts of legislation that impose criminal-like penalties on individuals, or groups of individuals, without any judicial procedure. They are, in short, mere declarations of a person's criminality, without any presentation of proof or opportunity for the accused to be heard. What the Legislature of Florida has done is declare Frito a criminal and imposed a penalty on him without any judicial process. This has all the hallmarks of a prohibited *Bill of Attainder*. Frito should argue that the Act that he was charged with violating was void due to it being a *Bill of Attainder*.

B. The *Due Process Clause* of *The Fourteenth Amendment* prohibits States from depriving persons of life, liberty or property without due process of law. To the extent that the Frito Act imposes a fine on Frito and prevents him from traveling out of State, he is being deprived of property and liberty. Since there has been no trial, no presentation of evidence, and no opportunity to present a defense, the deprivation of property and liberty arises without due process of law. The right to fair criminal procedure is fundamental to any notion of due process. It is a *Fundamental Right*. Only a compelling governmental interest, and a narrow tailoring of the deprivation so that it serves that interest without unnecessarily depriving individuals and society of fundamental freedoms, can justify such a deprivation. Since the Frito Act is a Bill of Attainder, and since the facts indicate that it was motivated by revenge, and not for any compelling reason, it is not likely the government could make the necessary showing to justify the law that Frito is being prosecuted for violating.

C. It should also be noted that under the *Fourteenth Amendment* the *Due Process Clause* is said to imply a set of *Fundamental Rights* that are essential to any understanding of what the Court has called ordered liberty. One of these rights is the *Right to Travel*.

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Here, the law prevents Frito from leaving the State via automobile, the common means of travel in the United States. Again, a compelling governmental interest must be demonstrated by the government to justify a law impairing a fundamental right and any prosecution arising from such a law. And again, since the law is likely a prohibited *Bill of Attainder*, which cannot be justified, it is not likely the government will be able to meet its burden.

III. The Assault and Contempt Actions

As noted above, the *Fourteenth Amendment* prohibits States from depriving persons of life, liberty and property without Due Process of Law. The Court's Order itself is based on a legislative act that itself seems to be Constitutionally questionable, if not prohibited. If it is prohibited, the Order itself lacks due process foundation. When Dogg showed up to enforce the Order, what he was enforcing, legally, was nothing. He had no proper basis to seize Frito's vehicle. Frito, of course, could raise the defense that the Order was void due to the Constitutional repugnancy of the underlying law. He can also argue that the actual attempt to enforce the Order was an unlawful search and seizure in violation of the *Fourth Amendment*. The *Fourth Amendment* is one of the Amendment's that has been incorporated by the Court into the *Fourteenth Amendment Due Process Clause*, and therefore is a legitimate defense against actions by a State or State officials that deprive individuals of a protected liberty or property interest.

One additional thing Frito needs to do in order to perfect his Fourteenth Amendment defense to the contempt action is make a showing that those who were violating his rights were *State Actors*. Clearly, the Attorney General who sought and obtained the Order was a *State Actor*, as was the Court that issued the Order. Dogg, though a private party, was working as an agent of the Attorney General, thus his role in attempting unlawfully to violate Frito's *Fourth* and *Fourteenth Amendment* rights can be attributed to the State.

IV. Constitutionally Based Civil Claims Against the Attorney General and Dogg

Section 5 of the *Fourteenth Amendment* provides Congress with authority to pass any reasonable laws to enforce the protections found in Section 1 of the *Amendment*, including the protections against unlawful deprivations of life, liberty and property.

Congress passed such legislation in the 1860s and 1870s, including Section 1983. Section 1983 permits civil suits against those who deprive persons of civil liberties while acting under color of State authority. Under 1983 and Section 5 of the *Fourteenth*

Empire College School of Law
Constitutional Law
Prof. Grady
Mid-term
Fall 2007

Amendment, Frito can bring civil suits against the Attorney General and Dogg seeking damages for injury to his due process rights. The Attorney General clearly was acting in an official capacity when he sought and obtained the Order against Frito. Dogg, while not a State employee, was certainly acting as an agent of the State. Whether or not Frito prevails, and what his damages are, will depend on whether the trier of fact believes that an unlawful deprivation of protected *Fourteenth Amendment* rights occurred.