

ISSUE OUTLINE MIDTERM EXAM
CONSTITUTIONAL LAW: 2012-2013

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Question Number One

The government budgetary and funding crisis continues. With a single party holding supermajorities in both houses of the California legislature, income tax increases were easily approved. At the urging of the Governor, all graduated tax brackets were eliminated and a single 30 percent rate was imposed.

To provide some form of relief for overburdened tax payers, the Governor also proposed a new *State* bankruptcy law. As drafted by the legislature and signed by the Governor, the new law permitted the discharge of certain debts not dischargeable under the existing Federal bankruptcy law. The new State law, however, did not affect any tax obligations. The thinking was that the taxpayers would be more willing to support the new taxes if they could better evade their private debts.

The Federal government was not far behind in crafting its own version of a solution to the budget crisis. It imposed an income tax of 60 percent on the highest earners. A “highest earner” was defined as anyone making in excess of \$ 100,000 per year from all sources. The law authorizing the new tax narrowly passed both houses of Congress prior to being signed by the President. According to the text of the law, one-sixth of the proceeds of the new Federal tax would be dedicated to fund a United Nations effort to control green house gas emissions. The President had previously agreed to provide money to this fund pursuant to a treaty he negotiated with representatives of U.N. member nations and the U.N. Secretary General. Another third of the proceeds would be dedicated to fund Federal government employee pensions, which were currently grossly under-funded.

Frito was a business owner whose pre-tax annual income was \$ 110,000. Before the taxes were due, Frito declared bankruptcy under the new *State* bankruptcy law. By doing so he avoided the immediate obligation to repay \$ 100,000 he owed to Joe, permanently discharged \$ 80,000 of that debt, and delayed repayment of the remainder for 3 years.

Frito paid *most* of his Federal tax, but refused to pay *any* of the State tax.

The State prosecuted Frito for tax evasion. He ultimately lost the case and was sentenced to prison, stuck with a \$ 100,000 fine, and was ordered to pay the outstanding tax debt.

Frito also filed a civil challenge to the Federal tax. One of the statements he made on his petition was “I’m sick of working my butt off so that bureaucrats can retire in style.” He lost that challenge. He then appealed to the appropriate Federal court.

Pursuant to State law, Frito appealed his State case to an authorized State law court. When he lost the State appeal, he sought a Federal writ of certiorari (which was permissible under operative rules) in order to obtain a higher level of review. However, before any further action in either the State or the Federal tax cases occurred, Frito was pardoned by the President.

Discuss the following:

- (1) With respect to the State tax, what Substantive Due Process claim or defense does Frito have, and what would be the government's response?
- (2) Does Frito have similar Substantive Due Process (or other) claims or defenses against the Federal government? If so, what would be the government's response?
- (3) Is the Federal tax suspect in light of the Constitution's rules regarding treaty ratification?
- (4) What is the effect of the pardon on Frito's two appellate cases?
- (5) What claim does Joe have against Frito and what constitutional argument (or arguments) could he raise?

Issue Outline Number One

Frito's Substantive Due Process Claim or Defense Against the State Tax

The basis of a due process challenge to the State Tax is the 14th Amendment. The 14th Amendment guarantees that individuals will not be subject to deprivation of life, liberty or property without due process of law. Historically, the Due Process Clause was deployed to combat State and Federal taxes. There was a time when such attacks were successful, but only because a majority of the Supreme Court during that era believed that economic rights were fundamental and should be protected by a high degree of judicial scrutiny. That changed in the first half of the twentieth century. Modernly, a challenger to legislation on due process grounds, when the claim is an alleged economic deprivation, must demonstrate lack of a rational basis for the law. Such challenges are virtually doomed to failure from the outset.

Frito would argue that the law is not rationally based— that is, that the tax does not serve a legitimate state interest and there is not a rational relationship between the tax and the State's supposedly legitimate interest. In response, the State could easily demonstrate that the law was designed, like most taxes, to raise revenue, was enacted in apparent accordance with the law (i.e. due process), and was a tax that State lawmakers could have reasonably considered would do what it was designed to do— that is, raise revenue, address the budget crises, and make good on contractual debts owed to government workers.

In response, Frito would have to be creative. He could argue that while the law on its face is reasonable, the effect of the law is not. He could argue that the purpose of any tax is to provide money to fund government functions. Here, the tax is largely justified in order to pay pensions of retired workers. Retired workers are not performing any function at all. He could also argue that when the law is construed with the recent increases in federal taxes, the effect is overwhelmingly clear: he has essentially nothing left over to pay for the necessities of life. It is difficult to imagine that a Court would be unresponsive to the reality of the impact of the tax and not provide some remedy, or at least find that the law does not provide for hardship waivers in cases like Fritos. There is simply no legitimate government purpose in impoverishing the people that government is supposed to serve.

The State could argue in response that while retired workers don't do anything, they are parties to contracts with the State, which are protected by the Contract Clause. The State has a Constitutional duty to make good on its contracts. Frito could argue in response that the Contract Clause was designed to prevent individuals from benefitting from a State's attempt to free them of duly contracted for *private* debts, not ensure that government workers were provided with a superior lifestyle even after they retired.

The State could also argue that it did provide a kind of waiver or exemption from the high tax rate by providing individuals with State bankruptcy protection. Under the new laws, one is still liable to pay taxes, but one can reduce the overall impact on one's income by freeing oneself from a number of his or her debts. Frito's response would be that the bankruptcy law provides nothing because it impermissibly intrudes upon a field that the Federal Government has

exclusive jurisdiction over. The Federal government has power under the Constitution to enact a uniform bankruptcy law. The Constitution invites the Feds to occupy this field completely. Everyone knows that the Federal Government has exercised this power. Consequently, the Federal law likely would preempt the State one.

Frito's Substantive Claims or Defenses Against the Federal Tax

With regard to the Federal tax legislation, Frito could argue that it violates the 5th Amendment's due process clause. The primary argument he would raise would be similar to the one raised against the State: that is, that the tax so impoverishes the tax payer (in his bracket at least) that it could not possibly be considered reasonable. The Feds likely would prevail on the legitimacy of the public purpose underlying the law (i.e. raising revenue), though Frito might question this by raising the fact that no public purpose supercedes the fundamental liberty of individuals— something which this law palpably does by taking so much of an individual's earnings. If the Constitution is designed, as the Preamble says, to secure the blessings of liberty, the new tax on high earners renders that design void. When considering that the purpose of the high tax is partly to fund a U.N. climate related project, and partly to fund retiree pensions, it is difficult to conclude that the balance between funding these programs is more weighty, or more reasonable, than the very subsistence of individual tax payers.

Because the tax is so high, Frito could also argue that the substantial portion of his income that the Feds are taxing away from him amounts to a taking. The argument would be that his property is being seized for a public purpose and that he is entitled under the 5th Amendment to "just compensation." The argument is a relatively novel one in the field of taxation, as well as with respect to anything other than rights rooted in real property. Likely the Court would reject the argument.

Frito could also raise the 13th Amendment prohibition on involuntary servitude. The effect of the tax scheme, particularly when combined with similar legislation by the State, is to reduce the tax payer to essentially servile status. Generally speaking, persons in Frito's "high earner" bracket would likely not retain enough income after taxes to avoid being reduced to abject penury, and would be transformed into bondman of the Federal Government, required to yield up the lion's share of their income. In Frito's case the tax would operate like the room and board requirements in the Jim Crow era "correctional" system, whereby one got further and further behind in his debts, requiring him to toil all the more.

With regard to the fine he was subjected to after trial, he could argue that it is both excessive and amounts to cruel and unusual punishment in violation of the 8th Amendment. Likely he would not be able to prove the second argument due to the fact that cruel and unusual punishments tend to be punishments that subject the person to bodily distress. As for the excessive fine argument, it seems on the face of it unlikely that the Federal Government could demonstrate that it possesses a sufficiently compelling purpose, narrowly tailored to meet that purpose alone, and thereby preserve both the fine itself and any law mandating its imposition. The prospect of the fine is no doubt to encourage payment of taxes, which is a compelling

purpose, but the amount of the fine imposed on Frito nearly equals his income for the entire tax year. There is simply no proportionality here. Likely the fine would not survive judicial scrutiny.

Is the Federal Tax Suspect Due to Rules Governing Treaties?

Spending of the tax money is done in part in accordance with the treaty, or so it seems. In fact, it is not entirely clear that the tax was indeed an enabling law designed to fulfill a non-self executing treaty. There is simply no clarity in the facts that the treaty had been ratified by the Senate at all, let alone via a super majority. And yet these potential flaws are probably irrelevant. The Congress is not so limited in its spending power. If Congress desires to spend money on a project it only need be done in accordance with the spending clause— that is, that it be done in furtherance of the general welfare. Certainly existence of a duly ratified treaty would bolster the Congress' jurisdiction to enact the law, but it would not be critical.

The Effect of the Presidential Pardon on the Appellate Cases

In his appellate case against the Feds, the presidential pardon would liberate Frito from any criminal liability, including prison time and the obligation to pay the fines. His appeal on the grounds that the fine imposed by the Feds is excessive would thus become moot. Not so his challenge to the Federal tax law itself. That aspect of the case would still be ripe. He would still be in a position to challenge the Constitutional viability of the Federal tax law for the reasons set forth above.

As for the appeal against the State Court decision, challenging the legitimacy of the State law, the pardon would have no effect. His State case would remain ripe.

Joe v. Frito

In his suit against Frito, Joe can argue that the discharge of Frito's debt was rendered void because the State's bankruptcy law was preempted by the Federal bankruptcy law. Because power to craft a uniform bankruptcy law is assigned to the Federal government by the Congress, and because of the well known comprehensiveness of the law enacted by Congress, Joe argument would likely prevail.

Joe can also argue that the State's bankruptcy law is a violation of the Contract Clause, prohibiting States from impairing obligations on contracts. Based on cases such as *Blaisdel*, it is possible that the delay in payment provision might survive, but the permanent discharge of debts would not. If the delay provision was struck down it would be because Joe was successful in arguing that the delay was too long and impaired too greatly his substantive rights. This would be an especially compelling argument if he could demonstrate that he had creditors of his own that demanded more immediate payment and that the delay would have the effect of ruining him.

Question Number Two

The government budgetary and funding crisis continues. Because of massive spending cuts mandated by the so-called “Fiscal Cliff” agreement of 2011, the Federal government is no longer able to adequately fund the military. In response, Congress passed and the President signed the “Universal Service Act of 2013.” The Act requires all adult citizens between the ages of 18 and 35 to enlist in the National Guard of their respective States and to purchase an assault rifle. The bulk of the nation’s defense would now be handled by amateurs supplying their own equipment.

At the time the Act was signed by the President, California had an assault weapon ban in place, prohibiting the purchase and possession of such weapons. Ammunition, however, was not banned, though the State did prohibit the sale of ammunition in the State by persons who are residents of other States.

Po was a resident of California and a Citizen of the United States. He received notice of his obligation to enlist in the Guard and obtain an assault rifle. He contacted a weapons dealer named Oogway, who was based in Nevada. Oogway agreed to sell him an assault weapon and said he would deliver a gun and a supply of ammunition within a week. A week later, Oogway personally delivered the weapon and ammo to Po. The transaction was observed by Vachir. Once Vachir determined what was going on, he arrested both Po and Oogway. Po was subsequently prosecuted for violation of the State’s assault weapon ban. Oogway was prosecuted for violation of the ban on the sale of ammunition by a non-resident.

After the criminal prosecution concluded, Po sued Vachir for violation of his Constitutional rights.

Discuss the following:

- (1) Can Congress lawfully mandate purchase of a gun, as it has done here?
- (2) Is California’s assault weapon ban pre-empted by any valid Federal legal authority, including but not limited to any Act of Congress?
- (3) How might Po use the so-called Dormant Commerce Clause to defend against State prosecution, and what would the government’s response be.
- (4) Can Oogway raise Article IV’s Privilege and Immunities Clause as a defense to the charge that he sold ammunition in California, and, if so, how would the State respond?

- (5) What right of Po's might have been violated when Po was *arrested*, and what would Vachir argue in response?

Issue Outline Number Two

Is the Federal Mandate to Buy a Gun Constitutionally Permissible?

The State has an interest in attacking the legitimacy of the mandate. The State would attack it in order to remove any argument that the Federal law preempted the State's law (discussed below). If the Federal law was not a valid exercise by Congress of its Constitutionally allocated powers, preemption would be a non-issue.

One approach the State could take would be to attack the mandate pursuant to the Commerce power. There is no question that what Congress has done is to require a large number of Americans to engage in commercial activity through the purchase of a firearm. Undoubtedly the scope of the commercial activity at issue is nationwide and not limited to the confines of each individual State. The Court would be faced with determining whether the law was enacted within the scope of the three broad categories arising from the Commerce Clause: that is, Congress' power to enact regulations to protect persons and products in interstate commerce, as well as to protect the channels of interstate commerce; the power to protect the instrumentalities of interstate commerce; and the power to regulate *intrastate* commerce when that commerce substantially affects *interstate* commerce. The regulation at issue is the near universal gun purchase mandate. In *Sebellius*, the Court recently held that the commerce power alone is not sufficient to form a valid basis for a mandate to purchase a product. Congress can only regulate what already exists, not what doesn't, and it can't use its power to essentially create or compel the activity it wishes to regulate.

In response to this, Po could argue that while the mandate is not supported by the Commerce Power, it is supported by the War Powers. Congress does have very expansive powers to regulate the armed forces and the militias in the States. In fact, in the 1790s, such a mandate was imposed and was never challenged. Likely, the Federal mandate would survive as an exercise of the War Powers. It matters not that a war is not actually being waged. The exercise of the War Powers is not limited to times when the nation is at war.

With the Mandate preserved, the State would have a difficult time overcoming Po's subsequent preemption argument. Likely, the State would fail to do so. One argument it could raise is a novel one— that the mandate violates the 2d Amendment. As with the 1st Amendment, the 2d Amendment must protect both the liberty to exercise the right and the right not to. One has a protected right not to speak, and, by analogy, a right not to keep and bear arms. There are several problems with the argument. First, the State lacks standing to assert rights belonging to individuals. Second, the scope of Federal power over war is sufficiently potent to overcome most doubts about the compelling purpose of its exercise. Third, there is no known precedent to support to the State's argument with respect to the 2d Amendment.

Finally, the State could resort to the 10th Amendment. It could argue it has the innate power to regulate the health, safety, welfare and morals of the people and that the law at issue is in

furtherance of all of these things. Again, the argument would fail, largely because of the Court's circumscription over time of the scope of State's rights. Moreover, the Constitution makes it clear that it is only powers *not* granted to the federal government that are reserved by the 10th Amendment, not the powers actually granted, such as the war powers.

Preemption of the State Gun Law by Federal Purchase Mandate

This issue has been discussed above. Should the war powers be upheld as the basis for the gun purchase mandate, there is little hope that the State could succeed in overcoming the argument by the Defendants that the mandate preempts the State's assault weapon ban.

Po's Dormant Commerce Clause Defense Against Prosecution

The California assault weapon ban has the effect of prohibiting anyone from outside the State selling a certain type of weapon inside the State. Po could argue that the law violates the so-called dormant commerce element of the Constitution. Since the State intends to ban incoming commerce, the standard of review would not be permissible. Po would argue that the ban is presumptively invalid and that State is burdened with justifying the law by demonstrating that it had a compelling or legitimate purpose and that there was no less restrictive means available to achieve it. Instead of attempting to justify the law in accordance with this standard, the State would be wiser to argue that the dormant commerce issue is a red herring. The State is *not* attempting to favor in-State residents in the area of commerce in certain kinds of firearms at the expense of persons from out-of-State. Instead, the State is attempting to end *all* commerce in these items (both interstate and intrastate), as well as any possession of certain weapons. In-State sellers and out-of-State sellers are treated the same. In short, there is no discrimination of the kind prohibited by the so-called Dormant Commerce Clause.

The State's argument seems sound. Consequently, Po would likely fail in any attempt to defend against criminal liability by appeal to the Dormant Commerce Clause.

Oogway's Article IV Defense to Ammo Charge

Oogway could argue that the prohibition on his sale of ammunition in California is a violation of Article IV's Privileges and Immunities Clause. That clause requires all States to afford citizens of other States the same rights and privileges it affords its own citizens. In order to prevail, Oogway would first have to demonstrate that he is actually a citizen of another State (and of the United States) and that the privilege abridged by California law is a fundamental one. Fundamental privileges protected by the Clause tend to be economic in nature. The privilege of doing business in the State with respect to a particular product, in this case ammunition, is likely protected by the Clause. The State would then have the burden of demonstrating that there is a substantial justification for the discrimination (that is, that out of state persons are the peculiar source of the evil to be avoided) and that the discrimination actually furthers the State's interest (or the discrimination bears a close relationship to the reason for it). In this case, the State would have difficulty overcoming its burden. The State would have to provide evidence that a substantial (if not exclusive) traffic in ammo flows in from out of State, that ammo manufacturing is minimal in California and that the ammo sold by non-residents is

subsequently used in violent crime. Perhaps the State could meet its burden, but this will depend on the peculiar facts. As for the last element, if the State fails to make a case in support of the third element, satisfaction of the fourth element would be irrelevant. As with the third element, the facts necessary to reach a conclusion are lacking, though the total ban on sales in the State by persons from other States is likely to be far more sweeping than a Court would be comfortable with.

Violation of Po's Rights When Arrested by Vachir.

If Po is successful in demonstrating that he violated no valid law when he purchased and gained possession of a gun in the State of California, he may be able to bring a civil suit against Vachir for impairing his exercise of Constitutionally protected rights, including his 2d Amendment right to keep and bear arms and his 4th Amendment right to be free from unreasonable searches and seizures. His ability to do so would be governed by Section 1983. He would, of course, have to prove that Vachir was a State actor.

The facts are silent on whether Vachir was a police officer or some other official of the government. It seems reasonable to conclude he was, but it could still be the case that he was acting as a concerned citizen and that the arrest was a citizen's arrest.

There may be law on point dealing with citizens arrests and whether a citizen in those circumstances becomes a state actor for purposes of 1983 liability. The facts are silent on this point and the issue was not discussed in the readings or the lectures. If Vachir was a private citizen, 1983 would not provide standing for Po to sue. Vachir's obvious argument would be that his private status invalidates Po's civil action.