ISSUE OUTLINE

CONSTITUTIONAL LAW

Empire College

Mid-Term Exam 2013-2014

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ANSWER TO QUESTION NUMBER ONE

1. Is the agreement negotiated by the President with Mexico valid?

The facts suggest the possibility that the President negotiated a formal treaty with Mexico, which is within the scope of his Article II powers. The facts also indicate that the treaty was presented to the Senate, a majority of which gave its approval. The facts however are not clear if the majority comprised at least two-thirds of the senators. (Article II, Sec. 2). If less than that portion voted aye, the treaty was un-ratified, hence not valid or enforceable.

The facts also suggest the possibility that the President entered into an executive agreement with Mexico. Such agreements need not be approved by the Senate at all in order to be valid. The subject matter of such agreements invariably relates to relations between nations. No executive agreements have ever been found to be constitutionally wanting. Here, however, there is some doubt that this particular agreement would pass constitutional muster. The subject matter relates to access to and from the United States by foreign nationals in Mexico. Presumably, the United State Congress has already addressed this subject, though the facts are not entirely clear on this subject. The reference to "visa-less" Mexican nationals does indicates a visa-less presence in the country was likely unlawful. In accordance with the approach outlined by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, when Congress has exercised its own power by enacting a law, the President's own power, even in the area of foreign affairs, is limited significantly. For instance, if Congress has already enacted a law governing access to and from the country, the President's innate authority to amend or alter that law through an executive agreement is highly suspect and likely would not be upheld if challenged in Court.

2. Is the President entitled to (a) refrain from enforcing Federal environmental regulations; (b) refrain from spending money authorized by Congress for a particular purpose; (c) refrain from going to war; and (d) spend money without Congressional authorization?

(a)

Pursuant to Article II of the Constitution, the President's duties include execution of the laws of the United States. (Article II, Sec. 1). When Congress has enacted a law, and when that law takes effect, the President's duty is clear: administer and enforce it. The same may not be true with respect to mere regulations, enacted by the Executive Branch. Many laws enacted by Congress delegate rule making authority to the heads of particular executive departments, such as commerce, labor and health and human services. (*National Labor Relations Board v. Jones & Laughlin Steel Corp*.). These regulations, as the creation of the executive branch, are within the power of the executive to amend or waive. If no formal waiver or amendment has issued, failure to abide by a regulation may be actionable by an aggrieved party. The executive must, more or less, enforce and abide by its own regulations, but the rigidity of the legal standard, being one imposed by itself, is hardly as firm as the standard embodied in laws enacted by congress. Here, the facts do not indicate that the executive amended the operative regulations, or suspended them, or granted waivers of any kind, hence the President's failure to enforce those regulations is likely unlawful.

(b)

Congress is expressly empowered to spend in furtherance of the general welfare of the United States. (Article I, Sec. 8). The spending power is broader than the scope of the enumerated powers of Congress, though certainly spending in support of military efforts falls easily within that scope. Once the Congress has approved money for a designated purpose, and the bill authorizing the spending of the money becomes law, the President's Article II duty to execute the laws of the United States is triggered. Though Presidents have refused from time to time to spend money authorized by Congress, and for many years considered it an inherent power of office, the non-spending of authorized or appropriated funds (known as impoundment) is highly questionable if not entirely impermissible Constitutionally. President Kenny's refusal to spend money appropriated for the purpose funding the authorized military effort was therefore unconstitutional.

(c)

The facts indicate that both houses of congress voted on a measure to authorize the president to "reconcile" San Diego with the government of the United States. The problem with the resolution was that it was somewhat vague. Congress didn't necessarily authorize or declare war. Perhaps all Congress did was authorize the President to negotiate; or perhaps Congress intended to provide the President with as much latitude as possible when resolving the crises. The President's failure to mobilize American troops in the immediate wake of the resolution likely would be justified in light of the vagueness of the resolution. Not so the President's failure to take action after the second vote, which not only called for mobilization of American forces, but provided money to fund the effort as well.

(d)

As indicated above, the President's duty, among others, is to execute the laws enacted by Congress. The law at issue here was a law authorizing the spending of money on a military adventure. The President was obliged to use the money prosecuting the military action. His failure to do so was a breach of his duty. The duty was further breached by his use of the money for an entirely unauthorized purpose— the funding of the Kenny Cars, which the Congress never approved and which violated federal safety standards.

With respect to the authorization to take military action against the San Diego militia, the President could argue that his inaction was an exercise of his independent authority in the area of foreign affairs. He could argue that the local militia was authorized by the Constitution, as interpreted by the Supreme Court. (*District of Columbia v. Heller*). He could argue that as of yet, the City of San Diego had not done anything contrary to its status as a component part of California or the United States (planning is not the same as actually doing). He could argue that the State of California has primary jurisdiction over the misbehavior of its sub-divisions, not the Federal government, hence action without the State's authorization violated the principle of quasi-sovereignty embodied in the Tenth Amendment. Under the circumstances set forth in the fact pattern, if the matter went to Court, the Court could forgo reaching the merits of the various arguments by invocation of the political question doctrine. In other words, a fight between the

two political branches over the exercise of the Constitutionally divided war powers is beyond the Court's authority to resolve.

3. Was removal of the Secretary of Homeland Security Constitutionally proper.

The Constitution provides for the appointment of executive branch officials. Article II, Sec. 2 states that principal officers, including the heads of departments, are appointed by the President, but confirmed by the Senate. The Constitution is silent on removal, other than via impeachment. Basing its decisions in this area on the Separation of Powers doctrine, the Court has held that the President is entitled to remove principal officers of government, though Congress may make provision for removal of inferior officers. (*Myers v. United States*; *Humphrey's Executor v. United States*). Congress, under no circumstances, save in the context of impeachment, may remove executive branch officials. Here, the facts suggest the *possibility* that Congress impeached the Secretary and that the Senate then removed her. The only Constitutional means by which Congress could remove the Secretary is through impeachment in the House and then a supermajority (or two-thirds) vote in favor of removal in the Senate. (Article II, Sec. 4). The facts do not provide sufficient specificity to support the conclusion that removal was proper. If a two-thirds majority was not mustered in the Senate in favor of removal, any vote to remove the secretary was invalid.

4. What action by Congress can be taken against the President in Response to his various acts and omissions?

According to the facts, Congress has already exercised a number of options available to it in response to the President's acts and omission. The Congress has issued resolutions calling on the President to uphold his duty. The Congress has authorized the President to act in particular ways, and even voted money to provide him with the funds necessary to act, only to have the President refuse to behave as directed. Certainly the Congress could put pressure on the President through discussion in session of the President's misconduct. Congress might hold hearings and call executive officials to obtain further information and perhaps embarrass the president through public disclosure of relevant facts. Or the House could impeach the President.

Impeachment is governed by fixed standards. It is available as a political remedy to what the Constitution refers to as high crimes and misdemeanors, treason and bribery. (Article II, Sec. 4). Treason is defined in the Constitution: two witnesses must testify as to overt treasonous acts, including bearing arms in the service of an enemy or otherwise providing aid and comfort to the enemy. (Article III, Sec. 3). The House might be able to prove (to a bare majority of its members) that the President's reference to active rebels and foreign invaders as "friends," in combination with his provenance of aid to the invaders and refusal to use authorized force against the rebels was treasonous. As for bribery, it is a term of legal art with a particular meaning and there is no evidence of it having actually occurred here. The remaining category, "high crimes and misdemeanors," is vague, and serves as a catch-all for any misconduct sufficient to give rise to articles of impeachment. As impeachment is essentially a political measure, what high crimes and misdemeanors are as legal principles, is not particularly important. If congress has the will to act, the actions and omissions of the president could easily fall within the broadest definition of what constitutes either a high crime or a misdemeanor.

Once the House impeached the President it would fall to the Senate to consider actually removing the President. The supermajority requirement for removal votes renders impeachment, especially with regard to presidents, as an unlikely remedy.

5. Must the civil suits against President Kenny be dismissed?

The Court has established that the nature of the President's role in the Constitutional system necessitates (or implies) the existence of a broad immunity to claims for harm caused to private persons proximately arising from the President's policies, or from presidential acts falling within the outer perimeter of the President's duties. (*Nixon v. FitzGerald*). Permitting private persons to sue the president for harm caused to them by the President's policies would, it was feared, essentially cripple the Presidency by permitting real or pretended litigants from harassing the President during and after his presidency, and thus dissuade and distract him from carrying out the executive branch duties.

Here the facts indicate that the President's policy at issue was one that was without Constitutional authority. The facts indicate the Kenny Car lacked many federally mandated safety features. If the lack of these safety features was the cause of the harm alleged in the lawsuits, and if the President indeed authorized the construction of the vehicles without these features, it could be argued the President's exceeded the scope of his Constitutional power. As such, his actions could be said to have fallen outside the outer perimeter of the President's authority. This, in turn, would mean the President could be liable for the harm alleged.

One further issue is whether such lawsuits, if viable, must be stayed until the President leaves office. The Court would have to weigh the potential impact of litigation on the President with respect his ability to conduct his duties. (*Clinton v. Jones*). The limited authority on this subject matter indicates the possibility that the lawsuits could go forward, at least with regard to discovery. Likely, the President's time involved in the lawsuits prior to trial would be limited to a single deposition. This would not likely be construed as too substantial an interference with his duties.

ANSWER TO QUESTION NUMBER TWO

1. Does the so-called Dormant Commerce Clause invalidate the State of California's Law?

The so-called Dormant Commerce Clause is an implied provision of the Constitution, inferred by the Court from the Commerce Clause, the Privileges and Immunities Clause and the federal nature of the Constitutional system of government. Generally speaking, State governments are permitted to regulate commerce within the States without Constitutional restriction. However, once a regulation touches upon and effects interstate commerce, the Dormant Commerce Clause is implicated.

The Supreme Court has developed several approaches to determining whether the Constitution prohibits the States from enacting legislation that impairs interstate commerce. Overt favoritism toward domestic commerce at the expense of out-of-state competitors is heavily disfavored and likely will be struck down, unless the State can provide a convincing rationale in support of the law. The State will have to demonstrate a compelling or important governmental interest that is furthered by the restriction on out-of-state commerce, and then show that the restriction is limited to the narrowest extent possible so as to eliminate any restrictions that do not serve the State's interest. The final approach taken by the Courts is one in which a Court will balance the burdens *inadvertently* imposed by a State's law against the laws benefits. With respect to this final approach, the burden of persuasion lies with the challenger, not the State. Moreover, the Court will grant the State considerable leeway in its policy determinations.

California's law is two-fold: it prohibits the use of petroleum in certain products, and it establishes a regimen of testing of *all* products entering the state by land for the purpose of determining whether those products contain petroleum. With regard to the first provision, the State certainly has the right to determine what is in the best interests of the people living within it, and may even be able to ban particular items from commercial life. However, the issue is complicated when the product banned is an item in interstate commerce throughout the rest of the country. So, long as favor is not shown to in-state producers, and so long as those already in the state are treated the same as those from beyond it, the State's law *may* be valid. If Rick were to challenge the prohibitory section of the law, he might argue that the State's elimination of petroleum from a (perhaps) substantial amount of the State's commerce so impacts the national economy that it rises to an impermissible impairment of interstate commerce. From this novel perspective, it matters little that no favor is granted to California producers; what matters is the overall negative impact on interstate commerce nationwide. Given the fact that the product at issue is petroleum, that argument *might* be persuasive— certainly more persuasive if the ban was limited only to zombie masks.

The second aspect of the law is the testing provision. There are numerous problems with it. First it is limited only to overland commerce, not commerce by air or even sea. Second, it applies only to items coming into the state, not to products manufactured domestically. Third, the testing fees rest solely on the manufacturers whose products are tested, and is determined via a vague sliding scale based on estimated gross (not net) profits from subsequent sale of the product.

Rick, if he was to challenge the testing provision, need not focus on the purpose of the law so much as the massive impact the law has on all interstate commerce. He need only point out that the law is limited only to interstate commerce, and applies to all products, not merely products identified on the list of prescribed items. This massive impact would convincingly establish that it is the State that bears the burden of justifying the law. The State would argue that its compelling or important purpose is to eliminate the threat of climate change. The State would then point out that the extensive testing serves to ensure that a substantial number of products containing petroleum do not enter the State, and further allows the State to compile data on the extent to which petroleum is used in products coming into the State.

Rick's response could be that while the purpose behind the law may be compelling, the law does not necessarily further that purpose. The items containing petroleum, after all, have already been manufactured, hence the polluting or climate altering effect has already occurred. While it is true that the proscription of certain petroleum containing products might ultimately effect manufacturing habits abroad by effectively cutting demand, with a commensurate beneficial impact on the climate, this is entirely speculative.

The bigger problem with the law is how ill tailored the law is to achieve its ends. Rather than subjecting only those products on the proscribed list to testing, *all* products are tested. Rather than limiting testing fees to a reasonable rate based on the nature and difficulty of testing a particular product, the rate is based on gross profits. Rather than subjecting all products sold in the State to testing, only those produced out-of-state are tested, which is an obvious attack on out-of-state commerce. Finally, rather than subjecting all in-coming products to testing, only those coming overland are tested, leaving a substantial number of products untested, and thereby saving air and sea shippers from any impairment of their shipping activities. Since the burden of the law falls only on overland shippers, the likely effect of the law will be to shift interstate commerce from overland transportation providers to those who transport by sea and air. In short, there are numerous problems with the law that tend to suggest that its purpose is not so much to limit climate change as to provide domestic producers of all products to a competitive advantage, and to restrict or eliminate *overland* shipping from out-of-state. The burden on interstate commerce seems to far outweigh the supposed benefits of the law.

2. Assuming that each law is not inherently defective, what effect, if any, does the Federal Zombie Protection Act have on California law?

The Federal government responded to the State's law by enacting a law that established basic standards for certain products that contain petroleum. These standards applied nation-wide, meaning that a conflict with California was created. California law banned petroleum containing products, while Federal law permitted them, so long as the federal limits were respected.

Pursuant to Article VI of the Constitution, the Constitution, statutes and treaties take precedence over other laws, including the laws of States. So long as a federal statute is enacted pursuant to one of Congress' enumerated powers, the federal statute would preempt state laws that were in direct conflict with the statute, or which fell within a particular field that the relevant statutory scheme presumed to occupy entirely.

With respect to the enumerated powers of Congress, the power to regulate interstate commerce is among them. (Article I, Sec. 8). That power may be exercised to regulate the use of the channels of interstate commerce, or to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, or to regulate those things having a substantial impact on interstate commerce. (*United States v. Lopez*). Here, it is certain products containing petroleum moving in interstate commerce that are at issue. As indicated by the facts (including the title of the Federal law), what the Congress has done is essentially overrule the ban on all commerce on certain petroleum containing products.

More likely than not, the effect of the federal Zombie Protection Act on California's law would be to preempt it, either entirely, or with respect to only the prohibitory section. With regard to the testing provision, this might remain in place, so long as federal not state standards were applied.

3. What could the State of California argue in order to invalidate the Federal Zombie Protection Act?

The facts are silent with respect to certain aspects of the enactment of the Federal law. Specifically, the facts indicate that the House of Representatives approved the bill, but do not indicate whether the Senate approved it. Without approval by *both* houses of Congress, the law would not be the result of the bicameral approval process set forth in Article I of the Constitution, and thus would be invalid. If it is true that the Senate never approved the bill, the State could argue that the law was void.

4. What defenses does Rick have to payment of the testing fee and the forfeiture of his California Business License?

(a) Defense against Payment of Testing Fee

Economic Due Process. Rick might have thought initially to assert a Takings Clause based defense, though further consideration would likely lead to the conclusion that the large testing fee was not a Taking. A Taking relates to real property and its loss, or, in the alternative, the diminution of its value. Here the property at issue was simply money.

A better defense would be based on the due process clause of the Fourteenth Amendment. Rick could argue that the large testing fee, based on a speculative gross profit, is too vague to pass due process muster. Moreover, he could argue that the large fee he was to pay was a violation of his economic liberties. The modern approach to due process economic rights claims is to require the claimant to demonstrate that the state action at issue was either not in furtherance of a legitimate state interest, or that the interest was not reasonably related to the law. While it would be difficult to argue successfully that the supposed purpose of the law was not a legitimate state interest (reduction of factors causing climate change), it would be less difficult to argue successfully that the law requiring testing of all products coming into the State (but only overland) was rationally related to that purpose. How rational is it that the testing of *all* products shipped into the State by land, but not products manufactured in the State or arriving by sea or air, would have any effect on climate change? It seems reasonable to surmise that all the State's law would do would be to prompt manufacturers to ship via sea and air rather than overland and thereby evade the testing procedure. The net decline in importation of certain out-of-state

products containing petroleum might actually be non-existent. Additionally, he could point out that the law is so overbroad as to be irrational. Specifically, rather than test only those products on the list of proscribed products, the State tests *all* products coming into the State (at least by overland routes). If only certain products are subject to the ban, what is the purpose of testing products not banned? Rick could conceivable win the argument, though the odds still favor the State due to the significant deference the Courts traditionally view the State's exercise of its sovereign authority.

Right to Travel. The Due Process Clause of the Fourteenth (and Fifth) Amendment is said to contain implied rights, including the Right to Travel. The Right to Travel is further supported by the Commerce Clause and the Privileges and Immunities Clause of Article IV. Rick could argue that the fine deterred his travel to California, and thus was void. The State would likely counter by arguing that it wasn't Rick's travel to California that was impaired. Instead, it was his export of goods into the State that was effected. So long as Rick wasn't trying to bring products into California for sale, his entry into the State was not subject to any check.

The State would likely prevail on this argument, thus it would not need to establish a compelling purpose for the law, or show that it was sufficiently tailored so as to avoid too great an impact on fundamental liberties.

Excessive Fine. The Eighth Amendment prohibits excessive fines. Though the Court has not yet incorporated the Eighth Amendment into the Fourteenth Amendment due process clause, likely it would do so if the opportunity arose. Incorporation would have the effect of providing victims of adverse State action with a defense.

Rick could argue that the fee is so onerous as to be more akin to a fine imposed as a penalty for wrong-doing. The fee is not merely ten percent of the profits, but of gross profits, which, when overhead is factored in, could conceivable leave him with little or less than nothing to show for his labor. The problem with this argument is that the fee is not a fine since it is not actually being levied as a penalty for wrongdoing. It is, instead, a means of shifting the costs (perhaps inflated) to the owner of the item subject to mandatory testing.

Privileges & Immunities Clause. Rick could argue that the testing procedure, including the associated fee, is a violation of the privileges and immunities clause of Article IV, Sec. 2 of the Constitution. Rick's ability to present the argument would hinge on his citizenship status. Assuming he is a citizen of the United States and a resident of Georgia, he could argue that his right to enter California for the purpose of engaging in commerce is a protected activity, fundamental in nature. Likely, he would prevail on this point. He could argue that this fundamental privilege or liberty interest was impaired by the testing fee, the tendency of which is to deter any interest in bringing his product into California. This position is a reasonable one: the deterrent effect of the law is obvious.

At this point, the State would have to argue that there was a substantial justification for the discrimination, and/or was aimed at a harm the peculiar source of which was from out-of-state. Here, the harm at issue was climate altering products. The testing, however, was imposed on all imported products, but not on *any* products manufactured in California itself. The State might point out that another provision of the law banned many petroleum containing products entirely.

Because other States had not done so, it could be presumed that the only source of these petroleum containing products would be somewhere outside the State. Of course the problem with this argument is that it does not address the fact that the same products may still be manufactured in the State. There does not seem to be a ban on manufacture, only on use of petroleum as a component. If other States were the peculiar source of the evil, how could it be that any products were permitted to go untested if manufactured in California?

Finally, the State would have to demonstrate that the law was no more burdensome than necessary to achieve the State's important interest (or that the discrimination was substantially related to goal). Rick could point out that the law is both under-inclusive and over-inclusive (terms usually reserved for analysis of equal protection questions). As noted, the law didn't require testing of *any* products coming into the State by air or sea, or of any products made in California itself. Instead, it applied only to any products coming into the State overland. The fact that the law it applied only to products coming into the State by one particular means, and that testing was not limited only to proscribed items, all but compels the conclusion that the law is simply too broad an application of the State's police powers, which in turn is fatal to the law's continued existence.

Dormant Commerce Clause & Preemption. Rick could argue that the ban on petroleum and the testing provisions violated the implied restrictions on California's ability to impair interstate commerce. As indicated above, the law banned entry into the State of certain products containing petroleum, which essentially cut California off from a sizeable portion of the nation's interstate commercial activity. The testing provision applied to *all* overland commerce from out of State, and imposed a substantial fee (or tax) on that commerce. This fee, in turn, likely would contribute to a decline in overland commerce.

Rich could also argue that the subsequent federal law, establishing permissible limits for the petroleum content of products nation-wide, preempted the State's ban. The State could still argue either that Rick's products did not satisfy federal standards (the facts are silent on this point) or that the State's testing provisions remained effective, so long as any prohibition of tested products occurred in accordance with federal (not State) standards. This last argument would, of course, have to overcome the foregoing dormant commerce clause-based objection. For reasons already explained, likely it would not.

(b) Rick's Defense of His Business License.

Procedural Due Process. A license issued by a government is considered property for purposes of due process. If the government attempts to revoke a license, the government must provide the aggrieved party with both notice and a meaningful opportunity to be heard on the issue of why revocation is improper.

Here, the State provided notice of the revocation, but did not permit a hearing opportunity *before* revocation was effective. In very few instances is government required to provide what is called a pre-termination hearing. Pre-termination hearings are rare: they are Constitutionally required with respect to certain means-tested welfare benefits and certain government jobs. When considering the propriety of a pre-termination hearing, Courts will consider the nature of the private interest involved, the risk of an erroneous deprivation if a pre-termination hearing were

not provided, and the nature of the government's interest, including administrative and financial burdens of alternative procedures. (*Mathews v. Eldridge*).

Here, the private interest at issue is a business license. Rick could argue that his ability to make a living is dependent on retaining it, and that he will lose substantial earnings impacting his very sustenance. The State might counter by pointing out that Rick is from Georgia and likely does (or can do) business in places other than California. His "very sustenance" is not likely threatened. This alone would likely prompt any Court to conclude a post-termination hearing was appropriate.

With respect to the second factor, Rick could point out that the law depriving him of his license was itself suspect for reasons set forth elsewhere in this answer and may even have been preempted. If Rick were persuasive, the Court might rule that the risk of an erroneous revocation was great and that a pre-termination hearing was proper.

Finally, the government's interest would be considered. This factor is always the least weighty of the three. Rick could point out what is well known: administrative and financial burdens, without more, are seldom substantial enough to justify a reduction of individual liberties. He could also again point out that the revocation of his license was based on actions highly suspect, as explained below. In the end, because a hearing was permitted at some point, and because Rick was not barred from conducting business anywhere but in California, a Court would probably conclude that a post-termination hearing was appropriate.

Ex Poste Facto Law. The revocation of the license came as a result of a law enacted in the wake of Rick's arrest for smuggling zombie masks into the State in violation of the State's petroleum content ban. Loss of his business license was not apparently a penalty for that particular offense. Instead, the State legislature enacted an entirely new law providing for the loss of a business license by those who violate the ban. That law was designed to apply retroactively. Rick could argue that at the time he violated the ban, he had no knowledge that his conduct might result in the loss of his license. He had no knowledge because the penalty did not at the time exist. Instead, it was applied retroactively. This is a classic instance of an *ex poste facto* law, which are prohibited via Article I, Section 10 of the Constitution. Rick's argument would likely prevail.

Bill of Attainder. A Bill of Attainder is a determination of wrong doing via legislative act as opposed to a judicial trial. Bills of Attainder issuing from States are prohibited by Article I, Section 10. If Rick argued that he was subject to a Bill of Attainder, the State could respond by pointing out the law at issue does not single him out for punishment, hence it could not possibly be a Bill of Attainder, and, secondly, the so-called punishment is hardly consistent with the types of punishments meted out to persons attainted in times past. Rick's response might be to rely on principles set forth in *Nixon v. Administrative Services*. In that case, the Court outlined factors to consider when an alleged Bill of Attainder did not precisely resemble historical Bills of Attainder (that is, those that the Framers were familiar with). Rick could argue that while the law does not mention him by name, the timing of the law, the circumstances of its enactment, and the Governor's denunciation of him personally immediately before signing the Bill, support the conclusion that the law was indeed aimed at punishing him. The flaw with this argument is that while it is true that the law was inspired by his experience, the law applied not merely to him but

to all persons who subsequently violated the petroleum product ban by bringing banned products from out of state.

Rick could also argue that the law fails to provide him with opportunity for a trial before being subject to the deprivation of his license. The State might respond by arguing that he has a right to hearing sometime later. This post-termination remedy, however, hardly cures the defect in the law, which subjects him to a detriment before proof of wrongdoing has been judicially established.

Finally, Rick could argue that while the loss of a business license is hardly so severe a loss as the loss of life imposed on many historic victims of such laws, the loss of a privilege to do business in the State certainly is a loss capable of being construed as a detriment consistent with modified bills of attainder historically referred to as bills of pains and penalties. In this he would likely be correct.

Because the law applied to everyone from other States who violates the ban in the manner he did, and not merely to Rick alone, the argument that the law was a Bill of Attainder would likely fail.