

1. Does the Nevada Bus Safety Act (hereinafter referred to as NBSA) infringe upon Frito's substantive rights, as guaranteed by the 5th Amendment of the Constitution?

Frito's first argument in support of his suit for relief would be that the Nevada Legislature improperly infringed upon his substantive due process rights, as guaranteed under the Fifth Amendment to the US Constitution. There are several steps to determining whether this argument is valid.

First, the State may argue that since this is a guarantee extended by the Bill of Rights, only the Federal Government is obliged to follow it. And initially, this analysis would have been correct, in that our jurisprudence first held that many of the provisions of the Bill of Rights were not applicable to the states. One such provision was indeed the Fifth Amendment's prohibition against depriving a person of substantive due process, and it remained that way until the Constitution was changed by the 14th Amendment, which stated that no person subject to the jurisdiction of the United States could be deprived of life, liberty, or property without due process. That particular clause of the 14th Amendment was used to "incorporate" many of the original protections guaranteed by the Bill of Rights, making them all applicable to the states. The Fifth Amendment was incorporated, and has been recognized as applicable to the states for over one hundred years now. As such, Frito is allowed to press his claims against the state government.

Next, it must be determined whether any of the rights that have been allegedly violated fall under the purview of substantive due process. In order for such rights to qualify, they essentially must be such a fundamental part of what society recognizes to be our rights that they have become part-and-parcel of our "social contract" -- in other words, they intrinsically accompany membership in our society. Here, Frito could allege a number of "rights" being violated -- first, he could allege that his right to move freely between the states has been violated. This right was recognized at the founding of our country, and was one of a number of things binding the states together as a union from the start. The Founders realized that without freedom to travel, economic ties between the states could be jeopardized, thus making the country less of a union and more of a confederacy of self-interested states, which is exactly what was trying to be avoided. So that right would qualify. Next, Frito may allege that his right to work and earn a living is being violated. That too is a centerpiece of our society, if not Western Civilization itself -- for thousands of years, it has been generally recognized that a person has an intrinsic right to support themselves through labor. Needless to say, the right is fundamental. Finally, Frito may allege an invasion of his substantive right to privacy. Of the three alleged, the State may be able to argue that this right hasn't been recognized by the judiciary for long enough to be a "fundamental" right that all citizens are entitled to. However, Supreme Court decisions over the last fifty years (*Griswold, Roe, Casey, etc.*) have been trending in exactly that direction, and both federal and state governments have taken many steps to establish safeguards to protect the privacy rights of citizens. On balance, I would argue that society now views a right to privacy as fundamental, for which reason any arguments suggesting that Frito wasn't pressing violations of "substantive" rights are invalid.

After the right has been established as "fundamental", a governing body may still

restrict it, provided that (a) the state has a compelling reason to do so, and (b) is using the least invasive possible method to accomplish the job. Nevada may argue in this instance that its interest in protecting its citizens from terrorist attacks is sufficiently "compelling" to justify its invasion of Frito's rights. And traditionally, courts have shown lots of deference to governmental entities who, in their deliberations, have decided that some deprivation of individual liberty is essential to protecting the populace from some threat. Given a recent terrorist attack, the judiciary would *probably* agree that the State has a compelling reason to restrict individual liberties. However, the second prong would be a much harder sell, as it is difficult to see the rational relationship between the goal (prevention of terrorist attacks) and methods used to achieve that goal (harass out-of-state citizens entering Nevada). Given the gravity of the rights being violated, the State would have to show a bona fide relationship between the law and preventing terrorist attacks, and that rationale would go up in flames if our Yemeni friends ever decided to arm a Nevada citizen with a dirty bomb! So it is difficult to see that the law would rationally prevent the danger from occurring, thus making its restrictions quite suspect.

In summation, since the NBSA infringes upon certain substantive due process rights afforded to Mr. Frito without sufficient justification, it is unconstitutional.

2. Does the NBSA violate the Privileges and Immunities Clause?

Frito's second claim could be that the NBSA violates the Privileges and Immunities Clause, which is contained in Article IV of the US Constitution. It says that state governments are obliged to extend the same privileges and immunities to out-of-state citizens as their own. Once again, several steps of analysis are necessary.

First, is Frito a citizen of a state? The fact pattern doesn't explicitly tell us that, so Nevada may be able to argue that he isn't a "citizen" of another State, and thus is not entitled to protection under the Privileges and Immunities Clause. Assuming this is correct, then that would be the end of the discussion. However, common sense would imply that no one from outside the United States would be taking weekly bus rides to Reno for business purposes -- it's not like the city is close to a national border. So for now, we assume he is a citizen.

Next comes the "fundamental rights" analysis -- were any of Frito's deprived privileges and immunities so fundamental that they deserve protection under this clause? Once again, we have the right to travel, the right to work, and the right to privacy. Of these three rights, Nevada may try and say that the privacy privilege is rather new, and certainly not part of the slew of rights afforded by every state government to all its citizens. And there, they'd probably be right -- "privileges and immunities" are not quite the same as substantive rights under the Constitution, and resultantly, the courts would probably afford more deference to Nevada's judgment that the privacy privilege could be suspended legally. However, the other two are firmly rooted in the social contract, and have been recognized as vital to our social contract for several centuries. Thus, recognized privileges are at stake here.

Finally, we analyze the reason for the governmental deprivation, and whether or not it is the most rational and narrowly-tailored way to prevent the alleged wrong. And here, the state's argument falls apart again, as there is nothing intrinsic about an outsider that makes them more likely to commit a terrorist attack than a Nevada citizen! In fact, the law arguably

increases the likelihood of another terrorist attack, since the terrorists just need to find an in-state citizen to do their dirty deeds without the threat of governmental scrutiny! There just isn't any rational relationship between the harm and the cure, for which reason the NBSA probably is in violation of the Privileges and Immunities Clause.

3. Does the NBSA violate the Dormant Commerce Clause?

Frito's last argument may be that the NBSA unduly burdens interstate commerce, and as such, Nevada has no business enforcing the law. Regulation of interstate commerce is Congress' job, as detailed in Article I of the US Constitution. Inherent in the Clause is a prohibition against states unduly burdening interstate commerce, even if the burdens aren't on the face of the legislation.

There are three tiers of analysis under the Dormant Commerce Clause: on the end, overtly protectionist laws will be declared invalid *per se*, as the Founders intended us to be an economic union of states. Clearly, legislation designed solely to prevent out-of-state competition violates that principle. Next, there are facially discriminatory laws, which are presumptively invalid -- those laws aren't quite as protectionist as the first category, but nonetheless impose a burden on out-of-state competition as part of the statute. A law may survive such scrutiny if the State has a compelling reason for its existence, provided that the law is the least invasive way of addressing the evil the State is attempting to fix. Lastly, there are facially neutral laws, which are laws that, while not discriminatory on their face, nonetheless have a discriminator effect in practice. Such laws are presumptively valid, and the State only need to show a rational basis to pass judicial examination of the law. Here, the NBSA doesn't really discriminate against economic activity -- at most, there would be some economic disruption caused by people and goods being held up by the inspection process. As such, the law would be considered facially neutral, and Nevada only needs to show a rational basis for the law to be upheld.

Frito may argue that since the law doesn't guarantee a prevention of terrorist attacks, it has no rational basis, and as such it violates the Commerce Clause. Here, a court would probably disagree with him; while the law may not guarantee safety, some inspection is better than none, for which reason it is *rational* to assume that the NBSA at least does *something* to address the terrorist attack problem. Balanced against the incidental harm of occasionally holding up people coming into the state, the courts would probably conclude that the NBSA's minimal burden on interstate commerce isn't enough to nullify the Legislature's judgment that public security would be enhanced by the NBSA.

Accordingly, the NBSA does *not* violate the Commerce Clause.

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1) Were there any defects in the process of enacting the "Federal Bus Safety Act" (hereinafter the "FBSA")?

The United States Constitution has a very clear method for passing federal laws: the Legislative branch drafts and passes the bill as law, while the Executive signs the bill into law

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and then subsequently enforces the bill. Any deviation from these methods will probably kill the law's effect.

In this fact pattern, it would appear that the bill originated in the Senate, where it was duly passed. So far, so good. However, we are then told that President Becky signed the act after nine days (also permissible by the Constitution, since the bill becomes law automatically unless the Executive vetoes it within ten days), and that is thereafter enforced by the Department of Homeland Security. Missing from this discussion is the House of Representatives, whose input and passage of the law is also required before any bill goes to the President for their signature. Since the fact pattern makes no mention of any participation from that house of Congress, one must assume that it wasn't passed in that legislative branch before President Becky signed it into law. Therefore, the law was not passed in a constitutionally permissible manner, making it null and void.

Additionally, there may be a problem with President Becky's age -- namely, she may not have been thirty-five when the law was passed, which is a requirement of actually being President. However, it is unclear how this would play out -- the courts probably couldn't adjudicate the issue, since it would be an inherently "political" question that is judged and decided by the voters electing the candidate. And it is unlikely that the Congress would impeach Becky, as she hasn't committed any "high crimes or misdemeanors", as required by the Constitution for impeachment. This is purely an academic issue.

2) What rights protected by the Constitution can Frito raise as a defense against prosecution under the FBSA?

Frito has a number of rights that he could use as a shield against prosecution under FBSA.

First, he may allege that the FBSA unreasonably infringes upon his right to participate in interstate commerce, and that Congress overstepped the bounds of the Commerce Clause in passing this law. The Commerce Clause states that Congress may regulate the channels and instrumentalities of interstate commerce, as well as intrastate commerce that substantially affects interstate commerce. Laws affecting the three are presumptively valid, though Congress must still show a rational basis for the passage of the law. Here, Frito could argue that the prohibition against private interstate travel unreasonably infringes upon those rights, and that the license requirement represents an impermissible barrier to such participation. Regarding the first portion of the law -- patdowns and X-ray scanners -- his claim would probably fail. There is a connection between terrorist attacks and interstate transportation, on which subject Congress' authority to demand that passengers of public transportation subject themselves to searches has been long-recognized in the field of aviation. Though this isn't an exact corollary, it probably is "close enough" that the judiciary would give Congress the benefit of the doubt. However, they may not be so quick with the second provision -- namely, the licensing requirement. Citizens of this country have long enjoyed a basic freedom to move between the states, owing to the Founders' recognition that such freedom would strengthen economic ties between the states, thus making for a more solid union. Requiring literally every single person to possess a license to drive their car across state lines is quite burdensome, and could severely impact many industries, such as tourism, manufacturing (the less people move, the less cars they buy), and a host of assorted services normally devoted to traveling citizens --

especially when one considers that the particular parties must pay a tax every time they make such a trip! Congress' justification for this would be that the license/taxation requirement is to enhance security -- however, Congress cannot turn the country into a police-state while pursuing an aim of absolute security. Especially balanced against the economic havoc this would wreak, the Courts would likely declare that Congress overstepped its bounds when it declared that everyone traveling between states required a special license.

Next, Frito may argue that the FBSA infringes upon his substantive right to travel freely between the states. The process to analyze whether a substantive due process right has been deprived is a three-step process: first, is the right at issue a "fundamental right"? Second, does Congress have a compelling reason to take that right away? And third, is the method used by Congress the least restrictive way of infringing upon the right while achieving its stated goal? The first question poses little challenge -- from the days of the Revolution, it has been widely accepted that a fundamental right of the citizenry is to travel between the states. In fact, that right is so ingrained into our society that it has necessarily become part of the social contract over time; accordingly, it is recognized as "fundamental". Additionally, the second issue is probably a "yes", as Congress certainly has a "compelling" reason in protecting its citizenry. However, the third prong comes up wanting in the balance -- in order for the FBSA to survive scrutiny, Congress must show that it is using the least possible restrictive method in pursuing its goal of thwarting terrorism. While the security requirements for commercial buses might pass such a test, Congress is *clearly* not showing restraint when it requires that all citizens get a license for any interstate travel. There just is no rational connection between the prevention of terrorism and the licensing requirement -- after all, such acts can begin and end within one state's boundaries. This gets even more outrageous when considering the tax: Congress is effectively trapping US citizens in a state unless they (a) get a license, or (b) spring for a bus ticket. Once again, no rational relationship to stopping terrorism can be found, for which reason the FBSA is probably unconstitutional.

Furthermore, Frito's right to work is being threatened by the FBSA, in that he now cannot go to his weekly business meetings without incurring substantial expenses. Same three-step test applies, and it is likely that the first two prongs will be satisfied. Frito's right to work is about as fundamental a right as Western civilizations will recognize, and Congress certainly has a compelling reason for stopping terrorist attacks. However, the third prong is once again the FBSA's Achilles heel, in that the licensing and taxation provisions unreasonably infringe upon Frito's right to work, while doing little (if anything) to avoid another terrorist attack. The terrorists could easily purchase such a license, or keep their acts within one state, at which point Congress' prevention scheme falls apart -- all the while, Frito can't do his job because of overly restrictive infringement upon interstate travel. For this reason, the FBSA is probably unconstitutional.

Additionally, Frito could argue that this right to privacy is being infringed upon. Same three-step test once again, on which subject the Federal Government could argue that privacy is not so fundamental a right that the citizenry essentially "attaches" it to the social contract. Frito would counter that, while that was originally correct, recent jurisprudence has recognized an explicit right to privacy in the Constitution. Given recent patterns, Frito would probably prevail on the first prong. The second prong is also passed, since Congress' duty to protect its citizens makes for a very "compelling" reason to restrict the occasional civil liberty. And here,

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the third prong of the test is *probably* satisfied -- the Constitution already allows for pretty significant invasions of privacy when a citizen is flying. Frito may argue that the more "casual" character of bus travel need not require such security measures, but it is unlikely that he will be able to knock out what is clearly a rational relationship between the act (searching passengers) and the goal (preventing hidden weapons from being used in terrorist attacks). As such, it is probably constitutional in that regard.

3) Is a pre-emption defense possible against prosecution under the NBSA?

Pre-emption is a constitutional doctrine that prevents the States from passing regulations in an area that Congress has (a) already regulated with the passage of laws, or (b) expressed an immediate desire and intention to regulate such an area.

From a "positives" perspective, the pre-emption defense may work because Congress has expressed a clear intent to regulate the security of interstate passenger buses. In fact, the Senate passed a law, which the President then duly signed -- the only thing keeping it from working is a (large) technical defect, namely the lack of participation by the House of Representatives. Frito could state that while the federal laws are in such a state of flux, it'd be unwise to press ahead with state regulation that may very well be null and void before he is even convicted.

However, that same argument can be turned on its head: namely, since the Federal Government failed to comply with the presentment clause, there is *no* federal law affecting that specific area, and thus, the states have every right to pass their own regulations. This probably wouldn't work however, since the federal government has manifested a very clear intent to regulate that area, specifically because of the "constitutionally" suspect efforts of the states. That they will act in the near future is almost a given, rendering any conflicting state laws void. Thus, a pre-emption defense is likely to work against the charges under the NBSA.



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1) Any Constitutional arguments against Federal law? Replies?

Frito can raise several constitutional arguments against the Federal Law.

First, Frito may argue that the law impermissibly infringes upon his right to keep and bear arms, under the Second Amendment. Jurisprudence in this area is rare, and the Supreme Court only held a couple of years ago that individuals have a constitutional right to bear arms. The question here is whether the registration requirement represents "too much" of an infringement. If all the government requires is a quick survey of some non-confidential information, then the law is *probably* constitutional in this area. After all, guns already have serial numbers that can be traced to their owners, so such information would be merely duplicative of existing data. However, if the survey was very intrusive -- say, it required the names of all gunowners in the household, along with extensive information about their guns/gun usage habits, then the law might put up to "large" a barrier to owning a gun. In that case, it would be unconstitutional.

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Next, Frito may argue that the law is an impermissible restriction of his substantive due

process rights. Here, a three-step analysis is required: first off, is the right so ingrained as part of our social contract that society recognizes it as "fundamental"? Second, does Congress have a compelling reason to restrict that right? And finally, is the method tailored to rationally prevent the supposed harm while inflicting minimal infringement upon those rights? Concerning the first test, the courts have never explicitly ruled whether the right to bear arms is a "fundamental" right, so Frito may be plowing new Constitutional ground here. In doing its analysis of that question, courts would probably realize that (a) the right is enshrined in the Bill of Rights; (b) American governments in the past have been quite reluctant in regulating the use and possession of firearms; and (c) the deprivation of guns by the United Kingdom was a significant impetus in causing the American Revolution, thus signifying a general recognition in the colonies that a fundamental right was being restricted. given the above, it is likely that the first prong would be satisfied. Moving to the second test, one of Congress' main priorities is passing legislation to ensure the general welfare and safety of the populace. Thus, it has a "compelling" reason. However, the third prong comes up a little wanting: how exactly does Congress prevent "international terrorism" by requiring information on *domestic* gunowners? The government might state that such regulations are necessary because those terrorists keep stockpiling weapons, but since the law allows states to opt-out, its effectiveness cannot be guaranteed. At that point, the lynchpin of the logic behind the government's case effectively falls out, and when that problem runs into a right as substantial as the right to keep and bear arms, the right must win. Therefore, Congress is infringing upon Frito's substantive due process rights.

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Finally, Frito might state the Federal government is requiring the states to enforce its laws, which is something that is forbidden by the Constitution. However, there is an easy "out" here for the Feds -- they aren't really *requiring* the states to comply as much as they using carrot-and-stick tactics to get the States to play along. That is completely permissible, since the States don't have any inherent right to things like education funds from the federal government. As such, the last argument would likely fail.

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2) Will Frito's 1983 claims against Wal-Mart and Vince succeed?

In order for Frito to file civil rights claims against Wal-Mart and Vince, it must be proven that they are *state actors*, since citizens can only file civil rights actions against governmental entities. The test consists of two prongs: first, is the harm being caused by an agent of the government? And second, is the conduct of the agent causing the harm fairly attributable to the government?

With regard to Vince, he is a state actor, in that he is acting under a grant of right given to him by the California state government. Whether or not his conduct is attributable to the government requires a subsequent inquiry -- for instance, is his function normally one done by the government? Does he normally involve himself with the public this way? And finally, are there are financial incentives for the government arising out of the contract? Regarding the first test, one might compare his information gathering to a Census worker, who is doing virtually the same thing -- collecting information for use in a survey of the citizens. However, private companies also frequently do this, so this prong is uncertain at best. Furthermore, the second prong probably doesn't apply to Vince, since he is presumably a private citizen who

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doesn't do this kind of thing all the time. However, the third one *definitely* applies, as California's interest in Vince doing his job consists of a grant of educational funds from the Federal Government! Here, the state entity (California) undeniably has a fiscal interest in the private actor (Vince) doing his job -- the educational funds are quite comparable to tax revenues in that respect. As such, Vince would probably be liable to Frito from acts arising out of the course and scope of his employment with the state government.

Concerning Wal-Mart, they satisfy the first prong, since they are acting in this fashion due to an express command from the Federal government. However, the second part of the test is less clear -- for instance, the selling of guns is almost exclusively done by private entities in this country, thus nullifying the first "signal" that Wal-Mart's conduct is fairly attributable to the government. In terms of the second sign, it is true that Wal-Mart does a lot of business with the public, and that they depend on interaction with the public to survive. However, that interaction is always done under the guise of a private entity: no one doubts Wal-Mart's ability to refuse service to anyone it wants, for instance. The store also has complete control over its hours and what products it wishes to sell, so the second sign is probably a no-go from Frito's perspective. And finally, it is difficult to see any direct fiscal governmental interest in Wal-Mart's dealings with Frito -- all the federal government is getting out of the deal is some information. Sure, the state government may be getting some sales tax, but Wal-Mart isn't acting on authority of California, so that isn't relevant to the discussion. In fact, it is difficult to see how Frito's transaction affects the government in any way, for which reason the third prong fails as well. As a result, Wal-Mart is not liable to Frito for civil rights violations.

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3) Can Vince use constitutional arguments to force California to pay his contract?

The Constitution guarantees that the right to obligation on contracts will not be infringed, except in circumstances where the State, acting as the official government in a time of need, suspends certain obligations. These instances are quite rare, and usually, the clause requires a state of grave, temporary emergency to justify a suspension on obligation of contract.

Here, there is no showing of such a substantial emergency -- maybe the State of California thought the federal mandate was unconstitutional, and thus figured it had no obligation to honor its contracts. That reason would not pass muster here, as "getting cold feet" will not be accepted as an excuse to weasel out of a binding contract. In this instance, Vince can use that constitutional protection to force the State to pay the claim.

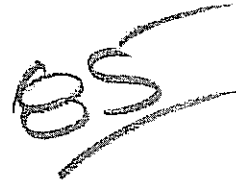
4) Can the State of California use any defenses against Vince's contract action?

As stated in item #3, the State may attempt to declare an emergency which justifies that suspension of obligating its contract with Vince. However, this will not work, as the fact pattern does not hint to any emergency, and even if it did, it is unlikely that the State's only action to alleviate that emergency would be not paying a single contract. The argument simply doesn't hold water.

The State may have better luck with using sovereign immunity as a defense -- the doctrine is derived from the (antiquated) notion that "the King can do no Wrong." Somehow,

the notion that the King was divine -- and thus, immune to any judicial body on this Earth -- has survived the ages, ultimately trickling down to this country in the form of sovereign immunity. And assuming that the state doesn't have some sort of mechanism to pay contract or tort claims, it, as an entity, is completely immune to suit from individuals. How this holds up against the prohibition against suspending obligations on contracts is uncertain, though in the past, courts have shown a substantial willingness to enforce the doctrine, absent some statutory mechanism the State has designed to allow such suits. So, within the confines of the fact pattern, it would appear that California could use sovereign immunity as a shield against Vince's suit, and that it would work.

END OF EXAM

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