

Issue Outline
Mid-Term Exam: Constitutional Law
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Question One

Al Qaeda operatives from Yemen boarded a bus in Sacramento, California that was bound for Reno, Nevada. They had explosives strapped to their bodies. They intended to detonate the explosives once they arrived in Reno. Fortunately, the explosives failed to detonate and the plotters were apprehended.

The Legislature of Nevada responded to this incident by enacting the “Nevada Bus Safety Act,” which required the search at border check points of all persons entering Nevada on commercial buses. Searches of persons would be via very revealing x-ray machines and/or thorough pat downs. Persons who presented valid Nevada driver’s licenses or Nevada issued identification cards were exempt from search.

Frito, who had been born outside the United States, took passage on a commercial bus en route to Nevada once per week in order to meet with business associates. After enactment of the “Nevada Bus Safety Act,” he boarded a commercial bus in order to attend his weekly business meeting in Reno. While waiting to be searched by Nevada officials at a border check-point, Frito observed persons with Nevada drivers’ licenses and Nevada identification cards being cleared without undergoing any kind of search.

Frito refused to submit to a search. He was not permitted to cross the border into Nevada by Nevada officials.

Frito sued the State in Federal Court for declaratory and injunctive relief.

Discuss any constitution-based arguments in support of Frito’s request for relief and any relevant arguments in response.

Issue Outline: Question No. 1

I. The law violates the dormant commerce doctrine.

A. If protectionist in nature, the law will be invalidated. A protectionist law is one that is designed to restrict or impair interstate commerce to the advantage of the State enacting the law. Frito could argue that the law here was clearly designed to impair commercial activity from out-of-state. The State could answer that while there may be an adverse effect on interstate commercial activity from out of state, the purpose of the law was not protectionist, but to protect the people of the state from terrorists who opportunistically rely on incoming commercial vehicles to reach their in-state targets.

B. If the law is not deemed to be protectionist, the question becomes whether the law is facially neutral or facially discriminatory.

Frito would argue that the law singles out out-of-state travelers driving or being conveyed in commercial vehicles and exempts travelers in commercial vehicles who are residents of the state. Strict scrutiny is required. This means the state has the burden of justifying the law. The State would carry its burden if it can show that the law serves a significant (or compelling) state interest and the burden on interstate commerce is no more than necessary to achieve that interest.

The State would argue first that while the law singles out out-of-state commercial travelers for x-rays and pat downs, the law actually requires everyone to be vetted in some manner. To some extent, every person crossing state lines on a commercial vehicle is subject to scrutiny of some kind. The law also does not favor Nevada commercial haulers over out of state haulers in that it is the passenger not the vehicle that is subjected to examination. Many, if not most, of these passengers are not even engaged in commerce per se. Many of these passengers no doubt are tourists or pleasure seekers and gamblers. (Frito could point out that tourism and gambling and “pleasure seeking” all involve some kind of commercial activity). If there is an adverse effect on interstate commerce, or a burden, it is not the result of any facially discriminatory law. Instead it is an unintended consequence of a facially neutral one.

If the State fails to establish the neutrality of the law, strict scrutiny will apply. In that case the State will have a harder time making the argument that there is no less burdensome means to achieve its goal. Commercial travel is not the only way a terrorist can enter the State, nor is it impossible that a Nevada resident could be a terrorist. Neither of those classes of traveler are subject to search. Consequently, Frito could point out that the law imposes absolutely unnecessary burdens on interstate commerce.

C. If the State has its way, the Court will review the law from the standpoint of the lowest level of scrutiny. The law will survive Frito’s attack unless Frito can convince the court that the law’s benefits are not substantially outweighed by its

burden on interstate commerce. Frito might point out that the law does not provide any benefit at all since only a smaller percentage of passengers in vehicles crossing into Nevada are even searched. Persons travelling in non-commercial vehicles are exempt. If the benefit of the law is supposed to be heightened security from out-of-state terrorists, how can such security be achieved when so much non-commercial traffic is exempted from search? Moreover, how reasonable is it to subject out-of-state travelers to searches but exempt Nevadans from the same treatment? Is it not possible that a resident of Nevada might be a terrorist? And as for the burdens, he could point out that many persons, such as himself, will refrain from going to Nevada simply to avoid being searched. If he can muster evidence that interstate traffic is actually being adversely affected, his case will be all the stronger.

II. Privileges & Immunities

- A. **Citizenship.** Article IV requires States to treat citizens of other states the same as it treats its own citizens. A threshold requirement for bring an Article IV claim is that the claimant actually be a citizen of the United States. The facts indicate that Frito was not born in the United States. This does not mean he is not a citizen. Frito will have to plead and then establish that he is in fact a U.S. citizen. If he fails to do so, the Court would dismiss the case for lack of standing—that is, because he is not a citizen he has not suffered a deprivation of or an injury to a constitutionally protected privilege or immunity.
- B. **Fundamental Right.** Once his standing to bring his Article IV claim is established, Frito must demonstrate that the privilege impaired by the State’s law is “fundamental.” Fundamental liberties include a variety of economic rights and freedoms. One could argue that other substantive liberties are protected, such as those protected by the Bill of Rights. However, Article IV would not be the primary means to protect those liberties; instead, the Bill of Rights or the 14th Amendment or some other provision would be.

Frito’s liberty interests here include the right to travel, the right to be free from unreasonable searches and the right to engage in business in the State of Nevada. The first two rights are protected by other parts of the Constitution (14th and 4th Amendments) and will be discussed later. As for the last liberty, it may be protected by Article IV. While Frito and other out-of-state travelers are free to engage in business in Nevada without having to submit to invasive and degrading searches which may have the effect of deterring business travel, Nevada travel who travel across the border from other States are exempt.

The State would argue that while the right at issue might be fundamental, it has not really been impaired. The State would argue that Frito is free to enter the State and to engage in business there. There is no bar to entry, no prohibition on his business activity. Frito would argue in response that, yes, he is free to enter the state and engage in business, but only on condition that he forego other rights, such as the right to be free from unreasonable searches and seizures. True liberty

does not consist of being forced to abandon some rights in order to obtain permission to enjoy others.

- B. **Substantial Justification, etc.** If the Court finds that the privilege or right is fundamental and has been impaired, the State will have to demonstrate that there is a substantial justification for the difference in treatment and that there is a close relationship between the goal of the law and the degree of discrimination practiced. Here, the State would argue that its own citizens are reasonably less likely to instigate terror attacks than persons from outside the State. It would argue, too, that the law focuses narrowly on passengers in commercial vehicles because of the history of use of commercial vehicles by terrorists to enter the State. Frito would argue that there is a lack of justification for targeting citizens of other states since it was *foreign nationals* who committed the crime that led to the law being enacted in the first place. Moreover, it is just as likely (if not more likely) that terrorists in the future would not use commercial vehicles to enter the state, but instead would use private vehicles, if only because they were aware that *only* commercial vehicle passengers were being screened.

III. Substantive Due Process.

- A. **14th and 4th Amendment Rights.** Frito can argue that the law violates his 14th and 4th Amendment rights to travel and to be free from unreasonable searches and seizures. The right to travel is inferred from the 14th Amendment's Due Process Clause. The 4th Amendment protection of unreasonable searches and seizures is incorporated into the same Due Process Clause, thereby affording protection to potential and actual victims of State intrusions. Both of these rights are fundamental, thus the law creating the impairment will be subject to strict scrutiny by the Court.

Under strict scrutiny, the State has the burden of showing there is no impairment or that a compelling purpose justifies the law. The State would argue first that Frito is not actually prevented from entering the State from abroad (and therefore there is no impairment of the right). Frito would respond by saying that he can enter only on condition that he waive other rights, including the right to be free from warrantless searches. In order to enjoy one right, he has to waive the other. This isn't free at all. One or both of his rights are impaired by this law.

If the State fails to show that no impairment exists, it must establish a compelling governmental purpose exists justifying the curtailment of these important rights. The State would argue that it has a compelling interest in protecting its people from terrorist attacks. Frito might agree with this, but would argue that the means chosen to achieve this end are not tailored precisely to address the problem, with the result that liberty is unnecessarily burdened. Here, only passengers in commercial vehicles are targeted, and of these, only those who are not able to prove they are citizens of Nevada. The law aims to prevent out of state terrorists from entering the state, but does not actually serve that end. The focus on only one class of interstate travelers leaves far too many holes through which terrorists

might slip, thus rendering the burdens on the fundamental rights of out-of-state travelers to Nevada utterly unnecessary.

- B. **Economic Liberties.** Frito can also argue that certain economic liberties are impaired by the law. These liberties are protected by the 14th Amendment's Due Process Clause. Specifically, his right to engage in activity related to contracts with persons in Nevada, and to pursue a living in Nevada, have been impaired. The State would argue that while there may be some impairment on these rights, the rights themselves are only minimally protected by the Constitution. Frito has the burden of demonstrating the law at issue does not serve a legitimate state interest and the curtailment of liberty represented by the law is not rationally related to that interest. Frito could point out that while there is a legitimate interest in protecting the state and its people from terrorists, the way the State has set about doing it makes no sense. All the law does is encourage would-be terrorists to avoid commercial travel and use private vehicles to enter the state on their deadly business. The State would respond by stating that it does not have to be perfect in tailoring its solution. It does not have to address every source of evil. It can address a mere part of the problem.

Question Two

Al Qaeda operatives from Somalia placed explosives on a commercial bus. Fortunately, the explosives failed to detonate and the plotters were apprehended.

In the wake of this incident, many States attempted to provide higher safety for bus passengers, but many of those efforts raised constitutional concerns.

In response to the constitutionally “suspect” efforts of the States to ensure safety for bus passengers, Senator Dave sponsored and the Senate passed the “Federal Bus Safety Act.”

The Act provided that anyone boarding a commercial bus *anywhere* in the country would be subject to searches of their persons and possessions via use of revealing x-ray scanners and/or thorough pat downs.

The Act also prohibited use of *any* vehicle other than a commercial bus to cross state lines unless the user of the vehicle purchased an annual interstate transit license and paid a tax each time they made an interstate trip. The Act would lapse after two years if not re-enacted by Congress.

The Senate transmitted the text of the “Federal Bus Safety Act” to President Becky. The President did not immediately sign it due to a week-long celebration of her 35th Birthday. Nine days after presentment to her, she signed the legislation.

A week after the President signed the “Federal Bus Safety Act,” the Department of Homeland Security (part of the executive branch) commenced enforcing the law.

Frito purchased a vehicle for the *sole* purpose of driving to Nevada from California for weekly business meetings. After enforcement of the “Federal Bus Safety Act” commenced, Frito drove his personal vehicle to Nevada in order to attend his weekly meeting. Frito had *not* obtained a transit license. He was not permitted to cross the border in his personal vehicle. He therefore slipped onto a commercial bus and hid in the bus’ restroom until the bus arrived in Reno. Fellow bus passengers later reported his presence to authorities.

A month later, Frito received notice that he was being prosecuted by the United States Attorney in Nevada for violation of the “Federal Bus Safety Act.”

He also received notice that he was being prosecuted by the State of Nevada for violation of the “Nevada Bus Safety Act” (as described in Question One). Specifically, he was being prosecuted for failing to submit to a search, or, in the alternative, to present a Nevada license or Nevada identification card prior to entering the State.

1. *In his defense against Federal prosecution, what defects in the process of enactment of the law can Frito raise?*
2. *What rights protected by the Constitution can Frito raise as a defense against Federal prosecution?*

3. *With respect to the State's prosecution of Frito, discuss the merits and demerits of a pre-exemption defense.*

Issue Outline: Question No. 2

I. Procedural Objections to Enactment of the Law

- A. **Bicameralism.** The Constitution requires that all laws (except treaties) be approved by both houses of Congress. Here the facts indicate that the law was passed by the Senate and then sent by the Senate directly to the President. On its face, this would be a violation of the bicameralism requirement, which would in turn render the law void, regardless of the President's signature.
- B. **Origination.** The Constitution requires that all revenue bills— that is, laws that impose taxes, originate in the House of Representatives. Here, the law originated in the Senate. The law imposes a tax on non-commercial interstate travel. Frito could seek invalidation of the law on the grounds that the law was a revenue bill that did not originate in the House. In response, the government could argue only the tax element of the law is invalid. The rest of the law, including that portion of the law that Frito was accused of violating, remained valid. Generally speaking, Courts will attempt to preserve laws by eliminating only unconstitutional provisions.
- C. **Eligibility of President.** The Constitution imposes several minimum eligibility requirements on the President. She must be a natural born citizen of the United States, must have lived in the country for at least fourteen years and of course she must actually be elected or otherwise raised to office pursuant to procedures set forth in Article II or the 25th Amendment. She must also actually take the oath of office and she must be no less than 35 years old when assuming office. Here, it seems the President entered office before she turned 35. The facts indicate that she delayed in signing the law because she was celebrating her 35th birthday. If she was not 35 when she took office, she would not be eligible for office. One of the essential steps in lawmaking is presentment of a bill to the President. If the president was Constitutionally ineligible to assume office in the first place, she would not have been able to receive the presented bill. Presentment would be rendered impossible, thus a bill could not become law even through default after ten days without the President's signature.

It could be argued that she was 35 when she signed the bill, but this would not cure her lack of eligibility at the time she entered office. Whether Frito could actually successfully raise this as a basis to invalidate the law is uncertain since eligibility is something that historically has been left either to Congress or the States to determine. In fact (until *very* recently), no president has ever been challenged formally before the election or after for lack of Constitutional eligibility, so there is no precedent governing this issue. It could be that a Court would refuse to hear a claim as to eligibility as a non-justiciable political question— that is, a matter that is allocated by the Constitution to the discretion of Congress, or to the States.

- D. **Timeliness.** Ordinarily, a President has up to ten days from the date of presentment of a bill to sign it, otherwise it will take effect without her signature. However, if the session of Congress ends before the ten days is up and the President still has not signed it, the bill will fail. Here, there is no indication that the session of Congress had ended. Presumably, the President's signature was timely. If Frito argues untimeliness of signature, likely the argument would fail.

II. Constitutional Rights Against Federal Prosecution

The Constitution imposes limits on Congressional Power. The limits are designed in part to ensure liberty. Any excess of the enumerated powers of Congress in the form of laws Congress enacts are an attack on a very broadly defined liberty interest. Before addressing particular rights the law at issue violates, Frito should attack the law as an assault on the broad right an individual has to be free from laws that exceed the scope of the government's power.

- A. **Commerce Clause.** Congress is permitted to pass laws that regulate channels of interstate commerce or items of persons in interstate commerce, or protect instrumentalities of interstate commerce, or to regulate any activity that substantially effects interstate commerce. If the Commerce Clause is the basis for the law, Frito could argue that the law does not regulate only interstate commerce; it also regulate *intrastate* commerce. *Intrastate* commerce is generally outside the scope of Congress' power. The government could counter this position by arguing that virtually every commercial vehicle in the country operates on federally funded highways, airways and rails. Congress' law serves to protect these Federally funded channels and the instrumentalities using them. Frito could respond by stating that the law does not regulate and protect roads as much as it regulates persons travelling in commercial vehicles. A person taking a bus from one part of a town to another is clearly not within the stream of interstate commerce. The law is thus far too broad. If indeed the law was too broad in this respect, the fact that it was limited in time to two years would not save it. If Frito prevails, the government can still assert that the commerce power was properly invoked in that the law regulates activity, while occurring strictly within a single State's bounds, nevertheless substantially effects interstate commerce. This is a questionable position when considering cases such as *Shreveport* and even *Wickard*. In those cases, the government was able to demonstrate that certain intrastate activity adversely impacted similar activity that occurred across State lines. For instance, in *Shreveport*, the lower rail freight rates for domestic shippers gave domestic shippers a competitive advantage over shippers sending goods to the same in-State locations from outside the State. Here, there is no similar competition that the law is seeking to equalize: a person desiring to cross town on a bus would simply never conceive of traveling out of State in order to get across town on a bus traveling across State lines to the ultimate cross town destination. Lower fares are irrelevant. What's relevant in this situation is convenience.

B. **War Powers.** If Frito succeeds in a Commerce Clause challenge, the government can raise the war powers as the basis for the law. The war powers are the most potent of Congress' powers and the Courts are highly deferential to Congress when they are evoked. Congress can argue that the war powers permit it to pass laws to protect the nation from terrorists, including the requirement that persons travelling across state lines submit to searches of their person. In order to prevail, Frito would have to demonstrate the law was simply unreasonable. He might attempt to do this by arguing the law was unreasonable because, while the end was legitimate, the means exempted perhaps the majority of travelers from search. Consequently, the law would actually tend to force any potential terrorists to resort to travelling in private vehicles. All they would have to do is pay money and obtain a license. Those requirements were hardly deterrents to terrorist activity.

C. **Tax Power.** Under the Constitution, Congress' power to tax is broad. Congress is permitted to impose excise taxes, also known as use taxes, uniformly throughout the country. The tax on interstate travel seems within Congress' power to tax. There is little hope that any argument that the tax power had been misapplied would succeed. Likely the argument would be stopped in its tracks once the government points out that Frito is being prosecuted for violation a section of the law unrelated to the law's tax provision.

If unsuccessful in the claim that Congress exceeded its powers and thereby broadly assaulted Frito's liberty interests, Frito could next argue that the law, while justified by Congress' enumerated powers, violates the Constitution in that it impairs particular protected liberties, including the right to travel and the right to be free from unreasonable searches and seizures.

D. **Right to Travel.** The right is protected by the 5th Amendment's Due Process Clause. If Congress is to be permitted to impair the right, the government must demonstrate a compelling state purpose and that the means chosen to achieve it are the least restrictive on individual liberties. Frito likely would attack the law pursuant to the second prong of the test. He might argue that the means chosen impair liberty without actually helping achieve the end of protecting the nation from attack. Specifically, the law subjects persons to search only if they are travelling on commercial vehicles. If any terrorists are to slip from one state to another, they likely would do so via a means that permit them to evade government searches—that is, they would travel in private vehicles.

E. **4th Amendment.** The 4th Amendment prohibits unreasonable searches and seizures. Any search without a warrant is presumably unreasonable. Waiver of the warrant requirement permits warrantless searches. The government could argue that people who travel across state lines waive their 4th Amendment rights. Frito could counter by arguing that there is no valid waiver of 4th Amendment rights when one is essentially forced to choose between two rights. If Frito is to be allowed to avail himself of his right to travel he must submit to the warrantless

search; if he is to avail himself of his right to be free from warrantless searches, he must forgo his right to travel across state lines.

III. Pre-exemption as to State Law by Federal Law.

- A. *Pre-exemption* is not a constitutional doctrine, thus, strictly speaking, no analysis is required in response to the question.
- B. However, if the term is construed to mean or refer to the doctrine of *preemption*, analysis could proceed. Frito could argue that the prosecution under State law was pre-empted by the federal statute.

Pre-emption is a doctrine traceable to the Supremacy Clause of Article VI of the Constitution, which provides that the Constitution, the acts of Congress and Treaties are the law of the land, taking precedence over the laws of the States.

Simply because a State statute deals with a similar subject matter does not mean a federal statute will take precedence. What is necessary for pre-emption to occur is that the statutes are in conflict with one another or that the federal law is part of a scheme that essentially occupies the field either constructively or expressly.

Clearly, the statutes are on point. While the Federal statute includes controls over non-commercial travel, it also imposes some of the same requirements as the State law. Specifically, both the State law and the Federal law require bodily searches of individuals travelling on commercial vehicles. Where they differ is that the Federal law provides no state-identification exemption.

Frito could argue that Congress intended to occupy the field. Specifically, he could argue that Federal law intended to eliminate the disparity of treatment between residents and non-residents of Nevada— perhaps to overcome constitutional violations pursuant to Dormant Commerce, Privileges and Immunities and even the Equal Protection Clause. If this were true, Frito could not be prosecuted for failing to show a valid Nevada identification card or driver's license. As for evading the search, the State had no basis to prosecute him under a law that was directly on point with a federal statute, designed apparently to achieve the same end, which was to detect and deter terrorist attacks.

The State could argue two points in response to Frito. First, the Federal law was invalid—perhaps for all or some of the reasons stated by Frito above. If the Federal law was invalid, it would be void, and thus there would be nothing to pre-empt State law. Second, if the first argument fails, the State could argue that its statute is permissible, at least with respect to the search element, as a voluntary assumption by the State of the duty to enforce federal law. If that were the case, however, the State still could not prosecute him for violation of State law. It would have to prosecute him for violation of federal law.

Question Three

In an effort to combat threats to the nation posed by international terrorists, Congress passed a law *requiring* the Secretary of State of each State either to directly undertake collection of information about gun possession in their respective State or to contract with private parties to undertake that task. States could opt out of the information collection mandate, but they would lose money provided them by the Federal government for education.

In accordance with this Federal law, any person who refused to provide information pursuant to the inquiry was placed on a list that was circulated among gun dealers, who were admonished not to sell guns and/or ammunition to persons whose names appeared on the list. It was the obligation of the State or any party they contracted with to compile and circulate this list.

The Federal law was entitled “An Act to Regulate the Militia and Combat Enemy Weapon Stockpiling.”

California opted to enter into year-long contracts with private parties to conduct the federally mandated inquiry into gun possession. Vince successfully bid on one of these contracts. He was to be paid on a monthly basis over the course of twelve months. Vince commenced his inquiry in Sonoma County. When Vince approached Frito and attempted to make the federally mandated inquiry, Frito refused to provide him with any information.

When several of his neighbors’ homes were burglarized three months later, Frito went to Walmart to purchase a shot gun for home defense. He was informed by Walmart staff that Walmart would not sell him any guns because his name was on a list of persons to whom guns should not be sold.

Frito sued Walmart, Vince, the State of California and the United States, seeking declaratory and injunctive relief. He also sought damages against Walmart and Vince pursuant to Section 1983.

During the pendency of the litigation, California terminated its contract with Vince.

1. *What arguments based on the Constitution can Frito raise to defeat the Federal law, and what arguments, if any, can be raised in reply by the State and/or Federal government?*
2. *Will Frito’s claim against Vince and Walmart prevail? If not, why?*
3. *If Vince sues the State for breach of contract, are there any constitution based arguments he can raise either to enforce the contract or recover damages?*
4. *What defenses, if any, can the State raise to an action by Vince to enforce the contract or recover damages?*

Issue Outline: Question No. 3

I. Constitutional Attack on the Federal Statute

- A. **War Powers.** The war powers of Congress include the power to regulate the militia. The law that was passed invokes this power in its title, as well as other of the war powers. Walmart has refused to sell Frito a gun due to admonitions received from the government. Frito can argue that the law at issue exceeds the war powers. The power to regulate the militia does not include the power to deny a citizen the constitutionally protected right to keep and bear arms. Congress might impose certain requirements as to the type of guns members (or potential) of the militia are free to maintain, but denying persons any gun at all probably goes too far. Moreover, it is not clear that it is the militia Congress is even regulating. The information collection requirement seems disconnected from militia service, while the admonishment element of the law seems more akin to a punishment for refusal to provide information. Any exercise of a power by Congress must be reasonable. Here, prying into the personal lives of citizens and then thwarting their exercise of a protected right seems irrational and unrelated to any reasonable regulation of militia activity, particularly in light of the lack of any militia activity here.

As for the objective of preventing enemy weapon stockpiling, the law itself seems unrelated to any such activity. Frito is not himself an enemy of the nation (certainly there is no allegation that he is), nor is the law tailored to address enemy activity, which one would expect to be largely clandestine. To be reasonable, a law should only subject an individual to an impairment of a liberty interest if the individual has proven deserving of such an impairment.

The government could argue in response that its powers are broad, and that instead of more aggressive regulation pursuant to its war powers, it has opted to exercise its powers leniently, in order to determine how well armed the citizenry is in the event their service in the militia is required. Additionally, it was not unreasonable for the government to combat stockpiling by enemies in an innocuous way: here, a few inquiries sends the message to secret enemies that the government is paying attention. Enemies, too, are less likely to cooperate with the information gathering process. It therefore is not unreasonable to “punish” persons who refuse to provide the relevant information. If one is innocent, what do they have to hide? If the law in fact sweeps too broadly, so what. Overbreadth is generally irrelevant when testing the rationality of an act of congress.

- B. **10th Amendment.** In accordance with principles represented by the 10th Amendment, Congress cannot require States and local governments to enforce federal law. Congress can obtain State consent to enforce a federal law or it can enforce the law itself. Here, the State is required to engage in the surveying of the populace, or to contract that duty to private parties. Frito could argue that the mandate violates the 10th Amendment.

The government could counter this argument by pointing out that the law provides an opt-out provision. This argument, however would give rise to a spending power based objection.

- C. **Spending Power.** Congress is permitted to spend federal revenue in order to promote the general welfare and provide for the common defense of the States and the people therein. Problems can arise when Congress attempts to condition allocation of federal money to States on performance of certain duties. When doing so, several rules apply: the condition must be clear and it must be related to the subject matter of the allocation. Here, allocation of funds for education to the State depends on the State's agreement to enforce the Militia Act. Frito could argue that while the Federal government is permitted to place conditions on acceptance of federal money, the condition here has no relationship to the subject matter of the allocation. Indeed, there is no obvious relationship between collecting information on gun possession and education.
- D. **2d Amendment.** The 2d Amendment guarantees the right to keep and bear arms. The Supreme Court has held that this right is an individual right. Its purpose is to permit individuals to protect themselves from threats to their persons and property, including threats emanating from government and foreign invaders. Here, Frito can argue that the law at issue impairs his 2d Amendment liberty. Because of the law, he was denied the right to purchase a gun for self-defense. The government could argue in response that the law doesn't require he be barred from purchasing a gun. Instead, the law leaves it up to private parties to refuse to sell guns to certain individuals. Frito can counter by arguing that the sale would have occurred but for the government's admonition to Walmart, which itself would not have given but for the Federal Act.
- E. **Procedural Due Process.** Whenever a vested right is subject to curtailment by the government, the individual who possesses that right is entitled to notice of the government's action and an opportunity to meaningfully challenge that action. Here, the government has succeeded to convincing Walmart not to sell firearms to Frito. Frito could argue that the government should have provided him with prior notice of the deprivation and an opportunity to challenge it. Because the right at issue was a fundamental one—the right to keep and bear arms—the notice and hearing should have come prior to the deprivation, not after. The government, however, could argue that they didn't deprive him of any rights. They simply suggested to the retailer that the retailer not sell Frito a gun. It was really the retailer's decision, not the government's, therefore, Frito was owed no process at all. That argument, however, is only as good as the government's ability to overcome Frito's argument that the admonishment to Walmart truly was merely an admonishment and that Walmart itself was, for constitutional purposes, a state actor rather than a private one.

- F. **Bill of Attainder.** Frito could argue that the law had the affect of punishing him by depriving him of a fundamental right without a judicial finding of fault. This, he could argue, amounted to a Bill of Attainder. The government could argue in response that the law was not aimed at him specifically and that it did not actually punish him. The first argument would likely fail since a Bill of Attainder does not have to single out named individuals. Instead, a legislative act qualifies as a Bill of Attainder if it imposes a punishment of some kind on an identifiable class of persons. The class here are those persons who refuse to provide information pursuant to the government mandated survey. The second argument might get a little further. The law actually didn't punish Frito or others similarly situated. Instead, it led to an admonishment to gun retailers not to sell guns to persons such as Frito. It was up to the retailer to heed then admonishment, or not.

II. Frito's Claim against Vince & Walmart

In order to prevail against Vince & Walmart pursuant to Section 1983, Frito will have to demonstrate that those two parties were State actors. Vince was under contract with the State of California to collect information and to pass on the names of non-cooperating individuals to gun dealers, including Walmart. Walmart was a gun dealer who opted to going along with the government's recommendation that they not sell firearms to Frito.

In order to impose 1983 liability on an individual or entity, Frito must show: (1) that the deprivation was actually caused by the exercise of some right to privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible; and (2) the party charged with the deprivation must be fairly said to be a state actor.

Regarding Vince, his status as a contractor with the State for the purpose of fulfilling a State function, easily renders him a State actor for purposes of 1983 liability. He might not have been a state official *per se*, but he was acting in accordance with the State mandate to collect information and pursuant to a contract with the State to fulfill that mandate in lieu of the State actually doing so.

Regarding Walmart, Frito's best argument would likely be that it should be liable for violating his Constitutional liberties because of the government's encouragement in the form of the formal admonition not to sell firearms to Frito. This would be a challenging argument due to the fact that Walmart was acting counter to its interests when it refused to make a sale to Frito. This suggests that Walmart was responding to governmental coercion, or the fear that if it did not act as the government indicated it should it might suffer some adverse consequence in the future, such as withholding by the State of various retailing licenses. In other words, Walmart was acting under duress. If Walmart could make this case, it would not be particularly appropriate for a Court to hold Walmart accountable for the violation of Vince's constitutional liberties.

III. Constitutional Bar to Vince's Action Against State

- A. **Contract Clause.** Vince can raised the Contract Clause in Article I, Section 10, which prohibits States from enacting laws that impair obligations on contracts. Here, the State has not merely breached the contract with Vince but terminated it. It is not clear from the facts whether the termination was the result of an executive decision or a law passed by the State legislature. In any event, the result is the same: Vince is not able to get paid for work he already performed, or to continue to enjoy the fruits of labor he had obligated himself to perform.

States are permitted to impair obligations on contracts. If the impairment is not substantial, no further inquiry is needed to justify the impairment. The government is free to impose minor limitations on contractual rights, particularly in the form of temporary stays on enforcement. If the impairment is substantial, it will be permissible only if it serves a significant and legitimate public purpose and is reasonably related to achieving the goal. When the government impairs its own obligations on contracts to which it is a party, the court looks at the law with greater scrutiny.

Here, Vince can argue (1) that it is the government that reneged on its obligations and thus must justify its action pursuant to a significant and legitimate purpose, and/or (2) that termination of the contract is not related to achieving that purpose.

- B. **Substantive Due Process: Economic Rights.** In the alternative to the Contract's clause, Vince can raise the Due Process Clause of the 14th Amendment. He is being deprived of a vested right. The right at issue would be the right to work—a right all the more potent in that his work was tied to this particular contract. The Due Process clause attack would be particularly relevant if the State's arguments below against the application of the Contract Clause prevailed. Unfortunately for Vince, economic rights are not afforded much protection under the Constitution. The burden would be on Vince to demonstrate that the limitation on his economic liberty in the form of the law bore no rational relationship to the goal of that law.
- C. **Procedural Due Process.** Vince could also allege that the termination of the contract was analogous to him being fired from a government job. As a terminated government employee, he was entitled, pursuant to the 14th Amendment's Due Process Clause, to notice of the pending action and an opportunity to challenge the termination. Of course, he would argue that the hearing should have come prior to termination.

IV. Defenses by State Against Vince's Action

If it was the executive branch that terminated the contract, the State could argue that the Contract Clause was inapplicable since the clause only prohibits the State from passing laws that impair obligations on contracts. If the Contract Clause applies even when the executive branch acts, the State certainly had a compelling reason to terminate the contract: that is, the contract itself was void due to it being made pursuant to an unconstitutional law and furthered an interest that violates constitutional liberties.

As for defending against a Substantive Due Process claim, the State would argue that Vince had the burden of disproving that the law was rationally related to a legitimate governmental interest. The interest informing the termination of the contract, while contrary to Vince's vested interests, was certainly legitimate. The government has a legitimate interest in refraining from violating the liberties of its citizens, including citizens who wish to avail themselves of the right to keep and bear arms. It has a legitimate interest too in refraining from enforcing federal laws in contravention of the 10th Amendment. Finally, the State would point out that terminating the contract was unquestionably rationally related to the aforementioned governmental interests.

As for defending against the Procedural Due Process claim, the government's position would be that Vince wasn't an employee at all. Instead, he was an independent contractor and thus was not entitled to any procedural due process rights. If the Court holds that Vince was an employee, the State would attempt to avoid a decision on the merits by stating no process was due— either before termination or after— because the contract itself was for an illegal or unconstitutional purpose. In other words, even if he was an employee and was theoretically entitled to due process, no process was appropriate here because the job he seeks to salvage is one that could not be carried out in conformity with the Constitution.