

Exam Post-Mortem
Constitutional Law I – Spring 2011
Professor Massey

Below is a brief dissection of the examination. What follows is a repetition of the essay question and a summary indication of the issues and the approach to be taken in handling those issues. ***This is not a model answer.*** Rather, it identifies the principal issues, outlines the analytical approach to those issues, and provides some feedback with respect to common errors or omissions. A model answer would analyze these issues thoroughly and persuasively in grammatically correct, well-organized, even elegant, prose. Organizational defects, which blurred inexorably into analytical lacunae, were not uncommon. Many of you tried to deal with every conceivable issue, even when the issues were non-existent or irrelevant. Some of you belabored the obvious, to the detriment of space devoted to the real issues. Some of you provided essays on the law but failed to apply that law to the question at hand.

A few common errors in usage of the English language are set forth below.

Principal and Principle. As Fowler, the God of English Usage, puts it: “Misprints or even mistakes of one for the other are very frequent, and should be guarded against.” H. W. Fowler, *A Dictionary of Modern English Usage* 478 (2d ed. 1983). *Principal* means “first,” “primary,” “foremost,” “chief in rank.” In finance it means the amount of the debt of corpus of a trust. In law, it means the person who employs another to act as his agent, or the person who commits a crime (as distinguished from an accessory to the crime). The chief teacher at a school is the principal. The most significant city in a state is the principal city. A student who devotes virtually all of his attention to constitutional law has made that subject his principal focus. *Principle* means the ultimate source or cause of something, or a doctrine or truth, or a rule of conduct. Racial equality is a principle. Newton’s physical laws are principles. The principles of constitutional law preoccupy the student who has made constitutional law her principal course of study.

Its and It’s. It’s the apostrophe that bedevils its understanding by you. *It’s* is a contraction of “it is.” As with all contractions, an apostrophe is used to indicate the missing letter(s). *Its* is a possessive determiner or possessive pronoun, but as with a variety of other possessive determiners or possessive pronouns (e.g., their and theirs) it does not have an apostrophe to indicate its possessive nature. Of course singular nouns that are used in the possessive form require an apostrophe (e.g., “the child’s toy”), plural nouns ending in something other than an “s” require an apostrophe (e.g., “the children’s toys”), and plural nouns ending in an “s” require an apostrophe after the “s” (e.g., “the girls’ books”). Singular nouns ending in an “s” engender dispute. Some say that the usual rule applicable to a singular noun applies (e.g., “Texas’s oil”) while others argue that the second “s” is unnecessary (e.g., “Texas’ oil”). I am of the former camp, but the Supreme Court often uses the latter form (as in “Congress’ legislation”). I think the Supreme Court is grammatically challenged and needs remedial assistance. Perhaps the Court thinks Congress is a plural noun, but the last time I looked the U.S. had one Congress.

Avoid mistaking *it’s* and *its*, lest you be regarded as evidencing “an unequivocal signal of illiteracy.” Lynne Truss, *Eats, Shoots & Leaves* 43 (2003) (a highly entertaining little treatise on

punctuation).

Affect and Effect. “Affect” means to have an “effect” upon, to influence, or to produce a change in something, as in “cultivation of wheat substantially affects interstate commerce.” It can also mean to move or stir the emotions, as in “she was greatly affected by the eulogy.” “Effect,” when used as a noun, means the result brought about by some cause or agent, or the ability to bring about a result, as “the drug had a cathartic effect.” It may also be used to describe the meaning of something, as “Her remarks on the Libyan problem were to the effect that it’s a mess.” Another meaning of “effect” is to describe form, color, or composition, as “cubist effects differ from those of the impressionist painters.” Still another meaning is to describe the impression produced on an observer, as “the magician’s skill produced quite an effect upon the audience.” When “effect” is used as a verb, it means “to bring about,” or “to accomplish,” which is different from “to influence.” Thus, “the purpose of Obamacare is to effect change in the delivery of American health care,” as distinct from “Obamacare will affect American health care.”

Wrong Word Choice. I did not diligently keep track of wrong word choices, but one comes to mind: *tenet* and *tenant*. A *tenet* is a principle, doctrine, or opinion held by some body of thought or group of people. It is a *tenet* of American democracy that the people are the sovereign. An owner of a leasehold is a *tenant* of the fee owner. Metaphorically, given the inevitability of death, we might claim that one of our *tenets* is that we are all *tenants* on this Earth.

The range of correct answers on the multiple choice portion was 8 to 20, out of 25 possible correct answers. The median was 14 correct answers. Because each question was worth three points, the range of raw scores on the multiple choice portion was 24 to 60. The median was 42. The range of raw scores on the essay was 6 to 30. The range of total raw scores was 36 to 83. The median was 59. The median course grade was a B+ .

PART TWO

The portion of Charleston, South Carolina that lies south of Broad Street is characterized by architecturally distinguished, beautiful, and remarkably well-preserved homes from the 17th, 18th, and early 19th centuries (the “Historic Quarter”). These treasures have become increasingly desired by wealthy persons who wish to use them as a second home, residing there for a small fraction of the year. Many full-time residents of the Historic Quarter complain that this phenomenon has caused a sense of community to atrophy, and that it has produced a civic desolation in which full-time residents feel isolated in a landscape of beautiful but uninhabited homes. These full-time residents note that the presence of large numbers of homes unoccupied for much of the year increases the dangers of crime (not only burglary but street crime due to the absence of pedestrian traffic at night and the lack of observant neighbors).

In response to these complaints, the Charleston city government has enacted the Charleston Partial-Year Residence Law (“CPRL”). The CPRL (1) prohibits the sale of any residence in the Historic Quarter to any person who fails to provide an affidavit made under

penalty of perjury that he or she intends to occupy the residence as his or her principal residence, and (2) imposes a property tax surcharge of quintuple the ordinary property tax on any residence in the Historic Quarter that is not occupied for at least 300 days in any calendar year.

After receiving a notice that his property taxes had been increased from \$10,000 to \$50,000, Gabriel, a Charleston native who now lives in New York City, and who has owned the family home in the Historic Quarter for twenty-five years (which he occupies for about 30 days each year, and is otherwise vacant), filed suit against the city of Charleston in federal district court, seeking a declaration that the CPRL is unconstitutional and requesting an injunction against its enforcement. Rhonda, a resident of Charlotte, North Carolina who has entered into a contract to purchase a home in the Historic Quarter, but who cannot truthfully execute the required affidavit, also filed suit against the city in federal district court, seeking a declaration that the CPRL is unconstitutional and requesting an injunction against its enforcement. Jack, a movie mogul and resident of Los Angeles who visited the Historic Quarter and decided that a residence there would be a great place to get away from L.A. glitz, also filed suit against the city in federal district court, seeking a declaration that the CPRL is unconstitutional and requesting an injunction against its enforcement.

You are the newly hired law clerk for District Judge Barbara Newbie, to whom these cases have been assigned. Judge Newbie has asked you to prepare a memo addressing the constitutional issues posed by these suits, and to explain and provide your conclusions concerning their disposition. Please do so.

The first issue is whether any of the plaintiffs have standing. Each plaintiff must be considered separately.

Gabriel has standing because he has a personal and immediate injury in fact – his property taxes have been raised by a factor of five, that economic injury is directly attributable to the City of Charleston’s enactment of the CPRL, and the requested declaratory and injunctive relief will completely redress the threatened injury.

Rhonda has standing because her immediately threatened personal injury is incipient failure of her contract to purchase a Charleston Historic Quarter home, that injury is caused by Charleston’s prohibition of purchase of Historic Quarter homes by partial-year residents such as Rhonda, and the requested relief will redress the injury.

Jack lacks standing because he has no personal actual or immediately threatened injury. Although he says that a Historic Quarter home “would be a great place to get away from L.A. glitz,” there is no indication that he has any plans to actually acquire such a residence. As with the plaintiffs in Lujan, Jack has only “someday” intentions and that is not enough to show that he is suffering any particularized or immediately threatened injury. He might argue that CPRL chills his desire to even look for such a residence, but that is sort of chill that the Court found to be insufficient injury in Warth v. Seldin. Jack’s claim should be dismissed for lack of standing.

The Eleventh Amendment is not an issue because the relief sought is a declaratory judgment and an injunction.

Gabriel and Rhonda each may claim that the CPRL violates the dormant commerce clause. To determine the relevant standard of review, their claims may be examined together.

The CPRL does not facially discriminate against interstate commerce, but it does have an impact on the interstate market for homes in the Historic Quarter. Both South Carolinians and out-of-staters are treated equally under this law. Indeed, even the South Carolinian who owns a Historic Quarter residence as his principal residence but who leaves it unoccupied for more than 65 days in any non-leap year is affected by the CPRL.

The effect of the CPRL is to discriminate against some, but not all, residents of other states. The only out-of-state residents affected by the CPRL are (1) those who already own a home in the Historic Quarter and who do not occupy it themselves or permit others to occupy it (e.g. by rental) for 300 days per year, and (2) those who wish to purchase a Historic Quarter residence but who do not wish to make it their principal residence. Any out-of-state resident who owns a Historic Quarter residence is free to avoid the tax surcharge by renting the home to someone who would occupy it for at least 240 days (assuming the owner would occupy it for another 60 days), or to someone who would occupy it for at least 300 days (assuming the owner wishes to occupy it not all), or some combination that adds to occupancy of at least 300 days. And, of course, an out-of-state owner could occupy it themselves for 300 days each year. Thus, the effective discrimination against out-of-state owners is not uniform.

Charleston's purpose in enacting the CPRL is to ensure that the Historic Quarter remains a functional community, rather than becoming a ghost town of part-time residents. That is intended to dampen crime, increase civic activity and participation, and probably spur local commerce as well. Although that last purpose might be viewed as protectionist, it does not seem to be Charleston's dominant purpose, and could be seen as a legitimate by-product of the desire to foster a vibrant and active community.

Thus, the CPRL should be treated as an even-handed law that imposes incidental burdens on interstate commerce and evaluated under Pike balancing. In the application of Pike balancing, Gabriels's and Rhonda's claims will be examined separately.

The burdens are considerable but avoidable in the case of Gabriel and others like him. Either they must pay 5 times the usual property tax or they must permit someone to occupy it for 300 days each year. The putative local benefits are harder to quantify but also considerable. A city that becomes a hollow shell of largely unoccupied residences loses the very qualities that cause it to be a city. It becomes more like a hotel with most of the rooms unoccupied. It may not be as horrific as the Bates Motel but it nonetheless loses the vital spark of inhabitation. That is an important and substantial local benefit. Given the presumption that laws subject to Pike balancing (as is the CPRL) are valid, the avoidable burden is not "clearly excessive" in relation to these local benefits.

The burden that the CPRL places on Rhonda and others like her is profound. Either they must forego owning a residence in the Historic Quarter or they must relocate their principal residence to the Historic Quarter. The qualitative impact of this burden is enormous, and it is not avoidable. Rhonda and her ilk must choose to be devoured by Scylla or sucked into Charybdis. The total foreclosure of the opportunity to be a non-resident owner of a Historic Quarter residence, even if one is prepared to rent it for 300 days per year, is a far greater burden than the avoidable tax hike that confronts current non-resident owners of Historic Quarter residences. The local benefits are the same as in Gabriel's case, and they remain as important and substantial as they were in Gabriel's case, but the burdens on interstate commerce are sufficiently greater here that they are clearly excessive in relation to the local benefits.

Gabriel might claim that the tax surcharge is a tax on interstate commerce but that is not well-founded. The tax is not on the privilege of conducting interstate commerce nor is it levied on any interstate commercial activity.

Rhonda and Gabriel may each claim that the CPRL violates the privileges and immunities clause of Article IV, §2. Their claims will be examined separately.

Gabriel claims that the CPRL discriminates between in-state and out-of-state residents with respect to a right that is fundamental to interstate harmony and union – the right to own property in the host state and pay the same taxes as would an in-state owner. The problem with Gabriel's claim is that the relevant fundamental right is the right to acquire and dispose of property within the host state. Charleston has not interfered with that right. It has imposed a property tax surcharge that is completely avoidable by any out-of-state owner and that will fall with equal impact on a permanent resident of the Historic Quarter who leaves his home unoccupied for 66 days in any given year. Similarly, both South Carolina residents and non-residents of South Carolina may not buy a home in the Historic Quarter unless they can honestly declare that it will be their principal residence. Although there may be a right fundamental to interstate harmony and union at stake, it is not clear that Charleston discriminates on the basis of citizenship with respect to that right. In any case, the CPRL is valid if it is rationally related to the accomplishment of any legitimate interest. As noted above, Charleston has substantial legitimate interests in ensuring a viable community, and the surcharge is a rational incentive to keep residences in the Historic Quarter occupied for a bit more than 80% of any year.

*Rhonda's claim is much better. The CPRL totally forbids her, **as an out-of-state resident**, to acquire a residence in the Historic Quarter. This is because no non-resident of South Carolina can acquire a home in the Historic Quarter **and** remain a non-resident of South Carolina. Only those people who are or who are willing to become residents of South Carolina may purchase such homes. Thus, she not only asserts a right that is fundamental to interstate union, she has proven that the first part of the CPRL discriminates on the basis of citizenship. Charleston can prevail only if it proves that out-of-state residents are a peculiar source of the harm. The harm, of course, is the degradation of civic life that occurs with large portions of the Historic Quarter residences remaining unoccupied for most of the year. That phenomenon occurs precisely because the owners of those residences do not use them as their principal residence and thus live in them. However, there are less discriminatory alternatives available to Charleston to achieve its objectives. It could permit absentee owners to acquire Historic Quarter residences so long as they will undertake to ensure that they are occupied by someone for at least 300 days per year. The city's goals of having a population present for most of the year would thus be served. Of course, the community would be more vibrant if the owner lived in the residence rather than a caretaker, or even possibly transient renters, but this alternative achieves most of the city's goals. Rhonda's claim should succeed.*

*Many of you thought that the Contract Clause was an issue. It is not. The effect of the CPRL on contracts is incidental, as in *Exxon v. Eagerton*. To the extent that the first part of the CPRL is aimed at contracts, it operates prospectively. Moreover, it is aimed at prohibiting certain transactions, much like a law prohibiting the sale of heroin. Abrogation of private contracts is a wholly incidental phenomenon.*

The takings clause is also not relevant. Not only did we not cover the topic in this class (although I realize you did so in Property and it is a constitutional issue), the effect of the CPRL does nothing to deprive owners of possession, the ability to transfer ownership, or limit use. It merely raises property taxes.

Some of you were confused about taxation. The federal government's power to tax is not at issue in this case. Nor does the CPRL trigger the problems of duplicate taxation that are at the heart of Complete Auto Transit. As noted earlier, this is a tax on a wholly local activity, not on interstate commerce.

Finally, equal protection is not at issue here. To the extent we covered any aspect of equal protection in this course, it was limited to the application of disparate treatment of non-citizens (e.g., corporations). Because the actors here are all real persons, Article IV's privileges and immunities clause is sufficient for analysis.