

time limit: one hour and 15 minutes

GENERAL INSTRUCTIONS:

1. **USE ONLY ONE BLUEBOOK.** Be sure that your examination number appears on your bluebook.
2. Please do not use pencil to write this part of the examination. If you use a felt-tip or fountain pen, please write on only one side of each sheet of paper in the bluebook.
3. Leave a margin on the left-hand side of each page for me to use in grading.
4. Do not take the bluebook or the examination copy out of the room in which you are writing.
5. When you are finished with this examination, place your bluebook on the instructor's table at the front of the room announced at the beginning of the examination.

SPECIFIC INSTRUCTIONS:

1. Do not assume facts not given, and do not change the facts. In particular, do not assume the existence of statutes unless referred to in the question.
2. Although there is only one question on this part of the examination, the question is divided into five sections, labelled A through F. Each section contains one or two issues. Each issue is valued at three or four points. Therefore you should budget your time so as to devote approximately ten minutes to each issue.
3. In some instances, the facts may be cumulative; e.g., in discussing the issue or issues in Section B, it may be necessary to refer to the facts given in Section A. It is not necessary, however, to refer to the facts given in later sections when you answer an earlier section.
4. Structure your answer by discussing each section separately, **and in the order given.** At the beginning of your discussion of each section, label it with the appropriate letter (e.g., "A"). Within each section, discuss each issue separately. Complete in full your discussion of one issue before discussing another issue. Likewise, complete in full your discussion of one section before discussing another section.
5. Discuss each issue fairly raised by a fact pattern, even if your answer on one issue within the fact pattern makes discussion of another issue unnecessary. For example, if you conclude that the Supreme Court lacks jurisdiction to review a case, you still should discuss the merits of any substantive issue raised by the fact pattern.

A. FACTS:

In 1982, Congress enacted a statute that provided that all motor vehicles engaged in or affecting interstate commerce were required to be equipped with a particular type of exhaust system that would reduce the emission of fumes, thereby lessening the polluting effect of motor vehicles. In 1983, Alan Alberts was arrested and subsequently convicted for driving, on a five mile long dirt road between two small towns in the State of Franklin, an antique automobile that was not equipped in compliance with the statute. This was the only time after the enactment of the statute that Alberts had his antique auto on a public highway. The conviction ultimately was reviewed by the United States Supreme Court. What result, and why?

B. FURTHER FACTS:

Assume, irrespective of your answer above, that the United States Supreme Court upheld the 1982 federal statute on its face but not as applied to Alberts, thus reversing Alberts' conviction, on the grounds that Congress' regulatory powers did not extend to the journey taken by Alberts. Thereafter, in 1984, Congress enacted a statute that imposed a special tax of 10% on all of the net income earned by any person who owned an automobile that was not equipped with the particular type of exhaust system that was described in Part A. In 1985, Betty Barton was convicted of tax evasion for not paying the 10% surtax after driving an automobile not so equipped from her home to a store three blocks away. This was the only known time that Barton had her car on a public highway. Her conviction ultimately was reviewed by the United States Supreme Court. What result, and why?

C. FURTHER FACTS:

Assume, irrespective of your answers above, that the United States Supreme Court reversed the conviction of Betty Barton. Thereafter, in 1986, the State of Franklin enacted a statute requiring that all automobiles driven in the state be equipped with catalytic converters, a device different from the device described in Part A above but also designed to reduce auto emissions. Charles Carter owned and operated his own tractor-trailer that was not equipped with a catalytic converter. In 1987, on a cross-country trip on which Carter hauled goods from New York to California, he was arrested and subsequently convicted for violating the state statute, in spite of Carter's arguments that his conviction would not consist with either the federal Constitution or federal statute. The conviction ultimately was reviewed by the United States Supreme Court. What result, and why?

D. FURTHER FACTS:

Assume, irrespective of your answer above, that the United States Supreme Court upheld the conviction of Charles Carter. Thereafter, in 1988, David Davis, the federal postal employee who drove a mail truck in the State of Franklin, was arrested and subsequently convicted in state court for violation of the state's catalytic converter statute and for violation of a state statute prohibiting "right turns on red." The United States Supreme Court ultimately reviewed both convictions on federal constitutional grounds. What results, and why?

E. FURTHER FACTS:

Assume, irrespective of your answer above, that the United States Supreme Court reversed both of Davis' convictions. Thereafter, in 1989, the State of Franklin enacted a statute requiring that all common carriers using state highways had to pay a tax of 5% of the fair market value of the vehicle. Franklin attempted to apply the tax to the truck owned and operated by Ellen Ellis who, several times a year, drove her tractor-trailer through Franklin while hauling goods from New York to California. Franklin also had a mileage tax, imposed only on common carriers, and a gasoline tax. The proceeds of all three taxes were earmarked for highway construction and maintenance. The United States Supreme Court ultimately decided whether the Constitution permitted the state to apply this tax to the Ellis' tractor-trailer. What result, and why?

F. FURTHER FACTS:

Assume, irrespective of your answer above, that the United States Supreme Court upheld the 1989 state tax. In 1990 the state legislature decided to use the proceeds from the tax to build new highways. One of the new highways to be built was a four-mile, two-lane paved road from State Road # 22 to a country house owned by the Governor of the state. No other adjacent landowners were to be permitted to have access to this road. In order to acquire the land to build this road, the legislature authorized the state Transportation Director to appropriate land owned by private persons. Accordingly, the state tried to buy a 25-foot wide strip of land from State Road #22 to the Governor's house. Most landowners agreed to sell but one landowner, Fred Foxx, refused all offers of the state to buy his land. The state then brought suit to compel Fred to sell. Fred's defense was that the state lacked the power to compel him to sell. The case ultimately was decided by the United States Supreme Court. What result, and why?

1991 CONSTITUTIONAL LAW FINAL EXAMINATION

Dean Freeman

MODEL ANSWER

- A. The issue is whether Congress, under the commerce clause and the necessary and proper clause, is empowered to regulate the emission control equipment on Alberts' car. Congress pursuant to the commerce clause has the enumerated power to regulate interstate commerce, and under the necessary and proper clause may adopt means that are appropriate to attain the legitimate end of regulating interstate commerce. Accordingly, Congress may regulate any activity, even if local, whether it is commerce or not, if it has a substantial or appreciable effect on interstate commerce. In the case at bar, it does not appear that there is any such effect. Although Alberts drove his antique auto on a road that forms a highway of commerce over which interstate commerce may be carried on, there is no suggestion that the fumes that his car emits will in any way affect interstate commerce. Absent some finding that Alberts' failure to equip his car with a pollution control device in some way affects vehicles carrying interstate goods or traveling in interstate commerce, it is doubtful that the statute, valid on its face, can be applied to Alberts.
- B. It must be determined if the 1984 federal statute is a tax or a penalty. Because the 1984 statute does not impose a tax directly on persons or property, it is not a direct tax but (if it is a tax at all) is an indirect tax, which will be upheld if it is geographically uniform. Here the statute does apply with geographic uniformity. However, it may not be a tax at all. Looking at the face of the statute, it is clear that the statute is not a good faith revenue raising measure but rather is an attempt to penalize those who fail to comply with a specified course of conduct. Thus the court will hold that the statute imposes a penalty, not a tax. The penalty is not necessarily unconstitutional, however; it will be upheld as a valid regulation if it is anchored upon an enumerated power of Congress other than the power to tax. In this case, because the Supreme Court held that Congress could not apply its pollution control standard on Alberts, and because Barton is in the same situation, then Congress likewise cannot regulate Barton. Thus Barton's conviction must be reversed.
- C. The first issue is whether a state can regulate pollution control devices on interstate carriers. The starting point is the Cooley doctrine, which asks if the subject of regulation demands national uniformity (i.e., would best be regulated by a single national uniform standard), in which case Congress has exclusive power to regulate; or whether the subject or regulation admits of local diversity (i.e., would best be regulated by diverse local rules, taking into account local facts and circumstances), in which case Congress and the states have concurrent power to regulate. In

this case, because the problems of pollution vary so much in different parts of the nation, the subject of regulation admits of local diversity and the states therefore have concurrent power to regulate. However, this particular regulation will be struck down because it imposes an undue burden on interstate commerce. If every state were to prescribe its own preferred pollution control device, then interstate carriers would have to stop at state lines to change devices. This would impose an incredibly heavy burden on interstate carriers and cause great increases in the expense and time of interstate transportation.

Even if the state had concurrent authority to enact such a statute, however, that authority is subject to the superior power of Congress to regulate, according to the supremacy clause. Congress can preempt the field, converting the subject of regulation from one admitting of local diversity to one demanding national uniformity. Congress can also supercede inconsistent state legislation. In this case, it appears that although the continued existence of the state regulation is consistent with the general purpose of the federal regulation, it might be impossible for a carrier to be equipped with two different pollution control devices. Thus, the state statute should be held to have been superceded by the federal statute.

- D. Even if the state is empowered to determine how interstate carriers are to be equipped, the state cannot apply that type of regulation to the federal government or its agencies or instrumentalities. Because of the concept of the supremacy of the federal government, as manifested by the supremacy clause, all federal functions are immune from state regulation. It is not a question of weighing the burden on the government against the merits of the regulation; the only answer consistent with federal supremacy is to wholly exempt the federal government from all state regulations. Thus the conviction for violating the catalytic converter statute will be reversed. The conviction for the traffic violation however will be upheld, as this statute does not regulate the federal government itself. It only regulates a person who happens to be employed by the federal government, and imposes some limits on how that federal employment is carried out without in any way affecting that federal employment in any significant way. It is similar to the principle that states can apply their income taxes to federal government employees.
- E. The registration tax, measured by 5% of the fair market value of the vehicle, has a risk of multiple taxation. If every state through which a carrier travelled imposed a similar tax, then interstate carriers would pay much higher registration taxes than would intrastate carriers. To avoid the possibility of multiple taxation, states ordinarily should apportion the tax to activities within the state. If all states apportion their taxes, there will result a rough approximation of tax equality as between interstate and intrastate commerce. At first glance, therefore, it appears that this tax, not apportioned to the extent of activities within the state, would violate the commerce clause. However, because of

their fiscal interest in highway construction and maintenance, states are given far more leeway to regulate highway use than any other aspect of interstate commerce. Even some slight multiple taxation has been permitted by the Supreme Court. In this case, the Court will not look at the registration tax in isolation. Rather, the court will consider that tax in conjunction with other highway user taxes; i.e., the mileage tax and the gasoline tax. Taken together, these three taxes have the cumulative effect of apportioning tax liability to the extent of highway use in the taxing state, and thus will be upheld.

- F. Foxx challenges the power of the state to take his land for the construction of a road to the governor's country house. Both the federal government and the states have the power of eminent domain; that is, the power to take private property whenever the public interest so requires. However, the 5th amendment (applied to the states through the 14th) imposes two limitations on this power: the taking must be for a public use, and just compensation must be paid. Here there is no issue of just compensation; the state is willing to pay. Rather, the issue is whether this taking is for a public use. This is decided by determining whether the use to which the property will be devoted, in some way, will promote the legitimate governmental ends; i.e., the state police power ends of promoting public health, safety, morals, or welfare. A rational basis standard of review will be used, and the Supreme Court will merely determine whether a reasonable state legislator could reasonably believe that the building of this road will in some way promote public health, safety, morals, or welfare. Maximum deference is given to the legislature and therefore if reasonable minds can differ the action will be upheld. In this case, it appears that the building of this road, to which nobody but the governor will have access, will not promote public health, safety, morals, or welfare. Yet because it could be argued that this road will permit the governor to remain in closer contact with other state officers and the people of the state, the Court will uphold the action, as weak as its rationale is.