

A state law makes it a criminal offense for any state employee to "knowingly provide educational services or extend welfare benefits" to a foreign national who was in the United States in violation of U.S. immigration laws. The principal of a public elementary school is prosecuted under the law for enrolling and providing education to several foreign nationals he knew to be in the country illegally. All of these actions took place before the law was adopted. No federal statute applied to the principal's actions.

What constitutional provision would be most helpful to the principal's defense?

- A. The due process clause of the Fourteenth Amendment.
- B. The equal protection clause of the Fourteenth Amendment.
- C. The ex post facto clause of Article I, Section 10.
- D. The privileges or immunities clause of the Fourteenth Amendment.

## Explanation:

### Ex post facto clauses

(applies to federal (art. 1, § 9) & state (art. 1, § 10) governments)

Prohibit enactment of retroactive criminal laws that:

- criminalize previously legal conduct
- impose greater punishment than previously prescribed
- eliminate previously available defenses
- decrease prosecution's previous burden of proof

The **Article I, § 10 ex post facto** clause **prohibits state governments** from enacting **retroactive criminal laws**—eg, laws that **punish conduct** that occurred **before the law became effective** (thereby criminalizing previously legal conduct). And because the principal enrolled foreign nationals before the law under which he is being prosecuted was adopted, the ex post facto clause would be most helpful to his defense.

**(Choice A)** The Fourteenth Amendment **due process clause** requires that states enact reasonable laws. Laws that substantially burden a fundamental right are only reasonable if they pass strict scrutiny—which rarely occurs. But since the principal has no fundamental right to enroll foreign nationals in his school, this law need only pass rational basis scrutiny—which is easily done. Therefore, due process would not be helpful to his defense.

**(Choice B)** The **equal protection clause** prohibits states from enacting laws that treat similarly situated people differently (as seen here). But since this state law does not substantially impact a fundamental right or protected class, the law need only pass rational basis scrutiny—ie, be rationally related to any legitimate government interest. Therefore, an equal protection challenge would likely fail.

**(Choice D)** The Fourteenth Amendment privileges or immunities clause prohibits states from infringing on the very limited rights of **national citizenship**—none of which are at issue here.

### Educational objective:

The ex post facto clauses prohibit federal and state governments from enacting retroactive criminal laws—eg, laws that punish conduct that occurred *before* the law became effective.

### References

- *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (explaining that the ex post facto clause "forbids the application of any new punitive measure to a crime already consummated").

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