Maryland Bar: Constitutional Law Essay Exams 1998-2008

Questions and Analysis by Board of Examiners with Representative Answers by examinees

The questions involving constitutional criminal procedure are not included. The exams are in reverse chronological order. Compiled from the information provided by the Maryland State Board of Law Examiners online at http://www.courts.state.md.us/ble/examques_ans.html .

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Maryland February 2008 Bar Exam Constitutional Law Essay Question

QUESTION 6

Hurricane Bob created such damage to the Maryland crabbing industry that the Maryland State General Assembly passed legislation stating that effective in January 2005 and until further notice, there will be a limit on crabbing in Maryland waters. The law included the following penalties: $2,500 fine, loss of crabbing license, and forfeiture of any instrumentality used to assist in crabbing. The law limited the number of crabbing licenses to one per family residing in Maryland, and it limited crabbing activities to only Saturdays and Sundays.

By the time crabbing season arrived in June of 2007, the crab population was stable in Maryland but the General Assembly did not bother to amend the law. The professional crabbers attempted to get the law repealed, indicating that their livelihood was being hurt. However, the effect of the law was an increase in state revenues, so the law remained in effect.

You are employed as counsel to the Maryland General Assembly and the Speaker of the House asks you to advise them as to what challenges might be raised to the law. What would you advise? Discuss fully.

REPRESENTATIVE ANSWER 1

The follow challenges might be raised to the law:

Standing requires actual or potential harm that is fairly traceable to government action. Here, the "professional crabbers" say their "livelihood was being hurt" as a result of state law, so they have standing.

The Procedural Due Process Clause of the 14th Amendment prohibits deprivation of freedom or property without notice and a hearing. Here, the law provides for "loss of crabbing license,"

which is deprivation of property. "Forfeiture of any instrumentality" is also deprivation of property. The law itself provides notice, but there must be a hearing.

The Eighth Amendment and similar Maryland common law prohibit excessive punishment. A $2,500 fine may be excessive punishment, especially in light of the fact there is no longer instability in the crab population.

The Fifth Amendment, incorporated to the States through the 14th Amendment, prohibits government taking of property for public purposes without just compensation. Here, "forfeiture of any instrumentality" is not a taking for public purposes so the Fifth Amendment is not implicated.

The Substantive Due Process Clause of the 14th Amendment limits the government's ability to regulate citizen's rights. Here the government is regulating the right to engage in a livelihood of crabbing. The right to engage in a livelihood is not a fundamental right so a rational basis test applies.

Under a rational basis test a law is valid if it rationally relates to a legitimate government interest, even if it is over or underbroad. Here the state had a legitimate interest in stabilizing the crabbing industry but the crab population has since stabilized. Also there is no rational relationship between saving the "crabbing industry" and limiting crabbing to recreational times of Saturdays and Sundays, which further hinders professionals' ability to crab.

However, the current interest of increasing state revenues is still a legitimate interest and the law is rationally related because it generates state revenue, so it is valid under a rational basis test.

The contracts clause of the US Constitution prohibits states from interfering with existing contracts. Here if the professional crabbers had existing contracts, this law may be implicated.

If any of the crabbers are out of state, they can bring additional challenges. Maryland crabbers will not have such standing, but as the Assembly has asked about possible challenges, I will advise them as to these possible challenges also:

The Commerce Clause of the US Constitution provides that Congress has plenary power to regulate interstate commerce. Therefore states cannot enact laws that substantially burden interstate commerce without an important government interest. Here, licenses are limited to "famil[ies] residing in Maryland, "thereby burdening interstate commerce because out of staters cannot get licenses. Stabilizing the crab population and crabbing industry are an important state interest, but the population is now stable, so the only interest left is to get additional revenue, which is not important enough to burden interstate commerce.

Furthermore, when a state law facially geographically discriminates, there must be a non-discriminatory alternative. Here the law is facially geographically discriminatory because of the limit to "Maryland" families. There is a non-discriminatory alternative: to limit crabbing overall. The law limits crabbing to Saturdays and Sundays; such a restriction but without the limit to

Maryland families could be effective. Also if the idea is to save the industry, it would make more sense to limit the window could be further narrowed, but a license could be granted to anyone. So it is invalid under the negative implications of the commerce clause.

The Privileges and Immunities Clause of Article 4 prohibits a state from treating out of staters differently in terms of basic rights of citizenship, such as right to contract or do business. Out of state crabbers cannot get contracts and continue crabbing. That is a violation of the clause.

The Equal Protection Clause of the 14th Amendment limits the government's ability to purposefully discriminate. Here, out of state crabbers cannot get licenses whereas in state crabbers can. That is discrimination. Crabbers are not a suspect class so a rational basis test applies.

Under a rational basis test a law is valid if it rationally relates to a legitimate government interest, even if it is over or underbroad. Here the state had a legitimate interest in stabilizing the crab population but as mentioned, that interest is no longer present. Also if it were, there would be no rational relationship between saving the "crabbing industry" and limiting crabbing to recreational times of Saturdays and Sundays. However, increasing state revenues is still a legitimate interest and the law is rationally related because it generates state revenue, so it is valid under a rational basis test.

REPRESENTATIVE ANSWER 2

Crab License Legislation.

As counsel to the Maryland General Assembly and Speaker of the House I would advise them that challenges may be made based on U.S. Constitutional Commerce Clause, Privileges and Immunities Clause under Art. IV, procedural due process, substantive due process, equal protection, 1st Amendment right of expression, and taxing authority.

Commerce Clause. The federal government may legislate instrumentalities, channels, and products in interstate commerce. When the federal government fails to legislate same, states may legislate so long as Congress did not intend to occupy the field. Here the General Assembly passed legislation limiting crabbing in Maryland waters. Crabs are products used in commerce. States may not discriminate against out of state residents unless on balance the burden on interstate commerce does not outweigh the legitimate state interest. The state is not a market participant. Here the law limits licenses to one per family residing in Maryland. Maryland wishes to preserve their natural resources, but the crab population is now stable. Therefore, the need to preserve no longer exists. As a result, a court will find that discrimination against out of state residents violates the dormant commerce clause. The crabbing population is stable, thus negating any need to discriminate against out of state residents.

Privileges and immunities under Art. IV. Under this clause states may not interfere with out of state residents to obtain employment and interstate travel. Crabbing activities are, however, not

a fundamental right, therefore a court will likely find against any claim based on Privileges and immunities clause.

Procedural Due Process. Under 5th Amendment, extended to the states via the 14th Amendment, states may not deprive a person of life, liberty, or property without due process of law. If the law affects a protected liberty interest, then states must show the law is narrowly tailored to meet a compelling state interest. Here the law has a penalty of $2500, loss of crabbing license, and forfeiture of any instrumentality used to assist in crabbing. Employment is a protected liberty interest that requires sufficient minimal process necessary to meet due process requirements. Because no procedure is established for alleged violators, this law violates procedural due process.

Substantive Due Process. Under the 5th Amendment, extended to the states via the 14th Amendment, states may not act arbitrarily without justification. If the law pertains to a fundamental right, then states must show the law is narrowly tailored to meet a compelling state interest. Again, employment is a fundamental right requiring strict scrutiny. As demonstrated above, states will be unable to show a compelling need restricting employment when the crab population has stabilized.

Equal Protection. Under the 5th Amendment, extended to the states via the 14th Amendment states may not discriminate against groups without justification. If the law affects a suspect class or fundamental right, states must show the law is narrowly tailored to meet a compelling state interest. Again, employment is a fundamental right requiring strict scrutiny. As demonstrated above, states will be unable to show a compelling need restricting employment when the crab population has stabilized.

Taxing authority. Government may tax for general welfare so long as the tax will reasonably raise revenue. Here the effect of the law if is that states revenues have increased. Therefore, a plaintiff would lose under this argument.

BOARD ANALYSIS February 2008 Exam

QUESTION 6

I would advise the General Assembly that the following constitutional challenges could be raised against the anti-crabbing law.

Substantive Due Process:

The Due Process Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, mandates that any law enacted by the General Assembly be rationally related to a legitimate governmental purpose. The Due Process Clause further requires that laws not be unconstitutionally vague or overbroad. The anti-crabbing law is subject to challenge since it may not be rationally related to the legitimate purpose of protecting the crab population – the facts indicate the crabs have rebounded, but even if

there was a shortage, the law broadly allows an unlimited and unascertainable number of "families" to crab each weekend for an unlimited amount of hours. The law is vague and overbroad because the penalty imposed involves the "forfeiture of any instrumentality" – the term is unclear and is too broad as a result thereof.

Equal Protection:

The law may also be challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment since the law is discriminatory on its face (prohibits families residing outside of Maryland, and prohibits individuals or business entities regardless of residence, from obtaining a crabbing license). The law does not appear to affect any suspect or quasi-suspect classification (such as race, national origin, alienage, or gender) so it would be reviewed under the rational basis test. The law may not withstand even this low level of scrutiny since (a) the facts indicate that there is no longer any threat to the crab population, and (b) it is unreasonable to assume that granting an unlimited number of licenses to "families" and allowing them to crab until their hearts content on the weekend is rationally related to the goal of stabilizing the crab population.

Eighth Amendment (Excessive Penalty):

The law includes a penalty of a $2,500 fine, loss of crabbing license and the forfeiture of any instrumentality used to assist in crabbing. This penalty may be challenged as violative of the Eighth Amendment's prohibition against excessive fines, which has been interpreted to include excessive forfeitures. United States v. Bajakajian, 524 U.S. 321 (1998) In determining whether a penalty is excessive, courts will review the proportionality of the forfeiture to the gravity of the offense and if the forfeiture is "grossly disproportional" it is unconstitutional. Bajakajian, at 336-337. The law includes a large fine and the forfeiture of any instrumentality used in the crabbing. This could range from a pot to a boat, given the vagueness of the term. Thus, the penalty will likely be held excessive under the Eighth Amendment.

Commerce Clause:

The Commerce Clause allows the State to enact laws that may affect interstate commerce if in furtherance of a substantial interest. However, the Supreme Court has consistently held that the Commerce Clause would preclude a State from giving its own residents preferential access to its natural resources or to products derived from its natural resources. See, Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). The crabbers could argue that the law clearly favors Maryland's "families" and hurts professional crabbers based within and without the State in violation of the Commerce Clause.

Maryland February 2007 Bar Exam Constitutional Law Essay Question

QUESTION 2

In January 2007, enormous underground oil reserves were discovered in several counties of Maryland's Eastern Shore. The reserves were so large that virtually overnight, Maryland became the wealthiest state in the nation. In response to this oil discovery and the wealth it created, the Governor proposed the following legislation:

> (a) The Maryland Currency Act. This statute creates new currency called the Maryland Dollar ("$M") that would be accepted as the official monetary unit for the State of Maryland. It also provided that United States currency would no longer be accepted in financial transactions within Maryland. A longstanding federal statute states that "United States coins and currency are legal tender for all debts, public charges, taxes, and dues." This means that all U.S. money, when tendered to a creditor, legally satisfies a debt to the extent of the amount (face value) tendered.
>
> (b) The Oil Residence Act. To protect local oil explorers, this statute imposes residency and territorial licensing requirements on oil drilling and exploration in Maryland. The statute states that only individual residents of the Maryland County in which the reserves are located can obtain an exploration license, and oil exploration and drilling is limited to the county for which the license was issued.

As a recently admitted attorney working for the Office of the Attorney General, you are asked by the Governor to give your opinion on the validity of the proposed legislation. What advice would you give? Explain your reasons.

ADDITIONAL FACTS

> (c) Investigators from the Maryland Department of Natural Resources discovered that the Delaware State government was engaging in oil exploration by "side drilling" into the Maryland oil fields and then selling the "Maryland" oil on the open market. In response, Maryland files a lawsuit against the State of Delaware in the Circuit Court for Kent County, Maryland seeking injunctive relief and damages. The relief is promptly granted. The State of Delaware files a timely appeal to the Maryland Court of Special Appeals arguing that Maryland courts lack jurisdiction to hear the dispute.

How should the Maryland Court of Special Appeals rule? Explain your reasons.

REPRESENTATIVE ANSWER 1

A) The validity of the MD Currency Act (MCA)

1) The Constitution of the United States explicitly gives the Federal Government the ability to coin and print money. The MCA is therefore unconstitutional for creating new currency call the Maryland Dollar. Doing so would be in direct conflict with the Federal Government's exclusive power. No State can individually print and coin money without interfering with preemption and express federalism.

When a state law and a federal law expressly conflict, or are mutually expulsive, or if a State law attempts to govern in an area reserved or traditionally controlled by the Federal Government, the federal statute preempts the State law and the Federal law is controlling. Here the provision of the MCA which provides that MD will no longer accept U.S. currency to fulfill financial transactions is unconstitutional because it is in direct conflict with the federal statute which states that U.S. currency is legal tender for all debts. Therefore, that provision is also unconstitutional.

B) The Oil Reserve Act (ORA)

Burden on interstate commerce. First the ORA unduly burdens interstate commerce by imposing residency and territorial licensing requirements on oil drilling and exploration. Because it discriminates against out of staters it must meet strict scrutiny, must be narrowly tailored to fulfill a compelling purpose. It is clearly not the least restrictive way to protect local explorers and protecting local interest is not a compelling purpose.

Privileges and Immunities clause of Art. 4: The P/I clause states that when a state discriminates against individuals inhibits their economic abilities or civil liberties, the law must meet strict scrutiny, the analysis above is applicable.

The law fails.

Equal protection: The equal protection clause of the 14th Amendment applies if the law attempts to discriminate based on classifications; this law does so in two ways. (1) It draws a distinction between instate residents and out of state residents; (2) Between County residents and other county residents. It also restricts drilling to that resident's county. This impairs economic interest in drilling and therefore must only be rationally based on a legitimate reason. The law must be a reasonable way to fulfill that purpose. Here issuing licenses to locations of counties does appear reasonable to protect local exploration.

Substantive Due Process: 14th Amendment protects substantive due process rights to a liberty interest, right to drill is an economic liberty but it is not fundamental right, so rational based review is applied.

Based on this analysis, the ORA violated the dormant Commerce clause and the P/I clause of Article 4 and is thus unconstitutional as written, the government is not a market participate nor is there a compelling reason for the law.

(C) The Circuit Court of Kent County does not have jurisdiction to hear the law suit, so the Court of Special Appeals should overturn the Circuit Court and dismiss the suit. The Constitutional

grants exclusive jurisdiction to the Supreme Court to resolve suits between 2 states. Here, Delaware and Maryland.

REPRESENTATIVE ANSWER 2

A. MD Currency Act

Under the supremacy clause. Federal law trumps state and local law. Here, a MD act creating new money and refusing to accept US currency contradicts the "longstanding federal statue…that US currency….settles all debts." Because of the contradictions in the state and federal statues, the federal statue would prevail and the MD statue would be found unconstitutional. Furthermore, Article I grants to the federal government the right to coin and print money. That authority is expressly given to the federal government. Therefore, MD's attempt to coin the money is not within its power or authority. This statue would be unconstitutional as a violation of Article I.

B. Oil Residence Act

Pursuant to the commerce clause of Article I, Congress has the sole authority to regulate interstate commerce and the individual states cannot unduly burden interstate commerce. Here, the act addresses oil drilling and exploration in MD because of the aggregate effects of oil drilling on interstate commerce, oil drilling/exploration is within interstate commerce. MD's residency requirement for licensing places an undue burden on interstate commerce, making it impossible for existing businesses to receive licenses, and is an unconstitutional violation of the commerce clause.

The dormant commerce clause, inherent in the commerce clause, prohibits a state from discriminating against out of state businesses absent a compelling state interest and no less restrictive means of achieving it. Here, MD requires residency in the county for oil licensing; discriminating against non resident persons/businesses. The acts purpose is to protect local explorer's an important state interest, however that may be achieved with additional fees or taxes on non residents not just on all out exclusion. Because there are less restrictive means, the act violates the commerce clause and fails.

Due process clause of the 5th Amendment applied to the states via the 14th Amendment, prohibits state action that discriminates against individuals. Here, the act treats residents and non resident businesses in MD differently. Since the discrimination involves an ordinary right, (not marriage, religion, etc.) the act is evaluated under rational review. Here, the states interest in protecting local oil explorers is legitimate. However, the exclusion of all others is not rationally/reasonably related to protecting that interest. The act violates due process and is unconstitutional.

The equal protection clauses of the 14th Amendment prohibits state action that treats similarly situated persons differently. Here Maryland residents and non residents are being treated differently in their ability to drill for oil. For the same reasons discussed above in "due process" no rational relationship the act also violated equal protection.

C. The MD Court of Special Appeals should rule in favor of Delaware because Art II of the Constitution grants original jurisdiction to the Supreme Court of the U.S. for disputes between/among the states. Here, MD and Delaware are the parties and jurisdiction lies with the S. Court.

Board's Analysis February 2007 QUESTION 2

Maryland Currency Act

Article I Section 8 states Congress has the power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. The power "to coin money" and "regulate the value thereof' has been broadly construed to authorize regulation of every phase of the subject of currency. *McCulloch v. Maryland, 17 US. (4 Wheat.) 316 (1819)*. Congress may restrain the circulation of notes not issued under its own authority *Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869)*. Congress may also abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed. *Norman v. Baltimore & O.R. Co., 294 U.S. 240* (1935). Thus, the statute is clearly preempted by federal law as the Federal Government has sole power to regulate currency.

The Oil Residence Act

Section I of the Fourteenth Amendment provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

When a governmental classification is attacked on equal protection grounds, the classification is reviewed under the "rational basis" test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. A statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary.

Where, however, a statutory classification burdens a suspect class or impinges upon a fundamental right, the classification is subject to strict scrutiny. Such statutes will be upheld under the equal protection guarantees only if it is shown that they are suitably tailored to serve a compelling state interest.

Finally, there are classifications which have been subjected to a higher degree of scrutiny than the traditional rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test. Included among these have been classifications based on gender, discrimination against illegal aliens with regard to a free public education, and a classification under which certain persons were denied the right to practice for compensation the profession for which they were qualified and licensed.

This statute is likely unconstitutional under the equal protection clause. Because the counties could not issue licenses to nonresidents, oil drillers and explorers could not cross county lines to pursue their trade, and residents of the non-oil counties in Maryland were effectively foreclosed from all commercial oil activities in the state

In *Mayor and City Council of Havre de Grace v. Johnson, 143 Md. 601, 123 A. 65* (1923), the city of Havre de Grace enacted a local ordinance which required an individual to establish city residency for a minimum of six months before he or she could operate a car for hire within the city limits. The city claimed that the ordinance was enacted to remove congestion from the streets and to reduce the large number of "irresponsible drivers" of cars for hire. The Court found no true relationship between the stated object of the legislation and the distinction between resident drivers and nonresident drivers, and we declared the ordinance invalid. There was so little relation between the classification and its proffered justification, in fact, that the classification raised questions about the true goal of the ordinance. By effectively conferring a monopoly upon residents of the city, Havre de Grace unconstitutionally infringed on the right of nonresidents to ply their trade within the city limits.

Although a distinction between residents of different counties may be valid for some purposes, an otherwise legitimate classification of residents that may be made for many purposes cannot be made if it affects a right which, as citizens of this State, they enjoy equally. *Bruce v. Director, Chesapeake Bay Affairs, 261 Md. 585, 276A.2d 200* (1971).

Here, the territorial licensing restrictions unconstitutionally discriminated among the residents of the counties of the State, with and without oil. The law has no real and substantial relation to the object of the legislation, and unconstitutionally infringed on the right of commercial oil drillers and explorers to ply their trade throughout the state. *Havre de Grace v. Johnson, supra*, and *Bruce, supra*, concerned territorial restrictions on economic activity that tended to favor residents of one county over another. Both were determined to violate equal protection guarantees.

In areas of economic regulation, Maryland Courts have been particularly distrustful of classifications which are based solely on geography, i.e., treating residents of one county or city differently from residents of the remainder of the State. Although the Court has not expressly stated so, it is evident that elements of Article 24 equal protection jurisprudence are analogous to those found in the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. The two federal clauses are similar: both originated in the so-called "states' relations" article of the Articles of Confederation, and both are concerned with a limitation on states' abilities to give economic preferences to their own citizens. See Laurence H. Tribe, American Constitutional Law, § 6-35, at 536 (2d ed. 1988). Article 24's guarantee of equal protection of the laws is concerned, *inter alia*, with limiting counties' abilities to give economic preferences to their own citizens. *See, e.g., Havre de Grace v. Johnson, supra*. Just as the Privileges and Immunities Clause frowns on arbitrary distinctions among citizens of different states, particularly in the area of economic regulation, the concept of equal protection of the laws

found in Article 24 frowns on arbitrary distinctions among citizens of different counties within Maryland.

There is no rational distinction between oil drillers from different counties. The power of the legislature to restrict the application of statutes to localities cannot be used to deprive the citizens of one part of the state of the rights and privileges that they enjoy in common with the citizens of all other parts of the state, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. *Verzi v. Baltimore County 333 Md. 411; 635 A.2d 967,* (1994).

3. Delaware is correct. Under Article III, Section 2 of the U.S. Constitution, the Supreme Court has original and exclusive jurisdiction over disputes between states. Typically, the disputes between states coming to the Court involve conflicting property claims. Two recent examples include *Louisiana v. Mississippi* (decided in October 1995) and *Nebraska v. Wyoming* (decided in May 1995).

Maryland February 2006 Bar Exam Constitutional Law Essay Question

QUESTION 5

In the late 1990's, Mineral X was discovered. It is a mineral that, when ingested, causes the average adult to appear younger in age.

A few companies in the 7 states where Mineral X was plentiful began manufacturing processed Mineral X and began making it available to consumers via direct shipping from the manufacturing plant via phone or Internet orders placed by the consumer. Processed Mineral X was approved by the Federal Drug Administration (FDA) and actually produced the very results (skin that looked a decade younger) that it purports to produce.

Mineral X is found in some areas of the State of Maryland, most notably in the soil around the Patuxent River. To capitalize on this growing market, John and Mary formed a Mineral X processing corporation in Maryland. They purchased a tract of land in Maryland where Mineral X was found to be plentiful, established a processing plant and a distribution company. Using essentially the same processing formula as the other seven (7) companies in the U.S., John and Mary packaged and sold their product as "America's Idol."

John and Mary persuaded the General Assembly of Maryland to enact a law prohibiting the import of Mineral X into the State. The purpose of the law was to encourage Maryland consumers to buy Maryland products.

Forty-nine year old Narcissist, resident of Gorgeous, Maryland, distraught about turning 50 and the advent of wrinkles, decided to order some Mineral X products via the Internet. He found "America's Idol" on line, but after perusing all the Mineral X websites, found one in New Mexico with discounted prices. Narcissist placed his order on line with the New Mexico company, called Dessert Flower, only to be told that Maryland state law precluded direct shipment of out-of-state Mineral X.

Narcissist and Dessert Flower contact you, a licensed Maryland attorney, to find out if there is any way to challenge the State law. What would you advise? Discuss fully.

REPRESENTATIVE ANSWER 1

Professional Responsibility – It can be construed as a conflict of interest to represent more than one client on one same matter. I would have to meet with Narcissist and Desert Flower separately to discuss their personal interests and would obtain informed consent confirmed in writing to continue representing both.

Standing is found when a person suffers a harm that is fairly traceable to government action. Here, Narcissist is a Maryland resident who wants to purchase the banned product, he has

standing. Desert Flower is a corporation wishing to do business in Maryland but is prohibited and has standing.

The **Commerce Clause** applies when states substantially interfere in the flow of interstate commerce. The Commerce Clause gives Congress sole authority to regulate interstate commerce. Here, Maryland's prohibition of Mineral X is placing a substantial burden on interstate commerce.

By interfering with interstate commerce, the State of Maryland will have to show that they are using the prohibition because it is necessary to achieve a compelling state interest.

Here, "John and Mary persuaded the General Assembly of Maryland to enact" the law to encourage Maryland consumers to buy Maryland products. Though the purpose is legitimate, this is not necessary to achieve that purpose and is not the least restrictive means available. It merely creates a monopoly for John and Mary even though their product is "essentially the same" as those offered out of state.

Also, I would argue that this statute violates the Equal Protection Clause of the Constitution incorporated to the states through the 14th amendment by treating in state and out of state suppliers of Mineral X differently.

This is not a suspect class and the rational basis test would be applied with the burden on Desert Flower to prove the law is not rationally related to a legitimate government interest.

The challenge based on the Commerce Clause would be successful but the Equal Protection challenge would not.

REPRESENTATIVE ANSWER 2

Narcissist

First, Narcissist would have to satisfy standing requirements and show that he has suffered an injury and therefore has a concrete personal stake in the outcome of the suit to be filed. Narcissist (N) would easily satisfy the standing requirement because he has placed an order on line with Desert Flower (DF), the New Mexico company, and has been told he cannot get his order because of a Maryland (MD) state law precluding direct shipment.

The Commerce Clause under Article I precludes any state from imposing laws that pose an undue burden on interstate commerce or enacting laws that will prevent the free flow of commerce. The Maryland law as it stands is preventing other states (7 other OS companies) from selling their Mineral X wares in Maryland. This surely is creating an undue burden on commerce. Maryland must show that the law enacted was necessary to satisfy an important interest. The law will not be successful because the purpose was to encourage Maryland's locals to buy local products. Maryland cannot do this unless it is a market participant. Apart from N challenging the law under the commerce clause, N could argue that his substantive Due Process rights have been violated. N could argue that his right to self-fulfillment and determination has been denied. This however

is not necessarily a fundamental right and therefore, N stands a greater chance of winning against the State by arguing that Maryland is violating the negative implications of the Commerce Clause.

Desert Flower (DF)

DF can also satisfy standing by showing it has suffered an injury and has a concrete personal stake in its outcome because N, a potential customer, has placed an order which cannot be fulfilled due to the Maryland law.

DF can challenge the Maryland law under the Commerce Clause because it places an undue burden on interstate commerce and for the same reasons already state above.

DF can also argue under the Equal Protection Clause that they as a class of Mineral X producers have suffered discrimination and that their Mineral X counterparts in Maryland are getting better treatment. DF will have to show that the law Maryland enacted was not rationally related to a legitimate purpose. DF can easily show that because the means Maryland chose were too restrictive. Maryland could have chosen to tax out-of-state Mineral X products higher but instead it chose to prohibit all imports. DF will win on this equal protection claim.

Lastly, DF could argue that its right to earn income in Maryland has also been abridged. Courts see this substantive due process right to be a low level one so it will get a low scrutiny. DF must show the law was not rationally related to a legitimate purpose and this can be shown easily as already explained above.

Board's Analysis QUESTION 5

Narcissist and Dessert Flower have standing to challenge the law. Narcissist is forced to pay more for in-state Mineral X and Dessert Flower and similarly situated companies are forbidden to ship their product into Maryland. The following challenges may be brought:

Commerce Clause: Article 1, Section 8, clause 3 of the United States Constitution (the Commerce Clause) grants Congress the power to regulate commerce among the several states. It is generally held that it is a violation of the Commerce Clause for a state to enact legislation that requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." **Oregon Waste Systems Inc. v. Department of Environmental Quality of Oregon**, 511 U.S. 93, 99 (1994) Legislation will be upheld if it "regulates even handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental …." **Pike v. Bruce Church, Inc.**, 397 U.S. 137, 141 (1970) The legislation at issue bans the purchase of out-of-state Mineral X - a product of national concern and interest since the facts show that it is approved by the Federal Drug Administration. The law was enacted to "encourage" the purchase of Maryland products and the State may assert that the law furthers a legitimate local public interest. However, the effect upon interstate commerce is not "incidental" and may only be upheld if Maryland can show that all alternatives that do not impact interstate commerce are unworkable. **Maine v. Taylor**, 477 U.S. 131 (1986) There has been no such showing

under the facts. Narcissist and the affected companies may successfully argue that the legislation should therefore be struck down as a violation of the Commerce Clause.

Equal Protection Clause: The legislation treats two classes of consumers differently – the Maryland consumer purchasing in-state Mineral X and the Maryland consumer who wishes to purchase out-of-state Mineral X. The Equal Protection Clause of the 14th Amendment to the United States Constitution precludes a state from denying any person within its jurisdiction the equal protection of the laws. The disparate treatment at issue does not appear to be based on any protected class, nor does it affect a fundamental right, so the law could be upheld if there is a rational basis for the distinction. The court may find there is no rational purpose for the law, given its clear impairment of commerce. Dessert Flower and Narcissist may be successful in its challenge of the law on this ground.

Due Process Clause: The 14th Amendment Due Process Clause does not grant an absolute freedom from reasonable regulation but does protect one's liberties from being limited by arbitrary restraints. There was no rational basis for the legislation; indeed, the facts suggest that the manufacturers of America's Idol persuaded the General Assembly that it was needed to encourage the purchase of Maryland products and not their competitors'. Thus, Narcissist's liberty interest in purchasing a less costly product, and Dessert Flower's liberty interest in selling to Maryland residents are being restricted for an arbitrary reason and the law should be voided.

Privileges and Immunities Clause: Article IV of the Constitution states that the citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states. Narcissist may challenge the law as violative of Article IV and the Privileges and Immunities Clause of the 14th Amendment since he is effectively being barred access to less costly Mineral X produced outside of Maryland. Desert Flower is precluded from raising this argument since corporations are not "citizens" of a state for the purposes of the Privileges and Immunities Clause.

JULY 2005 BAR EXAMINATION

QUESTION 1

Following a year long humanitarian trip to South America, rock star Bruce Rocker, planned to return to his home in Maryland to announce his run for political office. Fans wanted to welcome Rocker home by gathering at Baltimore Airport when he arrived and to express their support for his candidacy. Baltimore Airport is a large international airport, which serves several major airlines and has five concourses with numerous gates, parking lots and grassy knolls. The planned welcome-home gathering would involve about 200 enthusiastic fans and a 15 minute speech by Rocker to the group about his political views.

Baltimore Airport is owned and operated by the State of Maryland's Department of Transportation. One of the airport's regulations, Reg. B, forbids "any gathering of more than 30 people anywhere in the airport unless travel related." The stated purpose of Reg. B "is to avoid congestion and to promote the smooth operation of the airport." Violators of Reg. B are subject to a fine up to $1,000 and/or incarceration of up to 6 months.

Rocker's fans have requested permission to hold their welcome-home gathering in the airport, but the airport has denied this request based solely upon Reg. B. Rocker's fans hire you to file a lawsuit challenging Reg. B in order to obtain access to the airport for the welcome-home gathering.

Discuss in detail the basis of any challenges to Reg. B and evaluate the Rocker fans' chances for success.

REPRESENTATIVE ANSWER 1

The first amendment to the U.S. Constitution guarantees to the fans the freedom of speech, which includes political freedoms and freedom of association. The government cannot restrict the freedom of speech unless the given speech is not protected, for example, because it is obscene or incites illegal and dangerous action. The government and the state government, which must adhere to the 1st amendment based on its incorporation through the 14th amendment, can, however, place reasonable time, place, and manner restrictions on otherwise protected speech. The political speech and welcome gathering the fans want to hold is of this type. If a public forum, the regulation by Md. Department of Transportation would have to be a reasonable time, place, and manner restriction leaving alternative channels of communication open in furtherance of an important government interest. Outside the terminals like on the "grassy knolls" may qualify as such making Reg. B unduly overbroad, because it restricts any gathering anywhere in the airport. Although the statute is content neutral and not aimed at any speech, the Rocker fans may still successfully challenge it as overbroad on that basis and because it leaves open no other channels for their speech related activity.

Although portions of the airport might be considered public forums, airports have been held not to be public forums even though publicly owned property. On this basis, as a traditionally "non-

public forum," the State Dept. of Trans. has much more leeway to completely restrict use of the grounds for speech related activity, especially where the Reg's purpose is to avoid congestion and promote smooth airport operation. (200 fans and a speech would definitely congest the airport). The Regulation, however, may still be challenged though as overbroad or vague.

REPRESENTATIVE ANSWER 2

The first challenge to Reg. B should be made on the grounds that Reg. B is vague and overbroad. A regulation will be considered vague if a reasonable person would be unable to determine what conduct is prohibited. Here, "travel related" is vague because it could be open to many different interpretations, and it does not clearly prohibit any conduct. A regulation will be deemed overbroad if it prohibits substantially more conduct than is necessary to achieve the purported goal of the regulation. The stated purpose of "avoid(ing) congestion" and "promoting smooth operation" could arguably be achieved by less restrictive means.

A state may impose reasonable time, place, and manner restrictions on speech related conduct. Determining whether restrictions are reasonable will depend on whether the restriction seeks to restrict speech related conduct in a public forum or a non-public forum. If the airport is considered a public form because it is typically held out to the public, then the regulation of speech will be upheld if it is content neutral, narrowly tailored to advance a significant government interest, and if it leaves open alternative channels of communication. Here, due to vagueness of Reg. B, it is unclear whether it would be considered content neutral. It does appear to restrict gatherings of more than 30 people unless travel related.

If the court did find the restriction to be content neutral they would then determine if it was narrowly tailored to promote a significant government interest. As stated above, because the regulation encompasses potentially more conduct/behavior than is necessary to effectuate the smooth operation of the airport, it is unlikely to be found to be narrowly tailored.

In the event that a court did find Reg. Be to be narrowly tailored to promote a significant interest, the court would then determine whether it left open alternative channels of communication. Because Reg. B includes the language "anywhere in the airport" which includes concourses, parking lots and grassy knolls, Reg. B likely fails in this test also.

Thus Reg. B would not likely be upheld as a valid regulation on a public forum because it is not entirely content neutral, the means to achieve its purpose aren't narrowly tailored and it does not leave open alternative channels of communication.

BOARD'S ANALYSIS

QUESTION 1

The standard of review for violation of first amendment issues must past strict scrutiny analysis. Rockers supporters have the clear right to express their support for Rocker by gathering at his return home. The First Amendment also protects Rocker's right to speak to

the crowd. *See Buckley v. Valeo*, 424 U.S. 1 (1976). The extent to which the state may limit public access to its property depends on whether the property is a public forum. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985). Although the terminals in large regional airports like Baltimore airport are generally considered to be non-public forua, there is a question as to whether other locations such as the grassy knolls would be considered public. *U.S. Southwest v. U.S.*, 708 F.2d 760, 764-66 (D.C. Cir. 1983).

In a public forum, the State may not ban activity protected by the First Amendment, but may impose reasonable time, place, and manner restrictions on such activity. A time, place, and manner restriction on speech in a public forum is reasonable only if (1) it is content-neutral, (2) is narrowly tailored to meet significant government interests, and (3) leaves open ample alternative channels of communication. Here, Reg. B is probably not a reasonable time, place, and manner restriction although it is content-neutral. Although the State has a significant interest in the smooth operation of the airport, the regulation is not narrowly tailored to that purpose. It prohibits all gatherings of more than 30 people regardless of the impact on the smooth operation of the airport that such a gathering may or may not have. The prohibition also applies to the entire airport without respect to whether or not any congestion problem may or may not be present in a given area or at a given time, such as on the grassy knolls which may be away from the flow of traffic.

Reg B may be subject to a facial attack as well as attacked as applied under the First Amendment's over breadth doctrine if it also threatens others not affected in this particular instance because those others may refrain from expressing themselves rather than face prosecution. A statute may be invalidated on its face, however, only if the over breadth is "substantial."

Maryland February 2005 Bar Exam Constitutional Law Essay Question

QUESTION 1

Southside, a town in Somerset County, Maryland, is known for its local, family-owned small businesses and small-town atmosphere. For over 200 years this area has attracted tourists drawn to shop and dine in the quaint shops and restaurants. No commercial facility in Southside utilizes building space in excess of 5,000 square feet.

Mega Mart is a national chain of 50,000 square foot stores with hundreds of locations throughout the United States. Mega Mart wanted to purchase property in Southside to take advantage of the tourist trade. On September 1, 2004, Mega Mart paid $1,000,000 for a lot and hired contractors to survey the land and begin grading.

Existing store owners in Southside learned of Mega Mart's plans and became upset. They read of instances in other cities where Mega Mart quickly displaced existing small businesses and didn't want this to happen to them. They lobbied the Southside town council to enact emergency legislation to thwart Mega Mart. On October 1, 2004, the council introduced and enacted the following law:

> "Nationally owned commercial establishments in excess of 1,000 square feet and locally owned commercial establishments in excess of 5,000 square feet are prohibited."

You serve as general counsel to Mega Mart. What legal issues should you raise on behalf of Mega Mart to challenge the law? Discuss fully.

REPRESENTATIVE ANSWER 1

First thing to consider is whether Mega Mart has standing. Mega Mart does have standing because there was legislation enacted that prohibits national commercial establishments from being in excess of 1,000 square feet. Mega Mart is a national chain whose stores are 50,000 square feet. Mega Mart will suffer harm from the legislation and it is redressable – if the law is found unconstitutional it will no longer harm MM.

The attorney should challenge the law based on a violation of the Due Process Clause of the 14th Amendment. It is interfering with Mega Mart's livelihood. And must be necessary for a compelling state interest. The interest that the legislation is protecting is a local interest. Also, Mega Mart should have had notice and hearing because the legislation is affecting it. The legislation could be challenged as being vague and overbroad, since a reasonable person would not know what they could do.

The legislation could be attacked under the Equal Protection Clause. It is treating outsiders differently than locals. The legislation is based on geography and must be necessary for a compelling governmental interest. Protecting local interests will not meet that burden.

The legislation could also be considered a taking. The law was passed after MM paid $1,000,000, and due to legislation MM may not have a use for the lot. If so, it will be a taking and the Town of Southside will have to compensate MM for the fair value of the land.

The legislation is also a violation of the Commerce Clause. It interferes with the instrumentalities or effects of interstate commerce. Under the dormant commerce clause no local regulation should burden interstate commerce unless it has an important government interest – protecting local businessmen would not meet that test. Therefore, the law would be struck down.

The law also violates the Contracts Clause. The law substantially interferes with MM's existing contracts with the contractor. Thus it would be found unconstitutional unless the Town can show an important governmental interest.

REPRESENTATIVE ANSWER 2

Mega Mart may raise the following issues:

- Standing – To have standing the party seeking to challenge the law must be the party injured and court must be able to remedy the situation. The law was enacted to prohibit Mega Mart from building, and Mega Mart will be injured. If the court strikes the law as being unconstitutional the situation will be rectified.

- Contract Clause – The government cannot enact laws that will inhibit existing contracts. Mega Mart bought the land for $1,000,000 and had hired contractors to survey land and begin grading. The law will force Mega Mart to cancel its contracts with the contractors.

- Commerce Clause – This law violates the Commerce Clause because it unduly burdens interstate commerce, which is not allowed unless there is a compelling state interest. Mega is a national chain, and its products most probably come from a warehouse located out of state by a trucker from some other instrumentality. As such, this law will unduly burden interstate commerce. Favoring the local storeowners is not permissible.

- Taking – This law is also a taking. Congress or a government can take a person's land providing just compensation is given and as long as it is for a justified governmental purpose. Now that Mega will not be able to use the land for the purpose intended it has no use for the land and this should equate to an unlawful taking.

- Equal Protection – Through the 14th Amendment, the Equal Protection Clause prohibits this law as it is unfair to out of state businesses. The law allows commercial establishments of 5,000 square feet but national chains of only 1,000 square feet.

- Due Process – The law violates the Due Process Clause as it is a taking of life, liberty or property. Mega should have been entitled to a hearing on this taking of its property.

- Vague/Overbroad – Lastly, the law can be challenged for vagueness and overbreadth as it does not say what it is that he law is prohibiting besides square feet and does not provide a reasonable alternative.

BOARD ANALYSIS

QUESTION 1

Anyone seeking to challenge the constitutionality of a statute must show that they are in danger of substantial injury from the operation of said statute. Mega Mart's rights to develop its land in the manner that it would like are infringed by the law. Accordingly, it will have standing to challenge the law.

The Legislation enacted by the Town Council adversely affected Mega Mart's property rights. While a property owner is not entitled to rely upon the zoning of its land, he is entitled to the assurance that laws will not be enacted unless they are rationally related to the furtherance of the public health, safety, morals and general welfare of the Town's inhabitants. Levinson v. Montgomery County, 95 Md. App. 307 (1993) The facts do not reveal any rational basis for the law, other than the protection of local interests.

Mega Mart may argue that the law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution since any noncommercial use or commercial use less than 5,000 square foot in size may locate within Southside. The Town must have a rational basis to discriminate in this manner. Under the facts, it does not appear to have one since the emergency legislation was enacted solely to thwart Mega Mart.

Mega Mart may argue that Article I, Section 8, of the United States Constitution empowers Congress to regulate interstate commerce and precludes the Town from enacting a law that burdens or obstructs interstate commerce. The law bars any commercial use in excess of 5,000 square feet and is a clear burden upon a sizable portion of the commerce within the Town. It clearly favors "local" commerce. As a national chain, Mega Mart and its customers' rights are being obstructed since the former may not be able to sell, and the latter may not purchase, Mega Mart products within the Town.

Mega Mart may argue that its rights were infringed without benefit of procedural due process of law. Again, the facts state that emergency legislation was enacted to thwart Mega Mart. It arguably was not informed of the hearing and could not participate prior to enactment. The law also violates Mega Mart's substantive due process rights since it is unclear what activity is being prohibited (i.e. - the law is vague as to what is intended by commercial use) or, in the alternative, the law goes much further than it must (i.e. - prohibits all activity of a commercial nature) without any rational basis for so doing.

Although not as strong an argument, Mega Mart may argue that the State's legislation is a violation of Article I Section 10 of the Constitution, which is commonly referred to as the Contracts Clause. Although the Contract Clause "does not operate to obliterate the police

power", a court can look at the degree to which the government's action is a valid exercise of the police power. Keystone Bituminous Coal Association v.DeBenedictus, 480 U.S. 470, 503 (1987) Mega Mart would argue that the State legislation created a substantial impairment upon its contractual relationship with the property owner and the Town has not demonstrated a significant and legitimate public purpose for said impairment.

Maryland July 2004 Bar Exam Constitutional Law Essay Question

Question 7

In 2004, the Supreme Court of the State of Westover ruled that provisions of the Westover Code prohibiting marriage between persons of the same sex violate the Equal Protection and Due Process provisions of both the Westover State Constitution and the Fourteenth Amendment to the United States Constitution.

Two months later, Congress enacted, and the President signed into law, the Federal Marriage Act (the "Act") which provides:

Section 1 of the Act: (a) declares that the recent decision by the Westover state court, if adopted nationally, would raise profound societal, legal and economic problems; (b) states that the issues created by same sex unions are suitable for a uniform, national resolution and that Congress needs a period of three years to adopt such a solution in an orderly fashion; and (c) states that the Act has been enacted pursuant to Section 5 of the Fourteenth Amendment, which grants to Congress the authority "to enforce, by appropriate legislation, the provisions" of that amendment.

Section 2 declares that neither the Fourteenth Amendment nor any analogous state or local law renders invalid any prohibition against same sex marriages;

Section 3 provides that, while the Act is in effect, any federal, state or local official who presides over a same sex marriage or who issues a marriage license to two persons of the same sex is guilty of a misdemeanor punishable by a fine of $500;

Section 4 requires federal, state or local law enforcement officers to investigate any credible report of a violation of the prohibition contained in the previous paragraph and to make an arrest whenever probable cause exists after investigation;

Section 5 prohibits any state from enacting legislation allowing same sex marriages;

Section 6 states that the Act will expire three years after its enactment;

Section 7 provides that the invalidity of any section of the Act will not affect the remaining provisions of the Act.

Describe each of the constitutional grounds on which the Act or any of its sections can be attacked. How is a court likely to rule? Explain your answer thoroughly.

REPRESENTATIVE ANSWER 1

The federal judiciary is not likely to uphold this Act (Federal Marriage Act = Act). The Act is subject to several constitutional attacks, The most fundamental flaw in the Act is that it violates

the constitution's separation of powers by presuming that Congress (acting with the President) has

the authority to interpret and enforce the Constitution. It is the law of the land that the courts, not Congress, have the duty to say what the law is. The entire Act is predicated on the notion, as declared in Section 2 of the Act, that the Fourteenth Amendment does not protect same-sex marriages. It is the role of the judiciary (ultimately Supreme Court) not the Congress to decide that issue.

Moreover, Congress asserts that this Act is being created by its authority under § 5 of the 14th Amendment. See §1, paragraph c) of the Act. Under § 5 of the 14th Amendment, Congress may not enlarge or alter the scope of rights guaranteed (as recorded by the Courts) by the Constitution; it may only enact laws aimed to prevent or remedy violations of existing rights. Such measures must be cognizant and proportionate to the harm sought to be prevented. This is not a valid use of §5 power by Congress since the Act alters the rights that are currently recognized (namely Due Process and Equal Protection rights.)

The Act also suffers from federalism problems. The Act is essentially ordering all state courts and legislatures to cease enacting and upholding same-sex marriage laws. The Act asks for a 3 year period which Congress can act (See §1 (b) and §5 prohibits states from enacting legislation. These provisions arguably violate the Tenth Amendment and the anti-commandeering principles which flow from it. The Act also seeks to punish state and local officials who carry out their state's laws (see §3) by making it a crime to issue marriage laws. Congress' attempt to preempt state law will be unenforceable where, as here, Congress is not acting pursuant to valid authority.

Section 4 of the Act also has 4th Amendment problems. The Act asks citizens to basically spy on and report each other to the authorities. The standard authorizing police investigation is "credible report." This may be overbroad and vague. There are also anti-commandeering problems with this provision because state and locate officers are being ordered to enforce federal law.

Finally, individuals may attack this Act based on the Equal Protection and Due Process clauses of the Fourteenth Amendment. Congress is seeking to treat some citizens differently than others in an area generally recognized to be a fundamental right (privacy and family). Individuals may also seek to invalidate the law as a violation of privacy rights since it invades on same-sex relationships (recently the Supreme Court held states could not interfere there) and family life.

REPRESENTATIVE ANSWER 2

The Act poses an issue of state versus federal power. The 10th Amendment reserves all powers not expressly granted to the federal government for the states. The area of marriage has traditionally been an area in which states not the federal government regulate. The Act usurps the states' traditional power over marriage by postulating a uniform, national resolution of Congress to decide the issue. Section 5 of the Act in particular, which prohibits a state from

enacting legislation allowing same sex marriage, takes a traditional state power over an area (without any power to do so) away from states.

The Act relies on Section 5 of the Fourteenth Amendment for its power and authority. Section 5 allows Congress to enact laws infringing on traditional areas of state or if Congress acts with the purpose of furthering the aims of the Fourteenth Amendment such as remedying specific past discrimination. The Act does not advance the interest to be protected by the Fourteenth Amendment. Instead of protecting a substantive due process right to marry or an equal protection right to marry, it strips a group of people of fundamental rights. It absolutely prevents same sex marriage and thus can in no way be construed as a power needed to remedy an injustice or discrimination.

Furthermore, by declaring that the Fourteenth Amendment and analogous state/local law does not render invalid a prohibition against same sex marriage, Congress impermissibly intrudes of the process of Judicial Review. It is up to the courts to decide the constitutionality of state and federal law and to interpret the U.S. Constitution's provisions. Congress cannot decide for itself what rights are/are not protected by the Constitution.

Section 3 of the Act violates the 8th Amendment prohibition against cruel and unusual punishment. The Act is unconstitutional on forbidding state and local officials from issuing same sex marriage licenses and cannot make such action a crime punishable with a fine.

Finally, by requiring state and local law enforcement to enforce the Act, Congress is making impermissible use of the state police power. Congress cannot co-opt the state police power unless, pursuant to a constitutional exercise of power. There the Act is unconstitutional and Congress cannot force the state to enforce it.

For these reasons, a court is likely to find the entire Act unconstitutional.

Board's Analysis of QUESTION 7

The Act can be challenged on a variety of grounds.

First, while Section 5 of the Fourteenth Amendment gives Congress the power to enact legislation to enforce its provisions, this grant of authority does not extend to making decisions as to the extent of constitutional protections. This function is a judicial one and is exclusively reserved to the courts pursuant to the doctrine of separation of powers. *City of Boerne v. Flores*, 521 U.S. 507, 517 - 521; 117 S. Ct. 2157; 138 L. Ed. 2d 624 (1997);. Congress does not have the authority to set aside judicial decisions interpreting and applying the Constitution. *Dickerson v. United States*, 530 U.S. 428, 437, 120 S. Ct. 2326; 147 L. Ed. 2d 405 (2000). Thus Section 2 of the Act is unconstitutional.

2. Congress does not have the power to direct State officials to enforce federal laws, such as the prohibition against same sex marriages contained in Section 3 of the Act. *Printz v. United States,* 521 U.S. 898 (1997) (provisions of gun control legislation requiring local law enforcement officers to perform background checks is inconsistent with concept that

"the Constitution confers upon Congress the power to regulate individuals, not States.") This is true even if the federal mandate is intended to be a temporary measure pending adopting of an overarching federal regulatory scheme. *Id*. Thus, Section 4 of the Act is unconstitutional.

3. Congress does not have the power to compel state legislatures to take, or refrain from taking, legislative action. *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) Thus, Section 5 is unconstitutional.

4. While the Supreme Court's decisions in this area are not completely consistent, a good argument can be made based upon the Supreme Court's Fourteenth Amendment jurisprudence that Section 5 of the Fourteenth Amendment gives Congress the power to create remedies for violations of the provisions of that amendment but not the authority to set out the substantive scope of the amendment itself; *compare The Civil Rights Cases*, 109 U. S. 3, 13-14 (1883) ("The legislation which Congress is authorized to adopt is not general legislation upon the rights of citizens but corrective legislation") and *Boerne v. Flores, supra*, with *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Thus, Section 5 does not give Congress the power to prohibit same sex marriages. The authority to regulate marriage would be reserved to the State under the provisions of the 10th Amendment. *See United States v. Morrison*, 120 S. Ct. 1740 (2000) (Congress may not regulate non-economic criminal behavior based solely on the aggregate effect of such behavior on interstate commerce for to do so would render the 10th Amendment a nullity.) Such reasoning would lead to the conclusion that the Act is invalid in its entirety. *See also Lawrence v. Texas*, 539 U.S. 558 (2003) (Texas anti-sodomy law invalidated as violated substantive due process; majority (per Justice Kennedy) and dissenters (per Justice Scalia) disagree as to whether decision invalidates same sex marriage prohibitions.

Maryland February 2004 Bar Exam Constitutional Law Essay Question

QUESTION 6

Marvin Ramblin purchased 7 acres located in Prince George's County approximately 4 miles from the Mason/Dixon River in April, 2002, with the intention of developing it in phases. The zoning in that area required all dwellings to be located on a buildable lot of 2 acres or more. He constructed his home on 2 acres in October, 2002.

On March 22, 2003, the County Council of Prince George's County, Maryland, enacted a subdivision law that requires all parcels in excess of 2 acres and located within five miles of the Mason/Dixon River to dedicate _ acre of land to the County as recreational open space. The dedication was a required condition of subdivision approval. The law was enacted for the purpose of reducing the possibility of adverse impact of development to the river. The law exempts property owned by churches.

On March 24, 2003 he went to the applicable County office to begin the subdivision process for the remaining acres to construct two homes on two acres each and was informed that he would have to dedicate _ acre pursuant to the new law, and could therefore only construct one home.

Marvin is outraged by the law and has come to you, a licensed Maryland attorney, to find a way to challenge it.

Under what theory(ies) might you challenge the County's law, and what is your likelihood of success? Discuss fully.

REPRESENTATIVE ANSWER 1

Marvin can make several constitutional challenges to this law based on procedural and substantive due process, equal protection, takings and the establishment clause.

Marvin has standing because his property fits within the ordinance and he is subject to the dedication.

Procedural Due Process

When a person's life, liberty or property rights are violated they are entitled to notice and a hearing. Here, Marvin's property is going to be taken and there are no procedures. The deprivation to his rights must be balanced against the government's interest. Some procedural safeguards would not be a huge hassle in comparison with the extent of deprivation entailed in losing _ acre.

Substantive Due Process

Marvin can argue that the statute is vague because it's unclear what is included. It is also overbroad because it includes too much land for all subdivisions. There is no fundamental right involved here so the ordinance needs to be rationally related to a legitimate interest. Marvin can argue the probable impact on the river is not a significant reason.

Takings

This ordinance is taking an individual's property for a public purpose without just compensation. However, since it is a regulation and the government can use its police power to enforce measures for health, safety and welfare it will most likely be deemed rationally related to the legitimate interest in preventing adverse impact of development on the river. Marvin can argue that all economic viability of the land is taken, but this will probably lose because this is a regulation and it's only _ acre of land that is affected.

Establishment Clause

Under the First Amendment the government cannot enact laws that either advance or inhibit religion. The court uses a 3-part test: (1) was there a secular purpose? (3) did it advance or inhibit religion?, and (3) did it cause excessive government entanglement? Here we have an ordinance which appears to have the purpose of reducing adverse impact of development on the river. But under the second prong, by exempting property owned by churches the County is advancing religion by allowing them to keep this land. There does not appear to be substantial government entanglement because once exempt the government does not have to deal with churches. The property does however violate the second prong and this would violate the Establishment Clause.

Equal Protection

The 14th Amendment protection is provided to individual's facing discrimination by government action if they are in a suspect or quasi-suspect class. Marvin is not in a suspect or quasi-suspect class. Although this law is discriminating against non-religious property that is in excess of 1 acre this group is not a suspect class. Therefore the law will only be viewed under the rational basis test and it needs to be rationally related to a legitimate government interest with the burden on Marvin to show there is no legitimate interest. The government almost always wins under this test. Marvin can attempt to argue that reducing adverse impact from the development is not a legitimate reason to take _ acre of his property. However, under its police power government has broad discretion and protecting the river will most likely be upheld as a legitimate reason.

REPRESENTATIVE ANSWER 2

Procedural Due Process: Procedural Due Process requires a party who has a property, liberty or life interest to receive notice and a hearing before they are deprived of that interest. Here, Marvin purchased 6 acres of land with the intent of developing the property into 3 homes with 2 acres each. He purchased the land in April 2002. On March 22, 2003 the County enacted the statute that required all property in excess of 1 acre located within 5 miles of the Mason Dixon

River to dedicate _ acre. It had been approximately one year since Marvin bought the property before the County enacted the law. Marvin should have received notice and the opportunity for a hearing before potentially depriving him of his land.

Substantive Due Process: Under the Substantive Due Process Clause the state shall not infringe upon a person's life, liberty or property without a compelling reason. Here we are dealing with a law requiring Marvin to give up _ acre of land for every acre in excess of 2 acres. The County must have a compelling reason to deprive him of his property for the law to be constitutional. The courts apply the compelling interest test. The facts indicate the purpose for the statute was to minimize the adverse impact of development on the river. Certainly the County is concerned about the impact of development and the preservation of water, so this could satisfy as a compelling interest. However, the compelling interest test also stipulates it must be the least restrictive means in obtaining the compelling interest. Depriving someone of their property for this purpose is not the least restrictive means.

Takings: If a county government plans to deprive a party of their property, the government must provide just compensation to the property owner.

Equal Protection: The Equal Protection Clause of the 14th Amendment provides that every person shall be treated equally under the laws of the land. Similarly situated persons are to be treated similarly. Here the law exempts property owned by churches. Again, owning property is not a fundamental right. Therefore, the test to be applied is the rational basis test. Marvin would have to prove that the statute is not rationally related to a legitimate interest.

Establishment Clause: The Establishment Clause of the First Amendment provides that the government shall not inhibit or help religion. The courts apply the Lemon test to determine if the Establishment Clause has been violated. First, does the statute have a secular purpose? Second, does the primary effect of the statute hurt or help religion? Third, does the statute foster government entanglement? Here the purpose of the statute is secular because the county is trying to minimize the impact of development on the Mason Dixon River. Second, the primary effect of the statute is preventing churches from contributing tax dollars which is helping religion. Third, it is a fine line in determining whether the statute fosters government entanglement with religion. The law is enacted by the government which means it will be required to monitor and give notices to churches to give them the exemption. It does promote excessive entanglement from the requirement. Although it is required to satisfy all the elements of the Lemon test, prongs two and three are not satisfied. Thus, it is unconstitutional under the Establishment Clause. To be constitutional the County would have to prove that they have a compelling interest in exempting property owned by churches and must be the least restrictive manner in reaching or satisfying its interest. As noted above, its interest is protecting the Mason Dixon River. Exempting property owned by churches is not the least restrictive means nor necessary, and is, therefore, unconstitutional.

Marvin may challenge the law as violative of the 14th Amendment's Due Process Clause and Equal Protection Clause, the 1st Amendment's prohibition against the establishment of religion, and the 5th Amendment's prohibition against the taking of private property without just compensation. Marvin has standing to bring an action since he will suffer an injury in fact if the law is enforced.

Substantive Due Process

Land use controls such as the one at issue are subject to the Due Process Clause and must, therefore, be rationally related to legitimate governmental interests in furtherance of the public health, safety, morals and general welfare. The law was enacted in furtherance of what appears to be a legitimate governmental interest in furtherance of the public health and welfare. However, due process also requires that the law also be drafted in a way that is reasonable and substantially furthers said interest. Accordingly, Marvin may be successful in his attempt to challenge the law on this ground since the law unreasonably allows a blanket exemption for churches and lots less than 2 acres in size.

Equal Protection

The Equal Protection Clause also requires a showing that the law advances a legitimate purpose and does not unreasonably discriminate. Since no fundamental right is involved, the County's law will be reviewed under the rational basis test. Even under this more lenient test Marvin should be successful since there is no rational basis for the assumption that smaller parcels located as close to the river as Marvin's will not equally affect it. Similarly, there is no reason to assume that properties owned by churches will not adversely impact the river.

Establishment Clause

Marvin may also be successful in arguing that the law is violative of the 1st Amendment because it advances religion by exempting churches from its reach. As noted by the Supreme Court in Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982), "[t]he purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious acts, and to foreclose the establishment of a state religion . . . ." Courts apply a 3-prong test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) to determine whether an establishment has occurred - (1) whether the law has a secular purpose; (2) whether its primary effect is the advancement of religion; and (3) whether there is excessive government entanglement. As noted above, there is no rational basis in concluding that a church will not negatively impact the river, so such an exclusion may be an unconstitutional advancement of religion.

Takings Claim

The Takings Clause of the 5th Amendment provides that private property shall not be taken for public use without just compensation. It has been held that a subdivision dedication is an exaction that may result in a taking. In determining whether it is,

standards discussed in Dolan v. City of Tigard, 512 U.S. 374 (1994) are considered – that is, whether there is an essential nexus, and whether the property interest taken is roughly proportional with the demand on public services created by the development. The exaction of _ acre may reasonably be found to be an unconstitutional taking of Marvin's property since it precludes him from building the number of homes he could build but for the law, and the law does not bear a rational nexus to its stated purpose since those with less acreage and churches are allowed to develop. Assuming a rational nexus between the regulation and its purpose, a taking could still be found to have occurred if it can be shown that Marvin's investment-backed expectation of constructing two additional homes was reasonable and was thwarted by the law. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)

Maryland July 2003 Bar Exam Constitutional Law Essay Question

QUESTION 2

The Town of Conservative, Maryland, has experienced a recent rash of "outside agitators" who have descended upon the Town on weekends to hand out literature and conduct peaceful sit-ins in opposition to prayer at the Town's public meetings.

The Town Commissioners have asked you, the Town's attorney, whether you foresee any legal prohibition against enacting legislation that would:

1. Prohibit any person from canvassing upon Town property to promote any cause without first obtaining a permit from the Town Commissioners;

2. Prohibit any non-resident of the Town from canvassing upon Town property for any reason;

3. Prohibit any person not affiliated with a civic or religious organization from staging sit-ins on Town property.

The violation of any of the laws would be a misdemeanor punishable by a fine of $50,000.

What advice would you give as to each piece of legislation? Discuss fully.

REPRESENTATIVE ANSWER 1

I would first inform the Town Commissioners that most of the proposed legislation is violative of the Constitution.

Law 1

The prohibition banning canvassing on Town property for any cause is vague and overbroad. It is vague and overbroad because a blanket prohibition of this kind does not permit for emergencies or exceptions and will thus likely be stricken as unconstitutional. This prohibition is also a prior restraint that bans speech before it is made. There is no compelling state interest for this prohibition- it will be stricken.

This prohibition is also in violation of the 1st Amendment, made applicable to the States via the 14th Amendment's Due Process Clause. On public property, the government is permitted to enact viewpoint and content neutral legislation pertaining to speech. Nonetheless, the legislation is subject to intermediate scrutiny. The burden will be on the Town to establish that this statute is substantially related to an important governmental interest. It is doubtful that the Town will be able to sustain this burden because the prohibition is too broad and would restrict too much speech.

Law 2

The prohibition banning non-residents from canvassing Town property would not prevail either because it violates both the Privileges and Immunities Clause of Article IV and the Equal Protection Clause. The Privileges and Immunities Clause prevents states or state governments from denying benefits to non-residents that are afforded to residents. Here non-residents are not permitted to canvass for any reason and are not even given a chance to obtain a permit. In order to prevail the Town would have to establish that the ban is necessary and closely related to an important government goal. The Town will be unable to sustain this burden because this ban is not the least restrictive means by which the Town could achieve its objective. Thus, this prohibition should be stricken.

Because this prohibition disparately distinguishes between residents and non-residents it will be subject to an Equal Protection challenge. The Equal Protection clause requires that all similarly situated people should be treated equally. This prohibition will be subject to a rational basis analysis since it does not directly target a suspect class or infringe on a guaranteed right. The burden will be on a potential plaintiff to establish that the ban is not rationally related to a significant governmental interest. While laws subject to the rational basis test are presumptively valid, this ban will probably be held invalid because it is not rationally related and is unreasonable.

Law 3

This prohibition against non-civic or religious organizations staging sit-ins will be stricken as well. The Establishment Clause dictates that government action not result in a preference. Seemingly this ban which permits only religious organizations and civic organizations to engage in sit-ins prefers religious groups over non-religious groups. Thus the ban will be subject to strict scrutiny. The Town will be unable to carry its burden because the ban is not necessary to further a compelling state interest. Even if the Town were able to sustain this burden, the ban would be subject to the Lemon test. To prevail under this test State action must be: 1) secular in purpose; 2) its primary effects should not advance nor inhibit religion; 3) and should not involve excessive government and religious entanglement. There would be no excessive entanglement because the Town does not affirmatively authorize, facilitate, or encourage religion.

However, while the ban is seemingly secular in purpose, it advances religion because only a select few groups are permitted to engage in sit-ins.

Penalty

The misdemeanor fine of $50,000 is unreasonably excessive and a court would probably find that it violates the 8th Amendment's protection against excessive fines. This fine may also be violative of procedural Due Process if an offender is not given notice and a hearing.

REPRESENTATIVE ANSWER NO. 2

Each piece of legislation has problems:

Law 1 – The first problem with this law is that it is a violation of the 1st Amendment's right of free speech, made applicable to the States through the Due Process Clause of the 14th Amendment since it could be deemed void for vagueness and overbroad. It prohibits the promotion of any cause without first getting a permit – this could have a chilling effect on speech as the public may not know what exactly is prohibited by this language. The ordinance is overbroad in that it goes beyond what is necessary to achieve its end.

This permit or license requirement may be an unconstitutional prior restraint on speech. Requiring a license before allowing a person to speak may be permitted if the licensing requirement is narrowly drawn, definite, and necessary. There must also be procedural safeguards in place for the individuals who are responsible for issuing the license to insure they don't have too broad discretion.

I would tell the Town Commissioners to narrow the breadth of the legislation and clarify what exactly is prohibited. I would also advise them to have standards and procedural safeguards in place to ensure that the licensing requirement is constitutional. Also, because this ordinances seems to be a content-neutral ordinance and not based on race or origin the Town must meet intermediate scrutiny and the law must have a substantial interest and be narrowly tailored to achieve this important interest.

Law 2 – This piece of legislation may violate the Commerce Clause or the Privileges and Immunities Clause of Article IV. If the ordinance discriminates against non-residents in favor of residents of the Town without some important government interest in doing so there may be a violation of the P&I Clause if it affects the non-residents economic livelihoods or their civil liberties.

This law could also violate the Commerce Clause if it is discriminatory and has an undue burden on interstate commerce. Congress has the power to regulate the channels of interstate commerce and if a state's action usurps this power it will be unconstitutional. Even if an activity is purely intra-state if its cumulative effect in on interstate commerce, it is within Congress' regulatory power.

I would advise the Town to not discriminate against non-residents in its legislation.

Law 3 – This ordinance may violate the 1st Amendment's Establishment Clause made applicable to the State's by the 14th Amendment if it does not meet the Lemon Test. The law is unconstitutional under that test: if the state or local action is not secular in nature; if it inhibits religion as its primary purpose; or if it promotes excessive entanglement between the government and religion. This ordinance seems to be allowing religious organizations to state and participate in sit-ins while prohibiting others from doing so. The fact that it also allows civic

organizations to do so does not make it secular in nature, and will not alleviate the fact that this is excessive entanglement with religion.

This ordinance violates the 1st Amendment and I would advise the Town to eliminate it.

Penalty – Finally, the $50,000 fine may be excessive and a violation of the 8th Amendment.

Boards' Analysis QUESTION 2

Each piece of legislation runs afoul of various provisions of the United States Constitution. Though there are distinctions in the analysis among the provisions, as a threshold, all three components are attempts to limit the right to free speech guaranteed by the First Amendment, and made applicable to the States via the Fourteenth Amendment.

Legislation #1

As a threshold matter, this piece of legislation may be challenged as an unconstitutionally vague and overbroad prior restraint on speech. It is vague because the terms "canvassing" and "town property" are not defined. This is particularly significant since "town property" may consist of public streets and parks, traditionally recognized by the Supreme Court as public fora historically associated with the exercise of First Amendment rights. But "town property" may also consist of a government building or school where reasonable time, place and manner restrictions are more likely to be upheld. Here, there is no such definition of "town property" so the statute may be found void for vagueness. Additionally, the statue is overbroad in that it applies to "any person" promoting "any cause", thereby restricting substantially more speech than necessary.

The permit requirement is a prior restraint. Prior restraints may be upheld if the limitation is a reasonable time, place or manner restriction. A valid government time, place or manner restriction must be:

1. Content – neutral
2. Narrowly tailored to serve a significant government interest and
3. Leave open alternative channels of communication.

Additionally, a time, place, manner regulation/permit scheme must have defined standards and cannot grant unfettered discretion to officials.

Legislation #1 is not a reasonable time, place and manner restriction since there is no indication that there are alternative channels of communication available and there is no evidence of defined standards to be followed in determining whether to issue the permit, thereby giving the Town unfettered discretion. Many legitimate non-profit corporations solicit persons in order to carry out their charitable purposes. The Supreme Court has invalidated laws that have required religious groups such as Jehovah's Witnesses to seek a permit before soliciting door-to-door because the issuance of a license depended on the

exercise of discretion by a City official. Cantwell v. Connecticut, 310 U.S. 296 (1940); Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150 (2002)

The legislation is also not a neutral time, place and manner restriction since the facts indicate that it was enacted to inhibit expression deemed unpopular by the Town of Conservative. Here, there is no significant government interest, because the facts indicate that the "outside agitators" merely "hand out literature and conduct peaceful sit ins". It appears that it is their "opposition to prayer at the Town's public meetings" that the Town Commissioners are attempting to suppress, thus the restriction is not truly content-neutral, nor does it promote a legitimate government interest. For the aforesaid reasons, this statute is void on its face and unconstitutional.

Legislation #2

Once again, this statute may run afoul of the void for vagueness doctrine in that "canvassing" and "town property" are not defined. The statute is also overbroad because it prohibits canvassing for "any reason". Thus, it is an unconstitutional restriction of the First Amendment right to Freedom of Speech.

This statute also violates the Fourteenth Amendment Equal Protection Clause because it discriminates between residents and non-residents. Only non-residents are flatly prohibited from canvassing. Further still, the disparate treatment of non-residents may infringe on their fundamental right to travel and may violate the Privileges and Immunities clause of Article IV. The Privileges and Immunities Clause provides that the citizens of each state shall be entitled to the Privileges and Immunities of citizens in the several states and, as such, prohibits states from discriminating against non-residents where fundamental rights are concerned. Here, the non-residents' fundamental rights to freedom of speech, freedom of assembly and freedom of travel are unduly curtailed by this legislation. The prohibition on non-residents from canvassing "for any reason" also likely places an undue burden on Interstate Commerce, in violation of the Commerce Clause, as well.

Legislation #3

Again, this component is vague and overbroad, for the reason cited above. It is also a violation of the First Amendment rights to Freedom of Speech and Freedom of Assembly. The Town can lawfully enact a time, place, manner restriction prohibiting canvassing on private property, as it is not a public forum, but may not do so in a discriminatory manner. Prohibiting only those persons "not affiliated with civic or religious organizations" is not only a violation of the Equal Protection Clause, because it discriminates against non-religious and non-civic organizations, but clearly runs afoul of the Establishment clause of the First Amendment which prohibits laws respecting the establishment of religion.

To be valid under the Establishment Clause, the law must

1. Have a secular purpose

2. Have a primary effect that neither advances nor inhibits religion

3. Does not produce excessive entanglement with religion

By favoring religious organizations, the purpose here is not secular and it advances religion. Also, "sit-ins" are symbolic conduct and thus, a form of protected speech under the First Amendment. To prohibit on "town property" is a suppression of free speech and because only certain groups are discriminated against, it violates the 14th Amendment Equal Protection Clause and the Freedom of Assembly.

Penalty

Finally, the $50,000 fine for any violation of the statue is excessive, in violation of the Eighth Amendment prohibition on excessive punishment.

Maryland February 2003 Bar Exam Constitutional Law Essay Question

QUESTION 6

The newly enacted Federal Homeland Security Law, provides in relevant part, as follows:

> "It is illegal for any person who is not a citizen of the United States of America, to enroll in any college or university within the United States without first registering with the Federal Office of Homeland Security. Failure to register will result in deportation... . It is illegal for any business engaged in interstate commerce to transport items of commerce across State lines unless it has first registered with the Federal Office of Homeland Security. States are permitted to enact laws in due exercise of these provisions."

In response to this legislation, and in concern for its residents located so close to the nation's capital, the Maryland General Assembly enacted the following two laws:

> "Any truck or vehicle that weighs more than 5, 000 pounds and does not have a Maryland license plate and is traveling within the State of Maryland, is subject to a daily search of its contents at the nearest weigh station."
>
> "No foreign born person, regardless of citizenship, may register in any college within the State of Maryland without having first received a security clearance from the Maryland State Police."

The Lawson sisters have asked that you, a Maryland attorney, challenge the Maryland laws. Mary Lawson, a U.S. citizen, was born in Mexico City, Mexico, and has been accepted into the University of Maryland. She would prefer not to have to go through the hassle of obtaining a security clearance. Sara Lawson is a truck driver whose business is based in northern Virginia. It would greatly impede timely deliveries if she had to have her truck searched every time she makes a delivery in Maryland.

What challenges would you make to the Maryland laws, and why? Discuss fully.

REPRESENTATIVE ANSWER 1

The Commerce Clause as applied to the states through the 14th Amendment does not allow the states to place an undue burden on interstate commerce. Here, Sara has standing to challenge the law because the law states any truck or vehicle with more than 5, 000 pounds and no MD license plates is subject to a daily search. Sara is a truck driver from Virginia. Since Sara is not a member of a suspect class and no fundamental right is being violated she will have to prove that the law is not rationally related to a government interest. Here, the state is following the Federal Homeland Security Law so it is rationally related to a legitimate government interest. However, the law places an undue burden on interstate commerce, so it violates the commerce clause. Out-of-staters have to be subject to inspections that impede on the time of deliveries.

Sara may also state that her due process rights applied to the states through the 14th Amendment are being violated. She is being deprived of her right to travel for business through Maryland without being subjected to a search.

Sara may also state that her equal protection rights as applied to the states through the 14th Amendment are being violated. Trucks and vehicles that weigh less than 5,000 pounds with Maryland license plates are being treated better with no inspection as opposed to trucks that weigh more than 5, 000 pounds and have out-of-state license plates.

Mary may challenge the law as over broad. It includes all foreign-born persons regardless of citizenship. Mary may challenge that her rights to an education are being violated. Since Mary is not an alien because she is a U.S. citizen and there is no fundamental right to an education she will have to use the rational basis test. The law is not rationally related to a legitimate government interest. The government of Maryland is to comply with the Federal Homeland Security Law that states it is illegal for any person who is not a citizen of the United States to enroll in any college without registering. If the states are permitted to enact laws that are inconsistent with the federal law then the law will not be deemed rationally related.

Mary's equal protection rights via the 14th Amendment are being violated because foreign-born persons who are citizens of the United States are being treated differently than citizens who are not foreign born.

Mary's due process rights via the 14th Amendment to life, liberty and property are also being denied. She, as a United States citizen, is not allowed to attend the University of Maryland without obtaining a security clearance.

REPRESENTATIVE ANSWER 2

Standing:

Mary's standing to challenge the registration requirement depends on whether she actually intends to attend the University of Maryland. If so, the need to obtain a police clearance would be a concrete detriment providing standing. However, if she has been accepted to colleges out-of-state, Maryland could argue she lacks standing as she has not established any effect on her yet.

Sara's standing is also open to attack. The truck law does not state that searches of out-of-state trucks have to be conducted, only that they may. Sara's fear of being searched is not a concrete injury.

Assuming each has standing, the following challenges may be brought.

Truck Law:

Sara can challenge the truck law as a violation of the Commerce, Equal Protection and Privileges and Immunities Clauses. If the law places an undue burden on interstate commerce, Maryland must show that it was necessary to achieve an important governmental purpose. Sara can argue

that the daily searches on out-of-state trucks burden commerce and are not necessary to achieve safety. The State will counter that the act is within its police powers and that Congress expressly authorized it in the Homeland Law.

Sara can argue that the law discriminates against out-of-state truckers and impairs their ability to earn a livelihood, in violation of the Privileges and Immunities Clause. Based on this, the Law must be necessary to achieve an important purpose.

Under an equal protection analysis the discrimination against out-of-staters would only trigger a rational basis review, as they are not a protected class, so this is a weaker argument for Sara.

Student Registration Law:

It may be a violation of the Equal Protection Clause. Aliens are a protected class, so the targeting of them triggers strict scrutiny and the requirement must be necessary to achieve a compelling state interest. The State will not be able to meet this burden, given that the federal government is implementing national measures.

The power to regulate immigration is reserved solely for Congress under the Constitution and the State may not interfere. The authorization to enact laws consistent with the Homeland Security Law cannot override the Constitution. The State will counter that Congress can delegate such authority to act.

BOARD'S ANALYSIS

QUESTION 6

Mary and Sara can show danger of substantial injury from the operation of the laws and therefore have standing to challenge each. Both sisters may argue that the laws violate the Equal Protection Clause found in the 14th Amendment to the United States Constitution. The facts indicate that both sisters are presently residing within the United States but are treated differently from Maryland residents born in the United States. Mary will argue there is no rational basis for the disparate treatment since any United States born citizen is allowed to freely enroll, and persons within this group are just as likely as Mary to be terrorists. Sara will argue there is no rational basis for the disparate treatment since the law excludes all vehicles that are registered in Maryland and also excludes vehicles under 5,000 pounds regardless of registration, without any reasonable basis to assume that such exclusions will promote safety.

Sara could argue that the law is violative of the Privileges and Immunities Clause of the 14th Amendment, and the right to travel guaranteed thereby, since burdens are placed upon certain out-of-State vehicles and, as noted *supra,* no substantial reason exists for the discrimination. *See*, Saenz v. Roe, 526 U.S. 489, 501 (1999) ("[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits.")

Article I, Section 8, of the United States Constitution empowers Congress to regulate interstate commerce. The State may not burden or obstruct interstate commerce. Sara Lawson may argue that the law does just that since it requires an out-of-State business, such as hers, to either "register" before it can enter Maryland, or have its trucks undergo numerous stops while traveling therein.

The State law concerning school registration may be challenged on the grounds that it is unconstitutionally over broad or under inclusive, and vague. In an attempt to make the State "safe", citizens are required to go through an undefined security process *if they were born in another country,* while citizens born in America can attend the State school. The law concerning vehicle registration is under inclusive since there's no reason to assume that vehicles under 5,000 pounds could not be used in an act of terrorism and over broad in that there has to be a more narrowly tailored means to achieve the goal of safety than to require out-of-State vehicles to pull over at every weigh station passed.

Finally, the federal law arguably preempts the State from enacting its legislation. Article VI of the United States Constitution (the Supremacy Clause) notes that the "Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . ." A federal statute preempts State law when it is clear that Congress intended the federal law to occupy a field exclusively or when the state law is in actual conflict with the federal law. While the Federal Homeland Security Law does not expressly pre-empt the State from enacting its own legislation, an argument could be made that the State laws are too restrictive in that they prohibit that which the federal law would allow, and therefore conflict with the federal law.

Maryland July 2002 Bar Exam Constitutional Law Essay Question

Question 5

The Howard Youth Hockey Club, Inc. (the "Club") is a private, non-profit organization which sponsors recreational hockey leagues in Howard County, Maryland. Its activities are held exclusively at the County Skating Rink, a public recreational facility owned by the County and supported by County taxes. The Club leases rink time from the County at a rate substantially less than that which the County charges other users. When it is using the rink, the Club's volunteers operate a snack bar located at the facility and the sale proceeds are paid to the Club. The Club offers free skating clinics for County residents and allows any County resident to participate in its programs at a reduced rate. The County itself offers no recreational hockey program but several other groups use the skating rink. In addition, the rink is open to the public for skating several hours each week.

The 2000 - 2001 hockey season was marred by several fights among players and spectators. In response, the Club's Board of Directors adopted two rules for future seasons. First, it required opposing coaches to gather both teams together prior to games and lead a non-denominational prayer as follows:

> "Almighty God, we ask you to give us the gift of good sportsmanship for this game. We promise you and each other to do our best to skate well and play fair today."

Second, the Board adopted a rule that stated that any adult involved in a physical or verbal confrontation with any person at a Club event would be subject to a ban from all future Club events for a period to be determined by the Board.

On the first day of the Summer hockey season, July 1, 2002, Allan Atheist, a seventeen year old who has played Club hockey for ten years, objected to participating in the pre-game prayer saying that he did not believe in God. His coach suspended him.

Also on the first day, Lenny Loud, an adult whose daughter plays for a Club team, became involved in a verbal argument with a referee after a game. The Club Board met with the referee and the coaches of the two teams and decided to ban Lenny for the remainder of the season. At the Board's request, the County Parks director has written to Lenny telling him that he will be subject to arrest for trespassing if he enters the County Skating Rink during a Club event for the remainder of the season.

Allan and Lenny wish to challenge the actions and policies described above. What arguments might they raise? How would a court analyze these contentions? Explain your answer thoroughly.

Representative Good Answer 1.

Only state actions are subject to constitutional scrutiny. Here, the hockey club is private, however, it enjoys a number of benefits of the County, such as use of the county rink at substantially reduced rates with use of county taxes, free clinics for county residents and reduced rates; also, the public uses the facility. Because the county is so involved in the club (beyond mere licensure or use of premises) then the club's actions may be state action by the county.

A party must have standing to challenge a regulation. Here, Allan is a player who has been suspended for refusing to pray. Lenny has been banned from the rink where his daughter plays; so both have standing.

The First Amendment prohibits government endorsement of religion through the establishment clause. A government action is unconstitutional under the Lemon test if it has a religious purpose without a secular one, its primary effect advances religion, and it is excessively entangled with religion. Here, a prayer, even though non-denominational, may have a secular purpose of promoting sportsmanship and may have that effect, it is excessively entangled by addressing "almighty God."

The first amendment also prohibits the restriction of protected speech.

This includes a prohibition from forcing persons to speak or adopt beliefs they may not hold. It is therefore unconstitutional to force Allan to recite the prayer, so the prayer rule may not be used to suspend him and is unconstitutional.

Incitements to violence are not protected speech, also fighting words. Lenny's verbal argument is not an incitement or fighting words, so it is still protected speech.

Protected speech that is content-based may not be regulated unless it is narrowly tailored to serve a compelling government interest and it is the least restrictive. Here the rule of arguments may serve a compelling interest on reducing violence associated with sports, but the ban on "all physical, or verbal confrontation" is not narrowly tailored.

Statutes regarding speech may not be over broad; here the regulation bans "any adult" in a physical or verbal confrontation with "any person," and is thus over broad.

Due process: person can not be deprived of right without due process. Here, Lenny deprived of right to attend daughters games; not a fundamental right; subject to rational review; will survive.

May be cruel and unusual punishment to ban for whole season.

Representative Good Answer No. 2

<u>Establishment Clause - Allan</u>

The constitution provides under the First Amendment that government may not help religion pursuant to the Establishment Clause ("EC")

State action is necessary to implicate the EC. State action can be applied to private functions and organizations if the State 1) encourages the activity, 2) is excessively entangled in the activity, 3) or it is a company town. Here, although the club is a "private, non-profit organization," the county permits it to use the County skating rink at a lowered fee. The skating rink is owned by the county, supported by company taxes. The club also offers free skating clinics to the public and allows residents to participate in programs at a reduced rate. From these facts, the club's functions amount to state action since the County is leasing the premises and encouraging attendance and use.

Allan must have standing to bring an EC action. Typically, tax payers have standing in EC violations. Here, Allan is an atheist and was suspended from the hockey team for not participating in the pre-game prayer. He has suffered an actual injury which is redressable to the government.

EC challenges will be analyzed under the Lemon Test: 1) is the primary purpose of the rule secular? 2) is the primary effect of the rule inhibit or advance religion? 3) is there excessive state entanglement? Here, the rule that non-denominational prayer be said before games was implemented in response to fights. The prayer, however, states "Almighty God" which furthers religion. Although the primary purpose of the law is secular (less fighting), its primary effect is to advance religion. There does not seem to be excessive state entanglement since the employees are volunteers and there are no other facts.

Allan also has a first amendment right not to speak. Forcing a person to say a prayer violates this right.

Freedom of Speech-Lenny Loud

Assuming state action (see prior), a law prohibiting speech must not be vague or over broad. Vague is when a person of reasonable intelligence must guess at its meaning. Over broad means that protected and unprotected speech is affected. Here, the rule states that any adult involved in a "verbal confrontation" will be banned. "Verbal confrontation" is not clearly defined and may fail for this reason.

Lenny has standing because he is an adult who was banned from attending his daughter's games.

A regulation of speech that is content-neutral must have reasonable time, place, manner restrictions. This means that the rule has other available means for communication, is narrowly tailored and serves a substantial government interest. Assuming that the rule doesn't fail for vagueness or overbreadth, the rule seems reasonable because it is substantially related to reducing fights, and only prohibits "fighting words" a form of unprotected speech.

Procedural due process

Cannot deprive person of life, liberty, property interests without notice and hearing. Lenny banned from all games (may be a priority interest) without a hearing. Unconstitutional.

BOARD'S ANALYSIS

QUESTION 5

Question 5 asks for the applicant to identify and analyze constitutional law issues arising out of the operation of a youth sports league with some affiliation to a local government. The primary emphasis in grading is on issue identification.

As a preliminary matter, both Lenny and Allan have standing to file suit against the Howard Youth Hockey Club, Inc. (the "Club"). Each has suffered a direct injury arising out of the enforcement of the Club's rules. As a minor, Allan's suit will have to be brought by his parents or guardian.

The Constitution is not applicable to private organizations. Thus, one issue is whether the Club is a state agent as that doctrine has been developed in a long line of Supreme Court decisions beginning with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

> The test has been articulated by the Court as follows:
>
> > Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

It is clear that the mere use of the County recreational facility does not *per se* render the Club a state agent. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

Factors raised by these facts bear on whether the Club is a state agent are: the reduced rink rentals; the fact that the County allows the Club to use its snack bar facilities to raise money; and, most importantly, that the County Parks director banned Lout from the skating facility at the Club's request for a violation of a Club rule.

If the Club is deemed to be a state agent, the provisions of the Constitution apply to it. *Burton v. Wilmington Parking Authority, supra.* The mandatory prayer before each game violates the Establishment Clause of the First Amendment, even if its purpose is to reduce violence as opposed to inculcating religion. *Lee v. Weisman,* 505 U.S. 577 (1992). The Supreme Court applies a three part test to determine whether a law violates the Establishment Clause:

1. the regulation must serve a secular legislative purpose;

2. the regulation's primary effect must be one that neither advances nor inhibits religion; and

3. the regulation must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971*)*.

Here, the prayer requirement serves a secular purpose, i.e. minimizing violence, but its call to "Almighty God" clearly advances religion. Thus the rule would fail the *Lemon* test if the Club were deemed to be a state actor.

In addition, Allan can argue that requiring him to recite a prayer at odds with his own religious beliefs violates his rights under the Free Exercise Clause of the First Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940):

> The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.

Lenny should raise the argument that the Club rule against "verbal confrontations" is vague and overbroad. The two doctrines are related. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Chicago v. Morales,* 527 U.S. 41, 52 (1999) quoting *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612-615 (1973). A regulation is vague when it is not worded precisely enough to give fair warning that contemplated action would violate the regulation. *See e.g. Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

While a local government agency clearly has an interest in maintaining decorum and order, especially at public facilities, and avoiding violence at youth recreational activities, a ban on "verbal confrontations" would cover a broad variety of interactions between adults, many of which would not normally be likely to lead to violence. Thus the rule is overbroad. The regulation is also vague because it gives no real indication of what is, and is not, prohibited.

Lenny also can argue that the Board's action in banning him from the ice rink for the season without affording him an opportunity to present his version of events violates the Due Process Clause of the Fourteenth Amendment. Lenny has a liberty interest in watching his child participate in sporting events. Courts employ a balancing test to determine whether a hearing should be held and the extent and formality of the hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Maryland February 2002 Bar Exam Constitutional Law Essay Question

QUESTION 11

The State of Maryland is trying to recruit and retain the most efficient, professional employees to work for its various agencies. Therefore, a dress policy has been established. At the request of the Executive Branch, the Maryland Legislature enacted legislation that provides a dress code for its employees. The legislation prohibits State employees from wearing the following items of clothing: "tee-shirts, shorts, jeans, miniskirts, clothes with lettering or wording, or clothing determined to be offensive to others." The legislation also provides that violations of the dress code will result in immediate termination.

During the course of the year, the following State employees were terminated for violating the dress code:

- Jack, and accountant, is also a minister in a recognized denomination. Jack was admonished and terminated for wearing casual shirts with a cross visibly sewn onto the outside of the pocket with the words "In God we trust" emblazoned underneath the cross. An atheist and fellow employee told Jack's supervisor that he found the shirt offensive. The supervisor told Jack he could continue to wear the shirt if the lettering was removed. Jack pointed out that Bill, also in accounting, had the same cross and wording visibly tattooed on his forearm, but has never been admonished or otherwise disciplined. Jack continued to wear his shirt and was terminated.
- Mike, an intern, frequently wore a purple and gold vest worn by a notorious local gang, of which he is a member. Recognizing the vest as the official gang vest, a number of employees expressed fear and concern about Mike even though Mike was an exemplary and friendly employee. Mike continued to wear the vest and was eventually terminated.
- Mary is a world famous dress designer. Mary is not an employee of the State, however she pays her friend Sue, a State employee, to wear her designs which all carry her signature letter "M" on them. Sue has a highly visible job and a reputation for being stylish. Other State employees see Sue and want to wear Mary's designer dresses to work, but cannot because the signature letter is on them. A competitor's dress is similar to Mary's but instead of the "M" those dresses have an "!" symbol on them. State employees have worn the competitor's dress with no ramifications. Despite being admonished, Sue continued to wear Mary's dresses and was terminated.

Mary and the three (3) state employees come to see you, an experienced and duly licensed Maryland attorney, and ask you to represent them in an action against the State for the employees' terminations.

What legal arguments would you make for Jack, Mike, Sue and Mary? Discuss fully.

REPRESENTATIVE ANSWER 1

A conflict of interest may arise when an attorney is asked to represent more than one client in a particular case. A lawyer must not represent two persons who may have adverse interests. Here, Jack (J), Mike (M), Sue (S), and Mary (My) must be informed that they should seek independent counsel, but may consent to my representing each after consultation.

In order to proceed with the claims one must have standing. Standing to sue is obtained when one has actual, personal harm resulting from the violation. Here J, M and S have standing but My does not, as she is not the one who is prevented from wearing her designs.

A litigant may not generally sue the State directly for their claims. The matters would have to be adjudicated at a State agency for employee complaints. However, the three may sue on constitutional grounds. The 1st/14th Amendments guarantee free speech, exercise and assembly with limited exceptions. Speech, as a rule, may not be restricted unless it is unprotected (fighting words or obscenity). Here the legislation restricts lettering and wording determined to be offensive to others. The Equal Protection Clause prohibits the government from making undue restrictions on a certain class of people. Here people at these agencies are having their attire and speech restricted. Under the Equal Protection Clause (14th Amendment) this is a restriction of a fundamental right (expression/speech) and would be analyzed under the strict scrutiny test. Here the State would have the burden to show that the restriction was necessary for a compelling governmental interest and was the least restrictive alternative. J would have a viable claim as another employee has a tattoo with the same signs and wording and that employee was not terminated. M, although maybe not in the best taste, is not in violation with words but by colors that remind others of gang attire. He has a viable claim as well. S's claim is meritorious in that a designer's label is often on clothing and is not offensive. Additionally, a ! should be analyzed under the law as having the same weight as the letter M.

Additionally, the law may be found to be vague (what is offensive) or overbroad (all letters/words) and may be void on its face. Moreover, as written, the law does not offer notice or a hearing for the employees who are terminated. That is an obvious violation of both substantive and procedural Due Process (14th Amendment) protections. The law as applied to these plaintiffs is unconstitutional and should be abolished.

REPRESENTATIVE ANSWER 2

Conflict of interest – I would first advise that representing the 3 State employees and Mary may be a conflict of interest even though each have claims against the same statute. At the very least I must obtain consent from each.

Standing – Mary is not a State employee and therefore is not directly impacted by the law. However, she can claim 3rd party status if she can show a special relationship. Her contractual agreement with Sue and her economic dependence on Sue wearing the outfits might provide a sufficient connection to establish a special relationship.

1st Amendment issues – Jack would assert a claim that his 1st Amendment rights to freedom of religion have been restricted by the law. Under the Constitution the State must show that the statute is necessary to meet a compelling governmental interest. Here the dress code would not qualify because offensive to others will not be construed as a compelling reason to have a dress code. Also, Jack's rights of equal protection have been violated, as a fellow employee is allowed to have a religious tattoo. Here Jack would have to show that the law is facially discriminatory or discriminatory in application or purpose. He will be able to do so since the fellow employee is allowed to have the tattoo.

Mike would assert that his freedom of association right has been violated by this law. Again, since this is a fundamental right, the State is required to show that the law is necessary to a compelling governmental interest. Sue can also raise an equal protection challenge, or she and Mary can raise it. Here they must show that absent an infringement of a fundamental right, the law is not rationally related to a legitimate governmental interest. Because the dress code does further a legitimate concern (proper attire does increase productivity on the job) they may not win.

Due Process - Jack, Mike and Sue can all bring suit under the 14th Amendment's substantive and procedural due process clauses since they were terminated without notice and a proper hearing.

Vagueness, over breadth of the statute – The language "offensive to others" would also be considered vague, overbroad and unconstitutional.

BOARD'S ANALYSIS

QUESTION 11

The answer should first address whether each person has standing to challenge the State's dress code. Under the facts, Mary was not a State employee and may, therefore, be precluded from challenging the law. To have standing, a person must have a concrete stake in the outcome of the case. The test for standing set forth in the Federal case, *Siera Club v. Morton*, 405 US 727 (1972) is 1) actual or threatened injury, and 2) injury traced to a challengeable action, and 3) injury redressable by adjudication, 4) injury is within the zone of interest.

There does not appear to be a conflict of interest that precludes the attorney from representing the three employees. Maryland Rules of Professional Conduct Rule 1.7 requires that the attorney refrain from representing more than one client when the clients' interests could be adverse. To be safe, the attorney should seek the consent of all of the employees involved.

The law that enacted the dress code may violate the procedural Due Process clause of the Constitution 14th Amendment since no notice nor hearing was provided prior to the enactment of the legislation or the employees' terminations. The law is also violative of due process safeguards in that it is vague (what is offensive to others?) and overbroad.

The vagueness/overbreadth of the law makes it susceptible to challenges under the 1st Amendment, as well, since portions of the law affect the employees' rights of free speech, freedom of association, and freedom of religion. All of these are considered primary rights; any law infringing upon them must be the least restrictive means of addressing an important governmental purpose. Since it's unclear what clothing the law restricts, it can't possibly be the least restrictive means.

Finally, the breadth of the law makes it susceptible to challenge on Equal Protection grounds. Why is some clothing worn by one person better than others? Why can an individual tattoo wording on his arm, but not emblazon it on his shirt. Why is one symbol on a dress professional clothing, but letters or certain colors not?

Maryland July 2001 Bar Exam Constitutional Law Essay Question

QUESTION 12

In 1994, Trash Company, Inc. ("TCI") entered into an exclusive 10-year agreement with Montgomery County, Maryland, to engage in the pick up and disposal of all residential trash. Central to the terms and pricing of the agreement is that TCI deposit all trash in the Montgomery County landfill. TCI owns all of its trash trucks free and clear of any liens, and purchased them as a result of its 10-year contract with Montgomery County. TCI also has a contract to provide the same trash services for Fairfax County, Virginia. The trash that it hauls for Fairfax County is also deposited in the Montgomery County landfill.

Montgomery County environmentalists lobbied the Maryland General Assembly to stop landfills and require more recycling. The Maryland General Assembly decided to act. It first constructed a state-run recycling and incineration facility in Montgomery County. Next, it enacted a local law for Montgomery County that states in part as follows:

> Effective August 1, 2001, all residential trash in Montgomery County will either be recycled or burned in an incinerator. No trash originating outside of Montgomery County will be accepted. No trash, regardless of origin, will be deposited in a landfill.

Finally, the laws stated that only state-of the art environmentally sensitive trash trucks or personal vehicles will be allowed to access the State recycling and incineration facility.

The owner of TCI comes to you, an experienced Maryland attorney, and informs you that this legislation will put TCI out of business since it will cost over one million dollars to retrofit her trucks and she has nowhere to deposit the trash taken from Fairfax County. She asked that you challenge the law on her behalf.

What challenges might you raise on her behalf as to the validity of the law and why? Discuss fully.

REPRESENTATIVE ANSWER 1

The Commerce Clause of the U.S. Constitution delegates to Congress the sole authority to regulate interstate commerce, and the states may not substantially burden interstate commerce. Here, the law gives TCI standing to challenge its validity, since it was a state act that adversely affected its rights under the constitution. The law enacted here prevents the acceptance of trash originating outside of Montgomery County. This prevents any out of state trash, whether hauled by Marylanders or not, to be placed in the County incinerator. This may be seen as a facially discriminatory law since it does discriminate against out of state/county haulers who take trash into Maryland landfills.

Since it is most likely facially discriminatory, the law has to be necessary for a compelling governmental interest. Here, the governmental interest is to protect the county/state environment, but the law as written is most likely not necessary for that interest. The government also has to provide a least restrictive alternative, like charging more for the use of the incinerator. No alternatives were mentioned here. The one issue facing this challenge to the law is that the County may be acting as a market participant, and as such, may be exempt from scrutiny, since the recycling and incinerator facility here is state run.

TCI can also challenge the law based on an Equal Protection challenge, since the law restricts any vehicles that are not state of the art and environmentally sensitive. Here, it would cost TCI over one million dollars to fix the trucks. Additionally, she has "nowhere to deposit her trash from Fairfax County." The law must be substantially related to an important governmental interest to be constitutional. As such, an Equal Protection challenge may be successful since the law does not treat everyone equally.

TCI may additionally challenge the law as a violation of TCI's due process rights since it basically takes away TCI's right to participate in a business for profit without due process of the law. TCI would not be able to continue its business if it had to retrofit its trucks, and find another place to take its trash from Fairfax.

The Contracts Clause of the Constitution also prevents states from rescinding on their obligations by passing laws to allow them to escape that obligation. TCI had a contract with the County which held that "all trash be deposited in the landfill" and since the law was enacted after the contract it can't be retroactively applied to that contract. The contract is good until 2004. TCI has the right to continue until then.

REPRESENTATIVE ANSWER 2

Standing holds one must have injury and nexus. Here, TCI, a Maryland Company, will be hurt by the new law that holds that "no trash originating outside of Montgomery County will be accepted" in the new state run facility. Ripeness holds that an issue may not be brought if it is not an issue yet. Given that the law will become effective August 1, 2001 (a few days away), this case is ripe.

The Commerce Clause of the Constitution grants Congress sole authority to regulate interstate commerce and no state shall substantially burden interstate commerce. State law based on geography will be subject to strict scrutiny where the state has the burden of proof. Here the new Montgomery County law holds that the State bar trash originating from outside Montgomery County and holds no trash will be deposited in a landfill. Here, TCI would be hurt as it deposits all trash in a landfill and some of its trash comes from Fairfax County. This law must pass the strict scrutiny test holding it to be compelling for a necessary governmental interest and be the least restrictive/non-discriminatory alternative. Here, the only governmental interest is that of environmentalists' lobbying for more recycling. This is not a compelling, necessary

governmental interest. Further, this law could have been achieved with a non-discriminatory less restrictive alternative such as tax breaks for those using Montgomery County's incinerator.

The Contracts Clause holds that no state shall interfere with the contracts of its citizens. Here, TCI has a contract with Montgomery County for 10 years to engage in the pick up and removal of trash in the County. This law would clearly be seen as contractual interference and a violation of the Contracts Clause.

Therefore, I would seek an injunction and declaratory judgment against the law.

Bar Examiner's Analysis QUESTION 12

The question was intended to generate brief discussion on the following areas of constitutional law: 1) the Contract Clause; 2) the Commerce Clause; 3) the Equal Protection Clause; 4) the Takings Clause.

The analysis may also address the issues of ripeness and standing. The legislation was effective August 1, 2001. Was the legislation ripe for TCI to challenge? Since TCI was in the middle of the ten-year contract that began in 1994 it would arguably suffer an immediate threat of harm, making the action ripe. Additionally, since TCI has a contract stake in the outcome of the legislation it may challenge the legislation.

Contract Clause

The Contract Clause of the Constitution states in part that states cannot enact laws that retroactively impair contract rights. If the contract between TCI and Montgomery County is considered a private contract, the legislation would be reviewed under the intermediate scrutiny standard and would be an invalid impairment upon the contract clause unless it: 1) serves an important and legitimate public interest and 2) is reasonably and narrowly tailored to promote the specific public interest. Did the Maryland General Assembly's legislation meet these criteria? If the contract is considered a public contract, the same test would be applied but strict scrutiny would be the standard.

Commerce Clause

The Commerce Clause of the Constitution regulates interstate commerce, and although the State of Maryland is permitted to enact regulations that regulate aspects of interstate commerce said regulations cannot unduly burden interstate commerce nor discriminate against commerce to protect local interest. With the enactment of this legislation, no trash from Virginia or any other state could enter into a Maryland landfill. However, the legislation also prevented Maryland trash from being deposited into a landfill as well. Thus, the legislation may not be the least restrictive alternative measure that could have been enacted.

In utilizing the balancing test to determine if the State is discriminating against interstate commerce or whether the state is protecting a legitimate governmental interest, one must question whether the state and local entity is operating as a market participant in which case the local entity may be able to discriminate to the benefits of its citizens.

5th Amendment Takings Clause

A discussion of the 5th Amendment Takings Clause would be applicable as well. This clause is applicable to State action via the 14th Amendment. The legislation may constitute a taking of TCI's property if it does not substantially advance a legitimate state interest, or if it denies economically viable use of its property.

Equal Protection

The Equal Protection Clause of the 14th Amendment is designed to make sure that the law treats people in the same class equally, and not differently from each other, absent some important governmental reason for disparate treatment. In the subject case, the issues are whether there is any basis for the State to provide owners of state-of-the-art environmentally sensitive vehicles an unfair or discriminatory advantage over those that do not own such a vehicle or to treat trash emanating outside of the County differently.

Maryland February 2001 Bar Exam Constitutional Law Essay Question

QUESTION 6

To help revitalize its cities, the State of Saturn enacted legislation authorizing State funded grants to non-profit entities for purposes of acquiring and renovating vacant city buildings for use in a manner that would serve the community. The grant program is known as the City Revitalization Program ("CRP").

The Church of the Divine Light, a non-profit entity (the "Church"), has applied for a one million dollar grant from the CRP. The Church's application states that it intends to acquire a vacant building located in the most destitute areas of Saturn's largest city. The Church plans to turn the building into a community center (the "Center"), consisting of classrooms and a gymnasium. The Center will be open to the public, and will offer non-sectarian programs targeted to serve the low income and elderly families in the area. The programs will include child and adult day care, job training classes, and youth basketball and volleyball leagues.

In addition, the Church's application states that a portion of the grant proceeds will be used to construct a small chapel in the Center. The Church's application further states that large signs will be posted at each entrance to the Center, on the door to the chapel, and on the Center's bulletin board, that say the following:

Christian devotional services are held at the Chapel daily at 6:00am and 7:00pm. Attendance is Voluntary. You are welcome to use the Center regardless of whether or not you attend.

You are the attorney representing the State agency that administers the CRP. The CRP Director has requested you to analyze any legal issues raised by the application.

Explain your answer fully.

REPRESENTATIVE ANSWER 1

This question is one which involves the Establishment Clause of the 1st Amendment of the Constitution of the US, applied to states. The test for Establishment Clause: does the action have a primary purpose which is secular, does the action enhance or inhibit religion, and is there excessive entanglement with religion.

Here, the church which is a non-profit entity qualifies to apply for this grant in many ways which are compatible with the 3-part test.

A community center consisting of classrooms and a gymnasium could clearly be construed as a primary secular purpose. However, if the classrooms are primarily used for religious instruction, this could be a problem. Since the Center is open to the public, not just members of the church, this is secular. It will also offer non-sectarian programs which then will not promote or inhibit religion. This will be targeted not at religious groups but at low-income and elderly

families in the area. This all works. Programs which include child and adult day care, job training classes and youth basketball and volley ball all appear to be quite secular without promoting or inhibiting religion, without excessive government entanglement.

The Chapel and the signs The problems arise when the application states that a portion of the grant proceeds will be used to construct a chapel. This will interfere with the Establishment Clause test provision which stated no enhancement of religion. The church should not use the money for construction of this chapel. It will have to find another source of revenue if it is determined that on balance the Church's Center will not overall be promoting religious activities.

The Signs It must be determined whether Voluntarily Attended Christian devotional services which take place at 6 AM and 7 PM will be enhancing/promoting religion and distracting from the primary secular purpose of the Community Center and its funding from the State.

The line which states "you are welcome to use the Center regardless of whether or not you attend" is encouraging to the fact that religion is not being shoved down anyone's throats. It is also questionable whether voluntary services at the designated times - early at 6 AM and at 7 PM would really take away from the secular character of the building and its programs.

The Church of the Divine Light could be awarded the grant if it did not use the grant money to construct a small chapel.

REPRESENTATIVE ANSWER 2

The CRP's application raises 1st amend Establishment of Religion issues. In order for the application to pass constitutional muster, it must pass the Lemon Test established by Lemon v. Kurtzman. The act must have a secular nonreligious purpose 2) neither advance non inhibit religion and 3) there must be no excessive gov't entanglement. There, the purpose of the CPR's application corresponds to the state's and meets the 3 part test up until the portion stating they want to construct a small chapel.

The community center's being open to the public, offering non-sectarian programs, the child and adult care, job training and basketball and volleyball league all meet the constit. standards. The fact that the application is sought by The Church of Divine Light, does not advance religion nor create excessive gov't entanglement because the church is a non profit organization and would be allowed access to the state funded grants as long as all activity, purpose and function of the community center was secular in purpose and no religious instruction taught in the classrooms. However, state funded grants creates entanglement with religion when the center would house a chapel built with state funds. One will argue brick and mortar does not equate to religious purpose or goal. However, after the bricks and mortar form the chapel constructed with state funds, religious services will be held therein and the fact that these services will be voluntary does not change the outcome that a church is 1) not secular in purpose in that the Church of Devine Light will hold religions services based on their religion, 2) those services in the chapel will advance religion, 3) and the state funded grants will be found to be significant state involvement for excessive gov't entanglement.

I would recommend that CRP not construct the chapel and that they delete that portion of the application and in no way should any religious instruction or church services be held at the community center. The center is looking to do great things in the community and I applaud them, however, the state may not in any way fund, or help fund a program that is 1) not secular in purpose and effect 2) that advances or inhibits religion and 3) that involves excessive gov't entanglement. State funds are adequate to constitute government entanglement.

Maryland Bar Examiners' Analysis QUESTION 6

The First Amendment of the United States Constitution provides, in pertinent part, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof (the Establishment Clause). Through the Due Process Clause of the Fourteenth Amendment, this restraint is binding on the states.

Does the City Revitalization Program satisfy this test under the facts presented? There are two aspects to the problem: first, the construction of the chapel and, second, the use of the chapel for religious purposes.

The Supreme Court applies a three part test to determine whether a law violates the Establishment Clause:

1. The law must serve a secular legislative purpose.

2. The law's primary effect must be one that neither advances nor inhibits religion.

3, The law must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602 (1971*). See also, Roemer v. Board of Public Works*, 426 U.S. 736, 748 (1976); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); and *Agostini v. Felton*, ____ U.S. _____ 117 S.Ct. 1997, 2010 and 2015-2106 (1997).

With regard to the first test, a law that seeks to revitalize inner city neighborhoods by using state funds to finance the acquisition and renovation of vacant buildings to serve the community, has a secular purpose. Therefore the first test is satisfied.

With regard to the second test, the Court has held that providing aid to an organization that is pervasively sectarian has the primary effect of advancing religion. However, when an organization has religious and secular activities that can be separated, aid for the secular activities does not have the primary effect of advancing religion. *Tilton v. Richardson*, 403 U.S. 672, 679-681 (1971), *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973), and *Roemer*, 426 U.S. at 755. By applying this distinction, the Court has upheld state-sanctioned financial assistance for institutions of higher education which have a religious affiliation upon finding that the religious and secular functions can be separated, and that the assistance is focused on secular purposes.

Tilton, 403 U.S. at 679-682 and *Hunt*, 413 U.S. at 742-745. An important factor in concluding that the assistance was focused on secular activities was a prohibition on the use of the facilities for religious services or other religious activities. *Tilton*, 403 U.S. at 680-681 and *Hunt*, 413 U.S. at 744. Providing public money to an organization to construct or renovate a building in which religious services are conducted is an advancement of religion.

The Church is an organization that is sectarian by its very nature, but its plan to serve low income and elderly families by offering child and adult day care, job training classes, and recreation for youths can be separated from its religious functions. However, using a portion of the CRP grant to construct a chapel for religious devotions, even though attendance is voluntary, would advance religion and violate the Establishment Clause under *Tilton*, *supra, and Hunt, supra*.

While the signs are intended to convey the message that attendance at the chapel services are voluntary, they nonetheless contain a clear religious import because it announces the schedule of services. Again, it advances religion.

The third test may be met because the Court has indicated that a one time grant presents less potential for entanglement than a continuing financial relationship. *Tilton*, 403 U.S. at 688.

In conclusion, the CRP grant to the Church probably would violate the Establishment Clause. The second test would not be met because using State funds to construct a chapel for religious services would appear to advance religion. Were the chapel not constructed, there probably would not be a violation of the Establishment Clause because the Church's activities at the Center would be secular, and would not have the primary effect of advancing religion.

Maryland July 2000 Bar Exam Constitutional Law Essay Question

QUESTION 2

Retro, a small rural county deep in the hills of Western Maryland, has an elected school board. In the recent election three of the five members elected ran on a "return to traditional values" platform. They have proposed several measures which cause the superintendent of schools some concern. Among their proposals are the following:

A. Each public session of the Retro County School Board shall begin with prayer.

B. Each morning all students shall stand, salute the flag of Retro County, and recite a pledge of allegiance to the county, state and country.

C. Bible study shall be included as part of all literature classes.

D. The Ten Commandments shall be posted where they can be plainly seen by all students of Retro County High School. To facilitate their plan, the three members of the Board intend to purchase with their personal funds a small plat of land just across the street from the school's main entrance on which to place the "Commandments."

As an experienced Maryland attorney, write a memo to the superintendent addressing the issues raised in each of the above proposals.

REPRESENTATIVE ANSWER 1

The following is my memorandum as requested discussing relevant legal issues in relation to your four recent proposals.

A. Prayer to begin Board session.

The main legal issue here involves a possible violation of the incorporation clause of the First Amendment. While this does not seem to evidence a sect preference, I would advise you that you were to mandate a particular type/denominational prayer, you may open yourself to argument that the prayer discriminates based on religious sects, and thus would only be upheld if necessary to achieve a compelling government objective. This is a difficult standard to meet. Even if the prayer is sect neutral, the Supreme court has devised a three part test to assess whether the state action involves any impermissible advancement of religion.

First, the measure must have a secular purpose. You have only told me that the Board wishes a return to "traditional values," but you are probably going to need a more convincing argument that this measure has a secular purpose.

Second, the primary effect must be one that neither advances or inhibits religion. Again, absent a stronger justification than "traditional values" I would say that you would be hard pressed to argue that the primary effect here is not to advance religion.

Finally, you must demonstrate that the law does not foster an excessive entanglement with religion. This would not appear to be the case as no religions institution is being regulated or affected by the law.

I would also advise you not to make prayer mandatory. See First Amendment freedom of speech issues discussed in Part B, infra.

B. Pledge/Salute.

Your main potential problem here involves the first amendment provision on freedom of speech which also includes the freedom not to speak. Also, the flag salute is symbolic conduct that would probably be considered speech in this context. Thus, if you are going to compel the students to engage in this activity, it might be argued that this provision is a content based regulation on speech, and is thus subject to strict scrutiny. You would need to show that the law adopts to achieve a compelling government interest. We may be able to argue that having children say the pledge would make them better citizens and more respectful of their country. This is probably not sufficient to pass strict scrutiny. Thus, you would have to allow students who do not wish to participate to refrain from doing so.

Also, you might be challenged here under a free exercise clause by students with religious objections, but this is not a good argument as the provision is generally applicable, and any burden on religion is incidental.

C. Bible Study.

This issue presents a closer question. Like issue A the provision would likely be challenged on first amendment religious incorporation grounds. However, unlike A, you would have a much better argument that this is a secular purpose - to engage in literature study. Also, if the study is approached academically rather than an inculcating fashion, you would have a good argument that the primary effect is academic study rather than advancing religion. For the reasons discussed in, there appears to be no excessive entanglement with religious issues here.

D. Posting of Ten Commandments.

With this provision, unlike the previous three, there is a preliminary issue of whether there would be state action involved. The First Amendment prohibitions only apply to government conduct. Arguably, there would be no government conduct here because the land being used is being purchased on a private basis through personal funds. There might be a counter argument that because the purchasers are school board members, and seem to be acting pursuant to an agenda developed in relation to that position, that this is government conduct. Nevertheless, I would suggest that a court would likely find no government action here.

Nevertheless, in the event that state action is found, I would suggest that this provision would probably fail the three prong Lemon test, unless the Board can provide some reason other than "traditional values". Also, this would probably constitute a sect preference as the Ten Commandments are uniquely Judeo-Christian in nature.

REPRESENTATIVE ANSWER 2

The School Board cannot require a session to begin with prayer. The establishment clause as applied through the Fourteenth Amendment, prevents any state actor from unnecessarily and excessively entanglement with state resources (time, money, or other) in the active promotion or implicit acknowledgment of a religious message, doctrine or teaching. Requiring school board meetings, obviously a state act of serving a public function, to open with a prayer implicitly acknowledges and perhaps even openly promotes the prayer makers religion upon nonparticipating members of the community at the meeting. This is clearly impermissible under the Federal and Maryland Constitutions.

This same problem arises in teaching Bible study and a literature class. If done strictly as an elective we might be able to argue separation of our curriculum from Bible doctrine (though I should note, even then, our chances are slim at best). By requiring all our students to participate

in Bible study, even as a "nonreligious" literary study, we excessively entangle state resources and the very religious questions our constitutions proscribe us from entertaining.
Posting the Ten Commandments, even in the original Hebrew in any public school, clearly and excessively entangles the state actor with religious doctrine and is thus impermissible. The Board members seem aware of this as they collectively seek to place their display on private property across the street from the school. While crafty, this idea still fails. The Board members may use private/personal funds, but they cannot sidestep the purpose of the act - to fulfill a campaign promise and create this display. They cannot divorce themselves from their public roles as school board members and as such, state actors. Nor can they deny the intent that the display be clearly visible from the school. The display will be unconstitutional.
The pledges are better and outside the establishment clause as they serve a valid secular purpose. Requiring a recitation, however, still impinges upon an individual's right to speak (or not speak) freely. It requires some degree of associational activity and it is a state actor requiring such conduct. The only argument we have to save this will be the age of the children, and the governmental secular purpose and national loyalty.
All these problems will face strict scrutiny requiring us, as the state, to show a compelling need for the regulations and a compelling state interest, without a less restrictive alternative. We cannot do so.

Board's Analysis Question 2

A. Opening sessions of legislative and other deliberative public bodies with prayer has coexisted with the principles of disestablishment and religious freedom from colonial times. Thus, an invocation which is traditional and offered for a secular purpose may be permissible if it does not have as its primary effect either the advancement or the inhibition of any religion. The Supreme Court has devised a three part test to determine whether the invocation impermissibly advances religion:

(1) Does it have a secular purpose?

(2) Does its primary effect advance or inhibit religion?

(3) Does it cause excessive governmental entanglement with religion?

Needless to say, the invocation cannot be a precondition to anyone's participation in the process. There is also the question of whether a county board of education is primarily a "deliberative body" and therefore entitled to otherwise permissible invocations. Looking more for a general discussion of the First Amendment Freedom applicable to the states through the Fourteenth Amendment and an application of those principles to these facts.

B. The Bill of Rights in general and the First Amendment in particular deny those in power legal right to coerce the consent of the governed. Neither teachers nor students lose their constitutional rights to freedom of speech and expression at the schoolhouse gate. The memo

should advise the superintendent that the proposal is unconstitutional based on free exercise of religion and freedom of speech grounds. There has been a long standing exemption with regard to flag salutes and pledges of allegiance based on religious freedom. Likewise, there is a more recent exemption based on freedom of speech. Citizens in general, including students, have the right to speak freely and the right to not speak at all. While states and school officials have comprehensive authority to prescribe and control conduct in the schools, there is no essential aspect of "government" involved which would allow the board to override the speech and freedom of religion issues. Thus, the memo should advise the superintendent that the proposal is unconstitutional.

C. The term "Bible study" is undoubtedly too broad and vague to pass constitutional muster. In giving advice to the superintendent, the attorney should again mention the "purpose and primary" effect of the proposal. The establishment clause prohibits official support behind the tenets of any orthodoxy. Also the free exercise clause guarantees everyone the right to freely choose his or her own course of religious training. If the purpose of the proposal is to either advance or inhibit religion it is unconstitutional. However, it would also most likely be constitutionally infirm to require that the Bible be included as a part of all literature classes. The advice of the attorney to the superintendent should reflect that it is permissible to teach about the Bible and to teach about the differences between religious sects. So long as the Bible is taught as literature and not for the intrinsic values contained therein, it is a permissible part of a history or a literature course. Indeed it has been held that it would be difficult to teach many subjects in the sciences and humanities without some mention of religion.

D. Statutes or regulations requiring the posting of copies of the Ten Commandments on the walls of public school classrooms violate the establishment clause. It is certainly arguable that a proposal which makes its way into public school policy requiring the posting of the Ten Commandments in any place is constitutionally infirm. On the other hand, it is the public act that presents the problem. With the possible exception of a zoning violation of some sort there is no prohibition against citizens purchasing property and posting the Ten Commandments thereon. The memo should suggest that while there is nothing to prevent private citizens in engaging in this type of activity, it would be highly improper and perhaps unconstitutional for the board members to do this in their official capacities.

February 2000 Maryland Bar Exam Constitutional Law Essay Question

PART F- QUESTION I

(20 Points 25 Minutes)

In order to capitalize on the new professional athletic sport complexes that have been built in the State of Maryland, several local food vendors (the "outside vendors") have set up shop on the public sidewalks and streets around the complexes to sell food to the fans as they enter the complexes. The vendors who operate food stands within these complexes (the "inside vendors") have lost one half of their revenue, and they hire a lobbyist to try to get the Maryland General Assembly to enact a law to prohibit these competing food sales on game days. The Maryland General Assembly enacted a law that says in pertinent part:

> "All permits issued for food vendors on state or county public streets or rights-of-way in jurisdictions throughout the state, shall be issued with the specific exclusion of vending rights on Sundays or other days when an athletic event is scheduled. A person who conducts a food vending operation without a valid permit or in violation of the terms thereof is guilty of a misdemeanor punishable by a fine of $50,000 and/or incarceration for a period not to exceed 6 months. Notwithstanding the above, this ordinance does not pertain to vending conducted by churches, synagogues or similar organizations."

The outside vendors are furious since two of them have had their equipment confiscated and have been issued criminal citations for selling food outside of the complex on the same day the local professional team had a home game scheduled within the State of Maryland. They come to you, a respected member of the Maryland Bar, to institute action to challenge the legality of this legislation.

What constitutional arguments might you raise to successfully challenge this ordinance? What defenses do you expect the State to raise in support of the ordinance?

Discuss fully.

REPRESENTATIVE ANSWER 1

I would raise the following constitutional arguments against the ordinance.

The law is not rationally related to a legitimate government interest and it is overbroad. While it is a legitimate government interest to regulate the time, place and manner of commercial activity, this law punishes violators beyond a rational basis. The statue is meant to punish commercial vendors who are outsiders.

The fine is extremely high and would likely allow the non-payment of the fine to be a means of incarcerating the violators of the statute. It is similar to excessive bail, which is not permitted.

The law attempts to favor religion. The exclusion of churches, synagogues or similar organizations may be argued to be a government endorsement of, or favored treatment of, religious organizations.

For those vendors near state borders, the law may impact interstate commerce in a negative way and, therefore, violate the Commerce Clause.

The two vendors who have had their equipment confiscated have a takings claim and the statute does not permit confiscation.

If the statute has an effect on a suspect class (such as racial minorities) and the law benefits non-minorities, the law may be found unconstitutional under the equal protection clause of the 14th Amendment. For example, where a statute in San Francisco required laundries to be made of materials other than wood, and the impact of the ordinance was to run the Chinese laundries out of business, the law failed under rational basis scrutiny.

The State will counter that it may make laws concerning permits and exercise its police powers. It is a legitimate interest of the State to create laws touching on these issues. State may create a "charitable purposes" exception to a regulation where it is rationally related to a legitimate governmental interest. Here, religious organization vending activities are not part of the problem, but local outdoor vending is.

REPRESENTATIVE ANSWER 2

I would raise the following constitutional arguments. I have listed each and immediately thereafter I have listed the defense I expect will be raised by the State.

Establishment Clause – First Amendment violation. I would argue that the statute, as drafted, is in violation of the First Amendment's prohibition against the state's establishment of religion. The First Amendment applies to the State of Maryland through the Fourteenth Amendment. The statute exempts churches, synagogues and other religious organizations from the ban on vendors on the street during game times. I will argue that this violates the Establishment Clause because it benefits religion. To determine if there is a violation of the Establishment Clause, the Court will look at whether the law has a secular purpose; whether the law inhibits or endorses religion; and whether excessive governmental entanglement with religion results. I will argue that although as a whole the primary purpose is not to advance religion the section which exempts churches does just that. The State will argue that this statute's primary purpose is economic in nature and does not advance or inhibit religion, but merely allows the government to remain neutral with respect to religion.

Takings Clause violation – I will argue that this law amounts to a taking of the property of the street vendors in violation of the Takings Clause which requires that takings must be for

public use and cannot occur without just compensation. I will argue that this regulation denies street vendors of all economic uses of their property. The State will argue that a regulation or statute can only amount to a taking where the statute leaves property owners with absolutely no economically viable use of their property. This statute merely restricts the use of property, thus cannot be considered a taking. Street vendors have many other opportunities to make economic use of their property.

Equal Protection - I will argue that the statute's delineation between street vendors and inside vendors is irrational and thus is in violation of the outside vendors equal protection rights. The State will argue that distinguishing between inside and outside vendors must only meet a rational basis test, as opposed to strict scrutiny. Here, however, the state need only show that the statute is rationally related to a legitimate government interest. Although I will argue there is no rational basis, and that money was the root of this law, under the rational basis test the State will be able to come up with a legitimate interest – such as keeping the sidewalks clear.

Burden upon interstate commerce – I will argue that a restriction on street vendors, in the aggregate, necessarily burdens interstate commerce. This is because the lost business of the vendors impacts many interstate businesses – food producers, manufacturers of the carts, etc. The State will argue, and probably successfully, that this law does not unduly burden any interstate commerce, it merely restricts some use of specific sidewalks by the vendors.

Cruel and Unusual Punishment – I will argue that the fine of $50,000 or 6 months in jail is excessive in relation to the violation. In addition I will argue that having their carts confiscated is certainly excessive (and not even part of the statute). The State will argue that the punishment is not excessive and is meant to deter violators.

Boards' Analysis Part F - QUESTION I

The answer should first address who has standing to challenge the ordinance. In determining whether a particular litigant has standing to challenge an action, it must be shown that he or she has "an actual, real and justiciable interest susceptible of protection through litigation." *Mayor and City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 402 (1991). It is clear that two of the outside vendors have been directly impacted by the new ordinance, and the following actions can be brought on their behalf.

The vendors may be able to attack the law as violative of the equal protection guarantees of the 14th Amendment, arguing that there is no basis to support the distinction between the inside vendors and themselves. The State will counter that there is no suspect classification at issue and the rational basis standard of review should apply. Under this standard, the State will argue that the law must be upheld since it is reasonably related to the valid police power goal of relieving congestion in the public rights-of-way.

The vendors may also argue that the law is in violation of the Establishment Clause of the First Amendment, made applicable to the states via the Fourteenth Amendment, because it excludes

religious organizations from its purview and therefore promotes religion. Such challenges are generally analyzed by applying the test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, the ordinance must (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not foster excessive governmental entanglement with religion. The State will, of course, counter by arguing that its purpose is the lessening of congestion of its walkways (thus secular) and the law excludes all nonprofits and therefore does not promote or inhibit religion.

The vendors could challenge the penalty as being excessive and unreasonable under the Eighth Amendment since the fine is quite high for a few hotdog sales, as is the possibility of imprisonment. The State will assert that the penalty is the minimum necessary to ensure compliance.

The vendors could also argue that the ordinance violates their substantive and procedural due process rights, guaranteed by the Fourteenth Amendment, for several reasons. First, they were subjected to a loss of property without any hearing. Second, the ordinance is not reasonable – i.e., so vague and overbroad that the vendors have no true notice of what constitutes a violation or whether they fall into the class of possible violators. The State will argue that the law clearly prevents outside vending on Sundays or other game days by

non-philanthropic/charitable/religious organizations and a criminal trial will he held despite the failure of the law to expressly so state.

The vendors may, finally, argue that the ordinance results in an illegal taking of their property in violation of the Fifth Amendment. The State may counter that the vendors' property is tantamount to contraband under the circumstances, they were given reasonable notice not to sell their wares and they should have opted to follow the law.

July 1999 Maryland Bar Exam Constitutional Law Essay Question

QUESTION I

(20 Points - 25 Minutes)

The constitution of the state of Westover provides that its courts may exercise jurisdiction over all "persons and causes of action to the extent permitted by the Constitution of the United States of America." The Westover Courts and Judicial Proceedings Article provides, in pertinent part:

Service of Process - Small Claims. In addition to other methods prescribed by law, process may be served in a civil action for less than $2,500 by mailing the summons, together with an exact photocopy of the complaint and all pleadings or papers filed therewith, to each defendant at his or her last known address. Such mailing may be by first class United States mail, postage prepaid. The plaintiff shall file a certificate with the court of such filing and service shall be effective as of seven calendar days after the date of mailing.

Appliance Shack, Inc. is a retail chain with several stores in Maryland. In 1998, it relocated its corporate headquarters from Maryland to Westover. In June of that year, it filed a civil action in small claims court in Westover against John Smith, a retired teacher who resides in Carroll County, Maryland on Smith's overdue account for merchandise purchased at its Carroll County store. Service of process was accomplished by first class mail in accordance with the above-quoted rule; Smith did not answer and a judgment was entered against him by default in the amount of $1,500. In compliance with applicable law, Appliance Shack has now filed an action to enroll the judgment against Smith in the court records of Carroll County.

Smith claims that he never received notice of the action filed by Appliance Shack in Westover and does not owe the money. He also says that he has never been to Westover in his life. He has retained you, an attorney practicing in Maryland, to prevent the judgment from being enrolled in the court records for Carroll County.

What arguments would you advance on Smith's behalf? How is the court likely to rule? Explain your answer thoroughly.

REPRESENTATIVE ANSWER NO. 1

The Constitution places a limit on personal jurisdiction so that it does not impede substantial justice and notices of fair play. This presents a two part test 1) reasonableness 2) Notice of the Contact. Westover would acquire personal jurisdiction over Smith if this suit meets that test. Beginning with the notice of the contact, Smith has never been to Westover, the transaction was made in Maryland, the Appliance Shack was headquartered in Maryland until around the time of the suit (it is unclear where they were located at the origin of the lease action). This is almost no contact with Westover, except indirectly.

Second, the reasonableness of Westover claiming jurisdiction. It is unclear how close Westover is to Maryland but that could influence the determination, also the claim arose in Maryland so Maryland law would apply, giving Westover little interest in the proceeding.

Lastly, the travel combined with the little amount in question makes it fairly unreasonable for Westover to claim jurisdiction under the Constitutional standard. A court would likely rule that Westover does not have personal jurisdiction over Smith.

Additionally, I would argue improper service of process. In Maryland, service must be in person or by certified mail. They do allow service outside the jurisdiction based on the laws of another jurisdiction if they are reasonably calculated to give actual notice. While in this case Smith is inside MD the service by standard mail [will] likely be insufficient and would most likely have to be done in accordance with Maryland law.

While the full faith and credit calls for Maryland to respect the decisions of other state Courts, this only applies to Courts with proper jurisdiction and properly adjudicated. The Maryland Court would likely rule in favor of Smith and find no personal jurisdiction in Westover and insufficient process in Maryland.

REPRESENTATIVE ANSWER NO. 2

I would argue that the judgment must not be enrolled here because it was reached in violation of the Federal Constitution's Due Process requirements. The Constitution requires that in order to exercise personal jurisdiction over a defendant without his consent, a two part test must be satisfied. The first part of the test deals with the nature of the defendant's contacts with the forum state. In this case, S. has never been to Westover. He does not reside there, work there, or do business with Westover residents. Therefore, S. has NO contacts with the state of Westover. Furthermore, he has never "purposefully availed" himself of Westover or its laws. Therefore, S. does not have sufficient contacts with Westover to satisfy the Constitutional due process requirements.

The second prong of the test for whether Westover may exercise jurisdiction is whether doing so would be "reasonable." This involves a balancing test in which the state's interest in the transaction and the burden of the defendant are weighed. Here, the state has almost no interest in the transaction alleged. This is because the transaction occurred in Maryland and Maryland law (NOT WESTOVER LAW) should apply, so the forum state has no interest.

In contrast, the burden on S. of defending this claim in the forum state is high. He has never even been there. Therefore, Westover may not exercise personal jurisdiction. In addition, the statute allowing service on S. does not ensure in any way that the Constitutional standards are met. Therefore, service and process were insufficient because they were achieved under an unconstitutional statute.

Appliance shack will argue that the full faith and credit clause and the constitution's requirements of comity between the states requires MD to recognize the Westover judgment. This agreement will fail. These principles do not require MD to recognize a judgment as constitutionally infirm as the one against Mr. Smith.

Examiner's Analysis PART F- QUESTION I

Smith's case raises a number of constitutional issues. First, although the Full Faith and Credit Clause of the Constitution requires states to honor judgments issued by the courts of another state, this principle does not prevent Maryland courts from examining the validity of the underlying judgment and, if it is not valid, refusing to enforce the foreign judgment. *See, e.g., Miserando v. Resort Properties*, 345 Md. 43, 691 A.2d 208, 1997.

As to the merits of Smith's case, he should first argue that he had insufficient contacts with Westover to warrant that state's exercising jurisdiction over him at all. He resides in Maryland, is retired and thus has no occupation and claims never to have been in Westover in his life. More importantly, the contact which is the basis of the action was not made in Westover but Maryland; Westover's role in this action appears to be quite fortuitous and is based solely upon the fact that Appliance Shack has moved its corporate headquarters to that state. In a long series of cases, the Supreme Court has made it clear that there must be at least "minimum contacts" between the forum state and the defendant. "Due process requires only that . . . [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "The quality and quantity of contacts required to support the exercise of personal jurisdiction" depend upon the facts of each particular case. *Camelback Ski Corp. v. Behning*, 312 Md. 330, 338, 539 A.2d 1107 (1988), *cert. denied*, 488 U.S. 849, 102 L. Ed. 2d 103, 109 S. Ct. 130 (1988).

Ordinarily, cases involve either "general jurisdiction" where the cause of action is unrelated to the defendant's contact with the forum state, or "specific jurisdiction" where the cause of action arises out of the defendant's contacts with the forum state. *Id*. Generally speaking, when the cause of action does not arise out of, or is not directly related to, the conduct of the defendant within the forum, contacts reflecting continuous or systematic . . . conduct will be required to sustain jurisdiction. On the other hand, when the cause of action arises out of the contacts that the defendant had with the forum, it may be entirely fair to permit the exercise of jurisdiction as to that claim. *Camelback Ski Corp. v. Behning*, 312 Md. at 338-39.

This is a case of general jurisdiction and Smith does not have the regular contacts with Westover necessary to establish jurisdiction.

A second argument is that the notice afforded of the Westover litigation was inadequate. What steps are adequate to provide notice depends upon a consideration of several factors:

To determine whether notice in a particular case is constitutionally sufficient, the court "must balance the interests of the state or the giver of notice against the individual interest sought to be protected by the fourteenth amendment." At a minimum, the notice must be "reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections."

Among the multiple factors to be considered in determining what process is due in a given situation is the nature of the action being brought.

What is a sufficient method of notification depends upon the nature of the action and the circumstances. The interests to be considered are, on the one hand, those of the state and of the plaintiff in bringing the issues involved to a final settlement and, on the other hand, those of the defendant in being afforded an opportunity to defend. The practicalities of the situation must be considered. A state is not precluded from exercising such judicial jurisdiction as it may possess by the fact that under the circumstances it is impossible to make certain that notice will reach the defendant or because the only sure way of giving notice would be so burdensome and expensive as to be impracticable. *Miserando v. Resort Properties*, *supra,* 345 Md. 53, 54. [Citations omitted.]

Here, the action is for a small amount of money but, on the other hand, it is clearly established in most states and under most circumstances that actual service is the preferred method of effecting service. While service first class mail may be adequate under certain circumstances, it does not generally offer a sufficiently "high degree of actual notice." *Miserando v. Resort Properties*, 345 Md. at 65.

(Note: the Court of Appeals split 4 - 3 on this issue in the *Miserandio* case so I really don't care how the examinees come out on this issue.)

February 1999 Maryland Bar Exam Constitutional Law Essay Question

PART F

QUESTION NO. I

(20 Points - 25 Minutes)

Baltimore County, Maryland, has experienced an increase in private recycling facilities. As a result, the use of its publicly owned recycling facility has declined. The County Council is concerned that if this trend continues, its revenues will decrease and it will have to close its facility and default on the large loan used to construct it. The County Council, therefore, enacted the following law to ensure that the County facility would be used:

All recyclable materials generated within the territorial limits of Baltimore County are to be transported and delivered to the Baltimore County Recycling Facility. It shall be unlawful for any person to remove, transport and/or dispose of recyclable materials generated within the territorial limits of the County to any other recycling facility. Any recyclable removed, transported and/or disposed of in violation of the law shall be seized and become the property of the County.

Recycling R Us, a private company currently operating a recycling facility in the County, and Use Again, a private Virginia-based recycling company interested in relocating to Baltimore County and processing recyclables generated in the County, are opposed to the law. Their representatives come to you to see if there are any legal challenges you can mount on their behalf.

What would you advise each, and why? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

I would advise Use Again that it doesn't have standing to challenge the Ordinance. To have standing, a plaintiff must have an injury in fact. This injury cannot be speculative or prospective. Although Use Again may indeed want to enter the market for Baltimore County recyclables, it has not done so yet - so it has suffered no injury. Because it has no injury in fact, Use Again has no standing to challenge the law.

I would advise Recycling R Us that it does have standing to challenge the ordinance because it will be injured by its application. Recycling R Us has at least three good arguments:

1. The statute attempts to privatize an industry that has been open to the free market. This is in direct violation of the Commerce Clause unless it is necessary to achieve a compelling governmental interest. The Commerce Clause states that only Congress can regulate commerce between the states. In this case, the regulation would prevent recyclable material from being transferred to both in-state and out-of-state recycling facilities. Therefore, the Commerce Clause applies. The court will apply strict scrutiny to determine if the statute is valid, and the County will bear the burden of proof. Although default on a loan may be a compelling governmental interest, the statute is not necessary to avoid the default. The Legislature could do any number of things to raise money, such as raising taxes. The statute is therefore an impermissible violation of the Commerce Clause.

2. Recycling R Us could argue that the statute is unconstitutionally vague. It does not define recyclable materials or other terms, such as "dispose" and "remove".

3. The statute results in a taking for which just compensation is required. Recycling R Us will have to show that the statute took away all economically viable use of its business. This may be difficult to prove because other use for their equipment and land may be available and loss of the best or preferred use of the property may not be sufficient for a takings claim under the Fifth and Fourteenth Amendments.

REPRESENTATIVE ANSWER NO. 2

I would advise both Use Again and Recycling R Us to consider bringing suit against the County Council for violating their due process rights and unfair interference with a property right in the revenues they generate from their recycling businesses. First I would argue that the County has enacted legislation which unfairly discriminates between the Baltimore County recycling facility and all other recycling facilities. Although it is a legitimate concern of the County to want to increase its revenues to prevent defaulting on the loan, the law violates their rights to due process because the legislation is too broad and over-reaching. The County could more narrowly tailor its legislation and still protect its interests without unfairly discriminating against private recycling facilities. Thus, the law violates both businesses Fifth and Fourteenth Amendments due process rights by discriminating against them without a substantial and compelling reason.

I would advise Use Again that the law may be attacked as a violation of the Commerce Clause because it arguably regulates the flow of recyclables between the states. However, this may fail because Use Again may not have standing to oppose this law until it actually operates a recycling facility and does business in Baltimore County (and therefore could

show that it will suffer an actual imminent harm). If it wishes to insure its standing, I would tell Use Again to relocate immediately or invest in a plant in Baltimore or contact Baltimore recycles and contract to handle their recyclables, and then claim a violation of the Commerce Clause.

The law violates Recycling R Us' (and Use Again, if standing is shown) due process rights under the Fifth Amendment since the County can seize the recyclables without a hearing and without compensation. The recyclables aren't illegal contraband, therefore, the owners must be compensated.

Finally, the law may be an unconstitutional impairment of Recycling R Us contracts if they have already contracted to handle recyclables within the County.

Maryland Bar Examiners' Analysis Part F - Question I

Generally, the County may enact any law within its police powers (i.e., in furtherance of the public health, safety, morals, convenience or welfare) or within powers delegated by the General Assembly. However, the law may not violate the United States Constitution or other provisions of law.

The law enacted by Baltimore County may indeed violate the Commerce Clause because it denies out-of-state competitors access to the local recycling market and its sole purpose is local economic protectionism See, C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

The law is also subject to challenge as a violation of the Fourteenth Amendment's procedural due process provision because it is so vague and/or overbroad ("recyclable" is an undefined term) as to not place potential violators on notice as to what is being prohibited. See, Winters v. New York, 333 U.S. 507 (1948). The law may be challenged as a violation of the equal protection clause of the Fourteenth Amendment since in-County recyclables, and the County-owned recycling facility, are being favored over other recycling facilities and there is no rational basis for the discrimination. The law may be an impermissible violation of the Eighth Amendment since the penalty is excessive - all seized properties, regardless of value, become the property of the County. For the same reason, it arguably is a taking of property without compensation, and therefore a violation of the Fifth Amendment. Finally, the law may violate Article 1, Section 19 of the United States Constitution since it impairs any contracts which Recycling R Us may have to purchase, sell or otherwise use recyclables generated within the County.

There may be a conflict in representing both entities since Recycling R Us may find the law acceptable if it is amended to allow any in-County facility to handle in-County recyclables while Use Again would prefer that the entire law be invalidated. However, under the facts, Use Again may not have standing to challenge the legality of the law since it does not currently own or operate a facility in the County, nor do business which would be adversely impacted by the law.