ST. MARY'S UNIVERSITY SCHOOL OF LAW

**CONSTITUTIONAL LAW** **FINAL EXAMINATION**
**David Dittfurth** **Spring 1997**

**Instructions**

1. This examination consists of nine (9) pages, including this page, and of five (5) problems. Problem number five consists of ten multiple-choice questions. BEFORE YOU BEGIN, MAKE CERTAIN THAT YOU POSSESS A COMPLETE AND LEGIBLE COPY OF THE EXAM.

2. You will have **3 hours** in which to complete the examination. Each of the problems is assigned a point value (percentage of 100 points), budget your time accordingly. (Don't dawdle with the one-point, multiple-choice questions.)

3. In taking the examination, you are not allowed to use anything other than writing materials. In other words, this is not an open-book examination.

4. In completing the examination you may do any or all of the following:
   a. mark on this copy of the examination,
   b. respond to the problems in any sequence,
   c. use understandable abbreviations, or
   d. leave space after an answer in contemplation of additions.

5. If any part of a problem is ambiguous, explain your confusion and use what you consider to be the most reasonable interpretation under the facts in responding to the problem.

6. When you have completed the examination, place this copy of it inside your bluebook(s) (or attach it to your typed pages) and turn in both.

7. Place your exam number on the front of your bluebooks or typed pages and in the space below. Also, write "Constitutional Law" on the front of your first bluebook or on the first page of your typed answers.

8. By handing in the examination without comment, you are assumed to have sworn to the following:

   I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

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EXAM NUMBER

CONSTITUTIONAL LAW
David Dittfurth

FINAL EXAMINATION
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1. (25 POINTS)

In 1997, Congress passed the Secondary Smoke Effects Prevention Act (the "Act"), which was signed into law by the President. The Act consists solely of the provisions quoted below.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.*
> *Section 1.* **It is hereby declared to be the public policy of the United States to discourage the smoking of tobacco products by members of the public.**
> *Section 2.* **From the effective date of this Act forward, the smoking of tobacco products in any building which houses a public business, as defined in Section 3 herein, shall be unlawful.**
> *Section 3.* **A "public business" is any business which employs in a full-time capacity five or more persons or which invites the public into its premises to purchase products or services.**
> *Section 4.* **Any public business or the owner of the building in which a public business is located, or both, may be fined no more than $500 for the initial violation of Section 2 and no more than $2,500 for each violation thereafter.**

The Cigar And Cognac restaurant chain ("CAC") has brought suit, claiming that this federal statute is unconstitutional. The restaurant chain owns twenty-five restaurants across the country in which cigar smoking is encouraged and which would be defined as "public businesses" under the Act. Indeed, the primary distinguishing characteristic of CAC is that, in addition to food and wine, its restaurants sell expensive cigars for smoking with after-dinner drinks.

In support of the Act, the Attorney General of the United States contends that Congress has power to prohibit such local activities because enclosed smoking is more likely to harm the health of those who must remain in that enclosure throughout the day. Thus, these deleterious effects will be primarily felt by employees -- that is, persons who are not free to escape the secondary effects of smoking. If these workers become ill, they will miss more days of work and their productivity will be thereby diminished. In the aggregate, these negative effects on the health of workers will reduce the flow of goods in interstate commerce. In order to maintain commerce at its present level, Congress removed the health hazard for workers caused by the effects of secondary smoke. The Attorney General conceded, however, that Congress did not make these findings before enacting the statute and that the Act prohibits smoking regardless of whether the tobacco products have moved in interstate commerce.

**MAKE THE BEST CONSTITUTIONAL ARGUMENT TO SUPPORT THE**

## CONCLUSION THAT THE ACT IS INVALID.

**2. (25 POINTS)**

The City of San Antonio passed an ordinance calling for bids from private contractors that wish to collect recyclable items from all citizens residing within the city limits. The ordinance allows the successful contractor to dispose of most recyclables as it wishes but requires the contractor to submit all aluminum cans for initial processing by a privately owned recycling center in San Antonio. The owner of this recycling center had previously entered a contract with the City, requiring San Antonio to transport all recyclable aluminum cans to the center for five years. At the end of this five-year period, the owner has agreed to sell the recycling center to the City at 50% of its market value.

Three interstate recycling companies bid for the right to collect recyclables in San Antonio. The lowest bid was made by American Reusable, Inc. ("ARI"). ARI is headquartered in California and operates its paper and aluminum recycling plants near Los Angeles. After ARI began to collect recyclables from residents of San Antonio, the City noticed that ARI was transporting all recyclables, including the aluminum cans, to its California recycling plants and not to the recycling center in San Antonio. The City threatened to cancel its permission to collect recyclables in San Antonio, and ARI filed suit in federal court seeking an injunction against the City.

In its suit, ARI contends that the San Antonio ordinance is unconstitutional to the extent it requires initial processing of aluminum cans at the local recycling center. The City makes the following defenses: (1) The City contends that it "owns" the recyclables generated by its citizens and, therefore, can control those items to the same extent any participant in the market could. (2) The City also contends that the ordinance does not prevent the ultimate interstate sale and shipment of recycled aluminum, it merely requires that the initial processing be done in the San Antonio plant.

**MAKE THE BEST CONSTITUTIONAL ARGUMENT TO SUPPORT THE CONCLUSION THAT THE CHALLENGED PORTION OF THE ORDINANCE IS INVALID.**

**3. (25 POINTS)**

In 1994, the city council of Phoenix, Arizona, enacted an ordinance which requires an applicant for a non-managerial civil service job with the city to pass an English Competency Test ("ECT"). The test consists of two parts: one part covers English vocabulary, with a 40% emphasis on little-used English words; and the other part covers English grammar rules. An applicant must pass each part with 70% correct answers in order to be eligible for employment by the city. Managerial employees need not take or pass the ECT, but they must have a college degree.

Hispanic-Americans constitute approximately 50% of the City's population while African-Americans constitute 10% and Caucasians constitute 40%. In the three years since the ECT has been given, only 22% of the Hispanic-Americans who have taken the test have passed. Caucasians, on the other hand, enjoy a 66% pass rate on the ECT. African-Americans have a pass rate of 60%. Hispanic Americans make up only 10% of the city's civil service employees and only 5% of those employed in the higher-paying, managerial positions.

Before adopting the ECT in 1994, the city council heard evidence from its own personnel expert that the ECT had little relation to the work required of a civil servant. This expert noted that only normal English-language proficiency was required for these positions. On the other hand, the elaborate vocabulary knowledge and grammar skills required by the ECT were more necessary for those holding managerial positions. In the face of this evidence, the city council adopted the ECT requirement only for non-managerial positions, claiming that important constituents have demanded that their tax money be used to pay only those who have English as their primary language. The council also noted that the ECT requirement would encourage people to become more proficient in English.

A group of unsuccessful Hispanic applicants have sued the city, contending that the ECT requirement is unconstitutional.

**MAKE THE BEST CONSTITUTIONAL ARGUMENT TO SUPPORT THE CONCLUSION THAT THE ECT REQUIREMENT IS INVALID.**

**4. (15 POINTS)**

The Texas Penal Code includes the following provision:

**Section 26.3. Polygamy or Polyandry**

**(a) A person commits a felony if he or she knowingly becomes married to more than one person at the same time.**
**(b) It is not a defense to a charge under subsection (a) that the multiple spouses of an accused knew that the accused was married to more than one person at the same time.**

On the evening of April 3, 1997, Elaine Showers was arrested at her home in Houston where she lived with her husband Carter Stern. Ms. Showers has been charged with violation of Section 26.3 for the crime of polyandry. The Harris County district attorney has evidence to prove that Ms. Showers also resides in San Antonio for part of each year with another husband, Benjamin Tokaski. And she spends several months each year with yet another husband, Allen Barnes, in Dallas.

In her defense, Ms. Showers contends, and her three husbands agree, that each of the three knew of the other husbands and had agreed to the arrangement. Ms. Showers regularly moves among the three cities (Houston, San Antonio, and Dallas) as part of her job as a creator of software for business computer systems. Since she tends to reside in each of the three cities

for approximately equal periods of each year, it is more convenient to have a home and a companion in each. Although Ms. Showers is not religious, she has always been rather traditional. Therefore, she decided to marry the men she lived with, and they each agreed with full knowledge of the arrangement. Ms. Showers has no children, and is physically incapable of giving birth.

The district attorney, who is aghast at this crime, has discovered that polyandry was a crime at common law and was forbidden by each of the original thirteen states. When the Fourteenth Amendment was ratified in 1868, all but five of the 37 States of the Union had laws criminalizing polyandry. Today, approximately half of the States have criminal laws similar to that of Texas, although no prosecution under these laws has occurred in the last decade.

**MAKE THE BEST CONSTITUTIONAL ARGUMENT TO SUPPORT THE CONCLUSION THAT THE STATUTE VIOLATES MS. SHOWERS' RIGHT OF PRIVACY -- OR THAT IT DOES NOT (YOUR CHOICE).**

## 5. (10 POINTS)

[The ten multiple-choice questions listed below are each worth one point, for a total of ten points. INCLUDE YOUR ANSWERS TO EACH OF THESE QUESTIONS IN YOUR BLUEBOOKS OR TYPED PAGES (NOT ON THIS COPY OF THE EXAM). Write the letter for each of the multiple-choice questions and the number of the answer you have chosen.]

A. Horace Greenpatch, the leader of the Michigan Militia, attempted to stir approximately 80 of his followers at a rally with the following exhortations: "Your duty is to stand up for the rights of all citizens against a tyrannical government. That means you must rebel and revolt when the time comes." The crowd roared its approval and shouted "We're with you, Greenpatch." After recording the speech and the crowd's reaction, the only two FBI agents on the scene arrested Greenpatch. He has now been charged with violating a federal criminal law that prohibits the advocacy of violent overthrow of the government. The only evidence against him are the words quoted above and the crowd's reaction. Which of the following is the most appropriate legal conclusion?

1. Greenpatch can be convicted because he was inciting violence and was not discussing abstract ideas.
2. Greenpatch cannot be convicted because his words were not directed to inciting or producing imminent lawless action and they were not likely to incite or produce imminent lawless action.
3. Greenpatch can be convicted because the two FBI agents were unable to control the crowd and were forced to arrest the speaker.
4. Greenpatch can be convicted because he advised the crowd to engage in future violent revolution.
5. Greenpatch can be convicted because he used "fighting words," and such words are not protected by the First Amendment.

B. An executive of the local cable company published the following comments about the local mayor: "The mayor has lost his mind; he is ranting and raving about things which have only happened in his dreams. He is not fit to lead a great city." The mayor then brought a defamation action against the executive. Which of the following is the most appropriate legal conclusion?
1. The mayor will prevail because the comments were specifically addressed to him and were defamatory.
2. The mayor will prevail because the "lost his mind" comment was libel per se.
3. The mayor will lose if he cannot prove that the executive knew that his factual statements were false or published them with reckless disregard for their truth or falsity.
4. The mayor will prevail if he can prove that the executive was merely negligent in making any false and defamatory public comments.
5. The mayor will lose because he cannot prove that the executive's comments presented a clear and present danger of lawless action.

C. The same local cable executive recently authorized the showing of a documentary program which investigated the making of the *Sports Illustrated* swimsuit edition. In this television program, the bathing suits worn by the female models were so small that they appeared to be nude. The mayor happened to be watching on the night this story was shown, and he has now demanded that the local district attorney prosecute the executive for violation of the criminal obscenity law. The district attorney asks you whether this show would fit the constitutional definition of obscenity. Which of the following is the most appropriate legal conclusion?
1. This show was obscene if any of the models appeared completely nude.
2. This show was obscene if any of the models appeared completely nude because this nudity was transmitted on television.
3. Even though the show was obscene, viewers pay for the attachment of cable and this consent immunizes the cable company, and its executive, from prosecution.
4. Get a life, mayor; nudity alone cannot be obscene.
5. The prosecution will fail because obscenity requires both nudity and violence.

D. In the Communications Decency Act, Congress included a special provision which allows direct appeal to the Supreme Court of the United States from a federal district court's decision holding a part of the Act unconstitutional. Another federal statute grants the Supreme Court jurisdiction of an appeal from a court of appeals. A First Amendment challenge was made to the Act, and the challengers prevailed before the federal district court. The case has now been docketed in and argued before (but not decided by) the Supreme Court. You are the legislative assistant to a local member of Congress. She fears that the Supreme Court will hold that the Act violates the Freedom of Speech Clause and thereby establish a very dangerous precedent. She asks you what Congress can do to prevent such a Supreme Court precedent. Which of the following is the most appropriate legal conclusion?
1. Since the Supreme Court has not decided the case, Congress can repeal the provision in the Communications Decency Act under which the Court took appellate jurisdiction, thereby

requiring it to dismiss the case.
2. Congress is the final arbiter of statutory validity and can reenact the same statutory provision if the Court holds the original unconstitutional.
3. The Supreme Court does not have the power to invalidate a federal statute which has been passed by both Houses of Congress and signed by the President.
4. Only the highest court of a State can apply the Constitution to invalidate a federal statute.
5. Congress clearly has commerce power to enact such a statute, and, therefore, it cannot be unconstitutional.

E. The State of Texas provides for welfare benefits of various sorts to persons whose income falls below the poverty line. Texas also has a statute which prohibits paying these benefits to a person who is otherwise eligible unless he or she has resided in the State for at least one year. A group of new indigent residents has challenged the constitutionality of the one-year duration requirement. Which of the following is the most appropriate legal conclusion?
1. Texas can choose to pay its limited welfare funds to those who are long-time residents because they are more likely to have contributed to the State.
2. The compelling interest test applies because Texas is discriminating against the poor, but the need to prevent fraud will be a sufficient compelling interest.
3. The Texas statute is invalid because it infringes on the fundamental constitutional right to receive welfare benefits.
4. The Texas statute is valid because the State need only have a rational basis when it discriminates against new residents.
5. The Texas statute is invalid because it violates the constitutional right to migrate from one State to another.

F. A State has established a system of public-school financing which requires local school districts to depend solely on property taxes assessed against the property located in that district. That system has been challenged as being in violation of the U.S. Constitution. Which of the following is the most appropriate legal conclusion?
1. The State's system violates the Due Process Clause because children have a fundamental constitutional right to the equal provision of free public education.
2. The State's system does not violate either the Due Process Clause or the Equal Protection Clause.
3. The State's system violates the Equal Protection Clause.
4. The State's system violates the Freedom of Speech Clause.
5. The State's system violates the Privileges and Immunities Clause of the Fourteenth Amendment.

G. The City of San Antonio has asked you, as a legal expert, to determine whether the City can adopt an affirmative action plan for public contracting which encourages the inclusion of minority owned businesses. Which of the following is the most appropriate legal conclusion?

1. A narrowly tailored plan that remedies the identified effects of past racial discrimination in San Antonio can survive an Equal Protection challenge.
2. The Supreme Court has held that every affirmative action program is unconstitutional.
3. San Antonio can justify an affirmative action plan simply by citing the racial discrimination that has pervaded the contracting industry throughout the United States.
4. A plan that requires general contractors with the city to grant 30% of their subcontracts to minority-owned businesses has the best chance to survive a constitutional challenge.
5. Any plan that expressly discriminates because of race but in favor of a minority race will be upheld under the rational basis test.

H. The legislature of Texas has decided to continue the property tax system which provides most of the tax money in the State. But, as a compromise, it passed a statute which prohibits voting in state and local elections by anyone who has not paid property taxes within the year immediately preceding the election. Several pesky civil rights organizations have filed suit challenging the constitutionality of this statute. Which of the following is the most appropriate legal conclusion?
1. The statute is unconstitutional because the Constitution expressly protects the right of anyone over 18 to vote in state elections.
2. The statute is constitutional because those who have not paid property taxes recently are not primarily interested in statewide elections.
3. The statute is constitutional because the Constitution does not provide any protection for voting in state elections.
4. The statute is constitutional because, since the State can deny the franchise to everyone, it can arbitrarily deny voting rights to any segment of the population.
5. This statute is unconstitutional because it infringes on the fundamental right to participate in state elections on an equal basis with other qualified voters.

I. The Texas legislature is considering a bill which would deny a free public education to the children of foreign citizens who have been given permission by the federal government to reside and seek citizenship in the United States. The bill would require that, until they obtain citizenship, the parents of these children must pay an amount in tuition that reflects the cost of education. This amount has been set for the 1997-98 school year at $3,500. Legal immigrants have contended before the legislature that the bill would completely deny an education to many children because their parents cannot afford the tuition. Your local representative asks your legal advice on this question. Which of the following is the most appropriate legal conclusion?
1. This bill would be unconstitutional because it completely denies education to children of poor immigrants and because it discriminates against legally resident aliens.
2. The Due Process Clause protects everyone's fundamental right to a free public education, and this bill would violate that right.
3. Since no fundamental right to education exists, the State can deny educational services to anyone.

4. The bill would be constitutional because State governments have predominant authority over immigration.
5. The bill would be constitutional because only the rational basis test applies to State discriminations against legally resident aliens.

J. Congress passed a statute which required each State to assume "ownership" and to dispose of all low-level radioactive waste generated in that State by private companies. The statute sought to force States to create local waste disposal sites or to enter regional compacts with other States for this purpose. Once State officials began regulating in a manner likely to solve this problem, interstate shipment of such wastes would be diminished. This federal statute has been challenged as unconstitutional. Which of the following is the most appropriate legal conclusion?

1. Congress can conscript State governments to act in any manner as its agents in order to accomplish an end that it could achieve directly.
2. Congress can constitutionally enact this statute pursuant to its Fourteenth Amendment power.
3. Congress cannot constitutionally force State governments to carry out federal policy in this manner because to do so violates the Tenth Amendment.
4. Congress cannot constitutionally regulate the interstate transportation of low-level radioactive waste because waste is not a commercial product.
5. The Privileges and Immunities Clause of the Fourteenth Amendment authorizes this statute.

END

# CONSTITUTIONAL LAW
# DAVID DITTFURTH
# Section C
# Spring, 1997

## *EXAM MODEL ANSWERS*

[The text has been taken from a student's responses, with some additions.]

1. The Commerce Clause in the U.S. Constitution affords Congress power to regulate commerce among the several states. Throughout history, the U.S. Supreme Court has vacillated, sometimes giving Congress more deference and sometimes protecting, instead, the interests of state or individual litigants.

The modern era of Commerce Clause interpretation by the Court began with *Jones & Laughlin*. In this case the Court began giving greater deference to Congress in its decision to regulate local or intrastate activities which affect commerce. Traditionally, Congress has encountered less of a problem in regulating the channels or instrumentalities of interstate commerce ("IC"). These types of regulation have a direct effect on IC and more easily appear to be authorized directly by the Commerce Clause. However, Congress historically encountered more difficulty when it regulated activities that were not directly in IC. Regulation of intrastate activities have often been subject to a more examining eye by the Supreme Court.

In *Jones*, the Court held that even though the Statute regulated activities intrastate in nature, the fact that those activities will have a substantial economic effect on IC allowed Congress to regulate through its Commerce Clause power. Congress was also allowed to regulate local activities that, as a class though not individually, would substantially affect interstate Commerce. In *Wickard*, the Court held that even though one farmer breaking the law by growing more wheat than his federal quota may not have a substantial effect on IC, a substantial effect on IC by the threat of quota-violation by the class of all farmers. Through this use of the aggregate effect, Congress was allowed to regulate purely intrastate activities when the individual being prosecuted could not alone have a substantial effect on IC.

As this approach was developed, it seemed that Congress would be able to touch any intrastate activity with its regulations. The danger in this result arose from the incursion Congress could make on local powers intended by the Constitution to be beyond federal authority and therefore reserved for the States. But, the Court's automatic deference to Congress' assertion of its commerce power ended with the Court's holding in *Lopez*. *Lopez* effectively established a limit to Congress' commerce power that arose from the Commerce Clause itself -- an internal constitutional limit on that power. In the

*Lopez* decision, the Court concluded that a statute criminalizing the possession of handguns in school zones did not have a close & substantial relation to IC and, therefore, held the Statute invalid.

In our case, the Act prohibits smoking inside any public businesses. The Act obviously does not deal with a channel or instrumentality of IC, so the court will have to look closely at these intrastate activities to determine whether they have a close & substantial effect on IC. The Attorney General has contended on Congress' behalf that it has power to prohibit smoking in public businesses because such smoking affects IC. In *Lopez*, the Court found as significant the non-commercial nature of the activity regulated by Congress -- possessing guns in a school zone. That non-commercial nature made more difficult the conclusion that such activity substantially affected IC. In effect, the Court was less able to infer a connection between the local activity regulated by Congress under its commerce power when that activity was not even commercial in nature.

This Act teeter-totters on the line and, if described in different ways, could be seen as being either commercial or non-commercial in nature. Although the Act does affect public businesses who, in most cases, will be engaged in selling things, Congress has not attempted to regulate the act of selling. It merely affects the allowance of smoke in the building housing a business. Because the Act does not attempt to regulate the actual selling of a product, it should also be seen as a regulation of non-commercial local activity that is purely intrastate. This characterization should be prompt a court to be more skeptical of any alleged connection between the local activity and IC, at least after the Court's decision in *Lopez*. Just as the Court in *Lopez* invalidated the Gun-Free School Zones Act because possessing guns in school zones does not have a close & substantial effect on IC, so should this court invalidate the Act for the same reason.

Congress argues that the Act does have an affect on IC through the possible illness of employees who would otherwise be forced to remain in a smoke-filled atmosphere. Congress now reasons that these employees would become less productive because of smoke-caused illnesses and that this diminished productivity would necessarily affect IC. Traditionally, a State has assumed an exclusive ability to exercise the police power and thus to protect the welfare of the public residing within its territory. Although Congress' justification for this Act is valid as a matter of policy, it has intruded into an area which the framers of the Constitution most assuredly thought was reserved for State regulation. Furthermore, since the smoking in a building is inherently non-commercial, no practical justification appears to allow Congress wide ranging powers in the area. Such a reservation is explicitly recognized in the 10th Amendment, which thereby provides an additional source for limiting the commerce Clause power of Congress.

This Act does not have a close & substantial effect on interstate commerce. If Congress were allowed to regulate any local activity so long as it could plausibly link that activity to the diminished productivity of workers, the commerce power would be virtually limitless. For example, to prevent smoke-related illnesses by workers, Congress

has attempted to outlaw smoking in all public buildings. If the Court is willing to allow such an attenuated justification, Congress would automatically connect its local regulations to the health of workers. A federal regulation of no-fault divorce could be justified by a logic no more strained than that which would have justified this Act. In short, Congress would have no enforceable limitation on what would have become a general police power.

Congress may try to argue that the aggregate effect of the smoking will substantially affect IC because the health effects of secondary smoke would add up. However, the aggregation theory applies in *Wickard* but not here. In *Wickard* there was a clearly defined goal of raising wheat prices. Congress concluded that, in order to maintain a sufficient price for wheat sold in interstate commerce, it must reduce the supply with quotas imposed on wheat producers. Farmers growing more than their quota immediately hindered that interstate purpose first by reducing their own demand for wheat. And, the necessary conclusion was that once Congress succeeded in raising that interstate price, the illegal wheat would flood into the market thereby reducing the price. effort to achieve that goal. Any violator necessarily affected Congress' effort first by. That regulation had a clear economic link to an interstate activity, and the aggregate theory acted only to show that this clear and direct connection between the local activity and IC would be substantial as well.

Here, Congress is claiming that the aggregate affects of health on workers will reduce their productivity which, in turn, will reduce the quantity of goods available for sale in interstate commerce. But, the clear and direct connection between smoking and the reduction of interstate goods does not exist in this case, as it did in *Wickard.* Therefore, aggregating a nonexistent connection adds nothing to the government's case for extending the commerce power into this local area.

2. This question concerns a Dormant Commerce Clause ("DCC") problem. The DCC concept arises from the negative implications (for states exercising power over interstate commerce) of the grant to Congress of the power to regulate interstate commerce. Therefore, even when Congress has failed to exercise its commerce power in regard to particular activity or area -- thereby being dormant -- the Court has assumed that the existence alone of this federal power restricts the power of the States to regulate IC. When a State attempts to do so or does so as a consequence of a local regulation, the Court looks at the statute first to determine whether it discriminates against IC. The Court takes this unusual step because of the importance of the Commerce Clause and because it seeks to prevent the economic balkanization of the states. In other words, if one state is allowed to make laws burdening IC by placing the costs of regulation on outsiders while benefiting its own resident, other states would seek to gain the same benefits for its residents and to retaliate against the first state. In this way, permitting discrimination by the first state would cause proliferation of that type of behavior in other

states. Such rampant protectionism would fracture the national economy with internal trade barriers.

In this case, the city is attempting to invoke the market participant doctrine (MPD). The MPD is an exception to DCC analysis. This exception is based on the notion that if a state is participating in a particular market (investing money and taking the same risks as a private business) then it is allowed to exercise the same powers as any other private business by, for example, selling to particular groups (local residents).

San Antonio (SA) is not a market participant in this case. Although it claims that it owns the cans, it does not. The cans are owned by the residents from whom they are gathered. If any investment was necessary to produce the cans, it was made by the residents who purchased the canned products in the first place. In *Wunnicke*, the state of Alaska owned wooded land and was selling the trees. There, the state owned the product, at least in the sense of having title. In *Reeves* the state built a cement manufacturing plant and did so by investing state tax money. Here, the city has no title of any sort and has not risked tax money in any way to create the aluminum cans.

Even if the city were deemed to own the aluminum, it could not, even as a market participant, regulate a market other than the one in which they are a participant. In *Wunnicke*, the state tried to regulate "downstream" by placing regulations that affected actions by the buyer after he had purchased the logs. That type of regulation was not allowed because it was not within the timber selling market in which the state was a participant. Here, if SA is participant in some market, it would not enjoy immunity from DCC analysis for its regulations beyond that market, such as the ordinance which affects the company's actions after it collects (takes title to) the aluminum cans.

Once the logs were cut down and sold in *Wunnicke*, that severed the participation by the state; they no longer had the right to control the buyer after-the-fact. Like *Wunnicke*, once the cans are picked up, the seller-buyer relationship between SA and the company (if it ever existed), and SA no longer has the right to regulate the contractor after the fact with a law that discriminates against IC.

Since there is no preemptive statute by Congress, the city has not violated the Supremacy Clause. However, the ordinance discriminates against out-of-state processors. This is similar in *Carbone*. In *Carbone*, the city stated that all trash must pass through one privately owned processing plant. This ordinance was held invalid by the Court because it discriminated against out-of-state processors; it was, therefore, subject to the strict scrutiny test that the Court applies to state laws that discriminate against IC. As in *Carbone*, this law discriminates against those, including the contracting company, who wish to compete for the ability to recycle the cans but are prevented from doing so by the ordinance.

The strict scrutiny test requires the city to show that it has a legitimate interest that is being achieved by the ordinance. SA must also show that no less discriminatory alternative exists by which it could as effectively achieve its goal. From the facts, it is

clear that the city of SA does not have a legitimate interest; it is forcing delivery of aluminum cans to the local processing plant as a method of financing its subsequent purchase of that plant. In *Carbone*, the Court held that forcing all trash to go through a processing center, thereby discriminating against out-of-state competitors, was merely an ingenious method by which the city financed its purchase of the center. Even if that was a compelling local purpose, an obvious less discriminatory alternative exists. SA can gather money for the financing through taxes or subsidize the recycling plant with tax exemptions. Neither of these alternatives creates the discriminatory effect of the existing ordinance.

The SA ordinance is the type of discrimination which would excite other local governments to retaliate against or to copy SA. In this manner, allowing the ordinance would cause proliferation and bring about economic balkanization because recycling plants would soon find that they could only compete for aluminum can produced in their communities and not from all parts of the nation.

Although subsidizing local plants and not those out-of-state may seem to be discriminating, it is not the sort of economic protectionism which would tend to fracture the national economy. First, other states can do the same thing without placing a heavy burden on IC. In fact, if all states subsidized their centers, it would actually help rather than hinder IC. Second, subsidization with tax money carries its own brake or political check. By using taxes, SA's city council would have to answer to the voters because they, not interstate parties, are paying the costs for any local benefit. This political check provides a safeguard that discriminatory ordinances do not. If SA discriminates against out-of-state centers, these centers (owners) have no vote or say in what the council does. They are not represented as taxpayers or voters in SA or TX. A discriminatory ordinance is one which places all of the costs on outsiders and reserves the benefits for local residents. Thus, local voters have no reason to object to such ordinances, and those hurt by them have no vote. This, in addition to retaliation, is why discriminatory local laws tend to proliferate.

3. This question concerns the Equal Protection Clause (EPC) of the 14th Amendment. The EPC was designed primarily to protect newly-freed slaves from discriminatory laws. It requires government to treat similarly those who are similarly situated. The Supreme Court has established a three-tier structure to examine laws that are allegedly discriminatory. The top two tiers are for suspect or quasi-suspect classifications, and the highest tier also applies to discriminations involving fundamental constitutional rights. Classifications made on these levels are suspicious and are presumed to be based on bias or prejudice and are therefore presumed to be unconstitutional. In justifying such classifications, the government is forced to run uphill trying to overcome this presumption that its classification is constitutional.

The suspect classifications of race, national origin, and alienage (in state action)

are subject to scrutiny on the top tier. Classifications of these types are particularly dangerous because they are based on immutable characteristics which rarely have anything to do with a person's qualifications. The people subject to these classifications cannot change their status (with the exception of Alienage). Also, these classifications are made against groups that are often politically powerless and have historically been discriminated against.

Suspect classifications, such as race, are analyzed under the strictest scrutiny. The strict scrutiny test has two prong and both must be met: (1) government must have a COMPELLING interest, and (2) the means used must be NECESSARY to achieve that compelling interest. "Necessary" means that no less discriminatory means were available to achieve that compelling interest.

If the law is not, on its face, racially discriminatory, the challenger must prove purposeful discrimination. If the law is discriminatory on its face, the presumption of invalidity that is inherent in the application of strict scrutiny is automatically applied because that law was obviously intended to be a discrimination on the basis of race. However, if the law is not discriminatory on its face, the challenger initially bears the burden of proving purposeful discrimination. Once that is proven, the law is subject to scrutiny and the presumption of invalidity is applied. (*Washington v. Davis*)

In this case, the ordinance by requiring a qualifying test does not turn on race. Since the law is racially neutral on its face, we must prove purposeful discrimination on the part of Phoenix. We, as the challenger bear this burden, and if we cannot prove purposeful racial discrimination the court will apply rational basis review. With rational basis review, a presumption of validity is applied, and the government need only show that it was furthering a legitimate interest. Under such deferential review, the government is likely to win.

To prove purposeful discrimination, we must show that race or national origin was *a* motivating factor for the city's requirement of the test. If we can prove this, then the government must rebut the presumption of purposeful discrimination by showing that the test would have been used even in the absence of its discriminatory effect.

To prove that race was a motivating factor, we can point out the disproportionate impact of failure on the Hispanic applicants. Where 66% of whites and 60% of African-Americans pass, only 22% of Hispanics pass this test. Just like in *Washington, a* disproportionate impact of test on one class is evidence that race was a motivating factor. While the impact is essential evidence, the *Washington* Court held that impact alone, is not enough to prove purposeful discrimination.

We wish to argue to the Court that we are attempting to establish a pattern of discrimination by the city of Phoenix against Hispanics. If we can frame the issue in these terms, rather than having the court look only at this test requirement, we can include other evidence beside the passage rate of Hispanics to establish purposeful discrimination. The pattern of discrimination is proved by evidence such as the fact that

Hispanics only make up 10% of all civil service employees while they populate approximately 50% of the city. In addition, Hispanics only hold 5% of managerial positions. These facts make more likely the court's conclusion that a historical pattern of discrimination against Hispanics in Phoenix exists.

Furthermore, the expert testimony which alerted the council that the positions tested require only normal English-language proficiency also shows that the objective alleged by the city is illusory. The test requires elaborate vocabulary knowledge and grammar skills. These requirements go above and beyond the skills necessary to preserve proficiency in English. If the city urges that the test is necessary to obtain a high level of English-proficiency for jobs that require only a low-level of proficiency, it becomes more obvious that its actual objective was discrimination, or that at least *a* motive was discrimination.

The city will try to argue that evidence showing a broad pattern of discrimination by the city is not relevant to the issue of whether this test was the result of purposeful discrimination. However, if the Court does choose to go down this path, the state still loses. Because the test cannot be validated -- it does not serve the purpose it was supposed to achieve -- the Court will search further for the true intent of the test. If low level jobs require minimum-English proficiency, the city use a more lenient test. This test, on the other hand, requires extensive vocabulary and grammar knowledge. This skill level is not required for those in lower-level positions. Therefore, the test does not serve the alleged purpose. And if it does not serve the purpose, we urge the Court to recognize what is the real purpose -- racial discrimination. Consequently, the city will be unable to rebut the finding that discrimination was a motivating factor because the city cannot prove that, absent the discrimination, the test would still be applied. The city could easily implement a more lenient test to actually serve the purpose it claims to serve.

In addition, the city served the interest of important constituents who believed that their tax money should be paid only to those whose primary language was English. This is not a compelling interest. In *Cleburne*, the city argued that the elderly's fears of the mentally retarded residents in a group home was compelling and, therefore, allowed it to exclude these group homes from residential areas. However, the Court held that societal racism/animosity does not justify government's discrimination, and in *Cleburne* did not even provide the legitimate interest required for rational basis (w/bite) review used. If societal animosity towards groups is not a legitimate interest, then it is illogical to conclude that it can be a compelling interest.

In addition, the city may not prescribe orthodoxy by discrimination. Although the city's interest in encouraging unity of language is interesting, it is nevertheless not compelling. In fact, the Court rarely finds an interest compelling enough to warrant invidious discrimination.

In *Washington*, requiring a test that had discriminatory effects was valid because other evidence showed that discrimination was not a motivating factor. In that case, the

city had employed recruiting programs to hire black officers. The city also could prove that its test, which tested written and oral skills required during job duty, was valid because of its relation to essential job skills. It required that level of knowledge to properly perform the job. Unlike *Washington,* the Phoenix test requires much more than is necessary, and the city has no evidence to rebut the presumption of discriminatory motive. Having proved purposeful discrimination, the city must satisfy the compelling interest test.

Now that we have jumped the first hurdle, we move on the strict scrutiny test. Because the classification is suspect, a presumption of invalidity is placed on the test, and history has proven it difficult for the government to win in this situation. The compelling interest claimed by the city is constituent discrimination which, as explained above, cannot be a compelling interest. The second prong to the test is not satisfied either, because there are less discriminatory alternatives available to the city. The city could give a test which evaluated an applicant ability to perform competently as a lower-level civil servant, and the city could enhance the English proficiency of its employees by providing classes or other forms of instruction.

Consequently, the test requirement is invalid.

4. This question deals with a substantive due process problem. I will argue that the statute does violate the privacy rights of Ms. Showers.

The right to privacy is a fundamental right of American citizens. This right was established in *Griswold* where a penumbra theory was used. In *Griswold*, a challenger argued that a statute which criminalized the giving of contraception advice and contraceptives to married couples violated due process. The Court held that through the penumbrae of Amendments 1,3,5, & 9, a zone of constitutionally protected privacy has been established. This right to privacy has been held to encompass contraception, marriage, procreation, child-bearing & child-rearing.

Traditionally, the court has protected the privacy of married couples. In *Griswold*, intrusion into the private precincts of married couples prompted the Court to invalidate the statute. Because the thought of invading the sanctity of marriage was repugnant to the Court, the majority invalidated the statute prohibiting contraception. This case is just like *Griswold* because tradition in the broad sense protects the sanctity of marriage rights. The right to have decisional and spatial privacy (*Bowers* dissent) is essential to the right of privacy protected by the Due Process Clause. Because this case is similar to *Griswold* in that government seeks to invade the spatial privacy of married couples and displace their decisional rights in regard to an intimate matter, the polyandry law violates Ms. Shower's right to privacy. She should have the spatial (in her own home/life) and decisional (wishes concerning marriage) liberty as is required by the privacy right.

The state will argue that *Bowers* controls, but *Bowers* is distinguishable. The *Bowers* Court held that because sodomy was traditionally (in the specific sense) outlawed in many states,

the right of consenting adults to engage in sodomy is not protected under the right of privacy. However, in *Romer,* a more recent case, the court held that states may not "pick on" certain groups such as gays solely because of traditional dislike of them by the majority.

Like *Romer,* and unlike *Bowers*, our case is one of traditional dislike. It is clear that, traditionally, polyandry was disfavored. But that fact alone does not give the state the right to infringe on Ms. Shower's right of privacy. One of the Court's most important functions is to protect the constitutional rights of minorities -- those groups often disfavored by the majority -- because without the Court's protection this less powerful type of group would probably have no rights at all.

Consequently, criminalizing an activity historically is not enough evidence to prove that such regulation should be within the state's power. If that were the case, all the state would have to do is criminalize every activity that the majority did not like. Thank goodness for us, that is not the way our system works. If the state infringes upon a right of a citizen, that law is invalid. This Court has extended the right of privacy to include one's wish to be married, and the state cannot infringe that right when multiple marriages are at issue.

[One difficulty for Ms. Showers' position comes from a recognition that she is, in effect, demanding that the state take affirmative action to give her the protection of marital status for each of her "marriages." The state does not criminalize her decision to live with three men; it only criminalizes her formal marriage to all three at the same time. In this sense, the state does not interfere with her spatial or decisional privacy because she is demanding not a private but a public right. The right to marry has been used to strike down laws that prevented the marriage of persons of different races. Since marriage stands as the key societal requirement for one seeking to have a traditional family life, an irrational deprivation of the ability to marry causes serious harm. Ms. Showers has not suffered this harm.]

5. [Multiple Choice]

a. 2
b. 3
c. 4
d. 1
e. 5
f. 2
g. 1
h. 5
i. 1
j. 3