State and Local Government – Fall 2011 Final Exam Sample Question
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Question (64 minutes given)

Metropolis is an incorporated city in the state of Freeland. The Freeland constitution’s “home-rule” provision authorizes incorporated cities to exercise “any power pertaining to matters within its local jurisdiction.”

A group of concerned citizens in Metropolis—“Protect the Babies” (PTB)—has argued for banning male circumcision on public health grounds. The medical communities in both the United States and Freeland are agnostic about circumcision: they no longer recommend the practice for medical reasons but do not recommend against the practice either. Although Freeland has extensive regulations of the practice of medicine, its regulations say nothing specific about circumcision. State law does say that “no city may prohibit a state-licensed doctor from performing any procedure that falls within the professionally recognized scope of that license.” Freeland Code § 50. Many parents in Metropolis, as in the country at large, choose to have their boys circumcised shortly after birth for cultural or religious reasons. Circumcision is a traditional practice in both Islam and Judaism, seen in the latter religion as a “commandment” imposed on all fathers to ensure that their boys are entered into “the covenant” between the Jewish people and its God. In both religions, some practitioners rely on religious officials, rather than medical professionals, to perform circumcisions, usually for a fee. In Judaism, for instance, persons who perform ritual circumcisions are called “mohels.” While many mohels are also doctors, not all are.

Metropolis is a medium-sized city with very small Jewish and Muslim communities. While Christianity is the most popular religion in the community, many residents are unaffiliated with any organized religion. In its campaign to ban circumcision, PTB has argued that circumcision is a harmful practice that can maim males for life, adversely affecting health and sexual function. Although individual members of PTB have made comments to the press that refer to Judaism or Islam, the organization’s official communications have avoided commenting on religion, discussing only the public health benefits of the campaign. In 2010, the PTB succeeds in getting a measure on the local ballot that bans circumcision except in cases of medical emergency (Freeland allows cities to enact ordinances by a majority vote of legal residents). The ban is to be enforced by municipal prosecution with violations meriting fines of up to $10,000 and prison sentences of up to 90 days. The ordinance also provides a private right of action to children henceforth circumcised within Metropolis; such persons may sue their parents or guardians who authorized the circumcision as well as whomever performed it. The 2-year statute of limitations on this newly created private right of action is tolled until a child turns 18 years of age. PTB’s measure passes by a slim majority—51-49—in 2010.
**Part A** (5 points/32 minutes)

Before the measure takes effect, various Jewish and Muslim organizations, as well as the American Civil Liberties Union, discuss legal strategies for blocking implementation of the ordinance. Please describe which strategies might be worthwhile for the groups to pursue based on principles of state-local division of power (avoiding any discussion of federal or state constitutional claims based on the free exercise of religion or the right to control the upbringing of one’s children), and their chances of success.

**Part B** (5 points/32 minutes)

Assume that Metropolis’s anti-circumcision ordinance is preliminarily enjoined by a state court judge in 2010. While the case continues to be litigated in state court, Congress passes the Religious Rituals Protection Act of 2011 (RRPA). The RRPA specifically prohibits any federal, state, or local government, agency, or official from banning infant male circumcision. In passing the Act, the relevant committee of Congress heard testimony regarding the fact that circumcision is normally performed on approximately one million boys every year in the United States for religious or cultural reasons. Because doctors or religious officials normally charge for this service, Congress heard testimony to the effect that more than $250,000,000 is spent on circumcision annually.

The judge in the state case challenging Metropolis’s anti-circumcision ordinance asks the parties to brief the impact of the RRPA on their case. The PTB plans to argue that the RRPA is unconstitutional, while the groups opposing the ordinance argue that it is constitutional and largely preempts the ordinance. Please analyze the constitutionality of the RRPA.

**Model Answer**

**Part A**

The various plaintiff groups might challenge the anti-circumcision measure on a handful of different bases: that the measure is *ultra vires*; that it is preempted by state law; and that the private remedy part of the provision violates the “private law exception.”

Whether the anti-circumcision measure is *ultra vires* will depend on how Freeland courts have interpreted the scope of the Freeland constitution’s home-rule provision. If it has been interpreted essentially as a “legislative” provision, then Metropolis will likely have the authority to enact this ordinance unless denied by state law. Although the quoted language of the home-rule provision does not include language to the effect of “unless in conflict with state law,” whether there is language to that effect in the home-rule provision may influence whether courts read it as “legislative” or not.

If, on the other hand, the home-rule provision has been read as an *imperio* provision—which is possible given that it speaks of matters within the city’s “local” jurisdiction, then Metropolis may only have the authority to regulate the matter if it is deemed “local.” It is likely that circumcision, insofar as it is said to affect the health of males who may move beyond local
boundaries soon after their birth, is not simply a “local” matter or is at least a “mixed” statewide/local matter. If so, then the state is likely to have the power to preempt the ordinance, a la Colorado, but the city may have the authority to regulate the matter in the first instance in the absence of statewide preemption.

Assuming that Freeland is a legislative regime or that it is an imperio regime and circumcision is deemed a statewide or mixed local/statewide matter, the plaintiffs might attack the measure as preempted by state law. The key provision will be § 50 of the state code. Because § 50 speaks only of prohibitions on what doctors do, it may be that § 50 only partially preempts PTB’s ordinance—i.e., it preempts that part of the local ban that applies to doctors but not as applied to mohels or Islamic religious officials. If § 50 is seen as occupying the field of medical regulation, which would be a strong interpretation of its language, then perhaps the entire ordinance would be preempted. Certainly, the plaintiffs will want to argue that circumcision falls within the professionally recognized scope of a medical license. This inquiry will likely require expert testimony from doctors regarding the scope of normal practice and the fact that doctors are routinely trained in performing circumcisions.

Finally, the plaintiffs might attack the private right of action provision as a violation of any “private law exception” the state may still retain. The success of this argument will depend on whether this doctrine is still vital within Freeland and whether it is read as prohibiting local private rights of action.

If the ordinance is not severable, then getting a court to strike down any part of the ordinance—say, the private right of action provision or the ban as applied to doctors—could still achieve full victory for the plaintiffs. We would need to know something about Freeland severability law and what, if anything, the measure says about severability.

Part B

As a federal statute, the RRPA must be premised on one of Congress’s enumerated powers. The two most likely sources are the Commerce Clause or Section 5 of the Fourteenth Amendment.

To be justified under the Commerce Clause, the federal government (or other defenders of the statute, such as the plaintiffs here) must show that the matter regulated is economic activity, or that it substantially affects economic activity. Because millions of dollars are spent on circumcisions annually, the practice itself might be considered economic activity. Even those circumcisions that are performed by religious officials not for payment may be seen as “substantially affecting” commerce in the aggregate because they remove the need for paid circumcision services. Thus, Congress is likely on safe ground regulating circumcision.

Congress may also be on safe ground passing the RRPA under § 5 of the 14th Amendment. The question here is closer, however, in light of the Supreme Court’s invalidation of RFRA in Boerne v. Flores. In Boerne, the Supreme Court ruled that RFRA was not “congruent and proportional” to any finding of infringement on religious liberties. In considering RRPA, it is questionable whether the passage of one anti-circumcision measure by
Metropolis would be considered enough of a pattern of violation of constitutional (free exercise) rights for Congress to be allowed to step in under § 5 of the 14th A. It would help Congress’s case if 1) there are may other similar ordinances around the country and 2) if these kinds of ordinances are motivated by anti-religious animus rather than merely public safety concerns. If they are motivated only by public safety concerns, then Employment Div. v. Smith, the case that RFRA sought to “overturn,” holds that there is no constitutional violation. On the other hand, in the recent Voting Rights Act case, Northwest Austin Municipal District, the Court indicated that it was perhaps again allowing Congress to define the substance of what the 14th Amendment protects again. This is a close call. The history of regulation of circumcision may matter as well.