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501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester II, 2006-2007

Final Examination
UNM School of Law
Three Credits

Professors Browde & Bay
May 4, 2007
1:30 pm – 5:00 pm

INSTRUCTIONS

**Examination Format
Essay Answers**

1. **Laptops:** Start the Secureexam program entering your examination number, course name, professor's name, and date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. Use 12 point or larger type face and double space (but not triple space) your answer.

2. **Bluebooks:** Write in ink, on only one side of the page, and skip lines. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Be sure to number your bluebooks in consecutive order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen and close the bluebook immediately. If using a laptop, save and exit the program.

Go to the exam check-in table at the conclusion of the exam and fill out an examination receipt.

Professor's Instructions

1. This is a 3 ½ hour exam; however, during the first half hour you may only read the examination and make notes on the examination itself. You may not start writing (either in blue books or on your computer) until 2:00 p.m. The exam consists of three parts that are not equally weighted. The points ascribed will be in relation to the time assigned to each part.

2. This is an open book exam, except that you may not bring any commercial materials, including commercial outlines, hornbooks, or treatises. You may bring your casebook, class notes, the Constitution, and any outline you helped prepare.

[EXAMINATION BEGINS ON PAGE 2]

EXAMINATION

[In responding to this entire exam, do not waste your time writing an independent statement of facts. Instead, use the facts in your analysis of the issues presented. Also, please assume all the doctrines of justiciability have been met; do not discuss any of the justiciability doctrines.]

Part I (1 and ¼ hours)

The State of Ames is located on the Atlantic coast. For centuries, fishermen have plied the territorial waters of the State. Over the last decade, however, as a result of overfishing, catches of all species have plummeted. This is especially true for the famed Ames lobster (*Homarus llamas unmsolus*). Under prior law, lobstering was permitted September to April. No lobstering was allowed from May through August.

Moreover, the crustacean “whirling disease” is present in Ames waters, but it has infected less than one percent of Ames’ lobsters. This disease, which is caused by a small parasite, is somewhat contagious, though it has not yet spread to the territorial waters of other States. Lobsters infected with “whirling disease” are still edible but are carriers of the parasite, which causes obvious deformities and stunted growth. Cooking lobster kills the parasite.

To promote the sustainable harvesting of lobster and other seafood in its territorial waters the State of Ames has enacted the following law:

AMES CRUSTACEAN PROTECTION ACT (ACPA)

Section 1: Permissible Season. Lobster fishing may only occur from October through April in the territorial waters of the State

Section 2: Permissible Methods. Only wooden lobster pots may be used to catch lobsters, and in no instance may any fisherman, whether commercial or recreational, use a net or aluminum pots to catch lobsters.

Section 3: Inspection of Seafood. To ensure the quality of state seafood products marketed in Ames or elsewhere, all lobster caught by commercial fishermen must be inspected and treated at one of several private facilities within the State, equipped to decontaminate lobsters and label them as “Ames Grade A—Whirling Free.”

Section 4. Licensing Fee. All commercial fishermen, whether residents or non-residents, shall pay a licensing fee of \$25,000 per annum.

Section 5. Pequod Lobster Farm. All lobsters raised at the Pequod Lobster Farm—operated by the Fisheries Program of Ames State University (ASU)—shall be donated to charitable institutions that conduct their activities principally for the benefit of persons who are state residents. Such institutions may use the ASU-provided lobsters for any purpose, but any commercial sales by such charitable institutions must be limited to state residents.

As a rider to the general appropriation act during that same year, the Ames legislature provided a commercial fishermen’s tax rebate of \$20,000 for resident taxpayers, three-quarters of which is to be funded from general revenue, and one-quarter from the licensing fees collected under the ACPA.

Ahab is a fisherman who is a resident of New York. He has commercially lobstered in Ames’ territorial waters and elsewhere for many years. Unfortunately, he uses nets to catch lobsters. While almost all fishermen in Ames use traditional wooden lobster pots to catch lobsters, out-of-staters disproportionately use nets to trawl for lobsters along the seabed floor because they are cheaper to haul than lobster pots. Outside of Ames, modern lobstermen use either nets or compact lobster pots constructed of lightweight aluminum. Wooden pots are no longer made and sold anywhere other than in Ames. Nets are more indiscriminate and destructive to marine life than pots; modern aluminum pots cause less damage to lobsters than wooden ones. Two years ago, Ahab entered into a long-term contract with the New York Fulton Fish Market in which he agreed to supply Ames lobsters to them beginning in September each year.

Camp Lackawanna is a non-profit organization that operates a summer camp located in Ames. The camp serves children from the entire Atlantic region, but it does qualify to receive free lobsters from the Pequod Lobster Farm program. The camp’s major fundraising event occurs in New York City at which it desires to auction the ASU lobsters.

Ahab, and Camp Lackawanna have sued the State of Ames in which they seek declaratory and injunctive relief. They each challenge portions of the ACPA on constitutional grounds. You are the law clerk to the federal judge in the case, and she has asked you to **prepare a memorandum in which you identify all constitutional issues presented, explain how they should be resolved, and why.**¹ **Please write the memorandum.**

¹ In your research, you have discovered that an old federal health law declares that “it is in the national interest that seafood remain an accessible and regular part of the diet of all Americans,” and the federal Fisheries Management Act of 1890 provides: “It is in the public interest that States continue to regulate the taking of fish within their waters, unless such regulation unduly burdens interstate commerce.”

Part II
(1/2 hour)

Queequeg is picturesque city on the coast of Ames. Once a fishing center, it is now a popular tourist destination; it is known as the Sausalito of the East Coast and has become an affluent community. Starbuck Seafood, however, operates the last remnant of Queequeg's fishing past, a quaint two-acre facility called "Cannery Row" centrally located in the harbor.

For the past few years, the waterfront around Cannery Row has become gentrified. Leviathan Waterfront Properties, a private real estate company with close ties to the Mayor and some City Council members, has repeatedly and unsuccessfully tried to purchase Cannery Row from Starbuck Seafood. This year, in a 4-3 vote, the City Council passed a hastily constructed Master Development Plan, the substance of which was hotly contested by many members of the community. Pursuant to that Plan, the Council is considering an ordinance to condemn Cannery Row, which will then be transferred to Leviathan Waterfront Properties.

Two-thirds of the property will be used to develop a private marina with an exclusive yacht club and a gated luxury condominium development—and the expert testimony before the City Council was that there would be a 50% chance that the development would enhance the city tax base. The other third of the property is to be devoted to a private park for residents of the new development, but the park will be open to the public for fireworks displays on Memorial Day, the Fourth of July and Labor Day, and for a Christmas tree lighting ceremony in December, and an egg roll for city children on Easter morning.

Because of Queequeg's popularity, an increasing number of apartment building owners have evicted their tenants and converted their buildings into condominiums. A shortage of affordable housing has developed; this shortage particularly affects year-round working residents of Queequeg. Tenants who have been evicted have had difficulty finding housing in town. In order to protect tenants and to ensure the availability of affordable housing, the Queequeg City Council plans to pass the Tenant Relocation Assistance Ordinance (TRAO).

Under this ordinance, apartment building owners may convert their buildings into condominiums subject to two conditions. First, the owners must pay cash relocation assistance to any tenant they intend to displace in order to redevelop the property. This assistance is the equivalent of three-months rent or \$1000, whichever is less, but is only available to tenants who have resided in the State of Ames for more than one year. Second, at least 25% of the units in each converted building must be reserved for affordable housing.

The City Council asks for a legal opinion identifying **any federal constitutional problems with the proposed Condemnation Ordinance and Tenant Relocation Assistance Ordinance, explaining in depth the nature of those problems. Please write the memorandum.**

Part III
(1 and ¼ hour)

In an attempt to pre-empt a potential “Lobster War” among New England States, Congress passed the National Lobster Preservation Act after numerous hearings at which it heard masses of testimony from fishery experts, fisherman organizations, state officials, and wholesale and retail consumer groups. In a show of renewed bipartisanship, the President signed the bill into law, while standing on a pier in Portland, Maine, surrounded by many of his New England supporters. The new law is as follows:

NATIONAL LOBSTER PRESERVATION ACT (NLPA)

Section 1: Congressional Findings

- (a). Despite its unappealing visage, the humble American lobster is much prized by connoisseurs of fine seafood. Because of overfishing, prompt action is needed to protect this vital fishery from collapsing and to develop a sustainable fishery management program.
- (b). Lobstering has occurred with traditional wooden lobster pots, modern aluminum lobster pots, and nets. Individuals with disabilities are able to fish with lobster pots, but not with nets, which can be extremely difficult for them to handle. Aluminum pots weigh less and are easier to use than wooden ones. It is Congress’s intent that all Americans be able to exercise the fundamental right of engaging in the occupation of lobstering. Therefore, violations of this Act by States shall subject those States to suits for monetary damages.

Section 2: National Lobster Preservation Commission

- (a) There is created a National Lobster Preservation Commission (NLPC), which shall be responsible for the administration of this Act. It shall have power to enact rules and regulations governing lobster fishing in New England waters as it deems fit.²
- (b) The NLPC shall be composed nine members, selected as follows:
- (1) One member from each of the New England fishing States (a total of four members) appointed by the U.S. Senators from each of those States;

² Pursuant to that authority, the Commission has promulgated the following regulation:

Reg. 1: Violation of the unlawful lobstering provision of the NLPA is punishable by a fine of up to \$1,000 per unlawfully caught lobster.

- (2) Five members appointed by the President, three of whom must be representatives from the fishing industry and two of whom must be representatives from environmental groups;
- (3) Each Commission member shall be appointed for a six-year term and shall be removable only for good cause by the Comptroller General of the United States.

Section 3: State-Federal Cooperation

- (a) States shall make reasonable efforts to pass laws that implement the provisions of the NLPA as well as regulations promulgated by the NLPC. If practicable, state fisheries' officers shall also enforce the criminal provisions of any implementing state and federal law or regulation.
- (b) The Secretary of Commerce may impose a moratorium on all fishing within the territorial waters of any State that refuses in good faith to comply with the requirements of Section 3(a).
- (c) Any State that complies with Section 3(a) shall be eligible to receive an annual grant of \$10,000,000 to be used to fund assistance programs for families of lobstermen lost at sea.

Section 4: Unlawful Lobstering

It shall be unlawful to catch lobsters for any purpose in the territorial waters of the United States by any method other than the use of aluminum lobster pots.

Ishmael is a lobster fancier and renowned nature photographer. He is also president of the Lobster Fancier Club—a group of celebrities who share his love of all things crustacean. Many of the club members happen to be supporters of Ishmael's art. Ishmael and the club make monthly forays into Ames' waters to pursue their passion by netting large lobsters, photographing them, and gently returning them to the sea. Ishmael and the Club use only nets, because they are looking for extra large lobsters, none of which can be caught by pots.

On a recent trip, Ishmael netted 10 large specimens which he lovingly photographed and released. An Ames fisheries official noticed the activity and cited him for violating Reg. 1.

The judge who is to try Ishmael, and who has other cases involving the Act pending before her asks you for a memorandum: (1) analyzing all constitutional issues Ishmael may raise in his defense, and (2) analyzing all other constitutional infirmities with the federal statutory and regulatory scheme. Write the memorandum.

[End of Examination]