

Exam/Paper No. _____

552 FEDERAL JURISDICTION

Semester II: Spring, 2005

Final Examination
UNM School of Law
Three Credits

Professors Browde, and Kovnat
May 7 or May 9, 2005
9:00 a.m. to 12:30 p.m.

INSTRUCTIONS

1. This examination consists of four questions. The time indicated for each question is for your guidance, but it does not reflect the relative weight of the question in the final grade.
2. You should be able to answer the questions in three hours. The extra half-hour is allotted to encourage thought, clarity and lucidity in your answers.
3. This is an open book examination. You may bring the casebook, class notes, any supplementary materials provided, the course supplement with the relevant federal rules and selected federal jurisdictional statutes, and any outline that you have prepared either alone or together with other students in the class.
4. You may not bring into the examination any nutshell, hornbooks, commercial outlines, or other commercially produced materials.
5. BEST OF LUCK.

[EXAMINATION BEGINS ON PAGE 2]

BACKGROUND

A number of homosexual couples in New Mexico recently applied for marriage licenses with the County Clerk in their respective counties, and made arrangements with clergy to be married. They are all middle-aged professionals, with responsible jobs in the private sector. They have been living in stable, monogamous relationships for a number of years, and have come to the conclusion that they wish to solemnize their relationships in the same way that their married friends have been able to do.

As with many heterosexual couples, there are a number of practical and economic reasons which also informed their decision to marry. To name just a few, they are concerned that: 1) if medical treatment of one partner is required, the other partner will not be granted all the privileges which attach to a married partner; 2) their unmarried status may impair their ability to adopt children, which is something these couples wish to do; and 3) they have discovered that their health, auto, and life insurance rates would be considerably less if they were married. Indeed, each couple would save approximately \$1000/mo. in their current insurance costs from the date of marriage.

The marriage statute of the state provides that “Marriage is the cornerstone of a civil society; is critical to the acceptable procreation, and the well being of offspring. Protection of the institution of marriage is, therefore, of vital state concern.” NMSA 1978, § 40-0-0. The statutory law of New Mexico defines marriage as a “civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential.” NMSA 1978, § 40-1-1, but the only statutorily prohibited marriages are those “within the prohibited degrees [of kinship] or between or with infants under the prohibited ages . . .” *Id.* at § 41-1-9.

Recently, Congress passed and the President signed into law, the Marriage Protection Act of 2005 (MPA) which bans all marriages between same sex couples, and provides for criminal sanctions for anyone who violates that law.

PART I

John Amono and his partner, Sam Berkoff applied for a marriage license at the office of the Bernalillo County Clerk. They were provided the requisite forms in January, 2005, filled them out completely and returned them forthwith to the clerk. When the clerk reviewed the Amono-Berkoff application, she politely refused to issue the licenses.

When asked on what grounds the applications were being refused, the Clerk responded that she has been instructed by both the Secretary of State and her own County Commission¹ that

¹ The County Clerks have statutory obligations under the direction of the Secretary of State with respect to some of their functions, and have statutory obligations under the direction of the County Commission with respect to the issuance and enforcement of county ordinances. State law also imposes a duty on the County Clerks to issue certificates of marriage, and a duty to record and maintain records of the certificates of marriage duly executed by those authorized by law to perform marriages. *See* NMSA 1978, § 40-1-10 et seq.

New Mexico law does not allow for the marriage of persons of the same sex, and she pointed to the official state forms which designate the parties to a marriage as “Bride” and “Groom.” She also informed the couples of the new federal law which would make it a federal crime for them to marry.

John and Sam consulted an attorney on February 1, 2005. The lawyer advised them as follows:

First, that in her view the MPA is of questionable validity in light of *United States v. Morrison*, 120 S. Ct. 1740 (2002). *Morrison* struck the civil action for damages in the Violence Against Women Act as beyond the congressional power to regulate commerce because the prohibited conduct was not “commercial” in nature, and because the connection to commerce was too attenuated, thus impinging on the police power of the States.

Second, the lawyer believes that denial of the licenses is contrary to New Mexico statutory law because nothing in the law precludes the marriage of same-sex couples.

Finally, it is her opinion that the Clerk’s denial violated their rights to equal protection under the federal constitution.

The couple authorized the bringing of suit to enforce their rights. After considering all the options, the decision was made to file two suits in state district court, seeking declaratory and injunctive relief, and for damages. The suits asserts claims against the named defendants as follows:

- In the first suit Albert Gonzales, Attorney General of the United States, is sued in his official and individual capacities. The complaint seeks a declaration that the MPA is an unconstitutional exercise of the Congress’ Commerce Clause power, and violative of the 10th Amendment. Plaintiffs therefore seek an injunction against the law, and damages.

In the second suit the Bernalillo County Clerk, is sued in her official and individual capacities, and the County Commission is also named as a defendant in its official capacity. The counts of that complaint are as follows:

- Count I asserts a claim under 28 U.S.C. § 1983, and the Plaintiffs seek a declaration that they are entitled to the marriage certificates they seek, an injunction against the denial of their applications, and an award of damages from the time their applications were denied in January, 2005.
- Count II asserts a violation of the New Mexico marriage statute, and seeks the same relief as asked for in Count I.

The Justice Department lawyers who represent Attorney General Gonzales, and the state Attorney General lawyers who represent the Clerk and the County Commission met to plan defense strategies, and they decided to file notices of removal in federal court in conjunction with

several motions to dismiss. Plaintiffs, as you might expect, have filed motions to remand, and responses to the motions to dismiss.

Question 1 (75 minutes)

The defense lawyers ask you for a memorandum explaining a) the grounds which form the basis for defendants' several motions to dismiss, and b) the defendant responses to the plaintiffs' motions to remand. They want you to evaluate the merits of each and explain your reasoning in detail. Write the memorandum.

PART II:

Another homosexual couple, Julia Court and her partner May Jane Dale, recently returned from Massachusetts, where they were lawfully married under Massachusetts law. Late one night, after retiring to bed, they heard a loud noise at the front door, and were immediately confronted by a group of state police officers who broke down the door, invaded their bedroom, and were arrested for violation of the "Anti-Lewd and Lascivious Criminal Conduct Act (ALCCA)." State charges were filed against them, and they are scheduled to stand trial on those charges later in the summer. Investigation on their behalf indicates that the only arrests and prosecutions for violation of ALCCA have been against gay couples, in spite of the recent Supreme Court decision in *Lawrence v. Texas*, holding that a state statute that criminalizes homosexual sodomy violates due process.

Julia and Mary Jane file a § 1983 claim in federal court against the state police officers and the state prosecutor. The claim against the police officers seeks damages against them in their individual capacities, and the claim against the prosecutor seeks a declaration that the ALCCA is unconstitutional on its face, and an injunction against enforcement of the statute.

Question 2 (30 minutes)

Defendant has moved to dismiss the federal lawsuit. Write Plaintiffs' Memorandum in Opposition to the Motion to Dismiss.

PART III

Another homosexual couple, Luis Long and Jonas Hammerker, who live in Santa Fe also sought a marriage license from the County Clerk of Santa Fe County. She too refused to issue the license, although she agreed with Long and Hammerker that nothing in state law precluded the issuance of a license to a same sex couple. She gave as her reason for refusal that the federal MPA makes it a crime for them to marry and she is therefore precluded by federal law from issuing the license to them.

Long and Hammerker bring a federal lawsuit against the Santa Fe County Clerk under 28 U.S.C. § 1331. Their complaint seeking a declaratory judgment alleges that they are

entitled to a marriage license under state law and that federal law does not preclude the Clerk from issuing that license.

Question 3 [30 minutes]

What defense motion might you suggest the Clerk file, and will it be successful? Please fully explain.

PART IV

These New Mexico lawsuits regarding same sex marriage are not the only cases raising such issues. Indeed, there is a torrent of legal activity in this field, including a host of new state constitutional and statutory provisions, a number of recently filed lawsuits in both state and federal court, and the beginnings of an effort to amend the federal constitution to bar same-sex marriages.

Included in these efforts is the current draft of two new federal jurisdictional statutes being considered by the Senate Judiciary Committee. Those drafts are as follows:

28 U.S.C. § 1331 ½ [federal original jurisdiction deprived]

Irrespective of any other provision of this title [28 U.S.C.] the district courts shall have no jurisdiction to entertain any action seeking to impose the right of same-sex marriages.

28 U.S.C. § 1292(x) [federal appellate jurisdiction granted]

The United States courts of appeal shall have exclusive appellate jurisdiction of any state trial or appellate court judgment which compels a state to confer the privilege of marriage on same-sex couples, irrespective of whether the state court judgment is based on federal or state law.

- a. In reviewing such judgments, the courts of appeal shall do so de novo, and give no deference to the findings and conclusions of the state court.
- b. If the judgment of the court of appeals reverses the state court judgment, it shall be final, and not subject to further review.
- c. If the judgment of the court of appeals affirms the state court judgment, it shall be immediately appealable to the United States Supreme Court, which

shall review that judgment de novo, giving no deference to the findings and conclusion of either the state court or the federal circuit court.

Question 4 (45 minutes)

You are Minority Counsel to the Committee, and the ranking minority member, who strongly opposes these bills, has asked you for an evaluation of any and all constitutional and policy-based problems with these two statutes. Please write the memorandum to the ranking minority member.

[END OF EXAMINATION!]