

MONTEREY COLLEGE OF LAW

CONSTITUTIONAL LAW

Midterm Examination

Fall 2015

Prof. M. Cohen

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

1. International governments uncovered evidence indicating a radical sect planned, directed and carried out a series of tragic terrorist attacks in European cities. The United States quickly identified members of the sect residing in the United States. The President issued Executive Order 666, requiring federal law enforcement authorities to detain all male members of the sect found within the country. The President advised Congress of the Executive Order, and together with the leadership of Congress, conducted a joint press conference on the steps of the United States Capitol to announce the action that the President had taken, explaining the Executive Order was necessary to prevent an imminent attack on the nation.

Federal Bureau of Investigation agents immediately tracked and detained more than 5,000 members of the religious sect residing in various cities across the United States. Following recommendations from the Secretary of Defense, the President ordered the military to transport and hold the detainees at the United States Navy Base in Okinawa, Japan. All the detainees were minority race United States citizens who had emigrated from a particular region of North Africa. The Navy Base in Okinawa is considered to be Japanese territory. Japan permits the United States to occupy the military base, in exchange for protective services the United States Navy provides to Japan in the South China Sea. U.S. Navy personnel residing on the Okinawa base are subject to Japanese laws as if they were residing in Tokyo or any other part of Japan.

Seizing on the national popularity the President achieved with his swift action, the United States House of Representatives introduced the Support 666 Act, a law providing:

“In any claim based in whole or in part on Executive Order 666, the United States District Courts shall accept and adopt with absolute and complete judicial deference any and all factual proffers made by the United States Navy, and no decision by a United States District Court affirming Executive Order 666 shall be appealable.”

Fearful she may never see her husband again, a detainee’s spouse, Linda P., here in Monterey County has approached the MCL Clinical Studies program for some assistance. She is too scared to bring a lawsuit, fearful she and her family will be arrested and detained as well. She wants to know:

- a. What claims can Linda P.’s husband raise to challenge Executive Order 666 under the United States Constitution?
- b. Will the Congressional Support 666 Act make a legal challenge more difficult?

c. The detainee's spouse has a supportive neighbor who, as a United States citizen taxpayer, is outraged by the President's action. Her civic organization, Freedom Circle, is also in despair, because it has lost its members. Can they bring a lawsuit to challenge Executive Order 666?

2. The Desert Eagle handgun, a particularly accurate handgun with unique piercing ammunition, has been linked to a high number of fatalities in mass shootings, now occurring at an alarming rate of every sixty-four days in the United States. Sadly, many of these tragic events occur in or near schools. The United States Senate Committee on the Judiciary held public, televised hearings for more than three months. Subsequently, the Committee issued a report containing more than 1,000 factual findings concluding the Desert Eagle handgun possessed uniquely fatal qualities qualifying it for military grade use, and that in fact the handgun is standard issue to military personnel in foreign nations across the globe, though not in the United States. The report further links use of the Desert Eagle to 88% of mass shooting deaths that have occurred in the United States over the past two years. Based on these hearings and the report's findings, Congress passed a series of laws collectively called the Bury Desert Eagle Act. Specifically, the legislation:

- a. Bans further imports of Desert Eagle handguns into the United States;
- b. Prohibits interstate transportation of Desert Eagle handguns;
- c. Provides federal subsidies for public schools only to States that prohibit sales of Desert Eagle handguns;
- d. Makes possession of Desert Eagle handguns within one hundred feet of a school in a State receiving federal subsidies for education a federal crime punishable by 25 years in prison without possibility of parole;
- e. Due to limited federal resources at the local level, requires State police departments to enforce the new federal crime, and State prosecutors to prosecute the new federal crime in State courts and sentence violators to serve time in State prisons; and
- f. Imposes a nationwide 500% sales tax on any purchase and sale of a Desert Eagle handgun anywhere in the United States.

Which provisions of the Bury Desert Eagle Act are Constitutional?

3. The United States designated the Monterey Bay a “National Marine Conservatory” under the federal National Marine Fisheries Act (NFMA), which provides a statutory scheme to protect the nation’s coastal waters with high concentrations of marine life. The National Marine Fisheries Service (NFMS), a division of the United States Department of Interior, an executive branch agency, must pass regulations to preserve all coastal waters designated as Conservatories under the NFMA. The NFMS has published a comprehensive set of regulations for the Monterey Bay establishing a licensing and regulatory scheme for fishing. The NFMS regulations set forth “harvest control” rules which, by species of fish, regulate time periods for fishing in the Monterey Bay on various species, establish “catch limits” for commercial fishing vessels, and regulate fishing equipment that can be used to catch various species of fish. The regulations, furthermore, prohibit commercial fishing for many types of Monterey Bay fish species altogether. The NFMA preamble indicates it is intended to be “the exclusive criteria for protecting designated Marine Conservatories from commercial exploitation.”

To further sustainability of its coastal marine life, the California legislature passed its own regulations restricting fishing in the Monterey Bay. Specifically, the California legislature passed the Abalone Act, which:

- a. Establishes a limited, three month “Abalone Diving Season” and requires a Monterey Bay Conservatory license, available only to California residents, to dive for Abalone in the Bay.
- b. The Abalone Act also contains a provision requiring all vessels fishing in the Monterey Bay for Sardines to “land” their Sardine catch at the commercial fishing wharfs in either Moss Landing or Monterey. This requirement effectively precludes “transshipments” at sea – a practice by which commercial fishing vessels load their fish catch into “freighters,” which in turn pack the fish in ice and transport it to larger ports in Seattle, Washington or Portland, Oregon, for example. The legislative history indicates this provision is effectively the only way to monitor the NFMS Sardine quotas and harvest control rules.
- c. Finally, the Abalone Act requires the Moss Landing and Monterey fishing fleets to “tie-up” their boats for two months each year, a term that means the fleets must keep each of their boats docked at the wharf for two months of the year. The boats cannot fish during the two months. The legislative history indicates the purpose of this provision is to limit the fishing capacity of the local fleets in line with the sustainability requirements of the NFMS regulations. The Abalone Act does not compensate the fleets for the “tie-up” requirement.

Are the provisions of California’s Abalone Act Constitutional?

Question One Rough Issues Outline

Presidential Power – Inherent powers under Foreign Powers and War Powers.

Judicial Power -- Exceptions and Regulations limits to jurisdiction of United States Courts. Justiciability limits; cases and controversy standing requirements and analysis.

Equal Protection – Strict Scrutiny analysis.

Habeas Corpus – suspension of writ, applicability outside of United States.

Presidential Immunity -- suits against the President.

One Hour Question

Question Two Rough Issues Outline

Commerce Power – foreign and interstate requirements, substantial impact, rational basis.

Tax and Spend Power – analysis including coercion limitations.

Necessary and Proper Clause Analysis.

Tenth Amendment Reservations – compelling States to Regulate.

One Hour Question

Question Three Rough Issues Outline:

Preemption – express and implied preemption analysis of the Abalone Act in its entirety.

Privileges and Immunities Clause analysis of the fishing license restriction to California residents.

Dormant Commerce Clause analysis of the “landing” requirement.

Takings Clause analysis of the “tie-up” requirement.

Substantive Due Process analysis of state economic fishing regulations.

One Hour.

1) ~~34~~ / 34

===== **Start of Answer #1 (1408 words)** =====

1. ~~34~~ +8

There are three primary areas of concern here. First, the President is exercising Executive Powers when he issues EO 666. There are concerns here regarding the fact that detainees are US citizens and there are also equal protection issues. Second, Congress exercises legislative powers when it enacts the Support 666 Act. Here, the issue is possible interference with the judicial process and jurisdiction matters. Lastly, there are issues regarding justiciability and standing concerning Linda's supportive neighbor and the Freedom Circle.

Excellent

a.

Standing

In order to bring a suit, the Plaintiff must present an actual case or controversy. The Plaintiff (Linda's husband here) must have standing. Standing is achieved when the Plaintiff suffers an injury, the cause of the injury is traceable to an illegal action by the Defendant, and where the court has some form of redress to resolve the conflict. Here, Linda's husband is being detained, and thus is injured. His injury is traceable to the action of the government in enacting EO 666 and later the Support 666 Act. Some form of injunction could redress his problem, therefore he has standing.

+4 pt. C

Executive Powers

Does the President have the authority to enact EO 666, and if so, is it constitutional as issued? Outside of the qualified presidential privilege, the courts have not recognized any inherent presidential powers. Consequently, the three "Jacksonian" zones of executive authority can be used to analyze the validity of a presidential order:

+2

1. Maximum authority: Where the President acts in full compliance with the Constitution and/or Congress, and federal law. Likely constitutional.

2. Intermediate (or Twilight): Where the President acts where the Constitution and Congress have been silent. Maybe constitutional.

3. Lowest ebb: Where the President acts in direct conflict with the Constitution or Congress. Likely unconstitutional.

good!

Here, the President has issued EO 666 that states that federal law enforcement will detain all male members of the identified sect within the country. He (or she) informed Congress of the action. It appears from the press conference that the President is acting in full compliance with Congress (zone 1). But is the EO Constitutional?

Equal Protection

Under equal protection (5th Amendment pertains to the Federal government, 14th Amendment pertains to the states), there must be a classification to which some discriminatory act is being applied. Here, EO 666 applies to male members of this religious sect. There is discrimination here of both gender and race (all members of the sect were of a minority race). This is the classification.

There are three levels of scrutiny that can be applied where discrimination has been identified against a class.

1. Strict scrutiny: The discrimination must be necessary to achieve some compelling government interest and the law must be narrowly tailored to achieve that end.

+1
~~1~~

2. Intermediate (or heightened) scrutiny calls for excessively persuasive justification that the discrimination is needed to achieve an important government interest.

~~1~~ *+1*

3. Rational basis scrutiny: There must be some rational relationship between the discrimination and some legitimate government interest (must be something that government is allowed to do).

Gender falls under intermediate scrutiny, but race falls under strict scrutiny. But here the discrimination is not against all males or all members of that minority race, but only

those who are members of this sect. There is question here as to whether the classification is under or over inclusive. Over-inclusive would be to include people in the classification that do not belong. Under-inclusive would be to not include some people who are in the class while including others who are. Here, it appears that the FBI knows who the male members of this sect are, so the classification may be neither over nor under-inclusive. Still, strict scrutiny will be applied here. Are there other alternatives to rounding up these people and shipping them to Okinawa? Could the President have instituted due process for these people? The government interest appears compelling (preventing an imminent attack on the nation), but this is difficult to prove. No facts are provided to say how the President knows that an attack is imminent. It was presumed that a Japanese attack was imminent post 12/7/45 as well, but it never came. Under a strict scrutiny analysis, this EO is likely to be found unconstitutional.

Gout. Burden

+3

~~Handwritten scribble~~

Detention

All US citizens are granted due process under the Constitution. While the President had the authority to issue EO 666, he did not have the authority to disallow due process for these US citizens on the basis of their being males who happen to belong to this sect. Non-US citizens held inside the US are also granted due process. Only non-US citizens held outside the US can be held without due process (although this appears to be a dubious distinction).

Impact on Habeas?

Here, these citizens weren't even apprehended outside the US. They were apprehended inside the US and sent outside to be held indefinitely. The fact that Okinawa is outside the US will not change the invalidity of this detention. It is unconstitutional. These men are owed due process.

✓

Summary

The only way this would have been found to be constitutional is if it could pass the strict scrutiny analysis described supra under equal protection, similar to the Japanese internment that has yet to be overturned by the Supreme Court. The argument there appears to be that there could be a national emergency so dire that we would want to

✓

ID:

(ConLaw-F15)

0

be able to inter a group based on race or some other discriminatory factor. Here, the President says he is protecting the nation from imminent attack. When the attack doesn't come, he will claim it was because of EO 666, but this is impossible to prove. There are alternatives to the severe actions that EO 666 advocates. The courts are likely to rule that EO 666 is unconstitutional and that lesser non-discriminatory alternatives exist.

+1
✓

b.

~~ANS~~ +11

Legislative powers

The bulk of the Support 666 Act is directly aligned to the discussion supra regarding the constitutionality of EO 666. However, there is more here in that Congress has ordered the district courts to "accept with absolute and complete judicial deference and and all factual proffers made by the US Navy". Further, the Act disallows any appeal from any EO 666 decision.

✓
~~ANS~~
✓
✓

Congress has the authority to alter the jurisdiction of the federal courts, but not of the Supreme Court, which has appellate jurisdiction. The jurisdiction of the Supreme Court may not be expanded or restricted by Congress. Also, while Congress can pass laws that say what jurisdiction the courts have, once the courts have jurisdiction, Congress cannot tell them how to rule. Here, Congress is interfering with the judicial process in stating what the court must accept. Also, they are removing appeal which may be a due process violation.

+96
+5
~~ANS~~
good
(Exception
& Reg
clause)

Summary

While the Act may make a legal challenge more difficult because it adds the support of Congress behind EO 666, the Act still suffers from the same constitutional issues that EO 666 had, and it adds to that jurisdiction issues.

✓

c.

~~ANS~~ ~~ANS~~ (+10)

Justiciability and Standing

Linda's neighbor and the Freedom Circle want to help by bringing the lawsuit on Linda's

behalf. In general, there are no general grievances allowed and 3rd party suits are only allowed by exception. Linda's neighbor appears to be only a concerned citizen. She would not have standing here. If Linda (or her husband) had great difficulty bringing suit and the position of the neighbor was so close to the concerns of the harmed party that she could represent their interests, it could be allowed. That is not the case here. However, the Freedom Circle may be allowed to bring the case under the association exception. An association may bring a suit on behalf of a member or membership if the members would have had standing on their own and if the suit is aligned to the purpose of the association. Here, it does not appear that Linda or her husband are members of the Freedom Circle, therefore they could not bring this suit on behalf of either the husband or Linda. There is also no ripeness issue here because the husband is currently in custody. Even if he were to be released, mootness may not cause the court to dismiss because there are others who are still being detained. This is also not a political question regarding the internal governance of a branch of government or between branches of government. The suit here should be brought by Linda or best by her husband.

+4

+2

~~standing~~
~~standing~~
~~standing~~

=====
End of Answer #1
=====

2) 34/36

=====**Start of Answer #2 (1918 words)**=====

Congress's authority under the Constitution is provided for in the Article III enumerated powers. These powers include the Tax and Spend Clause, the Commerce Clause, and the Necessary and Proper Clause. Congress's authority with respect to regulating state activity is limited by the 10th amendment.

a. Importation of guns into U.S.

(+5)

The Commerce Clause gives Congress the plenary power to regulate the following: channels of interstate commerce (such as rivers, roads, highways), instrumentalities of interstate commerce, including people and things in interstate commerce (such as busses, planes, trains), and activities that substantially affect interstate commerce. The commerce clause expressly provides for congressional regulation of commerce with foreign nations (in this case constituting interstate commerce). Importation of guns by necessity requires commerce with foreign nations, and as guns are being exchanged across an interstate channel such as an airway or ocean, they become an instrumentality of commerce. This provision is therefore constitutional under the Commerce Clause.

+2

+2

+1

- exclusive re: Bo

b. Prohibiting interstate transportation

(+6)

See above for Commerce Clause rule statement. Interstate transportation again falls under the first and second prong of the Commerce Clause. Transportation across states would constitute a channel of interstate commerce (ie. by use of roads, airways, or trains spanning more than one state), and transportation of guns across these channels would invoke instrumentalities of commerce (by both the means of transportation itself and the item -- ie. guns -- being transported across state lines). This provision would therefore be constitutional under the Commerce Clause.

+4

+1

+1

c. Federal subsidies for public school in States prohibited handguns (+5)

The Tax and Spend Clause allows Congress to levy any type of tax, and spend revenue as it sees fit so long as in furtherance of a purpose that benefits the general welfare. +2

Congress may condition States' receipt of federal funds, so long as the conditions are specific and unambiguous, not coercive, and related to the federal interest in promoting the general welfare. Federal subsidies constitute an exercise of Congress's spending power. +2

The purpose benefiting general welfare in this case would be preventing tragic mass shooting in or near public schools. The condition imposed here is specific and unambiguous, in that it clearly requires that states prohibit sale of a specific type of handgun in order to receive federal funding for public schools. The only case that has ever held an exercise of the spending power to be coercive was Sebellius, in which additional funding to subsidize Medicare was not only withheld from states that did not enact the Affordable Care Act, but existing funding prior to enactment of the ACA was eliminated. There is no indication that the federal government is here threatening to remove federal subsidies that already exist should a state choose not to ban Desert Eagle gun sales. It is therefore unlikely this condition will be found coercive. However, +1

this condition may be unconstitutional according to relationship to the federal interest in only Q = general welfare. Schools must be funded regardless of whether handguns are sold, and there is no indication that withholding school funding has anything to do with prevent mass shootings. This provision is therefore likely to be unconstitutional under the Tax and Spend Clause. (X)

d. Making possession near school in State that receives federal subsidies a federal crime (A) (+6)

Commerce Clause

Possession of handguns near a school is a purely intrastate activity, and in order to be constitutional under the commerce clause must therefore fall under prong 3 -- activity

that substantially affects interstate commerce. *Lopez* and *Morrison* have held that regulation of a noneconomic criminal activity under the commerce clause must have a jurisdictional nexus tying the activity to interstate commerce. In *Lopez*, a similar statute banning possession of guns near schools was held unconstitutional because there was no jurisdictional nexus. Congress could argue here that the jurisdictional nexus exists in that it only applies to states that are receiving federal subsidies for education - presumably pursuant to the condition enacted in part (c) of the Bury Desert Eagle Act. Federal subsidies for education do not in themselves implicate interstate commerce, because there is no economic activity involved other than state receipt of funds in exchange for banning handguns. The state could argue that a jurisdictional nexus exists because the crime is only applied to those states that have prohibited sale of Desert Eagle handguns in order to receive federal education subsidies. Since allowing intrastate sales of handguns could spill over into interstate sale of handguns (since owners of handguns in one state could sell the guns to citizens of another state), giving federal funding to states that don't allow sales of these handguns could be connected to Congress's lawful authority under the Commerce Clause to prevent interstate transportation of handguns (see (b)). This nexus may be determined valid if it is determined constitutional for the state to conditional federal subsidies on prohibiting sales of handguns under (c). Since the condition itself may not be valid, and since the nexus here is attenuated at best, it is unlikely this provision will be constitutional under *Lopez*.

+ 1

✓

+ 2

Other than *Lopez*, intrastate activity under prong 3 is generally upheld if the regulation pertains to economic activity, and there is a rational basis that the activity in the aggregate substantially affects interstate commerce. Congress here has compiled a large amount of information regarding handgun possession, its fatalities and use by militaries, and its links to mass shootings. While this information could support a rational basis that Congress exercised its discretion in enacting this statute, it does not show a connection to interstate commerce. Regulating the sale of handguns themselves constitutes economic activity, but fashioning a federal crime to prevent handgun possession does not seem to implicate economic activity (thus the rules from

~~###~~

- Crime can have any predicate.
 - Protect subsidies!
 - As P re: same?

Lopez and Morrison). Although the evidence Congress has compiled showed a rational basis for regulating to prevent mass shootings, there is no evidence showing whether the incident of mass shootings in the aggregate affects interstate commerce. Absent this showing, it is unlikely the court will find a rational basis for this legislation.

Necessary and Proper Clause

The Necessary and Proper Clause grants Congress any means not prohibited by the Constitution to act pursuant to a power granted to any branch of the federal government. Certain cases hold that this power is limited to enforcement of enumerated powers, while other cases (*Comstock*) have indicated that the N/P Clause could be used to further Congress's implied powers under the Constitution.

+ 2

The enumerated power at issue for this clause would be Congress's power under to regulate handguns under the Commerce Clause. Although enacting a federal crime for possession of a handgun is a means in furtherance of regulating handgun sales, it is unclear whether this provision would be constitutional under the Commerce Clause itself (see above). Since the N/P Clause cannot be used to further an act that is prohibited by the Constitution, and since the Constitution likely prohibits this provision under the Commerce Clause, this provision would not be constitutional solely on the basis of the N/P Clause under the theory that the N/P Clause must be tied to an enumerated power.

~~Handwritten scribble~~

- Power to protect Spend?

The above analysis assumes the traditional Commerce Clause analysis of prong 3 as discussed in the above section. However, a concurrence by J. Scalia has indicated that prong 3 of the Commerce Clause should be analyzed according to the Necessary and Proper Clause itself, without using either the *Lopez* noneconomic criminal conduct rule or the economic aggregate theory rule. According to Scalia, Congress via the N/P Clause may use any means not unconstitutional to further activity under plenary powers of Commerce Clause prongs 1 and 2. Although Scalia may have intended to limit the scope of the Commerce Clause to prongs 1 and 2, applying the N/P Clause to regulate

excellent

+ 1

intrastate activity could expand the reach of the Commerce Clause. In this case, making possession of handguns illegal under the N/P Clause could further the enumerated powers of Commerce Clause prongs 1 and 2, because it would decrease sales of handguns which would reduce their interstate transfer. Because this track would bypass the economic / noneconomic distinction currently used to analyze Commerce Clause prong 3, the fact that enacting a federal crime does not constitute traditional economic activity would not defeat this provision. Using Scalia's analysis, this clause would therefore be constitutional under both the Commerce Clause and the Necessary and Proper Clause.



One case interpreting the N/P Clause has indicated that its use does not need to be expressly connected to an enumerated power. According to *Comstock*, this provision of the Bury Desert Eagle Act could also be lawful unconnected to the enumerated power of the Commerce Clause because Congress has power under the Constitution to establish certain federal crimes. Creation of this crime would be a means to furthering the implicit power to punish federal crimes, that may not otherwise prohibited by the Constitution (unless it is a violation of the Tax and Spend Clause and/or Commerce Clause)



Conclusion: Although alternate theories of Commerce Clause and N/P Clause jurisprudence may find this provision Constitutional, prevailing interpretations indicate it will not be upheld, unless Scalia's concurrence using the N/P Clause to analyze prong 3 of the Commerce Clause is adopted.



e. Requiring state police to enforce federal crime and state prosecutors to prosecute

+6

The 10th amendment limits Congress's authority by providing that any power not expressly granted to the federal government is reserved to the States. This means that Congress cannot directly require states to prohibit or mandate a specific activity, even if Congress otherwise has power to regulate that activity. However, Congress may

+ /

+ /

indirectly regulate state activities by conditioning States' receipt of federal funds pursuant to the Spending Power, or by preempting state regulation should the state fail to enact a regulation similar to the federal scheme. Assuming the federal crime provided for in (d) is constitutional, Congress has the authority to regulate the activity provided for by the crime, but does NOT have the authority to compel states to regulate the same activity. Congress therefore cannot require state officials to carry out federal regulatory functions, unless by conditioning state receipt of federal funds (not implicated in this particular provision), or by providing for federal preemption should states fail to regulate according to the federal scheme (no indication of preemption here). Since Congress here is attempting to directly require state compliance with a federal scheme, this provision is unconstitutional.

+4

f. 500% sales tax

+6

As stated above, Congress has the power to levy any type of tax. Indirect taxes, such as sales taxes on a particular commodity, must be geographically uniform, so that if an item is taxed in one state, it must be taxed in all states in the same way. Because the Tax Power has been used to uphold the Social Security Tax, which is crucial to a main function of the federal government, the taxing clause has received one of the broadest interpretations of any congressional power. This broad power would tend to hold the 500% sales tax constitutional, since it is applied equally across the United States to the same commodity. The tax could potentially be considered a penalty, in which case it wouldn't fall under the taxing power and would be unconstitutional, but the way the provision has been set up explicitly refers to a tax rather than a penalty, and envisions a scheme of taxation which has already been lawfully upheld under the Taxing Power (ie. taxation upon sale of a commodity). This provision is therefore likely to be constitutional.

+2

+1

+3

✓

==== End of Answer #2 =====

3)

30/30

===== Start of Answer #3 (1373 words) =====

Preemption

+6

Under the Supremacy Clause, if federal and state laws conflict, federal law will preempt state law such that the state law must yield. Preemption is determined primarily by examining congressional intent. Preliminarily, it appears that the Abalone Act would be unconstitutional under preemption.

Express preemption: A statute may expressly provide for preemption, but express preemption is interpreted very narrowly and still requires examination of congressional intent. The NFMA preamble expressly declares that the congressional intent is for the NFMA to be "the exclusive criteria for protecting designated Marine Conservatories from commercial exploitation." Exclusive criteria, interpreted narrowly, means the only criteria. Thus, any state attempt to regulate commercial exploitation of Marine Conservatories would be additional criteria that are not contemplated by the NFMA and which would be preempted by the federal scheme.

excellent

+2

Implied preemption: Preemption may be implied according to field, conflicts, or purpose preemption. Field preemption applies when a congressional scheme is so pervasive as to occupy the entire regulatory field pertaining to a certain activity. The NFMA is a comprehensive set of regulations specifically establishing a licensing and regulatory scheme for fishing in the Monterey Bay. According to the NFMA preamble, this scheme intends to occupy the entire field of commercial exploitation with regard to the Monterey Bay fishing, such that the Abalone Act would be preempted. Conflicts preemption requires a physical impossibility of complying with both federal and state regulations, which does not apply here as we do not know what the NFMA specifically provides. Purpose preemption is applicable where a state regulation presents an obstacle to accomplishing the full purposes and objectives of the federal legislation. Since one of

excellent

+3

the primary purposes of the NFMA is to be the exclusive criteria for regulating commercial exploitation of Marine Conservatories, California's attempt to establish its own regulatory scheme regulating the same activity would frustrate the purpose of the NFMA. Although provision (c) of the Abalone Act states that the purpose of the tie-up requirement is to ensure compliance with the NMFA, this provision still violates field preemption and express preemption, and the entire statute should therefore be declared unconstitutional. ✓

Dormant Commerce Clause (DCC) (48)

The DCC has been implied from the provisions of the Commerce Clause, and holds invalid state legislation that places an undue burden on interstate commerce in the absence of a federal statute provides for such regulation. Assuming that certain provisions of the Abalone Act are not preempted by the NFMA (which is unlikely), remaining provisions would be analyzed for constitutionality under the DCC, since commercial fishing of the Monterey Bay implicates interstate commerce. The first step to determining validity under the DCC is analyzing whether the statute at issue is discriminatory. +2

Facial discrimination: Provision (a) expressly provides that the abalone license is only available to California residents, therefore constituting facial discrimination against other state residents. This provision is therefore presumed unconstitutional and will not be upheld under the DCC. +3

Discriminatory purpose or effect: A statute that is discriminatory in purpose or effect will be upheld if the state shows: (1) a legitimate state interest, (2) the provision is substantially related to the legitimate interest, and (3) there are no available nondiscriminatory alternatives. Provision (a) of the Abalone Act has already been determined facially discriminatory. Provision (b) has a discriminatory effect, because all Sardine catch must be landed at the California fishing wharfs of Moss Landing or

Monterey, and cannot be landed at larger ports in other states that would benefit from having Sardine catch transferred up to them for packing and subsequent sale. The legitimate state interest here is in restricting fishing in order to further sustainability of its coastal marine life -- the court will likely agree that conservation is a legitimate interest. Restricting landing furthers this interest by allowing for monitoring of Sardine quotas in compliance with NFMS requirements. There are no reasonable nondiscriminatory alternatives, because this provision is the only way to monitor Sardine quotas. The state will therefore likely meet the DCC test for provision (b). +3

Non-discriminatory purpose: Provision (c) does not appear to have a discriminatory effect or purpose in terms of prejudicing residents from other states, because it applies only to Moss Landing and Monterey fleets. It will therefore be upheld if the benefit to the state outweighs the burden on interstate commerce. Limiting fishing capacity in order to promote conservation is likely to outweigh the burden of requiring boats fishing in Monterey to tie up their boats.

Privileges and Immunities (P/I) +8

The Constitution provides that states may not discriminate against U.S. citizens in such a way as to interfere with fundamental rights. There are no exceptions to the P/I Clause. The test for privileges and immunities is substantially similar to the DCC, except it applies only to U.S. citizens, there must be discrimination, and the interference must be with fundamental rights. Provision (a) expressly discriminates, and would violate the P/I Clause if there is a showing that abalone fishing is a commercial activity. +2 +3 +3
 If the license at issue includes a commercial license, then prohibiting citizens of other states from obtaining such a license could interfere with the fundamental right of engaging in economic activity to make a living, and would violate the P/I Clause. excellent

Provision (b) is likely to be discriminatory under the test discussed above under the DCC. This provision expressly applies to commercial fishing, and therefore interferes

with a fundamental right of engaging in economic activity. This provision would therefore violate the P/I Clause.

Since provision (c) is nondiscriminatory, the P/I Clause does not apply.

Takings Clause

(48)

Under the 5th Amendment, the government cannot take property unless it is for a public use and the owner is provided just compensation. Provision (c) of the Abalone Act implicates the Takings Clause.

+2

Taking: This regulation could constitute a permanent physical intrusion for the two months of tie-up, since the fisherman are not allowed to use their boats at all, in which case the court would find a per se taking under *Loretto*. Requiring boats to tie up to the wharf for two months per year could also constitute a regulatory taking depriving the owner of economic use. Temporary or partial deprivation of economic use is analyzed according to the Penn Central factors examining: (1) the extent of the economic deprivation, (2) interference with investment-backed expectations, and (3) character of the regulation. Two months constitutes 1/6 of each year, which would seem to be a significant deprivation of fishing capabilities. The exact extent of this deprivation would depend on which two months of the year the boats are required to tie up, and whether those two months constitute part of a fishing season would be crucial to determination of whether there is a taking. This regulation interferes with the expectations of fisherman to use their boats for year-round fishing, likely to implicate investments made by the fishing fleets. The state could have an argument under prong (3), because the character of the regulation furthers an important public interest of limiting fishing capacity such as to maintain sustainability of marine life (which in turn benefits fisherman because it enables them to continue making a living through fishing). Because of the strength of prongs 1 and 2, the tie-up is likely to be found a regulatory taking. ✓

+3

+3

Property: The Takings Clause applies to both real and personal property, and here would apply to the boats themselves and the income fisherman are losing by being unable to use their boats to fish. ✓

Public use: This element has been interpreted broadly to apply to any reasonable government interest benefiting the public. It is in the public interest to maintain sustainability of coastal marine life, to promote ecological diversity and to assist the fisherman themselves in continuing to make a living by fishing (which would not be possible if marine life became extinct through overfishing). Restraining use of fishing boats is therefore likely to be determined a public use. ✓

Just compensation: The state does not compensate the fisherman for the tie-up requirement. Since the tie-up requirement is likely to be determined a taking, just compensation measured by loss to the owner is required, and provision (c) of the Abalone Act will be held unconstitutional in violation of the Takings Clause for failing to provide just compensation. ✓

=====
===== End of Answer #3 =====

duplicate printed [unclear] 12/1/15 0

15)

===== Start of Answer #15 (1373 words) =====

Preemption

Under the Supremacy Clause, if federal and state laws conflict, federal law will preempt state law such that the state law must yield. Preemption is determined primarily by examining congressional intent. Preliminarily, it appears that the Abalone Act would be unconstitutional under preemption.

Express preemption: A statute may expressly provide for preemption, but express preemption is interpreted very narrowly and still requires examination of congressional intent. The NFMA preamble expressly declares that the congressional intent is for the NFMA to be "the exclusive criteria for protecting designated Marine Conservatories from commercial exploitation." Exclusive criteria, interpreted narrowly, means the only criteria. Thus, any state attempt to regulate commercial exploitation of Marine Conservatories would be additional criteria that are not contemplated by the NFMA and which would be preempted by the federal scheme.

Implied preemption: Preemption may be implied according to field, conflicts, or purpose preemption. Field preemption applies when a congressional scheme is so pervasive as to occupy the entire regulatory field pertaining to a certain activity. The NFMA is a comprehensive set of regulations specifically establishing a licencing and regulatory scheme for fishing in the Monterey Bay. According to the NFMA preamble, this scheme intends to occupy the entire field of commercial exploitation with regard to the Monterey Bay fishing, such that the Abalone Act would be preempted. Conflicts preemption requires a physical impossibility of complying with both federal and state regulations, which does not apply here as we do not know what the NFMA specifically provides. Purpose preemption is applicable where a state regulation presents an obstacle to accomplishing the full purposes and objectives of the federal legislation. Since one of

the primary purposes of the NFMA is to be the exclusive criteria for regulating commercial exploitation of Marine Conservatories, California's attempt to establish its own regulatory scheme regulating the same activity would frustrate the purpose of the NFMA. Although provision (c) of the Abalone Act states that the purpose of the tie-up requirement is to ensure compliance with the NMFA, this provision still violates field preemption and express preemption, and the entire statute should therefore be declared unconstitutional.

Dormant Commerce Clause (DCC)

The DCC has been implied from the provisions of the Commerce Clause, and holds invalid state legislation that places an undue burden on interstate commerce in the absence of a federal statute provides for such regulation. Assuming that certain provisions of the Abalone Act are not preempted by the NFMA (which is unlikely), remaining provisions would be analyzed for constitutionality under the DCC, since commercial fishing of the Monterey Bay implicates interstate commerce. The first step to determining validity under the DCC is analyzing whether the statute at issue is discriminatory.

Facial discrimination: Provision (a) expressly provides that the abalone license is only available to California residents, therefore constituting facial discrimination against other state residents. This provision is therefore presumed unconstitutional and will not be upheld under the DCC.

Discriminatory purpose or effect: A statute that is discriminatory in purpose or effect will be upheld if the state shows: (1) a legitimate state interest, (2) the provision is substantially related to the legitimate interest, and (3) there are no available nondiscriminatory alternatives. Provision (a) of the Abalone Act has already been determined facially discriminatory. Provision (b) has a discriminatory effect, because all Sardine catch must be landed at the California fishing wharfs of Moss Landing or

Monterey, and cannot be landed at larger ports in other states that would benefit from having Sardine catch transferred up to them for packing and subsequent sale. The legitimate state interest here is in restricting fishing in order to further sustainability of its coastal marine life -- the court will likely agree that conservation is a legitimate interest. Restricting landing furthers this interest by allowing for monitoring of Sardine quotas in compliance with NFMS requirements. There are no reasonable nondiscriminatory alternatives, because this provision is the only way to monitor Sardine quotas. The state will therefore likely meet the DCC test for provision (b).

Non-discriminatory purpose: Provision (c) does not appear to have a discriminatory effect or purpose in terms of prejudicing residents from other states, because it applies only to Moss Landing and Monterey fleets. It will therefore be upheld if the benefit to the state outweighs the burden on interstate commerce. Limiting fishing capacity in order to promote conservation is likely to outweigh the burden of requiring boats fishing in Monterey to tie up their boats.

Privileges and Immunities (P/I)

The Constitution provides that states may not discriminate against U.S. citizens in such a way as to interfere with fundamental rights. There are no exceptions to the P/I Clause. The test for privileges and immunities is substantially similar to the DCC, except it applies only to U.S. citizens, there must be discrimination, and the interference must be with fundamental rights. Provision (a) expressly discriminates, and would violate the P/I Clause if there is a showing that abalone fishing is a commercial activity. If the license at issue includes a commercial license, then prohibiting citizens of other states from obtaining such a license could interfere with the fundamental right of engaging in economic activity to make a living, and would violate the P/I Clause.

Provision (b) is likely to be discriminatory under the test discussed above under the DCC. This provision expressly applies to commercial fishing, and therefore interferes

with a fundamental right of engaging in economic activity. This provision would therefore violate the P/I Clause.

Since provision (c) is nondiscriminatory, the P/I Clause does not apply.

Takings Clause

Under the 5th Amendment, the government cannot take property unless it is for a public use and the owner is provided just compensation. Provision (c) of the Abalone Act implicates the Takings Clause.

Taking: This regulation could constitute a permanent physical intrusion for the two months of tie-up, since the fishermen are not allowed to use their boats at all, in which case the court would find a per se taking under *Loretto*. Requiring boats to tie up to the wharf for two months per year could also constitute a regulatory taking depriving the owner of economic use. Temporary or partial deprivation of economic use is analyzed according to the Penn Central factors examining: (1) the extent of the economic deprivation, (2) interference with investment-backed expectations, and (3) character of the regulation. Two months constitutes 1/6 of each year, which would seem to be a significant deprivation of fishing capabilities. The exact extent of this deprivation would depend on which two months of the year the boats are required to tie up, and whether those two months constitute part of a fishing season would be crucial to determination of whether there is a taking. This regulation interferes with the expectations of fishermen to use their boats for year-round fishing, likely to implicate investments made by the fishing fleets. The state could have an argument under prong (3), because the character of the regulation furthers an important public interest of limiting fishing capacity such as to maintain sustainability of marine life (which in turn benefits fishermen because it enables them to continue making a living through fishing). Because of the strength of prongs 1 and 2, the tie-up is likely to be found a regulatory taking.

Property: The Takings Clause applies to both real and personal property, and here would apply to the boats themselves and the income fisherman are losing by being unable to use their boats to fish.

Public use: This element has been interpreted broadly to apply to any reasonable government interest benefiting the public. It is in the public interest to maintain sustainability of coastal marine life, to promote ecological diversity and to assist the fisherman themselves in continuing to make a living by fishing (which would not be possible if marine life became extinct through overfishing). Restraining use of fishing boats is therefore likely to be determined a public use.

Just compensation: The state does not compensate the fisherman for the tie-up requirement. Since the tie-up requirement is likely to be determined a taking, just compensation measured by loss to the owner is required, and provision (c) of the Abalone Act will be held unconstitutional in violation of the Takings Clause for failing to provide just compensation.

=====
END OF EXAM