

FINAL EXAMINATION  
CONSTITUTIONAL LAW -- PROF. RUDNICK  
FALL, 2009  
DECEMBER 15, 2009

This examination is divided into two parts. The exam is worth a total of 80 points. The remaining 20 points come from the two quizzes. The first part of the exam, 60 TOTAL POINTS, is comprised of short answer fact patterns, followed by one or more questions relating to the fact pattern. READ THE FACT PATTERNS AND QUESTIONS CAREFULLY. The questions are, more often than not, very limited and some direct you to the precise constitutional issue to be addressed. Others are more open ended, and require you to determine, for example, the best argument, that is the one most likely to succeed. Some questions actually contain more than one question. **If that is the case, make sure you answer each sub-part.** You will NOT receive credit for non-responsive answers. You must write your answers on the exam itself. If you find yourself needing to go beyond the number of lines provided, the likelihood is that you are WAY off the correct track. You should be able to answer the questions in the space provided. You may use the reverse side of the page so long as you make it clear which numbered question you are responding to.

**YOU MUST PUT YOUR IDENTIFICATION NUMBER ON THE TOP OF EACH PAGE OF PART I OF THIS EXAM.**

The value of each question is set forth at the beginning of the question.

Part II is a typical essay question, WORTH 20 POINTS. The answer must be written in the blue book, on only one side of the page. YOU ARE LIMITED TO ONE BLUEBOOK. In discussing the issues consider the arguments and counter-arguments and the likelihood that any particular claim will succeed. If you think additional information is required to analyze the issue, or you are making factual assumptions, state the information required and/or the fact(s) assumed, and what bearing this has on your answer to the question.

THIS IS A CLOSED BOOK EXAM-Do not start until told to do so. You may have nothing with you in this exam except writing implements. This includes cell phones, blackberries and other electronic gadgets. Please place all your books, coats, bags and pocketbooks at the front or sides of the room.

**FOR THE ESSAY, YOU MUST WRITE ON ONLY ONE SIDE OF THE PAGE, EVERY LINE, AND YOU MUST LEAVE A MARGIN ON THE LEFT HAND SIDE FOR MY NOTES AND CORRECTIONS. YOU MUST WRITE LEGIBLY. I WILL NOT READ ANY PORTIONS OF THE EXAM NOT IN COMPLIANCE WITH THESE RULES, AND THUS, YOU WILL RECEIVE NO CREDIT FOR THOSE PORTIONS.**

**YOU HAVE THREE HOURS FOR THIS EXAM.**

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1. The legislature of the State of Sobriety recently held hearings at which experts on alcoholism and addiction as well as representatives from such organizations as Mothers Against Drunk Driving (MADD) testified. Experts convincingly testified that drinkers, particularly serious drinkers, do not consume less as the alcohol content of the libation increases. "Higher alcohol content only means that drinkers get drunk faster and stay drunk longer," one addiction specialist said. Concerned about the safety of the public and the increased health care costs occasioned by the presence of more drunks on the roads, the Sobriety legislature just passed a statute that prohibits the sale of beer, defined as an alcoholic beverage based upon fermented grain, with a percentage of alcohol greater than 4.95%.

Most beer manufacturers brew beer that contains less than 4.95% alcohol. However, microbrewers, that rising industry of small, boutique brewers that brew specialty beers in small amounts, are increasingly brewing specialty beers with up to 21% alcohol. These brewers claim that limiting alcohol content prevents creative brewers from tinkering with flavors by adding sugars or malt that change the beer's taste and increase its alcohol content, and limits the brewers' market for these beers. Most microbrewers are located in colder climates, such as the Rockies and New England. No microbrewers are located in Sobriety. The statute is set to go into effect on February 15, 2010.

The Association of Microbrewers, a trade association comprised of, as expected, breweries that make specialty beers in small quantities, brings suit against the state official charged with enforcing the statute, on January 19, 2010, in Federal District Court in Sobriety, alleging that the statute violates the Constitution, requesting prospective injunctive relief against its enforcement.

A. (3 pts) The State of Sobriety brings a Motion to Dismiss the case claiming that the Federal Court has no power to entertain the merits of the case. What should the State argue as the grounds for the Motion, how should the court rule and why?

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3. Since colonial times, states have been battling over the rights and access to and control over navigable interstate waters. Suits have been brought and decided, Congress has intervened through substantive legislation allocating states' rights to interstate waters, and has permitted states to enter into compacts designed to accomplish the same end. However, disputes continue to flare up, and they take a considerable amount of the time and resources of the federal court system, particularly the Supreme Court. Congress recently passed a law depriving the Supreme Court of initial jurisdiction over suits between states concerning riparian rights (rights to access and control over navigable waters). The statute vests jurisdiction over those cases solely in any federal district court located in any of the states which is a party to the suit. The Supreme Court will have jurisdiction to hear an appeal from the decision of the district court. Missouri contends that Illinois is diverting water from the Mississippi for use on farms in the southern part of that state, to the detriment of power plants south of St. Louis.

(2 pts.) Missouri contends that the jurisdictional statute is unconstitutional. Is the statute constitutional? Why or why not?

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4. The federal student loan program, created by Congress many years ago, provides federal funds for certain groups of students attending colleges, universities and other educational institutions of higher learning. In order to be eligible, students must be enrolled in a recognized (accredited) institution, must be United States citizens and must be attending the institution on a full or at least half-time basis. Students who have already begun to receive

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student federal funds must remain students in good standing at the recognized institution in order to continue to receive the federal funds. Any student who, while receiving loan money authorized by the statute, is convicted of a federal or state offense for possession or distribution of a controlled substance, will have his or her funding suspended immediately.

Wendie Weed, an American citizen who is a student at User University (a recognized educational institution located in the state of User) has been receiving federal funds since her freshman year in 2007. In November, 2009 she was convicted of possession of marijuana. Although Wendie had a prescription from her physician to use the marijuana for pain resulting from a serious eye condition she suffers from, and User has a compassionate use law, she was prosecuted in federal court, where the medical marijuana law has no effect, and is not a defense. She immediately had her loans suspended, was unable to pay tuition for the Spring, 2010 semester, and has had to drop out of school. Wendie brought suit in federal court against the Secretary of Education, who is responsible for administering the federal student loan program, alleging that the suspension portion violates the federal constitution. At trial, she introduced evidence that two members of the Lacrosse team at User U were convicted of driving under the influence. One of these athletes was also convicted of vehicular manslaughter because he ran over a pedestrian with his car while inebriated. Neither of these two students lost his federal loan. Another classmate was convicted of passing bad checks and is currently serving a 60 day sentence in a state penal facility in User. This classmate is still getting her loans, although she is unable to attend classes because she is in jail. Wendie and her lawyer think this makes no sense and is unfair.

(4 pts.) If Wendie claims that the federal law violates Equal Protection, what level of scrutiny will the court apply and why, who has the burden of proof, what does that party have to prove and who is likely to prevail?

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5. The federal Sexual Offender Registration and Notification Act (SORNA), passed by Congress and signed into law in 2006 by then President Bush was enacted “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators....” Among other provisions, it requires each state to create and maintain a sex offender registration database that includes the following information: offender’s (1) ss#, (2) residential address and (3) employer information including address where offender is actually employed. The state must keep the information current, so any registered offender who changes his or her residence, employer or place of employment must update the registration within 10 days of the change. The state registries must be maintained in a technological form compatible with the databases of the other 49 states, the District of Columbia and Puerto Rico. The compatibility requirement is necessary so that other states can access the registries of all these locations at any time. The statute also requires that each state designate a State Offender Registry Official (SORO) whose responsibility it is to maintain and operate the database. SORNA is overseen and implemented by the Department of Justice in Washington.

The Commonwealth of Massachusetts, which already has a comprehensive database and does not want to expend more of its scarce resources on the federal law, challenges the constitutionality of SORNA, including creation of the SORO, in federal court, as violating the United States Constitution.

A. (3 pts) What is the state’s strongest argument in favor of its claim that the statute is unconstitutional?

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B. (4 pts) Assume for this question only that in passing SORNA, Congress included the following provision:

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter, shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under [the Omnibus Crime Control and Safe Streets Act of 1968].

Assume that Massachusetts challenges SORNA as being in violation of the Constitution. What is the United States' strongest argument in favor of the constitutionality of this version of the statute? What four factors will the court use to assess the statute's constitutionality in light of the government's argument, and what is the likely result?

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6. In the early 1990s, the United States, Mexico and Canada entered into negotiations concerning the flow of goods between and among the three nations. The negotiations ultimately resulted in the North American Free Trade Agreement (NAFTA), an agreement signed by the leaders of the three nations. Congress passed legislation shortly after NAFTA was ratified, effectuating the provisions of the agreement. After NAFTA and the legislation went into effect, a group of businesses that (i) manufacture and service products made and sold only in the United States, and (ii) promote the manufacture and purchase of goods made wholly within the United States, known as the “Made in America Foundation” (Foundation), brought suit against the United States, contending that NAFTA is unconstitutional. The Foundation alleges that it should have been created through the executive’s treaty power, which requires Senate ratification, rather than by executive agreement, which does not require any Congressional action. The Foundation can prove that its members will lose business because NAFTA permits and encourages goods to be manufactured and sold at lower cost by Mexican and Canadian companies than by competing American businesses.

A. (1 pt) The United States moves to dismiss the case, alleging that the case is non-justiciable. What is the strongest basis for the motion?

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B. (3 pts) If the United States argues the answer to question 6A above, identify at least three factors that the court will apply to determine if the United States will prevail on its motion.

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7. During the War Against Terrorism, President Bush issued an Executive Order that garnered far less publicity than did his controversial military orders, including those related to the detention of enemy terrorists in Guantanamo Bay. This order nullified all existing contracts between the United States, any state or political subdivision of a state, individual or business entity located in or licensed to do business in the United States and the countries of Iran or Iraq or any political subdivision of those countries, or any person or business entity located in or licensed to do business by those countries. The order also banned the shipment of any products from the United States to those countries.

Terrorist Technology (“TT”), a New York corporation, was in the midst of negotiations with a privately owned Irani security company to provide it with night vision equipment for nighttime surveillance. Although no contract had been signed, the negotiations were going very well, and the Irani company had indicated that it would sign an agreement shortly. This was going to be a very lucrative contract for TT, and it hoped to use it as a jumping off point for doing more business with the Middle East. TT brought suit against Bush in federal district court asking for a declaration that the Executive Order was unconstitutional as beyond the President’s Executive power, and an injunction against its enforcement.

A. (3 pts) The President wishes to get the case dismissed without a ruling on the merits. What is the President’s strongest argument to achieve this goal, who has the burden of proof and what factors will the court use to evaluate the defense?

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B. (2 pts) Assume for this question only that the case proceeds to the merits. Where will the Executive argue he gets the power to carry out his duties and responsibilities in general?

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8. Following complaints lodged during the 2008 presidential election that individuals entering and leaving polling places were accosted by persons carrying signs and passing out literature for the various candidates and issues on the ballot in the State of Duress, the Duress legislature passed a statute that prohibits the dissemination of flyers or leaflets, handouts or other electioneering paraphernalia (as defined in the statute), promoting or opposing any person or issue on the ballot, within 100 feet of the entrance or exit to any polling place.

(1 pt) Assume a party with standing challenges the law by suing the appropriate party in federal court, alleging that the statute violates the First Amendment. What standard of review will the court use to evaluate the plaintiff's claim and why?

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9. Following 9-11, when the aircraft that destroyed the World Trade Center and the Pentagon, and crashed in the Pennsylvania field were piloted by foreign nationals who had learned to fly and been licensed in the United States, Congress passed a law prohibiting any individual instructor or institution licensed to give flying instruction or instruction in aircraft

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maintenance from knowingly giving instruction in aviation operations or aircraft maintenance to any individual not a citizen of the United States. The statute also prohibits the FAA from granting a pilot's license or an authorized mechanic's license to any individual not a citizen of the United States.

Fred Foreigner, an Italian citizen who was a licensed commercial pilot for Alitalia for 20 years, has moved his family to the United States where his wife's family resides. His wife is a United States citizen. Although Fred is exceedingly qualified to obtain a commercial pilot's license in the US, he is not an American citizen, and cannot become one for a minimum of 5 years. Fred sues the FAA in federal court claiming that the federal statute violates his equal protection rights.

(2 pts.) What level of scrutiny will the court apply to evaluate the constitutionality of the federal statute and why?

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10. Following extensive hearings from victims, mostly young people, of a crime called "cyberbullying," Congress passed the School Cybercrime Enforcement and Prevention Act (SCEPA). Congress heard extensive testimony concerning the misuse of the internet, including popular personal internet sites such as "My Space" as vehicles for sending harassing and threatening images and messages about classmates. The statute makes it a federal criminal offense for any student enrolled in a public or private elementary or secondary school, to use any technological device or electronic medium to convey by words, images or otherwise, communications constituting harassment, abuse, intimidation, or threats directed to another student enrolled in a public or private elementary or secondary school.

(4 pts.) Assume the statute contains no other provisions. Benny Bully, a 13-year-old student enrolled at City Elementary School sent a hand-drawn picture of a young black man hanging by a noose to several of his classmates, all of whom live in City. The image bore the word "Charlie"

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under the picture. There is a black boy in Benny's class named Charlie, who also resides in City. Benny is indicted in federal court under SCEPA. Benny defends the case on the grounds that the statute is unconstitutional as beyond Congress' power to legislate because all the activities occurred within City. Where should the government argue Congress obtained the power to enact such legislation? What three categories of activities has the Supreme Court held are within Congress' power to legislate under this constitutional provision?

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11. State has recently passed a law that requires all women seeking an abortion receive a statement in writing providing the following information:

- (a) The name of the physician who will perform the abortion;
- (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
- (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of State;
- (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
- (e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
  - (i) Depression and related psychological distress;

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(ii) Increased risk of suicide ideation and suicide.

A. (1 pt.) Patient, a pregnant woman, brings suit against State in federal district court asking for declaratory and injunctive relief declaring the statute unconstitutional and prohibiting enforcement of the statute. State wishes to get the case dismissed without a hearing on the merits. What is State's strongest argument to achieve that goal?

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B. (4 pts) Assume for the purposes of this question only, that the case proceeds on the merits. What possible standards will the court apply to evaluate Patient's claim, and how will the court decide which it will apply?

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12. Former New York Senator Hillary Clinton's nomination to be Secretary of State raised the issue of whether she is constitutionally permitted to serve in that capacity. Article I, Section 6, clause 2, known as the "emoluments clause," prohibits any Senator or Representative from serving in any civil office of the United States (Secretary of State) the pay or benefits (emoluments) of which that person voted to increase. Congress raised the pay of all cabinet secretaries last year. Clinton was among those who voted to raise the salaries.

(1 pt.) Several taxpayers brought suit in federal district court to enjoin Senate approval of Clinton as the Secretary of State on the grounds that their tax dollars should not be used to pay a government official serving in violation of the Constitution. Clinton's legal representative filed a motion to dismiss the action, claiming the case was non-justiciable. What was the strongest argument in support of the motion, how did the judge rule and why?

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13. (2 pts) The Supreme Court has held that two factual circumstances constitute, as a matter of law, a “compelling state interest” satisfying the first prong of the so-called “strict scrutiny test.” What are the two circumstances?

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14. Extensive scientific research has demonstrated that the brains of men and women, as well as boys and girls, function differently. According to experts, the brains of boys and girls develop on different “trajectories” and at different rates. Steven Superintendent, the Superintendent of the Middlesex Public School District in State, decided to address these differences, which he and other educators and psychologists believe are responsible for the fact that girls do considerably better in reading and writing in elementary school than do boys of similar ages and grade levels, and boys do better in math. Standardized test scores in these areas reflect these apparent biological differences. Superintendent and other teachers and administrators in the Middlesex Public School District decided to address this problem by creating a dual track program in which parallel single gender classes are conducted in English, Science and Math classes for students in grades 6, 7 and 8. All other classes for those grades and all other grades are co-ed. In the dual track program all curriculums, teachers and resources are identical. The only difference is that one class is all girls, the other all boys.

(4 pts.) A group of parents of students enrolled in grades 6, 7 and 8 at elementary schools in the Middlesex Public School District brought suit challenging the constitutionality of the dual track program. What is the strongest constitutional basis for the parents’ argument? If the court agrees with the parents, what standard will the court use to evaluate the

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constitutionality of the program, who has the burden of proof, what does that party have to prove and who is likely to prevail?

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15. For decades, the United States has been grappling with how to stem the tide of illegal immigrants teeming over the almost 2000 mile long border between the United States and Mexico. In the past, prevention has been attempted through a combination of barriers and extensive patrols by customs and immigration agents (now members of an agency known as ICE) on foot and using all-terrain vehicles. These methods have been extraordinarily ineffective, and have been responsible for injuries to or death of many illegals, not to mention damage to the ecosystem and wildlife. So Congress has decided to create a “virtual fence” along the entire border. Poles that are approximately 25’ high and 6” in diameter will be positioned into the ground every 100 feet along the border. Atop each pole will be affixed a closed circuit camera, capable of viewing in a circle of approximately 50 feet, so that the entire border will be observable by at least one camera. Each camera is equipped with special night viewing capabilities, and motion detectors that are calibrated to detect motion likely made by a human (greater than that of most animals native to that area). The cameras will feed directly by satellite to televisions located in ICE and/or Homeland Security buildings located on government property along the border. Homeland Security has already started installing the poles. A group of landowners, on whose property these poles and cameras will be affixed, has brought suit against the United States claiming that they should be compensated for the installation under the doctrine of eminent domain. The United States claims that the intrusion is insignificant and will not interfere with the landowners’ use of their property.

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A. (3 pts) The owners claim this is a per se taking. Please state the three kinds/categories of per se takings.

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B. (3 pts) Into which category does this fact pattern fall? Will the United States' defense be successful? Why or why not?

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## ESSAY QUESTION (20 pts)

You are all aware of the need for healthy transplant organs. Patients in need of a transplant so greatly outnumber donor organs that each year, many people die simply because they do not receive a transplant in time. Legislators in the state of Concern (which recently lost a former Governor because a donor could not be found timely) decided to do something about it. They enacted the Organ Donor Preference Law, which provides that any person who dies in the state of Concern, and who offers (or whose estate offers) an organ for donation after death, must first make the organ available to residents of the state of Concern except if a contributing factor to the condition necessitating the transplant is alcoholism or drug addiction. Eligible Concern residents in need of organs are placed on an Organ Recipient Transplant List ("List") in order of need. If no match is found or the organ is not needed by any of the eligible residents, then the organ's availability is made known throughout the world, via an international organ donor network.

Duck Chainey, a resident of Washington, D.C., who does not receive Medicare, suffers from Conservititis, which has destroyed his kidneys (some may say it has also affected his brain). He needs a transplant badly. He has been on the national recipient list for many, many months without a match being located. Rob Patterson, a resident of Concern, died suddenly in a car crash in that state, and his family offered his organs for donation. Pursuant to Concern's Organ Donor Preference Law, they were first offered to residents of Concern whose conditions were not the result of alcoholism or drug addiction.

None of Patterson's organs, except his kidneys, could be used by Concern residents. His kidneys were about to go to Al Coholic, a mechanic living in Concern who had recently been diagnosed with kidney disease, a by-product of his alcoholism. However, the transplant fell through and his name was removed from the list when the List Administrator discovered the nature of his illness. Because of the delay related to the mix-up with Al, Patterson's kidneys were not usable by the time the international network administrator was notified of their availability. It is strongly believed that Patterson's kidneys would have been a match for Duck, although whether he would have received them is unclear.

Duck's family is outraged. His wife Win, contacted a lawyer who researched the case. The lawyer discovered that in 2002, Congress enacted the National Organ Donor Law, which regulates certain organ donations. Legislative history reveals that the statute was designed to curb spiraling costs associated with organ transplants. The law provides, in pertinent part, that:

(1) Organ harvesting (surgery to retrieve the organ from the donor) and organ implantation can only be performed in a hospital licensed by the United States Department of Health and Human Services;

(2) If the donee is a Medicare recipient, Medicare agrees to pay for the cost of the operation and post-operative care ONLY if the surgery is approved before the transplant is performed by the Federal Transplant Panel, a three-person panel comprised of a doctor, an economist and a medical ethicist, one appointed by the Secretary of Health and Human Services, one by the Speaker of the House and one by the President Pro Tem of the Senate.

The panel is required to review the patient's case, including the health and age of the patient, and conclude that the transplant is necessary to the life of the person. The decision of the review board is final, and cannot be appealed or otherwise reviewed by any Court of the United States.

(3) No state may continue in force or effect any statute law or regulation that imposes any requirements on the receipt of an organ covered by this statute other than the above.

Duck's lawyer files suit against the proper party challenging the constitutionality of the Concern state law. Alas, Duck (who would not have been on Medicare) died shortly after the complaint was filed.

Al filed suit contesting the Concern law as well.

What are the constitutional issues raised by the above fact pattern?