FINAL EXAMINATION
CONSTITUTIONAL LAW -- PROF. RUDNICK
FALL, 2012
DECEMBER 18, 2012

This examination is divided into two parts. The exam is worth a total of 87 points. The remaining 13 points come from the two quizzes (I have taken the best of the two 10-point quiz scores). The first part of the exam, 52 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, unless you get permission to write them in a bluebook. 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 comprised of two typical essay questions, WORTH 30 POINTS total. 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.

Part II is 5 multiple choice, each worth 1 point.

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.
A. In response to the overwhelming number of identity theft cases, which often leave victims with insurmountable obstacles to restoring their damaged credit ratings, State recently enacted the Fair Practices Identity and Credit Security Act ("Act"). Pursuant to the Act, which is scheduled to go into effect March 1, 2013, a victim of identity theft may, by registered mail or electronic means provided by the reporting agency, notify a credit reporting agency doing business in State of the theft and place a freeze on the release of the individual’s credit report for a period of thirty (30) days. Any credit reporting agency receiving a request for a freeze must freeze the account immediately and confirm that the freeze has been placed by sending a registered letter to the individual within five (5) business days of the request. Under the Act, a credit reporting agency must keep the freeze until the consumer or a court notifies the agency it can lift it.

Many years ago, Congress enacted the Fair Credit Reporting Act ("FCRA"), which regulates the credit reporting industry nationwide. Under FCRA, an agency suspecting that a request for a freeze has been made erroneously or fraudulently, has seventy-two business hours to investigate the request, and it need not institute the freeze until it is satisfied that the request is genuine. This provision was reached after lengthy negotiations between Congress and the credit reporting industry to accommodate the needs of the businesses.

On December 1, 2012, a trade association comprised of consumer data companies, National Association of Consumer Data Companies ("NACDC") brought suit in federal court against the individual charged with enforcing State’s law requesting an injunction against enforcement of State’s law, on the grounds that several provisions, including the one set forth above, are inconsistent with federal law. NACDC claims that it will take months and significant revenues to reformulate their computers to account for the different requirements of State’s and the federal laws.

1. (2 pts) State moves to dismiss the case on the grounds of lack of justiciability under Article III. What is the strongest basis for State’s motion, and how should the court rule?
2. (2 pts) Assume the State’s motion is denied and the case continues on the merits. What Constitutional doctrine should be the basis for NACDC’s claim that the laws are inconsistent, and where in the Constitution is that provision found?

3. (5 pts) Courts divide the doctrine in the answer to question 3 above into 2 categories. What are they and please define and/or describe each in as much detail as you can, including any subcategories courts might recognize.
B. As products that protect a person’s body from damage from dangerous weapons have become more widely available, law enforcement officials have discovered that crime fighting is not only more dangerous, but more difficult. Those involved in violent crime at all levels are now sporting bulletproof vests and other pieces of what is called “body armor.” In an effort to keep these protective coverings out of the hands of criminals, Congress last year passed the Body Armor Act, which makes it a federal crime for any person who has been convicted of a felony involving violence to purchase or possess body armor. The statute defines “body armor” as “any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire.”

Dan Defendant was convicted in federal court of being a felon in possession of body armor. He challenged the statute as being beyond Congress’ power to enact. The government claimed that Congress derived its power from the Commerce Clause.

4. (2 pts) What three categories of conduct can Congress regulate under the Commerce Clause?

5. (1 pt) Into which of the three categories should the government argue the body armor statute falls?

6. (2 pts) How should the court rule on the issue of whether the statute was within Congress’ Commerce Clause, based on your answer to question number 5 and why?
C. Title IX prohibits gender discrimination in educational facilities, public and private. The statute provides for a private right of action brought in federal court, against any wrongdoer, including government entities, for declaratory and injunctive relief as well as damages, by any person aggrieved by a violation of the act. Under Title IX, women have to be afforded equivalent educational experiences as men in terms of courses, programs and athletics. Although substantial progress has been made since the passage of Title IX in equalizing opportunities for girls and women in school and college sports, discrimination has not be totally eradicated. Franklin County School District ("District"), a government entity, operates three public high schools in Franklin County. The three high schools field one varsity girls' basketball team, and one varsity boys' team. The state athletic director in the state department of education establishes the schedule for high school all varsity teams throughout the state. The District’s girls' basketball season starts two weeks before the boys' and during this time; the girls' games are scheduled for primetime nights. Primetime is defined as evenings that precede days without school. The record reveals that at those weekend games, there “are large crowds in attendance ..., substantial student and community support in the stands, and the presence of the band, cheerleaders, and dance teams.” When the boys' basketball season starts two weeks later, the girls are relegated to playing most of their games on week nights. At those games, the atmosphere is dramatically different. The girls lose the larger Friday night audience, pep band, cheerleaders, and dance team. The bleachers are nearly deserted; there is a lack of student and community support. Because the games are on week nights, they cut into study time, and the girls struggle to complete their homework and study for tests. Thus, the scheduling policy affects student’s grades during the season. Members of the girl’s team have said that the State’s practice of placing girls’ games disproportionately in non-primetime slots made them feel like the girls' accomplishments are less important than boys'. Finally, fewer scouts from colleges come to the week night games, and as a result, fewer girls are recruited by big-time college and university basketball programs than would be the case if they played on primetime nights.

A group of young women who are members of the girls’ basketball team filed a class action in federal court against the state and the state athletic director asking for injunctive relief as well as damages.

7. (2 pts) Bonnie Basketballer is the named plaintiff in the class action. By the time the case gets to trial, Bonnie has graduated. Defendants move to dismiss the case as non-justiciable. On which particular doctrine should Defendants base their Motion, how should the court rule and why?
8. (1 pt) Assume the Motion is denied and the case continues. Defendants now move to dismiss alleging the suit violates the Eleventh Amendment. What does the Eleventh Amendment prohibit, on its face, and as interpreted by the Courts?

9. (4 pts) Plaintiffs claim the Eleventh Amendment does not bar the suit, because it falls into one of the exceptions. What should the Plaintiffs argue in opposition to the Motion (to support their position), what tests or factors will the court use to evaluate whether the Plaintiffs’ argument is constitutionally sound, and how should the court rule?

D. The NCAA is a voluntary, nonprofit association which regulates college athletics, defines eligibility rules for players and imposes sanctions for violations of its rules. Both public and private colleges and universities are members of the NCAA. The rules and regulations that cover college sports, collegiate athletes, coaches and administrations of member colleges and universities are passed by a majority vote of the membership, with each college or university having one vote, no matter how large the school’s overall enrollment is or how many student athletes participate on behalf of a college or university in all NCAA sanctioned sports. NCAA rules limit a student-athlete to four seasons of intercollegiate competition within five calendar years. The five-year eligibility rule begins to run when a student-athlete initially registers and attends the first day of classes in a regular term of an academic year for a minimum full-time program of studies. NCAA rules allow a member school to grant a waiver of the five-year eligibility rule if the reason the student exceeds the maximum enrollment time is for factors beyond his/her control. In addition, a member school may grant “a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy.”
Fred Footballer, who, after being a star for three years on the varsity football team at State University ("SU"), a state-owned and operated university, was forced to leave school for one year when his GPA fell below acceptable levels and he was academically suspended. Fred claimed that the reason his grades fell below acceptable level was that his girlfriend gave birth to their daughter, and he had to take time off to attend to the child. Fred’s girlfriend, Sandy Swimmer, a member of the SU varsity swim team, was granted an extension of the five-year period under the pregnancy exception. Fred, who was readmitted to SU after one year, on the other hand, was held to the five year limit, and could only play ball for one more year. SU claimed they had adopted the NCAA rules, and were merely enforcing them.

10. (2 pts) Fred brings suit against the President and Athletic Director of SU requesting an injunction ordering that his eligibility be extended, claiming the “pregnancy exception” policy violates the Equal Protection Clause of the Fourteenth Amendment. What class will Fred claim is the subject of the discrimination, what level of scrutiny applies to that class, who has the burden of proof, and what does that party have to prove in order to sustain the constitutionality of the “pregnancy exception”?

11. (2 pts) Assume that Fred was enrolled at and played for a private university that was a member of the NCAA, and Fred sued the school and the NCAA for violations of Equal Protection. NCAA and the university move for summary judgment in the case on the grounds that they are not bound by the Fourteenth Amendment. What is the defendants’ strongest argument in support of the motion, how is the court likely to rule and why?
E. State A’s licensing statute governing Certified Public Accountants (CPAs) includes the following provisions:

(a) Any individual applying for a CPA license within State A must have graduated from an institution of higher learning located within State A, and

(b) Any individual applying for a CPA license within State A must be a resident of State A.

State A’s law prohibits any one other than a licensed CPA from performing audits or examinations of financial books and records of corporations or other business entities doing business in State A.

Christian P. Accountant was a licensed CPA in State B, which is adjacent to and shares a border with State A. His office is located in City B, very close to a major metropolitan area in State A, Capitol City A. As more and more clients from Capitol City A sought his advice, he decided he should become licensed in State A. His application was rejected, because he was neither a resident of State A, nor did he hold a degree from a college or university located in State A. When he asked the head of the licensing board why they had these rules, the Chairman said that this was the most effective way to control the quality of services offered businesses and persons located in State A. After all, State A has control, through the accreditation process, of insuring that the quality of educational programs offered by institutions located within State A remains high.

With respect to the residency requirement, the Chairman claimed that the State has an interest in making sure they can locate and have jurisdiction over professionals who serve consumers in the state, in the event that a resident of State is harmed by the CPA’s conduct.

Christian sues the head of the licensing board in federal court, requesting prospective injunctive relief, preventing future enforcement of both provisions, above.

12. (3 pts) What constitutional doctrine is the strongest ground for Christian’s argument that the provision requiring that all candidates for CPA licenses in State A have graduated from a college or university located in State A? How will the court analyze the issue (what test or factors will it apply), and what is the likely result?
13. (3 pts) What constitutional doctrine or provision is the strongest ground for Christian's argument that the provision requiring that all candidates for CPA licenses in State A reside in State A? How will the court analyze the issue (what test or factors will it apply), and what is the likely result?

F. Prior to the 2008 mid-term elections, in which Republicans gained a number of seats in the House and Senate, President Obama sign a treaty regulating global warming worldwide. Provisions of the treaty included the creation of a body comprised of appointees named by the leaders of all signatory governments. The entity would have the power to create regulations concerning the emission of greenhouse gases, among other things, which are binding on the signatory countries, without further action on their part. The treaty provides that no signatory country can enact any laws, rules or regulations that interfere or conflict with the regulations passed by the international group.

Two thirds of the Senate approved the treaty prior to the 2008 election. The treaty's ratification was accompanied by much controversy. Not only was there backlash from the environmental community, but many Americans resented being regulated by a body comprised, almost entirely, of foreigners. Thus, in late 2009, Obama, persuaded that it was a mistake to ratify the treaty, terminated America's involvement in the treaty. He did not consent with any member of the House or the Senate before making that decision.

A group of Senators who voted to ratify the treaty, and believe that international cooperation is the only way to effectively deal with the worldwide problem of global warming, sued Obama, claiming that he negated their role in the treaty process by unilaterally terminating the treaty. They brought suit in federal court, against the President, asking for declaratory and injunctive relief.
14. (2 pts) The President moves to dismiss on the grounds that the federal court should not decide the case on the merits. What is the strongest ground for the President to argue in support of the motion, what factors (3 are sufficient) will the court use to resolve the issue of whether the motion should be granted, and what is the likely outcome?

G. New York state law gives telecommunications companies the right to erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, public or private...

In the suburbs, where residences are detached, and streets usually have sidewalks or other public lands between the street and the private land, the telephone company installs "central feeder boxes" on telephone poles located on public ways, and strings the wires from the box to the individual customers in the individual residences. In Manhattan, and various other boroughs of New York City, residential customers reside in apartments or town houses, many of which are attached or semi-attached. Most streets are separated from private property only by sidewalks, which are not suitable for telephone poles. Therefore, in order to adequately service the literally tens of hundreds of customers per city block, the phone company attaches the "central feeder box" to the rear of a centrally located building, and then strings wires from that box to all the other buildings in which customers are located, including the residents of units in the building on which the central feeder box is located. The box is approximately 12" x 12" and is painted to match the building’s material, so it is barely visible. Neither placement of the box nor the wires interferes with the operation of any of the building’s services, or the residents’ activities.
Larry Landlord owns one of the apartment buildings on which the “central feeder box” is located. Larry was unaware that the box was even there until he went around to the rear of the building to see if the garbage had been picked up. Nonetheless, he feels put upon, and thinks that the tens of wires emanating from the box to other buildings on the block look hideous.

15. (2 pts.) Larry wants damages. What constitutional doctrine provides Larry the best chance to obtain money damages? Under what theory should he proceed, and what is the likelihood of success of his claim?

H. Recently, State passed a law criminalizing the distribution of mifepristone, also known as RU-486. In the first trimester, abortions are generally (but not always) performed using a procedure known as dilation and curettage (D & C) (“surgical abortions”), in which a tool is used to detach the embryo or fetus from the uterine wall, and is then suctioned out. The procedure usually takes fifteen minutes, and occurs largely without adverse effects on the patient. There is an alternative for pre-viability abortions. Mifepristone, sometimes in combination with misoprostol, is administered to perform a “medical abortion.” In that case, the drugs cause the gestational sac to loosen itself from the uterine wall, and, over the course of the next week to ten days, it is expelled from the woman. There are some side effects from this procedure, including nausea, and other intestinal irregularities. However, sometimes, the chemical abortion is preferable to a surgical abortion, for various reasons, both medical and otherwise. There are other drugs that will accomplish the same result as mifepristone, but they can cause even more negative side effects in the patient, and are therefore rarely used by the medical community.

Because of State’s law, physicians who believe that a chemical abortion performed by the use of mifepristone is the preferable medical procedure for particular women, cannot administer the drug, and are forced to do a surgical abortion using the D & C.
16. (2 pts) Planned Parenthood of State and two of its doctors, all of whom have standing, brought suit shortly after the Act's passage challenging its constitutionality. What standard will the court use to evaluate the constitutionality of State's law, and how do courts define that term?

1. During the Bush Administration, George W. created the "Office of Faith Based Initiatives." That department was responsible for assisting religious organization in applying for and receiving government funds targeted at creating programs for after school activities for at risk youth. Under the Office's regulations, a religious group must open the program to youth of all religions (or no religion), but it did not prevent the recipient of the government funds from basing some or all of the program on religious principles, or abandon sectarian prayer as part of that program. Because of the potential controversy surrounding the Office's work, Bush chose to fund the training and grants with discretionary money from the Executive Branch's accounts (assume that is money not targeted by Congress for some other purpose).

A group of taxpayers, who object to their tax dollars being spent on clearly religious activities, brought suit against the head of the Office, claiming that the program's activities violated the establishment clause of the First Amendment (the answer to this question does not require any knowledge of the substantive law in the area). The defendant moves to dismiss the case on the grounds that the case is not justiciable under Article III.

17. (1 pt) What is the strongest basis for the administration's motion to dismiss, how should the court rule, and why?
J. Because the recent economic downturn has resulted in a spate of foreclosures, as well as skyrocketing unemployment in the state of Despair, the list for residence in state-owned public housing is growing by leaps and bounds. Despair's Secretary of Housing, who is empowered to make regulations concerning eligibility, decides that one way to decrease the number of eligible persons waiting for residences is to restrict eligibility to citizens of the United States. Verna Visitor, who is here from her native Australia on a work Visa, and who would otherwise qualify for housing, has been told she is no longer eligible because she is not an American citizen. She brings a suit against the proper party in federal court claiming that the regulation violates her rights under the Fourteenth Amendment.

18. (3 pts.) What should Verna claim is the basis for her Fourteenth Amendment claim, what level of scrutiny should be applied, and who has the burden of proof?

19. (2 pts) Assume Verna wins her suit based on your response to the above question. Despair is still faced with a backlog of persons eligible for public housing. So the Housing Secretary decides to raise the annual family income level from $15,000 for a single person such as Verna, to $30,000. Again, Verna is told she is ineligible for public housing. She again brings suit against the proper party in federal court alleging her Fourteenth Amendment rights have been violated. What should Verna claim this time is the basis for her Fourteenth Amendment claim, and what level of scrutiny should be applied, and who has the burden of proof?

K. Diplomatic immunity is principle of international law that ensures that diplomats are able to render their duties without obstruction by the laws of the country in which they are stationed. Under the doctrine, diplomats, such as ambassadors and consuls, are not susceptible to civil lawsuits or criminal prosecution under the host country's laws, although they can still be expelled. The doctrine is embodied in various Vienna Conventions, among others, though the concept and custom have a much longer history. The head of state of the "host" country grants certain privileges and immunities to representatives of foreign states to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis. The doctrine even prevents a diplomat from being subpoenaed as a witness in any case or hearing. It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with their diplomatic roles. However, many countries refuse to waive immunity as a matter of course. Individual diplomats have no authority to waive their own immunity (except perhaps in cases of defection). The home country may prosecute the individual, but except in instances where security of the home country is involved, they do so infrequently.
Additionally, there are levels of immunity. Administrative staff to an ambassador or those who work in an embassy have lower levels of immunity than the Ambassadors themselves, and consuls and consular staff members have lower levels still. The existence of the doctrine does not mean that Ambassadors and consuls, for instance, do not encounter legal problems while residing in the United States, ranging from such mundane matters as breach of contract to pay vendors or workmen, up to and including commission of violent crimes.

Because most of these cases are dismissed extremely early in the litigation, and never even get to discovery stage, Congress has decided to create a Diplomatic Adjudication Court (“DAC”), which shall have sole and exclusive jurisdiction over cases involving diplomats, who allege they have immunity of some kind. The judges will be appointed by the President, serve a term of 5 years, and must have some background and experience in international law. Congress creates the DAC by statute and the President signs it into law. The purpose of the DAC is to expedite cases which, by and large, simply cannot legally proceed.

20. (1 pt) The Turkish Ambassador to the US is being sued in the DAC for $1,000,000. Plaintiffs allege he made material misrepresentations in order to induce them to invest in worthless companies in Turkey, and therefore, he should not be granted immunity. The Ambassador moves to dismiss on the grounds that the DAC is unconstitutional. How should the court rule and why?

L. In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (“Act”). Passage followed extensive lobbying by gun manufacturers, distributors, and gun enthusiast organizations such as the NRA. Lobbyists objected to what they claim are specious and frivolous actions brought by victims of gun violence who claim their injuries were as a result of the excessive manufacture and sale of firearms in the United States. The fact is that although many injuries come at the hands of criminals who possess guns illegally, some are injured by individuals who are licensed to carry the weapon. Plaintiffs claim that our “gun culture” is the fault of gun manufacturers and enthusiasts who encourage private gun ownership. One portion of the law prohibits suit in federal or state court for damages resulting from the criminal or misuse of a firearm distributed in interstate commerce.

Another part of the statute provides that any lawsuit pending in state or federal court that seeks damages for injuries resulting from the criminal or misuse of a firearm distributed in interstate commerce shall be immediately dismissed upon the effective date of the statute.

Several states have joined together and sued the United States in federal court claiming that the provision commanding dismissal of pending suits in state courts interferes with the states’ sovereignty and ability to control cases in their own courts.
21. (1 pt) According to the *Heller* and *McDonald* cases, what is the current scope of the fundamental right to bear arms as protected by the second Amendment?

22. (1 pt) With respect to the portion of the act that commands dismissal of pending suits in state courts, what Constitutional provision is the strongest basis for the states’ case?

M. 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 that 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 Association of Microbrewers, a trade association comprised of, as expected, breweries that make specialty beers in small quantities, brings suit against Sobriety in the Federal District Court of Sobriety, alleging that the statute violates the Constitution, requesting damages and prospective injunctive relief against its enforcement.
23. (1 pt) 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 Sobriety argue as the grounds for the Motion, how should the court rule and why?

24. (2 pts) Assume that eventually, the court proceeds to consider the Association’s claim. What does the Association have to prove in order to demonstrate it is the proper party to bring the case?

25. (3 pts) Assume that the case proceeds on the merits. The Association claims that Sobriety’s law violates the dormant commerce clause. What standard or test will the court apply to determine whether the statute does in fact violate this constitutional doctrine and why?
MULTIPLE CHOICE
(5 pts total)

1. City A, located in State, has always maintained its own fleet of tow trucks to remove illegally parked cars from City A's streets. However, because of the escalating costs of fuel and maintenance, City has decided to privatize its towing program. City A's City Counsel has decided that although the process for choosing will be subject to State's public bid law, City A will accept bids only from businesses having their principal place of business within City A.

   Tow Truckers, a tow truck company located in City B, which is close to City A, and does business in City A with both governmental and private clients, puts in a bid, but it is not considered because the company does not have its principal place of business in City A. As a result, the revenues of Tow Truckers decrease dramatically in the first six months following award of the bid.

   Tow Truckers brings suit against City A in federal court, asking for injunctive relief and damages on the grounds that the decision to limit eligible bidders to companies having their principal place of business in City A violates the dormant commerce clause.

   What is the most likely result of the case?

(A) Judgment for City because the suit violates the Eleventh Amendment;
(B) Judgment for City because it is a market participant;
(C) Judgment for City because the dormant commerce clause applies to states, not municipalities;
(D) Judgment for City because the bids were made in compliance with the public bid law.
2. New Jersey wants to construct a liquefied natural gas terminal on the banks of the Delaware River, which is estimated to generate enough fuel to provide electricity for all the homes in three states, and $1 billion in revenues for New Jersey. Sounds like a no-brainer, except that in order to build the LNG terminal, a pier that juts several hundred feet into the Delaware River must be constructed, and the state of Delaware, which opposes the terminal on safety and security grounds, claims it owns that part of the River under a 1682 land grant from the Duke of York. Delaware files suit in the Supreme Court against the State of New Jersey, claiming that the latter’s proposed LNG terminal trespasses on Delaware’s property and interferes with its riparian rights.

New Jersey moves to dismiss the case on the ground that the Supreme Court has no jurisdiction over the case. What is the most likely result of the case?

(A) The Motion will be allowed because the Eleventh Amendment bars all suits brought against a state in federal court.

(B) The Motion will be allowed unless Congress has enacted a statute providing the Supreme Court with jurisdiction over these kinds of cases.

(C) The Motion will be denied because the Supreme Court has original jurisdiction over the case, and the Eleventh Amendment does not apply.

(D) The Motion will be denied because the case involves issues of interstate commerce.
3. In light of the extraordinary dangers posed by the incorrect disposal of mercury, Congress recently passed the Safe Mercury Disposal Act, which requires all possessors of mercury (which, in addition to old fashioned thermometers, is found in widely-used compact fluorescent light bulbs) and/or products containing mercury, to dispose of the products in a manner that is safe for the environment and personal health. Among other things, possessors are required to place the mercury, or object containing mercury in zip loc bags, and the sealed bags must be taken to a federally authorized mercury disposal site. The statute defines “possessors” as any individual or entity including states, municipalities, counties, towns and other incorporated subdivisions of a state. Failure to dispose of mercury or products containing mercury can result in imposition of a fine.

Congress designated the Environmental Protection Agency as the executive department tasked with carrying out the statute.

State has its own mercury disposal law which is less costly to administer than the federal statute, and it does not wish to comply with Congress’s legislation, so it brings suit against the EPA claiming that the law unconstitutionally infringes on its sovereign powers.

What is the most likely outcome of the suit?

(A) State will win because Congress has no power to coerce states into complying with federal law.

(B) State will win because the federal law requires state employees to execute federal law without compensating them.

(C) The EPA will win because State is being regulated in the same capacity as similarly situated private entities.

(D) The EPA will win because Congress has the power to regulate nationwide environmental issues under the commerce clause.
4. Following hearings at which the House Committee on Education heard testimony that many states do not require municipalities and school districts to offer kindergarten classes to children under the age of 6 years old, members of the Committee determined that all states should be required to offer such educational opportunities. At the hearings, the Committee heard testimony that the number of incidents of juvenile delinquency and gang violence is directly related to the age at which children start school, when they are forced to socialize and interact with other children. Rates of juvenile delinquency and violence in municipalities which do not offer public education to or require children to attend school until they have attained the age of 6 are higher than jurisdictions which require children to attend school starting at 4 ½ or 5 at the latest. Some members of Congress wish to propose legislation making it mandatory for all states to enact laws requiring municipalities and school districts to (1) offer public school education to children from age 4 ½ or 4 and (2) require children to attend school from age 4 ½ or 5.

In order to avoid a successful constitutional challenge, where should Congress claim it derives its power to enact such legislation and why?

(A) From the Commerce Clause because education affects commerce in that it is directly related to earning capacity, and the greater one’s earning capacity, the more money one has to spend.

(B) From the tax and spend clause, because Congress can induce states to act by offering monetary incentives such as funds for elementary school buildings and teachers.

(C) From the necessary and proper clause, because that provision allows Congress to enact any legislation that benefits the nation as a whole.

(D) From Section 5 of the Fourteenth Amendment because education is a fundamental right under the United States Constitution.
5. The Nuclear Waste Policy Act made the federal government responsible for permanently disposing of spent nuclear fuel and high-level radioactive waste produced by civilian nuclear power generation and defense activities. It provided that the government would do so through geologic disposal, which involves constructing a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact. The Department of Energy was required to begin disposal by January 31, 1998. Since 1987, when the Act was amended, the Department has been directed to consider the suitability of one site only—Yucca Mountain, Nevada—for the repository. A variety of difficulties put off commencement of the disposal until 2010. The Act also made the generators of nuclear waste responsible for the full costs of the disposal of civilian nuclear waste. According to the statute, each year, the Secretary of the Department of Energy must assess a fee to every civilian generator of nuclear waste, commensurate with the costs of disposing waste coming from that generator. The Act provided for an appeal process before the Secretary if the generator objects to the assessment. However, once an appeal is lodged, the Secretary reviews the assessment de novo, and therefore can raise or lower the amount on appeal. If the Secretary amends the initial assessment, by raising or lowering the amount, he or she is then be required to transmit, to both houses of Congress, a written report stating the reasons that the assessment was changed. One house of Congress, by a majority vote, could overturn the Secretary’s decision, and reinstate the earlier one.

The Secretary lowered the assessment against Naughty Nuclear Research Company following Naughty’s appeal. However, the Senate, by a 54-46 vote, rejected the reduction, and reinstated the first assessment.

Naughty filed suit in federal court against the Secretary alleging the statutory procedure for assessing the amount due violated the Constitution.

What is the likely result of the suit?

(A) The Secretary will win because the President, representing the Executive branch, agreed to the process when he signed it into law.

(B) The Secretary will win because the statute was enacted in accordance with the requirements of bicameralism and presentment.

(C) Naughty will win because the assessment process violates due process.

(D) Naughty will win because the assessment process violates the separation of powers and the doctrine of bicameralism and presentment.
CONSTITUTIONAL LAW
FALL, 2012
ESSAYS (15 points each)

I. Louise and Susan met and fell in love while in college. They became a couple and lived together in a committed relationship for several years. During that time State, where they reside, did not recognize same-sex marriage. After they had been together several years, they decided they wanted to have a child. But in order to make the child-bearing process as much a joint enterprise for the two women as it would ordinarily be for a man and a woman, they devise the following plan: Louise would donate her egg which would undergo in vitro fertilization at the fertility clinic. The fertilized egg would then be implanted into Susan, who would carry the child to term and give birth.

Everything went as planned in the beginning. Susan gave birth to a beautiful girl whom the couple named Lillian, after Louise’s mother. Louise was present at the birth and cut the umbilical cord. For several years, the two shared equally in the parenting of Lillian, including educational and religious instruction, as well as in her financial support. Lillian called both Louise and Susan “momma.” The couple gave the child a hyphenation of their last names. Although the birth certificate lists only Susan as the mother and does not indicate a father, a maternity test revealed that there is a 99.99% certainty that Louise is the biological mother of the child. Louise and Susan sent out birth announcements with both of their names declaring, “We Proudly Announce the Birth of Our Beautiful Daughter.”

Shortly after Lillian turned 1, State legalized same-sex marriage, and Louise and Susan were married in their local church.

Shortly after Lillian turned 4, the marriage deteriorated. Louise was offered a better job out-of-state, and was resentful that Susan would not even think about moving, so she had to turn-it down. Louise then quit her job and was none too quick about getting another, leaving Susan to (begrudgingly) become the sole support of the family. Louise became interested in photography, and began spending more and more time away from the house, and Lillian. Right before Lillian’s 5th birthday, Susan asked for a divorce. Louise agreed, except for one thing. She wanted custody of Lillian, who was, after all, named after her mother. Susan refused outright, and said “I am the birth mother, and by the law of State, the mother of this child.”

In support of her position, Susan’s lawyer argued the following (among other contentions, not relevant here):
1) The Uniform Probate Code, which is in effect in States, includes the following relevant language:

(a) A man is presumed to be the father of a child if:

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) he agreed to be and is named as the child's father on the child's birth certificate; or

(C) he promised in a record to support the child as his own; or

(5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

(b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.

2. Another part of State's law provides:

The donor of any egg, sperm, or preembryo, other than one spouse in a married couple undergoing in vitro fertilization or surrogacy or a father who has executed a preplanned adoption agreement under State law shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.
3. Under State law, the birth mother is automatically listed as the mother on a birth certificate, and parties wishing to change that status must petition the appropriate court.

Louise contends that the above statutes are unconstitutional. Discuss the Constitutional issues raised by the fact pattern, including the constitutionality of the above statutes.

II. Doctor Know, a radiologist, has been on the staff at Union Hospital for 4 years. Although Union is a privately owned hospital. Because it is the only medical facility within 100 miles of the city of Hope, Idaho, the city of Hope and all surrounding towns contract with Union and its staff to provide medical services to their employees. Additionally, the City of Hope Counseling Center, which provides family, couple and individual psychological counseling and is the only municipally funded medical provider in the City or environs, rents space from and is located in the Hospital. Additionally, Union receives federal and state funds for services covered by Medicare, Medicaid, and other under other Health related programs. Doctor Know had the extreme misfortune to be at a gathering recently where drugs were being used. In fact, when the police entered the premises, a large quantity of cocaine was visible on a table in the living room. Know was in the kitchen adjacent to the living room. Doctor Know was arrested, taken to the station and booked. On November 24, she was charged with possession of cocaine.

When the Chief of Radiology at Union Hospital ("Chief") heard about Know's arrest on the morning of November 25, he suspended her privileges immediately, with pay, wrote her a letter and had it hand to her delivered that day. By the time the Chief got around to meeting with Know on December 1, the charges had been dismissed, for insufficient evidence. Chief, who had heard stories from other doctors about Know's drug use, met with Know, heard her side of the story about the arrest, and told Know he was recommending immediate termination of her privileges. The Chief did not share the rumors he had heard concerning her drug abuse with Know. According to hospital policy, the renewal of privileges is determined on an annual basis and is based upon, inter alia, the recommendations of the Chiefs of various services to the Hospital CEO. All recommendations to deny the renewal of privileges must be in writing and contain the reasons in support thereof. Any physician who is subject to an adverse recommendation must be notified of that recommendation by certified mail. The recommendation then goes to the hospital CEO, who makes the ultimate decision. When the recommendation is to terminate or not to renew privileges, the doctor can also arrange a meeting with the CEO to make his or her case. Privileges are terminable for "good cause," however, the hospital has never failed to renew privileges of any licensed physician except upon proof that the doctor suffers from a disability that presents a danger to patients or other health professionals. Chief's written findings gave as a reason for Know's suspension as "Substance Abuse." Know has been informed, in writing that she can meet with the CEO
February 13, but she remains on suspension with pay until then. She consults you for legal advice.

What CONSTITUTIONAL claims does Know have, and what is the likely result of any suit you might bring on her behalf. Don’t forget to discuss both sides.