FINAL EXAM INSTRUCTIONS: PLEASE READ CAREFULLY

This final examination consists of EIGHT (8) pages. Please be sure NOW that you have all of the pages.

Put your exam number on all of the exam books you will be submitting NOW. You do not need to put any other information on the exam books. **Do not write your name on the examination or on any of the exam books.**

All answers are to be written in the exam books. You may write or otherwise make notes on the examination. Do not use any scratch paper; use only the exam books for this purpose and turn in all exam books used in this manner with the exam books in which you have written your answers. Please write on every other line and leave the backs of the pages blank. Please write as legibly as possible; illegible answers will not receive credit.

This is a limited open book exam. You may have with you the following: (i) **FARBER, ESKRIDGE & FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEME'S FOR THE CONSTITUTION'S THIRD CENTURY (3rd Ed. 2003)**; and (ii) **FARBER, ESKRIDGE & FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEME'S FOR THE CONSTITUTION'S THIRD CENTURY (Supplement 2003)**, all of which may contain such handwritten notes as you are able to squeeze onto them. **NO ADDITIONAL NOTES, OUTLINES, OR REFERENCES OF ANY KIND WILL BE ALLOWED.** If you have any questions about what you may use during the examination, please ask. A violation of this restriction is a violation of the honor code.

The final examination consists of **SIX (6) essay questions.**
NONE OF THE QUESTIONS HAVE ANY SUBPARTS.

The suggested time to complete each question is as follows:

- Question 1: 30 minutes
- Question 2: 30 minutes
- Question 3: 30 minutes
- Question 4: 30 minutes
- Question 5: 30 minutes
- Question 6: 30 minutes
Instructions on answering the essay questions are underlined and are found at the end of each question. Follow these instructions carefully and discuss the issues presented fully. **BE SURE TO ANSWER ONLY THE QUESTION ASKED OF YOU.**

Indicate your answer clearly in the exam books. **YOU DO NOT HAVE TO ANSWER THE QUESTIONS IN ANY PARTICULAR ORDER, AS LONG AS YOU IDENTIFY THE QUESTION YOU ARE ANSWERING.**

Plan and organize your answers before starting to write them out. If you begin to run out of time and have not finished an answer to a question, or otherwise do not have time to finish writing an answer, present the points you wish to make in outline form in order to obtain partial credit.

Please keep the following in mind as you write your answers. The most important thing you can remember is this: **answer the question asked and only the question asked.** A good rule to follow is to read the question before reading the facts presented. Do not discuss legal doctrines that are not pertinent to the questions asked; likewise long introductory paragraphs which are not directly responsive to the questions asked; likewise long introductory paragraphs which are not directly responsive to the questions asked will receive no credit. Points will be deducted for erroneous statements of law. Please be sure to apply the law to the facts of the question as presented. If you think additional facts are necessary for a complete answer, state those facts and the reasons you believe such additional facts are necessary. An answer containing only a statement of your conclusions will receive no credit. Where this may be helpful to support your arguments, refer to specific cases by name (complete names and citations are not required) and to the Constitution and statutes by number (Bluebook form citations are not required).

**You will have 3 hours to complete this exam (LLM students will have FOUR (4) hours to complete the exam).** **The SUGGESTED TIME ALLOTTED and RAW SCORE POINTS are indicated on the top of each question.** You may leave the examination at any time during the exam; however, you will not be permitted to take anything out with you.

**I suggest that you budget your time according to the suggested time allotments and relative percentage value of each question.**

**When time is called, stop writing immediately,** and put your exam books and all other exam books you have used inside the front cover of the exam book you have number “1”. You will then turn your exam and exam books in as directed. If you finish early, please follow the same procedure. As you leave, please initial the roster located at the front desk.

Your grade will be based on this final examination, subject to decreases for excess absences.
I have enjoyed this fall semester with all of you. I look forward to seeing many of you again in the next two years when we will have even more fun (!!). GOOD LUCK! I wish you all well.
QUESTION 1
(Suggested time 30 minutes; 30 points)

In 2005, the United States declared the Republic of Badluckistan a criminal state. On the basis of a series of allegations -- relating to (1) the massing by the Badluckistan leadership of weapons of mass destruction, (2) the asylum that Badluckistan extended to several people wanted in connection with a number of terrorist acts and (3) reports that Badluckistan was preparing to invade its neighbor, the Republic of Honeydew -- the United States occupied Badluckistan.

Congress funded all expenditures necessary to fund the occupation. However, since the initial funding, the popular press had reported that the occupation was not going as well as expected. As a result, the Armed Services Committees of the House of Representatives and the Senate undertook investigations of the occupation. The ultimate purpose of the hearings were to determine how the Administration was using the funds provided for the occupation and whether Congress ought to consider legislation imposing restrictions of the use of future funds.

Both Committees have subpoenaed documents from the President as well as testimony from the President’s National Security Advisor, Candy Starch. In particular, the Committees are seeking documents relating to (1) discussion of fiscal needs for the Badluckistan operation, (2) notes of meetings at which determinations were made about the force levels to be deployed in Badluckistan, and (3) all writings relating to information about weapons of mass destruction, wanted terrorists and the invasion of Honeydew which were in the possession of the Administration at the time it made its decision to occupy Badluckistan. There were no limits placed on the questions that could be posed to Ms. Starch.

The President has refused to turn over any of the documents subpoenaed, and has also refused to permit the testimony of Ms. Starch.

You are General Counsel to the Clerk of the House of Representatives. The Chair of the House Armed Services Committee has asked you to write her a memo explaining in detail (1) all arguments that can be made in support of or in opposition to an action to compel the President to produce all of the documents and compel the testimony of Ms. Starch and (2) any alternatives available to resolve this dispute.
QUESTION 2
(Suggested time 30 minutes; 30 points)

In 1970, the Congress passed and the President signed the Education Grant Program Act (EGPA). The purpose of the EGPA was to provide additional funds to schools in distress so that children all over the country could have something closer to equal educational opportunity. While the funds can generally be used for any purpose related to 1-12th grade education, the expectation is that the bulk of the funds would be used to cover the costs of providing classrooms and classroom related materials (supplies, computers, musical instruments, sports equipment, etc.). None of the money can be used to fund university or post-university education. Nor can any of the money be used to fund programs at private schools.

No state is required to participate in the EGPA. All states have participated in the program from its inception. Most states now rely on the grant program to cover about 45% of the actual costs of funding 1-12th grade education within the state. The EGPA is administered through the federal Department of Education that has issued a large number of regulations to implement and monitor compliance with the EGPA.

After a series of highly publicized incidents on college campuses in Oklahoma and Texas involving the hazing of women for initiation into university honor societies, the federal government passed the Hazing Free School Zone Act (HFSZA). The Act requires every state desiring to continue to participate in the EGPA (and to receive grants through EGPA) to enact legislation making it a criminal offense for any person to conduct any sort of hazing ritual in connection with initiation into university honor societies. States that fail to enact such legislation will have their total EGPA grant reduced by 20%.

In addition, people subject to hazing within the meaning of HFSZA may seek compensation from their home university. If the university is a state institution, the person can sue the state directly for compensation.

There is very little legislative history for this proposal. The only references were to debates in committee with respect to the need to protect women against hazing, and the belief by some members that hazing and other rituals substantially affect the ability of women to take advantage of the benefits of joining honor societies. Representative Wormrot was quoted as saying, "since we would have the power to end this unjust discrimination against women by direct legislation, I see no reason we can't adopt the less stringent expedient of providing incentives for states to comply." HFSZA was attached as an amendment to a bill approving military spending. In signing the Bill, the President referred to the connection between the education of the young and the likelihood that children will grow up to become 'life long hazers.' Academic study has not shown any connection between education through high school
and hazing.

You work for the Attorney General of the Commonwealth of Pennsylvania. She is furious about HFSZA and would like to believe that no part of the Act ought to be enforceable— all of it ought to be beyond Congress's powers under the Constitution.

Write a memo describing in detail all of the arguments that can be made to support the proposition that the statute is unconstitutional. Be sure to discuss arguments that can be made in favor of the Constitutionality of the HFSZA.
QUESTION 3
(Suggested time 30 minutes; 30 points)

In 2004, Congress passed and the President has signed into law the “No Law Student Left Behind” (NLSLB) law. Under this law, uniform competency standards are set for law students nationwide. Competence is tested by way of the “Up or Out Test,” developed by federal bureaucrats. The NLSLB provides that no person may sit for a state bar exam unless she has taken the UOT and passed under criteria developed by the federal government. Another provision of NLSLB imposes on the state agency the requirement that it create a system for processing applications for passports for all law students. State officials will be charged with processing the applications of all law students enrolled in law schools within the state and for sending completed applications to Washington, D.C. for the issuance of U.S. passports.

There is very little in the way of legislative history. In hearings before the Senate Education Committee, a number of witnesses provided evidence that the uneven education of law students might have an effect on the ability to provide legal services to clients. But other witnesses suggested that over time experience is more important than education. Senator Blowhard asserted, in a speech delivered immediately before the vote on the bill, that law professors were all crazy and that it was important for every state to produce lawyers identically trained at least in federal law.

You are a first year law student at a law school in the Commonwealth of Pennsylvania and have just received notice of the requirements of NLSLB. To say you are unhappy is an understatement. You ask your Constitutional law professor whether Congress has the power to pass this sort of legislation. Your professor says, “Beats me. Why don’t you tell me? Your grade depends on it.”

**Prepare a memo for your Law Professor discussing fully all bases for challenging the constitutionality of the NLSLB. Be sure to include all arguments that could be made in support or in opposition to your challenge.**
QUESTION 4
(Suggested time 30 minutes; 30 points)

Odorama and Armpit were studying for the Constitutional Law exam. Odorama tells Armpit:

I am so sorry I missed class those two days when we covered the issue of separation of powers, checks and balances and the powers of the President. However, I have done the readings and think I understand the materials I missed. It is clear to me that the Supreme Court has severely limited the ability of the President to act, that is, to use his executive authority, in the absence of a direct authorization by Congress in the form of legislation. This limitation applies to the use of Presidential powers in both the foreign and domestic spheres. Thus, for example, the President has no authority to impound funds that the Congress directs be spent. Moreover, the President cannot enter into agreements with foreign powers other than treaties. To arrive at these rules the Supreme Court has developed principally a functionalist approach.

How should Armpit respond? Explain fully.
QUESTION 5
(Suggested time 30 minutes; 30 points)

Senufu was chatting with his friend Fang about the Constitutional Law class. Senufu said:

The political question doctrine is entirely dead.

*Do you agree? Comment fully.*
QUESTION 6
(Suggested time 30 minutes; 30 points)

The federal government has for a long time administered a federal medical care reimbursement program – Medicare. This program provides for federal reimbursement of certain medical expenses pursuant to a plan of administration formulated and implemented at the state level but approved by the Department of Health and Human Services (HHS). While the Medicare Act creates a federal program, the Act also permits states to create and operate their own independent and supplemental medical care reimbursement plans, as long as such plans are consistent with the substantive requirements of the Medicare Act. One of those substantive requirements, Section 355 of the Medicare Act, prohibits states from conditioning reimbursement for prescription drugs on a requirement that a prescription be pre-approved if the pre-approval procedures result or have the effect of severely curtailing a recipient's access to prescription drugs. Pennsylvania has enacted its own supplemental medical care reimbursement act – the PA Rx Plan – which it has operated successfully for a number of years.

In response to increasing costs of medical care and especially for prescription drugs, Congress enacted an amendment to the Medicare Act in 1990. Under the 1990 amendment, states were given the authority to enter into drug price rebate agreements with drug and medicine providers and either pass those cost savings onto consumers or use the cost savings to fund any medical cost reimbursement program run by the state.

Since the passage of this provision many states have enacted supplemental rebate programs to achieve additional cost savings on medical care which the state reimburses either under the Medicare Program or under independent state reimbursement plans. Among the states enacting rebate programs is Pennsylvania. In Pennsylvania the supplemental rebate program was included as an amendment to the "PA Rx" Program. The intent of the amendment is to provide discounted prescription drugs principally to Pennsylvania's uninsured citizens, but its coverage is open to all residents of the State. The statute provides that "the State [shall] act as a pharmacy benefit manager in order to make prescription drugs more affordable for qualified Pennsylvania residents, thereby increasing the overall health of state residents, promoting healthy communities and protecting the public health and welfare." Under the state rebate program, Pennsylvania negotiates rebates with all willing drug manufacturers. Rebates are to be paid into a fund administered by the Commissioner, and then distributed to participating pharmacies to compensate them for selling drugs at discounted prices. All drug manufacturers may participate in the rebate program without any restriction,
Constitutional Law
Professor Backer
Final Exam Spring 2004

No drug company is forced to negotiate a rebate and there are no special programs for manufacturers who are located in Pennsylvania. Drug companies that do not negotiate a rebate agreement are not prohibited in any way from selling their products in Pennsylvania. However, if a company does not enter into a rebate agreement, then prescriptions of all drugs produced by that company are subject to a pre-approval procedure – under that procedure a doctor must submit the prescription to the state agency for pre-approval before the state will agree to reimburse the cost of the drug under Medicare. This process makes it essentially much more difficult, but not impossible, to obtain these drugs (as well as reimbursement) and creates an incentive for doctors to prescribe a different drug.

You work for the general counsel of the giant drug manufacturer – VoraciousDrugs, Inc., a company operating in California. The General Counsel has just met with the company president. The President hates the PA Rx Act and wants to figure out a way to attack the validity of the provision. The General Counsel thinks this is a great assignment for you.

**Write a memo to the General Counsel discussing any legal basis for challenging the validity of the PA Rx Act under the federal Constitution.**