This examination is divided into two parts. The Exam is worth a total of 65 points. The remaining 35 points come from the two quizzes. The first part of the exam 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 question in each numbered question. 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 SOCIAL SECURITY NUMBER ON THE TOP OF EACH PAGE OF PART I OF THIS EXAM.

Each numbered question is worth 2 pts, no matter how many sub questions are in the numbered question.

Part II is a typical essay question. 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.
QUESTION I- 40 POINTS.

The state of Treadington has just enacted the Tire Handling Act, which establishes a comprehensive scheme regulating the disposal of used tires made of natural or man-made rubber (polyvinylbutyldexolene or "PVBD"). The law was enacted following extensive hearings at which the evidence demonstrated that (1) available landfills for the disposal of the aforementioned types of tires is rapidly decreasing in Treadington; (2) these tires simply do not decompose the way other refuse does, rather, as they break down, they emit a polyvinyl gas which some scientists believe can be toxic if inhaled or otherwise ingested in large amounts; (3) burning these tires absolutely creates an environmental hazard; (4) industry has simply not significantly increased recycled uses for used tires and (5) driving on tires having a tread of less than .3 inch is incredibly dangerous. The legislation provides as follows:

(A) All natural or man-made rubber tires sold or disposed of in the state of Treadington must have a tread of no less than .3 inch, unless that tire is owned by or sold to an authorized retreading establishment, licensed under the laws of the state of Treadington, for the purposes of retreading. (The stated purpose of this portion of the law is for safety, however, it will also prevent shipping bald, dangerously unusable tires into Treadington solely for the purpose of dumping them into Treadington's landfills);

(B) All natural or man-made rubber tires having a diameter greater than 13" (this would include tires used on autos, trucks, motorcycles, farm equipment and all-terrain vehicles, but would exclude tires on children's toys and bicycles) are subject to a "disposal fee" which is related to the tread depth and rim width. The larger the tire, the greater the fee. The legislation expressly provides that the proceeds of the disposal fees are used for research conducted by the state into uses for recycled tires and for environmentally safe disposal methods.

You are consulted by Jerry Goodyear, who owns a tire yard in Treadington. He claims that he's going to lose business as a result of the law. He says no other state has this .3 inch law, although he did admit that many states have recently enacted regulations on the disposal of used tires. Besides, he claims that the only person who will benefit from this law will be the governor's third cousin twice removed, who has recently received a patent on tires made from palm leaves, which, though equally durable as tires made of rubber or PVDB, harmlessly decompose when introduced to a solution of margarine and grapefruit juice. The governor's cousin has recently set up shop in Treadington.

You dutifully do your research and discover that in 1976 in the midst of the gasoline shortage, Congress passed a law regulating tire size for commercial vehicles traveling in
interstate commerce. After hearing extensive testimony that tire size was directly proportional to fuel economy, Congress enacted a statute making it illegal for the commercial vehicles to travel on interstate roads with tires having treads of greater than .25 inch. Assume that this law has been held constitutional on many occasions as a valid exercise of Congress' powers.

Discuss the constitutional issues the above fact pattern presents, and don't forget to discuss both sides.

**QUESTION II-45 POINTS total.**

**Part A. 30 points**

Everyone is aware of the spousal abuse crisis. Somewhere along the line, men have come to believe that physical violence against one's wife or significant other is permissible in our society. Congress has been monitoring states' efforts to cope with the problem, and many members have recently concluded that the states' laws, if they exist, are ineffectual. For example, although Massachusetts enacted 209A many years ago, the restraining orders issued under that chapter are impossible to enforce, and the threat of a prosecution for contempt is often too little too late. Therefore, some members of Congress are contemplating enactment of the following law:

Any person who travels across a state line with the intent to engage in conduct that violates a legally enforceable protective order issued by a state court of competent jurisdiction involving protection against threats of violence, repeated harassment of bodily injury to the person or persons for whose benefit the order was issued commits a federal criminal offense.

Other members have suggested that Congress ought to enact a law which withholds a certain percentage of federal funds from states which do not enact tough laws prohibiting spousal abuse. One of those legislators advocating this approach has suggested that 10% of federal funds offered to state courts for social workers to deal with domestic relations cases could be withheld.

Still others are contemplating an elaborate legislative scheme which would create a "Spousal Abuse Registry." Under the proposed law, state court administrators would have to report to a Federal agency the identity, social security number and last known address of any person against whom a restraining order was issued where the intended victim was a member of the defendant's family, a spouse, or significant other.

You are a legislative aide to one of the Representatives contemplating sponsoring one or more of the versions of the legislation as described above. Draft a memo discussing the
constitutional issues raised by each of the possible acts, and if you have any suggestions as to how any version of the legislation should read in order to survive constitutional scrutiny, include them.

**Part B- 15 points**

Assume your Congressman, Juan Macho, chose not to sponsor any of the legislation, and, in fact, took a pro-husband stance, alleging that husbands are the victims in this scenario, that they are treated unfairly by the courts, that wives wave the threat of bodily harm as a flag to convince judges to issue orders in cases where the wife just wants the upper hand in a divorce action. As a result, he was challenged in the general election by Rudy (short for Rudmilla) Codnick, a notorious feminist and President of the California chapter of NOAW (National Association of Angry Women). Codnick won by a narrow margin, after spending much of the campaign espousing her liberal philosophies. Macho filed a protest under the Federal Contested Elections Act (“Act”), which establishes the procedure for contesting a federal election. According to the Act, a protest is filed with the Committee on Elections in the House or Senate (“Committee”), depending on the branch to which the contestants aspired. Subpoenas for evidence and depositions may be issued upon application of the protesting party or the party against whom the protest is lodged, by a judge or magistrate of any federal district court, and discovery may be taken in a manner similar to that permitted in regular civil suits. The case is tried before a panel of the Committee on Elections in the appropriate branch. Any disputes arising during the course of the discovery are heard by a member of the Committee. The decision of the Panel and/or any member are not reviewable by any court.

Macho's protest was denied, and he has filed suit in Federal District Court against the Committee on Elections and Rudy alleging reverse sex discrimination.

Discuss the constitutional issues implicated by the above fact pattern. Do not discuss any fundamental rights or equal protection issues.

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Question II

A. This question raises 10th Amendment (State’s rights) and Commerce Clause issues.

The Commerce Clause, as interpreted by the Supreme Court since the New Deal gives Congress expansive power to regulate almost anything. Motive of the legislation is not questioned (Darby). A recent case (Lopez) has outlined how the legislation must be defined; the legislation must be related to the instrumentalities, or channels of interstate commerce or the activities that substantially effect interstate commerce (interstate travel and/or commercial transactions will qualify). Congress must draft a law that somehow relates the legislation to interstate commence in this way. This would not be hard to do.¹

A tension will arise, however, between Congress’ right to regulate interstate commerce with the states’ autonomy. Two recent cases address this issue. In Prinz, Congress was not allowed to pass legislation that would require state or local officials to enforce federal regulations. Congress could not therefore require each state to designate a SECO. Congress could, however, provide funds for the hiring of a SECO. This would certainly make such legislation more palatable to the states who would benefit from the process congress is proposing. In U.S. v. N.Y., the Court held that Congress could not commandeers legislation, i.e., Congress can’t require states to enact laws, so Congress could not require any state to enact legislation to participate in this process.

B. This raises Contracts Clause and Due Process Issues.

Article 1, Section. 10[1] of the Constitution says that states may not pass any law which impedes the obligations of a contract.

I. Is there a contract? Yes, and it has retroactive effects. When the teachers’ union entered into contract negotiations for current teachers, this legislation was not in effect.

II. Is there a substantial impairment of a contractual obligation? Yes, although there has never been any clear definition of how many people must be effected in order for it to be substantial, clearly there would be many, costly breach of contract suits brought if this legislation is enacted.

¹They could, for example, legislate that such a census is necessary to regulate the interstate distribution of school supplies.
III. If this were a private contract, the balancing test would be: Is the legislation appropriate for a legitimate public purpose. But here the state is a party to the contract, so the test is stricter; Is the legislation reasonable and necessary for a legitimate public purpose? Here the answer is clearly no. Raising the standard of public education is clearly a legitimate public purpose. But the legislation is not necessary or reasonable. The same means can be achieved by other means such as requiring in-service training to maintain teach skills, etc.

Education is not an area which is traditionally highly regulated (unlike car dealerships) so this would not negate the intrusive effects of this legislation.

Due Process:

I. Is there a protected interest? Yes, state employment is a protected property interest (*Roth v. . . Board of Regents*).

II. What process is due? (*Matthews v. Eldridge*)

A. What is the nature of the protected interest? In this case it is high because it involves issue of livelihood, tenure, reliance, etc.

B. How effective are the current processes? How likely is it to result in unjust treatment? This is a paper trial, which is ok as long as issues of credibility are not in question. In this case making an appearance, representation by counsel or live witnesses doesn’t really effect the outcome. This process is adequate to determine whether someone has a Masters Degree or not.

C. What is the cost to the State in providing a more extensive procedure? In this case, the cost of providing an opportunity to examine and cross examine witness and for the state to be represented by counsel would be considerable. Again, this would not really effect the ultimate decision of whether someone has a Master’s Degree or the equivalent or not.

*Regarding private school teachers: Because the state is not a party to the contract, the more lenient balancing test would apply here. And again, while the legislative purpose is legitimate (raising the professional level of teachers), the legislation is not appropriate. There are better means to achieve the goals -- good teachers are not necessarily the ones with the most education.*
Bottom line: I think the due process will be found adequate. I think the state will violate the contracts clause and current teachers will be “grandfathered.” This statute will apply to all incoming teachers, however.

C. This question raises balance of powers issues. The President’s authority comes from both the Constitution and Acts of Congress. In this case, there is no constitutional authority for the President to regulate in the area of Congress. In order for him to do this, therefore, his authority to act must be authorized by Congress. This authority can be express or implied. If Congress has expressly authorized the President to monitor the professional qualifications of teachers, this legislation would be Constitutional. If Congress has not given expressed authority to do this, the authority might be implied from legislation giving the President similar powers and this would serve as a “gloss” to give him authority. If Congress is wholly silent or in fact has enacted legislation indicating they do not want the President having this authority, that they are perfectly happy regulating in the area of education, thank you, then this statute will be unconstitutional as violating the separation of powers (Youngstown Steel & Tube). This will be true even if the President claims the situation to be an emergency.

Question III.

This question really involves the issue of standing which I have already covered in part in the first question (pages 1 and 2).

Article III of the Constitution specifies that Federal Courts can only hear “cases and controversies.”

Standing -- Greedy would argue that AECC does not have standing because there is no injury in fact. No one has been injured by the failure to file the report, certainly none of AECC’s (LuJan) members. AECC would argue that the EP & RTK act was passed to protect citizens, and failure to provide the required information threatens the members individually.

Greedy would argue that AECC cannot bring third party claims. Third party claims are only allowed if there has been an injury in fact, if there is a close relationship between the injured party and the third party, and if there is a hardship which disallows the injured party to file on his own behalf. AECC would argue it has organizational standing (see question I).
Advisory Opinions -- Greedy would argue that this is not an actual case or controversy, rather the Plaintiff is asking for an advisory opinion which are allowed under many state constitutions, but not the Federal Constitution. AECC would argue that declaratory relief does not equal an advisory opinion, and besides, the suit is for an injunction and monetary damages as well.

Timing Issues -- Greedy would argue that the case is moot because he already complied with the statute, although certainly a little late. AECC will argue that mootness is a flexible concept that allows for cases to be heard where (1) the injury is repetitive but by its very nature escapes review (Roe v. Wade); voluntary cessation of the injury makes it temporarily moot; (3) a class action. In this case #2 applies and greedy can’t wiggle out of the suit by complying this once.

Likely result -- I think greedy will win the motion because it is too hard to find an injury in fact or imminent and that the Court will ultimately not want to monitor the EPA (al that case whose name I couldn’t think of on the first page. Is it Allen v. Wright?) Which means this issue is really a political question and is inherently incapable of being resolved by the Court.