CONSTITUTIONAL LAW FINAL
FALL, 2001

PROFESSOR RUDNICK

DECEMBER 11, 2001

INSTRUCTIONS: The examination is composed of two (2) questions, one worth 50 points total, and one worth 35 points. The remaining 15 points come from the last two quizzes (10 pts for the racing quiz, 5 for the in-class brief). In answering the questions consider the arguments and counter-arguments and the likelihood that any particular claim will succeed. If you think additional information is required indicate what it is and what bearing it has on your answer to the question. However, if you find yourself assume whole paragraphs of facts, then you may be discussing a non-issue. If the same argument is applicable to more than one issue or answer, you do not need to repeat the entire analysis, but you may make reference back to the question and page on which the analysis you wish to repeat can be found. Be careful with this procedure as new facts frequently if not always necessitate new analysis, and make sure that the prior analysis is sufficiently similar to warrant such a reference!

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.

YOU HAVE THREE HOURS FOR THIS EXAM.

YOU MAY NOT USE MORE THAN A TOTAL OF 12 PAGES ONE SIDE. PLEASE WRITE ON ONLY ONE SIDE OF THE PAGE. IF YOU USE MORE THAN ONE BLUE BOOK, NUMBER THEM IN THE FOLLOWING MANNER: 1 of 2; 2 of 2.

Because of the page restriction, I advise you to outline your answers so that you do not needlessly waste space. You may write on only one side of the page and you must leave some margin on at least the left hand side. No credit will be given for illegible writing or for answers which exceed the page restrictions, or do not comply with the other requirements.

GOOD LUCK AND HAVE FUN!!!
QUESTION I
50 PTS.

During the ‘60s, when the civil rights movement was at its zenith, Congress passed the Fair Housing Act, which prohibited discrimination in housing based on race, color, creed, religion or national origin. Some years later, Congress amended the Fair Housing Law to prohibit discrimination on the basis of handicap.

Section 3604 reads in relevant part:

It shall be unlawful for any owner of a dwelling--
...
(f) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap--
...
(3) For purposes of this subsection, discrimination includes--
...
(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling....

The statute also defines “owner of a dwelling” as “any person, corporation, partnership, real estate trust or other entity having legal title to the dwelling under the laws of the state in which the dwelling is located, including any state, state agency or subdivision of a state.”

It also provides that “any person aggrieved by a violation of this statute may bring an action in federal court for declaratory and/or injunctive relief and damages.”

Prior to passing the above provisions, Congress heard extensive testimony on the history of national discrimination against individuals with disabilities in the housing market. Congress also heard testimony of how local zoning laws were used to effectuate the discrimination. Congress expressly found

While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities.

Groome Resources is a non-profit corporation that operates group homes and residential facilities for persons in need of medical and other support services. After locating a suitable one-family residence, left to the City years ago by an eccentric spinster, Connie Nickrud, and unused since then, Groome applied for a permit to operate a residential center housing 7 Alzheimer’s patients in the City of Lawrentian. Lawrentian’s zoning laws prohibit more than one “family” from living in the same residence unless a variance is obtained. The zoning ordinance defines family as:
one or more persons related by blood or marriage living together and occupying a single housekeeping unit with single culinary facilities or a group of not more than four persons living together by mutual agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit cost-sharing basis.

The City of Lawrentian held a public hearing attended by many members of the citizen’s association comprised of residents of the neighborhood where Groome seeks to locate its group home. The neighbors testified that the proposed site is located in an entirely residential area where many families with young children reside, it is only two blocks from a school and play ground, and the parent are concerned that persons suffering from Alzheimer’s may wander from the facility and bother or harass the children. Additionally, the proposed location is only 3 blocks from a city operated bus stop, and the neighborhood fears that the residents might get on public transportation and unwittingly venture into far parts of the city.

The City denied the variance on the above grounds, also citing its obligation to protect public health and safety of both the neighbors and the residents.

Groome appealed throughout the administrative process, and it lost each step of the way. If Groome files suit in federal court under the Fair Housing Act, what constitutional issues will that suit raise? (Assume Groome has standing and the case is ripe for adjudication).

QUESTION II
35 POINTS

Following the mercury in tuna and swordfish scares of the 1980s, the ever-environmentally conscious state of Freshair passed a series of laws regulating the use of that element. In 1998, the Freshair legislature discovered that light bulbs, particularly fluorescent bulbs of all things, contained significant quantities of mercury. Because this fact was not known to the general public, consumers would carelessly dispose of light bulbs causing the mercury to escape into the air and water in the state of Freshair. The legislature passed a law requiring the manufacturer of products containing 1 centigram or more of mercury to clearly label the product as containing mercury and to inform consumers, in a conspicuous location, that the product must be disposed of as hazardous waste in accordance with Freshair law. Products sold in violation of the law will subject the manufacturer and distributor to fines.

A representative of the National Electric Lamp Manufacturers Association (NELMA), a trade association comprised of manufacturers and distributors of electric light bulbs (often called “lamps" in the industry) which lobbies legislatures for favorable laws, and sponsors seminars and educational meetings at which state of the art designs are revealed, has consulted you for advice on whether a lawsuit would be successful. The representative, Phil Ament (get it-- "Filament"??), owner of Ament’s Electric Lamp Co. tells you that the cost of repackaging light bulbs for sale to Freshair consumers will be substantial, that a couple of other states have similar regulations (“Product Contains Mercury”), but none call for labels that also instruct how the products should be disposed.
He personally is concerned because he has agreements with the State of Freshair to provide fluorescent lights for all the High Schools in the State, and he’ll be subject to massive fines if he goes ahead with his deliveries.

As you’re doing your research, you discover Congress passed the Hazardous Waste Disposal Act in 1996, which provides as follows:

§ 5125. Preemption

(a) General.—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

The federal law regulates the manner in which hazardous waste can be disposed. It defines “hazardous waste” as waste containing any one of a number of compounds or elements including mercury appearing in a concentration of more than .2 centigrams. Assume that it has already been held as a constitutional exercise of Congress’ power.

If Phil, on behalf of himself and NELMA seek your advice, discuss the constitutional issues that the case would raise.
Question One

The first issue raised is whether the legislation passed by the State of Wisconsin requiring more than 10% of the fruit be NDD berries violates the dormant commerce clause. The dormant commerce clause arises from the commerce clause article 1 Sec. 8 of the U.S. Constitution that gives the congress power to regulate inter state commerce. The issue is dormant commerce not commerce clause since here it is the state which is legislating using it’s 10th amendment powers. Congress has the commerce power but it has not used it so to dormant and the state of Wisconsin can legislate for the safety, health and welfare of it’s citizens under its reserved powers under the 10th amendment.

The rule of law is that a state can legislate in matters of instate commerce, but in doing so it can not discriminate against or unduly burden interstate commerce either facially or in purpose or effect, or even pass a facially neutral statute which burdens interstate commerce. If the state passed a facially discriminatory statute (discrimination is treating out of state companies differently from instate companies.) Then to decide the constitutionality of the statue, we use the strict scrutiny (Maine v. Taylor case) test to see if there is a legitimate state interest and if there are no less discriminatory methods to achieve the state interest. If the statute is facially neutral but burdens interstate commerce incidentally, the pike balancing test applies balancing the burdens to interstate commerce with the benefit to the state. If it is a genuine safety legislation, then it is constitutional no balancing needed.

In the current case, the statute seems to be facially neutral since it seems to be treating all cranberry products sold in the state the same - no matter what state the berries come from. Assuming that the statute is facially neutral, we would use the pike balancing test. The state would use the 10th amendment argument that it is legislating not for the health of its citizens in that the new NDD berries have been shown to be more healthy than the traditional berries. The benefit to the state is the increased health of its citizens. Cranilda would argue that the burdens to interstate commerce outweigh the benefits to the state in that it will be very expensive to comply with the statute and that there is no evidence that the increasing NDD in the berries significantly make the berries more healthy so as to warrant requiring 10% of the fruit to be NDD. There is no evidence that a lower percentage would not suffice.

Though the legislation seems to be facially neutral, it in fact has the effect of discriminating interstate commerce because it is only a grower in Wisconsin who is growing the new berry. The statute seems to be the same to the one in Washington Apple case which appeared neutral on the face but in fact discriminated out of state apples. This current statute can be argued to be facially discriminatory in effect and Cranilda can argue the strict scrutiny test should apply. The state will argue it has a legitimate interest in that it is concerned with the health of its people. The state can argue it has no less discriminatory method of achieving its interest in that it is only berries with a higher NDD level which have been shown to be more healthy. Cranilda will however argue that the state has less discriminatory ways of achieving its purpose in that it can require a lower percentage of fruit to be used. (See above argument).
In the current case, any public or private school can be constitutionally required to comply with the federal government teacher's qualifications to receive funds or they can choose to refuse to comply and forgo the money.

The public school can however argue that the legislation is actually an unconstitutional coercion in that the public schools depend on government funds and by saying the only way the schools will get the federal money is by complying with the federal legislation, Congress is in effect coercing the schools to act contrary to New York and Printz. The federal government will argue the schools have a choice. Private schools may not be able to argue coercion strongly since they do not very much depend on government funds but on tuition but the private schools may still argue coercion since they still do need government money to some extent.

**Question Three**

The first issue that Greedy's lawyer should raise is whether the AECC has standing to bring the suit. To have standing, the law requires injury in fact, causation, and redress ability. The problem here is that of corporate or third party standing for a corporation like AECC to have standing, it must show its in members would have standing themselves. Then members have been injured in that they didn't get the reporting. They also have the standing given to individuals by the state. The injury is caused by Greedy and the case is redress able since Green can be forced by injunction to comply with the statute.

The other issue is that of mootness. The case seems to be moot in so in so far as the injunction is concerned because Greedy has filed the forms already. Yet. There is an exception to the mootness in that voluntary cessation does not moot a controversy. AECC can argue Greedy did voluntary cessation and may go back to his old ways. The declaration is not moot since it just seeks to see if greedy violate the law yet Greedy can argue this is an advisory opinion and therefore court can not issue it since the federal court can not issue advisory opinions. The damages issue is not moot and AECC can recover.

The injunction requiring Greedy to timely give are future reports had not been mooted out since just because he had now files the report did not mean that in future he will do so. The court can therefore issue the injunction to make sure in the future the reports are timely.

On the issue of standing, Greedy can argue that AECC isn't one of the parties given standing by the statute in that it is not a private individual or state, or local government. The AECC is relying in the standing of its member and as a general rule, third party standing is unconstitutional AECC can however rely on the exception that it is a corporation and its members individually have standing and their individual participation is not required.
CONSTITUTIONAL LAW I, FINAL
FALL, 1998

PROFESSOR RUDNICK

INSTRUCTIONS: The examination is composed of two questions. The first is worth 60 points, and the second is worth 40 points. I suggest you allocate your time accordingly. In your answer discuss ONLY issues discussed this semester. Do not consider any other issues, e.g., Fourteenth Amendment, Due Process, individual rights issues, etc. 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, 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. If the same argument is applicable to more than one issue or answer, you do not need to repeat the entire analysis, but you may make reference back to the question and page on which the analysis you wish to repeat can be found. Be careful with this procedure, make sure that the prior analysis is sufficiently similar to warrant such a reference!

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. Please place all your books, coats, bags and pocketbooks at the front of the room. You may keep valuables (wallets, etc.) with you ON TOP OF THE DESK IN FRONT OF YOU.

THERE IS A TWO-BLUEBOOK MAXIMUM FOR THIS EXAM—You may not use more than 2 bluebooks or 16 pages. Because of this restriction, I advise you to outline your answers so that you do not needlessly waste space. Please write on only one side of the page and leave some margin on at least the left hand side. No credit will be given for illegible writing or for answers which exceed the page restrictions.

YOU MUST WRITE ON ONLY ONE SIDE OF THE PAGE, EVERY LINE, BUT 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 AND ONE HALF HOURS FOR THIS EXAM.

IF YOU USE MORE THAN ONE BLUE BOOK, NUMBER THEM IN THE FOLLOWING MANNER: 1 of 2; 2 of 2.

GOOD LUCK AND HAVE FUN!!!
QUESTION I
60 POINTS

You are all aware of the need for healthy transplant organs. Patients in need of a transplant so greatly outnumber donor organs than each year, many people die simply because they do not receive a transplant in time. Legislators in the state of Concern (which lost a prominent citizen because a lung 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. If no match is found or the organ is not needed by any of Concern’s residents, then the organ’s availability is made known throughout the world, via an international organ donor network.

Clint “Bubba” Williams, a resident of Washington, D.C. suffers from Moosikitis, which has destroyed his kidneys (some may say it has also affected his brain). He needs a transplant badly. He has been on the donor list for many, many months without a match being located. Ken Moon, 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. None of Moon’s organs, except his kidneys, could be used by Concern residents. (The autopsy revealed he didn’t have a heart or a brain). However, his kidneys were snapped up by a felon serving a life sentence in Concern’s maximum security facility, who had recently been diagnosed with kidney disease, and whose name had just been placed on the organ donor list. As it turns out Moon’s kidneys would have been a perfect match for Bubba.

Bubba’s family is outraged. His wife Pillary, has contacted a lawyer who is researching the case. The lawyer finds that in 1996, Congress enacted the National Organ Donor Law, which regulates organ donations. Legislative history reveals that the statute was designed to curb spiraling costs associated with organ transplant. The law provides that:

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

2. If the donee is a Medicare recipient, Medicare will pay for the cost of the operation and post-operative care ONLY if the surgery is approved by two of three members of the Federal Transplant Panel, a panel comprised of a doctor, an economist and a medical ethicist, all appointed by the Secretary of Health and Human Services from a list provided by the Speaker of the House, who are 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 can impose any requirements on the receipt of an organ by a Medicare recipient other than the above.

Bubba's lawyer files suit challenging the constitutionality of the Concern state law. Alas, Bubba died shortly after the complaint was filed.

What are the constitutional issues raised by the above fact pattern? Do not raise any equal protection or substantive due process issues—only issues we covered this past semester.
QUESTION II
40 POINTS

In an effort to deal with the mounting crisis of where to dispose waste, the state of Connectusup enacted legislation whose purpose was to conserve the rapidly dwindling available landfill sites, by maximizing recycling and “energy recovery,” a process which harvests the energy released from combustibles and converts it into usable energy, which can then be sold to utilities. The legislation created the Connectusup Refuse Action Program (“CRAP”) pursuant to which the state and all municipalities must, by January 1, 1999, dispose of all refuse ONLY at state authorized disposal facilities which are equipped with “separators” or mechanized devices which separate combustibles from non-combustibles, and recyclables from non-recyclables. The legislation also created funding for the construction and operation of two state-owned “state-of-the-art” facilities, which would employ “separators” and thus, be authorized facilities.

Environmental planners and engineers testified before the legislature that if the separators are used properly, only 5% of the overall waste generated should be non-recyclable and non-combustible, and thus, subject to disposal in landfills. Based upon forecasts of Connectusup’s total waste generation for the next decade, the legislature then calculated a projected state-wide total yearly tonnage of non-recyclable and non-combustible refuse for each of the next ten years. In order to ensure that the maximum amount of recyclable and combustible refuse is being recovered, the legislation requires the state to monitor the amount of non-recyclable and non-combustible refuse being disposed of in landfills for no less than five (5) years. Because some facilities may dump at landfills out of state, the monitoring actually occurs at the in-state disposal facility, and is accomplished by a state-owned meter-like device, approximately 6" x 3", which is attached to the ground adjacent to the facilities’ scales. The device records the amount of refuse taken in, the amount recycled, burned, and finally, the amount transported to the landfill. The devices send the cumulative amount to a computer in the State Office of Energy by satellite on a monthly basis. The state pays for the cost of the device and its installation, as well as the removal of the device which, as stated, must occur before January, 2004. Agents from the Office of Energy may, by legislation, enter the facility once a year to examine and calibrate the accuracy of the device (with 48 hours notice), or without notice in the event of a malfunction reported by the facility or the Office of Energy.

The two existing privately owned recovery facilities in Connectusup have surveyed the situation, and discovered that conversion to an authorized facility will be quite costly, and they fear they will be unable to compete with the state-owned facilities if they do expend the monies necessary to purchase “separators” and bring their facilities up to the level necessary for them to become authorized. A privately owned facility in the neighboring state of Drode Island, however, is ecstatic about the legislation, because it already employs a separator, and believes that it can compete with Connectusup’s new state facilities.

Additionally, the two privately owned recovery facilities in Connectusup are concerned because they currently have contracts with many municipalities for the disposal of waste which run beyond January, 1999, but which will terminate if they cannot become authorized by that date.
The owner of one of the two in-state privately owned facilities, "Krafty" Roberts, whose facility is located in Heartford, has consulted your firm for legal advice. He wants to institute suit immediately to test the constitutionality of the law. What constitutional issues does the fact pattern raise, and what is the likely success of a suit by Roberts?
Bubba’s attorney has several ways of attacking the constitutionality of concern Organ Donor Law. The first issue is whether the commerce Clause Article I Section 8 clause 3 of the U.S. constitution allows Congress to regulate the area of organ donations. Article I and Section 3 of clause states Congress has the power to regulate commerce with Indian tribes, between states and with foreign nations. When analyzing this the National Donor Act the question becomes whether organ donations substantially effects interstate commerce. This test first arose from the Jones case. I would first like to analyze the Federal Government’s view or reasons.

1. Federal Government Reasoning: Congress must show that organ donations are interstate commerce. Congress with the commerce clause can regulate channels (rivers, roads) investments and those things that substantially effects commerce. The first two channels and instruments do not seem to apply. Congress then needs to make the substantially effects test. Using a more functionalist/realist test Congress could show this. The fact pattern here is limited so I need to insert facts that show Congress more findings. Congress could say the class of people and hospitals doing organ donations taken as a whole or aggregate show an increase in costs that in turn nurses health insurance costs. The aggregate test is based on Wickard. If this reasoning is applied then commerce affected and the federal government can create the laws.

2. The state will argue the organ donor law has absolutely nothing to do with interstate commerce and it should be left up to the states to regulate the health and safety of its citizens under a 10th amendments analysis. The transplants are happening within the
state of concern with concerned citizens nothing has crossed state lines. This case is reminiscent of the rarely ferry case argument (which I know did not work however the facts here are a little different). In the ferry case there was intrastate activity which the state said did not affect commerce. The problem in that case was the activity took place on a channel. In our case the organ transplant has taken place in concern with concerned citizens commerce was not affected. If the state is regulating activity which the government is not regulating (assume no federal law exists). Then we apply a dormant commerce clause analysis. The first step is deciding whether the law is facially neutral or discriminatory. This law appears to be discriminatory its treating out of states differently from instaters. In that situations we apply a strict scrutiny compelling state interest analysis. The states compelling state interest is basically protecting its own citizens by not allowing organs at least the state. This is not a compelling interest it is merely protectionist once well not sincere a constitutional attack.

Let’s assume the law is facially neutral that is the law treats everyone alike then we apply first a carbon analysis looking at whether (1) it’s facially discriminatory (2) it’s purpose is discriminatory or (3) it’s effect is discriminatory. The dormant commerce clause basically states the mere existence of the federal statute limits the states from discriminating against a unduly burdening interstate commerce. We see this in pike. This law in its purpose is discriminatory therefore the strict scrutiny test will be applied. Assume the law is not discriminatory in its purpose we now get to Pike. The Pike balancing test balances the state’s interest against he harm to interstate commerce. The states interest here is to protect it’s citizens while the harm to interstate commerce is spiraling costs to hospitals to companies concerned with organ donations this law does
unduly burden interstate commerce. If the federal law did not exist then this law would unduly burden interstate commerce under the Dormant Commerce Clause.

Assume that the stat is in the business of buying and selling organs (highly highly illegal, but this is my opinion). The market Participant Doctrine would apply. The MPD is an exception to the Dormant Commerce Clause it states when the state is a buyer or seller participating in a market it is to be treated as a private business. The state here is selling organs and it then can sell to its own citizens. However if after it sells it tries to regulate, the Timer case, then it won’t work. This could be countered by the privileges and immunities clause of Act IV which states a state can not discriminate against citizens of another state. The P&I clause is applied when a fundamental right is violated once the state does not have a reason to keep some sort of evil that out of stater’s might bring in. In this case there has to be a fundamental interest in living and concern’s reason for keeping the out of stater’s from getting organs from citizens of concern is really weak. However the opposite may be that the staters trying to protect its citizens from dying. A privilege and immunities argument could go either way.

The big issue that Bubba’s attorney should argue is preemption. That is whether the state law is preempted because the federal law is in place and because of supremacy clause the federal law is supreme. There are three types of Preemption (1) express (2) implicit and (3) conflict. 1. Express - Congress comes right out and says sates you can’t do this. In our case, Congress has not said this.
2. Implied Preemption - Implied Preemption means Congress has so pervasively regulated this area that the states should have known that they were not allowed to set out any regulations. In our case this is only law. A really good example of this is the case where Congress regulated basically everything involving air travel except advertising. The state tried to regulated advertising, but the court said because the Federal Government so heavily regulated this area it was implied the state could not. That is not the case here.

3. The last is conflict preemption. I believe we have that here. Conflict preemption means it is impossible to follow the state and the federal law. This exists because the federal law says the organ donation must take place in a Department of health hospitals and if the donee is a Medicare recipient it must be approved by a board. The state law does not mention any board approval or hospital requirement. This is clearly a conflict preemption problem. One area of conflict preemption is occupying the field. This means when Congress enacted a law it was forcing itself on a field of activity. In our case Bubba’s family attorney will argue that congress by enacting this law was occupying the field of organ donations.

The state has a great argument. It will argue that Congress’s intent was to curb spiraling costs not to regulate health and safety. If this is true then Congress was only occupying the field as far as safety was concerned. This is similar to the nuclear power case where the state regulated economics (I think) of a nuclear power plant and Congress regulated safety. Because the objections were different Congress did not occupy the field when it came to the economics of the plant. Concern was concerned with the health and safety of its citizens while Congress concerned with spiraling
healthcare costs.

Concluding this issue I believe that Congress under its commerce clause power has the ability to regulate this area. (I wish that I put the commerce clause analyses with Preemption however please refer to the opening pages.) Because there is a substantial effect Congress has every right under Article II Section 8 Chapter 3 to regulate the activity even though it was intrastate. Applying wickard the aggregate effect would be to great to ignore. The states 10th amendment argument concerning health and safety will be forsaken. Also any Dormant Commerce clause analysis would not work.

Issue: Whether the boards appointment violates the appointments clause of Article II Section 2 Clause 2. As the state I'm going to try to find a way that the federal law is unconstitutional. An appointments clause argument is a great idea. The appointments clause states congress can delegate the authority to appoint in the president heads of departments or in the judiciary. In our case a board is created it is comprised of a doctor, economist, and medical ethicist all appointed by the secretary of Health and human Resources. This is permitted because it is a department head. The problem I have is from a list provided by the speaker of the house. The speaker of the house is not one of the people the appt. clause. Let's have control. If the secretary is merely a power to the speaker this violates the appointments clause. They are performing an exclusive function that is enforcing the law. I do have a problem without any review by the court because if the board starts to make decisions which looks like legislation then the courts hands are tied. This begins to look like a separation of powers problem. The panel it seems is infringing on the judiciaries function, making decisions about life and death. There are two views to this formalistic and functional. A formalistic
approach is a bright line mechanical view. A functionalist view looks at whether the constitutional scheme is threatened. Under a formalistic view I think the answer is yes. The board has cut out the judiciary and is allowed to perform judicial functions. Under a functionalist view I still think the answer is yes. The statute has completely dissolved the judiciary. The Congress cannot do this. It is broadening its power.

As a side and to complete this analysis assume Congress said we have the right to remove. The appointments clause has set up two types of officers. 1. Senior and 2 Inferior. Senior officers are appointed by the President with consent of the Senate inferior officials are appointed by President department heads and judiciary. Congress can never remove a senior officer it is the presidents job. Senior officials are ambassadors. Attorney general etc. Congress can however limit the removal power of the president is good cause for civil service workers. Congress can never keep its hand in the mix. The reasoning is the power to remove is the power to control and Congress should not be able to control Executors officials. This statute is a violation of the appointments clause. The judiciary has been completely removed from doing its function it is a separation of powers violation.

Issue: Whether the family of Bubba has standing to oppose the statute. Article III requires the court to hear cases and controversies. This makes issues justiciable, that is able to be decided. There are five areas under cases and controversies (1) advisory opinions: the court cannot give it’s opinion on hypothetical. (2) Political questions: the court cannot decide issues that have no manageable standards under the constitution and should be decided between branches (regarding impeachment). (3) Standing has three prudentiary requirements (1) injury in fact or immunities (2) causation (3)
CONSTITUTIONAL LAW I. FINAL
FALL, 1997

PROFESSOR RUDNICK

December 20, 1997

INSTRUCTIONS: The examination is composed of two questions. The value of each question is marked at the beginning of the question. In your answer discuss ONLY issues covered by the syllabus this semester, whether or not the topic was discussed or extensively discussed in class. If you think additional facts or information are required, indicate what facts or information would be required and what bearing that has on your answer to the question. If the same argument is applicable to more than one issue or answer, you do not need to repeat the entire analysis, but you may make reference back to the question and bluebook page on which the analysis you wish to repeat can be found. Be careful with this procedure, make sure that the prior analysis is sufficiently similar to warrant such a reference!

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. Please place all books, coats, jackets, pocketbooks, knapsacks, etc. at the front of the room. You may have access to them during the exam only with the proctor’s permission (you may keep valuables atop the desk in front of you if you choose).

YOU HAVE THREE AND ONE HALF HOURS FOR THIS EXAM.

IF YOU USE MORE THAN ONE BLUE BOOK, NUMBER THEM IN THE FOLLOWING MANNER: 1 of 2; 2 of 2.

There is a page limit of two bluebooks total, single spaced. Because of this restriction, I advise you to outline your answers so that you do not needlessly waste space. You may write on only one side of the page and leave some margin on at least the left hand side. No credit will be given for illegible writing or for answers which violate these instructions, and/or exceed the page restrictions. Keep in mind the value of each question when apportioning your time.

GOOD LUCK AND HAVE FUN!!!
QUESTION 1- 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 (polyvinylbutyl Xylene 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 bailed, 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.
CONSTITUTIONAL LAW II, FINAL
SPRING, 1996

PROFESSOR RUDNICK

MAY 17, 1996

INSTRUCTIONS: The examination is composed of two questions each worth 50 points. In your answer discuss ONLY individual rights issues. Do not consider any other issues, e.g., standing, commerce clause, separation of powers, tenth amendment, etc. In discussing these issues consider the arguments and counter-arguments and the likelihood that any particular claim will succeed. If you think additional information is required indicate what it is and what bearing it has on your answer to the question. If the same argument is applicable to more than one issue or answer, you do not need to repeat the entire analysis, but you may make reference back to the question and page on which the analysis you wish to repeat can be found. Be careful with this procedure, make sure that the prior analysis is sufficiently similar to warrant such a reference!

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. Please place all books, coats, jackets, pocketbooks, knapsacks, etc. at the front of the room. You may have access to them during the exam only with the proctor's permission. (you may keep valuables atop the desk in front of you if you choose)

YOU HAVE THREE AND ONE HALF HOURS FOR THIS EXAM.

IF YOU USE MORE THAN ONE BLUE BOOK, NUMBER THEM IN THE FOLLOWING MANNER: 1 of 2; 2 of 2.

There is a page limit of two bluebooks total, single spaced, on each question. Because of this restriction, I advise you to outline your answers so that you do not needlessly waste space. Please write on only one side of the page and leave some margin on at least the left hand side. No credit will be given for illegible writing or for answers which violate these instructions, and/or exceed the page restrictions. Keep in mind that Question I is worth 65 pts. and Question II is worth 35 points when apportioning your time.

GOOD LUCK AND HAVE FUN!!!!
QUESTION I
65 POINTS

At the January, 1996 meeting of the Merrymack Valley AIDS Association ("MVAA"), the Executive Board voted to establish a hospice for persons who are terminally ill with AIDS. MVAA sought to create an environment which would be closer to a home than a hospital, permitting patients to furnish rooms with their own furniture and belongings, and having some space available for family members and friends to stay overnight on occasion.

Following a brief, but profitable search for a viable location, MVAA put a bid in on an estate in Fordhelms, which had belonged to a wealthy but recently disbarred lawyer who purchased it with clients' funds. The site abuts a prestigious girls' school, but the MVAA found it particularly advantageous, since it (i) would lend itself well to the "house" concept; and (ii) is close to both a convalescent home, where there are round-the-clock medical services, and Fordhelms Medical Facility, a 50-bed private mental hospital which also has full-time medical care available. MVAA's counsel has discovered, upon research into Fordhelms' zoning ordinance, that the estate is located in an R-3 zone, better known as a "limited multi-person dwelling district." Permitted uses in this district include (exclusively): Apartment houses or multiple dwellings of no more than 6 units; boarding or lodging houses; nursing or convalescent homes administering short-term care (but not a long-term chronic care facilities for the terminally ill), philanthropic or eleemosynary (non-profit) institutions, other than penal institutions, half-way houses, or pre-trial detention centers. All uses other than those expressly allowed herein are allowed only by special permit from the Planning Commission ("Commission"). Fordhelms' ordinances allow special permits to be granted when the proposed use "is in harmony with the purpose and intent" of the zoning by-law.

The Planning Commission ("Commission") determined that a special permit was necessary, since the proposed use was as a long-term chronic care facility for the terminally ill. According to Fordhelms' procedure, the Planning Commission renders a decision based upon submitted documentation, consisting of a "Request for Special Permit" and opposition from abutters, who receive notice of the application. The director of the convalescent home submitted a letter stating that because AIDS can be contracted from casual contact, and the Request made no mention of any attempt to sequester the patients, the possibility of communicating AIDS to the frail, elderly population of the home would be unacceptably high. The Commission's decision is made based entirely upon the aforementioned documentation. The Commission denied the application and issued the following reasons:
1) The very nature of AIDS, its virulence and ease of transmission, makes the location unsuitable, particularly in view of the girls' school located next door (the proprietor and board members submitted *very strong* opposition);

2) The Commission found, that in the experience of the members, persons with AIDS tend to be predominantly young, the number of visitors would be high, increasing traffic problems in an otherwise quiet neighborhood;

3) Many elderly residents voiced legitimate fears and concerns about having terminally ill, highly contagious patients so close.

As a result of the denial, in February, 1996, MVAA sought to change the zoning ordinance to include long-term chronic care hospices in the category of permitted uses. The zoning changes were sponsored by Goode Doobee, one of five members of the City Council ("Council"), who have the exclusive power to enact zoning ordinances in Fordchelms. Unfortunately, MVAA was unable to amass enough votes on the Board to pass the zoning change in February. Therefore, at the March, 1996 election, MVAA decided to back two candidates whose platform included a commitment to change the zoning regulations to expressly permit hospices. Supporters of the issue were at the polls on election day handing out leaflets which encouraged voting for the two candidates. MVAA would have had three candidates to support, but the third, Runny Codnich, noted left-wing activist and all around big mouth, found that she was ineligible to be on the ballot because she was delinquent in her water and sewer assessments, and, according to a Fordchelms' ordinance, any person delinquent in local taxes, including water and sewer assessment, is ineligible to appear on the ballot.

The history of this "tax delinquency" ordinance is particularly interesting. Fordchelms is a predominantly caucasian populated city. There is a small but vocal minority group, comprised of mostly african-americans and hispanics which are spread throughout the city. Following years of not having any representation on the board, due mostly to the way in which the districts were drawn (the town was divided into 5 one-member districts, each district sending one selectman to City Hall), the state passed a law requiring at least 5 members or 60% of the membership of all city governing bodies to be represented by candidates elected "at-large." As a result of the new state law, 3 candidates in the last election were minorities. There was quite a hoopla when opponents of the minority candidates raised as an issue the fact that 2 were delinquent in excise taxes and/or water and sewer assessments. At the next meeting, the all-white Council then passed the "tax delinquency ordinance." At that hearing,
several Council members suggested that it was inappropriate for a potential officeholder who will decide issues of amount and disposition of certain local taxes to show a blatant disregard for the community's financial welfare by being tax delinquent. There was quite a discussion concerning what taxes would disqualify a candidate from appearing on the ballot. Despite arguments that most minorities and poor are renters rather than land owners, real estate taxes were specifically excluded from the category of taxes disqualifying a candidate from being on the ballot.

Not wanting to alienate the incumbents (in the event they get reelected), the MVAA members decided not to affix MVAA's name on the hand-outs, but rather to sign it "CONCERNED CITIZENS FOR THE HUMANE TREATMENT OF PERSONS WITH AIDS." Liz Trailer, a vocal MVAA supporter, was fined (after a full adversarial hearing) $250.00 for distributing anonymous leaflets under a state statute which prohibits the distribution or display of any handbill, flyer or other written material designed to promote the nomination, election or defeat of any candidate, or to promote the adoption or defeat of any issue, unless there appears on the printed material the name and residence or business address of the chairman, treasurer or secretary or other responsible person of the organization issuing the printed material.

Discuss the constitutional issues raised by this fact pattern and don't forget to raise and discuss both sides.
QUESTION II
35 POINTS

A. Betty Bubble is a 30 year old woman who recently suffered severe financial reversals. She has been on welfare since she lost her job as a law professor at a prestigious ABA accredited school when, as a result of a Department of Justice investigation, schools were permitted to decrease the size of full-time faculties without threat of disaccreditation. Betty recently saw an ad in the newspaper in which a couple was looking for a surrogate mother to carry a child to term. After contacting the parents, Fred and Wilma Stoneflint, and reaching an agreement concerning the price and conditions, the three executed a surrogate parentage contract. (For those of you unfamiliar with the procedure, an egg and sperm from the Wilma and Fred, respectively, are implanted into the surrogate (here Betty) who acts as a "host uterus.

Shortly after she becomes pregnant, Betty develops complications. She is diagnosed with a rare condition that results from a diminution in her body's production of a certain hormone necessary to continue the pregnancy. However, Betty is lucky, because an industrious team of obstetricians and researchers has just obtain FDA approval to market a synthetic hormone which will, with virtual certainty, compensate for Betty's deficiency, and permit her to carry to term.

Betty agrees to start taking the drug immediately. At about 16-17th week, things begin to take a turn for the worse. Betty suffers complications from the drugs. She gets bloated, suffers pains in her joints so severe that she can barely walk. She gets sores all over her body. She wants to stop taking the drug. Her doctors tell her that this will, with virtually certainty, cause her to spontaneously abort. She decides that the money is not worth it, and that she is going to terminate the pregnancy by stopping the medication. Because this is essentially an abortion, her physician feels compelled to comply with the state of Oppressive's abortion laws, pertinent parts of which include that the following information must be conveyed by the physician who is to perform the procedure to both the mother and natural father (although only the mother need execute a signed consent): the precise medical procedure which will be used, the medical risks associated with the procedure, probable gestational age of the fetus. In addition, the physician must show the mother and natural father a movie of the fetus at the same gestational age in utero, as well as a film depicting the procedure which the woman will undergo. Fred and Wilma find out about Betty's plans, and go into court to get an injunction to enjoin Betty from stopping the medication.

Oppressive also has the following law:
OSA 5-195: No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.

A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to exclusive custody of the child.

What constitutional issues does the above fact pattern raise? What is the likely result should a constitutional challenge be brought and, more importantly, why? Don't forget to discuss both sides.

B. Before the court has time to act on the injunctive relief as described in part A, Fred prevails upon Betty to continue the pregnancy to term, offering her additional consideration. This so angers Wilma, that she commences divorce proceedings against Fred, which are finalized just days after Betty gives birth to a heathy baby boy, Bam Bam. Betty falls in love with the little boy, as do Wilma and Fred. In fact, Fred falls in love with Betty, and the two want to marry and obtain custody of the baby.

Assume, in answering this part of the question, that Oppressive allows surrogate parentage contracts but, has the following law:

If the mother (egg donor) of a child born as a result of a surrogate parentage contract is married, her husband is presumed to be the father of the child.

Assume you represent Wilma. What constitutional issues would you raise in seeking to gain custody for her? What is the likely result? Don't forget to discuss both sides.
You represent "Blush Berry," a small family owned corporation based in Middleboro, Massachusetts which owns acres of cranberry bogs. Blush Berry has been in business since the 1940s and has been gradually increasing both the number of bogs and the size of the harvest, the latter being due primarily to improvements in cultivation procedures and harvesting equipment. Blush Berry is a member of a Massachusetts-based cooperative Sea Spray which gets cranberries from members bogs in Massachusetts and 4 other locations, Minnesota, New Jersey, Oregon and British Columbia, processes them into a variety of foodstuffs and juices and distributes them for retail sale throughout the country.

As you know, Massachusetts is the largest cranberry producing state in the U.S., although Wisconsin is rapidly catching up. In fact, Wisconsin is projected to surpass Massachusetts in cranberry production in the year 2002 due primarily to the amount of usable land which can be devoted to the growing of cranberries.

Cranberries have gained new popularity recently, particularly in light of medical findings that ingestion of the little fruit prevents gum disease and urinary tract infections.

Historically there have been few differences between cranberries, however, a grower in Wisconsin has been experimenting with a genetically altered cranberry having a particularly high concentration of a nondialyzable polymer (NDP) which has been identified as the compound responsible for the antibacterial effects of cranberries. Obviously, the cost of growing these cranberries is higher than the traditional kind.

Consequently, the state of Wisconsin has just enacted legislation requiring that no less than 10% of the fruit in any cranberry product sold in the state must be these new NDP berries.

Cranilda Cran Berry, Blush Berries owner, who, at age 79, still participates in the berries harvesting, has complained to you that she will have to make substantial costly changes to her cranberry products in order to comply with the new Wisconsin law. In addition, she informed you that she attempted to get a special permit to construct a new processing plant (which would process her berries more efficiently, and perhaps save her enough money to enable her to meet the new Wisconsin regulation). However, the zoning board, stating its concern for environmental impact of such a large building, the increased waste water run-off from a new, larger plant, told her she could not have a new plant unless she provided for the run-off, including installation of town sewer for her facility (which had previously been served by a septic system). The cost would be prohibitive, she claims, as the nearest town sewer connection is more than a mile away. She claims that the real reason for the request is that a member of the board wants to
build a housing development further down the road, and this way, that's one mile less of the connection he has to pay for.

She asks for your appraisal of the Constitutionality of the legislation, and of the likelihood it would withstand a challenge if she brought suit. What do you tell her? Discuss all the constitutional issues raised by this fact pattern. Don't forget to discuss both sides (that is, what the opposing side's argument will be on a given issue), and what is the likely resolution of the issues raised. If you need to assume any other facts exist or don't exist in order to argue or resolve the problem, make sure you set forth those facts.

QUESTION II
40 POINTS TOTAL

As you know, education reform has been a priority of the Clinton Administration and of a number of Governors. Several bills proposed on Capitol Hill and in State Houses across the country are aimed at dealing with the various educational issues facing the country at the new Millennium. Among the pending legislation is the following:

A. (10 POINTS) Congress and the executive branch have been barraged by states alleging that the federal government's failure to enforce existing or to pass new, stricter immigration laws, has put an enormous fiscal burden on certain states, one which they are financially incapable of handling. Among the costliest state expenditures is public education. Congress is considering passage of legislation, which as a first step, will require all states to take a census of all students enrolled in its public schools, with respect to national origin and immigration status of the child, his/her siblings, and parents. No names will be attached to the census to protect the child and parents from self-incrimination. The present draft of the legislation requires each state to designate a student enrollment census operator (SECO), who is responsible for sending out the forms to all public schools, ensuring that all schools respond, tabulating the results and sending the results to Congress, which will then use the information to decide whether there is truly a crisis in education because of illegal aliens, and if so, what they should do about it. Discuss the Constitutional issues raised by this proposed law.
B. (20 POINTS) Governor Selyouche has recently proposed legislation which would require all schools, public and private, licensed by the Commonwealth’s Department of Education ("covered school"), to employ only teachers having a Master’s Degree in Education or the equivalent thereof. Any teachers employed by any covered school who does not meet these qualifications at the end of the school year must be terminated either at the end of the school year for teachers operating without a written contract, or at the expiration of any existing contract (which is the case where the teachers are unionized). Once the law becomes effective, teachers currently employed by “covered schools” must submit written proof that the degree or equivalent has been awarded. Failure to timely submit written proof will result in automatic termination. The Principal or Headmaster of each “covered school” then determines whether the teacher has the requisite advanced degree, or whether he/she must be terminated at the end of the school year or the expiration of the contract. The Principal or Headmaster has 30 days following the submission of the written proof to render a decision. Any person aggrieved by the decision of the Principal or Headmaster can appeal the decision to the Secretary of Education for the Commonwealth, who reviews the decision. The teacher is not allowed to appear, be represented by counsel or have live witnesses. The teacher must make his or her case in writing, but he or she may submit documents or affidavits.

All new hires must possess the requisite advanced degree. You are consulted by teachers at both public and private schools and asked to evaluate the constitutionality of the proposed law. Don’t forget to address both sides.

C. (10 POINTS) Clinton’s Secretary of Education learned of the Selyouche administration’s proposal and is considering enacting similar federal legislation: Any public or private school which receives federal funds (a small number of elementary and secondary schools) or is accredited by any federally recognized accrediting agency (just about all private and public high schools as well as a smattering of elementary and middle schools) shall not employ any teacher who has not attained a graduate degree in education or a graduate degree in the substantive subject taught plus a designated number of credit hours in college or post graduate education courses to be determined by the Department of Education. Is the statute constitutional? Don’t forget to address both sides.

QUESTION III
10 POINTS
The Emergency Planning and Right-to-Know Act, passed by Congress in 1986, requires, among other things, that facilities which are users of toxic and hazardous chemicals file certain reports containing, for example, the name and address of the user, the identity and quantity of the toxic or hazardous material on hand, waste disposal methods, and the quantity released into the environment. These "inventory forms" are filed with the Environmental Protection Agency ("EPA"), and they are available to the public. The statute empowers the EPA and states and local governments as well as private individuals to bring certain actions. The "citizen-suit" provision expressly permits an individual to commence an action against an owner or operator of a facility for failure to file the required inventory form.

The Association of Environmentally Concerned Citizens (AECC) is a consortium of individuals interested in environmental protection. It disseminates the information contained on the inventory forms to its members and other concerned citizens so that local residents can plan for emergencies in case of accidents and it lobbies Congress and state legislatures for changes in environmental laws.

When AECC discovered that Greedy Galvanizing, an Illinois company that uses toxic and hazardous materials had not filed the requisite inventory forms for the years 1986-1994, it brought suit in federal court to seek enforcement of the statute. When Greedy's lawyer obtained a copy of the complaint, it advised its client to file the documents immediately, which it did. AECC's complaint alleged the facts contained in the above paragraph regarding its constituents, and what it does with the information. It asked for a declaration that what Greedy did violated the law, an injunction ordering that Greedy timely file all future reports, and damages resulting from its inability to timely notify the public of Greedy's inventory.

Greedy moves to dismiss the case on the grounds that the federal court cannot hear the case, under Article III of the Constitution. What specific constitutional concepts should Greedy's lawyer rely upon as a basis for its Motion to Dismiss? What is the likely result of the Motion and why? Don't forget to discuss AECC's response to Greedy's allegations.
CON LAW I
STUDENT ANSWER

Question 1

The first issue here is does Ms. Berry have standing to be a party to the claim. The current standard comes from a case whose name I forget (how's that for a good start!), but which involved parents of minority school children who sued the Federal Government for failing to enforce IRS laws which gave tax-exempt status to private schools who discriminate against racial minorities. In that case the Supreme Court said that in order to find standing there must be a nexus between the injury and the alleged illegal activity, and the likelihood of redressibility. Ms. Berry's injury (increased cost of production) is certainly related to Wisconsin's legislation and repeal of the statute, which would be her request relief, would certainly redress the problem. Timing issues present no problems: the injury must have occurred or there must be an imminent threat of injury. If Wisconsin's legislation were proposed rather than actually enacted, Ms. Berry's suit would be unripe. Defendants might try to argue that there is no evidence that the legislation would ever actually effect Ms. Berry, but it is a weak argument because there is substantial evidence that the legislation is intended to impact people exactly like Ms. Berry. Mootness might become an issue; a legal suit must be alive at all stages of the litigation in order for it not to become moot (Definimis v. Odegard – See! I can remember case names.); the question is will the 79 year old plaintiff (although admittedly apparently in excellent health if she continues to help in the harvest) still be alive at all stages of the litigation. Certainly her heirs and decedents can keep the suit alive on her behalf. However, this raises the question that perhaps it would be better for the Massachusetts based cooperative to bring the suit as an organization. In order for an organization to have standing, there must be an injury in fact to one of its members (Would an imminent threat of injury suffice??? Ugh! I'd have to look that up.) The issue must be related to the organization's purpose. (Sea Spray is at the very least involved in marketing cranberries and the statute effects that. The advantage to this is that for organizational standing, individual members need not be named and the suit would survive Ms. Berry even if her kids sold the land for a housing development.

The next question is: who would Ms. Berry or Sea Spray sue? The 11th Amendment prohibits individual citizens from suing states. So the plaintiff(s) must bring a suit against Wisconsin or Wisconsin's legislature. Ex Parte Young, however, allows citizens to bring a legal action against agents or employees of a state. The action must be targeted at the person who actually has the authority to enforce the statute, so in this case I assume the case would be brought against the governor of Wisconsin or perhaps the head of the agency authorize to oversee or monitor the quality of cranberries. The plaintiff(s) can sue for injunctive relief -- legal fees. No retroactive relief will be allowed, nor monetary damages.
Now the really important stuff: Is Wisconsin’s legislation controlling the amount of NDP in cranberries sold in the state constitutional? This question triggers a dormant commerce clause analysis. (The dormant or negative commerce clause is created by Congress’ commerce clause power. It creates negative limitations on a state’s ability to regulate commerce.)

The first question: does the legislation effect interstate commerce? Wisconsin (D) might try to argue that cranberries are marketed locally; that cranberries are sold solely in the states where they are grown and therefore this legislation does not effect interstate commerce. This argument is weak and has not held up for similar commodities such as milk. (There was a New York case involving out-of-state milk whose name I forget . . . .) The fact that this legislation would significantly impact any potential sales of Mass cranberries in Wisconsin is enough to find that the statute impedes interstate commerce.

The next question to ask is what kind of discrimination does the statute pose? Is it facially neutral in which case a more lenient Pike balancing test would be applied by the court. Or is it facially discriminatory, in which case a stricter scrutiny test would apply. To find the answer you must put yourself in the place of both an in-state and out-of-state cranberry producer and ask “Am I being treated differently?

Facially Neutral: It could be argued that the statute is facially neutral. All cranberries, whether in-state or out-of-state, are treated the same. If I am a Massachusetts producer or Wisconsin producer, I still must produce the same quality berry. For a facially neutral statute the court would see if the statute even handedly regulated a legitimate state purpose and if the regulation have a minimal effect on interstate commerce (i.e., that the benefits to the state outweighed the burden to interstate commerce.) Defendant would argue that the legislation (1) treats in-state and out-of-state producers the same; (2) that the state’s efforts to reduce the gum disease and urinary tract infections of its citizens is a legitimate state purpose (consider skyrocketing medicaid costs, lost productivity due to workers being sick; loss of classroom time for sick children, etc.); (3) the effects on out-of-state growers is negligible because ultimately they are going to have to grow the superior GM berry anyway to remain competitive in the market; its just part of the cost of keeping your product up to date. (Unlike in the strict scrutiny test which will be discussed later, the state has no burden to prove there are less restrictive alternatives.) This would be a much harder test for the Plaintiffs’ claim to survive. Nonetheless, I would compare this case to the Washington State Apple Growers case which had a similar set of facts. In that case, even though the statute was facially neutral, the effect was so blatantly discriminatory and the consumer protection issue so minimal that the Court found the burden far outweighed the benefit. Using this case, I would argue that, at the current stage of research, there is no proof that a higher percentage of NDP in the berry produces greater health benefits (the good ‘ol traditional cranberry has been protecting peoples’ gums and urethras for many years now). I would also argue that
the economic burden to out-of-state cranberry producers is extremely burdensome which would necessarily burden interstate commerce. I might try to argue that there was a disproportionate impact on out-of-state growers. Defense would counter with the Exxon case where the Court found that disproportionate impact was inconsequential. No doubt about it; this would be a hard, although not impossible, case to win if a Pike balancing test were applied.

Facially Discriminatory: I would, therefore, strongly argue that this statute was discriminatory because, after all, Wisconsin cranberry growers have access to the GM berry and no one else does. Out-of-state growers are, therefore, treated differently. If I could prove that the statute was purely a protectionist act on the part of Wisconsin, it would be unconstitutional per se. Defendants would counter that they are legislating to protect the health and safety of its citizens, which it has the authority to do, which is not effected by the negative limitations of the commerce clause. Under a strict scrutiny test, however, the legislation must be necessary to effectuate a compelling state purpose and there must be no less discriminatory alternatives available. The Defendant would have a difficult time proving the minimal health effects of the statute were compelling and certainly other less discriminatory means would be available. Few statutes can survive such strict scrutiny and this statute, therefore, would probably be doomed.

Ms. Berry also has a “takings clause issue.” The Constitution gives the government the right to take and use private property, but specifies that the owner/citizen must be fairly compensated for such takings. There are three types of takings: physical, regulatory and conditional. When Ms. Berry was told that she needed to install a town sewer in order to get a permit this raised the issue of whether or not this would amount to a taking. The government cannot require you to give up either property or property rights in exchange for a permit — this would be a taking per se and the owner/citizen must be fairly compensated for it. On the other hand, governments do have a right and responsibility to regulate how property is used, for the benefit and protection of its citizens. In order for a permit condition not to amount to a taking, there must be a nexus between the condition and a legitimate public purpose and the condition must be proportionate to the permission applied for.

In this case, it seems that there is a legitimate public concern (environmental issues) and that there is a nexus between that concern and the requirement for the installation of the sewer. Perhaps the concern is bogus, as Ms. Berry claims. In order to prove this, I would examine other similar situations in Middleboro and see what the zoning board required. A showing of arbitrariness would weaken the zoning board’s claim. Also the condition must be proportional. On Ms. Berry’s behalf, I would argue that the building developer could pass on cost of the sewer installation to all of the buyers of the new houses, whereas Ms. Berry stands alone in absorbing the cost. This is disproportionate.
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 commerce 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 commandeer 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? (*Mathews 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.