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.

rudnick/cnlwfm.97
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 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? (*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.
Part I Short Answer (50 pts - each numbered question is worth 2 pts)

A. New Jersey wants to construct a liquefied natural gas terminal on the banks of the Delaware River, which is estimated to generate enough fuel to provide electricity for all the homes in three states, and $1 billion in revenues for that state. Sounds like a no-brainer, except that in order to build the LNG terminal, a pier that juts several hundred feet into the Delaware River must be constructed, and the state of Delaware, which opposes the terminal on safety and security grounds, claims it owns that part of the River under a 1682 land grant from the Duke of York. Delaware files suit in the Supreme Court against the State of New Jersey, claiming that the latter’s proposed LNG terminal trespasses on Delaware’s property and interferes with riparian rights.

1. New Jersey moves to dismiss the case on the ground that the suit violates the 11th Amendment. Should the court allow or deny the Motion, and why?

2. Assume that after the suit was filed, Congress passes a law providing that any suit brought by one state against another can only be commenced in the Federal District Court for the District in which the capitol city of the defendant state is located. The legislative history of the act indicates that Congress was motivated by a concern about the ever-growing case load of the Supreme Court, its desire to emphasize its appellate function, as well as the lack of expertise of the justices of that Court to try cases. Is the statute constitutional? Why or why not?
B. Penny Prisoner was tried and convicted in federal court for possession of a controlled substance, and sentenced to three years in prison. Patty, who was in the construction industry prior to her conviction and incarceration, had suffered a variety of professional setbacks in the year prior to her arrest. If truth be told, it was the fact that she had been laid off from two jobs, and saw no prospects for employment, that set her on the road to crime. She was recently told that a distant relative has just been awarded a major construction contract to build a new casino in Massachusetts, and the relative was prepared to give Patty a lucrative job. However, Penny has been incarcerated in Connecticut, where she is serving the last year of her sentence, and cannot work. Federal prisoners are eligible to go to half-way houses (where work-release is permitted) when 90% of the sentence has been served, or when 6 months remains to be served, whichever comes first. In Patty’s case, she would be eligible to go to a half way house in 6 months, but by that time, most of the construction would be completed, and Penny’s job would no longer be available. So, in accordance with the regulations of Federal Bureau of Prisons (BOP), she applied to the Regional Superintendent for immediate designation to a half-way house. Such early designations are permissible under certain circumstances, such as the availability of outside employment, but only when the inmate’s conduct while incarcerated has been exemplary. Penny’s request was denied, based upon her written application alone, but it took 30 days for the process to be completed. The written denial said that she had been the subject of several disciplinary actions while incarcerated, which she claims is not true. According to BOP regulations, a decision of the Regional Superintendent may be appealed to the Director of the BOP for review, again based upon documentary evidence only. That decision is, in turn, subject to limited review by the federal courts. Because time was of the essence, Penny did not file an appeal to the Director, but went instead directly to federal district court, claiming that her right to due process as guaranteed by the United States Constitution was denied by virtue of the perfunctory hearing process. In her complaint, she asked only that BOP be ordered to release her immediately to a half-way house.
3. BOP moves to dismiss the case on the grounds that the district court should not hear the case on the merits. What is BOP's strongest argument in support of this motion and how is the district court likely to rule?

4. Assume that Penny filed the appropriate appeal with the Director, which was also denied, again, without a live hearing at which she could be present and offer witnesses to rebut the finding that she was disciplined during her incarceration. She then filed suit in the federal district court, claiming that her right to due process as guaranteed by the United States Constitution was denied. In her complaint, she asked only that BOP be ordered to release her immediately to a half-way house. By the time the district court got around to hearing the case, Penny had already been sent to the half-way house, but, as she expected, her job had been given to another person, and construction was so far along that no other jobs on that project were available. BOP has again moved to dismiss the case on the grounds that the district court should not hear the case on the merits. What is BOP's strongest argument in support of this motion and how is the district court likely to rule?
5. Assume that Penny’s case is heard by the district court on the merits. What will Penny have to prove in order to prevail on her claim that she was denied procedural due process by virtue of the hearing procedure employed by the BOP (Hint: “She was denied a hearing” or “Her procedure due process rights were violated” are NOT correct answers)? How should the court determine whether the procedures were constitutionally adequate?

6. Assume that before she filed the complaint in district court, Penny learned, through the prison grapevine, that women almost never receive early designations to halfway houses. Women generally ask for early release in order to tend to their families, which is not a justification under the BOP regulations. Very few women, but most men, cite opportunities for outside employment as basis for early release. Penny believes that what is really going on here is gender discrimination. If Penny can convince the court that the BOP discriminates against women in its early designation policy, in violation of the Equal Protection Clause of the United States Constitution, what level of scrutiny will the court apply and who has the burden of proof?
7. What will Penny have to demonstrate to the court in order to convince it to apply the standard identified in (6) above?

8. If Penny is unsuccessful in convincing the court to apply the standard identified in (6) above, what level of scrutiny will the court apply and who has the burden of proof?

C. After news surfaced that Dr. Destructo, who had been the subject of numerous complaints while he was practicing medicine in Massachusetts, had reappeared on the staff of a VA Hospital in Illinois, where he was again negligently practicing medicine, Congress decided it was time to keep a national database of physicians who have been the subject of malpractice judgments and/or discipline for substandard performance, to enable medical facilities to have easy access to background information concerning a particular doctor’s performance. So Congress passed a law requiring that the medical licensing board of each state establish a data base of all physicians licensed to practice medicine in that state. The statute requires that the data base must contain information concerning malpractice judgments issued by any court in that state, as well as information concerning any discipline imposed by that state’s licensing board. The data base must be updated at least every 30 days, and the information must be transmitted to a national database operated by the Department of Health and Human Services in
Washington. The Board of Registration in Medicine of State refuses to comply, citing the cost of establishing and maintaining such a data base. The United States brings suit in federal district court to order State to comply.

9. What Constitutional provision or doctrine would provide State with its strongest argument in support of its position that it need not comply with the federal law? Summarize State’s argument under the constitutional provision.

D. (10). Because of the recent number of safety issues relating to food and other items imported into the United States from China, Congress recently exacted the Chinese Importation Safety Act (“Act”). Among other things, the Act creates the “Chinese Importation Safety Commission” (“Commission”), whose duty it will be to promulgate and enforce regulations relating to the safety of Chinese imports, both edible and inedible. The Commission is empowered to establish inspection sites in the United States and in China, which makes membership on the Commission attractive—after all, it’s free trips to China on a regular basis. Therefore, the composition of the Commission was seen by members of Congress as an important issue. Many Congresspersons claimed either that they should be able to serve on it themselves, or should be able to appoint members (political plums to gratify loyal supporters). In the end, the composition of the Commission is as follows: Five members;
One appointed by the US Secretary of Agriculture
One appointed by the US Secretary of Consumer Affairs
One appointed by the Senate Chair of the Consumer Protection Committee
One appointed by the House Chair of the Consumer Protection Committee
One by the President representing the Beef Association

The statute makes it a criminal offense for an individual or entity to import into or sell in the United States any product not authorized for importation or sale by the Commission.

We R Toys ("Toys") was recently caught selling toys not authorized for sale in the US. In the prosecution, Toys claimed that the statute creating the Commission is unconstitutional. What Constitutional provision(s) and/or doctrine(s) should Toys argue are violated by the statute? Briefly set forth its argument.
E. In the early 1990s, the United States, Mexico and Canada entered into negotiations concerning the flow of goods between and among the three nations. The negotiations ultimately resulted in the North American Free Trade Agreement (NAFTA), an agreement signed by the leaders of the three nations. Congress passed legislation shortly after NAFTA was ratified, effectuating the provisions of the agreement. After NAFTA and the legislation went into effect, a group of businesses that (i) manufacture and service products made and sold only in the United States, and (ii) promote the manufacture and purchase of goods made wholly within the United States, known as the “Made in America Foundation” (Foundation), brought suit against the United States, contending that NAFTA is unconstitutional. The Foundation alleges that it should have been created through the executive’s treaty power, which requires Senate ratification, rather than by executive agreement, which does not require any Congressional action. The Foundation can prove that its members will lose business because NAFTA permits and encourages goods to be manufactured and sold at lower cost by Mexican and Canadian companies than by competing American businesses.

11. The United States moves to dismiss the case, alleging that the case is non-justiciable. What is the strongest basis for the motion?

12. If the United States argues the answer to question 11 above, identify at least three factors that the court will apply to determine if the United States will prevail on its motion.
F(13). The Governor and Legislature of Massachusetts wish to attract more industrial business to the Merrimack Valley, and away from southern New Hampshire, where land and the cost of living are cheaper. So, the Massachusetts Legislature passes, and the Governor signed into law, a statute that would grant a sizeable property tax credit for any company incorporated under the laws of Massachusetts that locates, relocates or expands to the Merrimack Valley (as defined in the statute) any qualified manufacturing business that will employ more than 100 persons. A group of taxpayers, concerned that businesses seeking to take advantage of the property tax breaks will buy up large quantities of land that would otherwise be taxable, thereby decreasing the tax base and increasing the property tax burden on individual home owners, brought suit in federal court against the Massachusetts Tax Commissioner, challenging the statute on the grounds it violates the dormant commerce clause. The Tax Commissioner moves to dismiss the case on the grounds that the plaintiffs have no standing. How should the court rule and why?
G. New York State law provides the following: Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

The law defines an “owner” as:

[a] person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes a person entitled to the use and possession of a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise for a period of greater than thirty days.

After nation-wide vehicle leasing and rental companies, who claimed that state court liability for torts of those to whom the vehicles are rented is putting them out of business, lobbied Congress, it recently enacted the following:

(a) In general.-An owner of a motor vehicle that rents or leases the vehicle to a person ... shall not be liable under the law of any State ... by reason of being the owner of the vehicle ... for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-

(1) the owner ... is engaged in the trade or business of renting or leasing motor vehicles; and
(2) there is no negligence or wrongdoing on the part of the owner.

Patty Passenger was seriously injured one night when the vehicle in which she was riding collided with another vehicle driven by Don Driver. Don was on his way to the airport from a business meeting. Don’s car struck the passenger door directly. Fortunately, the driver of Patty’s car was not injured.

Patty brought suit against the driver of the vehicle in which she was riding as well as Don and Hurts, as the owner of the vehicle, under the above New York law for damages resulting from the crash. Hurts moves to dismiss.
14. What doctrine provides the strongest constitutional basis for Hurts' motion and where in the Constitution does the doctrine come from?

15. What should Patty argue in response to the position set forth by Hurts? How is the Court likely to rule and why?

H. North Dakota is a very fertile area in which to hunt ducks, geese and other waterfowl. However, the state Division of Fisheries and Game ("Division") has, for many years, been receiving complaints from North Dakota residents that tourists, who do not have to work, and can get to the best hunting areas earlier in the day and stay longer, are taking a disproportionate amount of waterfowl during hunting season. As a result, North Dakota passes a law providing that non-resident licenses cost $85/season, while residents pay just $6/season. A group of non-residents who are regular waterfowl hunters in North Dakota bring suit against the Commissioner of the Division in federal court requesting an injunction against the enforcement of the state law on the grounds that it violates the United States Constitution, particularly the dormant commerce clause and the privileges and immunities clause of Article IV.
16. With respect to the commerce clause claim, what is the state's strongest argument that this doctrine does not apply? If the court rejects the state's argument, what standard or test will the court apply to evaluate the constitutionality of the state law, why will that standard be applied and who is likely to prevail?

17. Assume that Congress had passed a law that includes the following provision: "Each state shall be authorized to regulate all wildlife within its boundaries. This shall mean the taking, for any purpose, of fish and wildlife, including the enactment of laws and regulations respecting the availability of licenses or permits of particular species, the kind and numbers that may be issued at any time, to whom, and the fees charges in connection with the issuance of the licenses or permits for hunting and fishing." Would the existence of this federal law have an effect on the resolution of the commerce clause issue in question 15? Why or why not?

18. With respect to the P & I claim, what test or standard will the court apply to evaluate the claim and what is the likely result?
I. Pedagogy Private School (Pedagogy) is a very elite, expensive private secondary school with an outstanding college preparatory curriculum located in State. Pedagogy has received and continues to receive state and federal funds for the construction of residences and classrooms, and its varsity sports teams are members of a league in which public secondary schools also participate. Many of its teachers are licensed by State to teach in public schools, although state licensing is not a requirement to teach at Pedagogy. Additionally, several of its students are the recipients of publicly financed scholarships that pay for a significant part of the considerable room, board and tuition. The administration of Pedagogy is very strict. It believes that the faculty members should act as role models for the students, and it enacts a strict code of conduct for faculty members. Among the prohibitions are: (1) teachers are not permitted to have a sexual relationship with students or other teachers employed at Pedagogy; and (2) any unmarried teacher who becomes pregnant must take a leave of absence, without pay, beginning at the beginning of the fourth month of pregnancy through the birth of the child. The Headmaster told the faculty when he announced the establishment of the policies: “You, as faculty members must set an example for our students. Ours is a society that takes sexual relations and giving birth as a casual by-product of going through puberty. It is about time that those of us who set standards for teenagers and act as role models act responsibly. Having sex and babies out of wedlock should not be activities in which our future leaders aspire to engage.”

Isabel Instructor, a member of the faculty at Pedagogy, fell madly in love with Terry Teacher, who is employed at the local public high school. Unfortunately for her, however, the feeling was not mutual. When she announced to Terry in November that she was pregnant, he broke off the relationship, saying he was not ready for a family. Isabel is in a quandary. Terry can probably hide her pregnancy until the sixth month, because she is fairly heavy and tends to wear loose fitting clothing anyway, but not much longer than that. But most of all, she needs the job. Isabel consults an attorney who brings suit against her employer in federal court claiming that Pedagogy’s compulsory leave policy violates her equal protection and fundamental rights as guaranteed by the Fourteenth Amendment to the
United States Constitution.

SS#______________

19. What is Pedagogy’s strongest argument to defend against Isabel’s case that Pedagogy’s compulsory leave policy violates equal protection and fundamental rights as guaranteed by the Fourteenth Amendment to the United States Constitution, and what should Isabel argue in order to defeat Pedagogy’s position set forth in the previous answer?

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20. What class(es) and/or rights should Isabel claim is/are violated by the mandatory leave policy? As to each of the classes or rights involved, what level of scrutiny should the court apply to determine if the Fourteenth Amendment has been violated?

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J. Suburb has just approved a subdivision control plan permitting Old Agers, Inc., a real estate development and construction company that builds upscale residential living facilities for the 55 and over set, to build a series of town homes, freestanding houses and condos on a 60-acre piece of land. In order to provide the requisite utilities for the approximately 100 individuals who will ultimately reside in the community known as “Grey Gables,” Suburb will have to run water, sewer and phone lines (which also accommodate internet and cable TV access lines) into the property. According to state law, the phone lines must be connected to poles placed no more than 20 yards apart. As a result, at least 3 of the poles must be placed on property belonging to Norma neighbor. She comes to you, as her attorney, complaining that she had nothing to say about the placement, and that when she suggested she should be paid for the use of her land, Suburb’s lawyer, Snidely Whiplash said “Oh, come on, Norma, it’s 3 poles that are no more than a foot each in diameter, and they are going to be placed on the edge of your property. You can’t see them from your house, and you never even go near that area, anyway. And, your taxes will go down when all these homes are occupied and they are paying residential real estate taxes. Right now, it’s farmland that gets taxed at the lowest possible rate. Quit your complaining.” Norma wants to know whether she can at least get compensated for the installation of the poles on her property.
21. What is Norma's strongest constitutional argument that she is entitled to monetary relief; what will likely be Snidely's best argument in response to her claim, and will his argument defeat her case? Explain your answer.

K. The state of Oppression has recently enacted a statute providing that no physician may perform an abortion unless the woman patient has signed an "informed consent" form stating that her attending physician advised her that she is pregnant, the nature and risks associated with the abortion procedure to be performed, and the alternatives to abortion. According to the statute the physician must show a film to the woman depicting the precise medical procedure she will undergo, which depends upon the length of the pregnancy at the time of the abortion. The more advanced the pregnancy, the more difficult and complex the procedure, and, because of the maturity of the fetus, the more graphic the detail. Planned Parenthood of the State of Oppression files suit against the appropriate person in federal district court asking the judge to enjoin enforcement of the law on the grounds that it violates the United States Constitution.

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22. What test(s) is/are the Court likely use to evaluate the constitutionality
L. Massachusetts passes a law requiring that all cranberry products sold in Massachusetts be made with cranberries that are no less that $\frac{3}{4}$” in diameter. The legislature passed the law after hearing testimony that as cranberries ripen, they grow in size and larger berries contain more antioxidants than smaller berries, and are therefore better for a person’s health.

Camden Crannies, a group of New Jersey cranberry growers and processors wishes to challenge the Massachusetts law as violative of the United States Constitution. New Jersey cranberry growers generally harvest their cranberries at $\frac{1}{2}$” in diameter, because it is cheaper, but they are not compelled by law to do so.

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23. On what Constitutional doctrine should the New Jersey growers base
their claim? What test or standard will the court use to evaluate the plaintiffs’ claim, why, and what is the likely result of the lawsuit?

M. By state statute, California has an “integrated bar” (“Bar”). That means that all persons licensed to practice law in the state of California must be members of the California State Bar Association (“Bar Association”). The Bar Association is totally funded by mandatory attorney dues, and its primary functions are to oversee and administer the continuing legal education opportunities in which all members of the Bar must participate as part of their ethical obligations, as well as monitoring compliance with that requirement as well as the mandatory Pro Bono requirement demanded of members of the Bar as well. Finally, the Bar Association recommends to the California Supreme Court any changes to the state Rules of Professional Conduct. All lawyer discipline matters, from investigation through adjudication, are conducted by a full-time staff of the Bar Association, although final judgment is entered by the California Supreme Court, which licenses all lawyers. By statute, Officers and Directors of the Bar Association are elected by attorneys licensed to practice in the state.

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A group of residents of the state of California, all of whom were the
unfortunate victims of unscrupulous lawyers, have recently organized to investigate the manner in which lawyers in California are superintended. They feel that the disciplinary process is inadequate, and blame it on the fact that lawyers are in charge of the regulating—in other words, the fox is guarding the henhouse. They bring suit in California state court challenging the method by which the Officers and Directors are elected, that is, by lawyers only. The former clients claim that they have a fundamental right to vote, as guaranteed by the United States Constitution, for these elected officials.

25. What level of scrutiny is the court most likely to apply to the former clients’ case and why?

II. Essay Question (15 points)

Fred Foreigner and Connie Citizen have been dating for several years. Fred
came here on a student visa, to study biotechnology at MIT, which expired years ago. By the time the visa had expired, Fred was already working at a very lucrative biotech job, which he hated to give up, so he just never went back to Guatemala, his homeland or took any steps to get the visa extended. Connie and Fred decided to get married, so they went to the Town Clerk of Hometown, in the State of Disarray where they both reside, to apply for a marriage license. Mass laws provide that any individual applying for a marriage license must present a photographic ID as well as proof of citizenship, or that the individual is legally in the country. Fred had a driver's license, but since his visa had expired, he could not provide proof that he was legally in the country. Hometown's Town Clerk denied Connie and Fred a marriage license. The Town Clerk said that the legislature had determined that documents reflecting citizenship or legality in the country were the only ones that Disarray should rely on as proof that the persons applying for the license are who they say they are.

Connie and Fred went directly to Larry Lawyer, an attorney who specializes in Immigration Law. While they were in the waiting room, Fred saw Andy Alien, a former college classmate who he knew to be from Argentina. They rekindled their relationship and began talking about the legal problems that each had encountered as a result of their having come from other countries. Andy introduced Fred to Chrissy, his wife of almost three years. Chrissy, Andy said, is a United States citizen. Andy told Fred that they were at the lawyers to prepare for their upcoming INS interview, a precondition to his becoming a US citizen. Andy told Connie and Fred the following:

The Immigration and Nationality Act grants preferential naturalization status to the alien spouses of United States citizens or permanent residents. Under the statute, an alien can become naturalized if (1) the alien's spouse is a United States citizen; (2) the alien has resided within the United States for three years; and (3) the alien has lived in marital union with the citizen spouse for a period of three years prior to the petition for naturalization. The INA does not afford preferential status to alien spouses engaged in sham marriages—situations in which the couple has entered into marriage "for the purpose of evading the immigration laws."

When an alien spouse applies for naturalization, the Department of Homeland Security, which since 9-11 oversees the activities of the Immigration and Naturalization Service, conducts a marriage fraud interview
to police the validity of the marriages of those aliens applying for naturalization under the INA. The INS may ask questions about the couple's "courtship, their wedding ceremony, the decor of their residence, the division of household chores, or what they had for breakfast on the morning of the interview." Questions about a couple's sex life before and after their marriage are not uncommon. If the INS officials become skeptical of the marriage, they acquire information about the couple from their friends, neighbors, and landlord. Based on the couple's responses in the interview, a DHS officer makes a determination as to whether or not the couple has lived "in marital union" for the three years preceding the petition for naturalization. Regulations promulgated by the INS create a rebuttable presumption that if the couple has voluntarily lived apart more than a total of 60 out of the past 360 days, the couple is not living in a valid "marital union."

Andy told Fred he is concerned about whether he will be approved for citizenship, because over the past year, he has lived on and off in Outofstate, where he found better employment, while Chrissy lived in State, so she could maintain her own job. Apparently, Andy had applied for a job as a biology teacher for a local school department, but was told that he was not eligible for the job because he was not a U.S. citizen. Even if the INS approves Andy's petition for citizenship, and the Attorney General and the Secretary of the Department of Homeland Security agree, under federal law, Andy reported that the recommendation that an individual should be granted citizenship because of marriage to a United States citizen can be vetoed by one house of Congress (either House of Representatives or the Senate), who by a simple majority can determine that the individual is not a suitable candidate for citizenship.

Fred and Connie met a third couple in the lawyer's waiting room (you know lawyers, you always have to wait for them; they are almost worse than doctors). This couple had a little boy, about 6 years old. They introduced themselves as Irma and Irwin Immigrant. Both confided that they entered the country illegally, along with their son, then an infant. They said they recently tried to get their son enrolled in a comprehensive after school program (academic, athletic and social activities) at the local public school, but were told since they could not demonstrate that they were lawfully in the country, their child could not participate in the programs. The administrator told Irma "Our resources are limited and we can't waste them on people who break the law."
Discuss the constitutional issues confronting

Fred and Connie

Andy and Chrissy

Irma and Irwin