Individual Rights Final Exam Grading Notation Key
Prof. McDonald

Issue
I1 = Correct issue statement
I2 = Incomplete issue statement
I3 = Incorrect issue statement

Rule
R1 = Correct statement of governing legal principles
R2 = Incomplete statement of same
R3 = Incorrect statement of same

Analysis
A1 = Correct factual analysis
A2 = Incomplete factual analysis
A3 = Incorrect factual analysis

Conclusion
C1 = Correct conclusion
C2 = Incomplete conclusion
C3 = Incorrect conclusion

Other Specific Notations:
D = Did not follow instructions provided on front of exam or as part of question (e.g., what rule to apply).
G = Good point or analysis.
ORG = Recommend better organization of issues and analysis, and/or not mixing together different issues within the same discussion.
Y = "Yes!" (as in "righto!")

2)

The first claim that Pam could bring in regards to the new accreditation law is that it burdens her constitutional right of free exercise of her religion. Under the establishment clause the govenrment is not allowed to act in a way that unduly interferes with a citizen's personal religious affairs. This is issue is examined by the Sherbert, Yoder, and Smith cases. In the Yoder case, Amish families wanted to keep their children at home after the 8th grade, because of religious beliefs, rather than abiding by Wisconsin's regulation making it mandatory for students to attend school through the age of 16. The Court explained that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. However, in the Smith case, individuals wanted exemption from a drug law so that they could ingest peyote for religious cermonies. There the court held that the right to free exercise of religion did not exempt someone from the obligitions of complying with a valid and neutral law of general applicability. This however was overturned in regards to federal regulations by RFRA and made federal action that hampered the free exercise of religion subject to strict scrutiny even if it were a neutral and generally applicable law. The Court struck down RFRA as unconstitutional as applied to state and local laws that inhibited the free exercise of religion. Here we have federal action through the Congress passing a law setting the minimum accredidation standards for all teachers of 6th-8th grade students. This means that Pam must pass the accredidation test to home school or children or she must send her kids to a public or private school. Pam claims that she homeschools her children because the family religion teaches that homeschool is a way to control the religious and secular education that the chidlren recieved. Under the cases above there is really no examination in the face of federal action as to whether

her children would be negatively impacted by going to a public or private school. The facts do not indicate anything to that extent, however because Pam claims to homeschool her children as part of her religious beliefs, under Yoder and the RFRA, the federal action must pass strict scrutiny. Under strict scrutiny, there must be a compelling state interest, and the means by which that interest is pursued must be narrowly tailored to achieve that interest. This requires that the means not be over or under inclusive in pursuit of the compelling state interest. Here Congress took action in regards to declining educational performance test results in public middle schools across the country. Maintaining acceptable education levels in middle schools is a compelling government interest that would meet that portion of the strict scrutiny test. The requirement that all 6th-8th grade teachers is not however narrowly tailored to accomplish this end. The facts indicate that there is no exception for private school or home school teachers even though performance test results for 6th-8th grade children in those groups have remained fairly steady and acceptable over the years. Because the interest is in maintaining public school education standards, the Congressional action would be overly inclusively and too broad because it sweeps in the interests of home school teachers like Pam, even though she has no bearing on the performance of public middle school students, and is in fact part of a group that has met the standards over time. As a result, the Congressional act would likely be found to be a violation of Pam's free exercise rights. This might not be the case if the Court uses this as a chance to strike down RFRA for federal action as well, but because that has not been done, under the current standards the Congressional action would be unconstitutional in this instance.

Pam could also claim that the acreditation laws burden her fundamental right to home

school her children. The Sup Ct has read the due process clause of the 14th Amendment to protect substantive due process rights that are deemed to be fundamental. Currently the test to determine whether a right is a fundamental right, is whether the right is deeply rooted in the history and tradition of our country and implicit in the concept of ordered liberty, such that no liberty or justice would exist if it were extinguished. The Court has also shown a willingness to consider precedent and an emerging societal awarness or set of standards to deem a right as fundamental. In this case, Pam would have to claim that the right to home school her children has been deeply rooted in our nations history and tradition and implicit in the concept of ordered liberty or as a matter of precedent and emerging societal concerns. This would be difficult in light of the facts. Homeschooling was allowed through the mid 1800s, so essentially for nearly the first 100 years of our country. However, free public education then became available and 80% of the states banned homeschooling. while 20% allowed it for k-8th grade. This means that from the mid 1800s until now, about 150 years, homeschooling was allowing for the demographic in question here (6th-8th grade) but only in 20% of the states (currently that would be 10). This makes it a little less likely that it has been part of the history and tradition of our county since it has been disallowed in more states than not, longer than it was allowed. In the 1960s, even more states banned homeschooling for k-8th grade. This shows that no only is not likely to be part of the history and tradition of our country, but now the emerging socital awareness tends to be going away from homeschooling. Pam could make the argument that precedent and regard for the family and raising the family as part of personal choices and fundamental rights would protect her right to homeschool. This could arguably be an extension of some cases such as Moore and the general right of a family but it would be difficult in the face of the above figures. As a result,

it is not likely that homeschooling would be recognized as a fundamental right. When rights are not fundamental, government action that burdens those rights must pass a standard of rational basis. This means that there must be a conceivable government purpose/interest and that the means set forth are reasonably related to achieving that interest. See above for the asserted interest. However, in rational basis situations the Court will even look to see if a government interest or purpose exists even though it was not asserted. Here it could be said that the government has a reasonable interest in ensuring high quality education across the board, especially in light of the chance that students could leave home schooling in the 6th grade and become part of the performance tests for the 7th and 8th grade. Due to the deferential nature of this part of the analysis there would not be any difficulty in finding a conceivable government interest in requiring all the teachers to take the accrediation test. The act of requiring all teachers, private and homeschool included would be reasonably related to promoting high quality education in the event that students leave to go to middle school or even to ensure continuing success of home schooled children. because this is not a fundamental right, the Congressional act would likely be upheld under a rational basis review.

Finally Pam could claim there was a violation of her procedural due process rights as a result of her children being forced to immediately enroll in an accredited private or public school while she waits six months on a review of her test. Procedural due process of the 14th Amendment is enforced to make sure that people have fair process given to them when they are deprived or a property or liberty interest. We must first determine whether Pam had a property or liberty interest in homeschooling her children, then look at whether there was a deprivation, and

finally whether the process was fair. To have a property interest one must have a legitimate expectation of legal entitlement based on law, regulations, government policy etc. Liberty is also defined broadly to mean more than just freedom from restriant. Here Pam likely had a property and/or liberty interest in homeschooling her kids because of government policy. She lived in a state that gave her the explicit right to home school her children. This would mean she would have a legitimate expectation of legal entitlement to homeschool her childrean and also the expectation that she would be free from restraint in that regard. There was also a deprivation of that interest becaue Pam was told in the letter that she must immediately enroll her children in a private or public school as a result of failing the accreditation exam. This deprived her of the right to home school her children. Now we must determine whether the process was fair. To do this we again look at three more factors. We determine 1) the importantce of the private interest that will be affected, 2) the risk of an erroneous deprivation of that interest under the current policy; and 3) the governments financial and fiscal interest in retaining the current policy/the burden of additonal processes. Here the private interest that is affected is likely pretty high because it is a direct violation of Pam's religious belief that she needs to homeschool her children. Without other facts it is a little difficult to accurately discern the risk that people would be errouneously deprived of this interest. It is possible that it could occur with alarming frequency however if the grading public school teacher knew they were grading a homeschoolers test since the facts indicate there seems to be some discord between the two groups. That is not likely however. It could also be said that because the grader is a newly-appointed teacher the risk could be higher that they are incorrect in their grading because of a lack of familiarity with the test and answers as well as the subjectivity of the short answer and essay questions. There is

however a much greater risk of a deprivation because there is a 6 month waiting period for the test to be reviewed. This would mean that students had completed at least one semester at the private or public school. The government has a funtional and fiscal interst in keeping the current policy as they might have to pay more for more experienced teachers to grade the test. However, the facts do not indicate that it would be a significant burden to speed up the review process. If it were a lengthy test that took months to grade they might have a high interest in avoiding that burden but that does not appear to be the case. They could also avoid the risks of having a new teacher screw up the grading by giving them a key/answer key. That would fix the errors 100% in regards to the multiple choice but the short answer and essay questions would still be subjective. In all, nothing indicates that there would be a substantial burden of speeding up the process and allowing someone like Pam a quicker appeal. Balancing all of these factors shows that there was likely a violation of Pam's procedural due process rights becuase she had a right that was taken away and the process is not adequate. She had nowhere else to send her kids and they had scored well before. This is a violation and the process must be fixed to give her adequate procedural rights.

Q2: Good job.

2)

The first Claim that Pam could bring is one of Substantive Due Process.

Because the actor here is the federal government, the 5th amendment due process clause applies. Due process clause of the 5th amendment says that the government cannot deprive a person of life, liberty or property without the due process of laws. The Court has read a substantive component into this law so that certain substantive liberty and property interests are protected. However, Pam's success on this claim will largely depend upon whether the Court is willing to see her right that is allegedly infringed as a fundemental right. If it is a fundemental right the Court will apply strcit scrutiny and probaly strike down the law, if not they will apply rational basis and most likely uphold it.

The Court recognized a right in a parents ability to direct the upbringing of their children in Myers and Pierce during the Lochner era. Although this was before modern substantive due process jurisprudence, this interest was affirmed in Troxel in a case concerning visitation rights of non-parents. The questions here is how narrowly the Court will define the right. If they are willing to see this as merely the right to direct the upbringing of the child then they will probably see it as fundemental. However, the Court in recent years has defined right in a somewhat more contained manner. (though not as narrow as Scalia in footnote 6 of Michael H.) Assuming the court follows the latter approach, the right will probably be define as "the right to educate the child in the home form 6-8th grade" Kennedy's method is probably the best guess here as to whether the Court will recognize this as fundamental. Kennedy says to start with History and

traditions, the look at the modern practices and emerging awarenesses as well as the Court's prior precedents.

Beginning with History and traditions there was a rich history of homeschooling in the early history of the country. Therefore under a very basic history and traditions approach the right would pobably be recognized (i'm looking at you Scalia) However, the modern trend is to shy away from hoeschooling, form 20% of the states in until 1960 to now only 3. There is a sense that subjects are getting to complicated for home schooling. Looking at prior precedents though, like the ones above, it seems that the court has recognized similar rights in the past. As wel as Yoder which, although decided under the 1st amendment, may be applicable to the discussion becasue of the similar concerns here. On balance this is a tricky question but I think the Court would find a fundamental right here (though I'll do both analyses)

If the Court determines the right is fundamental then they will apply strict scrutiny to the law. Strict scrutiny requires that 1) the law further a compelling govrenment interest and 2) be narrowly tailored to achieve that interest. Here the asserted government interest is the declining standards in public middle schools. The educational achivement of children is certainly a compelling interest. However, this law is substantially overinclusive as to this interest. It sweeps within tis terms all teachers, when private and homeschooled students achievement is remaining static. Further, it requires teachers to have a Bachelor's degree in Education, when a Ph.D. in physics will not exempt a person. Further, the Court may be persuaded by the fact that such a provision to exempt these groups was defeated only by lobbyists whose true intention was

to suck kids out of hoeschool and private schools.

If the Court finds this right not to be fundamental then it will only apply rational basis. Under rational basis the governemnt interest need only be legitimate and the law reasonably realted tot eh achievement of that interest. Here the interest is certianly legitiamte (as it was also compelling) and under the deferential standard the court would likely see this as rationally related, further they would completly ignore the lobbyist incident since there only needs to be a rational basis, not that the particalur interest was the actual one.

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On balance though I think there would be a fundamental right here and the statue struck down.

The next claim Pam could bring is a Free exercise claim under the First Amendment becasue the law is preventing her from educating her children according to her religous traditions

The law at issue here is not alleged to target religion or religous practices. Therefore any alleged burdens on religion would be incidental. The Court in Smith said that the Court would no longer hear incidental burden Free Excercise claims. This prompted Congress to pass RFRA which the court invalidated in the city of Beorne as to the states, but left the question open as to whether it applies to federal law. Under RFRA, incidental burdens on religion claims are to be recognized and subjected to strict scrutiny. If the Court allows this claim under RFRA, becasue this is a federal statute, then strict scrutiny will apply to the law. The facts of this case are similar to the facts in Yoder. A Court would determine that although the state has a compelling interest here

(see above) it is not narrowly tailored becasue it is over-inclusive as discussed above.

Therefore, if the Court follows RFRA, then the law will be struck down (though it is not 100% certain that they would)

The next Possible claim Pam could bring is for Equal protection.

The alleged classification is that people with Bachelor's degrees in educatoin are being treated differently than anyone else who wished to educate. Here the statute makes a distinction on its face and is therefore vulnerable to an equal protection challenge. However, there is no suspect classification involved under the facts of this question. when there is no suspect classification the Court merely applies rational basis when examining the law.

Here the classification furthers a legitimate government interest, the education of middle school aged children. And the requriement of a Bachelor's degree in education is reasonbly related to the achievment of that interest. Those with a Bachelor's degree in education have undoubtedly completed substantial training in education and are usually better equipped to teach children. The fact that it is substantially overinclusive will probably prove no bar because courts are going to be very tolerant of overinclusiveness in rational basis review. Therefore, the court would uphold the statute under equal protection

Pam could also bring a procedural due process claim against the governement.

The first questions is whether she has a protected liberty interest. The current test is whether you have a "legitimate claim of entitlement" to the alleged interest. Here, Pam has a legitimate claim of entitlement to homeschool her kids under state law becasue her state expressly permits it.) C1 / A2 / A2

The next question is whether there has been a cognizable deprivation of that interest. Under Williams, you must be able to show an intentional or reckless act on the part of the government to show a deprivation. Here, she had to take a test, but the proctor who graded the test is public employee (appointed by the government) and a member of the teacher's union tat is vehemently oposed to homeschooling. If Pam can show that she intentionally failed here than there has been a deprivation.) I3 / A2

The final question is whehter the governemnt afforded fair procedures. Generally you require fiar notice and a hearing by a neutral decisionmaker, but the Court has said that in somecircumstances post deprivations hearings are OK (she probably had notice because she knew if she failed then she couldn't teach her kids) To determine this the Court lookds to the Matthews test.

1) the private interest that is that will be affedcted by the official action; here it is a very important interest, especially to Pam because of her religous beliefs

2) the risk of an erroneous deprivation of such inters through the procedures used; here the test was set up so that biased individuals adminster the test, with a 6 month review time and by someone who is not eutral, but rather very biased, seems very likely to cause an erroneous

deprivation (as it seemd to do here)

3) The government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; Here there is somewhat heavy burden on the state becasue teachers do make the most natural graders and it probably is difficult to have a quick hearing. However, certain changes to the procedures (such as blind grading if not already employed) or hiring special proctors would not be overly burdensome considering the importance of the interest

G

Based on the above analysis Pam would likely succed on her procedural due process claim.

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