Exam Number ____

FINAL EXAMINATION
IN
CONSTITUTIONAL LAW

April 28, 2008
2:00-5:00 P.M.

Professor Shanor

This is a **three hour exam. I recommend a half hour be devoted to reading and organizing; the time limits per question are writing time estimates.**

The exam contains **three parts**. Part I is a lengthy fact pattern with one question. Part II is a shorter fact pattern with two questions. Part III contains five short answer questions. The amount of credit, suggested times for writing, and length of answers are provided at the beginning of each part.

The exam is **open book** and may be taken only in **rooms assigned** for taking this exam. The exam is governed by the **Honor Code**. If you believe additional information is needed to analyze any question, state what you think is needed and why it makes a difference.

Read, think, and organize before you write!

WRITE YOUR EXAM NUMBER ON EACH PAGE OF THE ANSWER SHEETS (or each blue book cover) AND ON THE COVER OF THIS EXAM. There is a cover sheet and four numbered pages for the questions.

YOU MUST RETURN BOTH THE EXAM AND THE ANSWER SHEETS TO RECEIVE CREDIT FOR THE COURSE.

GOOD LUCK AND HAVE A WONDERFUL SUMMER!

Exam Number_____

I.
(50 minutes; 35 points; recommended length 2-3 pages)

The Mormon Church (Church of Jesus Christ of Latter Day Saints) abandoned polygamy in the late nineteenth century, when Utah became a state. The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), however, maintains the practice of polygamy. The FLDS believes that men, as the spiritual heads of households, may marry multiple wives, that the practice of polygamy brings glorification in heaven, and that an FLDS elder male may marry girls at any time after they reach puberty.

In Eldorado, Texas, the FLDS maintains the Yearning for Zion Ranch (Zion), a large tract with numerous buildings. The 1700-acre fenced ranch contains a number of large dormitory-style homes, a small medical center, a cheese factory, a rock quarry, a water treatment plant, and a "towering white limestone temple."

On April 7, 2008, child welfare officials in Eldorado received a call from a female who said she was 16 years old, living at Zion. She said she had been beaten and raped by her 49-year-old husband. Operating on this tip, the Texas Department of Child Protective Services (CPS) promptly swung into action, obtaining a warrant to search the Zion compound. The tip, it was discovered weeks later, was not from anyone at Zion or married to a Zion man.

CPS, following its search of Zion, said it found evidence that at least 20 teenage girls had become pregnant by age 16. Pursuant to Texas law, CPS removed the 462 children found in the Zion compound to the San Angelo Coliseum, 45 miles north of Eldorado. About 140 of the mothers accompanied these children, 77 of whom were age two or younger.

Several FLDS mothers wrote a one-page letter to Governor Rick Perry which stated:

"We were away from Zion when CPS arrived, were contacted and told our homes had been raided, our children taken away with no explanation, and a law enforcement blockade prevented us from returning to our homes. We had no-where to go. On Wednesday, April 9, 2008, we were permitted to return to our empty, ransacked homes, heartsick and lonely. Many of our children have become sick as a result of the conditions they have been placed in. Some have even had to be taken to the hospital. Our innocent children are continually being questioned on things they know nothing about. The physical examinations were horrifying to the children. The exposure to these conditions is traumatizing them."

Officials have said that about a dozen children had chicken pox and that others needed prescription medications they were not receiving at Zion because such medications were contrary to the teachings of FLDS.

A massive two-day state court hearing was held before Judge Barbara Walther on April 10 and 11. At the hearing, described as "the largest child custody hearing in Texas history," about 350 volunteer lawyers showed up to represent the children. When the

state proffered its first piece of evidence to prove that underage girls were paired in forced marriages to older men often related to them, 350 lawyers demanded to examine the document and question its validity and scope. The hearing was temporarily halted. Thereafter, Judge Walther controlled the proceedings far more tightly. The state presented all its evidence without interruption; thereafter, several lawyers were permitted to present a limited number of objections to the state's evidence.

At the hearing, a state expert admitted in testimony that many of the children had not been physically abused, although he considered the authoritarian role of their church to be "abusive," at least with respect to teenage girls being pressured into "spiritual" marriages with much older men already married to other women. At the end of the hearing, Judge Walther upheld the state's custody of all the children, ruling that the state had proved the children were in imminent danger of being abused or neglected by their parents. Girls were in danger of molestation and boys of being raised as sexual predators, she ruled.

The judge's ruling contained two components. First, she allowed the state of Texas to proceed with DNA tests and other efforts to match parents, siblings, and children. She ordered DNA samples of children, taken through cheek swabs, to be matched against samples taken from FCLDS adults to determine family blood lines. A NEW YORK TIMES report noted that "Even with the help of DNA tests, figuring out who's who among the parents and children won't be easy because of the group's interrelationships." A typical child's response to questions about relations is: "The Church is my spiritual father. All the adults are my parents." The central question of how old many of the teen mothers were when they gave birth will focus not on DNA tests but "spotty and ambiguous" community records, many of which have not yet been fully investigated.

Second, she ordered that the children be separated from their parents while CPS investigates to determine what actually happened and to proceed without parental interference. She noted in her order that, while in children's shelters and temporary foster homes, the children should, insofar as possible, be kept to their normal routines. These include not being exposed to the color red (a color reserved for Jesus, whom the FLDS believes will return to earth wearing red robes) and avoidance of television, computers, and other aspects of modern technology and culture foreign to the children. The children were promptly moved to shelters and foster homes around Texas.

FLDS has filed an emergency appeal with the Texas Court of Appeals on behalf of Zion mothers and their children. As a law clerk for a judge on that court, you have been asked to analyze what violations of the due process clause of the Fourteenth Amendment, if any, have occurred. The judge tells you not to consider any First Amendment, equal protection, or other issues; clerks for other judges are working on these.

II.

(40 minutes; 25 points; recommended length 2 pages)

Congress, responding to widespread outrage from evangelical religious groups concerning the Zion Ranch case, passed the following legislation, which was duly signed by President Obama McClinton:

The Religious Freedom Enhancement Act of 2010 ("RFEA")

1. Congress Finds That:
    a. The high-handedness of state officials in the Zion Ranch case, including insensitivity to religious beliefs and practices different from the norms of contemporary culture, demonstrates the need for additional federal protection of religious liberty; and
    b. The Supreme Court, by denying certiorari from state court proceedings upholding travesties to justice suffered by the Fundamentalist Church of Jesus Christ of Latter-Day Saints, demonstrated its continuing insensitivity to religious liberty.

2. Therefore:
    a. State officials must, after the effective date of this Act, provide a hearing to any religious organization before any search is conducted on property owned by such religious organization;
    b. No state shall remove any child from his or her parents when the reason for the State's removal is premised on religiously-based beliefs of the parents, unless the state demonstrates that it had compelling reasons for removal and that the child may only be protected by removal from his or her parent; and
    c. Any state failing to comply with the foregoing sections of this statute shall be denied federal funds that would otherwise be available to fund medical services for children within that state.

Discuss whether the Religious Freedom Enhancement Act of 2010 (RFEA) is within Congress' powers under (1) the Spending Clause and (2) Section 5 of the Fourteenth Amendment.

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III.
(60 minutes; 40 points; <u>not more that 8 lines per answer</u>)

1. "Limiting the sources of law a federal court may rely upon in granting habeas relief to clearly established Federal law, as determined by the Supreme Court, impinges upon a federal court's judicial power by striking at the center of the judge's process of reasoning. It forces federal courts to ignore the binding precedents of their own circuit, and persuasive decisions of other circuits, in determining if a habeas petitioner is being held in violation of the Constitution." Discuss whether this statement is accurate.

2. The plaintiff alleged that the Central Intelligence Agency defendants conspired to cause his imprisonment and torture in Guatemala and negligently supervised their Guatemalan counterparts, resulting in his injuries. In response, the Attorney General certified that the CIA officials acted within the scope of their employment and moved that the suit be dismissed. Discuss whether there is a constitutional basis for dismissal.

3. A criminal indictment alleges that Akers, convicted of pederasty in 1996, traveled in interstate commerce to Indiana in April 2006 and thereafter failed to register under the federal Sex Offenders Registration and Notification Act (SORNA) of 2007. Akers argues that the indictment violates the Ex Post Facto Clause because it is premised on conduct that took place before SORNA came into effect. Discuss this issue.

4. Los Angeles County's complaint against the United States Medicaid program, which pays for treatment of indigent patients, alleges the US has refused to revise its LA County "fee schedule area" to reflect true economic costs of services provided by the county. The complaint claims that the United States, in refusing to properly adjust its fee schedule, has violated the equal protection component of the Fifth Amendment. Discuss how a court should rule on the United States' motion to dismiss the complaint

5. A district court found that Khouzam is likely to be tortured if extradited to Egypt, his native country. Subsequently, Egypt provided diplomatic assurances this would not happen. The United States asserts that the Egyptian diplomatic assurance was evaluated by the Executive Branch, but it has not revealed the factual basis for concluding that the diplomatic assurance is reliable. Khouzam's uncontradicted evidence shows that "the United States is the only government that denies a person subject to transfer the right to challenge the reliability and sufficiency of diplomatic assurances against torture before an independent, impartial body." Has due process of law been satisfied?

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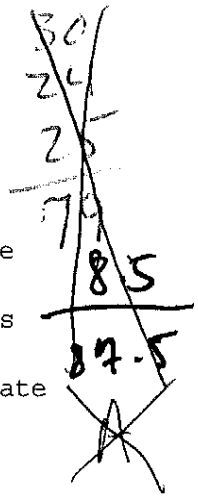

Question 1:

Several different entities have commited violations of the DP clause of the 14th amendment (5th amendment incorporated to apply 14th to federal govt as well.) The DP clause only applies to entities that can be construed as state actors, and thus we address this requirement for each actor.

CPS: CPS is a texas governmental department and is a state actor. In order to assess whether CPS has violated the DP rights of the members of FLDS by taking the children until they can be matched by DNA, we must assess whether there is a fundamental right to the custody of children for polygamous parents. Textually, there is no explicit grant concerning family or marriage However, historically, parents have always had the right to protect their children. Next we turn to precedent. In Troxel v. Granville, the SC found that there was a fundamental right to control the upbringing of one's children. However, this fundamental right to child rearing was applied in the context of a normal family, and not a polyamous situation. Similarly, the right to marraige has been protected as a fundamental right under Zablocki. Again however, this case did not apply to a polygamy situation. However, if read together, it can be seen as providing at least support for protection of marriage and family.

Since there is no case directly on point, it is possible that the "emerging awareness" approach as expressed in Lawrence could establish a "new" liberty interest that would warrant at least RB scrutin. In Lawrence, the court used the emerging awareness approach to give substantial protection to all adults

in how they conduct their private sexual lives. This line of reasoning could be extended to protect how polygamists marry and reproduce with multiple wives. (Although it is possible it may not because there is not necessarily an emerging societal awareness recognizing the rights of polygamists. In fact, it may be the opposite.)

If we define the liberty interest only as a polygamists right to custody of their chilren under the emerging awareness approach, it must, at the least, meet a RB test. In order to do so, the law must be rationally related to a legitimate state interest. 1) Legitimate state interest. The state indicates that they took away the children because they wanted to protect them from "imminent danger of being abused or neglected by their parents." They also seem to have a moral bias against polygamists. MOrality is an acceptable state interest for purposes of rational basis, so the state's fear of "boys being raised as sexual predators" should be deemed legitimate. Health and welfare of state citizens has always been at least a legitimate interest. However, the testimory of the state indicates that many of the children had not been physically abused, so FLCS might argue that the means (taking the children) are not rationally related to the end.For the purposes of RB, morality is a legitimate state interest. However, the fact that at least SOME of the children had been physcially abuse can show that taking children away is at least a rational method for stopping that abuse.

It's possible that an expansive approach to the right to family (Moore) could find that maintaining custody of/living with of ones own children (even if by polygamy) could rise to the level of a fundamental right. If the most protected level is the nuclear family, and the outermost circle would be

unrelated persons (who were deemed not to have any fund. right to live together under Belle Terre), then perhaps in between, polygamist families could exist, and their right to live together as a family could rise to the level of a fundamental right, thus drawing strict scrutiny.

To meet SS, we must have a compelling state interest, and the means must be narroly tailored to that interest. Again, health and safety of a state's citizens is a compelling governmental interest. Taking the children away to protect them from child abuse likely satisfies this test, however, the state's interest in morality (keeping the boys from growing into sexual predators) is never a compelling interest as far as SS goes. Furthermore, the state will not give the children back until a DNA test confirms the parents, enacting a long delay before the children may return home. Although the state will try to make the children's time away from home "as normal as possible," this still could hurt the children and seems to dig at the "compelling" state interest in protecting them. This is further evidenced by the fact that when the children were taken intitially, many of them became sick because of the conditions the state placed them in. If the state really had the children's health in mind, then they likely could have put them in better conditions. The state has essentially run counter to it's own interest.

The means are far from narrowly tailored. Without considering any other alternatives, the state has simply taken away all the children in the compound (additionally, based on a false complaint). It is quite possible that a child could be protected in other ways, or perhaps that an investigation actually concerning the abuse, and not just the underage pregnant mothers could occur before a seizure of the children. This remedy is certainly overinclusive. We

have an admission by a state official that says many of the children taken had not been physically abused at all. Furthermore, as discussed above, the Thus the taking of the children is likely not narrowly tailored and not based on a compelling interest, so it is likely to fail SS.

Texas State Court: In Shelley v. Kramer, state judicial enforcement of a racially restrictive covenant was seen as state action sufficient to violate the 14th amendment. Shelley is a very narrow holding an generally only used for cases that are directly on point. However the ruling in this situation, potentially infringes on several fundamental rights (discussed below), and as a result may be seen to be sufficient state action to fall into the control of the DP clause.

First we must assess whether the trial of the case invokes procedural due process concerns. Here, the judge after the first evidentiary challenge, controlled the case very tightly and did not allow the defense lawyers to interject, and only allowed them limited presentation of objections after the fact. The Court in Mathews v. Eldrge, articulated a balancing test for deciding what procedures are required when there has been any deprivation of life, liberty, or property. The court must balance the private with the public interest. First, compared to Mathews, where the potential deprivation caused by lack of a good evidentiary hearing was only low and temporary, the degree of potential deprivation here seems high, in that this is the largest custody trial ever, and the parents could be permanantly deprived of their children. Next, in terms of fairness of procedure, and the value of additional safeguards, the courtin Hamdi stated that fair procedure includes a

valid chance to rebut charges before a neutral decision maker. Here, the lawyers should at least get that right and it seems the judge has deprived them of this as well. Third, must weight the public interest, essentially the costs in implementing the additional safeguards. Hre, the judge would only have had to be a little more relaxed in the hearing to give the parents' lawyers a fair chance, and as a result the costs would be extrememly low. THus it seems that procedurally, a fair chance to be heard (for the parents' lawyers) should have been required of the court, and in not doing so the court infringed on their procedural due process rights.

Another PDP issue: CPS entered Zion under Texas law and removed 462 children without contacting the parents. Further, they blockaded the town and didnt let the mothers return to their homes. In Loudermill the court recognized a property interest in continued employemtn and stated that some opportunity to respond prior to its denial was necessary. Here, the mothers may have some sort of "property" interest in their children, or at the very least, in their homes. Under Loudermill, the Constitution requires some kind of hearing before the deprivation of any kind of property interest, which was not given here. he state might try to analogize this to Mathews, where only a temporary deprivation of payments were at stake and the court found that no hearing was required. They might argue that they only temporarily deprived the mothers of their children or houses, but in Mathew, the issue was truly small - social security payments - and not an essential element of life, like shelter, or the right to care for your children. Thus on balance, CPI likely violated the PDP rights of the mothers of Zion.

Thus, CPI liklely also violated the PDP rights of the mothers.

Thus, the state has likely violated the DP clause by depriving the parents and children of the right to live with their family (strange though it may be) and the court has deprived them of proper procedure during the trial.

very good 30

Question 2:

Spending Clause:

Under article 1, sec 8, cl 1, Congress has the power to tax and spend. Using the necessary and propert clause, their power has been expanded so that they now may use it to condition funds. In South Dakota v. Dole, the SC recognized that congress may use its conditional spending power to indirectly achieve objectives, but with limitations. The court explained the limitations on this power as follows The condition must be exercised in pursuit of the general welfare, must be stated unambiguously, contain a reasonable nexus between the ends and funds withheld, may not be coercive in the amount of funding withheld.

First, is the RFEA exercised in pursuit of general welfare? The court generally defers to congress on this issue. Here, Congress is keeping states from discriminating aginst religious organizations, and that seems to be in keeping with the general welfare of the people. Next, the condtion must be unambiguous, so the states can be fully aware of the consequences of their choices. Here, the condition states that a failure to comply with the statute by any STATE will lead to a denial of federal funds that would otherwise be

availible to fund childrens medical services. It is clear what a violation entails, but it may be slightly unclear as to just what funding is being withheld. Federal funding otherwise availible may fluctuate, and "medical service for children" may not be a very discrete category. Thus there is a good argument that the terms are ambigous, but assuming the court accepts them, we move on. Next, the couur looks for a reaosnable nexus between the ends congress seeks to achieve and the funding they are withholding. In SD v. Dole, the court allowed a conditioning of highway funding on the states having to raise their drinking age to 21. They found a sufficient connection betwene underage drinking and highway safety, which isnt really that strong of a link, however, it seems to simply mean that there must be A link. The RFEA intends to prevent children from being removed from their parents based on religious reasons and the findings indicate that the goal behind it to uphold religious liberty. The statute takes away funding available to fund medical services for children in the state. The nexus here between protection of children of religious familes and health care funding for children seems illegitimate. The statute aims to protect children, but at the same time takes away funds to help children if the statute isnt followed. Last, the statute, seems to take away all federal funds for the funding of children's medical services. In SD v. Dole, Congress only conditioned 5% of the funds for highways on compliance w/ the statute. Here it seems as though 100% of the funds for children's health care will be taken away, which would likely be coercion of the states. However the court never explicitly articulated just how much of a funding restriction would amount to coercion, so we do not know for sure.

Finally, the act may not violate any independent constitutional bar. In SD

v. Dole, even where the 21st amendment gave the states the power to regulate alcohol, congress was able to condtion funds. Here, the states have no explicit power to regulate religion, and in fact are prohibited from doing so by the constitution. Thus, this act will not run afoul of a constitutional bar.

Because the nexus is contradictory and the amount of funding withheld could amount to coercion, there is a good chance that Congress has not correctly employed their spending powers.

excellent 12

Section 5 of the 14:

There are 2 views on Congress' power under section 5 of the 14th amendment. The first, set out in Katzenbach v. Morgan, states that congress can enforce or expand the provisions of the 14th amendment. In that case, Congress prohibited literacy tests for voting despite the SC ruling that they were acceptable. It should be noted that the class protected was race, a "core" issue of the 14th amendment and perhaps this explains why Congress miught have more power.

The second and more recent view is the more narrow scope articulated in City of BOerne. In Boerne, the USSC held the RFRA unconstitutional, which imposed high burdens on states if they attempted to regulate religion. The court explained that this was an attept to invoke a substantive change in constitutional protections, and that COngress may not create new rights, or expand the scope of those that exist (as they did w/ the RFRA), but rather can only pass laws that are remedial or preventative of constitutional violations.

It is againt important to note that religion was not a core issue of the 14th amendment, and thus Congress likley had less power in this situation.

Remedial and preventative laws must be both proportional and congruent to the ends sought. The court explained the scope of this power further in UA v. Garretm when it struck an act that required employers to make special accomodations for disabled employees. The court explained that in order for an act to be truly remedial, there must be specific findings of a pattern of disctimination by the states violating the 14th amendment. Handicapped people were not a core group of the 14th as well, however, in Tennessee vs. Lane, the court allowed COngress to enforce the rights of handicapped because they were protecting a fundamental right. There, the handicapped could not get access to the courts, and as a result Congress had authority to legislate to protect thsi right.

Finally, in NEvada v. Hibbs, the court upheld a statutes designed to prevent gender discrimination in employee benefits. The court found that this law was congruent and proportional to its remedial object because the benefits at issue were relatively limited in nature (unpaid leave) and only occured in certain situations. This also seemed to imply that congress would have more power to enforce when the pattern of discrimination was against a more suspect class/core group.

Thus, first we ask if the statute protects a right that the SC has described

as fundamental? Here, the RFEA seems to be protecting religious liberty. In Boerne, the RFRA was struck down, indicating that protection of religion does not rise to this level.However, the statute could also be read to be protecting family. By Moore, we can see that there is also a fundamental right to family. Either way, Congress should have the power to enforce this bill because it protects a fundamental right(Tennesee v. Lane). However, if the court reads the statute another way and finds that it does not invoke a fund. right, then we continue with the analysis.

The classification at issue here is evangelical religious groups. Nowhere in our EP jurisprudence do we find that these groups are at the heart of the 14th amendment. Thus since COngress is not protecting a "core" group, they likely will not be granted much deference. Additionally, COngress is acting in the face of express disapproval of these rights by the USSC. This seems to place this case in the Katzenbach camp, and would mean that Congress is expanding a right not recognized, which bodes badly for its success.

Finally, are the remedies here congruent and proportional to the governments interest in religious freedom? Here it seems that they may not be. Remediation requires that there be a pattern of discrimination inherent in the findings. Here, the findings focus on a SINGLE instance, stemming from the Zion Ranch case and the FCLS. This is hardly a pattern, but one isolated incident. Second, section 2b requires that the state must have COMPELLING reasons to remove a child, despite inadequate findings of a pattern of

discrimination. This is similar to Boerne, where there wasnt much evidence in the findings of discrimination against these people, yet the RFRA imposed a SS burden on the city. Here, this seems the same. Also, unlike Hibbs, which provied a small remedy in limited circumstances, the RFEA broadly denies all federal funding in an area and gives no remedy to the actual people who may be deprived of their children. Thus it seems that the remedies offered here are neither congruent nor prorportional.

Unless the SC finds that the RFEA is based on a fundamental right to family, it will likely fail due to a lack of congruence and proportionality. 12

Question 3:

1) In Ex Parte McCardle, congress passed a law repealing the Court's habeas jx, and this was acceptable because the Con. grants the courts jx. subject to exceptions and regulations of Congress. The SC also determined in St. Cyr, that there is always a minimum content of HC in the constitution, and thus short of an explicit suspension thru the suspension clause, the court may presume that HC is alive and well, even outside the US (Rasul). The MCA essentially repealed statutory HC. Thus if all that's left is Const. HC, then we could see a revival of Eisentrager, and HC will no extend outsde the US. 7

2) The CIA agents weer acting w/in the scope of their employment as federal agency. They want to claim some form of executive immunity. While executive

immunity will grant absolute civil immunity for offical acts while in office, this applies only to the president, and increasingly less strongly to inferior officers. The VP (Cheney case) was able to invoke it, but for lesser people, the immunity will not stand where they have violated a "clearly established" right. Thus, the CIA officers 1) likely are too far down the pole to recieve immunity and 2)wouldnt anyway because they violated clear rights by torturing. 4

3) This law is not an ex post facto. It only punishes current offenses (not registering) and is not punishing his past travel. Thus, unless the law is an invalid exercise of CC power, SORNA is valid. SORNA regulates sex offenders in connection with commerce. The sex offenders may travel through ISC , but in Morrison, the court found that rape was not significantly tied to commerce to justify legislation. However, if regulating non-commercial activity as part of an interstate regulatory scheme (Raich), then congress is acting correctly. Here congress regulates sex offenders nationwide. This should be valid. 7

4) Medicaid's lagging fee schedule does not prejudice the people of LA county based on a racial classification, or a gender classification.(NO SS or IS) However, the insufficient funding to LA county, because it affects indigents (perhaps a quasi-fund. class), may invoke the RB/ bite that is often applied to groups biologically defined differences (mentally ill, handicapped - Cleburn). A court would apply RB, but might look more closely Medicaid is legitimately related to general welfare, however, in not updating the fee

schedule in only certain areas, Congress may receieve less deference. 5

5)The denial of a right to challenge reliability of diplomatic assurance likely violates DP. Procedurally, with respect to aliens, the court has found (Zadyvas) that there is a fundamental interest in freedom from incarceration, and that the governemnt must have a reason for detaining the alien. Here, the reason is to protect him from torture, as determined by the exec. Generally, the executive has broader power in executive affairs (Curtiss-writght) but this has been limited by cases like Hamdan, which required a hearing before a neutral decision maker even for an Enemy Combatant. PDP is likley violated. 7

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