Constitutional Law – Spring 2018 – "Hybrid" A+ Answer

Part 1

Question #1

(a) First the Constitution requires that either 2/3rds of Congress or the State Legislatures to call for an amendment. This removes the direct power of the people to call for amendments since that power is vested with their elected politicians (elite theory). Secondly, since the Constitution requires such big majorities (2/3rds and 3/4ths) to call for and ratify (by the states) amendments, this places a restraint on the peoples will, if that is defined by what a simple majority desire. This is a check on the potential tyranny of the majority and ignorance of the masses. Thirdly, Art V explicitly states that both, the slave trade clause and the clause that states how direct taxes should be apportioned in Art 1 sec 9, as well as the equal representation in the senate clause, cannot be amended thus limiting the ability of the people (and their elected rep.) from amending certain parts of the Constitution. One of the main reasons for having a Constitution is to restrain the people and the government from certain actions set out from the beginning.

(b) The slave owning states demanded that slavery not be written out of the Constitution during the convention. If it had been the slave-owning states would never have ratified the Constitution. Thus compromises were made such the slave trade clause and the 3/5th clause (which further empowered the slave states in the electoral system). However, their were representatives at the convention which wanted slavery outlawed and they believed slavery would naturally and slowly dissipate on its own. Thus that is why that agreed upon the banning of the importation of slaves after 1808. Furthermore the smaller states wanted direct taxes to apportioned by population as the Constitution States, for obvious reasons (pay less taxes).

Question #2

"...***Explicitly*** declaring that all Powers not ***expressly*** & particularly *Delegated by the aforesaid Constitution* are reserved to the several States to be, ***by them Exercised.***" (emphasis added) The addition of this proposed amendment would definitely give a lot of power back to the States. Anything that is not written in the text of the Constitution giving the federal government power will be given to the States. The State police power would grow much more than is currently being proposed. For example, just looking at some of the powers given to Congress can be found in Article 1, sec. 8. Among the list of enumerated powers is the Necessary and Proper (N&P) clause which allows Congress to make laws that help Congress carry out any "foregoing Powers." The proposed amendment would come into conflict with the N&P clause because what exactly does foregoing Powers mean? Can we imply powers? If they are implied though the N&P clause can we consider it "expressly & particularly delegated"? If no powers are given to Congress except those written in the text of Constitution, then this would give much of the power back to the States. This is similar to what could be found in the Articles of Confederation. We need to keep in mind that because the States had too much power under the Articles of Confederation, the States and government is currently in a situation where they have no money

and little ability to run the country effectively. Adding this amendment would just be repeating history. This is why they are writing the new Constitution in the first place, to fix any of the problems they had before in the Articles of Confederation.

Question #3

Even in the absence of a Bill of Rights, Congress would lack the powers to violate the liberties and unalienable rights of the people. Art I, Sec. 9, clauses 2 and 3 explicitly prohibit Congress from suspending the writ of habeas (unless there is a rebellion or invasion) and passing a bill of attainder or ex post facto law. Conversely, the enumerated powers in Art. I, Sec 8 reveal that the Founding Fathers' original intentions were to craft a large albeit just national government with the sole purpose of providing for the common defense and general welfare of the US. For instance, if clause 2 did not specify "during rebellion or invasion," Congress may be able to suspend a writ, let's say, during any time that it feels appropriate to further its agenda. In addition, the same prohibition is listed in Art I, Sec. 10, clause 1 (forbidding the states to deprive people of their rights).

Question #4

First, this proposition would have to be added as an amendment, because the Constitution has already been approved by 9/13 states. Second, this proposition seems wholly unnecessary. As noted above, and commented on by Hamilton, the judiciary will be the weakest of the branches, having "neither force nor will". They will not be able to influence the government the way congress, who has the power of the purse can. There only role is to issue judgements, and it must rely on the other branches to carry out those judgements. The Constitution does not take away the right of states to have their own judicial system. The purpose of Congress establishing inferior courts is so that citizens among several states have a forum to equitably resolve disputes. If this power was taken away from Congress, a person in one state would risk not getting a fair trial in another forum, so its unlikely that the people would ratify this as an amendment to the Constitution. One Strength of this proposition is that it clearly defines the jurisdiction of the Supreme Court as only having Appellate jurisdiction.

Question #5

There is an argument that may be presented in that the Constitution was never properly adopted because the rules under the Articles of Confederation were not complied with. Article VII would inherently not perpetuate a balance of representation of all of the states because only 9 of the states were required in order to establish that this Constitution would become the law of the land. This was significant because the Articles of Confederation were originally purposed by the Framers to create a weak central government such that the States would be supreme. A "firm

league of friendship" amongst the states, perhaps. However one would argue on the contrary that states like North Carolina that may have been left out may have also been left out by rules of the Articles of Confederation because there was only 1 house and each state was given 1 vote regardless of its size. Also, it would almost be impossible to get 9 of 13 states to agree because of their different interests. Ultimately however, allowing Article VII of the Constitution allowed the government to be able to have taxing power. Furthermore, the government would be able to regulate commerce in a more efficient way. This may have been one of the most significant reasons why this ratification process disregarded the required amendment process of the Articles of Confederation.

Part 2

Question #1

The BEWARE Act enacted by California is likely unconstitutional. Article I, Section 8 provides that Congress has the power to establish a uniform rule of naturalization. Likewise, it allows for Congress to make all laws that are necessary and proper for carrying into execution the foregoing powers. In *McCulloch v. Maryland*, the court determined that Congress can enact legislation so long as its ends are legitimate under the Constitution and the legislation is appropriate and plainly adapted to those ends. The constitution provides that Congress has the power to make all laws necessary and proper regarding naturalization, and they have chosen to do so by enacting the Immigration and Nationality Act. This act provides the basis for warrantless arrests. In *Prigg v. Pennsylvania*, Justice Story determined that when Congress has the exclusive power to regulate an area within the constitution, there cannot be a concurrent power from within the states to prescribe additional regulations for the same purpose. The BEWARE Act seeks to do precisely what Pennsylvania tried to do in *Prigg*. Furthermore, like in *Prigg,* BEWARE attempts to punish as the officer for carrying out a duty which Congress has explicitly allowed. Because the constitution provided Congress with the means (through N+P and rules of naturalization) to legislate this area, BEWARE is likely unconstitutional.

Question #2

California is probably correct that Section 1373 is unconstitutional. This is a 10th Amendment/Dual Sovereignty issue. In this case, Section 1373 is federal legislation that attempts to control state officials. More specifically, the California Attorney General is being required to disclose the date on which an alien, that is in the state's custody, will be released. This is a clear violation of the commandeering principle that was laid out in *New York v. United States* and further developed in *Printz*. In short, the cases purport that Congress may not commandeer the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program. In fact, as Scalia mentioned in *Printz*, the structure of the Constitution

congers upon Congress the authority to regulate individuals, not the states. Since the United States Attorney General is compelling the California Attorney General (executive official) to adopt their federal regulatory program (Section 1373) this violates the commandeering principle. Furthermore, RESIST is constitutional because states are allowed to direct individuals within the state to not comply with orders from federal officials. This idea of retaining state sovereignty goes all the way back to *Prigg v. Pennsylvania*, where individuals were free to disobey orders from federal government about the whereabouts of runaway slaves.

Question #3

The United States Attorney General might have discretion appointed to him by congress but he cannot include the stipulation of adhering to Section 1373. This does not adhere to the factors necessary in the conveyance of money to States in exchange for certain stipulations. *South Dakota v*. *Dole* provided factors for giving states money with conditions: 1. the grant has to be for the general welfare 2. the stipulations have to be unambiguous (States must be aware of their decision and agreement, cannot be an open ended promise) 3. Conditions on a Federal grant have to have a connection between the money being spent and what the Federal Government wants to be accomplished and 4. Federal government cant give money with a consideration that is barred by another part of the constitution. The conditions attached to the grant money in the case at hand could run a fowl of the 3rd factor. The money was not being spent on anything relating to Section 1373. There is not a close enough fit between the purchase of new police vehicles and Section 1373. Additionally if 1373 is deemed to be unconstitutional then factor 4 barrs the federal government from making adherence to it a stipulation on and grants.

Question #4

The court must look at the Equal Protection and Due Processes clauses afforded under the 14th amendment. In regard to law regarding race there must be a strict level of scrutiny applied. Under the equal protection clause (Amendment 14), race classifications are a suspect classification thus must fall under Strict Scrutiny which was established in *Korematsu*. The governmental policy (means) is narrowly tailored to serve a compelling governmental interest (ends). The burden is on the government to prove that the means fit the ends of their policy. The court may also look to *Bolling v Sharpe* where substantive due process is applied to cases based on race. We must look to see if the means fit the ends here. In having a law that compromises the education and upbringing of many DACA recipients this would affect the economy greatly. *Brown v Board* may be addressed here in that it is important in the context of education since these children are mostly younger and in school, that they have positive lasting impressions - "doll test". if the country in a whole and a younger generation witnesses the segregation of these students then it will place an assumption of inferiority with the Mexican immigrants in our society.

Question #5

The 10th amendment plays an important role in the conflict between the state and federal governments because it deals with states rights and pushes the state police powers. California wants to maintain their police power to be able to regulate how they deal with immigrants/aliens. For instance, in *Printz* the court held that commandeering individuals was for the states and not the federal government. the court found that Congress would commandeer state officials to run background checks because it was not a state task. Congress was trying to commandeer state legislatures which is prohibited, *Dole*. Like in our case, the federal government is trying to make state legislatures comply their strict immigration policies but states such as California are arguing that it is a decision for the states and the federal government.

Additionally, the 14th amendment plays an important role in the conflict between the state and federal government because it allows the due process and equal protections of citizens within the states. 14th amendment section 5, states congress does not have the power to compel individuals to do things. Although congress has the power to tell states what to do, the states can challenge its constitutionality and in this case, they might argue that the federal government is compelling immigrants/aliens who are individuals to limited access to the U.S. due to restrictive immigration policies. Once again, the state is what enforces these clauses, they do not apply to the federal law. Like many abolitionists during the Civil War, states that are open to immigration policies want to be able to make decisions regarding immigrant in their state. Under the 14th amendment, the states could question the means to ends and what the federal government was really trying to accomplish with their restrictive immigration policies. Thus, these are various roles that the 10th and 14th amendment play in the perpetual conflict between the state and federal governments.