Constitutional Law Final Exam – Spring 2016 – A+ Exam

Question #1

1. With Justice Holmes we must dissent. He was wrong in Giles v. Harris and he is wrong again. The argument the list is already fraudulent is a misnomer, it is fraudulent because it excludes not because it includes. The dismissal of Martin's claim is just like the dismissal of the plaintiff's claim in Giles. The correct holding would have been to open it and invalidate the tests designed to disenfranchise the masses. Section 1 of amendment 14 is clearly being violated he has been deprived of liberty by the government. Historically the 13th, 14th and 15th were all designed to protect minorities. The text of the 14th is being violated as is the spirit of the other 3, just like Harlan mentioned in his dissent in the Civil Rights Cases. Furthermore, the state is the one restricting freedom not private individuals so the majority holding in Civil rights Cases would substantiate our opinion. The court should hold Ordinance-one unconstitutional. While it might not help Martin this election, and he may not have standing this is capable of being repeated and therefore prevented. This is a political not a civil right protected by prior congressional legislation.

2. While substantive due process may not be written into the constitution it is there under an historical approach. English and now American common law has a long tradition of recognizing SDP, dating all the way back to the Magna Carta as the "law of the land" - this tradition was continued with Dr. Bonham's Case (1610). Our 5th amendment disallows the taking of liberty. Cary's arrest and conviction may be procedurally okay, but it isn't fair, it isn't right. This is an obviously race based and aimed squarely at natives. Substantively this is wrong, some argue it is not our place to judge the wisdom of laws only their soundness. Under the auspice of federalist 80 and article VI's supremacy clause substantive due process should rule the day. While we dissented in Lochner the ends and means were close enough, but we cannot pick and choose when we apply substantive due process or not. We applied it in Lochner and for the purposes of judicial efficiency and consistency we should reverse Cary's conviction and invalidate the law as an attack on individual liberty!

3. (Basically Buchanan v. Warley 12 years early) The governor enacted the ordinance in order to protect the peace, a noble aim, but it should not come at the price of liberty! What is next, we start segregating churches, markets, and streets in the name of keeping the peace? Simply but this is a taking, albeit in an abstract form. James has been deprived of the use of a house he legal bought. The statute is against MOVING IN not against purchase. That tiny linguistic difference is worth noting. He still could have purchased the house and rented it out if nothing else. But this court fills it fit to deny him such, limiting commerce. This court has made progress with Railroad co v. Brown (note similarities in mammy's and servant exceptions) and towards desegregation, this is a step in the wrong direction. Now, two men of separate races who were brothers in arms in their fight for freedom from Spain will be denied the right to live beside each other by choosing to uphold this law. Similar to what Harlan said in Plessy 9 years prior. (It is also worth noting the sale of the house is a contract and the state by way of the governor has abridged their rights to complete that sell under Article I § 10 cl. 1).

4. Taking an historical approach our forefathers passed circulars and printed volumes of material

treasonous to the crown. It is why we fought, so we could protect those freedoms. While the 1st amend. was not the 1st proposed and adopted its place high on the list should not be ignored under constructionism. Amendment 1 - no laws abridging speech, the 1st is unequivocal. Look at the historical distain by scholars and judges alike for the Early Alien and Sedition acts. Those convicted under it were eventually commuted and released. It is against our very nature to abridge speech even if there a degree in danger. He has the right to be heard, that's part of the process for our open representative republic. PR may be in chaos, what he said/distributed may boarder imminent criminal acts or even fighting words but it is not enough to warrant such a draconian response from the government. We cannot keep calling events a crisis in order to silence the law. What is the point of having a written constitution if we don't plan on following it? (Barron represents an issue the state abridged his speech not congress, incorporation problem.)

5.
Pros: Plessy ought very much to be overruled. We need to be consistent with our holding and return to RR v. Brown this would help maintain consistency. Strauder v. WV has already made steps in the right direction of equality. Equality was the goal of the 13th 14th and 15th, they need to be taken to their logical conclusion one step at a time. Granted it might not go over well, but any change you want to be lasting needs to happen slowly, it needs to happen with Plessy. Your own dissent in Civil Rights Cases says as much.

Cons: Plessy should stay, quoting justice Curtis' dissent in Dred Scott, we need to be a country of laws and not of men. If we reverse Plessy so quickly already having reversed RR Co v. Brown we become a government of men and not of laws. There would be so little stability and predictability it would damage the court. Stare Decisis, essentially even if Plessy is a bad call we are stuck with it and we should not resort to judicial activism, judicial restraint should win the day. This would overturn Civil rights cases as well, too much trouble.

Question #2

Almost like Bush. v Gore took a few dark turns.

1. If one is a so inclined to take a very liberal reading of the N&P Clause, or more appropriately here, the elastic clause (art I§8 cl.18). It is a bold step for the congress to say what they think the constitution means, but there are extenuating circumstances over the past 30 years SCOTUS has become increasingly protective of their job of interpreting the constitution to the point it has become a de facto monopoly. (look at the court's knee-jerk reaction when they were told use Sherbert after Smith). Looking back at McCullough N&P needs to be more than convenient and this is certainly the case here. We need to uphold the clause, so we work backwards like Marshall did in Marbury and you did in NFIB. We can say congress does not have the authority to grant this (that way we are not giving them power and violating separation of powers) but hold that's exactly what the framers meant, born anywhere to US parents. There is good policy behind this as well as we live in an increasingly global world/economy.

2. This question is a strange one and very difficult to answer. Under art. I § 9 cl. 4 congress shall pass no ex-post facto laws. This bill applies retroactively, it affects votes cast in the past before Americans were completely aware this issue may occur. We have approved ex-post facto laws that attach civil penalties in the past but its hard to argue this would be a logical extension. Furthermore this reeks of a bill of attainder it only really applies to one person (technically two). Good thing we read that out of the constitution with both Lovett and Nixon v. GSA. Arguably though if you wanted to bring it back from the dead, you may never get a better time. If you planned on upholding the act you could argue provision one was severable and invalid, while this one is severable to but valid because it falls under a liberal reading of N&P. There is also a separation of powers issue congress is picking the next president and substantially interfering with the executive. Looking back at federalist 45, this probably falls out of congress's domain unless we open up N&P further. With everything at stake we have to take the case despite the fact is probably a political question - Breyer will agree)

3. SCOTUS does not like being told what they can and cannot do nor how to interpret something, look how RFRA turned out. Again Going to the federalist (51), ambition must counter ambition. The court needs to push back without rocking the boat, because then it seems like judicial activism or worse, judicial imperialism. The best solution here again is to agree and invalidated. Working backwards like Marbury and NFIB. We interpret the constitution the way congress wants us to but simultaneously say it can't do that. Congress telling the court how to interpret this is a violation of separation of powers and strikes at federalism's core. If congress really wanted to have a solution they have the power to create tribunals inferior to SCOTUS (art. I § 8 cl. 9). If congress really did want a speedy solution they could have created an intermediate court or special tribunal between the DC Circuit and SCOTUS that would answer the question, all SCOTUS would have to do is remand it, have them settle in then deny cert or grant it and approve the lower holding by 4-4 split. If this were any less of a crisis I would say do not answer this, political question doctrine).

4. Oy Vey, again with the separation of powers. Congress is directing executive officials of the states to do as they say. This violates the 10th amendment and the purpose of federalism (having

a legislative body order around executive officials as such). The elastic clause does not stretch this far. The cases most pressing are Printz, Dole and NY v. US. Printz applies under anti-commandeering, congress cannot order state officials around as such. Under NY v. US, relying on O'Connor making the states take certain actions can be a violation of the 10th, while this case isn't the best it helps shore-up Printz. Following O'Connor her dissent in Dole, laws restricting and controlling the state as such violate the 10th. The only way to turn a blind-eye to the separation of powers would be an expansion of the supremacy clause with its historical roots in federalist 80 (art VI § 2). Even if we hold it unconstitutional States could always use their legislatures to direct their representatives/delegates as was intended (with senators) before the passage of amendment XVII.

5. When Bush v. Gore happened a solution was forthcoming. That is not the case. If the 4-4 deadlock occurs there are two things that could happen

Option 1. PA has no votes to offer because congress does not recognize or accept the votes from PA because of Katherine, leaving the tally at 267 Cruz to Clinton's 251. Having no third candidate on the ballot Cruz has a plurality of sorts and the 12th amendment (historic response to Adams-Jefferson election) comes into play. PA would not be needed all the others are enough for a quorum. It would basically be up to the house of representatives. (Without knowing who got what states its hard to make an accurate determination in many of these scenarios)

Option 2. Katherine casts her ballots for Clinton and the electoral college works as designed, protecting the people from themselves and Clinton becomes president. Remember gore did win the popular vote.

Option 3. Highly unlikely but someone concedes and the crises is averted.

Option 4. the house rejects both and votes on it all over again pursuant of amendment 20 because both are unqualified one is not American the others in prison.