

**Property I Examination**

**May 7, 2018**

**6:00 p.m. - 9:00 p.m.**

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**Instructions:**

You will have three hours to complete this exam. There are two essay questions. Each question is worth 50% of the final score. Each question has a 1,000-word limit. Anything you write past 1,000 words will not be read. Both answers combined should not total more than 2,000 words.

Please use the word-count (not the character count) feature to check the length of each answer. The **character count** for the exam will be visible just above the formatting icons on your screen. By clicking on the document icon, you may view the **word count**. If you hand-write the exam, or can't utilize the word-count feature, please do a manual word count.

The exam is completely open-book. You can use anything you wish, so long as that it was created *before* the distribution of this exam. Obtaining any new information from anyone or anything *after* the exam is prohibited.

**Please don't turn the page until the proctor signals that the exam has begun.**

Good luck!

## **Part 1 (50%)**

**Instructions:** The federal Constitutional Convention in Philadelphia has recently drawn to a close on September 17, 1787. Pursuant to Article VII, the proposed Constitution would become established when nine out of the thirteen states ratify the document. Throughout 1787 and 1788, the states will hold ratifying conventions, where delegates vote on whether to adopt the proposed federal Constitution. During this period, you are asked to address questions that were posed by delegates from five state conventions: Massachusetts, New Hampshire, Virginia, New York, and North Carolina. Please address each of these five questions in no more than 1,000 words.

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During the summer of 1787, delegates from twelve states met in Philadelphia to draft a new federal Constitution. (Rhode Island did not participate.) The delegates concluded their work on September 17, 1787. Article VII of the Constitution provided that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Several states ratified the Constitution with ease in the span of two months: Delaware on December 7, 1787, Pennsylvania on December 12, 1787, New Jersey on December 18, 1787, Georgia on January 2, 1788, and Connecticut on January 9, 1788. The first contentious vote came in Massachusetts.

### **I. Massachusetts**

On January 9, 1788, the ratification convention began in Massachusetts. The delegates noticed a tension in the text of the Constitution. The first part of Article V explains the process by which the Constitution could be amended:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

However, the latter portion of Article V imposes limitations on the amendment process:

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### **Question 1:**

- (a) Discuss how the Constitution can prohibit the people from ratifying certain amendments. Pay attention to the nature of the amendment process and how the Constitution can be changed.
- (b) Discuss why the delegates at the federal convention ensured that “the first and fourth Clauses in the Ninth Section of the first Article” could not be amended before 1808.

(On February 6, 1788, Massachusetts became the sixth state to ratify the Constitution.)

## II. New Hampshire

On February 13, 1788, New Hampshire began its ratification convention. As one of the least populous states, the New Hampshire delegates worried that the more populous states—with greater representation in the House of Representatives—would exert greater control on the federal government.

On June 21, 1788, New Hampshire becomes the ninth state to ratify the Constitution, but recommended the addition of twelve amendments. The first proposed amendment stated:

“That it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised.”

This proposed amendment was similar to Article II of the Articles of Confederation, which provided that “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

**Question 2:** Discuss how the addition of this proposed amendment would change the scope of the powers of the federal government and those of the states. Pay attention to Article I’s enumeration of Congress’s powers.

## III. Virginia

On June 2, 1788, Virginia commenced its ratification convention. One of the most vigorous opponents of ratification was George Mason, who had participated in the federal convention in Philadelphia. He complained that because the Constitution lacked a Bill of Rights, the federal government would have the power to violate liberties of speech, conscience, and other “essential and unalienable Rights of the People.”

**Question 3:** Discuss why, even in the absence of a Bill of Rights, Congress would lack the powers to violate these liberties. Pay attention to Article I’s enumeration of Congress’s powers.

(On June 27, 1788, Virginia becomes the tenth state to ratify the Constitution, over George Mason’s negative vote. The delegates submitted twenty proposed Amendments for Congress to introduce during its first session.)

#### IV. New York

New York began its ratification convention on June 17, 1788. During the discussion of Article III of the proposed Constitution, one delegate offered the following resolution:

“Resolved, as the opinion of this committee, that nothing in the Constitution now under consideration contained shall be construed so as to authorize the Congress to constitute, ordain, or establish, any tribunals, or inferior courts, except such as may be necessary for trial of causes of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas; and in all other cases to which the judicial power of the United States extends, and in which the Supreme Court of the United States has no original jurisdiction, the cause shall be heard, tried, and determined in the state courts, with the right of appeal to the Supreme Court of the United States.”

**Question 4:** Discuss the strengths and weaknesses of this resolution. Pay attention to the relationship between the state courts, the Supreme Court of the United States, and the not-yet-created inferior federal courts.

(On July 26, 1788, New York becomes the eleventh state to ratify the Constitution.)

#### V. North Carolina

North Carolina commenced its first ratification convention on July 21, 1788. Two weeks later, the delegates of North Carolina voted to neither ratify nor reject the Constitution. By that point, eleven states had already approved the Constitution. The first federal Congress convened on March 4, 1789, even though North Carolina and Rhode Island had not yet ratified the Constitution. The following month, George Washington took the inaugural oath. The new federal government was beginning, without any representation from North Carolina.

On November 16, 1789, North Carolina commenced a second ratification convention. The delegates expressed a more profound concern. The Philadelphia convention was called two years earlier “for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein.” Instead of proposing mere “alterations,” the Delegates drafted an entirely new Constitution. Furthermore, the Philadelphia convention did not follow the proper procedure for revising the Articles of Confederation. According to Article XIII of the Articles of Confederation, any changes must be “confirmed by the legislatures of every state.” Article VII of the Constitution, in contrast, declared that the Constitution would be established if conventions in nine out of thirteen states voted to ratify. The North Carolina delegates recognized that their votes were futile. The new federal government would continue with or without them.

**Question 5:** Discuss the significance of the fact that the ratification process that was provided in Article VII of the Constitution, disregarded the required amendment process that was provided in Article XIII of the Articles of Confederation.

(On November 21, 1789, North Carolina becomes the twelfth state to ratify the Constitution. Rhode Island became the thirteenth, and final state to ratify the Constitution on May 29, 1790.)

## **Part 2 (50%)**

**Instructions:** The year is 2018. Following the recent presidential election, the executive branch has increased its enforcement of the immigration laws. In response, California has enacted two so-called “sanctuary” laws. These federal and state actions have been challenged in the lower courts, and the appeals are now before the Supreme Court. You are a law clerk for the Chief Justice of the United States and are asked to prepare a memorandum of no more than 1,000 words addressing five issues.

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Generally, in order to make an arrest, federal and state law enforcement officers must obtain a warrant from a neutral magistrate by demonstrating that there is “probable cause” to believe that a crime has occurred. However, there are exceptions where the police can make a warrantless arrest. For example, under the Immigration and Nationality Act, a federal immigration officer can make a warrantless arrest “if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is *likely to escape before a warrant can be obtained for his arrest.*”

California enacts the BEWARE Act (“Before Escape, Warrants Are Required for Enforcement”). Under this law, a federal immigration officer needs to follow a specific procedure in order to make warrantless arrest in California. (Arrests made with a warrant are not affected by the BEWARE Act.) First, the officer must apply for a certificate from a California state judge, by showing that a specific alien “is likely to escape before a warrant can be obtained for his arrest.” Second, a California state court is required to determine if the alien “is likely to escape before a warrant can be obtained for his arrest.” If the court does not grant or deny the request within 60 minutes, the certificate will automatically be issued. Third, once the officer has the certificate, he can make the warrantless arrest. If the officer attempts to make the warrantless arrest without the certificate, he will be assessed a civil fine of \$1,000.

The Attorney General of the United States challenges the constitutionality of the BEWARE Act. The complaint argues that any potentially removable alien is, by definition, “likely to escape before a warrant can be obtained,” once he or she is released. In other words, all potentially removable aliens are, without exception, likely to escape before the government can obtain a warrant. Therefore, the state cannot impose this additional requirement on federal law enforcement. California counters that the BEWARE Act is merely ensuring that aliens in California are arrested in accordance with federal law.

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| <b>Question #1:</b> Assess the constitutionality of the BEWARE Act. |
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Under federal law, known as Section 1373, states “may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the federal government information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

California enacts a second law, titled the RESIST Act (“Requiring Every State Institution to Share Tactfully”). Under this law, California state prisons are prohibited from sharing with the federal government any information about the release date of an alien in custody. The RESIST Act prevents federal agents from taking custody of suspects at a secure facility, reducing the likelihood that the suspects will be caught and potentially putting federal officers in dangerous situations.

The United States Attorney General demands that the California Attorney General disclose the date on which an alien, that is in the state’s custody, will be released. Citing the RESIST Act, the California Attorney General refuses to share that information. The federal government challenges the constitutionality of the RESIST Act. In response, California counterclaims that Section 1373 is unconstitutional.

**Question #2:** Who has the stronger argument? Is the United States correct that the RESIST Act is unconstitutional? Or is California correct that Section 1373 is unconstitutional?

In 2006, Congress enacted a statute that allows states to apply for financial grants from the federal government to support local law enforcement purchases. Under the statute, states that submit applications for grants must “comply with all applicable Federal laws.” Even before the enactment of the RESIST Act, California did not comply with Section 1373. Over the past decade, California has received roughly \$5,000,000 per year (a miniscule portion of its budget), which was used to purchase new vehicles for local law enforcement agencies.

In 2018, the United States Attorney General issued a new opinion: in order to be eligible to receive these grants, states must “comply with all applicable Federal laws,” including Section 1373.

Because the RESIST Act prohibits California from sharing the release dates for aliens-in-custody, the United States Attorney General concluded that the state is not complying with Section 1373. As a result, he denies California’s request for a federal grant in 2019, even though the state meets **all other** requirements to receive the funding. The California Attorney General challenges the constitutionality of the denial of the federal grant, arguing that the new condition—compliance with Section 1373—has nothing to do with law enforcement grants to purchase new police vehicles. The United States Attorney General counters that Congress gave him the discretion to deny the grant.

**Question #3:** How should the Supreme Court resolve this conflict? Can the United States Attorney General deny California’s request for the grant?

In 2012, the Obama Administration announced a policy known as DACA (“Deferred Action for Childhood Arrivals”) that would grant lawful presence and work authorization to certain young immigrants. Over the past six years, nearly one million aliens—80% of whom are of Mexican origin—were granted status under DACA.

In 2018, President Trump issued an executive order, instructing the Secretary of Homeland Security to terminate DACA. President Trump concluded that he did not have the statutory or constitutional authority to grant lawful presence and work authorization to the DACA recipients. He also determined that the limited federal immigration resources should be focused on other priorities. Pursuant to that order, the Secretary of Homeland Security moved to terminate DACA.

The California Attorney General filed suit against President Trump and the Secretary of Homeland Security. He argued that the termination of DACA violates the Due Process Clause of the Fifth Amendment because of what he referred to as President Trump’s “long history of disparaging Mexicans, who comprise the vast majority of DACA grantees.” To support this claim, the complaint cites a number of statements made by then-candidate Trump about Mexican immigrants. For example, he said, “we have some bad hombres [men] here and we’re going to get them out.” The complaint does not cite any statements made after the inauguration. There are no allegations that the Secretary of Homeland Security made any disparaging statements concerning Mexicans.

**Question #4:** How should the Court resolve this claim? (Note: The California Attorney General does not dispute that President Trump has the authority to terminate DACA—he only claims that doing so violates the Fifth Amendment’s Due Process Clause.)

During the Obama administration, states that supported more restrictive immigration (like Arizona) policies tried to supplement the federal government’s enforcement priorities. During the Trump administration, states that support more open immigration policies (like California) have tried to frustrate the federal government’s enforcement priorities. This conflict is not new. Prior to the Civil War, abolitionist states sought to resist federal slavery laws. After the Civil War, segregationist states sought to resist federal reconstruction measures.

**Question #5:** Discuss what role the 10th and 14th Amendments should play in this perpetual conflict between the state and federal governments.