Constitutional Law: Power, Liberty, Equality

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Answers to Hypotheticals

Chapter 2 Foundational Principles and Cases

Answers to Hypotheticals

2.2.5 Hypotheticals: Judicial Review

1. Assume the Supreme Court declares a statute unconstitutional. The president orders the Attorney General and the Department of Justice to enforce the statute because she disagrees with the Supreme Court's interpretation of the Constitution on this point. What should the Attorney General and Department of Justice do, and why?

   Refuse to enforce the statute because the Supreme Court has the final say on interpreting the constitution, including the power to declare statutes unconstitutional. *Marbury v. Madison* (1803).

2. Explain the pros and cons of a placing the final authority as to the interpretation of a constitution in court in the judicial branch as opposed to in an elected legislative body.

   Generally in a democracy the final say should rest with the elected representatives of the people or with the people directly. However, the danger of a tyranny of the majority argues in favor of an independent judiciary protecting the rights of the minority against overreaching by the majority and protecting the rights of the people against assertions of power the people, in adopting the constitution, have declared off limits. For example, even if a majority of citizens at a particular time wanted to establish an official state religion, the people, when they adopted the constitution, chose to create a secular

state and prohibited the establishment of religion and guaranteed free exercise of religion.

3. Assume the Supreme Court interprets the Constitution such that the Second Amendment right to bear arms is a limit on both the federal government and the states. Does a state have the power to reinterpret the federal Constitution to the contrary? Should it have that power? Explain.

The Supreme Court's interpretation of the Constitution, including its application of rights as limits on states, is final and binding. States may interpret and apply the federal constitution, but not in a way that is at odds with the Supreme Court's interpretation.

Whether states should have the final say or the federal government should have the final say is a political decision dependent upon many factors, including how one views the proper roles for federal and state governments in a federal system.

2.3.3 Hypotheticals and Questions: Constitutional Interpretation

4. Why did it take so many pages for the Court to essentially define "necessary and proper" as "appropriate"?

One answer may be that the issue of the relationship of state power to federal power was still such a contentious issue, despite a number of prior court pronouncements on exactly that issue, that reiteration was felt appropriate to try explain the nature of national power with respect to states in our federal system. Perhaps it was a matter of respect for the losing side and an attempt to explain fully the legal (not political) arguments supporting the decision on as many grounds as were raised and on as many grounds as possible.

5. Is the decision correct? What would be the effect of deciding it the other way? Is consideration of the consequences of deciding a

case one way or the other a proper method of interpretation? Explain.

In the Reconstruction Amendments (the 13th, 14th, an 15th amendments), Congress is give power to enforce the amendments by "appropriate" legislation. That captures the intention of this sort of provision better than does the phrase "necessary and appropriate." Surely if the federal government is to be able to function, it needs sufficient power to do so. If one were required to enumerate every power as to the means to be employed to carry out another enumerated power, the list would be endless. It would also make the Court, not the legislative branch, the ultimate arbiter of what means could be used because any word describing means would be subject to interpretation more narrowly or more broadly.

Considering the consequences of an alternative reading is a proper means of interpretation in situations where the term could have various interpretations. The framers did not intend to create a useless federal government or one with nonsensical limits on its enumerated powers. If an otherwise permissible interpretation would frustrate the purpose of the whole structure, of the document, of the provision at issue, that is a consequence that should be avoided.

6. One method of interpretation used by the Court is that of defining a word. What sources did the court use in defining the word *necessary*?

   Those familiar with Aristotle's *Rhetoric* will find examples of methods of interpretation or definition articulated by Aristotle including exploration of alternative possible meanings, examination of how it is used and what it means in other contexts, cross referencing to other uses of the term in the same document, the meaning of related or root terms, and more.

7. The Court made particular note of the context of the Necessary and Proper Clause in the Constitution. To what extent should such

contextual cues be followed? For example, the powers of the executive branch are provided primarily in Article II, but the veto power is in Article I concerning the powers (and limitations) of Congress. Should interpretation of the clause be affected by its placement? See chapter 10, sections 10.2 and 10.3.

The N&P clause is in Section 8 of the Article I and Section 8 addresses powers granted to Congress. Section 9 articulates limits on Congressional power. Although the location of a particular provision of the constitution does not completely control its interpretation, it should and does affect it. This is just one of the many tools of interpretation used by the Court.

8. Assume Congress requires every person to spend two years in public service between the ages of 18 and 22. A person refuses to do the service, claiming that under natural law, to do so would be a violation of that person's natural right to liberty. Assume the Supreme Court had previously upheld the law as valid under the Constitution and that it is not an infringement of the liberty the Constitution is designed to protect. Would the natural law theory prevail? Explain.

No. The Constitution is not subject to revision by the Court under various conceptions of natural law per se. Nonetheless, in interpreting the Constitution the Court necessarily at times has recourse to matters of human nature and general understandings of terms like liberty that have a distinct natural law flavor to them. *See Obergefell v. Hodges* (2015). The point is that the Constitution, as interpreted, is the final word–not something outside of it.

2.4.4 Hypotheticals and Questions: Federalism

9. Assume there is no federal law or regulation regarding the safe design of car seats for children, and the state of Safeness passes a law requiring all children under five years old who are passengers in cars be in a state-approved car seat with a five-point harness. Assume further that all child car seats are manufactured in another state and so must pass through interstate commerce to reach the

state of Safeness. Is this sort of regulation within the general power of a state to regulate? (See chapters 5 and 11.)

Yes. States have general power over matters of health and safety and can regulate on matters within the state itself, including product safety standards, unless federal preempts the state from doing so. Issues concerning the extent of the state power will be explored in more detail in chapter 5 concerning the federal power under the Commerce Clause and in chapter 11 concerning express and implied limits the Constitution places on state power.

10. Explain the basic doctrine of sovereign immunity. Make the arguments for and against it as a matter of policy and political theory.

Sovereign immunity is the concept that the state as a state or the nation as a nation has immunity from liability for actions it takes. It derives from the idea in monarchies that the monarch is the sovereign and can do no wrong. The people in a kingdom are not citizens but subjects of the king and subject to the sovereign whim. In a democracy the ultimate sovereignty is with the people and the idea that their representatives, that the government of the state or nation would be immune from liability is a most strange one indeed. *Chisholm v. Georgia* (1793) got this issue right. But the result was overturned by the 11th Amendment. The 11th Amendment and modern sovereign immunity doctrine are considered in chapter 12.

2.5.4 Hypotheticals and Questions: Race and Reconstruction

11. Assume Congress enacts a law prohibiting discrimination on the basis of race by private employers engaged in interstate commerce. Would that be a constitutional exercise of the Fourteenth Amendment grant of power to Congress?

After *The Civil Rights Cases* (1883) Congress lacked power to reach private action under the 14th Amendment.

12. The right to travel from one state to another is a federal right that attaches to all U.S. citizens. Assume the state of Exclusion requires all visitors to the state to register at the border that they seek to enter and visit the state. Is this exercise of power by the state a violation of the Fourteenth Amendment Privileges or Immunities Clause?

Yes. The 14th Amendment protects federal rights from infringement by states. Because the right to travel is a federal right, the state of Exclusion's laws could not constitutionally be contrary to that federal law.

13. Under the same facts as in the preceding hypothetical, would Congress have power under the grant of power in the Fourteenth Amendment to enact a law to supersede the state of Exclusion's law?

Yes. The Supremacy Clause makes federal law supreme over states and Section 5 of the 14th Amendment grants Congress power to enforce the provisions of it.

14. Discuss the role of race in the pre-twentieth-century development of constitutional law. Can you think of any cases in which race influenced the development of constitutional law other than equal protection? (A number of such cases will appear later in this book.)

There are no short answers to this inquiry.

Chapter 3 Federal Judicial Power

Answers to Hypotheticals

3.2.1 Hypotheticals: Congressional Power with Respect to the Judiciary

1. Would a law requiring that all appeals in all intellectual property cases in the areas of patent, copyright, and trademark be appealed to the Federal Circuit Court of Appeals be constitutional?

Yes. It would be constitutional under congressional power to establish lower courts and to set the jurisdiction of the courts.

2. Assume that the same law further provides that no appeals to the Supreme Court can be taken from the Federal Circuit on intellectual property matters. Would that law be constitutional?

Yes. It would be constitutional under the Exceptions Clause under which Congress can set the appellate jurisdiction of the Supreme Court.

3. Pat Entee sued the state of Lisens for patent infringement in federal district court. Lisens defended, asserting its sovereign immunity under the U.S. Constitution. The district court held for Pat Entee. The state of Lisens appealed to the Federal Circuit Court of Appeals, which affirmed the lower court's decision. Lisens then sought review by the U.S. Supreme Court. Pat Entee claims the Supreme Court is without jurisdiction under the statute noted in hypothetical 2. Assuming the Supreme Court would want to hear the case unless it is barred by the statute from doing so, who wins?

Because this claim raises an issue of constitutional interpretation involving the federal-state power relationship and state sovereign immunity, the denial of a right to appeal to the Supreme Court could be ruled a violation of the Separation of Powers doctrine. But issues concerning the scope of Congressional power to limit Supreme Court review of matters of constitutional (as opposed to statutory) interpretation issue have not yet been fully addressed. The Congressional and Executive attempt to remove the constitutional right of habeas corpus from the judiciary was held unconstitutional in *Boumediene v. Bush,* 553 U.S. 723 (2008).

3.3.2.1 Hypotheticals: Advisory Opinions

4. The head of the Equality in Housing Administration requests the U.S. Supreme Court to advise it on whether the federal fair housing civil rights act allows it to ban discrimination on the basis of

disparate impact as well as intentionally disparate treatment theories. Should or will the Court do so?

The Court will not provide the requested advice because it is barred by the advisory opinion doctrine. There is no case or controversy as those terms have been interpreted by the court.

5. The Senate Foreign Relations Committee requests the U.S. Supreme Court to advise it on whether the president's use of drones to attack insurgent groups destabilizing allies is constitutional in the absence of Congressional authorization to do so. Should or will the Court do so?

Action on this request would be barred by the advisory opinion doctrine. There is no case or controversy as those terms have been interpreted by the court. Furthermore, the issue the Court is being asked to consider would probably be considered a political question and the Court would choose not to decide the issue.

6. Jon, Jim, and Mary petition the Federal District Court for a decision on whether they have a constitutional right for the three of them to marry each other and to have the state recognize their marriage as legal for all purposes. Should or will the Court do so?

There is no case or controversy since they are merely petitioning the court for a ruling and the court will not issue an advisory opinion.

7. Jon, Jim, and Mary sought a marriage license from the state license-issuing authority but were not given one because the state does not recognize marriage between more than two people. They sued the state marriage licensing authority to obtain a court order that the state issue the license. What result?

Jon, Jim, and Mary have standing to sue since they have experienced a particular impact, they have a constitutionally cognizable claim of liberty that they assert has been affected,

and the court could redress the putative denial of liberty by ordering the state to issue the license. Unlike in the preceding hypothetical, this time there is an actual case and so the advisory opinion bar will not apply.

8. Assume a federal agency bans nepotism in construction contracting for public works projects. The agency regulation further states that a general contractor cannot hire a trade contractor owned or managed by a relative of an owner or manager of the general contractor. May owns May's Road Construction, Inc. Pat, May's sister, owns Pat's Paving, Inc. Pat submitted the lowest responsive responsible bid on a federal highway project on which May's Road Construction was the general contractor. May asks Pat to sue May's Road Construction after May rejected Pat's low bid on the grounds of the anti-nepotism law. May said she would pay all the attorneys' fees for both sides. What result?

   The advisory opinion bar would apply because the lawsuit is collusive and therefore no real case or controversy exists.

9. State law prohibits state highway patrol officers from searching cars after ordinary traffic stops. The state law also forbids any evidence obtained as a result of such a search from being used against the accused. Bernard was convicted of possession of an ounce of cocaine found in his car after police searched the car after stopping him for speeding. He appealed his conviction claiming that the highway patrol violated the state law when it searched his car and on the grounds that they violated his Fourth Amendment rights against search and seizure without a warrant or probable cause. The state supreme court ruled on the constitutional issue and on the state law issue and overturned the conviction on both grounds. The state appealed to the U.S. Supreme Court on the Fourth Amendment constitutional issue. Should or will the Court address the case?

   This appeal would be subject to the advisory opinion bar because adequate independent state ground exists for the

decision below. The state statute forbidding the use of this evidence is sufficient standing alone to support the result without considering any constitutional issues.

3.3.3.9 Hypotheticals: Standing

10. In a domestic dispute, Maureen shoots Bill. Bill survives and sues Maureen for his injuries. Does Bill have standing to sue?

Yes. Standing requires injury in fact to a legally cognizable claim; causation by the defendant; and redressability by the court. Battery is a recognized tort; Maureen caused the battery (shot Bill); and a court can award damages to regress the legal wrong. In most cases standing is obvious and is not an issue.

11. Assume Congress passed a law requiring all businesses engaged in interstate commerce to use a particular method of transporting hazardous materials. Toksik, Inc., violates those rules by shipping its toxic waste to a general waste disposal facility. As a result of the violation, Byslin "By" Stander is injured. Stander sues Toksik. Does he have standing to do so?

Yes. In addition, violation of the law would probably be negligence per se. If By Stander had not suffered a particular injury, he would not have had standing to sue; merely because the law was violated by Toksik does not confer standing on a citizen.

12. Assume the same facts as in the prior question, but now Stander sues Job Paded, director of the Federal Toxic Waste Handling Department (FTWHD), the agency charged with administering the program. Stander claims the FTWHD failed to properly administer the law, thus allowing Toksik to harm Stander. What effect, if any, on standing?

Stander lacks standing because causation is lacking. Paded's actions were not the proximate cause of the harm to Stander.

13. Assume Job Paded, head of FTWHD, was appointed by a president who doesn't like the FTWH Act (FTWHA) and so instructed him to not issue any regulations as required by the act. Now Stander sues to force Paded and the FTWHD to issue regulations on the grounds that he (Paded) is violating the federal law enacted by Congress that requires the FTWHD to regulate this area. Does she have standing?

No standing. Stander has no particularized injury with respect to the non-issuance of regulations.

14. Congress passed legislation requiring all states and municipalities and all businesses to remove particulates from the exhaust air from power plants, generators, and industrial or commercial processes. The law also provides that any citizen can sue to enforce this law. Klee Nair, a citizen of Iowa, sues Pennsylvania Power Company, a private company, for failure to comply with the law. Nair is not a customer of Pennsylvania Power Company, nor is Nair affected in her home and work in Iowa by Pennsylvania Power Company's emission of particulates, all of which are carried east and north by prevailing winds. Does she have standing?

Nair has no standing on the basis of being an interested citizen. But if she could show particularized injury from a power plant, she would have standing to sue. Under the facts presented here, Nair cannot show the particularized injury required.

15. The EPA has adopted a set of regulations designed to reduce air pollution by certain manufacturers by 90 percent, in accordance with a law enacted by Congress that only set the benchmark. Watt Chdog sues to force the EPA to adopt stronger regulations, because he believes the specific technologies required by the regulations are not effective enough and therefore the EPA regulations will not work. Does he have standing?

No standing. No legally cognizable claim. No particularized injury.

16. Hanna Sutton likes wilderness camping. The federal Department of the Interior's Bureau of Land Management has just announced it will open leasing for oil exploration in the River Plain Buffalo Wilderness. Hanna sues to stop the government from allowing leasing in the relatively pristine wilderness. Hanna has camped in the River Plain Buffalo Wilderness in the past, as recently as last summer. She generally intends to return there eventually, but she has other places she intends to visit first. Does she have standing?

No standing. No particularized injury of the type required by *Lujan*, i.e., she has no specific plans to use the wilderness in the near future.

17. Congress passes a law that creates the Foreign Endangered Species Administration (FESA), charged with identifying endangered species outside areas controlled by the United States. FESA issues a regulation not only identifying such species, but also banning their import and the import of any pelts, tusks, horns, or any other parts of such animals. Exotic Ventures, a maker of potions using various plant and animal parts and chemicals, sues, claiming its business will be hurt if it is prevented from using such things in its potions. Does Exotic Ventures have standing?

Exotic possibly has standing because of the particularized injury, but it probably loses on the merits. The possibility also exists that there is no standing on the grounds of no cognizable claim.

18. Same facts as in 17, but assume FESA has listed only two species of foreign animals as endangered and has not taken any steps relative to imports of those or any other species. Maximum Endangered Species Protection (MESP), a nongovernmental organization dedicated to saving endangered species, sues to force FESA to list thirty other species MESP has identified as endangered. What effect, if any, on standing?

Again, no standing because no particularized injury under *Lujan*.

19. President Obama has decided to normalize relations with Cuba. Carlos Mendez, a Cuban exile living in Florida, and one of Florida's senators, sues, claiming the president cannot act without seeking the advice and consent of the Senate when normalizing relationships. Does he have standing?

No standing because as a citizen Mendez is just the same as anyone else and lacks the requisite particularized injury. No standing as a Senator because it is the Senate as a body that has the "injury" if any, but it also probably has no redressable, legally cognizable injury. *See Goldwater v. Carter* (1979). Also, the issue pretty clearly presents a political question.

20. A U.S. citizen who had been living in Syria sues the U.S. government for the financial losses she suffered as a result of the war there. She claims the United States is responsible for her losses because it failed to act quickly, decisively, and definitively early in the conflict. Does she have standing?

She has suffered a particularized loss, and a remedy could be given (damages), but causation in fact is highly questionable so she most likely does not have standing. The matter would also present a political question and the courts would not hear it. Even if a cognizable legal claim otherwise existed (which it probably does not), she would also lose on the additional grounds that presidential and governmental discretion in such matters immunizes them from such lawsuits.

21. Congress has passed a law providing free tuition to community colleges to all high school graduates who "show promise." The Department of Education is to set guidelines for who shows promise. The Department of Education has not issued the guidelines. Edward Jones has just graduated from high school and sues to force the federal government to pay his tuition. Does he have standing?

No standing. No cognizable claim exists until standards for who meets the "shows promise" standard are established.

22. Tex Paier-Bolton ("TPB" for short) is an isolationist and doesn't believe the United States should participate in the United Nations, especially in U.N.-sanctioned wars if the U.S. has not been directly attacked. TPB sues the United States in U.S. District Court claiming that U.S. participation in a U.N.-sanctioned war is unconstitutional. Does he have standing?

No standing because TPB does not have a particularized injury. Furthermore, this would be a political question and a matter of policy and discretion not reviewable by the courts.

3.3.4.1 Hypotheticals: Ripeness

23. Assume that Congress passed a law empowering the Environmental Protection Agency (EPA) to require power plants to reduce emissions of greenhouse gases to the maximum extent attainable using available technology in accordance with standards to be set by the EPA. The EPA has not yet issued any regulations. ElectriCoal, a company that creates electricity by burning coal, resulting in significant greenhouse gas emissions, sues to enjoin the issuance of any regulations. Should the court grant the EPA's motion to dismiss the case because it is not ripe?

Yes. The case is not yet ripe because the standards are not yet known. There is also a standing problem because of the lack of any harm yet.

24. The federal Department of the Interior's Bureau of Land Management has just announced it will begin granting leases for oil exploration in the River Plain Buffalo Wilderness. No leases have been issued yet. The Save the River Plain Buffalo Wilderness Foundation sues to enjoin issuance of any leases. Should the court grant the BLM's motion to dismiss because the case is not ripe?

In addition to the standing problem, the case is not yet ripe because the leases might never be granted.

3.3.5.1 Hypotheticals: Mootness

25. In a heated neighborhood dispute, Sven shoots Ollie. Ollie survives and seeks compensation from Sven for his injuries. They settle the dispute with Sven paying a substantial sum to Ollie in return for a release. Later Ollie thinks he did not get paid enough compensation and he sues. Should the court dismiss the claim as moot?

The case is mooted by the settlement; there is no longer a live case or controversy.

26. Pat is building a solar photovoltaic generating station on 40 acres of her farm. Under a government program, she is entitled to a substantial federal subsidy for doing so. The government did not pay her within the time her application said it would. She sued. Six months later the government paid her what she was owed, including interest accrued for the delay in payment, and moves to have the suit dismissed. What result?

Yes. The dispute is now moot insofar as Pat has received all the relief to which she is entitled and the case should be dismissed.

27. RiverRuins, Inc., a company that takes its name from some colonial-era ruins of a water-powered mill near Deer River, releases effluent into Deer River in the state of Minlanta. Under EPA standards in effect in 2010, this discharge was legal. Under a rule change in 2011, it became illegal. In 2012 Swi Mer, who lives downstream from RiverRuins' plant, sued to make RiverRuins stop releasing the putative pollutants. (Assume the law permits private suits and standing requirements are met.) In 2013, as a result of further study, the EPA determined that the substance discharged by RiverRuins is in fact benign and revoked the rule, doing so retroactively to make it as if the rule had never existed. Should the court grant RiverRuins' motion to dismiss the suit?

Yes. The case should be dismissed as moot. Swi Mer no longer has a claim for which relief can be granted because the defendant is not violating any law.

3.3.6.4 Hypothetical: Political Question

28. In response to an attack on a U.S. embassy in Otherland, the president orders an airstrike against the air defenses of Otherland, which is immediately carried out. Congress passes a joint resolution the next day condemning the attack on the embassy and urging the president to "take all appropriate measures" to protect U.S. embassies. Pas Afist sues to stop the president from taking any further actions and to get a declaration that the president's actions in ordering an attack on the air defenses of Otherland was unconstitutional. Should the court dismiss the claims by Pas Afist? On what grounds?

The case should be dismissed for lack of standing and because it raises a political question.

Chapter 5 Commerce Clause

Answers to Hypotheticals

5.7 Hypotheticals: Commerce Clause

Assess the constitutionality of the following actions:

1. Congress enacts a law prohibiting the sale of firearms over the Internet.

Constitutional. A firearm is an article of commerce and the Internet is a medium used for doing commerce. Because Congress is not banning the sale of firearms generally (which would violate the Second Amendment), but rather just limiting a channel of distribution, this should not be constitutionally problematic.

2. Congress enacts a law requiring airlines to allow musicians to carry musical instruments free of charge in the passenger compartment of the airplane.

   Constitutional. Performing music is often a commercial activity, and airlines are vehicles used for commerce.

3. Congress enacts a law requiring all private employers to carry minimum health insurance with specified coverage for all employees.

   Constitutional. Employment is connected to commerce, and terms and conditions of employment in the aggregate substantially affect interstate commerce. In addition, health insurance itself is commerce.

4. The Food and Drug Administration (FDA) issues regulations defining what constitutes organic food.

   Constitutional. Food is a substance that moves in interstate commerce and regulating the quality of it is within the power of the federal government as is regulating the characterizations of the particular food being sold, such as labeling it as "organic" or "non-GMO" or just about anything else.

5. The FDA establishes a process for certifying food that meets its standards as organic.

   Constitutional. Requiring certification and establishing a process for certification is an appropriate means to achieving commercial ends that are within the Commerce Clause.

6. The Interstate Commerce Commission requires that all producers, sellers, and transporters of food not advertise food as organic unless it is certified as organic by the FDA.

Constitutional. Regulating advertising for accuracy is a power included under the Commerce Clause under the substantial effects prong as well as regulating a commercial activity directly – advertising.

7. Congress enacts a law requiring all businesses engaged in business via the Internet to register with the Federal Communications Commission.

Constitutional as a simple regulation of a means of doing business. A legitimate purpose would be gathering information for regulatory purposes to make interstate commerce more efficient, for example.

8. Congress enacts a law requiring all businesses engaged in business via the Internet to report to the Commerce Department on a quarterly basis what products and services were sold, the unit price (on average) of each product or service, and the total sales.

Constitutional for the same reason as the previous hypo.

9. Congress enacts a law requiring all sales of comic books to include their provenance or a label that says "provenance unknown." Sam's Comix is a small, urban, hole-in-the-wall sort of shop; it has no Internet presence, sells only to walk-in customers, and deals only in cash. Sam claims this law, as applied to him, is unconstitutional.

Constitutional. Though local in nature, selling comic books is economic and thus can be aggregated to find a substantial effect on interstate commerce.

10. Congress enacts a law setting water and air pollution standards for all businesses.

Constitutional. Regulating businesses with respect to non-economic activity is still related to commerce at insofar as there

are commercial costs associated with cleaning up and handling pollution if it is not prevented initially.

11. Is the Endangered Species Act constitutional? Explain.

Yes, although later cases (*Lopez* (1995) and *Morrison* (2000) may cast a shadow of doubt on the earlier case upholding it. *See Lujan v. Defenders of Wildlife* (1992). Basically, one needs to use the Necessary and Proper Clause and focus on ecosystems and their interdependence to protect individual, single-state, local species. Species that cross state boundaries, like grizzly bears and wolves, are easily reached: They have economic value and move across state boundaries.

5.8.4 Hypotheticals: The *Lopez* (1995), *Morrison* (2000), and *Raich* (2005) Shift in Commerce Clause Power Interpretation

12. Reconsider hypothetical 9 from above: Congress enacts a law requiring all sales of comic books include their provenance or a label that says "provenance unknown." Sam's Comix is a small, urban, hole-in-the-wall sort of shop, has no Internet presence, sells only to walk-in customers, and deals only in cash. Sam claims this law, as applied to him, is unconstitutional. Do the decisions and reasoning of *Lopez* (1995) and *Morrison* (2000) affect the result?

Probably not since selling comic books is a commercial activity. *Raich* (2005).

13. The Central Valley Chess Club meets each week in a space it rents from a local church. A recent exposé in the local newspaper disclosed rampant cheating involving the surreptitious use of computers in its most recent chess tournament. Congress hears about this and to prevent such problems in the future passes the "Chess Tournament Regulatory Act of 2015" (CTRA). The CTRA makes it a federal crime to cheat in a chess tournament.

Chess tournaments would be difficult to see as an economic activity, so probably Congress cannot regulate cheating.

Nonetheless, renting space is an economic activity and the chess timing clocks, chess boards, etc. all involve economic activity of buying, selling, and shipping so there may be enough economic activity to subject the club to regulation. Cheating may adversely affect the willingness of people to participate in this activity and so it could, in aggregate, have an economic impact sufficient to invoke the commerce clause. But, given the target of the regulation is merely cheating, it seems to fall more to the *Lopez* and *Morrison* side of not being regulatable by Congress. This seems to be piling inference on inference to create an attenuated link that the Court may not allow.

14. Same facts as in 13. Does it matter a cash prize is awarded for winning the tournament? Whether an entry fee is charged?

A cash prize and an entry fee strengthen the case for this being an economic activity and thus in aggregate could have a sufficiently strong affect on interstate commerce under *Raich*.

15. Same facts as in hypothetical 13 with the following addition: Congress makes an element of the crime proof that the timing clocks used in the tournament, the device (if any) used in cheating, or the game board or pieces were sold through interstate commerce.

Although arguably under the narrow facts of hypo 13 there is not commercial or economic activity (just playing the game in a competition) without the cash award (or other monetary aspects such as fees, etc.), a sufficient nexus likely exists between something regulatable that moved in interstate commerce, i.e., the timing clocks and the chess boards and pieces and so the regulation would probably be upheld. That was the fix used by Congress after *Lopez*.

16. Same facts as in hypothetical 13 with the following addition: Congress criminalizes the use of the Internet to cheat in a chess tournament.

The Internet is a channel or instrumentality of interstate commerce, and its use can be regulated, so this is constitutional.

17. Congress criminalizes prostitution, providing that anyone who solicits sex for pay is guilty of a misdemeanor.

Economic activity is regulatable and so it is probably constitutional under *Raich*.

18. Assume the statute in hypothetical 17 is not constitutional. How could Congress fix it?

Probably by requiring that the person soliciting or the person solicited be from different states and by including an interstate element of the crime.

19. Congress makes it a felony to make alcoholic beverages without a license. Harold Smith makes his own wine for his own consumption and does not have a federal license to do so. Does Smith have a constitutional defense that Congress exceeded it Commerce Clause power when he is convicted under the statute for making alcoholic beverages without a license? Do any other provisions of the Constitution would support the action of Congress?

The Commerce Clause probably gives Congress enough power to reach this. It seems a straightforward application of *Wickard* (1942).

20. Congress holds hearings and makes findings that homosexuals have been and still are targeted specifically for violent attack. In response Congress makes it a felony to commit violence against someone on the basis of sexual orientation.

This is not economic activity and falls squarely within the *Morrison* (2000) rule and so one cannot aggregate the incidents

of the problems to find a substantial effect on interstate commerce.

21. Congress passes a law making bullying on school playgrounds a federal offense. Constitutional?

Education is not economic activity and neither is bullying. So it seems *Perez* (1971) will not overcome *Lopez* (1995) in this instance.

22. Congress passes a law making bullying over the Internet a federal offense. Constitutional?

Doing something over a regulatable instrumentality or channel of commerce subjects it to regulation with respect to it occurring through that medium.

Chapter 6 Spending and Taxing Power

Answers to Hypotheticals

6.2.3 Hypotheticals: Taxing Power

1. Congress wants to generate funds to pay for educational grants. Would a one percent sales tax on all transactions done over the Internet be constitutional?

This is a simply a taxing program and as such is constitutional. It taxes transactions so the "direct" tax or "capitation" tax bar does not apply. It is designed to raise money for a program for the general welfare. The funds do not need to be earmarked for any particular program, but could be.

2. Is a law requiring every homeowner who does not have a solar energy photovoltaic system installed at their homes to pay what the law calls an "clean energy surcharge" equal to 10 percent of the homeowner's annual energy bill be constitutional? Assume the law recites as its purposes "encouraging energy conservation and

speeding the transition away from fossil fuels to clean, renewable sources of energy."

Labeling a tax a surcharge does not change its nature for constitutional purposes. This would seem to fit within the *National Federation* (2012) rule in that regard. However, the record does not show that its purpose was to raise money as opposed to simply induce people to install photovoltaic generators at their homes. This would seem to make it more of a penalty for not complying with a regulation than a tax intended to raise money. But Congress does not need to recite that the purpose is also to raise money for government operations. The surcharge is calculated based on energy usage and thus is like a use tax. Congress does not need to tax all energy usage equally–it can incentivize the use of clean energy by taxing energy generated from other sources differently. So, on balance, it should be treated as a tax.

3. Rufus ("Roof") Ing refused to pay the surcharge and received a bill from the Federal Renewable Energy Agency (FREA) for the estimated amount he owed. Upon his nonpayment of the bill, FREA sued to collect the amount, plus interest, court costs, attorneys' fees, and a 10 percent penalty for late payment, all of which were authorized by the statute. Evaluate the constitutionality of the assessments by FREA and Ing's chances of prevailing in the suit.

If the surcharge is a tax (see answer above), then the federal government can use various means to collect it, including assessing a penalty for non-payment. Ing is unlikely to prevail.

6.3.2 Hypotheticals: Spending and Taxing Powers

4. Congress enacts a law under which states will be given large grants for urban renewal, provided they raise the minimum wage to 100 percent of the poverty level in their respective states (the cost of living varies from state to state and so the poverty level does as well). The funds must be spent on approved infrastructure and

capital projects, such as hospitals, roads, subways, sewer systems, and so on. Is the law a proper exercise of the spending power?

This program seems to be a straightforward spending program with clear conditions that a state can choose to accept or reject. Raising the minimum wage is related to urban renewal since the higher wages earned by a city's poor would likely be spent within the city, resulting in more development. Nothing in this hypothetical indicates the program is coercive.

5. Congress amended an existing law, the Educational Grants Initiative (EGI) to increase the funding available to states. To be eligible for any funding under the amended EGI, states must agree to have full-day kindergarten, to make Head Start available to all children from low-income families, to provide free before- and after-school daycare to all students under the age of 12 with working parents, and to require all students to study a musical instrument for at least three years between second and seventh grade. Under the old EGI the only restriction was that the money be used for K through 12 education as the state saw fit. The old portion of the EGI accounted for 5 percent of school funding in many states (less in states that spent more for education, higher in states that spent less on education in general). Under the new proposal, the new funding would cover 20 to 40 percent of the states' educational budgets. Assume state education budgets account for 25 percent of most state budgets. Evaluate this program under the Spending Clause.

This program lies between *South Dakota v. Dole* (1987) and the ACA spending program, *National Federation* (2012), in its impact on the state if the state does not accept the new program. On balance, this would likely be deemed coercive by the Court because of the large amount of funding involved and the tie to an older program.

6.4.1 Hypotheticals: Severability

6. Congress enacted the Comprehensive Renewable Energy Infrastructure System and Investment Statute (CREISIS). The Supreme Court declared one portion of the law, relating to

funding state initiatives for energy conservation and investment in energy infrastructure, unconstitutionally coercive in its operation. In the legislative history of the law Congress had described that portion of the bill as the "linchpin" of the law and as critical to the success of the entire initiative. Assume the law does not contain a severability provision. Should the rest of the law continue in force?

The lack of a severability clause gives the Court greater latitude in deciding whether the loss of the "linchpin" provision should void the whole statute. Probably it would, given the language used by Congress in its legislative record supporting the law.

7. Same facts as in the prior hypothetical, but now assume the law does contain a severability provision.

The existence of the severability clause means the Court should presume Congress intended the statute to survive if the offending section is severed. However, that presumption can be overcome where the loss of the linchpin provision would render whole statute unworkable. Given the inclusion of a severability provision in the law, the Court should resist finding a provision to be to central to the working of the whole statute, but if it finds that the offending provision is indeed critical to the working of the law, the whole statute should be voided.

Chapter 7 N&P and Other Powers

Answers to Hypotheticals

7.2.2 Hypotheticals: Necessary and Proper Clause

Are the following exercises of power constitutional exercises of power under the Necessary and Proper Clause?

All hypotheticals below dealing with the necessary and proper power (hypotheticals 1-11) illustrate appropriate use by Congress of its Necessary and Proper Clause power because in all instances Congress could rationally conclude it was employing appropriate means to accomplish legitimate ends

within its enumerated powers. The short answers after each hypo provide additional detail to this general point.

1. Congress enacts a law requiring all commercial airlines to equip all of their airplanes with equipment that constantly conveys information about critical aspects of the airplane's operation to ground-based recording facilities. Failure to comply can result in fines.

   The requirement is supported by the Interstate Commerce Clause power. The use of fines to enforce the requirement is constitutional under the Necessary and Proper Clause.

2. Congress enacts a health care insurance tax collected as part of the Social Security and Medicare taxes. Failure to pay the tax can subject the person to civil and criminal penalties.

   The requirement is supported by the Taxing Clause power. The use of civil and criminal penalties to enforce the tax is constitutional under the Necessary and Proper Clause.

3. Congress enacts a spending program to rebuild the nation's travel infrastructure to higher, more durable, longer-lasting standards. Anyone who embezzles the highway funds is guilty of a felony.

   The requirement is supported by the Spending Clause power. The use of criminal penalties for embezzlement of funds allocated under the spending program is constitutional under the Necessary and Proper Clause.

4. Congress enacts a comprehensive energy use program to convert from greenhouse gas-producing energy sources to nuclear, solar, and wind-based sources. Congress creates a new Department of Alternative Energy to adopt regulations and administer the program.

The requirement is supported by the Commerce Clause power. The creation of an administrative agency to run the program is constitutional under the Necessary and Proper Clause.

5. Congress enacts a special law to protect the intellectual property in software, removing it from patent and copyright protection. This software protection is for a period of ten years. The Software Protection Act provides that it is to be administered by the Copyright Office under such rules and regulations as the Copyright Office might adopt.

Congress has the power to protect software under the Intellectual Property Clause power because software constitutes an authored work (it is written by someone) and the protection is for a limited period (ten years). The assignment of the power to administer the law to an established administrative agency, the Copyright Office, is constitutional under the Necessary and Proper Clause. The law would also probably be constitutional under the Commerce Clause as well as under the Intellectual Property Clause.

6. Same facts as in problem 5, with the addition that Congress provides an administrative review process to contest the validity of the software protection granted or, if denied, the denial of the protection, and requires that the administrative review process occur before suit can be filed in court.

Congress has the power to protect software under the Intellectual Property Clause power. Providing an administrative procedural remedy as a prerequisite to suing in court is constitutional under the Necessary and Proper Clause.

7. Same facts as in 5 and 6, with the addition of a scheme of statutory remedies, including injunctions, compensatory damages, statutory damages, and the award of attorneys' fees to the prevailing side.

Congress has the power to protect software under the Intellectual Property Clause power. Providing for private suits

to enforce the rights and providing for particular remedies is constitutional under the Necessary and Proper Clause.

8. Congress enacts a comprehensive bankruptcy law under which all debtors and creditors, including governmental bodies, are subject to bankruptcy court jurisdiction for all purposes related to the person applying to the bankruptcy court for bankruptcy protection.

   Congress has plenary power over bankruptcy. Providing that all debtors and creditors have their claims and status adjudicated in bankruptcy court is constitutional under the Necessary and Proper Clause.

9. Assume Congress enacted a law providing a path for undocumented immigrants to obtain United States citizenship. The path includes registration with a federal immigration board, application to that immigration board, proof of residence in and employment in the United States, and sponsorship by United States citizens. The law also provides that applicants are entitled to notice of a hearing and an informal hearing on their application and to one appeal of a denial of the application.

   Congress has plenary power over naturalization and immigration. Creating a path to citizenship for the executive branch to administer and providing an appeals process within that administration are constitutional under the Necessary and Proper Clause.

10. Congress makes it a crime to tamper with the United States mail.

    Congress has plenary power to create and regulate a postal system, and criminalizing mail tampering is constitutional under the Necessary and Proper Clause.

11. Congress enacts a law regulating the pay and rank available to people serving in the armed services of the United States, but providing the various military branches with discretion as to the amount of pay within a range for each rank. Further, military branches are given authority to adopt such further gradations of rank as they deem appropriate for effective running of the branch.

Congress has power "to make rules for the government and regulation of the land and naval forces." Enacting laws regulating ranks is within that power, and granting the military branches discretion as to how to carry out the details of the law is constitutional under the Necessary and Proper Clause.

7.6.1 Hypothetical: Congressional Exercise of Power under Treaty Power

12. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates parties to the treaty to take affirmative steps to eliminate of acts of violence against women. Assume the United States ratified it. Assume Congress enacts a law (duly signed by the president) providing that anyone committing a violent act against a woman is guilty of a felony punishable by not less than one and not more than ten years in prison, depending on the severity of the harm and other circumstances clearly articulated in the law. P.T. Bulle was convicted under a federal statute for raping a woman in Metropolis in the state of Gotham. Bulle and the woman are both from Metropolis, and the rape happened in the city in her apartment. Bulle claims the statute is unconstitutional, citing *United States v. Morrison* (2000) (a similar statute held unconstitutional as beyond the power of Congress under the Commerce Clause). Is Bulle correct?

P.T. Bulle is wrong. Congress has power to enforce treaties under the Necessary and Proper Clause and that is what is doing. The fact that the same law was held not constitutional under the Commerce Clause power in *United States v. Morrison* (2000) does not affect the constitutionality of the law when

Congress is giving domestic effect to the treaty under the treaty power.

Chapter 8 Congressional Power under the Reconstruction Amendments

Answers to Hypotheticals

8.2.3 Hypotheticals: Congressional Power under Section 5 of the Fourteenth Amendment

1. Is a law enacted by Congress banning private discrimination on the basis of race in employment constitutional under the Fourteenth Amendment?

   No. Congress cannot reach private action under its Fourteenth Amendment power. Under the 14th Amendment Congress can only target state and local governments and state and local government agencies.

2. Racial discrimination in selection of jurors in state criminal trials is a violation of equal protection under the Fourteenth Amendment. *Batson v. Kentucky,* 476 U.S. 79 (1986). Would a law enacted by Congress making it a federal crime for state and local prosecutors to discriminate on the basis of race in jury selection be constitutional?

   Probably, although the Supreme Court might require a record of more than spotty violations before allowing Congress to enact such a law. At present the affected defendant must assert the violation and appeal the tainted conviction if necessary. There is such a law for the federal courts, 28 U.S.C. § 1862, but the source of Congressional power for it is not the 14th Amendment.

3. Assume Congress enacts a law prohibiting discrimination on the basis of gender by any agencies of the federal government. Is

Congress empowered to pass such a law under the Fourteenth Amendment?

The Fourteenth Amendment does not give Congress power to regulate the federal government, so such a law would need to find its proper constitutional basis elsewhere.

4. Assume Congress enacts a law requiring state and local governments not to discriminate in employment on the bases of LGBT (lesbian, gay, bisexual, or transgender) status. Assume that classifying on the basis of LGBT status for equal protection purposes is subject to rational basis standard of review. Assume Congress has made an extensive record of exclusion from employment by states against people on the basis of LGBT status. Is the statute constitutional?

First, Congress must establish a record of violations by state and local governments of the substantive right against discrimination on the basis of sexual orientation or sexual identity by showing that states, in fact, treat people differently based on those classifications *and* that states do not have a rational reason to treat some people differently from others based on sexual orientation or sexual identity.

Second, Congress would need to show that the remedy adopted— allowing aggrieved employees to bring lawsuits for damages—is congruent and proportional to the harm suffered. It seems the tie between lost back wages and discrimination is strong enough to pass this level of scrutiny.

If these predicates are met, it would seem Congress is acting within its power under the Fourteenth Amendment.

Congress would also need to explicitly abrogate state sovereign immunity (we have not yet covered this topic–see Chapter 12), which it can do under the Fourteenth Amendment.

5. Assume one manager in one state department of natural resources refuses to hire any state or private person who owns a dog. Is a congressional enactment making it illegal for anyone to

discriminate in employment on the basis of pet ownership constitutional?

Nothing in the Constitution protects dog owners from discrimination, provided the manager or the state can make a rational argument that classifying people based on dog ownership is rationally related to the purpose of the employment. This would probably be hard to do, however, even under the highly deferential rational basis standard of review. Even though the dog owner may have an individual equal protection claim directly under the Fourteenth Amendment (actually, probably a §1983 statutory action) for violation of a constitutional right, Congress would likely not have the power to enforce the Fourteenth Amendment in favor of dog owners because of the lack of a record of violations of this sort. If rampant violations of such a right occurred, the law would seem to be congruent and proportionate to the harm.

6. Same facts as in the preceding hypothetical. Would congressional abrogation of state sovereign immunity in such a case be constitutional?

Assuming the substance of the law met the congruence and proportionality test, then abrogating state sovereign immunity would probably be constitutional. See §12.3.

8.3.2 Hypotheticals: Fifteenth Amendment

7. Would a law enacted by Congress prohibiting states from requiring voter ID cards as a condition of voting be a proper exercise of Congressional power under the Fifteenth Amendment? What, if any, additional facts would you need to know to make the judgment as to constitutionality?

Nothing in the facts in the hypothetical show that the ID card requirements are related to race discrimination and so the Fifteenth Amendment would not seem to reach this.

8. Would a law enacted by Congress requiring all states with populations of more than five million people to obtain federal approval of the states' voting procedures be a proper exercise of congressional power under the Fifteenth Amendment? What, if any, additional facts would you need to know to make the judgment as to constitutionality?

   This may be a violation of the principle of equal treatment among states. Perhaps if Congress could show that only the more populous states were problem areas with respect to racial discrimination in voting procedures, the differing treatment among the states would be justified.

9. Would a law requiring all states to use a federally mandated method of voting by electronic means with safeguards established by the federal government be a proper exercise of power under the Fifteenth Amendment?

   Only if tied to race discrimination. Other constitutional provisions might support it.

8.4.3 Hypotheticals: Thirteenth Amendment

For each of the following, decide whether the targeted action (a) would be considered a badge or incidence of slavery by the Supreme Court acting directly under the Thirteenth Amendment, or (b) could constitutionally be identified as such by Congress in exercising its Thirteenth Amendment grant of power.

10. A person is paid minimum wage under a contract for life, which includes a provision that the person cannot break the contract or buy out of it or otherwise escape it without the permission of the employer.

    a. This would be slavery by another name and would be unconstitutional.

    b. Congress could constitutionally enact a law outlawing such a contract as a badge or incident of slavery.

11. A person is a member of a religion under which she takes a vow of poverty, and all money she makes from any activity is paid directly to the religion.

    a. The problem of free exercise of religion and the general separation of the internal operations of religious organizations from secular governance makes this problematic. Under some circumstances the Court could find this to be a violation of the 13th Amendment, but under others it may not.

    b. Congress could probably constitutionally enact a law banning such an arrangement as a badge or incident of slavery, but the problem of freedom of religion would still constrain what Congress could do.

12. A person voluntarily joined a religious order under which he is subject to the orders of his superior in the order, is subject to be called to perform any sort of service at any time, is not free to leave the order, and is paid nothing but room and board for his service.

    a. These sorts of restrictions are common in some religious orders and would seem to be exempt from 13th Amendment constraints except for the prohibition on being free to leave the order which would seem to be a clear violation.

    b. Congress could perhaps reach some limited aspects of working conditions, but the religious freedom problem would again constrain what Congress can do.

13. A person signs an exclusive contract under which his rights to play football are owned by one football team for a period of years. The football player cannot leave the team for the duration of the contract. If he does so, the team will seek an injunction against his playing for any other team.

    a. Such arrangements do not violate the 13th Amendment.

b. Congress under its Commerce Clause power is free to limit such contracts as it sees fit, but not under its power under the 13th Amendment.

Chapter 9 Executive Power

Answers to Hypotheticals

9.2.4.3 Hypotheticals and Questions: The Constitutionality of the War Powers Resolution of 1973

1. Do any of the procedures in the War Powers Resolution violate bicameralism or the presentment? (See chapter 10 for more on these requirements.)

   Possibly. The expiration of authority unless Congress reapproves the action could be problematic, but sunset provisions in laws are common enough, so it seems likely that this aspect is acceptable if Congress has power to act in the area at all.

2. Does the War Powers Resolution authorize the president to engage in military action? Or does it restrict it? Would the president have the power to act continuously, for more than sixty days, without violating the constitutional power of Congress to declare war or authorize the use of force?

   It seems to authorize the use of military force, but the president might already have that authority in many settings. It also restricts it to a limited time. This problem has arisen with respect to President Obama's actions relative to the Islamic State of Iraq and the Levant, aka, Islamic State of Iraq and Syria (ISIS), without the specific approval of Congress. Fighting in Iraq might still be acceptable under the older authorization related to it for President Bush, but not fighting in Syria.

3. Does the War Powers Resolution constrain the president in all the ways Nixon identified?

It seems that President Nixon interpreted the War Powers Resolution in the most expansive way possible such that it would impose the most restrictions on the president's power. It is likely it does not do quite as much as he claimed it does. For example, it probably does not restrict the president's power in times of actual emergency.

4. Does the constitutionality of this act present a justiciable issue, or is it a political question?

It would seem to create an inter-branch dispute over power. This sort of dispute is a type the Court, almost of necessity, tends to address.

5. Who would have standing to sue for violation of the War Powers Resolution?

It is difficult to find someone with actual standing to bring a claim that the president exceeded presidential powers under the War Powers Resolution until actual harm befalls a person due to the president's action.

9.5.3.2 Hypotheticals: Executive Power of Appointment

6. Does the president need the advice and consent of the Senate to appoint the secretary of state, a cabinet-level position?

Yes. Cabinet officials are not inferior officers and Congress by law stated that cabinet members are officials subject to the advice and consent of the Senate under Article II, Section 2, Clause 2 which provides:

> [The President] … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

7. Does the president need the advice and consent of the Senate to appoint a commissioner, one of five, to the Federal Communications Commission, an independent administrative agency that sets policy and administers federal communications statutes and regulations?

   Yes. Commissioners and board members of independent administrative agencies are deemed officers subject to the advice and consent of the Senate.

8. The head of the Environmental Protection Agency hires a former university information technology professor to a position with the title Advisor to the Director of the EPA for Implementing Geographical Information Systems. In this position, the advisor reports directly to the EPA administrator, the head of the EPA. The advisor does not supervise or implement any programs. The advisor does not make policy but only advises the EPA administrator on policy. The advisor serves at the pleasure of the EPA administrator. Is the advice and consent of the Senate needed for this appointment?

   No. This sort of person, though important and high ranking and engaged in policy-making is an inferior officer as are most federal employees of every rank.

9. The EPA has about 15,000 full-time employees. More than half of them are engineers, scientists, technicians, and environmental protection specialists. Others work in groups concerned with legal affairs, public affairs, finances, and information technology. How many are subject to appointment with the advice and consent of the Senate?

   As of 2017, appointments to only the following 15 EPA positions would be subject to Senate advice and consent: the administrator, deputy administrator, the assistant administrators charged with oversight of major groups within the EPA, the chief financial officer, the general counsel, and the inspector general. For a listing of officials subject to Senate confirmation see Christopher M. Davis & Michael Greene, *Presidential*

Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations, Congressional Research Service, https://fas.org/sgp/crs/misc/RL30959.pdf (August 23, 2016). For a more accessible but unofficial and unverified list see *List of positions filled by presidential appointment with Senate confirmation*, https://en.wikipedia.org/wiki/List_of_positions_filled_by_presidential_appointment_with_Senate_confirmation.

9.6.1.1 Hypotheticals: Executive Privilege Regarding Information

10. A prosecutor subpoenas presidential documents to obtain an indictment against someone else suspected of a crime. The president asserts the presidential privilege against production. The prosecutor seeks enforcement of the subpoena in federal court. The prosecutor asserts that the documents *may be helpful* to obtain the indictment. What result?

The assertion of the privilege prevails because the prosecutor's showing of "may be helpful" is not adequately strong.

11. Same facts as in the previous hypothetical, but this time the prosecutor asserts that the documents are *necessary* to obtain the indictment. What result?

The assertion of the privilege most likely would fail because a showing of necessity would be adequate to overcome it. The Court should use exceptional means to protect confidential communications and to guard against a widespread fishing expedition.

12. Same facts as in the previous hypothetical, but this time the prosecutor presents information showing why the information contained in the presidential documents is likely to be required to obtain the indictment.

The assertion of the privilege probably fails because the showing of need by the prosecutor was adequate, but the Court would probably do an independent assessment of the likelihood that those documents would be needed before turning any over to the prosecutor. In any event the Court would use exceptional means to protect confidential communications and to guard against a wide-spread a fishing expedition.

13. Rework the previous three examples, but this time assume it is the defense attorney seeking the information to (hopefully) help the client's defense.

Same answers, but with the added concern of the defendant's right to confront the evidence against him or her and to know of exculpatory evidence that might make it easier to avoid the privilege.

14. Congress seeks records from the U.S. Agency for International Development to determine whether any of its programs support abortion overseas. What, if any, records would be privileged?

Probably none, but possibly some records of confidential communications with governmental officials would be.

9.6.5 Hypotheticals: Executive Immunity

15. One year before being elected, a sitting president had been driving a car and was in an accident. In the first year the president is in office, the driver of the other car sues the president for negligence. Should the trial court grant the president's motion to dismiss on grounds of presidential immunity from suit?

No immunity from the suit proceeding against the sitting president. *Clinton v. Jones* (1997).

16. A sitting president liked to ride her motorcycle. She was arrested for reckless driving while intoxicated. Is her assertion of immunity well founded?

No immunity from this suit since she was not performing official duties as the president at the time.

17. The president authorized the FBI to conduct domestic surveillance on a foreign national residing in the U.S. and who, it turned out, was misidentified as a suspected terrorist of the same name. The victim of the error sues the president for violation of his rights of privacy. (Assume that substantively the claim would be proper.) Should the trial court grant the president's motion to dismiss on grounds of presidential immunity from suit?

Yes. Immunity would attach to this action performed in the course of his official responsibilities.

18. The president authorizes the use of drones in an active war zone. Due to a mistake, the drone destroys a bus, killing a group of American tourists. The heirs of the tourists sue the president. Should the trial court grant the president's motion to dismiss on grounds of presidential immunity from suit?

Yes. The president is immune from all acts taken while in office, including most especially discretionary actions relating to the conduct of war.

Chapter 10 Separation of Powers

Answers to Hypotheticals

10.4 Hypotheticals: Bicameralism and Presentment

1. The House and the Senate pass identical versions of a bill. The president vetoes the bill. The House and Senate both vote by more than two-thirds to override the veto. Has the bill become law?

Yes.

2. The House and the Senate pass identical versions of a bill. The president vetoes the bill. The House and Senate both vote 60 percent to 40 percent in favor of a joint resolution with the provisions identical to those in the vetoed bill. Has either the bill or the joint resolution become law?

   No.

3. The House and Senate pass bills with the same titles, but differing in one material respect. The bills are presented to the president as one bill with one option, with the condition that whichever option the president selects will become the law. Does this comport with the requirements of bicameralism and presentment?

   No. Providing the president with an option as to which provisions to sign and which not violates bicameralism. Congress must present one complete law.

4. The Senate has ratified a treaty that the Senate declares is non–self-executing. Has the treaty become law operative domestically within the United States? (See the chapter 9 section on the treaty power.)

   Probably not, although the power of the Senate to declare a treaty non–self-executing is unclear if the president disagreed on that point. The treaty proper is undoubtedly valid and binding on the U.S., but the non–self-executing aspect is uncertain. In general, a treaty's self-executing status is determined by examining the how it was presented to the Senate by the president as to the president's intentions with respect to domestic application.

5. The EPA adopts a regulation that requires that 40 percent of all new cars sold in 2020 and thereafter must be electric vehicles. Assume the EPA has the power to do this. The House and Senate

pass a joint resolution purporting to revoke that regulation. Is the joint resolution effective at doing so?

No. It violates the presentment requirement.

6. The Senate ratified a duly negotiated treaty presented to it by the president that ends the imposition of sanctions on Logiland. Two years later, the House and Senate pass a bill that re-imposes sanctions on Logiland. The president vetoes it. Both houses of Congress vote to override the veto. The president does not re-impose sanctions, citing the treaty and his power over foreign affairs. What result?

The later law prevails, and the president is violating the law. It seems unlikely that the president's authority would fall into category three of the Justice Jackson typology such that the president can ignore the will of Congress in this regard.

Chapter 11 Federal Constitutional Limits on State Power

Answers to Hypotheticals

11.2.4 Hypotheticals: Preemption

1. The federal government adopts a regulation requiring all cars to have seat belts, shoulder straps, and air bags. Does it preempt a state law that requires all cars sold in the state to have collision avoidance systems under which cars have sensors that detect possible collisions and apply the brakes automatically?

No preemption. Both state and federal government can regulate product safety. No showing exists of an intention that state laws be preempted. The requirements are not inconsistent. No extraordinary need for uniformity exists.

2. The federal government adopts a regulation requiring all cars to have seat belts, shoulder straps, and air bags. A provision of the law provides that "The purpose of this law is to ensure that all cars sold in the United States meet minimum standards of safety for

drivers and passengers of cars." Is a state law that requires all cars sold in the state to have collision avoidance systems under which cars have sensors that detect possible collisions and apply the brakes automatically preempted?

No preemption. Both state and federal government can regulate product safety. No showing exists of an intention that state laws be preempted. The requirements are not inconsistent. No extraordinary need for uniformity exists.

3. The federal government adopts a regulation requiring all cars to have seat belts, shoulder straps, and air bags. A provision of the law provides that "The purpose of this law is to insure that all cars sold in the United States meet uniform national standards of safety for drivers and passengers of cars." Is a state law that requires all cars sold in the state to have collision avoidance systems under which cars have sensors that detect possible collisions and apply the brakes automatically preempted?

   The requirement of uniformity may be enough to find either field preemption on conflict of purpose preemption. Nonetheless, it is still arguable that the state desire of uniformity does not mean that all state laws that meet and exceed the minimum federal standard are preempted. It could be interpreted to mean uniform *minimum* standards, not complete uniformity.

4. To ensure that all cars meet certain safety and quality standards Congress creates the Automobile Quality Administration (AQA) and adopts a comprehensive law authorizing the AQA to regulate all aspects of passenger cars. The AQA adopts comprehensive regulations that regulate all aspects of passenger car construction, safety, environmental impact, and so on. Is a state regulation that duplicates the federal regulation in most respects, but differs in ways that do not impose conflicting obligations and that do not undermine the purposes of the law as to safety and quality of passenger vehicles preempted?

The question would be whether this comprehensive regime would give rise to field preemption. Given the general approach of allowing states to regulate for health and safety with respect to cars and other consumer products and other important matters like the environment, it seems likely that absent an express preemption the law would be treated as not preempting the field.

5. Same as in the previous hypothetical, but would a provision in the law that one of Congress's purposes is to ensure uniformity in the marketplace to make a level playing field for car manufacturers change the result?

   The purpose of uniformity would be undermined by varying state regulations, so such state laws would likely be held to be preempted under both field preemption and conflict-of-purpose preemption.

6. To ensure that all cars meet certain safety and quality standards Congress creates the Automobile Quality Administration (AQA) and adopts a comprehensive law authorizing the AQA to regulate all aspects of passenger cars. Congress states that one of its purposes is to ensure uniformity in the marketplace to make a level playing field for automobile manufacturers. The AQA adopts comprehensive regulations that regulate all aspects of passenger car construction, safety, environmental impact, and so on. Is a state regulation that applies the same AQA passenger car standards to light trucks, which were not covered by the AQA's regulations, preempted?

   In this instance the field is probably defined as passenger cars, and so no preemption based on field preemption arises. However, there could be conflict of purpose preemption depending on whether Congress intentionally left light trucks out of the AQA's jurisdiction because, for example, it wanted light trucks to be more powerful and less subject to pollution requirements for the benefit of farmers and small businesses.

11.3.6 Hypotheticals: Dormant Commerce Clause

7. Can the state of Taxes constitutionally impose a 3 percent sales tax on goods manufactured and sold within the state and a 6 percent sales tax on goods manufactured elsewhere and shipped into the state?

   No. This is the simplest, most obvious form of unconstitutional discrimination against interstate commerce.

8. To support an important industry, the state of Cheezat requires that all cheddar cheese be sold at a minimum price, regardless of where the cheese is made. The state of Cheezat is the largest producer of cheddar cheese in the country. Yeldye Cheese, a producer of cheddar cheese from a neighboring state, wants to sell its cheese in Cheezat for 65 percent of the minimum price, a price at which Yeldye still makes an acceptable profit. Does the minimum price requirement violate the Constitution?

   Setting a minimum price burdens interstate commerce and here the justification appears insufficient to uphold the burden. Protecting local industry is not a sufficient justification.

9. The state of Organix completely prohibits the use of herbicides and pesticides in agriculture. Riddit, a maker of the most popular agricultural herbicides and pesticides, wants to sell its products to farmers in Organix. Organix based its decision to ban herbicides and pesticides on studies showing that herbicides and pesticides have a deleterious effect on the environment, including especially on bees, a critical pollinator. Is the Organix program constitutional?

   The prohibition is probably constitutional under *Maine v. Taylor* (1986) because of the important public interest being served in health and safety and there is no other method of meeting the goal that would be as effective and would still allow Riddit products to be sold in the Organix. Nonetheless, the matter is not free from doubt because it does undermine the idea of an integrated national economy. One can imagine the Supreme

Court deciding that this intrusion into the economy for merely environmental reasons is too much.

10. Organix prohibits the sale of nonorganically produced food of all types in all stores in the state and also prohibits the sale of genetically modified organisms (GMOs), which includes most corn and grains grown today. Prest, the maker of the most popular brand of corn flakes, as well as other breakfast cereals, wants to sell its cereals in the state, but most of its products contain GMOs grown using pesticides and herbicides. Organix based its action on its belief that organic foods are healthier for its people. Will Prest prevail when the state sues it for selling the non-organic GMO food in Organix?

Organix is not discriminating against interstate commerce; the regulation applies to both in-state and out-of-state vendors and producers. Is the burden unconstitutional? The state interest seems strong enough (health and safety), but, as stated, the action is based only on a "belief," not data. That may not be enough to meet the state's burden. Under deferential rational basis this might withstand scrutiny, but sometimes the Court looks deeper.

11. Same facts as for hypothetical 10, but now the state of Organix based its law on the judgment that organic farming without the use of pesticides and herbicides is a superior form of farming insofar as it is better for the land and the environment. Organix bases its judgment on information about farming techniques and sustainability developed by its own state university, Organix State University School of Agriculture (OSUSA). Does this change in purpose change the result?

Organix is not discriminating against interstate commerce; the regulation applies to both in-state and out-of-state vendors and producers. Therefore the question is whether the burden imposed on interstate commerce by these requirements is unconstitutional. The state interest seems strong enough—sustainable farming—but applying that interest to farms located

in other states is problematic under the *Dean Milk* case. Land and the environment in Organix will not benefit from farmers in other states growing GMOs and using pesticides and herbicides. This gives the feel of protectionism to the regulation – it will protect organic farmers in Organix from competition from those using less expensive means of producing crops.

12. Organix State University School of Agriculture (OSUSA) has successfully developed techniques for growing non-GMO corn and grains without using pesticides and herbicides and produces and sells its non-GMO corn and grain seeds. Can Organix constitutionally require that all OSUSA products be sold first to satisfy in-state demand for the seeds before any can be sold to buyers from out of state?

This would seem to be a market-participant case controlled by *Reeves*.

11.4.2 Hypotheticals: Article IV Privileges and Immunities

13. The state of Mintario requires everyone who operates a boat on state waters, including lakes and non-commercially navigable streams and rivers, to have a boat operator's license, much like an automobile driver's license. Assess the constitutionality of the following actions and situations.

a. The license must be issued by Mintario; no other state's boat operator's license is recognized.

Probably a violation, but see *Baldwin*.

b. Mintario recognizes any valid, current boat operator's license issued by another state or Mintario.

Certainly acceptable.

c. The state of Maryginia does not require boat operators' licenses, and a Maryginia resident claims that this entitles her to operate her boat in Mintario without a license.

The Maryginia resident does not take her Maryginia rights with her into Mintario. While in Mintario, she must comply with Mintario law.

d. Mintario charges in-state boat operators $50 for the license and requires operators to pass a written test. It charges out-of-state boat operators $250 for the license and requires them to complete a six-hour online course, pass a written test, and pass a practical driving test on a lake in Mintario.

This disparity of five times the price for the license plus the additional requirements probably dooms the law.

14. The state of Watir requires all plumbers to be state certified to do plumbing work for pay for others. Certifications from other states are not recognized as valid in Watir.

States can require local certifications for various trades and professions.

Chapter 12 Federalism and State Sovereign Immunity

Answers to Hypotheticals

12.2.7 Hypotheticals: Federalism as a Structural Limit on Federal Power

1. Assume Congress enacts gun regulation legislation. Consider the constitutionality of each of the following requirements of such a hypothetical federal law:

   a. All guns that have moved in interstate commerce must be registered with the federal Bureau of Alcohol, Tobacco, and Firearms.

This would be a constitutional regulation as a typical exercise of power under the Interstate Commerce Clause. No federalism issues arise from this simple regulation.

b. States must enact a gun registration scheme.

The federal government cannot require states to enact laws under the anti-commandeering theory of the Court.

c. State police officers must determine the origin of any gun used in a crime.

Just as the federal government cannot require states to enact laws under the anti-commandeering theory of the Court, so it cannot force state official to enforce federal laws.

d. States must report guns registered by the state under state law to the federal Bureau of Alcohol, Tobacco, and Firearms.

Ordinary reporting requirements imposed on states are constitutional.

2. Is a federal law requiring all state-employed medical officers to create a program to vaccinate the entire population of the state against the Zika virus constitutional?

No. This requirement would run afoul of the non-commandeering theory of the Court. The federal government cannot commandeer state officials to administer a federal program.

3. Assume a state constitutionally gathers information from its residents through multiple state agencies for various state administrative purposes. The information gathered includes each resident's name, address, marital status, number and names of children, pets, firearms ownership, automobile ownership, health insurance, car insurance, homeowner's insurance, accident record, court records, and more. The state then combines all the information from all of the agencies into one database to be sold

to those seeking this sort of information. In response, Congress wants to enact a law prohibiting states from selling information about residents unless the residents have expressly and knowingly consented to the disclosures ahead of time. Would the law be unconstitutional because of federalism concerns?

No. The law would be constitutional. The federal government would be regulating commerce and the states are subject to federal regulation under the Commerce Clause. This hypo presents a straightforward application of *Reno v. Condon* (2000).

4. Assume Congress enacts a law prohibiting states from banning cities from creating their own broadband fiber optic networks or over-the-air wifi-like networks for people to access the Internet. The state of Tennetucky had a law prohibiting cities from providing such services. The city of Ispede, Tennetucky, created such a system. Tennetucky instructs Ispede to cease providing such services. Ispede claims that the federal law controls. Who wins?

   This seems to be a straightforward preemption of state law by federal power being exercised in an area in which the federal government is granted power under the Commerce Clause. Tennetucky could argue that the federal government is unduly interfering in the sovereign relationship between a state and its subdivisions (the city of Ispede in this case). *See Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6th Cir. 2016) (6th Circuit holds FCC lacks authority to issue such a rule under the FCC authorizing statute in part because of the federalism concerns).

5. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates parties to the treaty to take affirmative steps to eliminate acts of violence against women. Assume the United States ratified it (which it in fact has not done). Assume Congress enacts a law (duly signed by the president) providing that anyone committing a violent act against a woman is guilty of a felony punishable by not less than one and not more

than ten years in prison, depending on the severity of the harm and other circumstances clearly articulated in the law. P.T. Bulle was convicted under a federal statute for raping a woman in Metropolis in the state of Gotham. Bulle and the woman are both from Metropolis, and the rape happened in her apartment in the city. Bulle claims the statute is unconstitutional, citing *United States v. Morrison* (2000) (a similar statute held unconstitutional as beyond the power of Congress under the Commerce Clause). Is Bulle correct?

No. The strongest federalism argument against this exercise of power is that it represents federal intrusion into an area of criminal law traditionally handled by states. However, federal power under the Treaty Clause allows Congress to implement valid treaties as an independent power, and so the cases based on Commerce Clause limitations would not apply.

6. Using the same facts as the preceding hypothetical, assume also that as part of the CEDAW implementing legislation Congress required states to enact laws that expand the reach of state laws relating to violence against women. Is such a law constitutional under the principles of federalism?

   No. This would be another variant on the anti-commandeering principle.

12.3.4 Hypotheticals: Sovereign Immunity

7. Assume Congress enacts a law requiring states to respect federally registered trademarks and gives private trademark owners the right to sue states for damages. Jackson, the owner of the trademark, Citural, the name of a program that checks legal documents for proper Blue Book citation form, learns that the state of Scofflania is using that trademark for a similar product created at its state law school. Assume that Jackson's trademark is valid and properly registered with the federal Patent and Trademark Office. Is Scofflania immune from a suit by Jackson in federal court?

Yes. Congress has not explicitly stated that it is abrogating state sovereign immunity, but since it specifically created a private cause of action against the state, abrogation would probably be inferred. However, Congress cannot abrogate state sovereign immunity under its Comnmerce Clause power which is the power that supports federal trademark legislation.

8. Same facts as in the prior hypothetical, but this time Congress expressly abrogates state sovereign immunity.

Trademark law is based on the Commerce Clause, so sovereign immunity cannot be abrogated even if Congress tries to do so explicitly.

9. Same facts as in hypothetical 7, but this time the law applies not only to states but also to counties, cities, towns, and all political departments and divisions within each state. Who, if anyone, would a trademark owner be able to sue if those other entities were also infringing the trademark?

State sovereign immunity only extends to states and state departments and divisions. It does not extend to counties, cities, towns, and other political subdivisions. Consequently, Jackson could sue those entities.

10. Assume Congress enacts a law requiring states to provide housing financing support to its residents and to do so without discriminating on the basis of LGBT status, a classification protected under the Fourteenth Amendment. Can Congress abrogate state sovereign immunity if it provides a private cause of action for those who have suffered such discrimination at the hands of the state? If so, what must it do to abrogate state sovereign immunity?

Yes. Congress can abrogate state sovereign immunity when exercising its power under the Fourteenth Amendment, provided its exercise of power meets the requirements of

Boerne (1997) and expressly abrogates state sovereign immunity.

But there is a problem with requiring states to provide housing financing support to its residents under the anti-commandeering principle. If Congress were requiring this as a part of a grant under a spending program and the state agreed to accept the grant, then the non-discrimination provision would be proper condition for the grant. Congress cannot use the spending power to abrogate state sovereign immunity but possibly it can condition receipt of the grants on a state consenting to be sued for matters relating to the grant.

If the hypo is changed to simply requiring states not to discriminate on the bases of LGBT status, that would be an exercise of Congress's14th Amendment power. Provided Congress complied with the requirements of *Boerne* (1997), then Congress could create a private cause of action in favor of affected persons and abrogate state sovereign immunity.

Chapter 13 Equal Protection

Answers to Hypotheticals

13.4.3 Hypotheticals: Equal Protection Rational Basis Standard of Review

1. A state law prohibits the use of motorized boats on any lake or reservoir that is a significant source of drinking water for residential communities. An exception is made for state water patrol boats and emergency rescue boats, which may be motorized. Assess the constitutionality of the general rule and the exception under equal protection.

This is an ordinary health and safety regulation by the state. The classification is those who would use motorized boats on reservoirs used for drinking water. This would get rational basis review. The interest, clean drinking water, is rationally furthered by prohibiting power boats which can result in oil and gasoline

pollution. The exceptions for patrol boats and emergency boats are rationally related to the objectives of policing the general rule and allowing for more effective rescue of boaters and swimmers in distress.

2. A city wants to encourage economic development among the poorest residents. To do so it funds urban renewal projects targeted at geographic areas with the lowest amount of property taxes paid to the city. Is this program constitutional under the equal protection clause?

Yes. Economic development is a legitimate end, and targeting funds at the poorest areas is rationally related to accomplishing it. Linking geography, tax revenues, and the objectives (economic development among the poorest residents) is rational and the courts will defer to the legislative judgments under the deferential rational basis standard of review.

3. Consider the constitutionality of the following actions:

   a. The State of Minichigan enacts a law barring vegans from serving food in restaurants that serve meat.

On one hand, this seems to be an economic regulation of employment and the qualifications needed for the job. If so, the regulation would receive highly deferential rational basis scrutiny. On the other hand, it is excluding certain people from a particular class of jobs based on a personal characteristic. This would seem to move it toward non-deferential rational basis. In either case, it is hard to come up with a legitimate state interest being served here. Furthermore, it is hard to come up with a an explanation of how this ban is rationally related to accomplishing any conceivable interest of the government. So one is left with the sense that it was enacted out of animus toward vegans. This would most likely not be constitutional.

   b. The city of Springlake passes an ordinance under which residents with incomes below 150 percent of the poverty line

are eligible for free home energy audits and free work to improve the energy efficiency of their homes.

Granting a benefit using economic-means testing is exactly the sort of thing that gets highly deferential rational basis review. The governmental interests could include economic assistance for those near or below the poverty level, could include conserving energy and reducing greenhouse gases, or general improvement of homes in the city. This program would serve all three interests and classifying who is entitled to them on the basis of economic status is constitutional.

c. The State Board of Education requires that all children in grades three through eight who are physically able be given free dance lessons one hour each week. An exception is made for those for whom dancing would violate their religion.

Constitutional. The government can establish educational objectives subject only to deferential rational basis scrutiny. The government has an interest (or it is permitted to have such an interest) in the physical fitness and balance and coordination of its residents. Studying dance helps all three.

d. The city of Ocean Surf requires that all life guards be blonde.

Unconstitutional. Not rationally related, even under the most deferential rational basis standard of review. There is no identifiable interest of the government requiring one hair color for the job of life guard. Even if the government were to advance some rationale such as light colored hair is easier to see, the ready availability of an obvious alternative such as wearing an orange lifeguard swimming cap makes the hair color requirement not constitutional. This would get non-deferential rational basis review because it is a classification based on a personal characteristic that seems to have nothing to do with swimming or lifeguarding.

e. The state income tax uses a graduated tax, based on income, with taxes ranging from 2 percent to 7 percent of income.

Constitutional as an ordinary economic regulation making distinctions (classifications) on the basis of income. Deferential

rational basis review would be employed and the judgments of the legislature would not be second-guessed. Having those who earn more pay more in taxes to support the state is rational.

f. The state income tax taxes all income of everyone from every source at a flat rate of 5 percent.

Constitutional as an ordinary economic regulation classifying on the basis of income. Deferential rational basis review would be employed and the judgments of the legislature would not be second-guessed. Both having those who have more and earn more pay more in taxes and imposing a flat tax to support the state is rational decisions.

13.5.2.3 Hypotheticals: The Equal Protection Requirement of Intent

4. Can the state of Virgilina constitutionally use a test under which, to be employed by the state, the applicant must speak and read English at a certain level of proficiency as determined by a standard English test?

This requirement is constitutional based on the information given because the intention of the test is to hire people qualified for the job which the state contends requires command of English. There is no evidence of an intention to discriminate on the basis of national origin, ethnicity, race, or any other suspect basis. Thus the regulation would be tested under rational basis and it should pass muster under either deferential or non-deferential rational basis.

5. Can the city of Riderton constitutionally require all city employees to have their own cars so they can use them in the performance of their duties? The city knows that 85 percent of the white population own cars and only 35 percent of the Asian population own cars.

Knowledge of racial disparities that may have an impact on who may be employed is not sufficient to show intent, although it is a relevant factor to consider. More investigation into other facts

would be needed to show a constitutional violation. Keep in mind that the disparate impact theory may work under a statute that may be applicable, but it does not, standing alone, support a constitutional claim.

6. The county of Loggin in the state of Washaska employs inspectors to check logging company compliance with environmental regulations. All of the current county inspectors grew up in the area and have worked in the logging industry. They are also all from one particular Native American tribe. Can the county constitutionally only hire relatives of those who are already inspectors on the grounds that "they grew up in the industry and know what to look for" and "because of their common cultural heritage, they work well together"?

   Although this regulation has a racial or ethnic disparate impact (those who are not from that particular Native American tribe are not likely to be hired), the use of consanguinity (hiring only relatives of employees) is neither a suspect classification nor a quasi-suspect one. Thus rational basis scrutiny would be used. The stated governmental interests are legitimate (working well together, local knowledge, knowledge of the industry) and the means to achieve those–hiring relatives–is rationally related to them. There is nothing to show intentional denial of equal protection here within the meaning of the Court's interpretation of the 14th Amendment. It does seem likely that relatively little additional evidence of racial or ethnic bias would be needed in the face of this policy, however, to support a claim.

13.5.3.3 Hypotheticals: Race-Based Classification

7. Can a city constitutionally adopt an ordinance requiring consideration of race for awarding government contracts given the following circumstances: The city is 60 percent African American, 30 percent white, and 10 percent Hispanic. Historically, 90 percent of city contracts have been awarded to whites.

   Unconstitutional under *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.,* 488 U.S.

469 (1989), and *Fisher II* (2016). The city would need to prove a compelling state interest and balancing racial disparities in the awarding of contracts is not a compelling interest. As the law stands, even if this were a program to remedy ongoing effects of past discrimination, that would probably not pass constitutional muster after *Fisher II* (2016) (though *Fisher II* is in the educational context rather than government contracting context and so the considerations may vary).

8. A state's flagship university seeks to increase the racial and ethnic diversity of its student body. Can it constitutionally adopt an admissions program under which race and ethnicity are explicitly taken into account in evaluating applications?

   It may be constitutional under *Fisher II* (2016) if race is only one factor and not a determinative one. However, the narrowness of the 4-3 *Fisher II* (2016) decision gives one pause–one may need the sort of history of other failed efforts that the University of Texas at Austin demonstrated. Also, the simple purpose of diversity for its own sake would not be constitutional under *Fisher II* (2016): The diversity must be for the educational benefit of all of the students. This rule as described above would probably not pass constitutional muster, though depending on how it is implemented and the complete history of it, it might.

9. A state's flagship university seeks to increase the racial and ethnic diversity of its student body. It adopts an admissions program under which geographic distribution and wealth are explicitly taken into account in evaluating applications. In the state the geographic and wealth distribution factors correlate at an 80 percent rate with race or ethnicity of underrepresented groups. Is such a program constitutional?

   Possibly constitutional, provided the whole program otherwise passes the requirements of *Fisher II* (2016). (See the answer to the previous hypothetical.) Assuming the diversity requirement is proper, i.e., not diversity for its own sake or a generalized

desire for diversity, then the race-conscious admissions program could be acceptable, especially since it is only tracking race and is race conscious rather than using race itself as the means to accomplish the diversity goal. In *Fisher II* the Court favors non-race-based means to achieve racial diversity; thus the use of geography instead of race would be a point in favor of the constitutionality of the program.

However, there is a lurking proxy problem here. That is, the classification is geography, not race, but geography seems to be being used as a stand-in or proxy for race. This would seem, under *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976), to be sufficient to show intentional discrimination on the basis of race. That is ok as long as the *Fisher II* (2016) test is met, but in such a case the school is not genuinely using something other than race as the classification; it is just using a proxy for race. This leads us to one of the problems with the means portion of *Fisher II*. *Fisher II* favors non-race-based systems to achieve the racial diversity sought, but if the non-race-based classification tracks closely enough with race to have an effect, it could be deemed a proxy for race and then need to be justified even more strongly than a program based on geography alone would need to be.

13.7.3 Hypotheticals: Gender-Based Classification

Assess the constitutionality under equal protection of the following hypothetical situations.

10. A school district provides separate sports teams for boys and for girls.

Gender-based classifications are measured under the intermediate standard of review under which the state/government (here–the school district) regulation must support an important or substantial governmental interest and the classification must be closely or substantially related to achieving that interest. The Court has also used the language that the gender classification must have an "exceedingly persuasive justification" to be constitutional. The government

has a substantial interest in providing educational and athletic opportunities to students, boys and girls and there are real differences that matter between the sexes with respect to size, speed, strength, and so on. In recognition of those real differences, separating boys and girls sports would be constitutional.

11. An engineering school provides five times as many scholarships for women only as are available on a non-gender-linked basis, and it provides no men-only scholarships. The purpose of the scholarships for women is to address ongoing disparities in enrollment. Four times as many men as women are enrolled in the engineering school.

Because affirmative action programs on the basis of gender are subject only to intermediate scrutiny, this program, unlike one that might be similar but done on the basis of race, is probably constitutional. Attracting more women into engineering would be an important interest, as is reducing gender disparities in education, employment, and training generally. Having gender-linked scholarships is closely related to accomplishing those important interests.

12. The federal government requires all employers to provide medical insurance that covers a broad range of contraceptive medical services to men and women, but it excludes abortion from the requirement.

Constitutional. Under the Commerce Clause the federal government has the power to require employers to provide health insurance. The government can specify what the insurance must cover. Even though only women can have abortions, the Court has ruled that excluding abortion coverage, though gender-linked, is not a violation of statutes prohibiting sex discrimination. It seems most unlikely that the Court would say that a government action requiring health insurance in general would need to require any particular coverage for a particular procedure.

13. The federal government requires all employers to provide medical insurance that provides a broad range of contraceptive medical services to men and women, but it allows any employer to opt out of providing contraceptive medical treatment to which the employer objects for religious reasons. Hobby Lobby objects to providing women employees' with insurance covering standard contraceptive devices the owners consider abortifacients, including in particular intrauterine devices. Does the exception for religious reasons violate equal protection?

No. The classification is made on the basis of religion. Classifications based on religion are generally subject to strict scrutiny. An exception is made when the purpose of the classification is to accommodate religious exercise, a right guaranteed under the First Amendment. One could think of this as considering that furthering freedom of religion is a compelling state interest and an opt-out provision from an otherwise generally applicable law is narrowly tailored to further that interest.

14. A school district provides single-sex education in middle school, grades six through eight. The school district based this model of education on research showing that (1) boys and girls learn differently and learn better from different teaching methods, in general; (2) boys and girls both learn better in single-sex settings between the ages of eleven and fifteen; and (3) fewer fights and less damage to school property occur in single-sex educational settings for boys between ten and fourteen and girls between ten and sixteen. Consider the equal protection issues.

Probably constitutional given the substantiality of the interest in education and that separated classes would, according the data in the hypothetical, further that interest. So classification on the basis of sex is closely related to the objective of effective education. Perhaps the generally discredited principle of separate-but-equal for racial classification works for gender-based discrimination in some settings. (Please note that the data in the hypothetical are also hypothetical.)

15. Same facts as in the previous hypothetical, with the following addition: (4) the evidence on each of the three items relied upon by the school district is contested, with some studies showing the opposite effects.

The result should be the same as in hypothetical fourteen for the same reasons plus the idea that even for intermediate scrutiny, the courts should defer to the judgments of the school districts when they are faced with conflicting data. Nonetheless, the amount of deference to give in such matters is not fully resolved.

13.8.3 Hypotheticals: Classification Based on Alienage

16. A state prohibits legal aliens from participating in an otherwise generally available statewide work training program designed to move citizens off welfare roles and to allow the underprivileged segment of the citizens of the state to advance.

Unconstitutional under the standard of review used for state regulation of legal aliens which is typically strict scrutiny. The interests of the state in helping its citizens get off welfare and advance economically is certainly legitimate and probably even important or substantial, but it does not seem to be compelling. States cannot so easily discriminate between citizens and legal non-citizen residents for ordinary economic programs such as this one. *Graham v. Richardson,* 403 U.S. 365 (1971).

17. The federal government has a work retraining program designed to help citizens who have been dislocated by rapid changes in the economy. It excludes legal aliens.

Possibly constitutional since the federal government has more latitude than states with respect to treatment of aliens. But probably this differentiation between citizens and legal resident aliens as to an ordinary economic program is not constitutional under the equal protection aspect of the Fifth Amendment guarantee of due process.

18. A federal program provides financial aid to local school districts on a per capita basis, but for purposes of the program it only counts citizens within the school districts.

The formula for granting aid probably is constitutional despite its differential impact on areas with large numbers of immigrants. It is just a school aid program tying the amount of funds to the number of citizens in a school district. The legal immigrants will benefit from the aid–because the aid goes to the school district directly and everyone in school there will benefit.

19. A state law requires that all employees of police departments, including those whose duties are merely janitorial and clerical, be citizens of the state.

Constitutional as to all employees directly involved with policing; probably not constitutional as to jobs that do not involve discretion and judgment and interaction with the public. *Ambach v. Norwick,* 441 U.S. 68 (1979).

13.9.5. Hypotheticals: Equal Protection and Personal Rights

20. A state has a six-week cutoff deadline to register to vote. Anyone who has not registered prior to six weeks before the deadline is not allowed to vote. To register to vote the state only requires that a citizen provide proof of residency in the form of a driver's license with an in-state address, a signed lease showing the address plus a sworn statement that the person lives there, or some other proof of residence plus a sworn statement that the person lives there. Are these requirements constitutional?

Constitutional. No one is being denied the right to vote on account of race so there is no 15th Amendment violation. Requiring proof of residency does not violate the right to vote. There is no invidious classification occurring. There is no evidence in the hypothetical of any intentional discrimination at

all other than the requirement that a person be a citizen in order to vote.

21. Assume the same facts as hypothetical 20, but add a six-month residency prior to registration. Is that constitutional?

Probably not constitutional because the burden on the right to travel is longer than would be necessary to insure that only citizens of the state vote. Limited durational requirements can be imposed to allow time to process voter registration for the purpose of avoiding fraud, but this one is probably too long.

22. Assume the same facts as in hypothetical 20, but now assume in addition that a town of one thousand residents requires people to have lived in the town for six months prior to registration. Assume that the state law permits towns, cities, counties, and other local governmental bodies (like school boards) to adopt their own voting requirements (that is, local actions are not preempted by the state law). Is the town's residency requirement constitutional?

Six months is probably too long, especially given the size of the town. Small towns are subject to the same constitutional constraints respecting the right to travel and equal protection durational requirements as is the state.

23. The state of Highedu is renowned for its excellent colleges and universities. Tuition is $1,000 for anyone who graduates from a state public high school. Full tuition for those coming from in-state private high schools costs $30,000. Does the state's assessment of different amounts of tuition violate equal protection?

Probably constitutional under the rational basis standard.

24. Assume the same facts as in hypothetical 23, and also assume that students coming from out of state pay the higher tuition.

It is constitutional the rational basis standard and under *Vlandis v. Kline,* 412 U.S. 441 (1973). See discussion of the right to travel in Ch. 16.

Chapter 14 Procedural Due Process

Answers to Hypotheticals

14.4 Hypotheticals: Procedural Due Process

1. A student was caught painting graffiti on the school walls. He was immediately suspended for ten days. What sort of procedural due process is he entitled to, if any?

The student is entitled to an immediate, informal, oral hearing with the principal or designated school official or some other hearing probably before the suspension takes place. If suspended without a hearing, one needs to be provided as soon as possible.

2. A social security administrator has determined that a person living on social security retirement benefits as her sole income may in fact not be eligible for the benefits. Is the recipient entitled to a pretermination notice and hearing?

Unlikely. The social security benefits could be treated like subsistence welfare benefits in which case a pretermination hearing would be required. But more likely the Court would decide that since so many social security recipients also have other sources of income, a post-termination hearing is sufficient.

3. A company providing janitorial services to city hall on an annually renewable contract has just been told the contract will not be renewed. The company demands notice of the reasons for the

nonrenewal and a hearing on the nonrenewal. Need the city provide reasons and hold a hearing as a matter of constitutional due process?

No. It is a simple nonrenewal of a contract for which the city does not need to provide a justification.

Chapter 15 Economic Rights

Answers to Hypotheticals

15.2.2 Hypotheticals: Contact Clause

1. Bob and Joan entered into a contract for Joan to sell Bob widgets. After performance of the contract, the state made widgets illegal to own, sell, or possess. Bob sues the state alleging a violation of the Contract Clause. Assuming no procedural infirmities, what result?

   There is no violation of the Contract Clause because the law is not impairing any existing contract rights.

2. Bob and Joan entered into a contract for Joan to sell Bob widgets. Before Bob has paid any funds or Joan has delivered the widgets or made them for delivery, the state enacted a law making it illegal to own, sell, or possess widgets. What is the status of the contract between Bob and Joan?

   There is no violation of the Contract Clause because as of the time of the change of law the contract was still fully executory and thus no existing obligations were impaired.

3. Amazing Health Insurance Company insures many businesses that provide health insurance coverage to their employees as an employee benefit. The state issues a new regulation requiring all

health insurance contracts to provide coverage for a particular medical procedure that Amazing Health Insurance Company had previously not covered. Can the state constitutionally require that all existing contracts are subject to the requirements of the new law immediately?

The substance of the regulation does not violate the Contract Clause, but the timing may be problematic. Because the change takes effect immediately, it may affect vested rights and so may constitute a Contract Clause or due process violation. More facts would need to be known.

4. Same facts as in hypothetical 3, but now the regulation takes effect at the time of annual contract renewal or open enrollment period. Would this revised law violate the Contract Clause?

There is no violation. Contracts are deemed to be subject to changes in the law over time with respect to executory contracts and non-vested rights.

15.3.5 Hypotheticals: Taking

5. State is building a new highway around the city and needs all of Farmer's farm for a complex intersection with multiple freeway entrances and exits, etc. The fair market value of the farm is well known and the state agrees to pay that amount. The farmer thinks the farm is worth more: His family has been on the farm for almost 160 years. Would an eminent domain process that resulted in payment of the fair market value be constitutional?

Yes. The emotional value is not considered in takings cases. This taking is for a public purpose, it is a physical taking of all of the real property, and just compensation is being made. This is the typical case of a taking for a public purpose with just compensation. It is constitutional.

6. State is building a power line and to do so it needs to obtain a right-of-way across rural farms and forests. Farmer does not want a power line across her property because it will disrupt fields and make planting, harvesting, and application of fertilizer and other chemicals more time consuming and difficult. Can she prevent the state from obtaining a right of way for the power line upon payment of just compensation?

   This partial physical taking is for a public purpose and the only issue will be the amount of fair compensation for the value of the right of way, which is not affected by the increased difficulty the farmer will have farming. Under the facts as stated nothing indicates that this partial taking has rendered operating the farm uneconomical.

7. State passes a regulation under which all buildings designated historic places cannot be renovated, modified, or torn down without permission of the State Architectural Board. Riverside Hotel was designated an historic building, but it wants to remodel to modern standards and does not want to negotiate with the State Architectural Board as to what will be allowed. Can the state force Riverside Hotel to comply with the law?

   Yes. Historic building regulations such as this have been upheld against takings challenges provided the property retains economic viability.

15.4.2 Hypothetical: Economic Substantive Due Process

8. Yused Car Dealer had a practice of misrepresenting the mileage of cars it sold and whether they had been in accidents previously. When Jan discovered that his used car from Yused had 125,000 miles on it, not just 35,000 miles, and that it had been in an accident that required replacing the entire front-end, he sued for misrepresentation. The jury awarded him $10,000 in compensatory damages and $800,000 in punitive damages. Yused Car's misrepresentations would subject it to a $2,000 fine per

incident. The misrepresentations were intentional. Yused had been fined once or twice annually for the past three years for such misrepresentations. Are the punitive damages constitutionally excessive so as to violate economic due process?

Whether the punitive damages are excessive is determined under all the circumstances. Not enough detail is really known to make that determination here, although the ongoing pattern of misconduct seems likely to make this award supportable.

Ch. 16 Substantive Due Process, Unenumerated Rights, and Incorporation

Answers to Hypotheticals

16.2.2 Hypotheticals for the Right to Bear Arms

Which of the following restrictions are constitutional:

1. Prohibiting convicted felons from owning firearms.

   A federal statute, 18 U.S.C. § 922(g)(9), allows states to prohibit felons and people convicted of a "misdemeanor crime of domestic assault" from owning or possessing firearms. The state of Maine has a law preventing those convicted of "reckless domestic assault" from owning a firearm. In *Voisine v. United States,* 579 U.S. --- (2016), the Court upheld the Maine law and the federal law seemingly (but not explicitly) ruling that the statutes would pass muster under the Second Amendment. See majority opinion footnote 6 and dissenting opinion part III.

2. Prohibiting mentally ill people from owning firearms.

   Both *Heller* (2008) and *McDonald* (2010) in dicta opine that this restriction would be constitutional and the Court's approach in *Voisine v. United States* (2016) seems to signal that this sort of restriction is constitutional. The Court has not articulated a standard of review for Second Amendment challenges, but it seems to be headed toward a non-deferential rational basis or some sort of balancing test. In any event it seems the dicta of

Heller and *McDonald* as to allowable sorts of restrictions will be given force by the courts.

3. Registering all firearms to their owners.

It seems very likely that such a regulation would be upheld insofar as it does not affect the actual right to bear arms. But we don't really know since we have not been provided with a standard of review and the Supreme Court has not yet ruled on the issue. It would seem not to be an undue burden on the right, given the dangerousness of guns and state interests in safety.

4. Requiring people to have a license to own firearms.

It seems very likely that such a regulation would be upheld insofar as it does not affect the actual right to bear arms. But we don't really know since we have not been provided with a standard of review and the Supreme Court has not yet ruled on the issue. It would seem not to be an undue burden on the right, given the dangerousness of guns and state interests in safety.

5. Requiring all firearm owners to take and pass a gun safety course including a practical training course and a written exam;

It seems very likely that such a regulation would be upheld insofar as it seems reasonable to require training and certification for people to own weapons because of the danger they can present to others from their misuse or lack of understanding of their use. Once again we do not have a Supreme Court decision on this nor do we have a clear statement of the standard of review to apply. Such a requirement would seem to pass even strict scrutiny given the compelling interest in public safety and that training gun owners in the proper and safe use of weapons would seem to be narrowly tailored to accomplishing that end.

6. Prohibiting the carrying of guns in certain places such as places of public accommodation, schools, government offices, and churches unless the guns are in closed cases, or are disassembled, or are trigger-locked;

   It seems that this restriction would be constitutional, but we do not know how much the right of self defense follows a person around in public as opposed to being restricted to one's home. Under a rational basis test, this would clearly be constitutional. Under an undue burden, balancing test, it would also pass muster. Under strict scrutiny the issue is a closer one.

7. Prohibiting possession of a loaded firearm in one's car or truck.

   It seems that this restriction would be unconstitutional, given the self-defense rationale for the right as stated by the Court in *Heller* and *McDonald*. The car or truck would be in this instance an extension of one's personal space, like one's home. Indeed, the need for defense might be greater on the move than in one's home. This is distinguishable from carrying arms in public places where other interests beyond self defense come to the fore.

8. Prohibiting possession of a loaded firearm in one's home if it is not a single-family residence.

   It seems that this restriction would be unconstitutional under the logic of *Heller* and *McDonald*, even though the danger to others in the apartment building change the calculus somewhat.

16.5.4 Hypotheticals: Abortion Restrictions

Which of the following restrictions would be constitutional? What additional information would you need in order to decide the issues?

9. Abortions must be performed at medical facilities that meet emergency room standards with respect to equipment, staff, and physical design including entryway and hallway size.

Texas enacted a statute (1) that required abortion clinics to have on staff physicians with admitting privileges at nearby hospitals and (2) that required abortion clinics to meet ambulatory surgical facilities standards. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. --- (2016), the Court held Texas abortion restrictions unconstitutional based on the evidence that the restrictions in effect created a substantial obstacle to women seeking to exercise their constitutional rights. The state had no evidence supporting the necessity or even value of such restrictions. Inability to comply with the requirements resulted in closure of many facilities, thereby creating a substantial obstacle to exercising the constitutional right.

The same would be true for this regulation. State cannot show the necessity of such a regulation for protecting the health of the woman. Thus this regulation would be an unnecessary regulation creating an unconstitutional burden on the exercise of the right by creating a substantial obstacle to obtaining an abortion.

10. Before an abortion is performed the abortion provider must conduct an ultrasound examination using a vaginally inserted ultrasound transducer because it has greater resolution than an abdominal one. Failure to perform this ultrasound examination is a felony.

This is an unconstitutional invasion of privacy without any medical justification whatsoever–as lower courts have held.

11. Abortions can be performed later than 20 weeks after conception only to save the life of the pregnant woman or to protect the health of the pregnant woman.

The constitutional division for the degree of regulation allowed is at viability. After *Whole Woman's Health v. Hellerstedt*, 579

U.S. --- (2016), the Court has made clear that some issues are not matters for essentially unreviewable legislative discretion, but must rather be based on medical and scientific evidence. Viability is a medical issue, not one for legislative determination. Viability is generally considered to happen a number of weeks later than 20 weeks. This seems likely to be unconstitutional.

12. All minors must have parental consent to obtain an abortion, or if there is no surviving parent, consent of the minor's legal guardian.

Under *Casey* (1992), this regulation is unconstitutional *as written* because it lacks a means for the minor girl to seek permission from a judge rather than her parent or guardian in certain circumstances.

13. All abortions must be reported to the state physician licensing authority.

This is an ordinary medical reporting requirement of the same sort required for many medical procedures and is constitutional.

14. All people seeking an abortion must wait 24 hours after the first visit with a physician to obtain the abortion.

This waiting period has been upheld as constitutional. It imposes a burden on those seeking an abortion, but not a substantial obstacle to obtaining one. The state need not be neutral with respect to abortions and can provide information and waiting periods to try to persuade women not to get an abortion.

15. All people seeking an abortion must watch a state-prepared anti-abortion informative video before seeing a physician.

The state can take a position on abortions and advocate against them, including making certain that those seeking the abortion do so fully informed. This may be constitutional, but the timing requirement that the video be seen before seeing a physician as

opposed to sometime before having the abortion may not be constitutional insofar as it interferes unduly with the physician-patient relationship.

16.5.11 Hypotheticals: Autonomy and Intimacy Aspects of Privacy

Which of the following are constitutional?

16. A state bans marriage between more than two adults.

Probably constitutional. Marriage between two people is a fundamental right and denying the exercise of that right on the basis of the gender of the two people violates equal protection and the substantive due process right to marry. *Obergefell v. Hodges*, 576 U.S. ___ (2015). However, the Court did not provide a definitive standard of review to be applied for such issues. Under non-deferential rational basis review the state would need to have a rationale other than history, tradition, and moral teachings of the dominant religion to support distinguishing between two-person marriages and multiple-person marriages. It seems that concerns relating to taxation, inheritance, and legal relationships generally could well be sufficient to support the distinction, but the matter is not free from doubt.

17. A state criminalizes bestiality.

Constitutional. Health justifications suffice.

18. A state prohibits marriage until the age of majority is reached.

Probably constitutional, but there may be a constitutional requirement that there be a path to allow someone to get married before turning 18 such as parental consent after age 14 or 16 or such. The state can treat minors and adults differently.

19. A state prohibits people of the opposite sex who are not married to each other from living in the same residential apartment or house.

Unconstitutional. After *Lawrence* (2003) and *Obergefel* (2015), the state has no legitimate interest in regulating such choices by individuals as to living arrangements. The state could probably permit single-sex housing to be provided by private parties and could probably even provide it itself (e.g., dorms and student housing generally), but could not reach individual choices in the matter.

20. A state criminalizes fornication.

Unconstitutional after *Lawrence* (2003) and *Eisenstadt* (1972). See *Martin v. Ziherl,* 607 S.E.2d 367 (Va. 2005) (holding Virginia's fornication criminal statute unconstitutional after *Lawrence* (2003)).

21. A state criminalizes adultery.

Probably unconstitutional after *Lawrence* (2003), but since the state has significant interests in the marriage relationship, *see Michael H. v. Gerald D.*, 491 U.S. 110 (1989), it is a closer question.

22. A state conditions the ability to obtain a divorce on proof of adultery or physical or psychological violence by one person toward the other.

Probably unconstitutional–forcing people to stay in a relationship against their will seems a significant infringement on personal choice and autonomy. As of 2010 all states permit some form of no-fault divorce so the issue is not likely to arise. However, some issues concerning procedural requirements and substantive impacts of no-fault divorce may ultimately be constitutionally challenged.

23. A state prohibits the payment of spousal support after divorce to someone who committed adultery.

This restriction, tying economic support to marital misconduct, may be unconstitutional as an improper burden on the exercise of personal choice and autonomy. On the other hand, the state has a legitimate interest in discouraging divorce and supporting marriage and this sort of sanction for adultery may be constitutional.

16.6.3 Hypotheticals: Private Information

24. A state sells information from its Department of Motor Vehicles records including each person's name, date of birth, address, phone, type of driver's license or identification card, and vehicles owned. In the absence of a statute or regulation regarding this practice, is there a constitutional violation?

Possibly, but the Court has not yet extended constitutional protection of private information this far. Indeed, the Court has only assumed that some sort of constitutional to private information exists; it has not so held explicitly.

25. Assume the federal government requires everyone to have a medical identification card which has the person's entire medical history on it and requires this card to be used whenever medical treatment is received or medical drugs or devices are acquired. Is such a requirement a violation of substantive due process right of privacy and/or liberty?

Probably not. If there are adequate safeguards on the control of and dissemination of the information, such a requirement is likely to be constitutional. *See Whalen v. Roe*, 429 U.S. 589 (1977).

26. Assume the same facts as in the preceding hypo. Now assume the information is aggregated and scrubbed of personal identifiers and distributed to bona fide medical researchers, public health

officials, and front line medical providers. Is this use of the information by the government a violation of a constitutional right of privacy and/or liberty?

The public health interest of the government is probably sufficient to justify this.

27. Pennsylvania prohibited doctors from telling patients that they have chemicals from fracking in their blood. *See* Kate Shepard, *For Pennsylvania's Doctors, a Gag Order on Fracking Chemicals,* The Atlantic, (March 27, 2012) http://www.theatlantic.com/health/archive/2012/03/for-pennsylvanias-doctors-a-gag-order-on-fracking-chemicals/255030/. In addition, as part of settlements reached with complaining families, the children are not allowed to discuss their health problems or the relationship of them to the fracking chemicals. *See* Beth Greenfield, *Children Given Gag Order In Pennsylvania Fracking Suit Settlement* (Aug. 6, 2013), Yahoo! Shine, http://shine.yahoo.com/parenting/children-given-gag-order-in-pennsylvania-fracking-suit-settlement-194638861.html

a. Consider whether the Pennsylvania law, if interpreted and applied as explained in the article in *The Atlantic* (and it may not be applied that way) would violate anyone's substantive due process right of privacy or other liberty interest.

It would seem that people would have the right to know what they have been poisoned with and that a law to the contrary is unconstitutional. It also interferes with the physician-patient relationship.

b. Consider whether the settlement, agreed to by the parents of the children, might violate the child's substantive due process right of privacy or other liberty interest.

It should be held to violate the child's separate interest because of the potential health effects, at least with respect to disclosure to physicians.

16.8.4 Hypotheticals: Durational Residency Requirements

28. A state requires six months of continuous residence before an individual can obtain a driver's license.

This durational requirement does not implicate a necessity like medical care or food. Nor does it implicate a constitutional right like the right to vote. It does implicate the right to travel or to relocate to another state. This would place it with the diverse cases regulating access to courts for divorce and access to in-state tuition at public universities. Reasoning by analogy to those cases with respect to the importance of the right or benefit (the ability to drive legally) to the person and with respect to the state's interest still leave the matter indeterminate. A state could argue that a person should be familiar with the area before being allowed to drive. But this putative interest would be knocked out by equal protection– neither in-state residents who relocate within the state nor visitors to the state would need to meet this requirement and therefore it seems not rational. Ultimately, the combination of burden on travel, the importance of a drivers license to many people today for work and general living, and the equal protection aspects argue against this being constitutional.

29. A state prohibits anyone from who moves to the state and attends a state institution of higher learning from becoming a citizen of the state until six months after the person stops attending the state college, university, or other post-secondary state-run educational institution.

This is likely to be unconstitutional as a burden on interstate relocation. If the person intends to stay in the state, the restriction of years of school plus six months seems excessive for the benefits that attach to state citizenship. But the Court has allowed similar restrictions as evidentiary requirements for showing intent to become a citizen of the state, so the matter is not free from doubt.

30. A state requires a person to live in the state for one year continuously in a setting other than with a relative to qualify for in-state tuition.

    This is probably constitutional for the reasons given in *Vlandis v. Kline,* 412 U. S. 441 (1973):

    > [We] fully recognize that a State has a legitimate interest in protecting and preserving ... the right of its own *bona fide* residents to attend [its colleges and universities] on a preferential tuition basis. ... [This legitimate interest permits a State to] establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, *bona fide* residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Chapter 17 Freedom of Expression

Answers to Hypotheticals

7.3.3 Hypotheticals: Content-Based and Time, Place, and Manner Regulation

Which of the following are content-based regulations and which are time, place, and manner regulations?

1. A city bans all speech in a meditation park.

   Clear violation insofar as it is not a reasonable time, place, and manner regulation. It is not "narrowly tailored."

2. A city prohibits all speech about abortion at public meetings.

   Clear violation insofar as it is a content-based restriction on speech on a matter of public interest at a public meeting, and the government will not be able to show a compelling state interest in doing so.

3. A city prohibits at city council meetings all speech favoring a woman's right to choose to get an abortion, but allows speech in favor of banning abortion.

Clear violation of the First Amendment as a viewpoint regulation.

4. A state law prohibits public nudity.

Conduct can be regulated under rational basis standard. The question would become one of expressive conduct if someone were making a public statement by being nude.

5. A state law prohibits public nudity unless it is part of a professional theatrical production.

Conduct can be regulated under rational basis standard. This distinction seems rational and even protective of freedom of expression.

6. A city requires organizations wanting to hold parades on city streets to get a permit from the city sixty days before the parade.

Imposing a wait period to get a permit will be assessed under the licensing/permitting standards. If the time is reasonable for the permitting agency to do its review and get the needed support in place, sixty days will be considered reasonable. In some instances it would probably be too long.

7. A city prohibits parades for any purpose other than those supporting patriotism and community spirit.

Content and viewpoint discrimination is clearly not allowed.

17.3.4.1 Hypotheticals: Facial or As-Applied Regulation

Which of the following are as-applied problems and which present constitutional problems on the face of the law?

8. The state law prohibits all speech designed to cause racial hatred.

Hate speech under U.S. law is protected speech. This would be facially invalid as overly broad.

9. A state prohibits speech that is likely to cause a breach of the peace.

This could fail for vagueness unless it has been construed to more narrowly define "breach of the peace."

10. When speaking to a Muslim congregation, the speaker accuses all Muslims of being radical terrorists bent on destroying all other religions. The speaker is arrested and charged with violating a law banning hate speech.

The hate speech is protected speech, so the law is facially insufficient. This could constitute fighting words given the context, but that was not the reason for the arrest.

11. Same facts as in 10, but now the speaker is arrested under the law prohibiting a breach of the peace which, with respect to speech, has been interpreted to mean speech reasonably calculated to incite others to commit violent acts. (You should assume for now that such an interpretation would make the law constitutional.)

This is probably ok. The speaker could incite retaliation against himself or incite illegal actions against others from such a speech. Fighting words and inciting to violence are hard to prove factually, however.

17.3.5.3 Hypotheticals: Content, Conduct, or Expressive Conduct

Consider which of the following situations involve content regulation and which involve conduct regulation.

12. The state law prohibits jay walking.

Pure conduct.

13. A city ordinance prohibits public nudity.

Pure conduct.

14. A city ordinance prohibits dancing.

Expressive conduct. Pretty much by definition dancing expresses something.

15. A city ordinance prohibits dancing except when done for religious purposes.

Content-based regulation subject to strict scrutiny.

16. A city ordinance imposes a dress code for anyone entering the courts and for all official public buildings, including city hall.

Conduct.

17.3.7.3 Hypotheticals: Vagueness and Overbreadth

Are the following laws or regulations unconstitutionally overly broad, unconstitutionally vague, both, or neither?

17. Loud music in residential neighbors is prohibited after 10:00 p.m.

This would be a proper time, place, and manner regulation, except that it is vague: What is "loud"?

18. Any person maintaining a public nuisance can be required to abate it by officials of the jurisdiction in which the public nuisance exists.

This regulation is proper. Nuisance law is well enough developed in the common law to prevent it from being overly broad or vague. It could be abused, in which case the action would be one for "as applied."

19. Under the city's civility policy, all offensive speech is banned.

Unconstitutionally vague and overly broad.

20. The city council adopted an ordinance requiring all sexually explicit material to be removed from the public library.

Vague and overly broad.

21. The city council adopted an ordinance requiring all computers provided for public use in the public libraries with access to the Internet to have filters preventing access to online pornography.

Reasonable time, place, and manner regulation. Also reasonable regulation under designated public forum doctrine.

22. Assume the same situation as 21, but now the ordinance includes a detailed definition of pornography.

Constitutional if the definition otherwise meets the *Miller* test.

17.4.1.5 Hypotheticals: Incitement to Illegal Activity, Fighting Words, True Threats, Hate Speech, and Offensive Speech

Which if any of the five categories—incitement to illegal activity, fighting words, true threats, hate speech, and offensive speech—are reflected in the following situations?

23. A speaker at a populist rally advocates a march on the National Bank of Wealth offices on Wall Street.

Mere advocacy cannot be sanctioned. If there is a clear and present danger of the illegal action taking place imminently, then the speaker could be sanctioned if the march entailed illegal activity. But this scenario presents no indication that such illegal activity is contemplated.

24. Marti Jones, a speaker at a radical socialist rally, advocates looting the National Bank of Wealth in order to redistribute the wealth.

Mere advocacy cannot be regulated. If circumstances warrant, such that the looting is imminent, then it could be sanctioned.

25. Marti Jones whips up the people at the rally into an aggressive emotional state such that they are about to immediately go loot the National Bank of Wealth.

This is on the other side of the line and would be sanctionable.

26. When confronted by a police officer telling her to tone it down, Marti Jones starts yelling obscenities at the officer, saying insulting things about the officer's parents and religion and using various unflattering words as name-calling. In response the officer arrests her.

Possibly fighting words, although society tries to hold police to a higher standard.

27. A heckler in the crowd began calling Marti Jones names and lampooning her political anarchic statements, disrupting the speech. Marti Jones got angry and threatened the heckler saying, "If you had any guts you'd come up here and show yourself, and I'd teach you a thing or two."

    The question would be whether this is a true threat. Nothing indicates the heckler is actually in fear or has any reason to be and so it is not in the true threat unprotected speech category.

28. Marti Jones concluded her speech with a diatribe against all capitalists, trying to incite the crowd to hatred of capitalists.

    Inciting to hatred is protected speech.

17.4.2.4 Hypotheticals: Defamation and Related Torts

Faux News reported that Jim Bowie, a male candidate for governor of Pennajer, was known to have engaged in homosexual relations while Bowie was married to Kayla Roe. Under which of the following circumstances, if any, would Jim Bowie have a well-founded claim for defamation?

29. The story was true, but Faux News had not checked any facts supporting the assertion.

    No claim.

30. The story was false and Faux News was simply reporting a rumor started by Bowie's opponent in the governor's race.

    Probably no claim since the point of the story was the source of the (false) rumor.

31. The story was false, but prior to reporting it Faux News had asked Bowie to confirm it. Bowie denied it, but the Faux News reporter subjectively but genuinely thought Bowie was lying.

    Probably not malice, but close call. May be just for a jury to decide.

32. The story was false, but Bowie had been a long-standing supporter of gay rights and was regularly seen eating lunch and attending sporting events with a friend, Sam Wise, who was gay.

Flimsy factual support such as this is probably good enough to avoid liability.

33. Same as in 32, but add that Faux News had a picture of the two men hugging when they greeted each other.

Stronger case for the reporter.

34. Same basic facts as 32 and 33, but a Faux News editor, George Jett, had known Bowie since high school and knew he was heterosexual and knew that Sam Wise was just Bowie's platonic friend. Jett knew this because he was Wise's lover.

Likely to meet the "actual malice" standard and the news station will be held liable.

Which of following laws would be constitutional? In answering the question identify which tort or torts may be implicated and the interest or interests the government is seeking to protect by the law.

35. A state passes a law that prohibits demonstrations within three hundred yards and within thirty minutes of the start and end of certain listed ceremonies, including in particular weddings and funerals.

This would seem to be a constitutional time, place, and manner regulation. It is not focused on the content of the speech, and its purpose is to protect privacy of people and groups with respect to certain important ceremonies.

36. A state law makes it illegal to disrupt certain public ceremonies, including weddings and funerals.

This law focuses more broadly on conduct by banning actions that result in disruption. There could be vagueness and overbreadth problems. It is hard to tell without more detail. It might pass muster on a facial attack, but surely, under some facts, could be subject to an as-applied attack.

37. Fred went to the funeral of an abortion doctor who had been murdered by anti-abortion activists and disrupted the eulogy with shouts about how the murder of the doctor was "God's just retribution" and a "courageous moral act" and how all who

supported the deceased and abortion were damned to hell. The surviving spouse of the doctor suffered a stroke when she got up to confront Fred. Upon her recovery, she sued him for intentional infliction of emotional distress.

Assuming the elements of the tort are met, it would seem to be a proper limit on speech under all the circumstances.

17.4.3.8 Hypotheticals: Obscenity, Pornography, and Protection of Minors

38. Korner Porner, a small store that sells pornographic works, was prosecuted for renting out obscene material in violation of the Cleenton city ordinance. The city ordinance provided that selling or leasing any pictures or videos or films that explicitly show sexual intercourse and that involve any bondage or infliction of pain was prohibited. At trial the defense produced evidence that the local hotel not only carried HBO, but also carried a library of pay-per-view films that showed explicit sex, some of which included bondage and infliction of some pain (or at least simulated pain). The evidence showed that some of the hotel guests were local residents and that the hotel, Staythenite, sold much more pay-per-view hours than Korner Porner ever rented. What result?

Assuming the statute is sufficiently explicit in its description of what is banned, there will be a problem establishing community standards were violated. It might be a jury issue, but it might be a matter for summary judgment. In general, these sorts of restrictions, while constitutional, are very difficult to enforce in particular cases.

39. Cleenton also has an ordinance that prohibits all nude dancing. Another section of the ordinance prohibits lewd dancing. Another section of the ordinance prohibits sexually provocative dancing intended to arouse customers. Consider the constitutionality of these provisions.

The problem becomes one of expressive conduct (dancing expresses the message that the body is beautiful and that erotic emotions are proper). The cases are hard to parse to get rules that lead to predictable results. This would fall into the

secondary effects category of analysis. These ordinances outright banning such dancing would probably fail under the narrowly tailored aspect of the test. Furthermore, since they are complete bans, they seem to be concerned more about the content than about regulating conduct to protect minors.

40. Assume Congress passes a law providing that all video games must be licensed to be sold and that to get the license the games had be rated. The rating system was designed to inform customers as to the amount and graphic nature of the violence depicted in the video games. Consider the constitutionality of this law.

Licensing might be ok as part of a scheme to regulate the industry, but a rating system seems to be likely to run afoul of the problem of prior restraint.

41. Assume Congress passes a law that is the same as in the previous hypothetical, but applies it to Internet games. Consider the constitutionality of this law.

Same analysis as in in the preceding hypothetical, almost. But perhaps if the vagueness and overbreadth can be overcome, the difference in media and accessibility by minors will make a difference.

17.4.4.4 Hypotheticals: Commercial Speech

Determine for each of the following whether it accords with current understanding of the nature and regulation of commercial speech.

42. A state law bans all false and misleading advertising of goods and services.

Perfectly acceptable.

43. A state bar association, the regulatory body of the state for attorneys, prohibits attorneys from advertising the following matters:

   a. Areas of expertise

   b. Win/loss record in court

   c. Size of settlements and verdicts obtained

d. Names of particular clients

e. How much the attorney charges for services

f. Negative advertising

g. Advertising concerning any ongoing lawsuit

h. Advertising intending to solicit clients for suits against doctors for personal injury, suits involving medical devices, or suits involving defective or dangerous products.

Come back to address these after your professional responsibility course. It is difficult to find state interests that would permit all of these restrictions. Attorney statements that tend to "guarantee results," such as past performance, can be problematic and are more likely to survive scrutiny under the commercial speech standard and therefore prohibitions1, 4, 5, and 7 seem unlikely to pass constitutional muster.

17.5.1.3 Hypotheticals: Prior Restraint

44. Which of the following are constitutional?

a. A city law requires everyone who wants to hold a parade to get a permit at least sixty days in advance and to post a bond to cover security and cleanup costs. Constitutional?

If the sixty-day period is not too long, this is probably constitutional, provided some exception is made for those who cannot afford to post the bond.

b. A city law grants discretion in the official in charge of granting permits for use of the city park for speeches, rallies, and concerts to refuse to grant a permit "whenever in the official's sound judgment the event would be divisive to the community." Constitutional?

Too much discretion in the issuing authority makes it unconstitutional.

45. An employee of the NSA illegally took many documents showing that the NSA was spying on U.S. citizens within the United States. The government sues to prevent him from disclosing the information, claiming disclosure will compromise (a) ongoing

investigations of terrorists, and (b) the methods and procedures use by the NSA to gather information on terrorists and their plans. Constitutional?

The compelling interests would seem to support the lawsuit even under the strictest of the strict scrutiny because disclosure could cause imminent harm to others.

17.5.2.2 Hypotheticals: Campaign Financing

Which of the following laws are constitutional?

46. A law limits the total amount that a candidate can spend to try to get elected to public office.

Unconstitutional.

47. A law limits the total amount that can be spent by or on behalf of a candidate for public office. Constitutional?

Unconstitutional.

48. A law requires candidates to disclose the sources of their funds. Constitutional?

Probably constitutional.

49. A law requires everyone, including all sorts of for profit and not-for-profit businesses and organizations, to disclose all funds spent for or on behalf of or contributed to candidates. Constitutional?

Such disclosure requirements are probably constitutional as done in service of ferreting out quid pro quo fraud.

50. A law requires everyone, including all sorts of for profit and not-for-profit businesses and organizations, to disclose all donors of funds spent by the organization for or on behalf of or contributed to candidates. Constitutional?

Such disclosure requirements are probably constitutional as done in service of ferreting out quid pro quo fraud.

17.5.3.2 Hypotheticals: Speech by the Government and Governmental Employees

Which of the following speech by the government would likely be constitutional?

51. The government spends $10 million on a public service advertising campaign against abortion. Constitutional?

Constitutional. The government can take sides on matters of public health and public concern.

52. The state government spends $10 million to attract tourists to the state. Constitutional?

Constitutional.

53. The city government refuses to allow a private organization to erect a permanent monument in the city park honoring homosexual scientists and their contributions to society. Constitutional?

The government cannot be compelled to speak, which is what erection of a permanent monument does.

54. The city government allows President Roosevelt's Four Freedoms speech to be chiseled in stone and erected in the city park. Constitutional?

Constitutional.

55. The city requires all employees to spend one hour each day walking the streets and parks distributing informational brochures against taking action to mitigate global climate change. Constitutional?

Most likely this is constitutional. The government is speaking through its employees. While the employees can dissent, the government can require them to officially support the government's position while on the job.

56. The school board fired a teacher because she spoke publicly to the press against the latest reforms of instructional methods required to be used by all teachers. Constitutional?

Probably cannot do this constitutionally.

Chapter 18 Freedom of the Press

Answers to Hypotheticals

18.5 Hypotheticals: Freedom of the Press

1. The state of Inimical imposes a general corporate tax of 10 percent on all businesses in the state.

   A general business tax that does not single out the press is constitutional.

2. The state of Inimical imposes a general corporate tax of 10 percent on all businesses except publishers, on which it imposes a tax of 25 percent.

   A tax that treats the press significantly differently from other businesses is presumptively unconstitutional. If the state cannot show a compelling reason for the different treatment, it will be found unconstitutional.

3. The defendant has subpoenaed a reporter's records and has subpoenaed her to testify at the defendant's trial. The reporter refuses to testify and refuses to turn over the records. The court holds her in contempt of court and jails her. She claims this action is unconstitutional.

   A reporter's privilege does not exist under the Constitution.

4. A notorious crime has been committed, and the courtroom will not be large enough to accommodate all the spectators. A consortium of reporters from TV, radio, the Internet, and print apply for special passes to be assured of access to the courtroom. Should this be granted?

   The press does not have special status for access to government proceedings or records or information generally.

Chapter 19 Freedom of Association

Answers to Hypotheticals

19.7 Hypotheticals: Freedom of Association

1. The Olde Countrye Sporting Club provides a golf course, tennis courts, trap and skeet shooting ranges, a swimming pool, party facilities, and dining facilities exclusively to its members and a limited number of guests each year, provided the guests are invited and accompanied by a member. Members are chosen by invitation only; no one can apply to be a member. Is the Olde Countrye Sporting Club subject to nondiscrimination provisions of the state law regulating places of public accommodation?

   The answer depends on the definition of "public accommodation" in the statute. Public accommodation laws are generally not written so broadly as to reach such purely private clubs, although some are. Under many statutes Olde Countrye Sporting Club would still be considered a private club. Even if the statute included the club as a place of public accommodation, it seems likely that both types of freedom of association—expressive association and relationship affiliational association—would limit the impact of such a law on this essentially private club.

2. The city of Civipri built and owns a civic center/sports arena/live theater complex that it makes available for sporting events, live theater, film series, and speakers. The use of the facilities is limited (1) to residents of Civipri; (2) to those sponsored by residents of or business located in Civipri; and (3) to nongovernmental nonprofit organizations located in the city of Civipri. It is not open to religious organizations of any kind, nor are religious services or speeches allowed. The Go Forth Evangelical Church applied to use the theater for a revival meeting, but the city refused, citing its policy against religious use. Does the Go Forth Evangelical Church have a viable freedom of association claim? Does it have any other viable constitutional claims?

   Under the designated forum doctrine the city of Civipri seems to be limiting use of its facilities to three classes of persons. But, by opening it up to nonprofit organizations while excluding

churches, the city is engaging in content-based discrimination against religion and so is likely not acting constitutionally. Establishment of religion problems may also be involved.

Chapter 20 Freedom of Religion

Answers to Hypotheticals

20.2.6 Hypotheticals: Free Exercise and RFRA

1. Assume Congress enacts a law prohibiting discrimination in employment, education, and places of public accommodation on the basis of sexual orientation and sexual identity. The law provides no exemptions for religious organizations or others who object to employing, serving, or admitting as students LGBT people. Is the law constitutional?

   Constitutional under *Smith* as neutral and generally applicable. Suspect under RFRA. Does the requirement that one associate with homosexuals, bisexuals, or transgendered people "substantially burden" one's exercise of one's religion? How far does the logic of Hobby Lobby's ruling on complicity with evil extend? Does the state have a compelling interest in stopping this sort of discrimination? Is the means chosen the least restrictive intrusion on free exercise?

2. Assume the same facts as in the previous hypothetical. Would a private restaurant owned and operated by a heterosexual couple that refused to hire a transgender person as a waiter on the grounds that changing what God created is against their religion and would make them complicit with evil be protected by RFRA?

3. The state of Asterism enacts a law prohibiting discrimination in employment, education, and places of public accommodation on the basis of sexual orientation or sexual identity. The law provides no exemptions for religious organizations or others who object to employing, serving, or admitting as students homosexuals, bisexuals, and transgendered people. Is the law constitutional under the U.S. Constitution?

States are not subject to the federal RFRA, so this would be measured solely by *Smith*, which it should pass easily. Whether it would also pass a state RFRA would depend on the particularities of the state version of RFRA.

4. The state of Asterism enacts a law prohibiting discrimination in employment, education, and places of public accommodation on the basis of sexual orientation and sexual identity. The law specifically exempts religious organizations or others who on religious grounds object to employing, serving, or admitting as students homosexuals, bisexuals, and transgendered people. Is the law constitutional under the U.S. Constitution?

   Exemptions and accommodations do not make an otherwise generally applicable, neutral law non-neutral or non–generally applicable within the meaning of the *Smith* test.

5. Is a law enacted by the state of Asterism prohibiting businesses and religious organizations from receiving any state business or funds if the business or religious organization discriminates in employment, education, and places of public accommodation on the basis of sexual orientation and sexual identity constitutional?

   States are not subject to the federal RFRA, so this would be measured solely by *Smith*, which it should pass easily. The government does not need to pay for or contract with those whose actions undermine governmental positions. However, the issue is complex, involving freedom of expression, freedom of religion, and constraints on governmental discrimination.

6. The state of Asterism prohibits the display of all wiccan, humanist, atheist, or Satanist symbols publicly. Ironically, it publishes a list of prohibited symbols and has illustrations of the banned symbols. Is the state law constitutional?

   This would be a violation of freedom of religion, freedom of expression, and the Establishment Clause.

20.4.10 Hypotheticals: Establishment Clause

7. Assume a high school chooses one student each morning to read a prayer over the school public address system. The content of the

prayer is up to the student, but it must be reviewed and accepted by the principal before it can be read. Is such a prayer at the start of the school day constitutional?

Clear violation of the Establishment Clause.

8. A group of high school students gather each morning before classes for a prayer meeting. Can the school constitutionally prohibit this meeting?

Clearly permissible and cannot be stopped by the school.

9. At a public elementary school a student responds to a homework assignment to find and tell a favorite story to the class by telling the story of Noah and the Ark. Does the Constitution require the teacher to prohibit the telling of the story?

The teacher is incorrect both on the Free Exercise and Establishment Clauses.

10. Is a school board requires that biology classes teach creationism constitutional?

This is a violation of the Establishment Clause.

11. Can a school board constitutionally require all students to take a comparative religions class in high school as a condition of graduation.?

While probably not a violation of the Establishment Clause (good secular reasons exist for such a requirement), it could in some instances violate a student's freedom of exercise, but then *Smith* would support the government.

12. Can a public school district constitutionally create a voucher program under which parents choose the school their child attends and that school is paid by the government on a per-student basis, regardless of whether it is a public school, "charter school," sectarian religious school, or nonsectarian private school?

Probably constitutional.

13. Would it be constitutional if every year for six weeks around Christmas a town leases a corner of a public park across from the

town hall to a Protestant church, which builds and maintains a lighted crèche on the site.

Probably unconstitutional. The leasing of the space so that it is no longer the town's property for possession purposes will not be enough to avoid the endorsement perception.

Chapter 21 State Action

Answers to Hypotheticals

21.7 Hypotheticals: State Action

1. Does the arrest of a citizen by the city of Metropolis for writing an opinion letter to the newspaper complaining that the mayor's priorities are wrong constitute state action?

   State action. Cities are governmental bodies subject to the state action rule.

2. Is there state action when the state of Confusion enacts a law banning all Muslims from serving as members of any state or local police organization?

   State action.

3. Is a police officer's actions of stopping of everyone he sees driving when he thinks the driver is "foreign" and demanding to see a birth certificate or passport state action?

   State action. Actions of employees of the state are state action.

4. The Modern Art Museum, a private museum that receives 20 percent of its funding from the state Department of the Arts, refuses to hire women. Is there a constitutional violation?

   Not state action without much more than merely 20 percent funding from the state.

5. Is a trial court judge engaging in state action when the judge refuses bail to all black defendants, but refuses bail to only a few white defendants?

   State action. Actions by the courts are generally state action unless they are merely enforcing private rights between private parties.

6. Is there state action when a trial court enforces a contract provision between two private companies that requires the two companies not to sell any products to homosexuals?

   Probably not state action since the court is only enforcing a contract involving private rights between two private entities.

7. Is there state action when CornerMart, Inc., a privately owned convenience store, fires an employee for posting a comment on social media advocating gun control?

   Not state action.

8. The State Fine Arts Museum (SFAM) has a collection of historical and cultural artifacts from the state's past as well as collections of art from around the world. In the museum is a gift shop called "The Museum Gift Shop." While the SFAM is owned and operated by the state under the supervision of a board of directors appointed by the state's governor, the gift shop is privately owned and operated. The gift shop leases space from the SFAM, and a share of the profits from the gift shop goes to the SFAM under the agreement between the two. That agreement also binds the gift shop not to discriminate in employment on the basis of race, color, national origin, sex, disability, and age. It also specifies the hours of operation of the gift shop and the sorts of merchandise the gift shop must include in its inventory for sale. Are actions taken by the Museum Gift Shop subject to constitutional constraints under the state action doctrine?

   Even this probably is not enough entwinement to subject the gift shop to treatment as a state for state action purposes. It might have been enough under *Burton v. Wilmington Parking Authority* (1961), but the Court's shift away from expanding the state action doctrine to address more private conduct argues against it.