CONSTITUTIONAL LAW MNEMONICS

1) PEG a violation of the Establishment Clause:
   P – The state statute or activity must have a primarily secular PURPOSE as opposed to the purpose of advancing or inhibiting religion
   E – The law’s primary or inevitable EFFECT must neither disapprove of nor endorse religion AND
   G – The law or conduct can’t foster excessive GOVERNMENTAL religious entanglement

2) A content-neutral regulation must be a reasonable SON of the First Amendment:
   S – The restriction must be justified by a SIGNIFICANT governmental interest
   O – The regulation must leave OPEN ample alternative channels of communication AND
   N – The regulation must be NARROWLY tailored to further the government’s goal, but doesn’t have to be least restrictive means of doing so

3) All commercial speech restrictions with STAN are valid:
   S – Government must have a SUBSTANTIAL INTEREST to restrict the speech
   T – Advertisements must be TRUTHFUL and concern lawful products and services
   A – Governmental restrictions must directly and materially ADVANCE the government’s “substantial interest” in enacting the law (and there must be “reasonable fit” between the state’s goal and means used to achieve that goal)
   N – The regulation must be NARROWLY-DRAWN and must not be more extensive than necessary to achieve the government’s substantial interest

4) The statute’s primary purpose must be a secular (non-religious) purpose, as opposed to a DOE purpose of Disapproving Or Endorsing religion

5) SLAP POP’S PAW is simply obscene, and is not constitutionally protected:
   SLAP – Lacks SCIENTIFIC, LITERARY, ARTISTIC, or POLITICAL value (determined by a national standard, not local)
   POP’S – PATENTLY OFFENSIVE PORTRAYAL of SEX
   PAW – PRURIENT interest appeal, in which the material tends to excite lewd, lascivious, and lustful thoughts in a person of AVERAGE sensitivity; here, the WHOLE material must be weighed by the court

6) A suspect class RIO for equal protection:
   R – RACE
   I – IMMIGRANT
   O – National ORIGIN

7) Fundamental rights drink from the Equal Protection VAT:
   V – VOTING rights
   A – ACCESS to courts
   T – The right to TRAVEL throughout the U.S.
8) Privileges and immunity does not apply to a plaintiff who can **GRAB**:
G – The **U.S. GOVERNMENT**
R – A **RESIDENT** of the state who’s law is being challenged (i.e., the P here must be a non-resident or a newly arrived resident)
A – **ALIENS** (immigrants)
B – **BUSINESS** Organizations (corporations, LLCs or partnerships)

9) There are three **SIR** levels of judicial scrutiny for constitutional challenges:
S – **STRICT SCRUTINY**
I – **INTERMEDIATE** Scrutiny
R – **RATIONAL** Basis, i.e., the law simply must be rationally related to a legitimate state interest

9(a) For an intermediate level of judicial scrutiny, use “**IS**” four times…
IS – **INTERMEDIATE** level of judicial **SCRUTINY**
IS – There must be an **IMPORTANT** governmental interest, and the method chosen must **SUBSTANTIALLY** relate to achieving that interest
IS – **ILLEGITIMACY** and **SEXES** (genders)
IS – **ILLEGAL SCHOOL-AGE** children

10) Intermediate scrutiny arises whenever you drink **GIN**:
G – **GENDER**
I – **ILLEGAL IMMIGRANT** school children
N – **NONMARITAL** children

10(a) Note that “**IS**” does NOT apply to a **MAP** person:
M – **MENTALLY** disabled
A – **AGE** discrimination victim
P – **POVERTY-STRICKEN** person

11) The Separation of Powers Doctrine is referred to as the Constitutional **CARD**. That is, it
C – **CREATES**, 
A – **ALLOCATES**, 
R – **RESTRICTS**, and 
D – **DISTRIBUTES** federal power

11(a) The President always wears his **VETS’ CAPS**:
V – **VETO** power over Congressional acts
E – **EXECUTIVE** power to “**take care**” that laws of the U.S. are faithfully executed
T – **TREATY** Power
S – **STATE** of the Union recommendation to Congress for proposed legislation
C – **COMMANDER** in Chief of the armed forces
A – **APPOINTMENT** power over ambassadors, judges of the Supreme Court, and other “superior officers” of the U.S.
P – **PARDON** power over federal crimes
S – Power to call a **SPECIAL** Session of Congress
12) Congress requires a 2/3 vote only when drinking a **V.I.P. TEA**:

- V – For both Houses to override a Presidential **VETO**
- I – For the Senate to convict an **IMPEACHED** official (2/3 of those present)
- P – Dispute between **PRESIDENT** and Vice President whether the President is able to carry on his duties (2/3 vote in each house)
- T – For the Senate to ratify a **TREATY**
- E – To **EXPEL** a member from either House of Congress
- A – To propose an **AMENDMENT** to the Constitution (2/3 vote in each House)

13) **PIEPER FIT WABCD** in Congress (express powers of Congress, enumerated in Article I of the U.S. Constitution):

- P – **POST** office
- I – **INVESTIGATORY** power to find facts in order to pass legislation
- E – **ENFORCEMENT** of federal civil rights under the 13th, 14th, and 15th Amendments
- P – **PROPERTY** power
- E – Federal **ELECTIONS**
- R – **RAISING** revenues by taxing
- F – **FISCAL** power
- I – The power to regulate **INFERIOR** federal courts and their procedures
- T – **TREATY** power
- W – The power to declare **WAR**
- A – Power over **ALIENS** immigration, and their naturalization to become citizens
- B – **BANKRUPTCY**
- C – International and interstate **COMMERCE**
- D – **DISTRICT** of Columbia police power

14) The 13th Amendment confronts the **VIBS** of slavery:

- V – **VESTIGES**
- I – **INCIDENTS** and
- BS – **BADGES** of the **SLAVERY** system

15) **MAD2 COPS** protect fundamental privacy interests:

- M – Right to **MARRY**
- A – Right to an **ABORTION** (“undue burden” standard)
- D – Spouse’s right to **DISSOLVE** a marriage
- D – Right of a terminally ill person to **DIE**
- C – Right to buy, sell, or use **CONTRACEPTIVES**
- O – Right to privately possess **OBSCENE** material (but not if it depicts minors)
- P – **PARENTING** rights (right to control the upbringing and education of child)
- S – Right to private, consensual **SEXUAL** activity

15a) **MAD2 COPS** are “Fundamental rights except for the three **SAD** ones which are only “liberty interests”:”

- S – Private consensual **SEX**
- A – **ABORTIONS**
- D – The right to **DIE**

16) A parent has **3-C** fundamental rights to raise children:

- C – **CUSTODY**
- C – **CARE**
- C – **CONTROL**
In-Class Multistate Questions:
Constitutional Law

Breakdown of Constitutional Law on the MBE

Individual Rights (50%)
What Concepts Do They Expect You to Know?

Individual Rights
A. State action
B. Due process
   1. Substantive due process
      a. Fundamental rights
      b. Other rights and interests
   2. Procedural due process, including personal jurisdiction
C. Equal protection
   1. Fundamental rights
   2. Classifications subject to heightened scrutiny
   3. Rational basis review
D. Takings
E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws
F. First Amendment freedoms
   1. Freedom of religion and separation of church and state
   
   a. Free exercise
   b. Establishment

2. Freedom of expression
   a. Content-based regulation of protected expression
   b. Content-neutral regulation of protected expression
   c. Regulation of unprotected expression
   d. Regulation of commercial speech
   e. Regulation of, or impositions upon, public school students, public employment, licenses, or benefit based upon exercise of or associational rights
   f. Regulation of expressive conduct
   g. Prior restraint, vagueness, and overbreadth

3. Freedom of the press
4. Freedom of association
I. Judicial Review

A. Organization and relationship of state and federal courts in a federal system
B. Jurisdiction
   1. Congressional power to define and limit
   2. The Eleventh Amendment and state sovereign immunity
C. Judicial review in operation
   1. The “case or controversy” requirement, including the prohibition on advisory opinions, standing, ripeness, and mootness
   2. The “adequate and independent state ground”
   3. Political questions and justiciability

II. Separation of Powers

A. The powers of Congress
   1. Commerce, taxing, and spending powers
   2. War, defense, and foreign affairs powers
   3. Power to enforce the 13th, 14th, and 15th Amendments
   4. Other powers
B. The powers of the president
   1. As chief executive, including the “take care” clause
   2. As commander in chief
   3. Treaty and foreign affairs powers
   4. Appointment and removal of officials

C. Federal interbranch relationships
   1. Congressional limits on the executive
   2. The presentment requirement and the president’s power to veto or to withhold action
   3. Non-delegation doctrine
   4. Executive, legislative, and judicial immunities

III. The Federal System

A. Intergovernmental immunities
   1. Federal immunity from state law
   2. State immunity from federal law, including the 10th Amendment
B. Federalism-based limits on state authority
   1. Negative implications of the commerce clause
   2. Supremacy clause and preemption
   3. Authorization of otherwise invalid state action
1. Congress passed a new federal excise tax on cigarettes and mandated that the funds collected be spent on advertising the dangers of smoking. A major U.S. tobacco company brought suit in federal district court to block implementation of the new tax.

On the issue of standing, how is the court likely to hold?

(A) The tobacco company has taxpayer standing because the tax is solely on cigarettes and thus the tax affects it uniquely.

(B) The tobacco company does not have standing until it has experienced actual harm.

(C) The tobacco company does not have standing to object to an exercise of Congress’s spending power unless it alleges a positive constitutional limitation on that power.

(D) The tobacco company has standing because Congress cannot use the taxing or spending power to achieve goals it could not achieve directly.

1. (C) is correct because a challenge to the taxing and spending power is only possible where there is a positive limitation on those powers in the Constitution, a condition not present here.

(A) is incorrect because there is no applicable limitation on the taxing and spending power of Congress. Therefore, there is no taxpayer standing.

(B) is incorrect because the harm to the cigarette company’s sales is clear before the statute is actually implemented. Therefore, the cigarette company need not wait until actual harm occurs before it sues.

(D) is incorrect; Congress can use the taxing and spending power to achieve goals which it cannot achieve by regulation.
2. Congress passed an act requiring that all beekeepers be licensed, regulating the cleanliness of apiaries, and establishing safety standards for the removal of honey from the hives. Congress appropriated $500,000 to fund the act. A plaintiff, suing in his capacity as a federal taxpayer, challenged the act’s validity.

What is the most likely disposition by the federal court?

(A) The court would evaluate the validity of the statute if the taxpayer could show a direct benefit from a determination that the Act was unconstitutional.

(B) The court would dismiss the challenge for failure to state a cause of action.

(C) The court would evaluate the validity of the statute if the appropriation in support of the regulatory agency were a separate appropriation.

(D) The court would dismiss the challenge for lack of standing.

2. A federal taxpayer would not have standing to challenge the act’s validity because the court will view the act as a regulatory rather than a spending statute. Furthermore, “[t]he only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the establishment clause.” Erwin Chemerinsky, Constitutional Law Principles and Policies § 2.5 at p. 96 (4th ed. 2011). Therefore, the suit will be dismissed and (D) is correct.

(B) is incorrect because there is a cause of action, even though this plaintiff (i.e., a federal taxpayer) lacks standing to assert it.

(C) is incorrect because the expenditures under the act are merely incidental to enforcement of the regulations. The court will not look into the validity of the appropriations.

(A) is incorrect because it misstates the requirement for federal taxpayer standing.
3. A city zoning ordinance prohibited more than two unrelated individuals from living in a dwelling unit. Pursuant to this ordinance, a zoning officer threatened to cite for violation a married couple who provided foster care for children through a local child welfare organization. At the time, there were six foster children living in the house.

The couple brought suit in federal court, challenging the constitutionality of the ordinance. At the time the case went to trial, there was only one foster child living in the couple’s house, so there was no violation of the ordinance. The town brought a motion to dismiss.

What action should the court take?

(A) Grant the motion, because the plaintiffs no longer have standing.
(B) Grant the motion, because the unconstitutional issue is moot.
(C) Deny the motion, because once a constitutional issue is raised, a change of circumstances cannot defeat the constitutional claim.
(D) Deny the motion, because the plaintiffs may in the future want to take care of more than two foster children at a time in their home.

3. When a party has standing at the commencement of litigation but the controversy is resolved before trial, the party no longer has a stake in the outcome of the litigation and the suit will be dismissed as moot. An exception to the mootness doctrine is the situation where the injury to the plaintiff is of a recurring nature. Here, the married couple is not injured at the present time by the prohibition against unrelated individuals living in the same dwelling, but the injury will arise again when they take in additional foster children. Because of the recurring nature of their injury, the couple does not lose standing whenever the number of foster children in their home falls below two. Therefore, (A) is incorrect because the couple has standing even though at the time of the motion they are not in violation of the ordinance.

(B) is incorrect for the same reason. A justiciable issue exists, even though the plaintiffs are not now in violation of the ordinance they are challenging, because the injury to the plaintiffs is capable of repetition.

(C) is incorrect because a change of circumstances can defeat a constitutional claim under the doctrine of mootness.

(D) correctly states an exception to the mootness doctrine that permits review of a controversy which does not exist at time of trial but has occurred in the past and with reasonable certainty may recur in the future to the same complaining party, and therefore should be resolved.
During religious ceremonies of a certain tribe, all participants drank a liquid called secsip, which contained hallucinogenic properties. The controlled substances law of the state where the tribe’s members lived specifically exempted, from the criminal provisions of the act, the practice of ingesting secsip as a part of a religious ceremony.

Some members of the tribe regularly engaged in a seasonal migration to another state, taking with them a supply of secsip for their religious ceremonies. Under the laws of this other state, secsip was an illegal controlled substance, and there was no exemption for its use in religious ceremonies.

When the other state’s attorney general indicated that he would prosecute any persons using secsip, the tribe brought suit in federal court, alleging that the other state’s controlled substances statute was unconstitutional as applied to the use of secsip for religious ceremonies of their tribe.

How will the court rule?

(A) The state will prevail, because it may proscribe the use of hallucinogenic drugs under its police power, so long as the statute applies to the use of those drugs throughout society.

(B) The state will prevail only if it can show a compelling state need to proscribe the use of secsip in religious ceremonies.

(C) The tribe will automatically prevail, because the use of secsip is an essential part of their long-standing religious practice and has been recognized as such in the laws of their home state. Thus, the state statute denies them the free exercise of their religion.

(D) The tribe will prevail, because the state has not accorded them the privileges and immunities they enjoy as citizens of their own state.

In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), the Supreme Court struck down the Religious Freedom and Restoration Act of 1993, which had prevented the government from enforcing laws that substantially burdened religious observations or practices unless the government could demonstrate a “compelling” need to do so. Such federal legislation can only apply to federal laws and not to state laws which must follow the Smith case. Thus (B) is not correct because the government no longer needs a “compelling” interest.

The Supreme Court case of *Employment Division v. Smith*, 494 U.S. 872 (1990), controls this issue. It found that the use of peyote by Indian tribes in religious ceremonies was not protected against neutral state criminal statutes regulating hallucinogenic drugs. (A) is therefore correct. The court concluded that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* at 879.

(C) is incorrect because the “free exercise” argument with respect to the use of hallucinogenic drugs can be defeated by a state’s law that applies to everyone provided the law was not passed to single out or discriminate against religious practices.

(D) is incorrect because under the Privileges and Immunities Clause, a state is only required to accord citizens of another state the same privileges and immunities it offers its own citizens. Since its own citizens are prohibited from using the drug, a state can prevent out-of-state residents from using it while within its borders.
5. An incumbent state senator was opposed by the local newspaper during an election campaign. Extensive coverage was given to his opponent, but the only things written concerning the senator were unfavorable editorial comments. In desperation, the senator called a news conference, but no reporters attended. There were no other newspapers in the district, and as a result of a lack of favorable publicity, the senator lost the election. The senator thereafter brought an action for damages against the newspaper, which based its defense on the First and Fourteenth Amendments.

Which of the following would be most helpful to the senator in responding to that constitutional argument?

(A) The editorial comment against him contained false and defamatory matter.
(B) The newspaper was the only means of effective communication to the voting public in the district.
(C) The owner of the newspaper was the senator’s opponent.
(D) The senator’s reputation as a legislator was in fact excellent.

5. Freedom of the press, as defined by the First and Fourteenth Amendments, gives a newspaper an almost unlimited right to refuse to print. There is no cause of action against a newspaper for the failure to cover a story, even if that failure is due to base motives. Therefore, there is no cause of action for failure to cover the senator’s campaign, even if the newspaper was the only effective way of communicating with the voters. See *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Therefore, (B) is incorrect.

The fact that the senator’s opponent owned the newspaper and used it to his own advantage does not give rise to a cause of action, because there is no duty of fairness imposed upon a newspaper in a political campaign. Therefore, (C) is incorrect.

(D) is incorrect because a legislator standing for re-election puts his reputation on the line. A newspaper favoring an opposition candidate can attack that reputation, even if that reputation is in fact excellent.

There is not necessarily a cause of action against the newspaper even if the editorial contained false and defamatory matter. Since the senator is a public figure, he must prove either knowledge of the falsity or a reckless disregard of the truth by the newspaper under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Even though the senator might have difficulty recovering for defamation, (A) is the best answer here.
6. In an effort to raise revenue without enacting a general tax, a state legislature enacted a three percent excise tax on newsprint and ink used in publishing newspapers and magazines.

The owner of a state newspaper of general circulation properly challenged the constitutional validity of the tax.

Which of the following provides the strongest constitutional basis on which he is likely to prevail?

(A) The Commerce Clause.
(B) The Supremacy Clause.
(C) The Equal Protection Clause of the Fourteenth Amendment.
(D) The Due Process Clause of the Fourteenth Amendment as it incorporates the First Amendment.

6. The United States Supreme Court held, in the case of Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983), that a discrete tax on newsprint was a violation of the newspaper’s First Amendment rights and therefore (D) is the best answer. Taxes that single out the press are unconstitutional.

(A) is incorrect because the tax does not interfere with interstate commerce.

(B) is incorrect because the tax is not inconsistent with any federal statute.

(C) is incorrect because the court will apply a rational basis test to a classification for tax purposes and the tax certainly meets that test.
7. A state statute made it a misdemeanor for any mass media organization to publish the name of any victim of rape. A woman was raped in a manner that indicated that she was the latest victim of a serial rapist, a story which received much media attention. The crime was investigated by the town police department, and a report of the crime, which included the woman’s name, was prepared. In violation of regulations of the police department, but in violation of no law, the sergeant in charge of the case distributed copies of the crime report to representatives of all of the newspapers and television stations in the area. A reporter for the town newspaper prepared a story about the series of rapes and accurately reported the name of the latest victim. The story was given wide exposure in the newspaper.

The newspaper was charged with a violation of the state statute and the newspaper defended on the ground that the state statute was unconstitutional.

Will the court hold the newspaper guilty?

(A) Yes, because the statute serves an important governmental purpose in that it protects the privacy of rape victims.
(B) Yes, because the statute meets the compelling need of protecting the privacy of rape victims.
(C) No, because the statute infringes upon the First Amendment rights of the newspaper.
(D) No, because the statute does not fulfill its purpose because it does not prohibit disclosure by non-media entities.

7. This question is based on the United States Supreme Court case of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which held that the First Amendment protects the right of a newspaper to publish the lawfully obtained name of a rape victim and that a state statute forbidding the publication of a lawfully obtained name to protect the privacy of the victim is unconstitutional. Therefore, (C) is the correct answer.

“We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.” *Id.* at 541. Protecting the privacy of rape victims was not a sufficient governmental interest to impose tort liability under the tort of invasion of privacy.

While the Court mentioned the under-inclusiveness of the statute in that it did not prevent non-media disclosure, the basis for the judgment was the First Amendment right of the newspaper. Therefore, (D) is not the best answer.

The Court did not find the victim’s need for privacy a compelling need when the state released her name and, therefore, (B) is incorrect.

(A) is incorrect because it sets forth the incorrect burden that the state must meet when imposing a content-related restriction on a newspaper.
8. A city’s zoning ordinance prohibited the operation of a theater showing sexually explicit material within 1,000 feet of another such theater. Just prior to the effective date of the ordinance, the owner of a company signed a contract to lease a gas station which was within 500 feet of an existing adult theater. He planned to convert the gas station into an adult theater, but when he applied for a license to exhibit adult films in the building, the license was denied because of the zoning ordinance. The owner brought an appropriate action to challenge the validity of the zoning ordinance.

Which of the following would be the owner’s strongest argument?

(A) The prohibition of the use of the theater violates a fundamental property right and is invalid under the Due Process Clause.

(B) His inability to use the garage as a theater in accordance with his lease constitutes an impairment of the obligation of contract.

(C) A zoning ordinance can be used to concentrate specific uses, but it cannot be used to disperse them.

(D) The zoning ordinance is an impermissible prior restraint upon the owner’s right to exercise his First Amendment rights of free speech.

8. The owner’s best argument against the ordinance is that it violates his right to free speech. He would argue that adult films are not necessarily obscene and that the ordinance unconstitutionally infringes upon his freedom of speech by prohibiting him from operating a business in a certain location based on the content of the films to be shown. Therefore, (D) presents the best argument.

Such ordinances have been upheld when their primary purpose is to control the secondary effects such establishments have, (e.g., increased crime, drugs and prostitution) and the ordinance leaves open alternative methods of communication (other locations to open such shops).

(A) is incorrect because zoning does not generally constitute the taking of a property right, so the Due Process Clause is not involved. Moreover, the Due Process Clause would only give the owner the right to a hearing; it would not invalidate the ordinance.

The Contract Clause is not an absolute bar to disruption of contractual relationships. When an exercise of state police power impairs contracts, courts will balance the state’s important interest against the contract rights involved. Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983). In other words, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In light of the State’s important interest here, the ordinance does not unreasonably impair any contractual obligations of the parties to this lease. Therefore, (B) is incorrect.

(C) is incorrect because zoning ordinances can be used to disperse specific uses.
9. A busy city, and a quiet, residential suburb of the city, were located at the geographical center of a large state. Traffic and parking in the city became so difficult that commuters started parking in the suburb, and then taking mass transit to and from the city. This resulted in the suburb’s residents finding it difficult to park in their own neighborhood.

Subsequently, the suburb’s council passed a parking ordinance providing that only cars with stickers issued by the suburb would be allowed to park on residential streets of the suburb and only suburb residents would be eligible for such stickers. An organization of angry commuters who were not eligible for the parking stickers sought to enjoin the administration of this plan.

Who will prevail?

(A) The city will prevail, because the ordinance is the least restrictive means to serve a compelling interest.
(B) The city will prevail, because the ordinance is rationally related to the city’s police power.
(C) The commuters will prevail, because the ordinance is an unconstitutional violation of the right to travel guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment.
(D) The commuters will prevail, because the ordinance is an undue burden on interstate commerce.

9. The suburb may enact this parking restriction pursuant to its police power. Since it affects no fundamental rights or suspect classes, it is valid if it has a rational purpose. (B) is therefore the correct answer.

(A) is incorrect because no compelling need must be shown to regulate parking. There are no suspect classifications or fundamental rights involved.

(C) is incorrect because there is no fundamental right to travel protected by the Privileges and Immunities Clause of the Fourteenth Amendment. That choice is almost universally incorrect.

(D) is incorrect because the facts tell you that the city and the suburb are at the geographic center of a large state and the parking ban only affects commuters to the city. Therefore, this is only discrimination against other state residents. (Note that the fact pattern states that the city is “located at the geographic center of a large state,” a fact that indicates that automobile commuters are likely to be from within that State). Thus, there is no burden on interstate commerce.
10. In an effort to encourage greater minority participation in the construction industry, a city ordinance required all prime bidders on city construction contracts to file proof that thirty percent of the dollar value of the construction would be performed by “minority-owned firms,” a term carefully defined in the statute. There was no evidence that the city ever discriminated on account of race in awarding construction contracts. Under the ordinance, the city could waive all or part of the requirement if the prime contractor demonstrated that qualified minority-owned sub-contractors were not available.

A carpenter, the low bidder on a contract for a new city high school, was unable to achieve the required level of participation by minority contractors. After his waiver request was denied and the contract was awarded to a higher bidder, the carpenter sued the city alleging that the regulation was unconstitutional.

How should the court rule?

(A) The carpenter will prevail, because the city is unable to demonstrate a compelling state interest for requiring minority quotas for its construction contracts.

(B) The carpenter will prevail, because even though there is a compelling need to classify by race because of the historic under-representation of minorities in the construction field, the act is not narrowly drawn to achieve permissible objectives.

(C) The city will prevail, because under-representation of minorities in the construction field is the compelling state need requiring classification by race.

(D) The city will prevail, because the ordinance is remedial in nature and rectifies the effect of past discrimination.

10. This question is based upon City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which held unconstitutional minority “set asides” in the construction industry when the set asides were not for the remedial purpose of correcting past discrimination by that particular municipality. Choice (A), which states that in this situation there is no compelling state need for the classification by race, is the correct answer, and (C) is incorrect.

The Equal Protection Clause prohibits government affirmative action that is not intended to remedy specific past incidents of discrimination. Evidence of generalized societal discrimination within an entire industry in the past is not enough to currently justify racial classifications. There is essentially one compelling state interest that can justify racial classifications -- specific proof of past discrimination.

In City of Richmond, the Supreme Court required courts to apply strict scrutiny review to all racial classification. Id. at 493-94.

(B) would be correct if the Court ever found a compelling state need, because City of Richmond also said that the statute requiring a certain percent of the construction be handled by minority-owned firms was not narrowly tailored to correct the wrong. However, since the Court found no compelling need, the issue of the narrowness of the statute was not the basis for the decision.

(D) is incorrect because the Court declined to impose a standard more lenient than a compelling state need standard to review classification by race.
11. To reduce the incentive for needy individuals to travel to its state solely to obtain larger public assistance benefits, a state enacted a law requiring that any person requesting public assistance first establish proof of six consecutive months of in-state residency before receiving the benefits.

An indigent, elderly individual who recently moved to the state started an action in the federal district court for a declaratory judgment declaring the residency requirement unconstitutional as a violation of the Privileges or Immunities Clause of the 14th Amendment.

Will the individual prevail?

(A) No, unless there is proof of an actual intent to impede travel.
(B) No, since she should have asserted an Equal Protection argument.
(C) Yes, because the statute treats recent residents differently than other residents and it involves a basic necessity of life.
(D) Yes, but only if she proves the statute deterred her from traveling to the state.

11. Frequently, when states are challenged in this area, they argue that there was no actual state intent to impede the right to travel and that the statute challenger was not impeded. However, the U.S. Supreme Court has held that actual intent to impede is irrelevant in such cases. Dunn v. Blumstein, 405 U.S. 330, 339-40 n.10 (1972). Thus, choice (A) is incorrect.

Likewise, the fact that no evidence was offered that anyone has been deterred from travel by the statute did not move the Court. It rejected such arguments noting, in fact, that “few welfare recipients have in fact been deterred [from moving].... Indeed, none of the litigants had thereby been deterred.” Thus, choice (D) is incorrect.

Choice (B) is incorrect because the outcome would be the same whether the individual argued an Equal Protection violation or a Privileges and Immunities violation. The Supreme Court has effectively consented to a blending of the two clauses into one general rule applicable to both. “Of course, regardless of the label we place on our analysis - right to migrate or equal protection - once we find a burden on the right to migrate, the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.” Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904-05 n.4. (1986); Saenz v. Roe, 526 U.S. 489 (1999).

Choice (C) is correct. “The right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.” Soto-Lopez, 476 U.S. at 903-04. The right to travel is impeded whenever there is an unequal distribution of rights and benefits among residents of the state based on time of residency. Placing a penalty on basic necessities of life based on residency is simply not tolerable. Brown v. Wing, 170 Misc. 2d 554 (1996); Saenz v. Roe, 526 U.S. 489 (1999).
12. The President of the United States was concerned that his butler’s grandmother was transmitting sensitive defense secrets to terrorists. After an investigation, despite discovering that the grandmother was most likely innocent, the President ordered the butler to kill his grandmother. In obedience to that order, the butler ran his grandmother over with his car, severely injuring her. The grandmother brought suit against both her grandson and the President for assault and battery.

Will the grandmother prevail?

(A) Yes, but only after the President leaves office.
(B) Yes, even if she was actually transmitting defense secrets to terrorists and the President’s beliefs were fully justified.
(C) No, only if the President believed in good faith that she was transmitting defense secrets to terrorists.
(D) No, even though the President knew that she was most likely not transmitting defense secrets to terrorists.

12. The President has absolute immunity from suit for damages arising out of his official conduct even after he leaves office. *Nixon v. Fitzgerald*, 457 U.S. 800 (1982). Choice (D) is therefore the correct answer. Note that the President has no immunity for unofficial conduct committed prior to or during his presidency. *Jones v. Clinton*, 520 U.S. 681, 117 S. Ct. 1636 (1997).

(A), (B), and (C) are incorrect because they suggest that the President’s immunity is qualified by the circumstances of the case.
13. Congress enacted, over a presidential veto, an act which provided that the President must withdraw any troops from foreign hostilities within sixty days of committing them, unless he received congressional authorization to continue the hostilities. The President sent troops into a foreign state, where they were engaged in hostilities for a period of sixty days. A resolution was presented to both branches of Congress to continue the hostilities beyond the sixty-day period, but the resolution was defeated in both branches. The President refused to withdraw the troops.

This controversy was referred to the judicial branch and the court decided in the President’s favor.

What was the most likely basis for this decision?

(A) The President has the power to continue foreign hostilities pursuant to his power over foreign relations.
(B) The President has the power to continue foreign hostilities pursuant to his power as Commander in Chief.
(C) The President has plenary power to engage the U.S. in foreign hostilities short of declaring war.
(D) U.S. statutes cannot reach actions in foreign countries.

13. The answer to this unresolved issue depends upon the scope of the President’s power to deploy troops when exercised without the approval of Congress. The most obvious source of that power is his constitutional power as Commander in Chief of the Armed Forces and (B) is therefore correct.

While the President also has considerable power over foreign relations, that power is not as closely related to this action as the President’s power as Commander in Chief and, therefore, (A) is incorrect.

(C) is incorrect because it takes an unnecessarily expansive view of the President’s power and does not relate it to specific constitutional authority.

(D) is incorrect because Congress has the power in many cases, such as the regulation of foreign commerce, to reach actions in foreign countries.
14. Congress passed an act which protected the country’s unbranded horses and burros from capture, branding, harassment, and death on federal land. A certain state’s livestock board, in enforcing its stray law, rounded up wild burros on federal land located within the state and sold them at auction. The state’s secretary of agriculture protested the federal act, and state officials sought declaratory and injunctive relief in federal court, challenging the constitutionality of the statute.

Is the federal statute constitutional?

(A) Yes, because it constitutes appropriate regulation by Congress under the General Welfare Clause.

(B) Yes, because it constitutes appropriate regulation by Congress under the Property Clause.

(C) No, because the wild burros are not federal property.

(D) No, because it infringes on those powers reserved to the states under the Tenth Amendment.

14. Article IV, § 3 of the Constitution provides that “[t]he Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” This question is based upon the case of *Kleppe v. New Mexico*, 426 U.S. 529 (1976), where the Court upheld the power of Congress to protect wild burros under the federal Property Power. The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340 enacted by Congress to protect “wild free-roaming horses and burros from capture, branding, harassment or death.” This Federal law is enforced by the Department of the Interior, and Bureau of Land Management. “In our view, the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.” *Id.* at 540 - 41. Therefore, (B) is the correct answer.

(A) is incorrect because, while Congress may tax and spend for the general welfare, it may not regulate for the general welfare. Note that general welfare is often presented as a choice on the MBE, but it is rarely the best choice.

(C) is incorrect because the complete power of Congress over public lands includes the power to protect wildlife on them.

(D) is incorrect because a specific grant of power to the federal government (the Property Power) preempts any power in the states reserved under the Tenth Amendment. Here, the state cannot claim a right to act on federal property.
Congress passed a law which required all males in the country to register with the selective service system after their eighteenth birthday. To combat widespread disregard for the law, Congress conditioned the eligibility of students to receive federal financial aid for higher education upon proof of their compliance with the registration requirements.

Which of the following is the strongest argument in support of the power of Congress to enact a law limiting aid to students pursuing higher education?

(A) This law, requiring draft registration in order to receive federal educational aid, is a valid exercise of Congress’s war powers.
(B) Congress may condition the grant of a federal benefit made pursuant to the spending power upon compliance with an unrelated federal policy.
(C) Congress may regulate education pursuant to its commerce power.
(D) The act was not a bill of attainder, it did not violate the equal protection clause, and it did not require individuals to incriminate themselves.

The Supreme Court opinion in Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984), relied upon the power of Congress to condition federal financial benefits upon compliance with unrelated federal policies under the spending power as the authority to pass this legislation. Thus (B) is the correct answer.

The war power is the authority for the original draft registration requirement, but is not as pertinent to the statute in question here, which imposes conditions under the spending power. (A) is, therefore, incorrect.

The statute has only remote relevance to the regulation of education (assuming that Congress has the power to regulate that field under the Commerce Clause) and, therefore, (C) is incorrect.

(D) is a correct statement of the law as determined by the Supreme Court in the Minnesota case, but it does not go to the power of Congress to enact the statute.
16. In which of the following cases is review by the United States Supreme Court inappropriate?

(A) A vendor challenges the imposition of a compensating use tax imposed by a state statute on the ground that it violates the Commerce Clause of the United States Constitution. The state’s highest court holds the statute unconstitutional.

(B) A vendor challenges the imposition of a compensating use tax imposed by a state statute on the ground that it violates the Commerce Clause of the United States Constitution. The state’s highest court upholds the statute.

(C) A vendor challenges the imposition of a compensating use tax imposed by a state statute on the ground that it violates the Equal Protection Clause of the state constitution. The state’s highest court has upheld the statute.

(D) A vendor challenges the imposition of a compensating use tax imposed by a state statute on the ground that it is contrary to an act of Congress. The state’s highest court finds the congressional act in conflict with the state statute and strikes down the state statute.

16. (A) and (D) are incorrect because review by writ of certiorari is appropriate where a state supreme court decision holds a state statute unconstitutional as a violation of federal law.

(B) is incorrect because review by writ of certiorari of a state supreme court decision upholding the validity of a state statute which is in violation of the federal Constitution is appropriate.

(C) is correct because no federal question is presented; it involves an interpretation solely of state law.

Though you should not worry about it for the bar exam, a “compensating use” tax is simply a tax on the use or consumption of an item that is similar to a sales tax, but is commonly paid to the government by the purchaser rather than the seller.
17. A state regulatory statute was challenged in the state’s trial court on the basis that it constituted an unconstitutional taking of property under both the U.S. and state constitutions. The state constitution provided that “no property shall be taken by the state or its agents without due process and just compensation therefor.” On appeal, the state’s supreme court affirmed the trial court’s ruling that the statute was not an unconstitutional taking under the state constitution, adding that its decision was in line with a long series of precedents decided under the federal constitution. The appellant sought review of this case in the U.S. Supreme Court.

What action should the court take?

(A) Hold that it has no jurisdiction to review this case.

(B) Refuse to review the case on the basis that it was decided on an adequate and independent state ground.

(C) Review the case because it has final authority to determine the scope of the taking clause of the Fifth Amendment as it applies to the states under the Fourteenth Amendment.

(D) Review the case because the state court invoked federal law when it held that its interpretation of the state taking clause was in accordance with federal precedents.

17. This question requires careful analysis of the decision of the state court. That court decided not only that the state regulatory action did not violate the taking clause of the state constitution, it also decided, since it upheld the regulation, that the state action was valid under the federal constitution. While the United States Supreme Court cannot review the state interpretation of the state constitution, it can properly review the challenge under the Fifth and Fourteenth Amendments and, if it finds a violation, reverse the judgment. Therefore, (C) is correct.

(A) and (B) are incorrect because the federal question concerning the interpretation of the Fifth and Fourteenth Amendments is present and necessary for decision.

(D) is incorrect because the federal question is present once the state finds the action valid, whether or not the state court tries to interpret federal law.
18. Congress determined that a new dam needed to be built on an interstate river used by barges to transport commerce. The dam was to be constructed at a point of the river solely within a certain state to produce electricity for the surrounding communities in the state. Congress, as part of the authorizing legislation, exempted the new dam from any federal or state environmental regulations.

Opponents proved that the dam would have a severe, deleterious effect on the environment and would violate many applicable state and federal environmental regulations. Indeed, a group of individuals possessing riparian rights on the river, and whose properties would be significantly affected by the construction of the dam, formed a coalition. The coalition challenged the validity of the federal law concerning construction of the dam.

Will the coalition prevail?

(A) Yes, because Congress cannot pass laws interfering with prior, valid federal statutory schemes.
(B) Yes, because Congress cannot pass laws interfering with prior, valid state statutory schemes enacted pursuant to the state’s police power.
(C) No, because the statute authorizing the dam is valid.
(D) Yes, because the electricity produced by the project will only be used in the state.

18. Here, Congress has passed a statute which is clearly authorized under its power to regulate interstate commerce. Statutes may supersede prior federal legislation and (A) is, therefore, incorrect.

The congressional action and authority nullify conflicting state regulation because of the Supremacy Clause. (B) is therefore incorrect.

(C) is the correct answer.

The statute affects interstate commerce, so the issue of where the electricity will be used is irrelevant, and (D) is incorrect.
19. A package delivery company incorporated in its home state was licensed to do business in many other states. The company’s services within another certain state consisted solely of picking up packages at in-state addresses and delivering them to the local airport; from there, the packages were shipped out-of-state.

The other state imposed a service tax on all merchants whose annual in-state transactions exceeded $100,000 or it made more than 200 deliveries into the state in a year. The equal tax was equal to 5% of the fee received by the shipping companies for picking up and delivering packages in the state. The company wished to avoid this imposed state tax on its deliveries within the state, and brought an appropriate action.

How should the court rule?

(A) The other state cannot tax the company, as the company is incorporated in another state and might be subject to multiple taxation by virtue of the income tax in its home state.

(B) The other state cannot impose a tax on the company’s services, because the goods the company is carrying are exclusively within the realm of interstate commerce.

(C) The other state’s tax is valid because the company has sufficient contact with the other state with respect to the in-state services taxed, and the tax does not discriminate against interstate commerce.

(D) The other state’s tax is valid only if it is apportioned according to the amount of business that the company does in the other state compared to the total business it conducts in all states.

19. The validity of a state tax on businesses in interstate commerce is controlled principally by the case of General Motors Corp. v. Tracy, 519 U.S. 278 (1997). To be valid under the dormant commerce clause, there must be a “substantial nexus” with the taxing state. In South Dakota v Wayfair, Inc., 138 S. Ct. 2080 (2018) the court upheld the $100,000 or 200 transactions with the taxing state as a “substantial nexus” to compel it to collect a tax and forward it to the taxing state. There must be fair apportionment, the tax cannot discriminate against interstate commerce, and the tax must be related to the services rendered. The tax in issue is on services rendered within the state and applies uniformly to in-state and out-of-state companies. It is therefore valid, and (C) is correct.

(D) is incorrect because there is no need for apportionment when the tax is only on services rendered in the state.

(A) is incorrect because a foreign company doing business in a state is subject to taxation in that state, within the limitations described above.

(B) is incorrect because it misconstrues the nature of the tax. An ad valorem property tax on goods that are exclusively in interstate commerce is invalid, but this tax is only on the delivery fee and, therefore, is not covered by this doctrine.
20. State “X” had a statute which provided that cheese manufactured outside of that state must meet the state “X” standards for quality before it could be sold in state “X”. Moreover, no cheese manufactured in any other state could be sold in state “X” unless that state permitted cheese manufactured in state “X” to be sold within its borders.

The reciprocity provision of this statute was challenged as unconstitutional.

Which of the following is the strongest argument in support of that challenge?

(A) There is no compelling state interest justifying it.
(B) The negative implications of the Commerce Clause prevent this type of state action.
(C) Preventing the sale of out-of-state cheese is a taking without just compensation.
(D) The reciprocity provision has no relationship to the quality of the cheese.

20. When the purpose or effect of a state statute regulating commerce is to discriminate against out-of-state businesses, and the regulation addresses an area in which Congress has not exercised its full authority over interstate commerce, the Court may find a violation of the negative implications of the Commerce Clause. Thus, (B) is correct.

(A) states an improper standard of review of a state statute regulating interstate commerce in an area that has not been addressed by Congress.

A prohibition of the sale of out-of-state cheese is not a deprivation of property and thus does not constitute a taking. Therefore, (C) is an incorrect answer.

(D) could be an argument in support of a constitutional challenge because the state would not be able to justify the discrimination on the basis of health and safety interests (the quality of the cheese). However, (B) states the strongest argument because it precisely states the standard for judicial review.
21. A state imposed a tax upon the gross receipts of all corporations domiciled in the state.

Which of the following clauses is the strongest basis for challenging the validity of the tax?

(A) The Contracts Clause.
(B) The Commerce Clause.
(C) The Equal Protection Clause.
(D) The Taxing and Spending Clause.

21. A tax on all the gross receipts of a domiciliary corporation has an adverse impact upon that corporation’s ability to do business in interstate commerce because that corporation is also legally subject to tax on a portion of those receipts in the other states in which it does business. *Mobil Oil Corp. v. Vermont*, 445 U.S. 425 (1980). The Supreme Court has used the Commerce Clause as a vehicle to strike down such discrimination against interstate commerce on the ground that the unexercised power of Congress to regulate interstate commerce limits the state’s power to tax entities in interstate commerce. Therefore, (B) is correct.

Note that both due process and the Commerce Clause limit a state’s authority to tax value or income that cannot fairly be attributed to the corporation’s activities within the state. Rather than isolating the intrastate income producing activities from the rest of the business, a state may tax a corporation on an apportioned sum of the corporation’s “unitary” multistate business. *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 224 (1979); *Allied Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992).

(A) is incorrect because there is no contract in existence that the state is impairing. Note that the Contracts Clause, while often an answer choice, is rarely the best answer choice.

(C) is incorrect because discrimination in the economic sphere can be successfully challenged only if the classification by the legislature is totally irrational.

(D) is incorrect because the Taxing and Spending Clause deals with the power of Congress to tax and spend and does not imply any limitation on the state’s ability to tax.
22. In the past three years, a city lost millions of dollars due to medical malpractice claims arising from the hospital it owned and operated. In a substantial number of these cases, the claims arose because the hospital’s foreign doctors frequently could not sufficiently understand the English language, causing them to misinterpret the patients’ needs, complaints, and requests. As a result, the municipal agency running the hospital issued a regulation summarily dismissing all foreign doctors employed at the hospital. The discharged doctors challenged the constitutionality of the regulation.

Which of the following represents the doctors’ best argument?

(A) Privileges and Immunities
(B) Due Process Clause of the 5th Amendment.
(C) Dormant Commerce Clause.
(D) Equal Protection Clause.

22. Choice (A) is not correct because Privileges and Immunities does not apply to either aliens or to citizens of the state whose law is being challenged. Also, there is no discrimination against newly arrived residents that is any different from long-term residents.

Choice (B) is not correct because there is no federal action here - rather it is state or municipal action. Thus, the Fifth Amendment Due Process Clause would not be applicable.

Choice (C) is incorrect because the Dormant Commerce Clause does not apply to the State as a market participant, i.e., as a buyer or seller of goods or services.

Choice (D) is the best of the four choices because the discrimination is based on national origin, i.e., where a person was born.
23. A state passed a law imposing a 3% tax on gross premiums for business done in the state by out-of-state insurance companies. No tax was imposed on home-based insurance companies. The state believed, in good faith, that it could justify this discrimination. Congress authorized the tax, and the same was subsequently challenged.

Will this tax be found lawful?

(A) No, the tax could never be sustained.
(B) Yes, because it was specifically authorized by Congress.
(C) Yes, because the state believed it could justify the discrimination.
(D) Yes, assuming Congress had been silent on the matter.

23. Since the statute favors local commerce and discriminates against interstate commerce, it would be unconstitutional under the negative implications of the Commerce Clause (unless authorized by Congress). Therefore, (D) is incorrect.

Nowhere in the Constitution can a state find arguments to justify such discrimination absent direct congressional authorization. Therefore, (C) is incorrect.

However, if Congress specifically authorized such discrimination, a state could then enact such a statute. Congress is the final arbiter of permissible state activity in interstate commerce. Therefore, (B) is correct and (A), which contradicts (B), is incorrect.
24. A city contained a world-class oceanic research university which also operated a unique aquarium that attracted thousands of visitors to the city each year. The trustees of the university were solicited by many other cities offering generous subsidies if it would relocate. In order to keep the university and aquarium in the city, the city council agreed to donate to the university a parcel of city-owned land and to grant it five million dollars toward the construction of an aquarium facility. The total cost of the construction was fifteen million dollars.

Because of the specialized nature of aquarium construction, the university hired an out-of-state contractor which employed only white male construction workers skilled in building aquariums. There was no state or federal antidiscrimination statute applicable to this case.

A group of the city’s minority residents who possessed construction skills, and the owners of local minority-owned construction firms, filed suit against the university to enjoin it from proceeding with the construction by the out-of-state contractor.

What action will the court take?

(A) The court will refuse to hear the matter because of the political question doctrine.

(B) The university will prevail because there is no sufficient nexus between the university’s hiring of the construction company and the donations by the city.

(C) The plaintiffs will prevail based on the Equal Protection Clause if the construction company purposefully discriminated against minorities.

(D) The plaintiffs will prevail because they are being denied the privileges and immunities guaranteed by Article IV of the United States Constitution.

24. In this case, while there is a substantial state grant to the university, that entity is not engaged in any unlawful discrimination except by employing a segregated contractor. The Fourteenth Amendment imposes limitations only upon “state action.” It does not encompass purely private conduct, no matter how discriminatory. While there is precedent for finding state action where there is a direct subsidy to an entity engaged in racial segregation (such as furnishing tuition payments to a segregated school), state action is not present when the discriminatory activity is one additional step removed from the state action. The state is only furnishing part of the money and the university is far more than a conduit for furnishing money to a segregated company. Therefore, (B) is the best of the four choices.

(C) is incorrect because there must first be “state action” before there is a basis for unconstitutionality under the 14th Amendment.

(D) is incorrect because the Privileges and Immunities Clause applies to state unequal treatment of newly arrived out-of-state residents, a circumstance not present in the facts of this question.

(A) is incorrect because this fact pattern does not involve a matter committed to another branch of government or a matter inappropriate for judicial review. Therefore, the political question doctrine does not apply.

Thus, whether using the “public function” doctrine (e.g., delegating to a private actor a function that has traditionally been reserved for the government), “joint participation” doctrine, (where the state is significantly encouraging or coercing the activity), or “close nexus” doctrine, the construction of the ocean research aquarium does not constitute “state action” merely because it receives 33% government funding. See, American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999). Even where the private actor (a private school) received 99% of its funding from the state, the court found no “state action.” Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
25. A man and woman were inmates in a new, co-ed state prison. In violation of prison regulations, the man and woman engaged in sexual intercourse, resulting in the woman becoming pregnant. The inmates applied to the state for a marriage license and to the prison authorities for permission to be married while in prison. Their application for a license and ceremony was denied because of a regulation duly adopted by the state’s department of prisons prohibiting intermarriage between inmates.

The man and woman brought suit against the warden alleging that this regulation was invalid, and asking the court to enjoin the warden from interfering with their right to marry.

Who will prevail?

(A) The warden will prevail, because the state has a compelling interest in maintaining prison discipline, which was flagrantly breached by the plaintiffs in this action.

(B) The warden will prevail, because an individual’s constitutional rights are diminished during incarceration, and the regulation is a reasonable limitation on those rights.

(C) The man and woman will prevail, because the regulation is not the least restrictive means to achieve the state’s penological interest.

(D) The man and woman will prevail, because the rule is not reasonably related to the state’s legitimate penological interests.


The following have been upheld as a rational response to legitimate security concerns:

(i) restrictions on prisoner’s access to the press. Pell v. Procunier, 417 U.S. 817 (1974);

(ii) prohibiting prisoners an opportunity to witness cell “shakedowns.” Block v. Rutherford, 468 U.S. 576 (1984);

(iii) restricting a prisoner’s right to receive certain visitors. Kenn. Dep’t of Corr. v. Thompson, 490 U.S. 454, 463-65 (1989); and

(iv) relocating a prisoner to another prison outside the state does not require a prior hearing. Montanye v. Haymes, 427 U.S. 236, 243 (1976).

However, the right to marry is a fundamental right entitled to the highest tier of equal protection. In Turner v. Safley, 482 U.S. 78 (1987), the Supreme Court held that the denial of the right to marry was not “reasonably related” to the state’s prison security needs. Id. at 99. The regulation was enacted in response to illusory and conjured security concerns. Therefore, (D) is correct and (A) is incorrect.

(C) is incorrect because prison authorities are not required to establish that the regulation complained of is the least restrictive alternative for achieving the penological objective in order to pass constitutional scrutiny.

(B) correctly states that a prisoner’s constitutional rights are diminished, but that diminution does not permit the state to deny a prisoner’s right to marry. Therefore, (B) is incorrect.
26. Congress decided that the application of the Uniform Consumer Credit Code needed to be uniform throughout the country, and enacted a law making it directly applicable to all consumer credit loans and retail installment sales. The law was intended to protect borrowers and buyers against unfair practices by suppliers of consumer credit.

Which of the following constitutional provisions most readily justifies federal enactment of this statute?

(A) The Obligation of Contracts Clause.
(B) The Privileges or Immunities Clause of the Fourteenth Amendment.
(C) The Commerce Clause.
(D) The Equal Protection Clause of the Fourteenth Amendment.

26. Consumer loans, small loans, and retail installment sales all affect interstate commerce. Therefore, Congress has the power to regulate them under the Commerce Clause, and (C) is the correct answer. Keep in mind that the Commerce Clause, while not without limitation, is an extremely broad congressional power. When answering MBE questions, one should take pause before dismissing an answer choice based on the Commerce Clause.

The Contracts Clause limits the ability of state governments to impair the obligations of contract. It is not a source of federal power, and (A) is therefore incorrect.

The Privileges or Immunities Clause of the Fourteenth Amendment is not a clause authorizing congressional action; (B) is therefore incorrect.

While Congress has power under Section 5 of the Fourteenth Amendment to prevent state infringement of Fourteenth Amendment rights, including the Equal Protection Clause, the regulation of credit is not a subject matter associated with that clause, and (D) is, therefore, incorrect.
27. A state employee federally challenged her state’s “English only” policy as a violation of her federal First Amendment rights. She named both the state and the state’s governor in the governor’s official capacity. The employee sought an injunction and money damages under Federal Civil Rights Law 42 U.S.C. § 1983. The state law presented novel and unsettled questions of the state law involved. The employee did not file her suit as a class action.

Just prior to the trial in the federal district court, the employee resigned from her employment. The federal district court declared the law unconstitutional, and the state and its governor subsequently appealed.

What action should the Circuit Court of Appeals take?

(A) Dismiss the injunction action as moot.
(B) Dismiss the money action as not cognizable under 42 U.S.C. § 1983.
(C) Dismiss the injunction action because the employee lacks standing.
(D) Dismiss the injunction action because it is moot and the employee lacks standing, and dismiss the money action because it is not cognizable under 42 U.S.C. § 1983.

27. In the 1997 case, Arizona for Official English v. Arizona, 520 U.S. 43 (1997), the U.S. Supreme Court held that since the case was not brought as a class action, the plaintiff’s resignation from state employment rendered her claim for prospective relief moot. She no longer could assert a need for protection, an injury in fact, or anything beyond a generalized grievance possessed by any citizen unhappy with a particular law. Thus, the mootness and standing choices of (A) and (C) are correct. Note, that if the plaintiff had brought a class action, then her resignation from employment would not have rendered the action moot since the other class members still would have a case or controversy.

Here, the employee’s resignation from her state job rendered her injunction claim moot. The Article III limitation on the jurisdiction of the federal courts to actual cases and controversies pertains to all stages of court litigations, “not merely at the time the complaint is filed.” Thus, mootness is “the doctrine of standing set in a time frame.” Id.

The plaintiff’s money damages claim would not be rendered moot because of her resignation. However, there is no cognizable § 1983 claim for damages against the state or the governor in the governor’s official capacity because states, state agencies, and state officials in their official capacities are not “persons” subject to suit under § 1983. Will v. Michigan, 491 U.S. 58 (1989). Thus, choice (D) is the correct choice. Note that the employee could have asserted her damages claim against the governor in the governor’s personal capacity. Hafer v. Melo, 502 U.S. 21 (1991).

The federal court can grant prospective relief compelling a state official to comply with federal law. Thus, an injunction claim against the governor would not be barred had the employee not resigned from her employment or had she brought a class action.

Also, the abstention doctrine figures prominently in this problem. Since the law presented novel, unsettled questions of state law, the federal court should have sought certification from the state court on the unresolved issue of state law. “Certification today covers territory once dominated by a deferral device called ‘Pullman abstention’, a doctrine that proved protracted and expensive.” Id.
28. After extensive negotiations, the President of the United States executed an agreement with foreign officials providing that U.S. citizens who died holding property in the foreign country could have their estate administered by a U.S. administrator without the formerly-required appointment of a special foreign administrator. Conversely, under the agreement, a citizen of the foreign country who died owning property in the U.S. could have his U.S. estate administered by a foreign administrator.

A citizen of the foreign country died having U.S. real property in his estate. The state statute where this property was located required the appointment of a special administrator when a nonresident died seized of real property in the state. Accordingly, the appropriate state official sought to enjoin the deceased’s foreign administrator from interfering with the property in question without first seeking the appointment of a state administrator.

What action should the court take?

(A) Grant the injunction because the agreement has not received the advice and consent of the Senate.
(B) Grant the injunction because the agreement interferes with the state’s power over the ownership and conveyance of real property located within its borders.
(C) Grant the injunction because the agreement violates the Equal Protection Clause.
(D) Deny the injunction because of the Supremacy Clause.

28. The President, pursuant to his power to conduct foreign relations, has entered into a valid executive agreement. Under the case of United States v. Belmont, 301 U.S. 324 (1937), that agreement takes precedence over any state law inconsistent with it, and therefore (D) is correct. Tribe, American Constitutional Law § 4.4 at 648 (3d ed. 2000).

An executive agreement is valid without the advice and consent of the Senate because it is not a treaty and needs no ratification. (A) is therefore incorrect.

(B) is incorrect because the executive agreement takes precedence over inconsistent state law.

The federal government can discriminate against (and presumably in favor of) aliens on the showing of a rational basis. (C) is incorrect because there is a rational purpose for the agreement and, therefore, the classification will be upheld.
29. A state adopted antipollution legislation to limit levels of industrial smoke emissions within the state in the interest of reducing the incidence of acid rain. The federal statute regulating the same type of emissions was less stringent.

A large automobile manufacturer feared that compliance with the state statute would be prohibitively expensive, and thereafter announced its plan to close operations before the new requirements went into effect. Congress’s stated objective in enacting the federal emissions regulations was to achieve clean air at a cost that would not unduly burden private industry.

Before the date when the state statute was due to take effect, the manufacturer brought suit in federal court seeking a declaratory judgment and an injunction against enforcement of the statute.

Which of the following provides the manufacturer’s strongest argument that the federal government has preempted the field of emission controls?

(A) A regulation of an industry impliedly preempts the entire area from state regulation.
(B) Air quality is not an area historically regulated by the state.
(C) The state statute frustrates the expressed federal purpose of regulating air quality in a manner not designed to impose excessive financial burdens on businesses.
(D) States cannot enact stricter standards than the federal government in regulating the same activity.

29. A state law may be preempted by a federal law:

1) where Congress expressed an intent to totally preempt;
2) where Congress’s regulation of the area in which the federal interest is so dominant and pervasive that it is assumed (implied) to preempt the entire area; or
3) where the state law stands as an obstacle to Congress’s objective so that it is impossible to comply with both statutes, or where state law frustrates the purpose of Congress in enacting the legislation. English v. General Elec. Co., 496 U.S. 72, 79 (1990).

The state emission statute here frustrates the purpose of the federal statute if the federal statute was designed to ensure a minimum standard of emission control while limiting the adverse effect of the statute on industry. Thus, (C) is correct.

(A) is incorrect because it is possible to comply with both federal and state law in this case.

(B) is incorrect because public health measures, including clean air standards, are within an area historically regulated by the state.

30. A city ordinance created a three-member zoning board, which is responsible for approving the location of all entertainment venues in the city. In an inseverable provision, the ordinance requires that one member of the board be a representative of the local council of churches.

A minister was appointed to the board to represent the local council of churches. During the minister's tenure, the board denied a company permission to open a nightclub in a particular location solely because it would be so close to an existing church that it might disturb the church's operations. The company has challenged the ordinance and its application in federal court on constitutional grounds.

Is the company likely to prevail?

(A) No, because the existing church has a right to have its vested property interests protected.  
(B) No, because the minister was only one of three votes and, therefore, could not dictate the decision of the zoning board. 
(C) Yes, because the requirement that the zoning board include a representative of the local council of churches violates the First and Fourteenth Amendments. 
(D) Yes, because, as applied, the ordinance denied the company the equal protection of the laws by irrationally discriminating against its particular type of business.

30. (A) Incorrect. While it is true that churches have a right to protect their property interests, the ordinance is an unconstitutional means of affording that protection. The U.S. Supreme Court has held that the establishment clause of the First Amendment does not permit important, discretionary governmental powers, such as the power to make zoning decisions, to be delegated to or shared with religious institutions. Therefore, the requirement that the zoning board include a representative of the local council of churches violates the establishment clause.

(B) Incorrect. The fact that the representative of the local council of churches does not control the decisions of the zoning board is not dispositive. The U.S. Supreme Court has held that the establishment clause of the First Amendment does not permit important, discretionary governmental powers, such as the power to make zoning decisions, to be delegated to or shared with religious institutions. Therefore, the requirement that the zoning board include a representative of the local council of churches violates the establishment clause.

(C) Correct. The U.S. Supreme Court has held that the establishment clause of the First Amendment does not permit important, discretionary governmental powers, such as the power to make zoning decisions, to be delegated to or shared with religious institutions. Therefore, the requirement that the zoning board include a representative of the local council of churches violates the establishment clause.

(D) Incorrect. The U.S. Supreme Court has held that cities have a legitimate interest in protecting churches from the disturbances associated with land uses such as nightclubs. Therefore, the decision of the zoning board to deny the company's preferred location of its nightclub near a church did not violate the equal protection clause of the Fourteenth Amendment.

However, the U.S. Supreme Court has also held that the establishment clause of the First Amendment does not permit important, discretionary governmental powers, such as the power to make zoning decisions, to be delegated to or shared with religious institutions. Therefore, the requirement that the zoning board include a representative of the local council of churches violates the establishment clause.
## CON LAW

<table>
<thead>
<tr>
<th><strong>Strict Scrutiny</strong> (government burden)</th>
<th><strong>Intermediate Scrutiny</strong> (government burden)</th>
<th><strong>Rational Basis</strong> (plaintiff burden)</th>
</tr>
</thead>
</table>
| "Exacting" Scrutiny; the law burdening a constitutional right is necessary to achieve a "compelling governmental interest" (least restrictive means) | Substantially relates to and furthers an important governmental interest  
**SON:**  
Significant governmental interest, **Open** and ample alternatives, and **Narrowly** drawn (though not "least restrictive") | Rationally related to a legitimate governmental interest |
| Content based speech (flag)  
Intentional discrimination against religion (presumed invalid)  
State law that purposefully interferes with religion/free exercise  
Federal law that purposefully or when applied evenhandedly to a secular activity interferes with religion/free exercise (Religion Freedom Restoration Act)  
Public or Limited Public Forum (content neutral)  
Vague and Overbroad Statutes (exacting scrutiny) | Content neutral speech regulation (time, place, and manner)  
Commercial speech regulations | School and prison speech (except for inmates under "RLUIPA" (Religious Land Use & Institutionalized Personal Act), which requires compelling interest and least restrictive means test)  
State law that when applied evenhandedly to secular activity interferes with religion/free exercise. |
| States (14th) E.P. "suspect class" – **RIO** (race, immigrant’s origin, nationality)  
States (14th) E.P. fundamental rights – **VAT** (voting, access to courts, travel) | States (14th) E.P. "quasi-suspect class" (gender, non-marital children, school age aliens) – "substantially relates to and furthers an important governmental interest" | States (14th) E.P. all other classes (zoning, taxation, selling drugs near school, poor, food stamps, school kids, physically or mentally disabled, age)  
States (14th) discrimination not on face of statute, but in impact (de facto discrimination) – plaintiff must show not rationally related or discriminatory intent, and then court applies strict scrutiny |
| Substantive Due Process – compelling and narrowly tailored – fundamental rights **MADD COPS** – marriage, abortion, die, dissolve marriage, contraceptives, obscene, parenting, sexual acts (note that, for liberty interests of abortion and private sexual acts, require only a rational basis as they are protected but not "fundamental" interests | | Aliens by state in state political function or right to govern  
Alien regulation by congress (which has constitutional jurisdiction over entry into the U.S.)  
Mentally disabled, age discrimination, poverty |