

374. PRACTICE EXAM

incurred to have the work completed. (B) is incorrect because the fact that Lakeview did not contractually assume Lightpost's obligations does not alter its liability to Shoes under privity of estate principles. Had Lakeview contractually assumed the obligations, Shoes could have also proceeded against Lakeview on a contractual basis as a third-party beneficiary of the assumption agreement. Even without the assumption, Lakeview is liable to Shoes on privity of estate grounds. (C) is wrong because the fact that privity of estate between Lightpost and Shoes was severed by the sale does not alter Lightpost's privity of contract obligations. Because Lightpost made a covenant in the lease to maintain the parking lot, he is contractually obligated to fulfill that covenant regardless of the sale of the property to Lakeview. (A) is incorrect because the failure of Shoes to pay rent does not excuse the prior breach of the covenant to maintain the parking lot. As a general rule, covenants in a lease are independent of each other. Thus, if one party breaches a covenant, the other party can recover damages, but must still perform his promises under the lease. Absent application of constructive eviction, an implied warranty of habitability, or some other statutory provision, Shoes may not have had authority to withhold rent despite the breach of the maintenance covenant, and Lakeview may now have the option to terminate the lease as a result. Even if that were the case, however, both landlords would remain liable to Shoes for the damages incurred from the breach of the maintenance agreement while the lease was in force.

Answer to Question 22

- (A) The state may impose a tax on the fiberoptic line. A state tax levied directly against the property or operation of the federal government without the consent of Congress is invalid. However, nondiscriminatory, indirect taxes on the federal government or its property are permissible if they do not unreasonably burden the federal government. Because this tax is not levied directly against the government but rather against the provider of a service that the government is obtaining, and is levied on all communications lines in the state, the tax is valid. The fact that the economic burden of the tax will ultimately be borne by the government under the "cost plus" contract does not invalidate the tax. (B) is wrong because the Tenth Amendment provides that powers not delegated to the United States, nor prohibited to the states, are reserved to the states. This limits Congress's power to regulate the states but does not serve as an independent grant of power to the states. Both the federal government and the state government have the power to tax, but the federal law is supreme in this area. (C) is incorrect because not every state tax that burdens the federal government is invalid. A nondiscriminatory tax on a service provided to the federal government by a private entity does not appear to be an unreasonable burden on the operation of the federal government. (D) is wrong because the fact that interstate commerce is involved does not invalidate the tax. Power over commerce is concurrent, belonging to both the states and the federal government. While federal law is supreme in the area of interstate commerce, state legislation that affects interstate commerce is not automatically invalidated.

Answer to Question 23

- (A) The document should be admitted. Related to the exception to the hearsay rule for public records and other official writings, Federal Rule of Evidence 803(10) provides that evidence in the form of a certification or testimony from the custodian of public records that she has diligently searched and failed to find a record is admissible to prove that a matter was not recorded, or, inferentially, that a matter did not occur. Here, David's status as a licensed psychotherapist would normally be revealed in the records of the department. The document here at issue is admissible, under the foregoing hearsay exception, as a means of proving that David is in fact not licensed. (B) is incorrect because this hearsay exception does not require unavailability of the declarant. (C) is incorrect because, as explained above, the statement of absence from public record forms an

exception to the hearsay rule. (D) is incorrect because a public document that has been signed and certified is self-authenticating under Rule 902; hence, no testimonial sponsorship for the document is required.

Answer to Question 24

- (C) Page will not recover because she was an unforeseeable plaintiff to whom Dwyer owed no duty. A duty of care is owed only to foreseeable plaintiffs. A trespasser is not a foreseeable plaintiff unless the landowner has discovered her presence or should reasonably know of trespassers who constantly cross over a section of his land. Neither of these situations is indicated by the facts. Thus, Page was an undiscovered trespasser to whom no duty is owed. Dwyer was under no obligation to inspect his premises to determine if trespassers were entering his cabin. (A) is incorrect. Because Dwyer owed no duty to Page, it is irrelevant whether Dwyer knew that the stove was defective. (B) is incorrect for the same reason. Dwyer had no duty to inspect the appliances in his cabin to make it safe for undiscovered trespassers. (D) is incorrect because it mitigates Page's liability for trespass but has no effect on Dwyer's duty to Page.

Answer to Question 25

- (C) Masters's suit will be unsuccessful because he has no right to a hearing here since he has no life, liberty, or property interest at stake. The Due Process Clause requires a hearing only when a life, liberty, or property interest is at stake. Masters clearly is not at risk of losing his life or liberty, and the Supreme Court has made clear that neither is a property interest involved here. To have a property interest in continued government employment, there must be a statute, regulation, contract right, or clear policy that the employee can be dismissed only for cause. Absent such a right to employment, the employee is an at-will employee and may be terminated without a hearing. Here, there was no law, contract, or policy giving Masters a right to a job absent cause for firing him. Therefore, no hearing was required. (A) is incorrect because bills of attainder involve criminal or otherwise punitive measures inflicted without judicial trial. Nothing here indicates that Masters is being punished; rather he is not being retained as an employee. (B) is incorrect because while the Equal Protection Clause prohibits government from discriminating between similarly situated persons unreasonably, where, as here, no fundamental right or suspect or quasi-suspect right is involved, the discriminatory government action will be upheld as long as it is rational. The random hearing policy here could be rational (*e.g.*, it might provide a sufficient sample to ensure that probationary employees are not being terminated for improper reasons); thus, it will be upheld. (D) is incorrect because it is too broad. Not every aspect of state government employment is protected by the Tenth Amendment. [*See, e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority* (1985)]

Answer to Question 26

- (A) Marvin will win because the contract is fully enforceable under the U.C.C. Tubing is a good, and so Article 2 of the U.C.C. applies. The contract is for the sale of goods over \$500 (10,000 linear feet at \$2/foot); so ordinarily section 2-201 would require a writing. However, section 2-201(3) provides that a writing is not required where the contract is for "specially manufactured" goods not suitable for resale in the ordinary course of the seller's business and the seller has made a substantial beginning of their manufacture or commitments for their procurement. Because the tubing is a custom order of unique specifications and Marvin has begun manufacture, this exception to the U.C.C. Statute of Frauds applies. (B) is incorrect because the contract is fully enforceable. While Marvin is required to mitigate damages, it is entitled to the full range of contract remedies to put it in the position it would have been in had Golde not breached (*i.e.*, benefit of

376. PRACTICE EXAM

the bargain damages on the entire contract). (C) is incorrect because while it is true that a contract for the sale of goods over \$500 must ordinarily be evidenced by a signed writing, the “specially manufactured goods” exception (*see* above) applies here. (D) is incorrect because the parol evidence rule bars admissibility of evidence that varies an integrated writing; here, there is no writing at all.

Answer to Question 27

- (D) The court is not likely to agree to suppress the confession for two reasons: Drake probably has no standing to raise a violation of Trent's Fourth Amendment rights, and even if he did, the confession would not be excluded because it was not the fruit of the Fourth Amendment violation. Under the Fourth Amendment, the police generally can arrest, without a warrant, anyone that they have reasonable grounds to believe has committed a felony. There are two exceptions, however, when a warrant is required: Absent exigent circumstances, the Fourth Amendment requires the police to have a warrant to arrest a person in his own home or to search the premises of a third person for an arrestee. Here, the police had probable cause to arrest Drake and the arrest did not occur in Drake's home. Although the arrest did take place in Trent's home and the police did not obtain a warrant to search Trent's home, this will not help Drake because the warrant requirement for a third person's premises is intended to protect the third person's expectation of privacy; while the search may have violated Trent's Fourth Amendment rights, Trent is not being charged with an offense. The Supreme Court has held that a person can have evidence excluded on Fourth Amendment grounds only if that person's Fourth Amendment rights were violated; a person has no standing to raise a violation of another's Fourth Amendment rights. A person has standing to object to the search of a place only if the person has an ownership or possessory interest in the place searched or is an overnight guest in the place searched. Here, the police entered Trent's home, and the facts indicate that Drake was there only to obtain a forged license. Thus, Drake probably has no standing to raise the Fourth Amendment violation. Furthermore, even if he had standing, his confession could still be used against him. While the exclusionary rule generally provides that evidence obtained or derived from exploitation of illegally obtained evidence must be excluded, the Supreme Court has held that where the police have probable cause to arrest a defendant and improperly arrest him in his home without a warrant, a confession made by the defendant at the police station is admissible because it is not the fruit of the unlawful arrest (since the police could have lawfully arrested the defendant the moment he stepped outside of the house). [New York v. Harris (1990)] Here, even if the arrest were unlawful because of the absence of a warrant, the police had probable cause to arrest Drake and so could have waited until he left Trent's house. Hence, the confession at the police station was not a fruit of the unlawful arrest and should not be suppressed. (A) is wrong because, as discussed above, it is unlikely that Drake can establish that the warrantless entry by itself was a violation of his own reasonable expectation of privacy. (B) is incorrect because the absence of an arrest warrant, even if it would have made the arrest unlawful under the circumstances, would not require suppressing the confession. As discussed above, the confession was not the fruit of the unlawful arrest because the police had probable cause to arrest Drake as soon as he left the house. (C) is wrong because it is irrelevant. The fact that a reliable informant gave them Drake's location, even assuming that it would have helped establish probable cause for searching there, does not excuse the requirement that a magistrate make an independent evaluation of probable cause before issuing a warrant.

Answer to Question 28

- (D) Nora will be able to enforce the restrictive covenant as an equitable servitude. Zoning regulations and restrictive covenants in private deeds are completely separate concepts. Both must be complied with, and neither provides any excuse for violating the other. Thus, a variance from the government regulation does not prevent enforcement of the private covenant. The court will enforce the covenant as an equitable servitude because Nora is seeking an injunction. An equitable

servitude is a covenant that, regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have notice of the covenant. Here, all of the deeds contained the restrictive covenant. There is no indication that Dampier did not have notice of the restriction, and it is both possible and reasonable for him to comply with the restriction at this stage. Privity of estate is not required because the majority of courts enforce the servitude as an equitable interest in the land itself. Hence, Nora will obtain the injunction. (A) is incorrect because, as noted above, zoning regulations and covenants in deeds are completely separate; thus, the zoning regulation would not take precedence over the covenant. The only time a zoning regulation might prevent enforcement of such a covenant is where enforcement would result in a zoning violation (*e.g.*, covenant calls for single family residential housing only, while the land is zoned strictly commercial). (B) is an incorrect statement of law. Equity will impose a hardship, although it will try to balance the hardships between the parties. Here, the hardship on Dampier is not unreasonable because it is possible for him to build a house that complies with the setback restriction and he has not yet dug the foundation for the house he was planning. (C) is incorrect because nothing in the facts indicates that Dampier will be unjustly enriched by building his home in violation of the covenant; *e.g.*, there is no indication that his home or property will be worth more simply because it has a 30-foot setback rather than a 50-foot setback.

Answer to Question 29

- (A) Howser will win because Awl's notice constituted an anticipatory repudiation, which can be treated as an immediate and total breach of contract. If a contract is executory on both sides and one party *unequivocally* notifies the other party that he will not perform when his duty is due, the nonrepudiating party has the option of treating the repudiation as an immediate and total breach and suing for damages. Although the repudiator can retract the repudiation, this must be done before the nonrepudiating party relies on the repudiation. Here, the contract was wholly executory (since neither party had performed) when Awl said that he would not perform at the agreed price. Since Awl's statement was unequivocal, it constitutes an anticipatory repudiation. Thus, Howser was free to find someone to substitute for Awl. Since Howser did find a substitute, he relied on the repudiation and so Awl's attempted revocation was invalid. (B) is incorrect because the difference in price between Awl's demand and Gutter's price is irrelevant. Under the common law, Awl had a contractual duty to perform at the price he agreed to, and his statement that he would not do so constituted an anticipatory repudiation regardless of the price Awl was attempting to obtain. (C) is incorrect because Howser had no duty to inform Awl of the contract with Gutter. The repudiating party is the wrongful party in an anticipatory repudiation situation, and so the law does not impose a duty of notification on the nonrepudiator. If the repudiator suffers harm by his repudiation, it is his own fault. (D) is incorrect because, as stated above, a repudiator can revoke the repudiation only if the nonrepudiating party has not relied on the repudiation. Here, Howser had relied (by hiring Gutter). Thus, it is too late for Awl to revoke the repudiation.

Answer to Question 30

- (D) Howser can recover \$15,000, the difference between Awl's contract price and the contract price of the substitute performance. In construction contract cases where the builder breaches, the proper measure of damages is the difference between the cost of obtaining substitute performance (*i.e.*, the cost of completion) and the contract price. Here, while Howser actually paid \$25,000 more than Awl's contract price to have the house built, he was obligated to pay only \$15,000 more since Gutter had a legal duty to build the house for his contract price and no more. Howser will not be able to recover the \$10,000 difference because he has a duty to mitigate damages, and paying more than he was actually obligated to pay breaches the duty. (A) and (B)

378. PRACTICE EXAM

are incorrect because they do not apply the proper measure of damages formula. (C) is incorrect because the “cost of completion” does not include the additional \$10,000 Howser gave Gutter to save Gutter from having performed the job at a loss. As explained above, Howser was not required to pay Gutter the \$10,000 to complete the house and Howser’s paying the extra amount breaches his duty to mitigate damages. Thus, Howser cannot recover the extra \$10,000.

Answer to Question 31

- (C) Smith owns Whiteacre because a deed to a nonexistent person is void and conveys no title. Because Benjamin was dead when the deed was delivered, the deed passed nothing and was a nullity. Note that Smith will be required to return the \$75,000 to Benjamin’s estate to avoid unjust enrichment. (A) is wrong because title never passed from Smith. Furthermore, even if it had, it would not have passed even bare legal title to Lenora since she was not a grantee and Smith did not intend to pass title to her. (B) is wrong because Benjamin was killed before the contract was formed. Had he been alive at that time, the contract would have been valid and executory on his death. If a buyer dies after the contract for sale was entered into but before it has been completed, his heirs or devisees can demand a conveyance of the land at the closing. Since Benjamin was dead when the contract was entered into, however, Lenora’s agency was no longer valid and there was no contract. (D) is wrong because the term “risk of loss” refers to risk of the property’s being destroyed after the contract is signed but before closing. Here, the property was not destroyed. Moreover, there was no valid contract since Benjamin died before the contract was signed. Therefore, the risk of loss is irrelevant.

Answer to Question 32

- (B) The testimony was properly admitted under the excited utterance exception to the hearsay rule. Statements made under the stress of some exciting event and relating to that event are admissible as an exception to the hearsay rule. (A) is incorrect because the Federal Rules require the maker of a dying declaration to be unavailable for the declaration to be admissible. (C) is incorrect; even though the statement bolsters the credibility of Patricia, it still qualifies as an exception to the hearsay rule and is admissible substantive evidence. (D) is incorrect because it is up to the broad discretion of the trial judge under Federal Rule 403 whether to exclude relevant evidence based on needless presentation of cumulative evidence. There is nothing to indicate that admission of the testimony constituted an abuse of discretion.

Answer to Question 33

- (A) The party in choice (A) is the only one which clearly meets the “injury in fact” requirement for standing. The plaintiff should “have such a personal stake in the outcome of the controversy as to ensure the concrete adverseness that sharpens the presentation of issues.” The business will be clearly injured if its customer is required to drastically reduce purchases to comply with the State Green statute. In addition, the fact that the proposed plaintiff is not a citizen of State Green indicates the interstate impact of the State Green legislation. (B) is incorrect, because the corporation’s sales are not large enough to fall within the ambit of the State Green statute, so no injury in fact has been suffered. (C) is incorrect because the general rule is that a plaintiff must have standing in his own right, he cannot assert the rights of another to obtain standing, and nothing here indicates that the governor has a concrete stake here. (D) is incorrect because the potential plaintiff’s claim is far too tenuous. While the corporation whose bonds the potential plaintiff owns will be subject to the law, it is not likely that the potential plaintiff will suffer any injury since he has no interest in the corporation’s profitability (a bondholder does not share in a corporation’s profits, but is only entitled to repayment, and since the owner’s bonds here are secured, his investment is protected no matter what happens to the corporation).

Answer to Question 34

- (D) Bert will win because the officer was not privileged to arrest Bert. A police officer is privileged to make an arrest without a warrant for a felony or for a breach of the peace committed in her presence, but not for a misdemeanor not involving a breach of the peace. If the arrest is privileged, the officer may use only that degree of force necessary to effect the arrest, but never deadly force. Here, Bert's offense of jaywalking was a misdemeanor that did not involve a breach of the peace, so the officer did not have a privilege of arrest and committed a battery by grabbing Bert. (A) is incorrect because the fact that Bert struck the officer after she came at him with a baton would not affect her liability for the initial battery. (B) is incorrect because an ordinary misdemeanor cannot be the basis of an arrest even if it is committed in the presence of the officer; it must also constitute a breach of the peace. (C) is incorrect because it is irrelevant whether Bert will be found guilty of jaywalking—the officer was not privileged to arrest Bert for it.

Answer to Question 35

- (B) If the officer was unaware that Ruth was watching, the officer could not have the requisite intent to inflict emotional distress. For intentional infliction of emotional distress based on conduct directed at a third person, recovery is ordinarily limited to plaintiffs who are not only present at the time, but are known by the defendant to be present, so that the mental distress is likely to have been anticipated by the defendant. (A) is not as good an answer, because even if the officer knew the precise relationship between Ruth and Bert, the essential fact of the officer's knowledge of Ruth's presence is not established. (C) and (D) state elements of the tort, but are meaningless without the necessary intent towards Ruth.

Answer to Question 36

- (C) The court should instruct the jury that Dunken is not liable for first degree murder if he did not form the intent to commit the crime of burglary, because a defense to the underlying felony precludes a conviction for felony murder. Voluntary intoxication is a defense to specific intent crimes, such as burglary, if it prevents the defendant from formulating the requisite intent. In the absence of Dunken's liability for burglary, he cannot be convicted of first degree murder based on the facts presented here. (A) is incorrect because voluntary intoxication may be a defense to first degree murder under the circumstances here. (B) is an incorrect statement of law; the intoxication must negate a specific intent for the underlying felony for it to serve as a defense. (D) is incorrect; while premeditated murder is a specific intent crime for which voluntary intoxication may be a defense, nothing in the facts suggests that the charge is based on premeditation. Here, the first degree murder charge is based on commission of a burglary.

Answer to Question 37

- (B) The most serious crime for which Dunken can be convicted is second degree murder, because voluntary intoxication is not a defense to that crime. Under the statute, second degree murder encompasses all murders committed with "malice aforethought." Voluntary intoxication is not a defense to crimes requiring malice, including murder based on malice aforethought. Malice aforethought includes acting with reckless indifference to an unjustifiably high risk to human life (*i.e.*, an abandoned and malignant heart), and the jury could find that his reckless driving while intoxicated satisfies that standard. (A) is wrong because, regardless of Dunken's intoxication, there is no evidence that Dunken premeditated the victim's killing or was committing one of the enumerated felonies at the time of the victim's death. (C) and (D) are wrong because, while the jury could find Dunken guilty of only involuntary manslaughter based on criminal negligence or

380. PRACTICE EXAM

unlawful conduct, it could instead find that he was acting with reckless indifference to human life, which would result in a conviction for the more serious offense of second degree murder.

Answer to Question 38

- (B) The property power of Article IV, Section 3 of the federal Constitution is directly on point. The Property Clause contains no express limit on Congress's power to dispose of property owned by the United States. Such property includes all species, such as leasehold interests and electrical energy as well as ordinary realty and personalty. Disposal may include direct competition with private enterprise (such as TVA and the High Grasslands hypothetical) and has never been invalidated on that ground. (A) is incorrect because the General Welfare Clause allows Congress to spend for the general welfare, and here Congress is not spending, but disposing of property. (C) is not as good an answer as (B) because it is not direct. The Commerce Clause gives Congress the power to regulate interstate commerce, which encompasses any activity that either in itself or in combination with other activities has a substantial economic effect on, or effect on movement in, interstate commerce. When this power is combined with the Necessary and Proper Clause, it might allow Congress to regulate disposition of federal lands in a specified manner, but the property power is much more direct. (D) is incorrect because the Supremacy Clause merely states that federal law takes precedence over conflicting state law, but no state law is involved here. A private company is suing because the federal government is undercutting the company's price.

Answer to Question 39

- (A) The annual is admissible as an adoptive admission of the defendants. Admissions of party opponents are nonhearsay under the Federal Rules (801(d)(2)) and an exception to the hearsay rule under the common law. Furthermore, a party may expressly adopt someone else's statement as his own, thus giving rise to an "adoptive" admission. The manufacturers have done this by referring Peck to the figures in *Insulation Manufacturer's Annual Journal* as accurate in their response to the interrogatory. The defendant is estopped, at trial, from denying their admissibility. (B) is incorrect because the *Journal* does not clearly contain entries made in the ordinary course of business. (C) is incorrect because admissions of party opponents are nonhearsay under the Federal Rules. (D) is incorrect because party admissions waive the authentication requirement.

Answer to Question 40

- (C) The agreement between the parties is a type of requirements contract that obligates GM to buy from FGF all of the red cheese that it will sell and obligates FGF to supply GM's needs up to FGF's entire output. GM does not have to buy any FGF red cheese if it acts in good faith. Requirements contracts (a promise by the buyer to buy all of his requirements from the seller, who promises to sell that amount to the buyer) and output contracts (a promise by the seller to sell all of his output to the buyer, who agrees to buy that amount from the seller) are enforceable under section 2-306 of the Uniform Commercial Code. Consideration exists on both sides in these contracts. In a requirements contract, the buyer's consideration is the good faith operation of his business and the promise that he will only buy from the seller; the seller's consideration is the promise to sell at an agreed-upon per unit price whatever the buyer requires. In an output contract, the seller's consideration is the good faith operation of business and the promise to sell the goods only to the buyer, and the buyer's consideration is the promise to buy at an agreed-upon unit price whatever the seller produces. The agreement here is essentially a requirements contract that puts an upper limit on what GM can require—the total output of FGF—and also requires FGF to sell its red cheese only to GM. It is not an output contract because GM is not required to buy all of FGF's output even though it has retained the right to do so. Under the U.C.C., the buyer in a requirements contract is required to conduct his business in good faith and according

to commercial standards of fair dealing in the trade so that his requirements will approximate a reasonably foreseeable figure. However, good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. Thus, a shutdown by a requirements buyer for lack of orders may be permissible if the buyer is acting in good faith. [U.C.C. §2-306, comment 2] In this case, then, choice (C) best states the obligations of the parties: GM is not obligated to buy any red cheese from FGF as long as it acts in good faith, but any red cheese it sells must come from FGF.

Answer to Question 41

- (D) The court should determine that title to Greenacre is one-half in the heirs of Susan, one-quarter in the heirs of Henry, and one-quarter in the heirs of Audrey. Henry and Audrey held the one-half interest in Greenacre as joint tenants with right of survivorship. Thus, had one of them survived, he or she would own the entire one-half interest. The operation of the simultaneous death statute in the jurisdiction, which disposes of property as if each survived, results in their property being distributed as though they were tenants in common; *i.e.*, one-half of their interest passes through Henry's estate as though he survived and one-half of their interest passes through Audrey's estate as though she survived. Susan always held her one-half interest as a tenant in common, so her one-half interest clearly passes to her heirs without any need to resort to the simultaneous death statute. (A) is wrong because Constance effectively conveyed her entire interest in Greenacre to Audrey, Henry, and Susan, and Constance is not the sole heir of the decedents. No consideration is required for a valid conveyance, and both deeds were properly delivered. Acceptance is presumed. (B) is wrong because it ignores Susan's interest. Henry and Audrey never owned the whole of Greenacre; therefore, they cannot pass the whole of Greenacre to their respective heirs. (C) is wrong because it implies that the one-half interest was not effectively conveyed to Susan. The delivery of the deed to Susan's parent during the time that she was a minor is effective delivery. The fact that the deed was not recorded has no effect on its effectiveness.

Answer to Question 42

- (B) The court should find the tax constitutional because it is nondiscriminatory. Nondiscriminatory, indirect taxes on the federal government or its property are permissible if they do not unreasonably burden the federal government. The tax here is a nondiscriminatory "doing business" tax directed at the gross receipts of *all* business conducted within the state, and there is no indication that the tax unreasonably burdens the transaction of business by the federal government. Hence, the fact that the corporation was acting as a federal contractor will not immunize it from liability for the tax. (A) is incorrect because it is too broad. A state's power over purely intrastate commercial transactions is subject to the Due Process Clause and, where the federal government is involved such as here, the Supremacy Clause. However, the tax here does not violate the Supremacy Clause, as (C) states, because it is not targeted at, nor does it unreasonably burden, the federal government. (D) is incorrect because, even if interstate commerce is involved here, the three factors evaluated by a court in determining whether an undue burden exists (substantial nexus, fair apportionment, and fair relationship) do not appear to be lacking in this case.

Answer to Question 43

- (A) The subpoena should be upheld because the information about hours billed is not within the privilege. There is no privilege regarding a communication that is relevant to an issue of breach of duty by the lawyer to his client or by the client to her lawyer. Thus, the billing data does not fall within the ambit of the privilege. (B) is incorrect because the information here is not covered by the privilege. Furthermore, if the privilege were applicable, Able would be able to invoke the privilege on behalf of his clients. The lawyer's authority to do this is presumed in the absence of

382. PRACTICE EXAM

any evidence to the contrary. (C) is a correct statement of law, but the work product rule does not apply to these facts. Documents prepared by the lawyer for his own use *in prosecuting his client's case* are protected by this rule. Time records are not prepared for litigation purposes; they are not related to the substance of the client's case. (D) is incorrect because the other clients are protected by the blacking out of confidential information. Moreover, since the time records are not communications to or from the client and the identity of clients is often not considered to be within the privilege, the billing records of other clients may not be privileged and their consent may not have been necessary even without the deletions.

Answer to Question 44

- (D) The grandchildren take nothing because the purported conveyance to them violates the Rule Against Perpetuities. Under the Rule Against Perpetuities, an interest in property is not valid unless it will vest, if at all, not later than 21 years after a life in being at the creation of the interest. The validity of interests under the Rule is determined at the time the interests are created, taking into account the facts then existing. The "lives in being plus 21 years" period begins to run, and the measuring lives used to show the validity of an interest must be in existence, at that time. The problem in this case is that there is an age contingency beyond age 21 in an open class. The perpetuities period begins to run on the date Torgeson conveyed Fruitacre to Fran. After that date, Diana could have additional children, shortly after which the lives in being (she, Fran, Hubert, Dubert, and Luberta) might all die. The additional children's interest would vest when they reach age 25, which is more than 21 years after lives in being. (A) is wrong because the interest violates the Rule Against Perpetuities. Except for the Rule, the grandchildren's interest would be classified as contingent remainder. It is contingent because of the condition precedent of their reaching a certain age before taking an interest. (B) is wrong because, even if the Rule Against Perpetuities had not been violated, the grandchildren's interest would not have been vested because their taking was subject to a condition precedent. (C) is wrong because, even if the Rule Against Perpetuities had not been violated, the grandchildren's interest would be a remainder rather than an executory interest. Their interest follows a life estate and as a rule of thumb, remainders always follow life estates. An executory interest is an interest that divests the interest of another, and under these facts, Fran would not have been divested of her interest; she was entitled to retain the property for the remainder of her life.

Answer to Question 45

- (D) The purported contingent remainder to the Sisters of Charity violates the Rule Against Perpetuities and consequently they take nothing. As noted in the above answer, the grandchildren are not certain to reach age 25 (or to die before reaching 25) within 21 years after any life in being. Thus, the interest to the grandchildren violates the Rule Against Perpetuities and, hence, any interest being conveyed subsequent in time, such as that to the Sisters of Charity, will automatically violate the Rule Against Perpetuities. Like any other gift, a gift for charitable purposes is void for remoteness if it is contingent upon the happening of an event that may not occur within the perpetuities period. The only exception to this rule is that if there is a gift to a charity, followed by a gift over to another charity upon a possibly remote event, the gift over is valid. Remember, this is a charity-to-charity exception; the Rule Against Perpetuities still applies to dispositions over from an individual to a charity on a remote condition. In this case, there is a disposition over from an individual to a charity on a remote condition in violation of the Rule. (A) is wrong because the interest is void under the Rule Against Perpetuities. If the Rule did not apply, the Sisters of Charity would have a contingent remainder, and (A) would be correct. The grandchildren would have a contingent remainder and the Sisters' interest is contingent on none of the grandchildren attaining age 25. (B) is incorrect because a vested remainder subject to total

divestment arises when: (i) the remainderman is in existence and ascertained, (ii) his interest is not subject to any condition precedent, but (iii) his right to possession and enjoyment is subject to being defeated by the happening of some condition subsequent. The remainder here at all times remains subject to the condition precedent that none of the grandchildren attain age 25 and therefore the remainder can never be vested. Furthermore, there is no condition subsequent that would ever divest the Sisters of Charity of their interest once they acquired such interest. (C) is incorrect because without regard to the Rule, any interest that the Sisters of Charity would ever take would not divest Fran of her life estate. Thus, their interest could not be described as an executory interest.

Answer to Question 46

- (D) The strongest argument against the validity of the state action is that state provision of textbooks to this segregated private school violates the Equal Protection Clause by giving state support to a racially segregated educational process. The practice amounts to significant state involvement in these activities. Note that a party challenging the state involvement here would also have to show a discriminatory motive, because the distribution of textbooks to all public and private schools is neutral on its face. (A) is incorrect because it is nonsensical. Providing textbooks necessarily serves a legitimate educational function; and even if it did not, there is no requirement that a state serve such a function in the exercise of its power to tax and spend. For example, denial by the Internal Revenue Service of tax-exempt status to racially discriminatory religious schools does not violate the Constitution since the governmental interest in ending racial discrimination outweighs the burden on these religious schools. (B) is wrong because a state may aid anyone as long as its acts are not constitutionally prohibited. (C) is incorrect because the Constitution does not forbid any private bias; it only forbids discriminatory state action. To the extent that private discrimination is forbidden under various federal civil rights acts, the source of the prohibition is legislative, not constitutional.

Answer to Question 47

- (C) If it can be shown that there is neither a religious purpose nor an effect on religion, and that there is not excessive entanglement between government and religion, then the government is not involved in an establishment of religion. The fact that private sectarian schools fulfill an important function (A) would not justify a violation of the Establishment of Religion Clause. That religious instruction in private schools is not objectionable (B) is true—but the issue here is whether the government is involved in the establishment of religion, not whether what is being taught is objectionable or unobjectionable. The Free Exercise Clause (D) does not require identical treatment of public and private schools and, furthermore, the relevant issue here involves the Establishment Clause, not the Free Exercise Clause.

Answer to Question 48

- (A) Edgewater probably will be vicariously liable to Parka because Edgar's deviation did not take him outside the scope of the employment relationship. Under the doctrine of respondeat superior, an employer will be vicariously liable for tortious acts committed by its employee if the tortious acts occur within the scope of the employment relationship. What the scope of employment is in a particular case is a question of fact determined by factors such as the specific authorization by the employer, the employee's motivation, and the normal routines of the employee. Ordinarily, an employee heading home after work is no longer within the scope of employment. Here, however, Edgar was required to be "on call" 24 hours a day and was required to drive the company van to

384. PRACTICE EXAM

his home so that he would be ready to provide emergency service whenever a call would come in. Most likely, then, Edgar was still within the scope of his employment when he was driving the van home. The next issue is whether his deviation from his route home took him outside the scope of his employment. Most courts today consider the foreseeability of the deviation to be the most important factor in determining whether the employee was still within the scope of employment or was on a “frolic” of his own. Thus, minor deviations in time and geographic area from the employer’s business are still within the scope of employment because they are foreseeable. Here, Edgar’s deviation of a few blocks from his normal route home to pick up some groceries was not a substantial enough departure from his employment purposes so as to be unforeseeable, and therefore Edgewater can be held vicariously liable for Edgar’s negligence. (B) is incorrect because Parka can recover even without showing that Edgewater knew of Edgar’s potential for negligence. While that might make Edgewater independently liable for its own negligence in allowing Edgar to drive a company van, Edgewater is vicariously liable even without the assumption stated in choice (B). (C) is wrong because, as discussed above, a minor deviation of a few blocks is not considered a “frolic” by most courts unless it is unforeseeable. (D) is incorrect even though it is a true statement as a general rule. While an employee traveling to and from work ordinarily is not acting within the scope of his employment, Edgar was “on call” for his employer under the facts in this question even while he was driving home from work.

Answer to Question 49

- (C) The best defense that Smythe’s testimony offers is insanity. Under the *M’Naghten* test for insanity, defendant must show that (i) a disease of the mind (ii) caused a defect of reason (iii) such that defendant lacked the ability at the time of his actions to either know the wrongfulness of his actions or understand the nature and quality of his actions. Under the A.L.I./Model Penal Code test for insanity, the defendant is entitled to acquittal if the proof shows that he suffered from a mental disease or defect and as a result lacked substantial capacity to either: (i) appreciate the criminality (wrongfulness) of his conduct; or (ii) conform his conduct to the requirements of law. Smythe’s testimony indicates insanity under either test. Smythe’s hospitalizations indicate a mental disease and his delusion regarding his wife’s basement activities indicates a defect of reason and an inability to appreciate the wrongfulness of his conduct. (A) is incorrect because Smythe intended to kill his wife; hence, the mens rea required for homicide, malice aforethought, is satisfied. (B) is incorrect because Smythe performed the act that killed his wife. (D) is incorrect because Smythe’s belief was not a reasonable one and does not, by itself, establish a defense.

Answer to Question 50

- (B) Scholastica will lose because Rector can raise consent as a complete defense to her libel action. A defamation action at common law required plaintiff to prove (i) defamatory language on defendant’s part that is (ii) “of or concerning” the plaintiff, (iii) publication of the defamatory language to a third person, and (iv) damage to the reputation of the plaintiff. (Because the defamation here does not refer to a public figure or involve a matter of public concern, the elements of falsity and fault do not need to be proved.) In this case, Rector uttered a statement to a third person, Loretta, that linked Scholastica to the sale of drugs; this satisfies the first three elements of the *prima facie* case. Because the statement was libel (uttered in a writing), general damages will be presumed by law; Scholastica does not need to show actual damages from the statement. Hence, Scholastica can establish a *prima facie* case for libel against Rector. As with all torts, however, consent, whether express or implied, is a complete defense to a defamation action. Implied consent includes apparent consent, which is consent that a reasonable person would infer from plaintiff’s conduct. Here, it was reasonable for Rector to infer that Scholastica’s dispatch of her

lawyer to request the reasons for her dismissal included a consent for Rector to make defamatory statements to the lawyer as long as they related to the reasons for Scholastica's dismissal. Thus, Scholastica impliedly consented to the statement in the letter and will not prevail in her suit against Rector. (A) is incorrect even though Rector should have verified the statement before repeating it. His defense is that Scholastica impliedly consented to the statement rather than that he did not originate the statement. (C) is incorrect because the fact that Rector did not originate the statement does not provide a defense. One who repeats a defamatory statement will be held liable on the same general basis as the primary publisher even though the repeater states the source or makes it clear that he does not believe the defamation. (D) is incorrect because whether Scholastica was dealing in drugs only affects whether Rector can also raise the defense of truth in this defamation action. Rector will win by raising the defense of consent; the fact that Scholastica was not dealing in drugs does not change this result.

Answer to Question 51

- (B) Rose's motion should be denied because a prosecution for conspiracy is distinct from a prosecution for any substantive offense involving the same conduct as the conspiracy. The Fifth Amendment provides that no person shall be twice put in jeopardy for the same offense. The general rule is that two crimes do not constitute the same offense if each crime requires proof of an additional element that the other crime does not require, even though some of the same facts may be necessary to prove both crimes. [Blockburger v. United States (1932)] Furthermore, a prosecution for conspiracy is not barred merely because some of the alleged overt acts of that conspiracy have already been prosecuted. [United States v. Felix (1992)] Here, both the conspiracy charge and the possession charge require proof of an element that the other charge does not; hence, there is no double jeopardy problem with the indictment. (A) is incorrect because it is too broad a statement. The fact that separate statutes are involved does not establish that these are not the "same offense" for purposes of double jeopardy. (C) is incorrect because the "same conduct" test is not currently used by the Supreme Court to evaluate a double jeopardy claim. (D) is incorrect because the question involves defendant's motion to quash an indictment and not her ultimate punishment.

Answer to Question 52

- (B) Where a statutory classification is challenged as violating the Equal Protection Clause, one of three tests is used. If the classification relates to exercise of a fundamental right or is based on a suspect trait, a compelling state interest must justify the classification. If a quasi-suspect classification is involved (*i.e.*, one based on gender or legitimacy), the law will be upheld if it is substantially related to an important government interest. In other cases, the classification is valid if there is a rational basis for the classification. This rational basis test is used for classifications that relate to matters of economics or social welfare. The Midland statute does not infringe on a fundamental right, nor is it based on a suspect or quasi-suspect trait. Thus, it is judged under the rational basis test. (C) is incorrect because the compelling state interest test is inapplicable here. (A) is incorrect because the existence of a protected property interest is a consideration more appropriate to a due process argument than to one based on equal protection. (D) is incorrect because, although interstate travel is a fundamental right subject to the compelling state interest test, not every restriction on the right to cross state lines is an impairment of the right to travel. Prohibiting possession of snipe traps would not penalize or unduly burden the right of interstate travel.

Answer to Question 53

- (D) A valid federal statute or regulation may expressly or impliedly occupy the entire field regulated, so as to preclude even nonconflicting state or local regulation of the same general subject. Here,

386. PRACTICE EXAM

the federal rule relates to the subject of consumer product safety, while the Midland statute relates to animal conservation. Thus, even if the federal rule is deemed to occupy the entire field that it regulates, that field differs from the field to which the state statute relates. Consequently, there is no preemption. It follows that (A) is incorrect. (B) is incorrect because the mere absence of affirmative authorization for continued state regulation does not establish preemption. (C) is simply an incorrect statement of the law; it is much too broad.

Answer to Question 54

- (B) This videotape, after being properly authenticated, would be considered to be real evidence going to show the intoxicated state of Dryden shortly after he was driving. It would be admitted as relevant because its value would not be substantially outweighed by undue prejudice. (A) is incorrect because the videotape is not being offered to prove the truth of any statements that Dryden made; it is offered to prove only that he was intoxicated. Thus, there is no statement being made that would constitute an admission. (C) is wrong because Dryden is not being asked to give any testimony. Rather, the matter in question is the introduction of real proof. (D) is wrong because a videotape of the defendant at the time in question has nothing to do with specific instances of conduct, which have to do with past actions of the defendant.

Answer to Question 55

- (C) The seller of land is obligated to deliver a title that is free from reasonable doubt either in fact or law. This does not require a perfect title, but rather one that is free from questions which might present an unreasonable risk of litigation. Title is marketable if a reasonably prudent buyer will accept it in the exercise of ordinary prudence. An inability to establish a record chain of title will generally render the title unmarketable. If the seller attempts to rely on adverse possession to show that defects have been cleared, courts traditionally do not favor such an argument, because proof of adverse possession normally rests on *oral* evidence, which might not be available to the buyer at a later time. Here, although Simmons may have acquired title by adverse possession, Boyd should not be faced with the prospect of having to prove this in court in the future. Thus, (A) is incorrect. (If Simmons had written proof or a quiet title judgment, title would be marketable.) (D) is incorrect because it does not appear that Simmons's conduct amounted to fraud. (B) is nonsensical.

Answer to Question 56

- (D) Susan takes subject to State National Bank's mortgage. A foreclosure sale wipes out all junior mortgages (those that came later in time than the mortgage that was foreclosed) but does not wipe out senior mortgages (those that came earlier). Since State National Bank's mortgage preceded Home Finance's, it is senior and is not wiped out. Susan takes subject to this mortgage. Thus, (B) is wrong. Although Susan is not personally liable on this debt (she did not sign the note, Jane did), she must pay the mortgage or face foreclosure by State National. Since Property Equity Lenders's mortgage came later than Home Finance's, it is junior and is wiped out. Thus, (A) and (C) are wrong. If, after paying the cost of the foreclosure and paying off Home Finance's mortgage, there is money left over from the sale, it will first go to paying off Property Equity Lenders's mortgage. But regardless of whether Property Equity Lenders is paid off or not, Susan takes completely free of this obligation.

Answer to Question 57

- (C) (C) is the least correct statement because a condition subsequent is one the occurrence of which

cuts off an already existing absolute duty of performance. Beta's tendering of good title would not cut off Alpha's duty to perform. (A) and (B) are wrong because they are not inaccurate statements. A condition precedent is one that must occur before an absolute duty of immediate performance arises in the other party. When conditions are concurrent as they are here (as discussed below), it can be said that each condition is a condition precedent to the other. (D) is wrong because conditions concurrent are those that are capable of occurring together (which describes Alpha and Beta's relationship regarding the exchange of the farm and the apartment house) and the parties are bound to perform at the same time. In effect, each is a condition precedent to the other.

Answer to Question 58

- (A) (A) is correct for the following reasons: A condition subsequent is one the occurrence of which cuts off an already existing duty of performance. The *form* of the condition requiring removal of the shed is that of a condition subsequent because, under the language of the contract, failure to do so will cut off Beta's duty to pay the \$1,000. A condition precedent is one that must occur before an absolute duty of immediate performance arises in the other party. The *substance* of the shed removal provision is that of a condition precedent because no duty to pay \$1,000 arises until *after* Alpha has removed the shed. (B) and (C) are wrong because Beta is not under a duty to pay the \$1,000 before Alpha is required to remove the shed. (D) is wrong because removal of the shed is a condition precedent to Beta's duty to pay the \$1,000.

Answer to Question 59

- (C) A land occupier has an affirmative duty to warn or protect children against dangerous artificial conditions on the land. Thus, the best answer to the question is what Cantebury Trails should have done to best protect the children in this factual situation. (B) is thus easily eliminated, since it has nothing to do with this particular issue; regardless of the neighborhood, Cantebury Trails was aware that children played among the buses. (A) is not the best answer because Cantebury Trails must do what is necessary to protect the children, consistent with the business it is operating on the premises. This answer only goes to one narrow possibility of injury. There are many other ways the children could have been injured playing with these abandoned and wrecked buses. Due care could also have required installation of a higher fence or more diligent patrol of the yard. (D) is also not the best answer because the maintenance of the fence is not in issue; the facts indicate that the children were able to climb the fence without problem. Hence, (C) is the best answer because it states a breach of duty in the broadest terms. Donny would be best able to show a breach of duty by proving that Cantebury Trails could have taken precautionary steps to prevent any injury to children who were tempted to come on the premises.

Answer to Question 60

- (B) The record should be admitted because its direct relevance to the ultimate issue of the case outweighs the danger of prejudice against the defendant. (A) is wrong because evidence of this prior conviction would not be admissible as character evidence against Davidson. (C) is wrong because the process leading to conviction is irrelevant. (D) is wrong because an exception to the hearsay rule applies. Federal Rule 803(22) provides that judgments of felony convictions are admissible in both criminal and civil actions to prove any fact essential to the judgment. Felony convictions are those for which the *potential* punishment is imprisonment in excess of one year; hence, the hearsay exception applies here.

388. PRACTICE EXAM

Answer to Question 61

- (C) Defendant will not be guilty of burglary in situation (C) because he did not have an intent to commit a felony at the time he entered Victor's house. The elements of burglary as defined by the jurisdiction here are (i) a breaking (ii) and entry (iii) of a dwelling or other building (iv) of another (v) at nighttime (vi) with the intent of committing a felony therein. In situation (C), Defendant entered Victor's house with the intent only to obtain repayment of a debt, which does not satisfy the intent required for larceny. Since Defendant believed he was entitled to take the money as repayment of the debt, he did not intend to permanently deprive Victor of his property. The fact that he later decided to steal the painting will not establish the requisite intent; it must exist at the time of entry for burglary to be established. (A) is wrong because Defendant committed a constructive breaking by gaining entry to the store by means of fraud, and the other elements of burglary are present from the facts. (Note that the fact that he broke *out* of the store after he committed the felony is irrelevant.) (B) is incorrect because Defendant committed an entry of the premises by reaching his hand through the mail slot. Since he had the intent to commit a felony at that point, he has committed a burglary; his withdrawal is irrelevant. (D) is wrong because Defendant made an entry by inserting an inanimate object (the bullet) into the dwelling by breaking (the window) with the intent to commit a felony (since he knew he did not have authority to use deadly force). Hence, he has committed a burglary.

Answer to Question 62

- (C) The evidence is admissible to show that the tree was on Dow's property. While evidence of repairs made following an accident is generally inadmissible to prove negligence or culpable conduct under Federal Rule 407, such evidence may be introduced to show ownership or control, since a stranger would hardly make repairs. (A) is wrong because while there is such a public policy, in this case a valid exception applies. (B) is wrong because the evidence is not being introduced to show the condition of the tree at the time of the accident. (D) is wrong because Dow's cutting down of the tree cannot be admitted to show the tree was in a rotted condition. This would contravene the policy of the rule, which has the purpose of encouraging people to make such repairs.

Answer to Question 63

- (C) Lane, as the beneficiary of the nonassignment clause, could have taken positive action to avoid the transfer, but by accepting rent from Andrews, he waived his right to avoid the transfer. Talbot has no such right to contest the transfer because he was not the beneficiary of the nonassignment clause. (A) is wrong because one co-tenant generally does not need the consent of other co-tenants to assign his interest. Only Lane's consent was necessary under the lease clause. Since Lane waived his right to avoid the transfer, the transfer became valid. (B) is wrong because the right to enforce this lease provision was waived by Lane. (D) is wrong because nonassignment clauses in leases are valid. They are not considered to be void restraints on alienation.

Answer to Question 64

- (D) The judge should overrule the objection because lay opinion is permissible (and often essential) to identify handwriting. A foundation must first be laid to establish familiarity with the handwriting. (A) is wrong because expert testimony is not necessary to identify handwriting. (B) is incorrect because only a proper foundation is required for the admission of testimony identifying handwriting. The fact that there are other individuals who may be more familiar with or in more recent contact with the handwriting does not, of itself, preclude admissibility of the teacher's

testimony. The fact that the teacher has not seen John's handwriting for 10 years goes to the credibility of her testimony but not to its admissibility. (C) is wrong because expert testimony is not required for handwriting identification and, therefore, the witness need not be qualified as an expert.

Answer to Question 65

- (A) Wanda will prevail on a theory of intentional infliction of emotional distress. To establish liability for intentional infliction of emotional distress, the defendants must have intended to cause severe emotional distress (*i.e.*, either acted with the goal of bringing about such distress or knew with substantial certainty that such distress would result from their conduct). It is also sufficient if the defendants acted recklessly, *i.e.*, in deliberate disregard of a high probability that their conduct would cause emotional distress. Here, Grandmaw and Grandpaw caused Wanda to spend four years not knowing where her young son was. Grandmaw and Grandpaw acted in deliberate disregard of the high probability that a mother would be severely distressed by being kept from her child, not knowing whether he was safe or even alive. (A) correctly states the requisite intent for this tort. (B) is incorrect because, as explained above, it is not required that defendant actually know that the conduct would cause severe emotional distress. (C) is incorrect because it is not necessary to prove physical injuries to recover for intentional infliction of emotional distress. (D) is incorrect because the "zone of danger" is more appropriately used in determining liability for **negligent** infliction of emotional distress. Here, Wanda has a cause of action for intentional infliction of emotional distress.

Answer to Question 66

- (B) The general rule is that people do not have standing as taxpayers to challenge the way tax dollars are spent because their interest is too remote. However, there is an exception to the general rule. A federal taxpayer has standing to challenge federal appropriations and spending measures if she can establish that the challenged measure: (i) was enacted under Congress's taxing and spending power; and (ii) exceeds some specific limitation on the power. To date, the only limit that the Supreme Court has found on the taxing power is the Establishment Clause. Here, Allen's challenge is based upon such an Establishment Clause matter. Hence, the exception applies and (B) is correct. (A) is incorrect because it is overbroad. Only spending falling within the exception described above may be challenged by taxpayers. (C) is incorrect because sufficient "nexus" is a concept applied to state taxation of interstate commerce—a state can tax only those persons with a sufficient relationship to the state. Here, the complaint is not that Allen is being taxed, but that the tax money is being spent in violation of the Constitution. (D) is wrong. First, state action *is* involved—the government is giving money for textbooks. Second, standing depends on whether the party has a concrete stake in the outcome of the litigation and is not dependent on whether the action complained of is state action.

Answer to Question 67

- (D) The salary supplements probably will be held unconstitutional. The controlling case in this area is *Lemon v. Kurtzman* (1971), which determined that supplements to salaries of teachers in religious school raised "excessive entanglement" problems. The current Establishment Clause test is that the government program must: (i) have a secular purpose; (ii) have a primary effect that neither advances nor inhibits religion; and (iii) not produce excessive government entanglement with religion. The instant case raises both "primary purpose" and, from the policing of the restriction on use of the funds, "entanglement" problems. Option (D) goes most directly to the issue in question and is, therefore, correct. (A) is incorrect because it does not consider the

390. PRACTICE EXAM

“entanglement” problems of the “no religious instruction” restriction. The answer given in option (A) goes only to the “secular purpose” issue. (B) is incorrect because: (i) no “free exercise” issues are involved here; and (ii) distinguishing between public and private schools *avoids* Establishment Clause problems. (C) is incorrect because the facts do not indicate disproportionality. Even if disproportionality can be assumed, the courts have elected to invalidate similar laws on the basis of the three-pronged test discussed above rather than couching the issues in terms of “sect preference.”

Answer to Question 68

- (A) The Supreme Court applies the Establishment Clause prohibitions less strictly when the benefited institution is a religiously affiliated college or hospital rather than a grade or secondary school. The Court will uphold a government grant of aid to such a college or hospital as long as the government program requires that the aid be used only for nonreligious purposes and the recipient so agrees in good faith. Option (A) most nearly approximates this test and is, therefore, correct. (B), on the other hand, is incorrect because it is overbroad. “Bricks and mortar” may not be used, *e.g.*, to build a college chapel. (C) is incorrect because it is overbroad in another direction. Certain grants (*e.g.*, state-approved textbooks, transportation to and from school, expenses of compiling state-required data) have been allowed even for grade and secondary schools. (D) is incorrect because the Supreme Court has found that no excessive entanglement is involved when government funds are used to build “secular” buildings at colleges and universities.

Answer to Question 69

- (D) An offer must be accepted within a reasonable time. Eureka’s reply letter constituted an offer to sell 24 LBVCs for \$39.99. Gourmet accepted this offer by a memo plus full performance. If this occurred within a reasonable time, a contract was formed. (A) is incorrect because contracts may be formed by nonmerchants. (B) is incorrect because the contract would have already been formed by Gourmet’s acceptance; it is irrelevant whether Eureka has enough stock on hand. (C) is incorrect because Eureka’s offer called for prompt acceptance and so did not constitute a firm offer, which must be kept open for a reasonable time, not to exceed three months.

Answer to Question 70

- (C) If Eureka’s original reply was not an offer, then Gourmet’s sending the check and memo would have been an offer and Eureka’s shipment of the LBVCs would have been an acceptance. The acceptance would have included terms altering the offer (the no resale provision), but under the U.C.C., between merchants such terms generally become part of the contract. Thus, Gourmet could be held liable for breaching the no resale provision. (A) is wrong because under Article 2, the status of Eureka does not change the result. (B) is wrong because if the invoice by Eureka was a material alteration, Eureka would not prevail. (D) is incorrect because the phrase “not available in stores” is not sufficient to restrict subsequent resale. It merely indicates that the LBVCs were not currently available in stores.

Answer to Question 71

- (D) A strict liability offense does not require awareness of all of the factors constituting the crime. Strict liability offenses are generally part of a regulatory scheme. They generally involve a relatively low penalty. Here, (A) and (B) are incorrect because the offenses described do not appear to be part of a regulatory scheme. Also, they appear to require awareness of all of the factors constituting the crime; *i.e.*, a defendant probably could not be convicted under (A) without an awareness that he

was shoplifting, and a defendant probably could not be convicted under (B) without an awareness that he possessed heroin. (C) presents a closer question. The offense described in (C) appears to be part of a scheme to regulate firearms. The offense described in (D) is part of a scheme to regulate the sale of milk for the purpose of protecting the public from the threat of consumption of tainted milk. Such statutes, in protecting the public health and safety, almost always provide for culpability, regardless of the seller's knowledge of the tainted nature of the product. Also, the statute in (D) describes a misdemeanor, meaning that a violation thereof carries a lesser penalty than does violation of the felony statute in (C). Consequently, because (D) fits more closely the classic concept of a strict liability offense, it is a better answer than (C).

Answer to Question 72

- (A) Most courts impose upon a landowner the duty to exercise ordinary care to avoid reasonably foreseeable risk of harm to children caused by artificial conditions on his property. Under the general rule, the plaintiff must show: (i) that there is a dangerous condition present on the land that the owner is (or should be) aware of; (ii) that the owner knows or should know that young persons frequent the vicinity of this dangerous condition; (iii) that the condition is likely to cause injury because of the child's inability to appreciate the risk; and (iv) that the expense of remedying the situation is slight compared to the magnitude of the risk. If the sprinkler head was a hazard that Peter would probably not discover, it would meet the requirements for a showing of attractive nuisance, and O'Neill would be liable. (B) is incorrect because O'Neill would continue to be responsible even if he had objected to the children playing on the common area. (C) is incorrect because it is of no consequence where Peter lived. (D) is incorrect because there is a higher standard of care where attractive nuisances to children are concerned.

Answer to Question 73

- (B) A state may require that those enrolled to vote be bona fide residents of the community. However, any law regulating the right of persons over age 18 to vote must be narrowly tailored to promote a compelling interest. (A) is incorrect because a state *does* have a compelling interest in the integrity of the voting process that will support narrowly tailored restrictions. (C) is incorrect because whether persons have attained the age of majority has nothing to do with their status as bona fide residents. (D) is incorrect because there does not appear to be any discriminatory effect on interstate commerce. (B) is correct because it is the only answer that recognizes that the state may limit ballot access to actual residents, albeit with safeguards against over-inclusiveness; *e.g.*, the state should provide means by which the students can show that they are bona fide residents.

Answer to Question 74

- (C) Perry is entitled to the proceeds of the sale because under the doctrine of equitable conversion a deceased seller's interest generally passes as personal property. If the seller dies, "bare" legal title passes to the takers of his real property, but they must give up the title to the buyer when the contract closes. When the purchase price is paid, the money passes as personal property to those who take the seller's personal property (unless the seller *specifically* devises the land in question to a devisee). Thus, Perry, as the personal property devisee, is entitled to the proceeds of the sale. (A) is incorrect as a matter of law. A real estate contract survives the death of either party unless the agreement itself provides otherwise. (B) is wrong because the doctrine of equitable conversion came into play as soon as the contract of sale was signed. (D) is wrong because marketable

392. PRACTICE EXAM

title is title reasonably free from doubt. Generally, this involves either defects in the chain of title or encumbrances that might present an unreasonable risk of litigation. Such problems are not present in these facts.

Answer to Question 75

- (A) Buyer's heir may specifically enforce the agreement. Under the doctrine of equitable conversion and principles applicable in most states, if the buyer dies, the takers of his real property can demand a conveyance of the land at the closing of the contract. (B) is incorrect because the death of either Seller or Buyer does not render the agreement cancellable at the will of either party. (C) is wrong because a real estate contract survives the death of either party unless the agreement itself provides otherwise. (D) is wrong because marketable title is title reasonably free from doubt. Generally, this involves either defects in the chain of title or encumbrances that might present an unreasonable risk of litigation. Such problems are not present in these facts.

Answer to Question 76

- (D) By process of elimination: (A) is not the best answer because it cannot be determined whether the eyewitness was under the influence of the exciting event when he spoke to the police, and there are multiple levels of hearsay involved. (B) suffers from the same defects. (C) is wrong because inability to cure an error by jury instruction is not a valid reason for denying a motion to strike. Therefore, (D) must be the best answer—since Dellacourt's counsel was being argumentative, and asked how the witness knew a certain fact, the specific response to counsel's question might be admitted as precisely what counsel asked for.

Answer to Question 77

- (A) In a strict liability action, the plaintiff must prove that a product was so defective that it is unreasonably dangerous. The defect causing the harm must have existed when the product left the defendant's control. The defendant must be a commercial supplier of the product in question. Brake failure on a bicycle is an unreasonably dangerous defect. If this defect existed when the bicycle left the factory of Cycle Company, then Roth has a viable cause of action sounding in strict liability against Bike Shop, a supplier in the distributive chain. Thus, (A) is correct. (B) is wrong because it implies *absolute* liability, not *strict* liability; *i.e.*, Bike Shop is not liable simply because the brakes failed. It must be established that the brakes were defective when placed in commerce. (C) is wrong because, in jurisdictions retaining traditional contributory negligence rules, ordinary contributory negligence does not bar recovery in strict liability cases where the plaintiff fails to discover the defect or to take steps to guard against its existence. (D) is wrong because a careful inspection would be relevant to a negligence action, but not to one based on strict liability.

Answer to Question 78

- (B) To prevail on a negligence claim, Perez must show negligent conduct by Cycle Company, leading to the supplying of a defective product by the company. (B) is the correct answer because the failure to exercise reasonable care is a major element in a negligence action. (A) is wrong because simply placing a defective bicycle into the stream of commerce would present grounds for a strict liability action, but not one for negligence. Some negligence must be shown. (C) is wrong because privity is not required. The duty of due care is owed to any foreseeable plaintiff. (D) is wrong because any negligence on the part of Roth is reasonably foreseeable and will not relieve Cycle Company of the consequences of its negligence.

Answer to Question 79

- (B) Manslaughter will not serve as the underlying felony in a felony murder prosecution. The felony murder rule can be applied only where the underlying felony is independent of the killing. With a felony such as manslaughter, there is ordinarily no intent to commit a felony independent of the killing itself; hence, felony murder does not apply. In contrast, the other crimes listed would satisfy the requirement that the defendant intend to commit an underlying felony. One who is guilty of arson (choice A) would have intended that a burning take place. Attempted rape (choice C) requires the intent to perform an act which, if achieved, would constitute rape. Burglary (choice D) requires intent to commit a felony at time of entry.

Answer to Question 80

- (C) Williams's testimony is hearsay, because it relates to a statement made by the driver, while not testifying at the trial, and it is offered in evidence to prove the truth of the matter asserted; *i.e.*, that the blue convertible was involved in the hit-and-run accident. (B) is incorrect because the fact that the driver's statement came 10 minutes after the accident probably indicates that the statement was not made close enough to the time of receipt of the sense impression to qualify for the present sense impression exception. (A) is incorrect because there is no "recent perception" exception to the hearsay rule. (D) is incorrect because the evidence is very probative and would not be excluded as prejudicial simply because its receipt in evidence would disadvantage the defendant Dorry.

Answer to Question 81

- (D) Claret is not an intended beneficiary of the contract between Bouquet and Vintage. Although Claret was mentioned in the contract, it seems clear that Bouquet and Vintage did not intend to confer any benefits or rights on Claret. Rather, the parties seem to have been simply expressing a preference as to the distributor of the wine, with no indication that the validity of the contract depended on use of Claret as the distributor. (A) is incorrect because Vintage was contractually bound to perform only with regard to Bouquet, rather than to Claret. (B) is incorrect because Bouquet and Vintage could not foresee that Claret would act in reliance on a contract that conferred no rights on him. (C) is incorrect because an express agreement between Bouquet and Vintage would not have been necessary to a determination that Claret had some rights under the contract. For example, if Claret stood in such a relationship to Bouquet that one could infer that Bouquet wished to make an agreement for his benefit, then it would be more likely that the contract was primarily for the benefit of Claret. (D) is the best answer because the key factor is that Bouquet and Vintage were simply protecting their own interests, with no thought of conferring a benefit upon Claret.

Answer to Question 82

- (C) The only theory under which Amicusbank can recover Bouquet's share of the profits is that Amicusbank is an assignee of Bouquet's rights. (D) would not provide a strong defense for Vintage, because it is clear that Amicusbank was not an intended beneficiary of the Bouquet-Vintage contract. (A) is incorrect because there is no presumption that an assignment is invalid absent express authorization in the contract. (B) is incorrect because, even if Bouquet and Vintage are partners, Bouquet would still be able to assign his rights to profits. (C) is the best answer, because Amicusbank's only hope of prevailing is for it to be considered an assignee of Bouquet's rights. It appears that the written instrument executed by Bouquet lacks the present words of assignment necessary to manifest the intent of the assignor to transfer his rights under

394. PRACTICE EXAM

the contract completely and immediately to the assignee. The instrument merely allows Amicusbank to collect the debt from Bouquet's share of the profits. Thus, Vintage has a fairly strong argument that Amicusbank is not an assignee of Bouquet's rights under the Bouquet-Vintage contract.

Answer to Question 83

- (A) A contractual duty may not be delegated if performance by the delegate will materially change the obligee's expectancy under the contract. Here, substitution of Agribiz, a company with no experience in the wine-grape business, for Vintage, an established entity in the business, greatly decreases the probable profits which will accrue to Bouquet, the obligee. Thus, a court should rule that the attempted delegation by Vintage of its duty to grow grapes for the venture is invalid. It follows that (C) is incorrect. (B) is incorrect because a delegation can be effective absent a contractual provision authorizing the same. (D) is incorrect because, although Vintage certainly must delegate duties to its individual employees, here it is attempting to delegate duties to an entirely different company, one with no experience or reputation in the industry.

Answer to Question 84

- (A) In defamation actions involving a private person plaintiff and a defamatory statement relating to a matter of public concern, the plaintiff must show that the defendant acted, if not with malice, then at least negligently. This principle applies where the defamatory potential of the statement was apparent. Here, Miller is a private person plaintiff. His application for transfer of a liquor license, as the subject of public hearing held by a governmental entity, is a matter of public concern. The defamatory potential of Hammond's accusations of Miller's underworld connections is apparent. Therefore, Hammond must have, at the very least, been negligent for Miller to recover; *i.e.*, no strict liability. (A) reflects this fact. (B) is incorrect because Miller's reputation could have been damaged even if his application were granted. (C) is incorrect because it implies liability without fault, simply because a false statement was made. (D) is incorrect because, even if Hammond's appearance was voluntary, there still must be a showing of fault.

Answer to Question 85

- (C) Actual possession of property held in concurrent ownership by one concurrent owner for the statutory adverse possession period will not be sufficient to give that possessor title to the whole estate to the exclusion of his co-tenant, unless there has been an ouster. Here, Arthur occupied Goodacre under unity of possession with Celia. Thus, his possession is not adverse to that of Celia and (A) is incorrect. (D) is incorrect because, had Arthur ousted Celia prior to possessing the land for the required period, he could claim title to all of Goodacre because his possession would have been adverse. (B) is incorrect because the facts do not indicate that Celia intended to renounce her rights in the property.

Answer to Question 86

- (A) The choice to testify will be Wanda's. In federal court, one spouse may testify against the other in a criminal case, with or without the consent of the party-spouse. Thus, the witness-spouse may not be compelled to testify, but neither may she be foreclosed from testifying (except as to a confidential communication made between the spouses while they were husband and wife). Here, Wanda is being asked to testify about a meeting in which her husband participated that took place before her marriage to David. Thus, the privilege for confidential marital communications is

inapplicable, making (C) incorrect. Of (A), (B), and (D), only (A) reflects the fact that Wanda may not be compelled to testify, nor may she be foreclosed from testifying.

Answer to Question 87

- (C) The motion to dismiss should be denied. For purposes of the Double Jeopardy Clause, two crimes do not constitute the “same offense” if each crime requires proof of an additional element that the other crime does not require, even though some of the same facts may be necessary to prove both crimes. Here, even though the same facts are involved for both crimes, the robbery charge requires proof of a taking by force but not a death, while the murder charge requires proof of a death but not of a taking of property. Thus, (C) is correct and (A) is incorrect. (B) is incorrect because armed robbery is not a lesser included offense of premeditated murder. (D) is incorrect because the prosecution would be estopped if violation of one statute constituted a lesser included offense of the other statute.

Answer to Question 88

- (B) Under Article I, Section 8, Congress may spend to “provide for the common defense and general welfare,” which means, in effect, that spending may be for any public purpose. Furthermore, the Necessary and Proper Clause grants Congress the power to make all laws appropriate for carrying into execution any power granted to any branch of the federal government. The power to require that the weapons system be purchased falls within this rubric. Furthermore, the President has no constitutional authority to “impound” (*i.e.*, refuse to spend) funds whose expenditures Congress has expressly mandated. (A) is incorrect as a matter of law. Whether a bill is passed with the President’s signature or over his veto is not relevant to the question of whether spending is permissive or mandatory. (C) is incorrect because even though the President’s powers do not expressly refer to spending, the President has extensive military powers as commander in chief that could include spending for military necessities in the event of actual hostilities against the United States. (D) is wrong because, in the event of actual hostilities, the President, as commander in chief of the armed forces and militia, could exercise his inherent power to allocate funds. There is also some case law implying that the President has some inherent powers, even in internal affairs, to meet national emergency needs.

Answer to Question 89

- (B) Potts can testify as to any first-hand knowledge he has and need not rely on any written records if he presently remembers the facts. First-hand knowledge is considered to be reliable testimony. (A) is wrong because the records themselves are not being introduced. (C) is wrong because the best evidence rule applies only in situations where the content of the writing is in issue. Here, Potts is testifying about facts he perceived; facts that exist apart from the writing. The notebooks merely describe what Potts saw and knows personally. (D) is wrong because no such summary is sought to be introduced, and even if it were, (D) is an incorrect statement of the law.

Answer to Question 90

- (B) Testimony obtained by a promise of immunity is by definition coerced and therefore involuntary. Thus, immunized testimony may not be used for impeachment of the defendant’s testimony at trial. Simmons’s testimony will not be permitted to be used against Taylor because it resulted from Taylor’s immunized testimony. (A) is wrong because it is an inaccurate statement of the law. Prosecutors can bargain away the rights of co-defendants. (C) is wrong because police suspicion is not the equivalent of actual testimony. (D) is wrong. Even though a witness wants to

396. PRACTICE EXAM

testify, various privileges such as lawyer/client, doctor/patient, etc., may bar the testimony. Here, the grant of immunity to Taylor is a bar to Simmons's derived testimony because use immunity bars use of one's testimony or anything derived from it.

Answer to Question 91

- (C) Dino owed to a foreseeable plaintiff a general duty to behave as a reasonable person would under the same or similar circumstances. If, upon noticing that the car was once again pulling to the left when braking, Dino should have been on notice that further operation of the car was dangerous, then he should have had the car towed to the repair shop. Continuing to drive the car with knowledge of an attendant danger would create an unreasonable risk of injury to people such as Pedestrian, and would constitute a breach of Dino's duty of care. However, Dino had no reason to know of the dangerous underlying problem (the defective master cylinder), and he had been assured by Dealer's mechanic that the car was safe to drive. (A) is incorrect because Dino had been assured by Dealer's mechanic that a recurrence of the problem would not result in total brake failure. Thus, Dino had a reasonable belief that he could safely drive the car to Dealer. (B) is incorrect because Dino's duty to maintain his car's brakes does not make him strictly liable for a brake failure. Dino reasonably relied on the advice of Dealer's mechanic in believing that the car was safe to drive. It is true that, as (D) states, Dino had diligently had his brakes repaired, but if he had reason to know, subsequent to the repairs, that the brakes were dangerous, he should not have driven the car. Because Dino reasonably relied on the advice of Dealer's mechanic, Dino had no reason to know of the danger involved in continuing to drive the car. Thus, (C) is a better answer than (D).

Answer to Question 92

- (B) To hold Belchfire, a manufacturer, strictly liable for a defect in the car, the car must have reached the consumer without substantial change in the condition in which it was supplied. If the master cylinder was defective when the car left Belchfire's control, then Belchfire has produced a product that is so defective as to be unreasonably dangerous. This defective product actually and proximately caused Pedestrian's personal injuries, and so Belchfire will be liable. (A) is wrong because, unlike (B), it ignores the requirement that the defect be attributable to the manufacturer. (C) is wrong because Pedestrian's strict liability action is based on failure of the master cylinder. The facts do not establish that the mechanic's readjustment of the brakes effected any alteration in the master cylinder. Thus, the work performed on the brakes does not preclude the success of Pedestrian's action against Belchfire. (D) is wrong because a history of brake defects would show that Belchfire should have had notice of the problem. Such notice would be relevant to a negligence action, but not to an action for strict liability.

Answer to Question 93

- (C) While inspecting and repairing Dino's car, Dealer's mechanic owed a general duty of due care to Dino and to any other foreseeable plaintiff. If a reasonably competent mechanic would have discovered the defective cylinder while inspecting and repairing the brakes, then Dealer's mechanic breached the duty of due care by failing to discover the defective cylinder. This breach of duty caused injury to Pedestrian, a foreseeable plaintiff. Dealer would be vicariously liable, under the doctrine of respondeat superior, for the negligence of his employee, the mechanic. (C) is correct because it recognizes that Dealer's liability in negligence hinges on whether the mechanic should have discovered the defective master cylinder. (B) is incorrect because it ignores the possibility that the mechanic should not have been expected to discover the defective cylinder while seeking to remedy the problem originally complained of by Dino. (A) is incorrect

because merely selling the car with an unreasonably dangerous defect, without knowing or being expected to know of the defect, will not subject Dealer to liability for negligence. The statement in (A) is more appropriate in an action based on strict liability. (D) is incorrect because, absent any reason to believe that Belchfire is not a reputable manufacturer, Dealer is not liable for Belchfire's negligence.

Answer to Question 94

- (A) Gaint is seeking to enforce the covenant by means of an equitable remedy. Thus, this question concerns an equitable servitude. An equitable servitude relates to a promise that touches and concerns the land. A covenant touches and concerns the land when it makes the land itself more useful or valuable to the benefited party. Here, an agreement to purchase electrical power only from a specified source probably does not touch and concern the land. (B) is incorrect because a common development scheme is not necessary for an equitable servitude. (C) is incorrect because the covenant here does not restrain alienation. (D) is incorrect because privity of estate is not required for enforcement of an equitable servitude, and in any event, privity is present here.

Answer to Question 95

- (B) The Supreme Court has specifically upheld requirements that public employees take an oath to "support the Constitution of the United States" and the state constitution [Connell v. Higgenbotham (1971)] and that state employees take an oath "to oppose the overthrow of the government . . . by force, violence, or by an illegal or unconstitutional method." [Cole v. Richardson (1972)] The Court held that such oaths merely required the takers "to commit themselves to live by the processes of our system." (B) is, therefore, correct because it reflects these Supreme Court precedents involving loyalty oaths. (A) is incorrect because the Supreme Court has moved away from the old privilege vs. right analysis, and, in any case, there is no justification based upon "privilege" that would permit oaths that are overbroad or vague, resulting in a chilling effect on First Amendment activities. (C) is wrong because it is overbroad. States may not infringe on First Amendment rights in employment. (D) is wrong. It is doubtful that a college instructor position would be considered to be a position of governmental trust.

Answer to Question 96

- (B) Homey will only be able to recover his actual damages; the liquidated damages clause is unenforceable because it constitutes a penalty. A liquidated damages clause will be enforced only if: (i) damages in case of breach were difficult to ascertain at the time the contract was made, and (ii) the amount agreed upon was a reasonable approximation of what the damages would be. The liquidated damages clause here fails the second test. The facts indicate that Homey knew that he would not be moving into the new house until November. Thus, there is no reason for assuming that Structo's late performance would cause any damages until November. The \$500 a day late fee during October can thus only be viewed as a penalty. Therefore, the liquidated damages clause will be unenforceable and Homey will be able to collect only actual damages. (C) is incorrect because there was no valid waiver here. For a waiver of rights to be valid, one must at least know of the rights being waived. Here, Homey did not know of Structo's late performance when Homey paid. Thus, the payment cannot constitute a waiver of Homey's rights arising from the late performance. (D) is incorrect—there was no enforceable modification here—because of the parol evidence rule. The parol evidence rule prohibits a party to a written contract from bringing into court evidence of prior or contemporaneous oral communications that seek to vary the terms of the written contract. Here, the oral statement was made before the written contract was signed, and the evidence seeks to vary the completion

398. PRACTICE EXAM

date provided in the written contract. This will not be allowed under the parol evidence rule. Thus, Structo will not be able to bring in evidence seeking to vary the written date.

Answer to Question 97

- (A) Structo will win because the condition of the architect's certificate will be excused by Bilevel's bad faith. While the issuance of the certificate was an express condition precedent to Homey's duty to pay, the condition will be excused by Homey's hindrance. If a party having a duty of performance that is subject to a condition wrongfully prevents the condition from occurring, the condition will be excused. Here, Homey's duty of payment was subject to the condition precedent that Bilevel issue a certificate of approval, and Homey wrongfully hindered the occurrence of the condition by agreeing to allow Bilevel to not issue the certificate for an improper reason—Structo had done all that it was obliged to do under the contract properly and the only reason for refusing the certificate is that Bilevel and Homey believe the price Homey agreed to is now too high. This is not a valid reason for withholding the certificate. Thus, the condition of the certificate will be excused and Structo can collect the full \$40,000. (B) is incorrect because, as explained above, the condition of the architect's certificate will be excused. Thus, the contract is fully enforceable. (C) and (D) are incorrect because, as explained above, the contract is fully enforceable. Thus, Homey will have to pay the contract price. It is not a defense that the price is higher than it should have been at current prices.

Answer to Question 98

- (D) The entry into Desmond's apartment and his arrest, without a warrant, probable cause, or circumstances permitting an exception from these requirements, were illegal. The statements he made thereafter were fruits of the original illegality and must be suppressed unless the taint was purged. The giving of *Miranda* warnings was not sufficient. Hence, (D) is the best answer. If probable cause for a warrant is based on information from an informer, usually that informer's identity need not be revealed. Thus, (A) is incorrect. (B) is a misstatement of law. There was no interrogation by the police to trigger the *Miranda* requirements. (C) is attractive but not as accurate an answer as (D). If the police had been acting with probable cause to arrest, their forced entry into the apartment would not have made Desmond's statements involuntary.

Answer to Question 99

- (D) Don can introduce all of the items of character evidence as part of his defense. The general rule is that evidence of character to prove the conduct of a person in the litigated event is not admissible in a civil case. However, when a person's character itself is one of the issues in the case, character evidence is not only admissible, but in fact is the best method of proving the issue. Where the plaintiff brings a defamation action for injury to reputation and the defendant pleads as an affirmative defense that his statements were true, plaintiff's character is directly at issue in the case. Under the Federal Rules, any of the types of evidence (reputation, opinion, or specific acts) may be used to prove character when character is directly in issue. [Fed. R. Evid. 405(b)] Here, William's character is at issue and Don is offering character evidence to show that his assertion that the mayor is corrupt is a true statement. Item I. is evidence of a specific act that demonstrates the mayor's character for corruption; Item II. is testimony regarding the mayor's general reputation in the state as a corrupt politician; and Item III. is opinion testimony about the mayor's corrupt character. All of these items of evidence are admissible; hence, (D) is the correct choice.

Answer to Question 100

- (B) Purr will be entitled to obtain specific performance. If the vendor of land cannot give marketable title but the purchaser wishes to proceed with the transaction, the purchaser can usually obtain specific performance with an abatement of the purchase price in an amount representing the title defect. Here, Kuzz's legitimate claim to 1/10 of the property constituted a defect that would make title unmarketable. The title defect was cured by Purr at a cost of \$10,000. Thus, an abatement will be applied to the purchase price. The certified check for \$140,000 in choice (B) represents the purchase price (\$160,000) less the earnest money already paid (\$10,000) less the abatement to obtain marketable title (\$10,000), leaving the amount to be tendered as \$140,000. (A) is wrong because either the abatement or the earnest money is not taken into account with that figure. (C) is wrong because Purr acted reasonably in clearing the title defect himself. The rule that a buyer must notify a seller of title defects is intended to prevent the buyer from avoiding the closing by raising a title defect problem at the last minute. Here, Purr was trying to facilitate the closing by resolving the title problem himself, which he did. Prior notice to Venn was not necessary in this case. (D) is wrong because the action is based on a contract that was signed before any potential co-tenancy occurred, and there is no rule that precludes a co-tenant from obtaining specific performance from another co-tenant on an otherwise valid contract.

Answer to Question 101

- (D) Egbert prevails if he believed the truth of the assertion. Charles is a candidate for public office and, as such, to recover he must establish (i) falsity, and (ii) "actual malice"—*i.e.*, knowledge of falsity or reckless disregard of truth or falsity. Thus, if Egbert honestly believed the truth of his statement, Charles could not show actual malice, and Egbert would prevail. (A) is wrong because it goes to malice in the sense of "ill will." That type of malice is not the standard for defamation; it is irrelevant that defendant wanted to "get even" with Charles. (B) is wrong because a showing of negligence is not sufficient to recover for defamation of a public official or figure; knowledge of falsity or reckless disregard of truth or falsity is required. (C) is wrong because even if the story is a matter of public concern, Charles might still prevail if he can show fault on the part of Egbert—such as Egbert's reckless disregard for whether the statement was true.

Answer to Question 102

- (D) Mathews will not be convicted of an attempt to violate the statute if her employee did not have the requisite intent. Although the statute has been interpreted to create a strict liability crime, which does not require proof of criminal intent, to *attempt* a strict liability crime requires proof that the defendant acted with the intent to bring about the proscribed result. Therefore, for Mathews to be charged vicariously with attempt, her employee must have acted with the requisite intent; he must have intended to sell the ammunition to a minor. If he did not so intend, Mathews will not be convicted of attempt. (A) is incorrect because this is a case of factual impossibility, which is not a defense to attempt. (B) is incorrect because careful instructions will not, in and of themselves, absolve an employer from vicarious liability. (C) is incorrect because the strict liability elements of the underlying offense make it clear that knowledge of the age of the purchaser is not an element of the underlying offense. Thus, the clerk (and Mathews) can be liable for selling ammunition to a minor no matter how old the purchaser looked or how old he claimed to be. Duncan's lie may have bearing on the clerk's lack of intent, but this is not as direct an answer as (D).

Answer to Question 103

- (B) Where a dispute exists as to the meaning of a written agreement's terms, parol evidence can be received to aid the fact finder in reaching a correct interpretation of the agreement. The Uniform

400. PRACTICE EXAM

Commercial Code, which governs the contract here, follows the modern approach that permits evidence of interpretation even when the terms are not patently ambiguous. [See U.C.C. §2-202, comment 1] Here, the terms may be explained by the previous course of dealing between the parties, because it suggests that the parties understood that specifying “Yellow Giant” in the contract did not mean that a Yellow Giant was being ordered. In addition, the fact that the purchase price for the “Yellow Giant” is \$25,000 more than the going price for a Yellow Giant creates enough uncertainty to warrant admission of testimony explaining what the parties meant by the term “Yellow Giant.” While Cruncher will have the burden of proving that the term meant something different from what it appears to mean, any evidence it offers will be considered by the trier of fact. (A) is incorrect because reformation is generally available only when a writing incorrectly reflects a valid antecedent agreement, such as where a mistake was made in transcribing the agreement. Here, the writing correctly reflects the antecedent agreement, since the parties agreed to use the words “Yellow Giant”; the problem now lies in determining what was meant by “Yellow Giant.” Also, this answer overconfidently states the outcome of the controversy, since Technix may have evidence of its own contradicting Cruncher’s. (C) is incorrect on these facts because the president is seeking to explain, not contradict, the terms of the written contract. Before it can be determined that testimony is being offered to contradict the terms of a written agreement, the meaning of the terms must be resolved. Thus, the parol evidence rule does not bar admission of this testimony. (D) is incorrect because the requirements of the Statute of Frauds [U.C.C. §2-201] are satisfied here. The U.C.C. requires only (i) a writing sufficient to indicate that a contract was formed, (ii) a quantity term, and (iii) the signature of the party to be charged. All other terms of the contract, including the meaning of a contract term, can be established by parol evidence without implicating the Statute of Frauds.

Answer to Question 104

- (A) The licensing requirement is constitutional. The state may “within the proper purpose of the exercise of its police powers” require licensing of anyone who deals with the public in general, and the Supreme Court has particularly been very liberal when the state is attempting legislation that is remedial in effect to cure a social evil that exists within the state. (B) is incorrect because the designation of the attorney general does not affect the constitutionality. (C) is wrong because this is a permissible burden (if it is one at all). (D) is wrong because there is no indication that the state is treating nonresident garment makers differently than those residing in the state. (Note also that the Interstate Privileges and Immunities Clause does not protect corporations.)

Answer to Question 105

- (A) It is unlikely that this provision could survive even the traditional rationality test. There is no apparent rational relationship between the classifications of citizens and noncitizens, and particularly residents and nonresidents, and the proper state purpose of discouraging the hiring of illegal aliens. Furthermore, state alienage classifications are suspect and will be upheld only if necessary to promote a compelling state interest. The classification in this case is not necessary because there are less burdensome means available to accomplish the state’s purpose. (B) is wrong because the Fourteenth Amendment Privileges and Immunities Clause is limited to rights arising out of national citizenship. (Note that the durational residence requirement, but not the United States citizenship requirement, may violate the Article IV Privileges and Immunities Clause.) (C) is wrong because the Due Process Clause of the Fifth Amendment applies only to federal government action. (D) is wrong because the Tenth Amendment reserves power to the states; it does not include restrictions on state power.

Answer to Question 106

- (B) The Bible listing is admissible as a family record. Federal Rule of Evidence 803(13) provides a specific exception to the hearsay rule allowing admission of family records, such as family Bibles, genealogies, engravings, etc. A family Bible with a record of births and deaths is exactly the type of document intended by this exception. (A) is incorrect because the inscription concerning Baggs's niece is less than 20 years old. (C) is incorrect because the hearsay exception described above applies to the family Bible. (D) is incorrect because there is no such foundational requirement in the exception to the hearsay rule. The family Bible is considered to have inherent indicia of trustworthiness. The Bible has been properly identified as having belonged to Baggs's family, and there is no reason to consider the inscription untrustworthy.

Answer to Question 107

- (D) Mark and Martha each own an undivided one-half interest because the Statute of Frauds applies. The Statute of Frauds requires that any transfer of an interest in land be in writing. The right of survivorship Taylor and Scott tried to create by their oral agreement is an interest in land. As such, it must be in writing to be enforceable. Furthermore, to create a joint tenancy with right of survivorship, the unities of time, title, interest, and possession must be present; *i.e.*, a tenancy in common cannot be converted to joint tenancy by agreement. Therefore, Taylor and Scott remained tenants in common at their deaths, with each undivided one-half interest passing through their respective estates. (A) is incorrect because reliance on a mistake of law cannot convert a tenancy in common to a joint tenancy, and for Martha to take the entire interest, Scott would have to have a right of survivorship. (B) is incorrect because, as discussed above, Scott and Taylor's mistake as to the operation of law is an insufficient basis to reform the deed. A joint tenancy is not created without the four unities and the use of the specific language required by the jurisdiction. (C) is incorrect because the deaths of Scott and Taylor resulting from the same accident is irrelevant. The deaths were not simultaneous and it would not have mattered if they were. The share of each tenant in common goes to each tenant's heirs, and death resulting from the same accident or simultaneous death would not entitle the other co-tenant to take as if he or she had survived because a tenancy in common is involved.

Answer to Question 108

- (D) The state must demonstrate that the requirement is necessary to advance a compelling state interest. The Equal Protection Clause requires that similarly situated persons not be discriminated against unreasonably. Where a suspect class is involved, it is unreasonable to discriminate unless the government can show that the discrimination is narrowly tailored to achieve a compelling governmental interest. As to state government regulation, alienage is a suspect class. Thus, (D) is correct. (A) is incorrect because it states the wrong test (rational basis). (B) is incorrect because it places the burden on the wrong party (the alien). (C) is incorrect because it states the wrong test (rational basis). This test applies only to laws restricting alien participation in the functioning of the state government.

Answer to Question 109

- (A) The only proposition that must be established is that the gas caused Nyman's death. The storage of highly toxic gas is an activity for which strict liability is imposed. Proposition I. relates to an element required in a strict liability case, while propositions II. and III. relate to additional matters that might be necessary to prove if negligence were the issue. In strict liability the plaintiff

402. PRACTICE EXAM

need only prove: (i) the existence of an absolute duty on the part of the defendant to make safe; (ii) breach of that duty; (iii) that such breach was the actual and proximate cause of the plaintiff's injury; and (iv) damages. Ultrahazardous or abnormally dangerous activities fall into the strict liability category because they: (i) involve risk of serious harm to persons or property; (ii) cannot be performed without risk of serious harm no matter how much care is taken; and (iii) are not commonly engaged-in activities in the community. The storage of toxic gas is such an ultrahazardous activity. Nyman's personal representative need only prove that the escaping toxic gas was the cause of Nyman's death. It follows that (B), (C), and (D) are incorrect because they state propositions that need not be proved for the plaintiff to recover in a strict liability case.

Answer to Question 110

- (C) The strongest argument for admission of Pullen's testimony concerning the telephone call is that, after hearing Denison speak in chambers, Pullen recognized Denison's voice as that of the person on the telephone. Aural voice identification is not a subject of expert testimony; *i.e.*, lay opinion is sufficient. Familiarity with the voice may be acquired before *or after* the speaking that is the subject of the identification. Thus, the fact that Pullen became familiar with Denison's voice later, in the judge's chambers, does not disqualify the identification. That identification, coupled with Denison's self-identification during the call, is sufficient to authenticate the telephone conversation. (A) and (B) are wrong because they state requirements for identifying the person called, not the caller. (D) is wrong because self-identification of the caller is insufficient evidence of identity; additional evidence of identity, such as the testimony in (C), is required.

Answer to Question 111

- (B) Drake can be guilty of arson because his failure to put out the fire that he started establishes the malice necessary for arson. Arson at common law consists of the malicious burning of the dwelling of another. All that malice requires is that defendant have acted with the intent or knowledge that the structure would burn, or with reckless disregard of an obvious risk that the structure would burn. Here, it is not enough that Drake accidentally or negligently caused the fire to start. However, since he was the cause of the fire, he had a duty to take reasonable steps to try to prevent it from spreading. His failure to do anything when the fire was probably small enough to put out would suffice as reckless disregard of an obvious risk that the building would burn, which it did. With regard to the dwelling requirement, most states extend the crime of arson to structures other than dwellings, and questions on the MBE testing on other arson issues will often assume without saying that the jurisdiction's arson law applies to other buildings. The requirement that the building be "of another" pertains to possession rather than ownership. Thus, a landlord could be guilty of arson for burning down his own building if his tenants were in possession of it rather than him; hence, (D) is incorrect. (A) is wrong because the malice requirement is not established by the fact that Drake harbored ill will against Teague, and there is no "felony arson" doctrine comparable to the felony murder doctrine. (C) is wrong because, as discussed above, Drake need not have intended to start the building on fire; all that need be shown is a reckless disregard of an obvious risk that the structure would burn.

Answer to Question 112

- (A) Dietz should be found guilty of robbery because his accomplice obtained the wallet by means of force. Robbery consists of (i) a taking (ii) of personal property of another (iii) from the other's person or presence (iv) by force or intimidation (v) with the intent to permanently deprive him of it. Thus, robbery is basically an aggravated form of larceny in which the taking is accomplished by force or threats of force. The force must be used either to gain possession of the property or to

retain possession immediately after such possession has been accomplished, but the defendant need not have intended to use force to complete the crime; the only intent required is the intent to permanently deprive the victim of his property. Here, Dietz and Atkins had such an intent, and they were able to carry out that intent in part because Atkins slashed Verner's hand with the knife, incapacitating him. The fact that he did not intend to injure Verner is irrelevant; hence, (C) is wrong. (B) is wrong because Verner's erroneous belief that he was being threatened does not establish the element of threat or intimidation. Dietz's conduct was merely an attempt to distract Verner and did not constitute a threat or intimidation; the fact that Verner's intoxication caused him to believe otherwise does not change that result. (D) is incorrect because the unreasonableness of Verner's belief does not change the fact that Dietz is liable as an accomplice to the robbery by Atkins, since robbery (the use of force) was a foreseeable consequence of the pickpocketing.

Answer to Question 113

- (A) David will probably be required to pay Peterson \$105 under an implied-in-fact contract. An implied-in-fact contract is a contract formed by manifestations of assent other than oral or written language, *i.e.*, by conduct. Even if there is no subjective "meeting of the minds," the parties will be bound if their conduct objectively appears to manifest a contractual intent. Where an offeree silently takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation, the offeree's inaction may constitute an acceptance. [Rest. 2d Contracts §69(1)(a)] Here, David's silence in the face of Professor Peterson's offer and his conduct in staying within earshot of the group is a sufficient objective manifestation of contractual intent for the court to find an implied-in-fact contract. Hence, a court will probably allow Peterson to recover the contract price. (B) is wrong because it states the wrong rationale. The Statute of Frauds would not be applicable even if the cost of the tour were over \$500; the \$500 provision of the Statute of Frauds is applicable only to the sale of goods. (C) is incorrect because it states a quasi-contract remedy. Quasi-contract is not really a contract at all; it is a legal remedy to prevent unjust enrichment where an enforceable contract is not present, and allows the claimant to recover the reasonable value of the benefits that he rendered to the other party. While Peterson probably could pursue a quasi-contract remedy because he rendered services with a reasonable expectation of being compensated, he is not limited to that remedy because he can establish an implied-in-fact contract. Hence, he can recover the contract price for the tour without having to establish that it was a reasonable fee for the lectures. (D) is wrong because, as stated above, David's conduct would be sufficient for a court to find the existence of an implied-in-fact contract here, or, at a minimum to grant a quasi-contract remedy.

Answer to Question 114

- (B) The court could find the title marketable by finding that an implied easement for the benefit of Blackacre was created from the existing use when Blackacre was severed from Whiteacre by the sale. The requirement that the seller provide the buyer with marketable title means that the title must be free from questions that present an unreasonable risk of litigation. A significant encroachment constitutes a title defect, regardless of whether an adjacent landowner is encroaching on the seller's land or vice versa. However, under the circumstances in choice (B), a court will be able to avoid the encroachment problem by implying an easement from the existing use (a quasi-easement). If a use exists on the "servient" part of the tract that is reasonably necessary for the enjoyment of the "dominant" part, and a court determines that the parties intended the use to continue after division of the property, an easement will be implied.

404. PRACTICE EXAM

Given that title will not be marketable otherwise, the court will deem that the parties intended for the use to continue. (A) is wrong because the fact that the law requires a ramp would not prevent the adjacent property owner from bringing a lawsuit to have the encroachment removed. (C) is incorrect because an encroachment of 10 inches is significant enough to make title unmarketable. Whether an encroachment is significant enough to make title unmarketable is ultimately a question of fact; however, structures that encroach an inch or more over the property line are generally found by the courts to be significant encroachments. (D) is incorrect because the type of deed required by the contract does not establish marketability. Also, the fact that a contract calls for a quitclaim deed, which does not contain any covenants for title, does not eliminate the implied warranty to provide marketable title.

Answer to Question 115

- (C) Ned will not recover because Parker did not breach a duty owed to him when he parked the car. This question can be analyzed in terms of either the extent of the duty of care or proximate cause. Where defendant's conduct creates an unreasonable risk of injury to persons in the position of the plaintiff, the general duty of care extends from the defendant to the plaintiff. However, no duty is imposed on a person to take precautions against events that cannot reasonably be foreseen. And in terms of proximate cause, intervening forces that produce unforeseeable results (results not within the increased risk created by defendant's negligence) will be deemed to be unforeseeable and superseding, and thus break the causal connection between the defendant's negligent act and the ultimate injury. Here, Parker's allegedly negligent parking did not increase the risk that Driver would sideswipe his car; Driver's conduct was an unforeseeable intervening force that cuts off Parker's liability for his conduct. (A) is incorrect for two reasons. For breach of a statute to establish negligence per se, plaintiff must show that the statute was designed to prevent the type of harm that occurred, which does not seem to be the case with the fire hydrant ordinance here. Furthermore, proving breach of an applicable statute establishes only duty and breach of duty. Actual and proximate cause must still be established for recovery, and proximate cause is lacking here. (B) is incorrect because the fact that Parker's conduct was a cause in fact of Ned's injury, even assuming that leaving the car there was negligent, does not establish the necessary element of proximate cause. (D) is incorrect because violation of an ordinance may establish negligence per se if the statutory standard is applicable to the situation.

Answer to Question 116

- (B) Byer probably will be required to pay \$6,000 for all but lot 101. Since the facts stipulate that there was an enforceable contract at \$5,000 as to lot 101, there was no consideration for Byer's agreeing to pay more for that lot. However, as to the other lots, Ohner's telephone call would act as a revocation of the original offer, and a new offer at \$6,000; Byer's telegram was an acceptance of this new offer and bound Byer to pay the raised price.

Answer to Question 117

- (D) Byer probably will not succeed. Notice to an offeree that the offeror has made an inconsistent contract with a third party operates as a revocation of the offer. (A) is incorrect because there was apparently no consideration given by Byer for Ohner's promise to keep the offer open until June 1, and hence it too was revocable. (C) is not as good an answer as (D) because it is the *notice* to the offeree that constitutes the revocation (rather than the inconsistent contract with the third party).

Answer to Question 118

- (C) Arguably, Byer's telegram on May 2 could reasonably be interpreted as a rejection of Ohner's offer as to all other lots except 101; *i.e.*, having accepted only 101, he was impliedly rejecting the rest. Once rejected, the offer is terminated and the offeree's power of acceptance is extinguished; thus, the May 6 attempt to accept would be ineffective. None of the other alternatives makes sense. For impossibility of performance in (A) to apply, the impossibility must be "objective"; *i.e.*, the duties could not be performed by anyone. Also, the impossibility must arise *after* the contract has been entered into. (D) is wrong because a condition precedent must be distinguished from a promise. A condition is the occurrence of an event that will create, limit, or extinguish the absolute duty to perform. In this case, it would probably be determined that the intention of the parties was an exchange of promises. (B) is incorrect because a unilateral mistake in most cases will not prevent formation of a contract. Only mutual mistake going to the heart of the bargain may prevent the formation of the contract.

Answer to Question 119

- (B) Leonard's conviction will be sustained because states can prohibit or regulate conduct in general, and this is true even if the prohibition or regulation happens to interfere with a person's religious practices. The Free Exercise Clause cannot be used to challenge a neutral law of general applicability (such as the law against cruelty to animals) unless it can be shown that the law was motivated by a desire to interfere with religion. [See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993)] A law that regulates the conduct of all persons, as this statute appears to do, can be applied to prohibit the conduct of a single person even if the person's religious beliefs prohibit him from complying with the law. (A) is incorrect because the constitutional protection of religious beliefs does not require that the belief arise from a traditional, or even an organized, religion. Beliefs in Satan could have constitutional protection. (C) is wrong for the reasons given in the analysis of option (B). (D) is incorrect because the reasonableness of religious beliefs is not a suitable subject for constitutional inquiry. The courts may not, for example, declare a religion to be "false." The courts may inquire into the sincerity of religious belief, but the reasonableness of the belief is not relevant.

Answer to Question 120

- (A) The phone message is admissible because it is an admission by a party-opponent. An admission is a statement made or an act done that amounts to a prior acknowledgment by one of the parties to an action of one of the relevant facts in dispute. The statement may be in writing and need not be against that party's interest at the time it was made. Here, Peters is offering a statement made by Dietrich that is directly relevant to the issue in the lawsuit. The phone message should therefore be ruled admissible. (B) is incorrect. While statements of a declarant's then-existing intent are admissible as an exception to the hearsay rule to allow an inference that the intent was probably carried out, statements of memory or belief are not admissible to prove the truth of the fact remembered or believed. Thus, even if Dietrich left the message shortly after he made the agreement with Peters, it would not be admissible under the state of mind exception to the hearsay rule. (C) is incorrect because the privilege for confidential communications between a husband and wife does not extend to routine communications of a business nature that were not made in confidence. Here, Dietrich gave the message to the switchboard operator to relay to his wife. Thus, the communication was not made in reliance on the intimacy of the marital relationship. (D) is incorrect because the statement is admissible as an admission of a party-opponent, which is not hearsay under the Federal Rules.

Answer to Question 121

- (A) Patrick will prevail if Hotel's management breached its duty of care by not improving the locks. Innkeepers have a duty to use a high degree of care to aid or assist their guests and to prevent injury to them from third persons. Included in this duty is the duty to take reasonable precautions against foreseeable criminal acts of third parties. If, as stated in (A), Hotel's management had reason to believe the locks were inadequate, it breached its duty of care to Patrick, and this breach caused his injury. (C) is incorrect because the burglary would be a superseding intervening force only if it was unforeseeable. Also, if Hotel's management had reason to believe the locks were inadequate, it is likely that the burglary and assault will be deemed to be a foreseeable risk of the inadequate locks. (B) is incorrect because the fact that innkeepers owe a high degree of care to their guests does not make them strictly liable for their injuries; some breach of that duty of care must be shown. (D) is incorrect because compliance with the statute is not determinative. The statute sets forth a minimum standard of conduct regarding installation of locks in hotel rooms. Despite compliance with this statute, a careful hotel proprietor would be required to take additional precautions if he was or should have been aware of special circumstances; *e.g.*, a history of prior criminal acts despite use of the statutorily mandated locks.

Answer to Question 122

- (A) Patrick is liable for the type of invasion of privacy of intrusion upon plaintiff's private affairs or seclusion. Husband could reasonably expect that what he did in the woman's hotel room would be free from intrusion. Patrick violated Husband's seclusion by listening to the activities in the room. This intrusion would certainly be objectionable to a reasonable person. (D) is wrong because the viability of this cause of action does not depend upon publication by the defendant; the interest protected by this type of invasion of privacy is the plaintiff's right to be let alone, rather than his interest in not having the information disseminated. (B) is wrong because illegality of the defendant's actions is not an element of the *prima facie* case for this form of invasion of privacy. Even if the eavesdropping is legal, Patrick's conduct would still be an objectionable intrusion upon Husband's private domain. Finally, the fact that Husband may have been engaging in illegal adulterous conduct does not justify a private individual's intrusion on his solitude. (The situation might be different if Patrick were a law enforcement officer acting pursuant to previously obtained judicial authorization.) Thus, (C) is incorrect.

Answer to Question 123

- (D) The gifts are valid under the Rule. Hubert's will created a life estate in Waverly, contingent remainders in the class consisting of Hubert's children (contingent upon their attaining age 30), and contingent remainders in the class consisting of any children of Hubert's children (contingent on their surviving their parent, and the parent dying before attaining age 30). There are two keys to understanding the question. The first is that a will speaks at death, no matter when it was executed. Here, Hubert's will became an effective conveyance only when he died in 1990. The second key is that the grandchildren (*i.e.*, the children of Allan, Beth, or Carter) do not themselves have to survive to any particular age to take their gifts. The wording of the question is somewhat confusing on this point, but it is clear when read carefully. Since there are two future interests in the question, each must be analyzed separately under the Rule Against Perpetuities. The gift to Hubert's children is a class gift, and the Rule makes class gifts entirely void unless it is certain that the gift will vest or fail as to all members of the class within the perpetuities period. However, it is clear that this will be true here. The three children (Allan, Beth, and Carter) are all alive when the will speaks in 1990. Hence, they are all lives in being. (If Hubert's wife had been pregnant when Hubert died, that child, when born, would also have been considered a "life in being" as of Hubert's death.) The gift is certain to vest as to each of Hubert's children

when each reaches age 30, which is obviously within each's lifetime. Likewise, if one of the children dies before age 30, his interest will fail; again, that is certain to happen within his or her lifetime. Since this is so, the class gift to the children of Hubert is certain to vest or fail as to each member within "lives in being." The gift is therefore valid under the Rule. It is not even necessary to add the 21-year period as permitted by the Rule. As to the class gift to the grandchildren of Hubert, a similar analysis follows. If any grandchild's interest ever becomes vested, it will do so immediately upon the death of that grandchild's parent (Allan, Beth, or Carter) prior to reaching age 30. Since those three persons are "lives in being" at Hubert's death, the grandchildren's interests are certain to vest or fail in every case at the end of a life in being. Again, it is not necessary to add the 21-year period as permitted by the Rule. (A) is wrong because the time of execution of the will is irrelevant; it is the date of the testator's death that commences the running of the perpetuities period. (B) is wrong for the same reason. (C) is wrong for the reasons discussed above.

Answer to Question 124

- (D) To have a Fourth Amendment right, a defendant must have a reasonable expectation of privacy in the object seized. A person does not have such an expectation in objects held out to the public, such as account records held by a bank. Thus, (D) is correct. (A) is incorrect because a search warrant is not required where the defendant does not have a Fourth Amendment right. (B) is incorrect because Downs did not have a Fourth Amendment right in the records. Also, the period covered by the records was not necessarily overextensive. It could be that Downs was suspected of being involved in bribery for the preceding two years. (C) is incorrect because, even if the facts here presented describe an exigent situation, such a situation is actually an exception to the warrant requirement; and, like the warrant requirement, will not arise unless and until the defendant has a Fourth Amendment right.

Answer to Question 125

- (A) Devon's knowledge that Plummer was about to sit on the chair makes his action a battery. A *prima facie* case for battery requires an act by defendant that brings about harmful or offensive contact to plaintiff, intent on the part of defendant to do the act, and causation. Here, Devon's act in pulling out Plummer's chair brought about offensive contact to Plummer. The causation element is satisfied not only by direct contact but also by indirect contact. Here, since Devon set in motion the events that brought about the offensive contact, causation exists. The intent element is satisfied if defendant knew with substantial certainty the consequences of his act. Here, if Devon knew that Plummer was about to sit on the chair, he also knew with substantial certainty that Plummer would fall if the chair were moved. Thus, Plummer will prevail on a battery cause of action. (B) is incorrect because Devon's negligence would not suffice for battery, and the only alternative cause of action based on negligence is negligent infliction of emotional distress, which requires that defendant's negligent conduct cause some physical injury to plaintiff. Here, Plummer suffered no physical harm. (C) is incorrect because the *prima facie* case for battery does not require physical harm to be shown. Even if Plummer cannot prove any actual damages, he will be entitled to a judgment for nominal damages. (D) is incorrect because it merely states Devon's motive for moving the chair. Regardless of the fact that Devon did not have an evil motive or intend to cause injury, he knew with substantial certainty that his conduct would cause an offensive contact to Plummer; this satisfies the intent requirement for battery.

Answer to Question 126

- (B) Where a witness makes a statement not directly relevant to the issues in the case, the rule against impeachment on a collateral matter applies to bar the other side from proving the statement

408. PRACTICE EXAM

untrue by extrinsic evidence or by a prior inconsistent statement. Here, the actual number of years during which Walters was employed by the roofing company is irrelevant to the genuineness of Daly's signature on the note. Thus, this is a collateral matter, and Daly will not be permitted to impeach Walters on it. (D) then is incorrect. (C) is incorrect, not only because Wilson's testimony is irrelevant to any issue in the case, but also because such testimony is not evidence of a regularly conducted activity. (A) is incorrect. Although the witness is testifying orally about matters contained in a writing (the employment records), the records here are collateral to the issue being litigated. Accordingly, the collateral document exception applies and the best evidence rule is inapplicable.

Answer to Question 127

- (D) The Secretary must distribute \$100 million, because the President's executive order constitutes an attempted exercise of legislative power. Although the Supreme Court has not fully resolved the scope of the President's power over internal affairs, it has held that the President has no power to refuse to spend appropriated funds when Congress has expressly mandated that they be spent. Congress has the power to spend money for the general welfare under Article I, and the President's action here infringes on that power. It follows that (A) and (B) are incorrect. (C) is incorrect because, although it presupposes a less drastic spending cut than (A) or (B), the President may not unilaterally impose even a cut of 10% when Congress has clearly required the spending of the full amount.

Answer to Question 128

- (B) The outcome will turn on the definition of "value," because Crider, having received his deed after Price, is the junior claimant. His recordation prior to Price will protect Crider's right to Blackacre only if Crider took the deed in good faith and for value. Here, Owen apparently gave the deed to Crider in exchange for a release from the antecedent debt. If the jurisdiction in question considers this "value," Crider will benefit from the recording act because he is a subsequent bona fide purchaser for value, the very person the recording acts seek to protect. (A) is wrong because the form of deed has no effect on bona fide purchaser status. A quitclaim deed merely means the seller is not making any warranties of title. (C) is wrong because whether Price paid value is irrelevant. Price is not the subsequent purchaser. The recording act protects subsequent purchasers, so Price's interest depends on whether Crider benefits from the protection of the act. (D) is wrong because Price's title is good as against anyone except a subsequent bona fide purchaser for value. Thus, unless Crider is shown to qualify for the protection of the recording act, Price's title is good. There is no estoppel component to the recording acts.

Answer to Question 129

- (B) The scenario in (B) provides the best defense because it would enable Green to rescind based on unilateral mistake. Rescission of a contract is available when one party is mistaken about material facts relating to a contract, the mistake adversely affects that party, and the other party knows of the mistake. (A) is wrong because in this case it is the nonmistaken party who is adversely affected. (Note that under choices (A) and (B) it is unclear whether Brown's claim is based on a contract. If it is, the promissory note will be treated as a modification. The modification could be rescinded as discussed above, but there also is an issue of whether there was valid consideration for the modification under the preexisting duty rule. (B) is still the best answer. Under the preexisting legal duty rule, past consideration is valid consideration if there is an honest dispute as to duty owed. There would be no honest dispute under (B) because the nonmistaken party is taking

advantage of the mistaken party, but this is not true in (A).) (C) is wrong. The Statute of Frauds is not a problem here because Brown is seeking to enforce the promissory note—which complies with the Statute of Frauds—and not the original agreement. Neither does the preexisting legal duty rule negate the consideration here since there is an exception to the rule for reaffirmations of voidable promises (*e.g.*, promises unenforceable under the Statute of Frauds, promises by infants, promises based on fraud, etc.). (D) is wrong because the statute of limitations would run anew on the note that Brown is trying to enforce, and there is no preexisting legal duty consideration problem because of the exception to the rule for “technical defense bars”—a new promise to pay a legal obligation barred by a technical defense (such as the statute of limitations) is enforceable according to the terms of the new promise.

Answer to Question 130

- (A) Generally, a joint tortfeasor may recover indemnification from another joint tortfeasor where there is a considerable difference in the degree of fault. Here, Ellis, the person whose improper design actually caused Carla’s injuries, is a “more wrongful” tortfeasor than Toyco. Thus, Toyco should prevail in its claim against Ellis, which result is reflected in (A). (B) is incorrect because indemnity is not available simply because Toyco and Ellis are joint tortfeasors. (C) is incorrect because Toyco’s liability to Carla does not preclude it from obtaining indemnity from Ellis. (D) is incorrect because, even if Toyco was negligent in failing to discover the defect, it may still be entitled to indemnity from the person who negligently designed the game.

Answer to Question 131

- (C) The Due Process Clause has been interpreted to require the prosecution to prove each element of the crime charged beyond a reasonable doubt. The “malice aforethought” element of murder has traditionally been defined as encompassing the absence of provocation engendering a passion. Putting the burden of persuasion as to the existence of provocation and passion on the defendant relieves the prosecution of its burden as to their absence. Therefore, (C) is the best answer and (A) is incorrect on the facts. (B) is incorrect because the presumption of “malice aforethought” is not a legitimate presumption. (D) is incorrect as a matter of law. Presumptions are permitted as long as they are not mandatory for the jury.

Answer to Question 132

- (B) Tommy had a reasonable expectation of privacy, as evidenced by the obscuring of the window so that passersby could not see into the shop. Hence, the officer’s search would have to be based on a valid warrant or qualify under one of the exceptions to the warrant requirement. Climbing on the trash cans and peering through a narrow opening eight feet above the pavement would be considered a violation of Tommy’s Fourth Amendment rights and not a “plain view” of criminal activity. Since the seizure of the cocaine, mirror, and razor was based on the illegal search, the evidence could not be used by the state. (A) is wrong; absolute certainty of illegal activity is not required for a valid search. A reasonable belief is required. (C) is wrong. The arrest itself is probably invalid, and in any event a search of the next room would not be an area within the immediate control of the defendant. (D) is wrong. Consent to enter the shop is not a consent to search the back room.

Answer to Question 133

- (B) The evidence is admissible as evidence of Wade’s possible bias in favor of Dexter. Evidence that a witness is biased tends to show that the witness has a motive to lie. A witness may always be

410. PRACTICE EXAM

impeached by extrinsic evidence of bias, provided a proper foundation is laid. Bias may be shown by evidence of a business relationship or friendship with a party. Here, the fact that Wade is Dexter's partner in a gambling operation is admissible to impeach Wade for bias. (A) is wrong because the only relevant facet of Wade's character in this case is his veracity, and extrinsic evidence of bad acts is not admissible to impeach a witness. Under the Federal Rules, instances of a witness's conduct may be inquired into on cross-examination if they are probative of truthfulness (*i.e.*, acts of deceit or lying), but extrinsic evidence is not allowed. It is doubtful that running a gambling operation would be found to be probative of Wade's truthfulness. Even if it were, extrinsic evidence would be inadmissible. (C) misstates the law. Criminal conduct can be shown by means other than admission or record of conviction. As discussed above, a party may be impeached by instances of bad or criminal conduct (even if it does not result in a conviction) if it is probative of truthfulness and it is brought out on cross-examination (no extrinsic evidence). (D) is wrong because extrinsic evidence of bias is admissible. (Note, however, that many states require that the bias be inquired into on cross-examination before extrinsic evidence is admissible.)

Answer to Question 134

- (B) Cost of completion minus installments is the correct measure of damages because the facts give us the breach of a construction contract by the builder during construction. In such cases where the builder breaches after partially performing, the owner of the land is entitled to the cost of completion plus reasonable compensation for any delay in performance. Courts generally allow the builder to offset or recover for work performed to date to avoid the unjust enrichment of the owner. Hence, the unpaid installments should be deducted. Although this option does not mention reasonable compensation for delay, it is clearly a more accurate statement of the correct measure of damages than the other options. (A) is wrong because Farquart's damage relates to the cost of having the house completed. This cost could either exceed or be less than the restitution of the installments. If the amount is less, Farquart would be unjustly enriched. (C) is incorrect because damage relates to cost of completion and not market value. The house might have minimal market value in its partially completed state, and to measure damages based on the differences between such minimal value at the time of breach and market value when completed according to specifications could dramatically overstate Farquart's real damages. (D) is incorrect because damages for mental distress are too speculative and are not awarded in a contract situation.

Answer to Question 135

- (C) Farquart's additional expense in providing temporary housing would be the best basis for a claim of consequential damages. In addition to the standard measure of damages, consequential damages may be awarded for further losses resulting from the breach that any reasonable person would have foreseen would occur from a breach *at the time of entry* into the contract. Temporary housing expenses would have been foreseeable at the time Sawtooth and Farquart entered into the contract. (A) is incorrect because it would be consequential damage to Junior rather than Farquart, because it is Junior who will incur the expense. (B) is incorrect because the fiancee's jilting of Junior is not a foreseeable consequence of the breach. (D) is incorrect because at the time Sawtooth and Farquart entered into the contract, both parties would have reasonably assumed that the house would be built and completed by experienced construction personnel. Farquart's attempt to complete the house himself and the ensuing negligence were not foreseeable.

Answer to Question 136

- (B) The legal effect of the two circumstances is best stated by (B). When a condition or duty of performance (*i.e.*, payment) is broken, the beneficiary of the condition or duty has an election:

he may (i) terminate his liability; or (ii) continue under the contract. If he chooses the latter course, he will be deemed to have waived the condition or duty. Since Sawtooth did not terminate his liability to complete construction of the house, but rather treated the contract as ongoing, he is deemed to have waived the delay in payment. Farquart's failure to require a certificate from Builders would be deemed a revocable waiver. At any time Farquart could insist on the certificate before making a monthly payment. Because the certificate represents that the work performed during a particular month met the specifications, Farquart would always retain the right to condition his payment for a particular month on receipt of the certificate. (A) is incorrect because there was no estoppel waiver as to either I. or II. Whenever a party indicates that he is "waiving" a condition before it is to happen, or some performance before it is rendered, and the person addressed detrimentally relies upon such an indication, the courts will hold this to be a binding (estoppel) waiver. Sawtooth never indicated in advance that he was waiving the four monthly payments and there was no detrimental reliance by Farquart. Likewise, Farquart never indicated in advance that he was waiving the certificate requirement and there was no detrimental reliance by Sawtooth. (C) is incorrect because mutual rescission requires an *express agreement* between the parties to rescind. The agreement to rescind is itself a binding contract supported by consideration (the giving up by each party of his right to counterperformance from the other). The parties did not rescind the contract here. (D) is wrong because, as noted above, there was no estoppel waiver as to II. Also, there was never any discharge of Farquart's duty to make the four payments. (Although Farquart's duty might be excused because no work was done between November and February, this does not necessarily follow from the terms of the contract.)

Answer to Question 137

- (D) The outcome of Stone's suit will be governed by whether the power to "sell and convey" is construed to include the power to execute the usual form of deed used to convey realty. If Mitchell lacked the authority to include covenants for title, Rogers will probably not be bound by those covenants. (A) is wrong because the deed included covenants. It may be slightly relevant on the issue of how the power of attorney should be construed, but the outcome of the case will not be governed by this determination. (B) is wrong for a couple of reasons. Covenants for title are not like real covenants; they are not characterized as personal or running with the land. Covenants for title are either present or future. Even if the terminology of personal or running with the land were used, (B) would be incorrect because the suit concerns the original parties; thus, whether the covenant runs with the land would be irrelevant. (C) is wrong because bona fide purchaser status is irrelevant to the enforcement of covenants for title. This status is important mostly for purposes of the recording statute.

Answer to Question 138

- (A) The court should dismiss the action because Midwest cannot show that any injury it allegedly suffered will be remedied by a decision enjoining performance of the Great Plains contract. Even if a federal court has jurisdiction over the subject matter of a case, it will not decide a constitutional challenge to a government action unless the party challenging the action has "standing" to raise the constitutional issue, *i.e.*, a concrete stake in the outcome of the controversy. This requires plaintiff to show an injury in fact—caused by the government—that will be remedied by a decision in its favor. Here, Midwest cannot establish that whatever injury it might have suffered by having its bid rejected will be remedied by an injunction preventing Great Plains from performing its contract with the government; hence, it does not have standing to bring this action.

412. PRACTICE EXAM

(B) is incorrect because it is too broad; even in the absence of express constitutional limitations, the government is restricted by the Bill of Rights in the exercise of its contracting power. (C) is wrong because Midwest does not have standing to raise a claim on behalf of minorities potentially affected by the waiver. Even if the court were to consider the merits of the case, the government, while it might have had to show a compelling government interest to *institute* its affirmative action policies, would not have to show a compelling interest to *suspend* the policies. (D) is wrong because Midwest does not have standing to assert a violation of its rights in an action to enjoin another party's performance of a contract with the government.

Answer to Question 139

(B) Under pure comparative negligence, the plaintiff may recover no matter how great her negligence. In this case, Phyllis has suffered damages of \$100,000. Because she was 40% negligent, she may recover only \$60,000 (\$100,000 less \$40,000). Therefore, (B) is correct, and (A) is wrong. Absent a statute, damages are not reduced or mitigated because of benefits received from collateral sources (*e.g.*, health insurance). Thus, Phyllis's receipt of \$10,000 under her insurance plan does not diminish her recovery. (C) is therefore wrong. Andrew and Brett are jointly and severally liable for Phyllis's injuries because their negligent acts combined to proximately cause an indivisible injury to Phyllis. Because Andrew and Brett are jointly and severally liable, Phyllis may recover the entire \$60,000 from Andrew. Thus, (D) is wrong.

Answer to Question 140

(A) Ben, who is apparently a purchaser at arm's length, had ample opportunity to inspect the property and discover the conduit. The law will not protect a party in Ben's situation who failed to protect himself. Owen, in the absence of a fiduciary relationship with Ben or of any affirmative representations that Owen knows or discovers to have been false, has no duty to disclose the existence of the conduit except (in some jurisdictions) if he knows that Ben is laboring under a misapprehension as to a basic assumption and the act of nondisclosure is made in bad faith. The facts do not support either of these exceptions. It does not appear that Owen acted in bad faith, particularly because Owen permitted an inspection and Ben had ample opportunity to discover the truth. Furthermore, it does not appear that Ben will be unable to build the high-rise simply because of the presence of the conduit. (B) is incorrect because Ben's purpose is not irrelevant: if Owen knew about Ben's purpose, Owen may have a duty to disclose any fact that would preclude that purpose. (C) is incorrect because the existence of the conduit does not make title unmarketable. (D) is incorrect because nothing in the facts indicates that Ben could not build the high-rise on the property despite the existence of the conduit; there are no facts indicating that Ben will experience grossly excessive costs in attempting to do so; and the existence of the conduit, which was discoverable, is not the sort of unforeseeable supervening event that would give rise to a frustration defense.

Answer to Question 141

(B) Burglary requires a breaking and entering with the intent to commit a felony therein. Because what Donaldson intended to do when he broke in was not a crime, it cannot be said that he entered with the intent to commit a felony. For this reason, he should be acquitted of burglary. It follows that (B) is correct and (C) is incorrect. (D) is incorrect. While the fact that Donaldson was unable to retrieve the exams would not have been a defense to the burglary charge, the decisive fact in this case involves *legal* impossibility, not *factual* impossibility. (A) is incorrect.

because the crime of burglary would have been complete at the moment of breaking and entering with intent to commit a felony therein. However, because looking at exam questions was not a crime, Donaldson could not be convicted of either burglary or attempted burglary.

Answer to Question 142

- (C) Martha will lose unless she was in the “zone of danger” with Sue. Under the traditional approach for negligent infliction of emotional distress, one of the elements for recovery by a bystander is that she must have been within the “zone of danger” or “target zone” of defendant’s negligent conduct. Unless Martha was crossing the street with Sue and therefore in the “zone of danger,” she will not recover. Thus, (A) is incorrect. (The modern “foreseeability” approach would permit Martha to recover even though she was outside the “zone of danger”—her relationship to the person injured and her presence at the scene would establish foreseeability under this approach.) (B) is wrong even though severe shock to the nervous system may be a sufficient physical injury; Martha will lose because of the “zone of danger” requirement. (D) is incorrect because Martha’s relationship to Sue is not relevant under the traditional “zone of danger” approach.

Answer to Question 143

- (B) The testimony of Watts should be admitted as a statement to a physician made for purposes of diagnosis or treatment. The Federal Rules allow the admission of statements not only of past symptoms and medical history, but also of the cause or source of the condition as reasonably pertinent to diagnosis or treatment. This is an exception to the hearsay rule. (A) is incorrect because this is not a statement of *present* bodily condition which falls under a different exception to the hearsay rule. (C) is incorrect because, as explained above, this testimony is admissible under an exception to the hearsay rule. (D) is incorrect because this hearsay exception does not require unavailability of the declarant.

Answer to Question 144

- (A) If a law burdens a fundamental right, the state must demonstrate that the law is necessary to promote a compelling state interest. In all other cases, a law is valid if it rationally relates to a legitimate end of government. Where the “rational basis” test applies, the law is presumed valid and the burden is on the challenging party to prove its invalidity. The statute at issue infringes on Zeller’s right of parental custody, which is almost certainly a fundamental right. Thus, the *state* bears the burden of showing that this statute is needed to promote a compelling state interest. (A) is correct. (B) and (D) are wrong because showing a rational relationship is not enough since a fundamental right is involved. (C) and (D) are wrong because the burden is on the state, not Zeller.

Answer to Question 145

- (D) A conviction for felony murder requires that the defendant have had the intent to commit the underlying felony. Here, because Dunbar believed that the \$200 rightfully belonged to her, she did not have the intent to permanently deprive Stone of his money. Thus, Dunbar lacked the intent required for conviction of the underlying felony, and she cannot be found guilty of felony murder. (A) is wrong because it fails to account for the necessary intent to commit the underlying felony. (B) is wrong because taking Balcom to the store did not in and of itself create a risk of death. Also, (B), like (A), fails to account for the necessary intent to commit the underlying felony. (C) is wrong because the required mental state for felony murder (*i.e.*, intent to commit the underlying felony) has nothing to do with knowledge that Balcom was armed.

414. PRACTICE EXAM

Answer to Question 146

- (C) Conviction as an accessory requires that the defendant have given aid, counsel, or encouragement with the intent that an offense be committed or, in some cases, knowing that she was contributing to the commission of a crime. If Dunbar neither planned to use force nor knew that Balcom was armed, and she believed that the \$200 was rightfully hers, then she cannot be said to have aided, counseled, or encouraged Balcom with the intent that an offense be committed, or knowing that she was contributing to the commission of a crime. (A) and (B) are incorrect because they ignore the encouragement and intent necessary for conviction as an accessory. (D) is incorrect because, even if Dunbar was only exercising self-help, this alternative does not address her state of mind regarding the charge of being an accessory to murder.

Answer to Question 147

- (D) The accused in a criminal case may introduce evidence of a *pertinent* character trait because it may tend to show that he did not commit the crime charged. But here, evidence of Duncan's character for truth is not pertinent to a charge of a violent crime (aggravated assault). (A) is wrong because the character evidence is admissible only if it is pertinent to the charged crime. (B) is wrong because Duncan's credibility is not in issue, since he did not testify. (C) is wrong because in a criminal trial such evidence may be admitted, if pertinent, at the initiative of the accused.

Answer to Question 148

- (B) If the decision is for Andy, it will be because the right to take minerals is an incident of a fee simple interest. The owner of a defeasible fee has the same right to possession and privileges of use as the owner of a fee simple absolute. Only unconscionable conduct by the owner that substantially reduces the value of the land could possibly be enjoined by the person who would take the land should the current owner's estate terminate. (A) is incorrect because Bob has an executory interest. (C) is an incorrect statement of the law. A person in possession (*e.g.*, a life tenant), absent other circumstances, does not have the right to exploit mineral resources. (D) is incorrect because it is irrelevant. Andy's mental state or "good faith" or lack thereof has no bearing on his right to take minerals from his fee estate.

Answer to Question 149

- (D) Norris will not prevail if Josephs had reasonable grounds for his statement. As a former employer responding to queries of a prospective employer about a job applicant, Dr. Josephs has a qualified privilege. Such a privilege is not absolute; it exists only if exercised in a reasonable manner and for a proper purpose. The privilege may be lost if the speaker made a statement not within the scope of the privilege or if the speaker acted with "malice" (*i.e.*, knowledge that the statement was untrue or with reckless disregard as to its truth or falsity). If Josephs had reasonable grounds for his belief, he was not acting with malice. (A) is incorrect because of the reasons stated in the analysis of option (D). A statement of opinion may be actionable if it appears to be based on specific facts which, if expressly stated, would be defamatory. However, because of the qualified privilege, Dr. Josephs will not be liable for his mistake as long as his belief was reasonable. (B) is incorrect because the fact that the statement was in a category that is slander per se (*i.e.*, adversely reflecting on Norris's abilities to practice her profession) goes to whether Norris must plead special damages. It does not, however, undermine the qualified privilege. (C) is incorrect because permission to make inquiry is not tantamount to consent to be defamed.

Answer to Question 150

- (D) Marketable title is one that is free from reasonable doubt in fact or in law. Here, there is confusion because the building restrictions apply to all the lots shown on the map, but the parcel at issue is not one of the 10 numbered lots. Thus, it is unclear whether the parcel is subject to restrictions that will reduce the uses of the lot or its market value. Thus, (D) is correct. (A) is wrong because it is not clear that the undesignated parcel is not subject to the subdivision restrictions. It was included on the map and the restrictions apply to “all lots shown.” (B) is wrong because even though it is not one of the 10 lots, it may be bound by the restrictions. Since this is unclear, title is not marketable. (C) is wrong because there could be marketable title without government approval.

Answer to Question 151

- (C) Venus is entitled to the contract price for the grapes delivered and accepted, but Tipple is entitled to cover—to purchase grapes at the market price prevailing at the time of performance and to deduct any increase over the Venus-Tipple contract price. (A) is wrong because Tipple is entitled to cover, and does not “waive” the breach by accepting a part performance. (B) is wrong because the price for the grapes delivered is the contract price, not the prevailing market price. (D) is wrong because Venus is entitled to payment for the grapes she delivered, and would be able to enforce her claim through litigation, if necessary.

Answer to Question 152

- (C) Wall’s testimony is admissible as prior identification by the witness. Under the Federal Rules of Evidence, a statement of prior identification by the witness of another person is nonhearsay. Thus, (A) is incorrect. (B) is incorrect because Wall is testifying at the trial and is subject to cross-examination. Thus, Dray’s right of confrontation is not violated. (D) is incorrect because past recollection recorded is an *exception* to the hearsay rule, and the statement here at issue is nonhearsay. Also, past recollection recorded involves use of a writing made when the events were fresh in the mind of the witness. There is no such writing involved here.

Answer to Question 153

- (A) The modification is fully enforceable. Although there was no consideration for Barnes’s promise to take only half of the bargained-for production, none is required because this is a contract for the sale of goods and hence subject to U.C.C. section 2-209(1), which provides that a good faith modification is enforceable regardless of lack of consideration. Hence, (C) is wrong. (B) and (D) are wrong because they imply that the original agreement was not fully enforceable. The agreement between Barnes and Stevens is basically an output contract and is fully enforceable under the U.C.C. Although generally the subject matter of a contract must be definite and certain, an agreement to buy or sell all of one’s requirements or output is deemed capable of being made certain by reference to objective, extrinsic facts. It is assumed that the parties will act in good faith.

Answer to Question 154

- (D) Discharge of contractual duties by impossibility must be objective; *i.e.*, the duties could not be performed by anyone. Generally, physical incapacity of a person necessary to effectuate the contract only excuses performance where the services are deemed “unique.” That would not be the case here. Stevens’s allergy to the bees does not constitute objective impossibility of performance because his duties are delegable. Hence, his failure to deliver is not excused. (B) is wrong

416. PRACTICE EXAM

because his performance would be excused only if the parties had entered into a contract for personal services. (A) is wrong because Stevens promised to supply at least 100 lbs. per month. (C) is wrong because such notice would not excuse a breach.

Answer to Question 155

- (C) The basis for finding that the bank's due process rights have been violated is that it should have received notice through personal service or by mail. When the government seeks to use a judicial or administrative process to take or terminate property interests, it must give notice to those persons whose property interests may be taken by that process. The form of notice must be reasonably designed to insure that those persons will in fact be notified of the proceedings. Here, the bank had recorded its mortgage and presumably could have been notified by mail that the property was being seized by the government. Being deprived of the opportunity to protect its interest in the property violated the bank's due process rights under the three-part test of *Mathews v. Eldridge*. *Mathews* lists three criteria that the courts should weigh in determining what constitutes fair process: (i) the importance of the individual interest involved, (ii) the value of specific procedural safeguards to that interest, and (iii) the governmental interest in fiscal and administrative efficiency. Here, the Bank has an important property right that is being terminated, the procedure of publishing a general notice was not sufficient to safeguard its interests, and the government interest in efficiency would not have been overburdened by requiring notice by mail to parties with a recorded interest in the property. (A) is wrong because it is too broad. Under *Mathews*, the government is not required to provide personal notice to all parties if it is not feasible, nor is it required to provide a preseizure hearing if exigent circumstances make it impracticable. (B) is incorrect because even when a private party is seeking to use a judicial or administrative process, state action is involved and the Due Process Clause must be satisfied; hence, notice to a record mortgage holder would be required even if a private party were seeking to seize the property through judicial means. (D) is incorrect because the state's characterization of the mortgagee's interest is not critical; the mortgagee has legal rights to the property that are protected by the Due Process Clause, regardless of how the rights are characterized.

Answer to Question 156

- (C) The court should deny Darren's motion if it finds that he voluntarily consented to the search that revealed the drugs. The police may conduct a valid warrantless search of an area otherwise protected by the Fourth Amendment if they have a voluntary and intelligent consent to do so. The scope of the search is governed by the scope of the consent, but consent extends to all areas to which a reasonable person under the circumstances would believe it extends. The fact that a defendant has been placed under arrest does not mean that he cannot otherwise give valid consent to a search, and the search that led to the discovery of the cocaine in this case was within the scope of the consent that Darren provided. Thus, he has no Fourth Amendment grounds to exclude evidence of the cocaine. (A) is wrong because the fact that Darren was arrested did not mean that his consent was not voluntary. Whether consent is voluntary is judged by the totality of the circumstances. He does not necessarily need to be told that he has a right to withhold consent or be informed of the specific items being sought in the search. As long as his consent was not the product of express or implied coercion, it will be valid. (B) is incorrect even though it is a true statement. After making a lawful arrest of the occupant of an automobile, the police may conduct a warrantless search of the passenger compartment of the automobile but may not search the trunk. Here, however, the search of the trunk was based on Darren's consent rather than as incident to his arrest. (D) is incorrect. The lesser expectation of privacy in vehicles permits the police to search a vehicle without a warrant if they have probable cause to believe that the vehicle

contains contraband or evidence of a crime. However, the facts in this question do not indicate that Officer Jones had probable cause to search the trunk of Darren's car. The more certain basis for upholding the validity of the search is the consent given by Darren.

Answer to Question 157

- (B) Defendant is guilty of larceny because he had the intent to deprive the victim permanently of his car at the time of the taking. Neither victim's fraudulently procured consent nor defendant's later return of the car negates the larceny. (A) is wrong because, since the defendant intended to return the car within a reasonable time and, at the time of the taking, had a substantial ability to do so, his unauthorized borrowing of the car does not constitute larceny. (C) is wrong because the elements of false pretenses have not been met. False pretenses involves the obtaining of title to the property of another by an intentional false statement with intent to defraud the owner. Here, since defendant did not get title, it cannot be false pretenses. (D) is wrong because no conversion occurred. For embezzlement to have occurred, the defendant who was in legal possession of the car would have actually had to convert it for his own gain. Returning the car within a reasonable time would not constitute embezzlement.

Answer to Question 158

- (A) The testimony should be admissible as sufficiently authenticated. Where the identity of the speaker of an oral statement is important, authentication as to the speaker's identity is required. A statement made during a telephone conversation may be authenticated by a party to the call who testifies that: (i) he recognized the other party's voice; or (iii) he called a certain person's telephone number, and a voice answered, "This is (the person whose number was called)." Here, the identity of the person with whom Jones spoke on the telephone is important because the speaker admitted that his horse caused the damage. Thus, authentication is required. Because Jones called the listed phone number for Smith, and the answering voice identified itself as Smith, authentication is proper under (iii) above. (B) is incorrect because the accuracy of phone books is not an accurately verifiable fact or a matter of common knowledge. (C) is incorrect because, as noted above, familiarity with the speaker's voice is only one means of authentication. (D) is incorrect because there is no requirement of corroboration by the speaker.

Answer to Question 159

- (A) Photographs are admissible only if identified by a witness as a portrayal of certain facts relevant to the issue and verified by the witness as a correct representation of those facts. The witness who identifies the photograph need only be familiar with the scene or object that is depicted. It is not necessary to call the photographer to authenticate the photograph. Jones, as the owner of the cornfield, is familiar with the field that is depicted. Thus, Jones may testify to the photograph as an accurate portrayal of the condition of the field after the damage was done. (B) is incorrect because, if the photograph accurately depicts the damage, the photograph need not have been taken within a week after the occurrence. The fact that it was taken within a week does not establish that it was an accurate portrayal of the damage to the field. (C) is incorrect because, as noted above, it is not necessary to call the photographer. (D) is incorrect because, as long as the photograph is properly authenticated, it is admissible.

Answer to Question 160

- (C) State laws based on alienage are subject to strict scrutiny, meaning that a compelling state interest must be shown to justify the disparate treatment. However, if the law discriminates against

418. PRACTICE EXAM

alien participation in the self-governance process, the “rationality” test is applied. Here, Clovis’s application for tuition assistance does not relate to participation in the governmental process, thus the strict scrutiny test applies. (B) is incorrect, because it is based on the assumption that the “rationality” test is appropriate. (C) is the only answer that addresses the fact that the state must demonstrate a compelling interest to justify the restriction. It follows that (A) is incorrect. (D) is incorrect because aliens are excluded from the protection of the Privileges and Immunities Clause of Article IV.

Answer to Question 161

- (C) Partition and cross-easements is the best approach because the holder of an easement has the right to use a tract of land (called the servient tenement) for a special purpose, but has no right to possess and enjoy the tract of land. Typically, easements are created to give their holder the right of access over a tract of land. An easement is deemed appurtenant when the right of special use benefits the holder in his physical use or enjoyment of another tract of land. For an easement appurtenant to exist, there must be *two tracts* of land. The dominant tenement has the benefit of the easement, and the servient tenement is subject to the easement right. One consequence of appurtenance is that the benefit passes with transfers of the benefited land, regardless of whether the easement is mentioned in the conveyance. Partition is necessary to create the required two tracts of land. (A) is incorrect because a covenant not to partition is personal to the parties and thus subsequent owners will not be bound by the covenant. It is also wrong because under the principles of the Rule Against Restraints on Alienation, the courts will enforce prohibitions against partition by any one co-tenant only if the restriction is to last for a reasonable time. (B) is wrong because, as noted above, easements appurtenant require two tracts of land. As long as the strip remains undivided, a new neighbor, as a tenant-in-common, would have the right to partition the strip and thus terminate the cross-easement. (D) is incorrect because a trust in perpetuity would violate the Rule Against Restraints on Alienation. The effect of the trust would be to create a disabling restraint.

Answer to Question 162

- (B) Petrone will prevail if the cement dust constituted an unreasonable interference. For a private nuisance to be actionable, defendant’s conduct must amount to a substantial, unreasonable interference with plaintiff’s use and enjoyment of property. The operative language in the choice is “interfered unreasonably,” and in most MBE nuisance questions such language usually can be found in the correct choice. (A) is incorrect because, even though a balancing test is sometimes used in nuisance cases, mere increased costs is not a sufficient justification to allow continued unreasonable interference with plaintiff’s rights. (C) is incorrect because the number of individuals affected is not determinative of whether a nuisance exists. (D) is similarly incorrect; conformity to general methods in the industry will not preclude Silo from being liable for nuisance.

Answer to Question 163

- (D) Federal courts are barred from rendering advisory opinions. The legislation here calls for a federal court to transmit to the head of a federal agency an opinion regarding the proper disbursement of federal funds, and the agency head is not required to follow the opinion. This would be an advisory opinion. (A) is incorrect because it fails to consider the necessity for a case and controversy prior to the exercise of federal judicial power. (B) may be a true statement, but the rendition of advisory opinions by a federal court is not a permissible method to settle disputes involving the spending of federal monies. (C) is incorrect because the Eleventh Amendment pertains to suits brought against a state by citizens of that or any other state. Such a suit is not at issue here.

Answer to Question 164

- (A) The credibility of an expert witness may be attacked by cross-examining him as to: (i) his general knowledge of the field in which he is claiming to be an expert; and (ii) his particular knowledge of the facts upon which his opinion is based. Pine's question on cross-examination relates to Wall's general knowledge of the field of chemistry. This bears directly on the weight to be given Wall's testimony. Thus, (A) is correct. (C) is incorrect because any determination of Wall's qualifications as an expert does not preclude an attack on his credibility or on the weight to be given the opinion. (B) and (D) are incorrect because the question relates to neither Wall's truthfulness nor his character.

Answer to Question 165

- (A) Because stopping a car is a seizure for Fourth Amendment purposes, police generally may not stop a car unless they have at least a reasonable suspicion that a law has been violated. However, even absent that suspicion, police may set up roadblocks to stop cars if (i) the cars are stopped on the basis of some neutral, articulable standard, and (ii) the stops are designed to serve a purpose closely related to a particular problem arising from automobiles and their mobility. [See Indianapolis v. Edmund (2000)] The use of a checkpoint to detect evidence of ordinary criminal wrongdoing unrelated to use of cars or highway safety, such as the conduct here, was improper and thus the marijuana would be inadmissible under the exclusionary rule. (B) is wrong because if the car had been properly stopped, the use of the flashlight would not have been improper. (C) is wrong because the established police plan cannot overcome the constitutional objection to the random stopping. (D) is wrong because the stopping of the car was improper. If it had been proper, the subsequent search would have been proper since it would have been based on probable cause.

Answer to Question 166

- (C) Hunko is likely to prevail because of the preexisting duty rule. At common law, a modification of a contract required consideration because the parties were under a preexisting legal duty to perform. Since there was no consideration for the modification, Adman is not entitled to the \$2,000. (B) would be correct if the U.C.C. applied, but it does not apply to this fact situation. (A) is wrong; the parol evidence rule does not apply to subsequent modifications. (D) is wrong. It is a true statement but it is not the reason Hunko will prevail.

Answer to Question 167

- (D) Judgment could be for either Purvis or Rand, because there is a split of authority as to whether a recorded deed, obtained from a grantor who had no title at that time, but who afterwards obtains title, is constructive notice to a subsequent purchaser from the same grantor. Thus, the answer to this question turns on whether the deed from Vine to Purvis constitutes constructive notice to Rand. (A) is incorrect because it does not address the issue of Rand's notice of the prior deed. (B) is incorrect because of the possibility that the deed to Purvis should have put Rand on notice of Purvis's claim. (C) is incorrect because it does not address the issue of notice.

Answer to Question 168

- (B) The rehabilitation will most likely be permitted to rebut testimony of Willie's perjury conviction. Under Federal Rule 608(a), a witness can be rehabilitated with evidence of his good reputation

420. PRACTICE EXAM

for truthfulness after the character of the witness for truthfulness has been attacked by “opinion or reputation evidence or otherwise.” The commentary to 608 specifically states that impeachment through a prior conviction is covered by the “or otherwise” provision and therefore will give rise to rehabilitation through reputation for truthfulness evidence. (A) and (D) are wrong because the commentary to 608 specifically states that impeachment through bias does not allow rehabilitation with reputation for truthfulness evidence. (C) is possible. It could be argued that the impeachment in (C) qualifies under the “or otherwise” provision. (C) is not, however, as good an answer as (B), where the rehabilitation through good reputation evidence would clearly be allowed.

Answer to Question 169

- (D) This question involves spoken defamation (slander). Ordinary slander is not actionable in the absence of pleading and proof of special damages. The defamation here does not fall within one of the slander per se categories (adverse reflection on plaintiff’s abilities in his profession, loathsome disease, crime involving moral turpitude, unchastity of a woman). Thus, Poe will not prevail without a showing of special damages. (A) is incorrect because it implies that Poe can prevail without proof of special damages. (C) is incorrect because proof that the defendant knew of the falsity of the defamatory statement is not required in cases involving a private person plaintiff and a matter of private concern. (B) is incorrect because “extreme and outrageous conduct” is part of the *prima facie* case for intentional infliction of emotional distress, not for defamation.

Answer to Question 170

- (A) Extreme and outrageous conduct is an element of the *prima facie* case for intentional infliction of emotional distress. Because Kane’s conduct was extreme and outrageous, intentional, and likely caused Poe severe distress, Poe will probably prevail. (B) is incorrect because mere intrusion on the plaintiff’s property does not constitute intentional infliction of emotional distress. (C) is incorrect because physical injury is not required to recover for this tort. (D) is incorrect because, even if Poe still owed Store for the merchandise, this would not justify extreme and outrageous methods of bill collection. Thus (A) is the best answer.

Answer to Question 171

- (B) The requisite intent for intentional torts (such as battery) is satisfied if the actor knows with substantial certainty that the consequences of his conduct will result. Here, by slamming the door shut, Poe set in motion a force that brought about harmful contact to Kane. (A) is wrong because a request to leave the property would not have justified commission of the battery. Generally, one may use reasonable force to prevent the commission of a tort against his property, if use of force is preceded by a request to desist. Kane was not engaged in the commission of a tort against Poe’s property. Thus, Poe’s use of force was not justified, with or without a request to leave the property. (C) is wrong because, although Kane’s conduct undoubtedly did trigger Poe’s response, there are no circumstances indicating justification for such a response. (D) is wrong because, as explained above, Kane was not committing a tort against Poe’s property so as to justify the use of force.

Answer to Question 172

- (A) Rimm can be convicted of murder because the way Rimm employed the firearm was sufficient to fulfill the “malice” requirement for murder. Murder is the unlawful killing of a human being with

malice aforethought. Malice aforethought may be express or implied. In addition to obvious malice situations where there is intention to kill, malice is implied where there is: (i) intent to inflict great bodily injury; (ii) reckless indifference to an unjustifiably high risk to human life (also called acting with “an abandoned and malignant heart”); or (iii) felony murder situations. Here, Rimm’s firing of the gun when aimed slightly to the side of Hill in an enclosed room (where ricochet was likely) constituted acting with reckless disregard of an unjustifiably high risk to human life. Rimm’s malice is thus implied. (B) is incorrect because the provocation that would reduce murder to voluntary manslaughter is not present in the facts. (C) is incorrect because Rimm’s activities could be found to be more dangerous than “criminal negligence.” (D) is incorrect. Although Hill’s conduct of aiming a pistol at Rimm and firing could constitute assault with a deadly weapon, the more serious crime of which Rimm can be convicted is murder, because Hill was killed by Rimm’s reckless conduct.

Answer to Question 173

- (C) The statute will probably be found to violate the First Amendment because it is overbroad. The state can adopt a specific definition of obscenity applying to materials sold to minors, even though the material might not be obscene in terms of an adult audience. However, government may not prohibit the sale or distribution of material to adults merely because it is inappropriate for children. Here, there is no indication that the state has attempted less restrictive means of keeping minors from the objectionable video games, such as requiring arcade operators to put these games in a limited access area and monitor their use. While an outright ban on these games may be the most certain means of denying minors access to them, the denial of adult access to them indicates that the statute will probably be found unconstitutional. (A) is incorrect even though it is a true statement. As indicated above, a statute designed to protect minors must be narrowly drawn to avoid a First Amendment violation. (B) is incorrect because the fact that the statute precisely defines the content that is prohibited indicates only that it probably is not unconstitutionally vague; it does not affect its overbreadth problem. (D) is wrong because, as indicated above, restrictions on materials available to minors do not necessarily have to satisfy the constitutional test for obscenity. In addition, choice (D) misstates the test: the element of serious social value is determined by a national standard, rather than community standards.

Answer to Question 174

- (C) Wren’s testimony is inadmissible hearsay because it is an out-of-court statement by the declarant (Dent) offered to prove that Dent’s wife had driven through a red light, and no hearsay exceptions apply here. (A) is wrong because Dent is not a party to the litigation, and the husband-wife relationship does not suffice to allow the use of the statement against his wife as a vicarious admission. (B) is wrong because there is no indication that Dent is unavailable as a witness, which is required for the statement against interest exception to apply. (D) is incorrect because Dent’s statement was a statement of fact, rather than opinion; further, even if it were opinion, that would not make it inadmissible if it otherwise qualified as an admission.

Answer to Question 175

- (C) Judgment should be for Jose. Luis, by quitclaim deed, conveyed to Jose his future *interest* in Blackacre; technically, it is an executory interest. When Eugenia died survived by a husband and no children, Luis would have taken title to Blackacre pursuant to Ortega’s will. However, because of the quitclaim deed, Jose takes title to the property. (A) is incorrect because no after-acquired title is involved; Luis had his future interest from the moment of Ortega’s death, and that is what his deed transferred. (B) is incorrect because, although it is true that Jose took nothing under

422. PRACTICE EXAM

Ortega's will, Luis chose to convey his interest in Blackacre to Jose, as permitted by the applicable statute. (D) is incorrect because after-acquired title is inapplicable to these facts. Moreover, the after-acquired title doctrine applies to conveyances by warranty deed. The conveyance here was effected by quitclaim deed.

Answer to Question 176

- (A) In single delivery contracts, the buyer can reject goods for any defect in the goods, even if the breach is not material. Here, the ties sent by Kravat were nonconforming goods. Thus, Clothier properly rejected the ties delivered on June 3. (B) is incorrect because even if Kravat had notified Clothier that the ties were shipped as an accommodation, this would merely be a counteroffer, and Clothier would not have been obligated to accept the ties. (C) is incorrect because acceptance of an offer by shipment of nonconforming goods results in a breach of the contract, giving the buyer the right to reject. (D) is incorrect because, after rejection of goods in his possession, the buyer's obligation is to hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. The buyer is not obligated to promptly return the goods to the seller in order to preserve his remedies.

Answer to Question 177

- (C) Where a buyer has rejected goods because of defects, the seller may, within the time originally provided for performance, cure by giving reasonable notice of intention to do so and making a new tender of conforming goods, which the buyer must then accept. Kravat took all of the steps necessary to cure. Consequently, Clothier's rejection of the ties tendered on June 30 was improper. It follows that (A) is incorrect. (B) is incorrect because Kravat's prompt dispatch of a telegram on June 4, indicating his intention to cure the defect, does not indicate a clear unwillingness or inability to perform, as is required for anticipatory repudiation. (D) is incorrect because modification of the contract is not at issue here. By curing the defective delivery, Kravat is simply performing according to the terms of the contract.

Answer to Question 178

- (A) Deanna is not guilty of larceny of the computer because her mistake prevented her from having the requisite mens rea for larceny. Larceny requires an intent to permanently deprive another of her interest in the property taken. Deanna did not have such an intent because she believed that the computer was her own and that Vanessa had no possessory interest in it. Therefore, she did not have the intent required for larceny. (B) is wrong because Deanna's mistake need not have been reasonable. When mistake is offered to negate the existence of general intent or malice, it must be a reasonable mistake. However, any mistake of fact, reasonable or unreasonable, is a defense to a specific intent crime, and larceny is a specific intent crime. (C) is wrong because, as stated above, she did not have the intent to deprive Vanessa of Vanessa's computer; her mistake negates such an intent. (D) is incorrect because the "continuing trespass" doctrine is inapplicable. While larceny generally requires that the intent to deprive another person of her interest in the property must have existed at the moment of the taking of the property, the continuing trespass doctrine provides that if a defendant takes property with a wrongful state of mind but without the intent to steal, and later forms the intent to steal it, the trespass involved in the initial wrongful taking is regarded as "continuing" and the defendant is guilty of larceny. However, this doctrine has no application if the defendant's initial taking of the property, although trespassory, was not motivated by a wrongful state of mind. Here, Deanna took Vanessa's computer as a result of an innocent mistake. Even if she decides to keep the computer,

she will not be guilty of larceny because her initial taking was done with an innocent state of mind.

Answer to Question 179

- (B) Walter's testimony is admissible to show the effect of the statement on Dent's state of mind. A statement is hearsay if it is offered to prove the truth of the matter asserted in the statement. If the statement is offered for another purpose, it is not considered a hearsay statement. Statements offered for the purpose of showing the effect on the listener are generally not classified as hearsay. Thus, (B) is correct, and (C) is wrong. (A) is wrong; the statements are not hearsay, and the state of mind exception applies to the state of mind of the speaker. (D) is wrong. Clearly, if Dent heard the statement, that would tend to establish the fear necessary for a self-defense claim.

Answer to Question 180

- (C) Because the appropriation by the village council implicates the Establishment Clause and a portion of Curmudgeon's taxes are paying for the appropriation, the Court should entertain his suit. The Supreme Court will not decide a constitutional challenge to a government action unless the person who is challenging it has standing to raise the constitutional issue. To have standing, a person must be able to assert that he is injured by a government program. This injury must be more than the merely theoretical injury that all persons suffer by seeing their government engage in unconstitutional actions. In cases where a taxpayer is claiming injury from the use of his taxes for an unconstitutional appropriation or expenditure of public funds, the Supreme Court has required the taxpayer to show that the challenged measure (i) was enacted under the governmental body's power to tax and spend (rather than as an incidental expenditure in the administration of an essentially regulatory statute), and (ii) exceeds some specific limitation on that power. The only specific limitation that the Court has recognized when an appropriation measure has been challenged is the First Amendment's Establishment Clause. [See *Flast v. Cohen* (1968)] Here, Curmudgeon is challenging a specific appropriation of money by the village council that has been earmarked to benefit the property of the local church. The Establishment Clause, which is applicable to the states through the Fourteenth Amendment, requires that government programs (i) must have a secular purpose, (ii) must have a primary effect that neither advances nor inhibits religion, and (iii) must not produce excessive government entanglement with religion. Because the council's appropriation may violate these requirements, Curmudgeon has standing as a taxpayer to sue the council. (A) is incorrect even though the portion of Curmudgeon's taxes that would be used for the appropriation is minimal. While this factor has been relied on by the Supreme Court in its general refusal to grant federal and state taxpayers standing, it has not been used to deny municipal taxpayers standing in federal courts. [See *Asarco, Inc. v. Kadish* (1989)] Furthermore, the Court has carved out a narrow exception for federal taxpayers to challenge an appropriation, despite the fact that any one taxpayer's contribution would be minute and indeterminable, where the measure was enacted under Congress's taxing and spending powers and violates the Establishment Clause (as discussed above). This exception would be equally applicable to the village council's appropriation here if the court were to follow the federal taxpayer approach. Thus, the minimal contribution by Curmudgeon's taxes would be irrelevant. (B) is incorrect because it does not recognize the limited exception discussed above. (D) is incorrect because generally taxpayers do not have standing to sue on constitutional grounds. The Supreme Court has not expanded the standing rules beyond what *Flast v. Cohen* had established.

Answer to Question 181

- (D) Landesmann can recover all of his damages. Where two or more tortious acts combine to proximately cause an indivisible injury to a plaintiff, each tortfeasor will be jointly and severally liable

424. PRACTICE EXAM

for that injury. This is so even though each defendant acted entirely independently. Here, the tortious acts of Acorp and Beeco combined to proximately cause the poisoning of Landesmann's cattle. Thus, each company will be jointly and severally liable for the entire amount of Landesmann's damages. Thus, (D) is correct. (A) is wrong. Where two or more acts combine to cause the injury, but none of the acts standing alone would be sufficient, each of the acts is an actual cause of the injury (because but for either of the acts, the injury would not have occurred). Thus, Landesmann can recover because the combined actions of the defendants caused his injury. (B) is wrong because to recover Landesmann need not show the amount of fault of each defendant. (C) is wrong because, as mentioned, in this type of case the defendants are jointly and severally liable for the entire injury.

Answer to Question 182

- (B) Barton's right to purchase is a preemptive option, which is subject to the Rule Against Perpetuities. If the option could be exercised more than 21 years after some life in being at its creation, it is void. Obviously, Barton's right to purchase will vest or fail within 21 years after Amato's death. Thus, the Rule's provisions are satisfied. (D) is incorrect because a preemptive right, such as is held by Barton, is not so onerous a restriction on transfer of property as to constitute an unreasonable restraint on alienation. (A) is incorrect because recordation is not essential to the validity of the instrument, as between the grantor and grantee. Recordation merely gives notice to the world that an interest affecting title has been conveyed. (C) is incorrect because there is no prohibition against the owner of property conveying her property so that it will pass outside of her will. Here, Amato has chosen freely to dispose of Riveracre in the manner described, and her choice will be given effect.

Answer to Question 183

- (A) Pretrial familiarization of a signature by a nonexpert is not an accepted method of authentication because lay opinion as to the authenticity of handwriting must be based on personal familiarity with the handwriting. Here, the nonexpert's only familiarity with Drake's usual signature has come from pretrial preparation. An expert witness or the trier of fact can determine the genuineness of a writing by comparing the questioned writing with another writing proved to be genuine. Thus, (B) would be an accepted method of authenticating Drake's signature. (C) is an accepted method of authentication because it describes the requirements under the Federal Rules for authentication of an ancient document. (D) is acceptable as an admission by a party-opponent—*i.e.*, a prior acknowledgment by one of the parties of a relevant fact.

Answer to Question 184

- (D) If Dennison believed that the building was abandoned, he probably will not be found to have the requisite mens rea for murder. Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists when the defendant has (i) intent to kill, (ii) intent to inflict great bodily injury, (iii) reckless indifference to an unjustifiably high risk to human life ("abandoned and malignant heart"), or (iv) intent to commit a felony (under the felony murder doctrine). Here, the jury could find that spraying a building with submachine gun fire demonstrates a reckless indifference to an unjustifiably high risk to human life even though Dennison was not intending to shoot anyone. However, if the jury accepts his assertion that he believed that the building was abandoned and had no idea that there would be any people inside it, the jury will probably find that he did not have a sufficient awareness of an unjustifiably high risk to human life to be liable for murder. (A) is not as strong a defense as (D) because Dennison may still be found liable for the murder as an accomplice. Dennison will be an accomplice to the

drive-by shooting even if he was only the driver because he assisted the principal in the commission of the crime and had the intent to do so. An accomplice is liable not only for the crime he intended to aid but also for any other crimes committed during commission of the intended crime if the other crimes were probable or foreseeable. Here, even though the Assassins knew that the store was closed, a jury could find that it was foreseeable that someone would be killed when they sprayed the building with submachine gun fire. Even if Dennison was only the driver, his best defense would be his belief that the building was abandoned. (B) is incorrect because Dennison's voluntary intoxication would not be a defense to a murder charge that was based on reckless indifference to an unjustifiably high risk to human life. Voluntary intoxication caused by alcohol or drugs is a defense to a crime that requires purpose (intent) or knowledge as long as the intoxication prevents the defendant from formulating the purpose or obtaining the knowledge. It is no defense to crimes involving recklessness or negligence, however. Even though recklessness requires a conscious disregard of the risk, and the defendant's intoxication may make him unaware of the risk, courts hold him liable for recklessness offenses because his initial act of becoming voluntarily intoxicated was reckless. Thus, for murder based on a malice aforethought of reckless indifference to an unjustifiably high risk to human life, voluntary intoxication would not be a defense. (C) is wrong because duress is not a defense to murder. A criminal offense may be excused if the defendant does the act under threat of imminent infliction of death or great bodily harm, as long as the defendant reasonably believes that the threat will be carried out. However, no threat will suffice as a defense to a homicide crime. Dennison may still be liable for murder if he acted with an awareness of an unjustifiably high risk to human life.

Answer to Question 185

- (A) Hull acquired title to Brownacre by adverse possession. He possessed the property for longer than the required 10 years. Although Hull entered Brownacre without Orris's knowledge, he dealt with the property in such a manner as to put the true owner and the community on notice of the fact of his possession. Also, Hull's possession was continuous, exclusive, and hostile. Thus, the elements of adverse possession are present. Because Orris lost title to the land due to Hull's adverse possession, it follows that (B) is incorrect. (D) is incorrect because Powell, who supposedly took title to Brownacre by a quitclaim deed from Orris, cannot take title from someone who had none to convey. (C) is incorrect because Burns never possessed the land for the requisite statutory period. Also, he did not hold the land in a hostile manner for a continuous period.

Answer to Question 186

- (A) Under the concept of fixtures, the dam was converted from personalty into realty. The dam is an accessory to the land and passes with the ownership of the land. (A) expresses this fact. (B) is wrong because the document purporting to transfer Hull's interest in the dam to Burns was insufficient to transfer real property. (C) is an incorrect statement of the law. (D) is wrong because the dam, as an accessory to the land, belongs to the owner of the land.

Answer to Question 187

- (D) The provision is unconstitutional. The Supreme Court has found "legislative vetoes" to be unconstitutional because they are not subject to presidential review and they violate the separation of powers guaranteed by the federal Constitution. The mechanism set up here has even less basis for constitutionality because the legislative veto that the Supreme Court held unconstitutional at least envisioned votes by one or both full houses of Congress (rather than a mere committee). (A) is incorrect because the Necessary and Proper Clause does not allow Congress to exceed its powers

426. PRACTICE EXAM

or violate the separation of powers. It merely allows Congress to adopt laws necessary and proper to the powers granted by the Constitution. (B) is incorrect because there is no such rule. Furthermore, the Supreme Court has generally abandoned the “privileges vs. rights” dichotomy. (C) is incorrect because the Equal Protection Clause applies only to actions by the states. Moreover, since no fundamental right or suspect class is involved, the discrimination here would be upheld as long as it is rational.

Answer to Question 188

- (C) Title to Brownacre is vested half in Tenniel, free of the mortgage, and half in Stokes subject to the mortgage. Because the jurisdiction in which Brownacre is located recognizes the title theory of mortgages, Johnson’s execution of the mortgage on Brownacre effected a severance of the joint tenancy, by passing a title interest from Johnson to Lowden. Following severance of the joint tenancy, Johnson and Tenniel held as tenants in common, with no right of survivorship. The interest of a tenant in common passes by succession. When Johnson died, Tenniel could not take Brownacre by right of survivorship, because of the severance of the joint tenancy. Thus, (A) and (B) are incorrect. Upon Johnson’s death, Stokes succeeded to his interest in Brownacre, subject to the mortgage. However, Tenniel’s interest in the property, as a tenant in common, is not subject to the mortgage. Therefore, (D) is incorrect and (C) is correct.

Answer to Question 189

- (B) Both damages and an injunction would be ordered. Church has a life estate pur autre vie, and a life tenant as a general rule is not entitled to consume or exploit natural resources on the property; this constitutes affirmative (voluntary) waste that injures the interests of the future interest holders. Any award of damages will be held until the class gift to the grandchildren closes at Carl’s death. (A) is wrong since the church’s action did not terminate its interest. The “provided that” language creates a condition subsequent. An estate subject to a condition subsequent does not terminate automatically on the happening of the condition. To terminate, the grantor must exercise a right of entry, and here no right of entry was reserved. (C) is wrong because it is entirely unnecessary for Omar and Carl to be parties, since neither of them has any interest in the land. Omar has given up his interest entirely, and Carl is present in the conveyance only to serve as a measuring life for the life estate; he owns no interest in the land itself. (D) is wrong because the injury to the land is permanent and therefore should be prevented by an injunction.

Answer to Question 190

- (D) Defendant acted in self-defense and, therefore, should not be convicted of a homicide. A person may use deadly force in self-defense if: (i) he is without fault; (ii) he is confronted with unlawful force; and (iii) he is threatened with imminent death or great bodily harm. All three elements are present under these facts. Because Vincent initiated the attack, he will be considered the aggressor, and Defendant will be deemed “without fault.” Mere teasing words should not be sufficient to deem Defendant the aggressor, but even if the words were such a provocation, Vincent’s sudden escalation of the fight into one involving deadly force would allow Defendant to use force in his own defense. Unlawful force is defined as force that constitutes a crime or a tort. Vincent’s attack with the metal bar so qualifies. The defendant must reasonably believe that he is threatened with imminent death or great bodily harm if he does not respond with deadly force. Defendant had such a reasonable belief. Furthermore, Defendant had no duty to retreat under the prevailing rule. It follows that (A), (B), and (C) are incorrect, because Defendant’s use of deadly force was justified by self-defense.

Answer to Question 191

- (A) Since White persists in refusing to testify as to matters covered in his earlier testimony, he should be considered “unavailable” at Dean’s trial. Thus, his former testimony should be admissible as an exception to the hearsay rule. It will be considered to be trustworthy since it was given during formal proceedings, under oath, and subject to cross-examination. (B) is wrong because this is not the applicable exception to the hearsay rule. In this case there is no evidence that White does not presently remember the facts in question. (C) is wrong because White could have asserted his privilege against self-incrimination when the former testimony was given. He can assert his privilege at present to keep from testifying. (D) is wrong because there is an applicable exception to the hearsay rule.

Answer to Question 192

- (D) Having created a forum generally open for use by all groups, Hometown must justify its exclusions therefrom under applicable constitutional norms. To justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, Hometown must show that the ordinance is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end. Alternative (B) suggests that the ordinance serves the compelling interest of maintaining separation of church and state. However, the former “equal access” policy did not offend the Establishment Clause. The former policy had a secular purpose (providing a forum in which citizens can exchange ideas); it avoided excessive entanglement with religion; and it did not have a primary effect of either advancing or inhibiting religion (permitting religious groups to use the auditorium would result in, at most, an incidental benefit). Thus, (B) is incorrect. (A) is incorrect because an unjustified content-based exclusion of religious speech is not made more acceptable by virtue of the fact that it treats all religions equally. (C) is incorrect because, although there is no authoritative constitutional definition of religion, it is unlikely that the term “religious groups” will be deemed to be impermissibly vague.

Answer to Question 193

- (A) Light Company had notice that the insulators were being destroyed, causing the power lines to fall. Certainly, it was foreseeable that children, or anyone else, in the vicinity of a fallen line might be injured by such a dangerous condition. Consequently, Light Company had a duty to take reasonable steps, if possible, to prevent the lines from falling. Breach of this duty will lay the foundation for a recovery by Paul. (B) is simply an incorrect statement of the law. (C) is incorrect because, even if the company took measures to stop the destruction of the insulators, it also had a duty to take precautions against the danger of falling power lines. (D) is incorrect because Light Company had a duty to make its operations safe in light of the destruction of which it had notice. This is true even though the destruction was intentional. Criminal acts and intentional torts of third persons are not superseding forces where they are foreseeable, such as here.

Answer to Question 194

- (D) Generally, an existing violation of a zoning ordinance renders title unmarketable. Here, the location of the house in relation to the side line setback exposes Perrine to the threat of litigation, both for violation of the zoning ordinance and for violation of a restriction in the recorded subdivision plot. Regardless of the likelihood that such litigation may be initiated, and of the likelihood that Perrine would ultimately prevail, he cannot be required to “buy a lawsuit.” Thus, (D) is the correct answer. It follows that (A) and (B) are incorrect. (C) is incorrect because it fails to

428. PRACTICE EXAM

address the issue of unmarketability of title through exposure to potential litigation, which forms the basis for Perrine's refusal to consummate the transaction.

Answer to Question 195

- (B) Restrictions on the ability of persons to be candidates may violate the First Amendment rights of speech and political association or the Fourteenth Amendment Equal Protection Clause. The Supreme Court uses a balancing test in determining whether a regulation of the electoral process is valid: if the restriction on First Amendment activities is severe, it will be upheld only if it is *narrowly tailored* to achieve a compelling interest, but if the restriction is reasonable and nondiscriminatory, it generally will be upheld on the basis of the state's important regulatory interests. Thus, if the ballot restriction here is deemed to be a severe and unreasonable burden on independent candidates, Roderick's best argument is choice (B)—that the objectives of the statute could be satisfactorily achieved by less burdensome means. [See *Norman v. Reed* (1992)] A state may require that independent candidates obtain a reasonable number of signatures. Although such a requirement may be burdensome, that factor alone does not make it invalid. Thus, (A) is not as strong an argument as (B). (D) is incorrect because signature requirements may be justified by a state interest in assuring that candidates have at least minimal support before they are allowed to appear on the ballot. (C) is incorrect because the fact that few independent candidates have obtained ballot status may simply reflect the absence of even the minimal popular support which the state may legitimately require.

Answer to Question 196

- (C) *Miranda* warnings are required only where the accused has made a statement during custodial interrogation. Barber voluntarily complied with a request to come to police headquarters, where he was not arrested and was free to leave. During his discussion with the police officers, he voluntarily made a spontaneous inculpatory statement. Thus, he was not entitled to *Miranda* warnings, and (A) is incorrect. (B) is incorrect because, in circumstances such as these, the right to counsel would attach only if there was a custodial police interrogation. "Interrogation" refers not only to express questioning, but also to other words or actions reasonably likely to elicit an incriminating response from the suspect. However, routine questions that the police had no reason to believe would elicit an incriminating response do not constitute an interrogation. Also, there is no due process violation arising from the making of a free and voluntary statement. (D) is incorrect primarily because Barber was not entitled to *Miranda* warnings simply by visiting the police station. Thus, he had nothing to waive. However, even if Barber was entitled to the warnings, the facts do not indicate a waiver. A waiver must be knowing, voluntary and intelligent. Merely agreeing to visit police headquarters does not constitute a knowing, voluntary, and intelligent waiver of *Miranda* warnings.

Answer to Question 197

- (D) Garrison is liable by virtue of his negligence, and Astin is vicariously liable for Garrison's negligence by virtue of the statute. Where such joint liability exists, the plaintiff may recover the entire judgment amount from either defendant. Further, where one is held liable for damages caused by another simply because of his relationship to that person (*i.e.*, vicarious liability), such person may seek indemnification from the person whose conduct actually caused the damage. Applying the foregoing principles to the facts of this question, Placek may recover the entire \$100,000 from Astin and Garrison jointly. This eliminates (A) and (B). Because Astin is only liable vicariously, she is entitled to indemnification from Garrison for any amount collected from Astin by Placek. Therefore, (D) is the correct answer and (C) is incorrect.

Answer to Question 198

- (B) If the Smiths had a reasonable (*i.e.*, good faith) belief in the enforceability of their claim, their surrender of the claim is valid consideration. (A) is wrong because the reason they made the gift is immaterial if neither Herb nor Edna deliberately misled them. (C) is irrelevant because the accounts were held in joint tenancy and any interest Edna may have had in the funds ended when she died. (D) is wrong because there was no consideration given for Edna's promise and the fact that it was in writing does not change the lack of consideration.

Answer to Question 199

- (D) If the Smiths have given up a good faith claim, their agreement with Herb is a compromise supported by valid consideration. Thus, there is an enforceable contract. (A) is wrong because Herb was requesting a promise from the Smiths, not an act. (B) is wrong because Herb was under no obligation to reject a gift if he did not deliberately induce the Smiths to give it. (C) is wrong because there is no evidence that the Smiths gave the food in reliance on any promise made by Herb.

Answer to Question 200

- (A) Walter's testimony, although hearsay, should be admissible under the exception for present sense impressions. Hearsay is defined under the Federal Rules as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Walter's testimony as to what Vincent said on the phone is hearsay: Vincent's statement that "Dornbach is here" is being offered in evidence by someone other than Vincent to prove that Dornbach was present at Vincent's house shortly before he was killed. Walter's testimony is therefore not admissible under Fed. R. Evid. 802 unless an exception to the hearsay rule applies. Rule 803(1) recognizes an exception for a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Because the statement is made concurrently with the event it is describing, it is safe from defects in memory and there is usually little or no time for calculated misstatements. Here, Vincent's statement that "Dornbach is here" was made to Walter immediately after he went to the door and perceived Dornbach to be there. Thus, the statement is Vincent's present sense impression that Walter may testify to at trial. (B) is incorrect because Vincent's statement is not being offered to show his state of mind or his intent to do something in the future. The prosecution is using Vincent's statement simply to establish Dornbach's presence at Vincent's house the day he was killed. (C) is wrong because the prior identification must be by the witness testifying at trial to be admissible. Had Vincent survived an attempted homicide and testified at Dornbach's trial, Fed. R. Evid. 801(d)(1)(C) would permit his prior statement to Walter identifying Dornbach to be admitted as nonhearsay and substantive evidence. (D) is incorrect. While the testimony is hearsay, it falls within the exception to the hearsay rule for present sense impressions.



*Released Multistate Questions and
Analytical Answers*

CONSTITUTIONAL LAW QUESTIONS

Question 1

A newly enacted criminal statute provides, in its entirety, "No person shall utter to another person in a public place any annoying, disturbing or unwelcome language." Smith followed an elderly woman for three blocks down a public street, yelling in her ear offensive four-letter words. The woman repeatedly asked Smith to leave her alone, but he refused.

In the subsequent prosecution of Smith, the first under this statute, Smith will:

- (A) Not prevail.
- (B) Prevail, because speech of the sort described here may not be punished by the state because of the First and Fourteenth Amendments.
- (C) Prevail, because though his speech may be punished by the state, the state may not do so under this statute.
- (D) Prevail, because the average user of a public street would think his speech/action here was amusing and ridiculous rather than "annoying," etc.

Question 2

Congressional legislation regulating the conditions for marriages and divorces would be most likely upheld if it:

- (A) Applied only to marriages and divorces by members of the armed services.
- (B) Applied only to marriages performed by federal judges and to divorces granted by federal courts.
- (C) Implemented an executive agreement seeking to define basic human rights.
- (D) Applied only to marriages and divorces in the District of Columbia.

Question 3

Assume for the purposes of this question that you are counsel to the state legislative committee that is responsible for real estate laws in

your state. The committee wants you to draft legislation to make all restrictions on land use, imposed by deeds (now or hereafter recorded), unenforceable in the future so that public land-use planning through zoning will have exclusive control in matters of land use.

Which of the following is *least* likely to be a consideration in the drafting of such legislation?

- (A) Compensation for property rights taken by public authority.
- (B) Impairment of contract.
- (C) Sovereign immunity.
- (D) Police power.

Questions 4-6 are based on the following fact situation:

Congress provides by statute that any state that fails to prohibit automobile speeds of over 55 miles per hour on highways within the state shall be denied federal highway construction funding. The state of Atlantic, one of the richest and most highway-oriented states in the country, refuses to enact such a statute.

4. Which of the following potential plaintiffs is most likely to be able to obtain a judicial determination of the validity of this federal statute?
 - (A) A taxpayer of the United States and the state of Atlantic who wants his state to get its fair share of his tax monies for highways, and fears that, if it does not, his state taxes will be increased to pay for the highway construction in the state of Atlantic that federal funds would have financed.
 - (B) Contractors who have been awarded contracts by the state of Atlantic for specified highway construction projects, which contracts are contingent on payment to the state of the federal funds to which it would otherwise be entitled.

432. RELEASED QUESTIONS

- (C) An automobile owner who lives in the state of Atlantic and regularly uses its highway system.
- (D) An organization dedicated to keeping the federal government within the powers granted it by the Constitution.
5. The best argument that can be made in support of the constitutionality of this federal statute is that:
- (A) The states conceded their authority over highways to the national government when the states accepted federal grants to help finance the highways.
- (B) The federal government can regulate the use of state highways without limitation because the federal government paid for most of their construction costs.
- (C) Reasonable legislators could believe that the 55 mile-per-hour speed limit will ensure that the federal money spent on highways results in greater benefit than harm to the public.
- (D) A recent public opinion survey demonstrates that 90% of the people in this country support a 55 mile-per-hour speed limit.
6. The federal statute relating to disbursement of highway funds, conditioned on the 55 mile-per-hour speed limit, is probably:
- (A) Unconstitutional.
- (B) Constitutional only on the basis of the spending power.
- (C) Constitutional only on the basis of the commerce power.
- (D) Constitutional on the basis of both the spending power and the commerce power.

Questions 7-8 are based on the following fact situation:

A recently enacted state law forbids nonresident aliens from owning more than 100 acres of land within the state and directs the state attorney general to bring an action of ejectment whenever a nonresident alien owns such land. Zane, a nonresident alien, has obtained title to 200 acres of land in the state, and he brings an action in federal court to enjoin the state attorney general from enforcing the statute. The defendant moves to dismiss the complaint.

7. The best argument for Zane is that:
- (A) States are forbidden by the Commerce Clause from interfering with the rights of nonresidents to own land.
- (B) The state's power to restrict alien rights is limited by the federal power to control foreign relations.
- (C) The state statute adversely affects Zane's right to travel.
- (D) The 100-acre restriction means that aliens cannot engage in farming operations requiring larger amounts of land.
8. The federal court should:
- (A) Dismiss the action, because under the Constitution, nonresident aliens may not sue in federal court.
- (B) Dismiss the action, because a state has plenary power to determine the qualifications for landholding within its boundaries.
- (C) Hear the action, because the United Nations Charter forbids such discrimination.
- (D) Hear the action, because a federal question is presented.

Question 9

Zall, a resident of the state of Paxico, brought suit in federal district court against Motors, Inc., a Paxico corporation. Zall seeks recovery of \$12,000 actual and \$12,000 punitive damages arising from Motors's sale to him of a defective automobile. Zall's suit is based only on a common law contract theory.

From a constitutional standpoint, should the federal district court hear this suit on its merits?

- (A) Yes, because Article III vests federal courts with jurisdiction over cases involving the obligation of contracts.
- (B) Yes, because it is an action affecting interstate commerce.
- (C) No, because this suit is not within the jurisdiction of an Article III court.
- (D) No, because there is no case or controversy within the meaning of Article III.

Questions 10-11 are based on the following fact situation:

The state of Missoula has enacted a new election code designed to increase voter responsibility in the exercise of the franchise and to enlarge citizen participation in the electoral process. None of its provisions conflict with federal statutes.

- 10. Which of the following is the strongest reason for finding unconstitutional a requirement in the Missoula election code that each voter must be literate in English?
 - (A) The requirement violates Article I, Section 2 of the Constitution, which provides that representatives to Congress be chosen "by the people of the several States."
 - (B) The requirement violates Article I, Section 4 of the Constitution, which gives Congress the power to "make or alter" state regulations providing for

the "times" and "manner" of holding elections for senators and representatives.

- (C) The requirement violates the Due Process Clause of the Fourteenth Amendment.
- (D) The requirement violates the Equal Protection Clause of the Fourteenth Amendment.
- 11. The Missoula election code provides that in a special-purpose election for directors of a state watershed improvement district, the franchise is limited to landowners within the district, because they are the only ones directly affected by the outcome. Each vote is weighted according to the proportion of the holding of that individual in relation to the total affected property. The best argument in support of the statute and against the application of the "one person, one vote" principle in this situation is that the principle:
 - (A) Applies only to election of individuals to statewide public office.
 - (B) Does not apply where property rights are involved.
 - (C) Does not apply because the actions of such a district principally affect landowners.
 - (D) Does not apply because of rights reserved to the states by the Tenth Amendment.

Questions 12-14 are based on the following fact situation:

The state of Yuma provides by statute, "No person may be awarded any state construction contract without agreeing to employ only citizens of the state and of the United States in performance of the contract."

- 12. In evaluating the constitutionality of this state statute under the Supremacy Clause,

434. RELEASED QUESTIONS

which of the following would be most directly relevant?

- (A) The general unemployment rate in the nation.
 - (B) The treaties and immigration laws of the United States.
 - (C) The need of the state for this particular statute.
 - (D) The number of aliens currently residing in Yuma.
13. If the Yuma statute is attacked as violating the Commerce Clause, which of the following defenses is the *weakest*?
- (A) The statute will help protect the workers of the state of Yuma from competition by foreign workers.
 - (B) The statute will help ensure that workers with jobs directly affecting the performance of public contracts are dedicated to their jobs.
 - (C) The statute will help ensure a continuously available and stable work force for the execution of public contracts.
 - (D) The statute will help ensure that only the most qualified individuals work on public contracts.

14. Suppose the state supreme court declares the statute to be unconstitutional on the ground that it violates the Privileges and Immunities Clause of the Fourteenth Amendment to the federal Constitution and the Equal Protection Clause of the state constitution. If the state seeks review in the United States Supreme Court, which of the following statements is most accurate?

 - (A) The United States Supreme Court may properly review that decision by certiorari only.
 - (B) The United States Supreme Court may properly review that decision by appeal only.

- (C) The United States Supreme Court may properly review that decision by appeal or certiorari.
- (D) The United States Supreme Court may not properly review that decision.

Questions 15-16 are based on the following fact situation:

The state of Champlain enacts the Young Adult Marriage Counseling Act, which provides that, before any persons less than 30 years of age may be issued a marriage license, they must receive at least five hours of marriage counseling from a state-licensed social worker. This counseling is designed to ensure that applicants for marriage licenses know their legal rights and duties in relation to marriage and parenthood, understand the "true nature" of the marriage relationship, and understand the procedures for obtaining divorces.

15. Pine, aged 25, contemplates marrying Ross, aged 25. Both are residents of the state of Champlain. Pine has not yet proposed to Ross because he is offended by the counseling requirement.

Pine sues in federal court seeking a declaratory judgment that the Young Adult Marriage Counseling Act is unconstitutional. Which of the following is the clearest ground for dismissal of this action by the court?

- (A) Pine and Ross are residents of the same state.
- (B) No substantial federal question is presented.
- (C) The suit presents a nonjusticiable political question.
- (D) The suit is unripe.

16. In a case in which the constitutionality of the Young Adult Marriage Counseling Act is in issue, the burden of persuasion will probably be on the:

- (A) Person challenging the law, because there is a strong presumption that elected state legislators acted properly.
- (B) Person challenging the law, because the Tenth Amendment authorizes states to determine the conditions on which they issue marriage licenses.
- (C) State, because there is a substantial impact on the right to marry, and that right is fundamental.
- (D) State, because there is a substantial impact on the discrete and insular class of young adults.

Question 17

A statute of the state of Tuscarora made it a misdemeanor to construct any building of more than five stories without an automatic fire sprinkler system.

A local construction company built, in Tuscarora, a 10-story federal office building. It constructed the building according to the precise specifications of a federal contract authorized by federal statutes. Because the building was built without the automatic fire sprinkler system required by state law, Tuscarora prosecutes the private contractor.

Which of the following is the company's strongest defense to that prosecution?

- (A) The state sprinkler requirement denies the company property or liberty without due process.
- (B) The state sprinkler requirement denies the company equal protection of the laws.
- (C) As applied, the state sprinkler requirement violates the Supremacy Clause.
- (D) As applied, the state sprinkler requirement violates the Obligation of Contracts Clause.

Question 18

A state accredits both public and private schools, licenses their teachers, and supplies textbooks on secular subjects to all such schools. Country Schoolhouse, a private school that offers elementary and secondary education in the state, denies admission to all non-Caucasians.

In a suit to enjoin as unconstitutional the continued racially exclusionary admissions policy of the Country Schoolhouse, which of the following is the strongest argument *against* the school?

- (A) Because education is a public function, the Country Schoolhouse may not discriminate on racial grounds.
- (B) The state is so involved in school regulation and support that the Equal Protection Clause of the Fourteenth Amendment is applicable to the school.
- (C) The state is constitutionally obligated to eliminate segregation in all public and private educational institutions within the state.
- (D) Any school with teachers who are licensed by the state is forbidden to discriminate on racial grounds.

Question 19

A federal statute requires United States civil service employees to retire at age 75. However, that statute also states that civil service employees of the armed forces must retire at age 65.

Prentis, a 65-year-old civil service employee of the Department of the Army, seeks a declaratory judgment that would forbid his mandatory retirement until age 75.

The strongest argument that Prentis can make to invalidate the requirement that he retire at age 65 is that the law:

436. RELEASED QUESTIONS

- (A) Denies him a privilege or immunity of national citizenship.
- (B) Deprives him of a property right without just compensation.
- (C) Is not within the scope of any of the enumerated powers of Congress in Article I, Section 8.
- (D) Invidiously discriminates against him on the basis of age in violation of the Fifth Amendment.

Question 20

Congress passes a law regulating the wholesale and retail prices of "every purchase or sale of oil, natural gas, and electric power made in the United States."

The strongest argument in support of the constitutionality of this statute is that:

- (A) The Constitution expressly empowers Congress to enact laws for "the general welfare."
- (B) Congress has the authority to regulate such products' interstate transportation and importation from abroad.
- (C) Congress may regulate the prices of every purchase and sale of goods and services made in this country, because commerce includes buying and selling.
- (D) In inseverable aggregates, the domestic purchases or sales of such products affect interstate or foreign commerce.

Question 21

Congress enacted a statute providing that persons may challenge a state energy law on the ground that it is in conflict with the federal Constitution in either federal or state court. According to this federal statute, any decision by a lower state court upholding a state energy law against a challenge based on the federal Constitution may be appealed directly to the United States Supreme Court.

The provisions of this statute that authorize direct United States Supreme Court review of

specified decisions rendered by lower state courts are:

- (A) Constitutional, because congressional control over questions of energy use is plenary.
- (B) Constitutional, because Congress may establish the manner by which the appellate jurisdiction of the United States Supreme Court is exercised.
- (C) Unconstitutional, because they infringe the sovereign right of states to have their supreme courts review decisions of their lower state courts.
- (D) Unconstitutional, because under Article III of the Constitution, the United States Supreme Court does not have authority to review directly decisions of lower state courts.

Question 22

Congress enacts a criminal statute prohibiting "any person from interfering in any way with any right conferred on another person by the Equal Protection Clause of the Fourteenth Amendment."

Application of this statute to Jones, a private citizen, would be most clearly constitutional if Jones, with threats of violence, coerces:

- (A) A public school teacher to exclude black pupils from her class, solely because of their race.
- (B) Black pupils, solely because of their race, to refrain from attending a privately owned and operated school licensed by the state.
- (C) The bus driver operating a free school bus service under the sponsorship of a local church to refuse to allow black pupils on the bus, solely because of their race.
- (D) The federal official in charge of distributing certain federal benefits directly to students from distributing them to black pupils, solely because of their race.

Questions 23-24 are based on the following fact situation:

All lawyers practicing in the state of Erewhon must be members of the State Bar Association, by order of the state supreme court. Several state officials serve on the Bar Association's Board of Bar Governors. The Board of Bar Governors authorizes the payment of dues for two staff members to the Cosmopolitan Club, a private dining club licensed to sell alcoholic beverages. The Cosmopolitan Club is frequented by affluent businessmen and professionals and by legislators. It is generally known that the purpose of the membership of the Bar Association staff is to enable them to go where members of the "elite" meet and to lobby for legislation in which the Bar Association is interested. The State Association has numerous committees and subcommittees concerned with family law, real estate law, unauthorized practice, etc., and its recommendations often influence state policy. Some committee meetings are held at the Cosmopolitan Club. The club is known to have rules which restrict membership by race, religion, and sex.

Plaintiffs, husband and wife, who are members of the Erewhon Bar Association, petition the Board of Bar Governors to adopt a resolution prohibiting the payment of club dues to and the holding of meetings of the Bar Association or its committees at places that discriminate on the basis of race, religion, or sex. After substantial public discussion, the Board of Bar Governors, by a close vote, fails to pass such a resolution. These events receive extensive coverage in the local newspapers. Plaintiffs bring an action in federal court seeking an injunction against such payments and the holding of meetings in such places as the Cosmopolitan Club.

23. The strongest argument for Plaintiffs is:

- (A) Private rights to discriminate and associate freely must defer to a public interest against discrimination on the basis of race, religion, or sex.
- (B) The failure of the State Bar Association to pass a resolution forbidding discrimination on the basis of race,

religion, or sex constitutes a denial of equal protection.

- (C) The State Bar Association is an agency of the state and its payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.
 - (D) The State Bar Association's payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.
24. Which of the following actions should a federal district court take with respect to jurisdiction?
- (A) Hear the case on the merits, because a federal claim is presented.
 - (B) Hear the case on the merits, because the expenditure of state funds in support of segregation is forbidden by the Fifth Amendment.
 - (C) Abstain from jurisdiction, because the constitutional issue should be litigated first in a state court.
 - (D) Dismiss the case for lack of jurisdiction, because the issue of Bar Association activities is solely within the domain of state law.

Question 25

Congress enacts a statute punishing "each and every conspiracy entered into by any two or more persons for the purpose of denying black persons housing, employment, or education, solely because of their race."

Under which of the following constitutional provisions is the authority of Congress to pass such a statute most clearly and easily justifiable?

- (A) The Obligation of Contracts Clause.
- (B) The General Welfare Clause of Article I, Section 8.

438. RELEASED QUESTIONS

- (C) The Thirteenth Amendment.
- (D) The Fourteenth Amendment.

Question 26

A federal criminal law makes it a crime for any citizen of the United States not specifically authorized by the President to negotiate with a foreign government for the purpose of influencing the foreign government in relation to a dispute with the United States.

The strongest constitutional ground for the validity of this law is that:

- (A) Under several of its enumerated powers, Congress may legislate to preserve the monopoly of the national government over the conduct of United States foreign affairs.
- (B) The President's inherent power to negotiate for the United States with foreign countries authorizes the President, even in the absence of statutory authorization, to punish citizens who engage in such negotiations without permission.
- (C) The law deals with foreign relations and therefore is not governed by the First Amendment.
- (D) Federal criminal laws dealing with international affairs need not be as specific as those dealing with domestic affairs.

Question 27

A state statute requires that all buses which operate as common carriers on the highways of the state shall be equipped with seat belts for passengers. Transport Lines, an interstate carrier, challenges the validity of the statute and the right of the state to make the requirement.

What is the best basis for a constitutional challenge by Transport Lines?

- (A) Violation of the Due Process Clause of the Fourteenth Amendment.

- (B) Violation of the Equal Protection Clause of the Fourteenth Amendment.
- (C) Unreasonable burden on interstate commerce.
- (D) Difficulty of enforcement.

Question 28

Congress passes an act requiring that all owners of bicycles in the United States register them with a federal bicycle registry. The purpose of the law is to provide reliable evidence of ownership to reduce bicycle theft. No fee is charged for the registration. Although most stolen bicycles are kept or resold by the thieves in the same cities in which the bicycles were stolen, an increasing number of bicycles are being taken to cities in other states for resale.

Is this act of Congress constitutional?

- (A) Yes, because Congress has the power to regulate property for the general welfare.
- (B) Yes, because Congress could determine that, in inseverable aggregates, bicycle thefts affect interstate commerce.
- (C) No, because most stolen bicycles remain within the state in which they were stolen.
- (D) No, because the registration of vehicles is a matter reserved to the states by the Tenth Amendment.

Question 29

A statute of the state of Lanape flatly bans the sale or distribution of contraceptive devices to minors. Drugs, Inc., a national retailer of drugs and related items, is charged with violating the Lanape statute.

Which of the following is the strongest constitutional argument Drugs, Inc., could make in defending itself against prosecution for violation of this statute?

- (A) The statute constitutes an undue burden on interstate commerce.

- (B) The statute denies minors one of their fundamental rights without due process.
- (C) The statute denies Drugs, Inc., a privilege or immunity of state citizenship.
- (D) The statute violates the First Amendment right to freedom of religion because it regulates morals.

Question 30

Congress enacted a law prohibiting the killing, capture, or removal of any form of wildlife upon or from any federally owned land.

Which of the following is the most easily justifiable source of national authority for this federal law?

- (A) The Commerce Clause of Article I, Section 8.
- (B) The Privileges and Immunities Clause of Article IV.
- (C) The Enforcement Clause of the Fourteenth Amendment.
- (D) The Property Clause of Article IV, Section 3.

Question 31

The President of the United States recognizes the country of Ruritania and undertakes diplomatic relations with its government through the Secretary of State. Ruritania is governed by a repressive totalitarian government.

In an appropriate federal court, Dunn brings a suit against the President and Secretary of State to set aside this action on the ground that it is inconsistent with the principles of our constitutional form of government. Dunn has a lucrative contract with the United States Department of Commerce to provide commercial information about Ruritania. The contract expressly terminates, however, "when the President recognizes the country of Ruritania and undertakes diplomatic relations with its government."

Which of the following is the most proper disposition of the Dunn suit by the federal court?

- (A) Suit dismissed, because Dunn does not have standing to bring this action.
- (B) Suit dismissed, because there is no adversity between Dunn and the defendants.
- (C) Suit dismissed, because it presents a nonjusticiable political question.
- (D) Suit decided on the merits.

Question 32

Congress passes an Energy Conservation Act. The Act requires all users of energy in this country to reduce their consumption by a specified percentage, to be set by a presidential executive order. The Act sets forth specific standards the President must use in setting the percentage and detailed procedures to be followed.

The provision that allows the President to set the exact percentage is probably:

- (A) Constitutional, because it creates a limited administrative power to implement the statute.
- (B) Constitutional, because inherent executive powers permit such action even without statutory authorization.
- (C) Unconstitutional as an undue delegation of legislative power to the executive.
- (D) Unconstitutional, because it violates the Due Process Clause of the Fifth Amendment.

Question 33

The federal government has complete jurisdiction over certain park land located within the state of Plains. To conserve the wildlife that inhabits that land, the federal government enacts a statute forbidding all hunting of animals in the

440. RELEASED QUESTIONS

federal park. That statute also forbids the hunting of animals that have left the federal park and have entered the state of Plains.

Hanson has a hunting license from the state of Plains authorizing him to hunt deer anywhere in the state. On land within the state of Plains located adjacent to the federal park, Hanson shoots a deer he knows has recently left the federal land.

Hanson is prosecuted for violating the federal hunting law. The strongest ground supporting the constitutionality of the federal law forbidding the hunting of wild animals that wander off federal property is that:

- (A) This law is a necessary and proper means of protecting United States property.
- (B) The animals are moving in the stream of interstate commerce.
- (C) The police powers of the federal government encompass protection of wild animals.
- (D) Shooting wild animals is a privilege, not a right.

Question 34

A state statute makes fraud for personal financial gain a crime. Jones was convicted of violating this statute on three separate occasions. Following his most recent conviction, he professed to have undergone a religious conversion and proclaimed himself to be the divine minister of "St. Rockport," an alleged messiah who would shortly be making his appearance on earth. Jones solicited cash donations from the public to support his efforts to spread the word of St. Rockport and his coming appearance on earth.

Following complaints by several contributors who claimed he defrauded them, Jones was again charged with fraud under this state statute. The charge was that Jones "should have known that his representations about St. Rockport were false and, therefore, that he made them solely to collect cash donations for his personal gain." A witness for the prosecution in Jones's trial stated that Jones had admitted that, at times, he had doubts about the existence of St. Rockport. Jones was the only religious minister prosecuted for fraud under this state statute.

The strongest constitutional defense that Jones could assert would be that this prosecution:

- (A) Deprived him of the equal protection of the laws because other religious ministers have not been charged under this statute.
- (B) Denied him procedural due process because it placed upon Jones the burden of rebutting evidence, submitted by the state, of his bad faith in raising this money.
- (C) Denied him rights conferred by the Obligation of Contracts Clause by preventing him from taking money from persons who wished to contract with him to spread the word of St. Rockport.
- (D) Denied him the free exercise of religion in violation of the First and Fourteenth Amendments because it required the state to determine the truth or falsity of the content of his religious beliefs.

CONSTITUTIONAL LAW ANSWERS

Answer to Question 1

- (C) The statute at issue is void for vagueness. If a criminal law or regulation fails to give persons reasonable notice of what is prohibited, it may violate the Due Process Clause. This principle is applied somewhat strictly when First Amendment activity is involved in order to avoid the chilling effect a vague law might have on speech (*i.e.*, if it is unclear what speech is regulated, people might refrain from speech that is permissible for fear that they will be violating the law). Here, the statute does not give reasonable notice as to what language is being prohibited, and no court decisions have limited its construction. Thus, it is impermissibly vague, and Smith will prevail. Therefore, (A) incorrectly states that Smith will not prevail. (B) is incorrect because it is too broad a statement. First Amendment freedoms are not absolute; for instance, obscenity may be punished under a properly drawn statute. The problem here is that it cannot be determined what speech is being prohibited. (D) is incorrect because there is no *constitutional* “average person test.”

Answer to Question 2

- (D) (D) is the “safest” answer because Congress has the same legislative authority over the District of Columbia as a state legislature has over matters internal to its state. This clearly includes the authority to regulate marriage and divorce. It could be argued that Congress’s military and war powers could sustain (A); that Congress’s power to regulate the jurisdiction of federal courts could sustain (B); that Congress’s power over external affairs, which includes the power to implement executive agreements, could sustain (C), but these arguments are more speculative than that for (D).

Answer to Question 3

- (C) (A) is incorrect because, depending upon specific applications of the proposed legislation, a “taking of property,” requiring just compensation, could result. This would raise the issue as to whether the governmental action amounts to a taking (in which case the state must fairly compensate the owner of property) or a regulation (in which case there is no need for compensation), and would certainly be a consideration in the drafting of the subject legislation. (B) is incorrect because the proposed legislation could be seen as constituting a prohibited retroactive impairment of contract rights. (D) is incorrect because questions of “taking” often arise in connection with the state’s exercise of its police power (*i.e.*, the power to legislate for the health, welfare, or safety of the people). (C) appears least relevant because the proposed legislation does not seem to contemplate suits against the state.

Answer to Question 4

- (B) In order to have standing, a person must usually show a direct and immediate personal injury due to the challenged government action. The claimant must be in a position to demonstrate a concrete stake in the outcome of the suit and a direct impairment of his own constitutional rights. The contractors in (B) satisfy the criteria. The plaintiffs in (C) and (D) do not. As to (A), federal taxpayers generally have no standing to challenge the validity of federal expenditures; in any event, the federal taxpayer here is not complaining of any added tax burdens. State taxpayers may challenge the validity of state programs that involve measurable state expenditures, but here it is a federal program whose constitutionality is in issue and, in any event, the state expenditure is only hypothetical.

Answer to Question 5

- (C) (A) is incorrect because the mere acceptance of federal money to help pay for highways does not amount to a concession of authority over such highways. Federal authority over the highways

442. RELEASED QUESTIONS

must be derived from a specific source, rather than from the mere supplying of funds for the highways. Thus, (B) also is incorrect. (D) is incorrect because the constitutionality (or lack thereof) of an exercise of federal legislative power is in no way based on public opinion. (C) is correct because Congress has power to condition federal spending if Congress reasonably finds that the spending program is for the general welfare. Even where Congress otherwise has no power to regulate an area, it can use its spending power to so regulate by requiring entities that accept government money to act in a certain manner.

Answer to Question 6

- (D) (D) is correct, because Congress clearly has the right to place conditions on appropriated funds under the spending power and because highways fall within the purview of interstate commerce and are thus subject to Commerce Clause regulation. Few cases have ever declared a generally applicable federal statute based on commerce power to be an unconstitutional interference with state functions, and spending power conditions were upheld in *South Dakota v. Dole* (1987). It follows that (A), (B), and (C) are incorrect.

Answer to Question 7

- (B) (B) is an accurate statement of constitutional doctrine. Congress has plenary power over aliens. A state or local law that is based on alienage is subject to strict scrutiny (*i.e.*, a compelling state interest must be shown to justify disparate treatment). When, as with the state law here at issue, state action regulates aliens, Congress's plenary power over aliens arising from its power over naturalization is more directly implicated than Congress's commerce power; thus (B) is a better choice than (A). (C) is incorrect because the state law does not penalize anyone for exercising the right to travel from state to state. (D)'s relevance is remote, at best.

Answer to Question 8

- (D) The federal judicial power extends to cases arising under the Constitution of the United States. (D) is correct because the recently enacted state law discriminates against aliens, and many state discriminations against aliens have been held unconstitutional. Thus, there is a federal question. (A) is incorrect because aliens are permitted to bring certain actions in federal court challenging constitutionally suspect governmental action. (B) is incorrect because a state's regulation of land ownership may not be exercised in a manner that runs afoul of constitutional parameters. (C) is incorrect because, even assuming that there is a United Nations charter provision on point, this would not give the court jurisdiction; there must be a federal question.

Answer to Question 9

- (C) The court should not hear this suit on the merits because Article III courts are not empowered to hear suits between citizens of the same state where no federal question jurisdiction is involved. Article III lists the cases to which federal jurisdiction extends. It includes suits arising under federal law, and suits between citizens of two or more states. Zall's suit against Motors involves two citizens of the state of Paxico and no federal question is raised. No provision of Article III covers such a suit. Thus, Zall should have brought suit in Paxico state court. (A) is incorrect because the Contracts Clause deals with state *legislation* impairing contracts and no such legislation is implied by the facts. Article III has no general provision for suits involving the obligation of contracts. (B) is incorrect because while it might be said that the action can affect interstate commerce and thus is subject to federal regulation, absent such federal regulation, there is no basis under Article III for jurisdiction. Article III does not provide for federal court jurisdiction in

all cases affecting interstate commerce. (D) is incorrect because a “case or controversy” exists. The case or controversy requirement only prohibits federal courts from rendering advisory opinions, such as where the case is moot or unripe, or the parties are not truly adverse. The parties here are clearly adverse and there is a real, live controversy; the only thing missing is a basis for federal court jurisdiction.

Answer to Question 10

- (D) The Fourteenth Amendment prevents states from discriminating against the exercise of “fundamental rights,” one of which is the right to vote, unless the state shows a compelling interest. The English requirement suggests discrimination against the right to vote of people who cannot speak English. (A) is clearly inapplicable. (B) is clearly incorrect. (C) may be correct, but it is not as good as (D). Note that the Supreme Court has not specifically decided whether a “discriminatory purpose” is required for a violation of the Fifteenth Amendment’s bar against governmental racial discrimination in voting.

Answer to Question 11

- (C) When a governmental body establishes voting districts for the election of representatives, the number of persons in each district may not vary significantly (“one person, one vote”). This principle applies to almost every election where a person is being elected to perform normal governmental functions. However, the government can limit the class of persons who are allowed to vote in an election of persons to serve on a special purpose government unit if the unit has a special impact on the class of enfranchised voters. The watershed improvement districts referred to in this question are so specialized that election of their directors is not subject to the “one person, one vote” principle. These districts disproportionately affect landowners and do not perform general governmental functions. Thus, (C) is correct. (A) is incorrect because “one person, one vote” has a broader reach than merely election to statewide office. As noted above, the principle applies to almost every election for the performance of normal governmental functions. (B) is incorrect because conditioning the right to vote on property ownership normally would be invalid under the Equal Protection Clause. Only certain special purpose elections can be based on property ownership. (D) incorrectly implies that “one person, one vote” does not apply to states. In fact, the principle is binding on states through the Equal Protection Clause of the Fourteenth Amendment.

Answer to Question 12

- (B) An act of Congress or federal regulation supersedes any state or local action that actually conflicts with the federal rule, whether by commanding conduct inconsistent with that required by the federal rule, or by forbidding conduct that the federal rule is designed to foster. The conflict need not relate to conduct; it is sufficient if the state law interferes with achievement of a federal objective. In addition, note that Congress has exclusive power over naturalization and denaturalization. Thus, United States treaties and immigration laws would supersede an inconsistent state law, making them relevant to the constitutionality of the state Yuma statute. (A), (C), and (D) all refer to some perceived justification for the statute. However, they are irrelevant because, even if a state law was enacted for a valid purpose, it will be rendered void if it conflicts with federal law.

Answer to Question 13

- (A) The acknowledgment that the statute will protect Yuma workers from outside competition is the weakest defense because it indicates that the law has a discriminatory impact. State legislation

444. RELEASED QUESTIONS

that is challenged on Commerce Clause grounds (i) must not discriminate against out-of-state competition to benefit local economic interests, and (ii) must not be unduly burdensome. A discriminatory law will be valid only if it furthers an important *noneconomic* state interest and there are no reasonable alternatives available, whereas a nondiscriminatory law will be valid as long as the legitimate state interests outweigh the burden on interstate commerce. Here, choices (B), (C), and (D) all attempt to provide a nondiscriminatory rationale for the statute, making it easier to pass muster under the Commerce Clause, while choice (A) amounts to a concession by the state that the statute discriminates in favor of state economic interests, making it more likely to be invalidated.

Answer to Question 14

- (D) The Supreme Court will hear a case from a state court only if the state court judgment turned on federal grounds. The Court will refuse jurisdiction if it finds adequate and independent non-federal grounds to support the state decision. The nonfederal grounds must be adequate in that they are fully dispositive of the case, so that even if the federal grounds are wrongly decided, it would not affect the outcome of the case. Also, the nonfederal grounds must be independent. If the state court's interpretation of its state provision was based on federal case law interpreting an identical federal provision, the state law grounds for the decision is not independent. Here, the state supreme court rested its decision on the ground of violation of the state constitution, without any interpretation based on an identical federal provision. Thus, the decision is supported by adequate and independent nonfederal grounds, and the Supreme Court should refuse jurisdiction. (A), (B), and (C) are all based on the incorrect premise that the Supreme Court may somehow properly review the decision.

Answer to Question 15

- (D) This issue would not be considered ripe because there is no real harm or immediate threat of harm. If Pine and Ross were actually engaged to be married, refused to undergo the counseling, and then requested that a license be issued, the issue would be ripe, because at that point they would have been denied the license on the basis of the statute. As it is, they have not even come to the point of requesting a license. (A) is wrong because diversity is not the only basis for federal jurisdiction. (B) is wrong because there is a substantial federal question—the right to marry is part of the constitutionally protected right of privacy. (C) is wrong because no political question is presented. Political questions include those issues committed by the Constitution to another branch of government and those inherently incapable of resolution and enforcement by the judicial process.

Answer to Question 16

- (C) Where a fundamental right, such as the right to marry, is substantially affected, the state bears the burden of persuading the court that the statute in question is necessary to achieve a compelling or overriding government purpose. (A) is wrong because there is no presumption that state legislators acted properly. Also, as can be seen from the analysis at the beginning of this answer, (A) places the burden on the wrong party. (B) also places the burden on the wrong party. In addition, the Tenth Amendment provides that all powers not delegated to the federal government by the Constitution are reserved to the states. The Tenth Amendment does not authorize states to place unconstitutional burdens on fundamental rights. (D) is wrong, because “young adults” are not a discrete and insular class entitled to judicial scrutiny of laws that arguably require equal protection under the law.

Answer to Question 17

- (C) Whenever Congress acts within the scope of a delegated power such as that of the Commerce Clause, the Supremacy Clause renders any conflicting state or local law or action void. Thus, as applied, the state sprinkler requirement violates the Supremacy Clause. (A) is wrong because a substantive due process claim would be almost guaranteed to fail, since business regulation is now invariably sustained as reasonable state action under the Due Process Clause. (B) is wrong because classifications that relate only to matters of economics or social welfare (not fundamental rights) and do not employ suspect or quasi-suspect classifications are almost always upheld. The classification of building story size is not arbitrary. (D) is wrong because the contract has not been breached, so no Obligation of Contracts Clause issue is presented.

Answer to Question 18

- (B) Race is a “suspect category” under the Equal Protection Clause, but the Fourteenth Amendment does not apply to purely private acts of discrimination. However, if state action is found, the clause can be invoked against Country Schoolhouse. State action can be found in the actions of seemingly private individuals who (i) perform exclusive public functions or (ii) have significant state involvement in their activities. (B) states an example of significant state involvement and is, therefore, correct. (A) is wrong because to be state action, the activity must be both a traditional and exclusive government function. Education does not so qualify. The Supreme Court has only found running a town and running an election for public office to be such exclusive government functions. (C) is wrong because the statement is overbroad. Only intentional discrimination will be found to create discriminatory classifications calling for strict scrutiny. (D) is wrong because state involvement must be “significant” to trigger state action. Mere licensure is generally not “significant.”

Answer to Question 19

- (D) Prentis’s strongest argument would be that his Fifth Amendment due process rights have been abridged. While the Equal Protection Clause of the Fourteenth Amendment only applies to state action, it is clear that arbitrary or invidious discrimination by the federal government violates the Due Process Clause of the Fifth Amendment. Thus, there are really two equal protection guarantees. Since age is not a suspect category, this legislation would only be subject to the rational basis test. Because other civil service employees can work until the age of 75, Prentis would have an argument that the state had invidiously discriminated against him on the basis of age. His argument would probably fail, but is the “strongest” argument of the four alternatives given. (A) is wrong because employment is not a privilege or immunity of national citizenship. (B) is wrong because, where a public employee holds his position at the will of an employer, there is no property interest in continued employment. Since Prentis was dismissed on the basis of his age, rather than for cause, he had no property interest in continued employment. (C) is wrong because under the Necessary and Proper Clause, Congress may do anything that is arguably appropriate to relate to a federal interest.

Answer to Question 20

- (D) This would be the strongest argument in support of the constitutionality of this statute. Article I, Section 8, Paragraph 3 empowers Congress to “regulate commerce with foreign nations and among the several states, and with the Indian tribes.” Only rarely has a modern case invalidated a federal law regulating nongovernmental persons because it exceeded the commerce power. (A) is wrong because Congress does not have a general welfare power to regulate all activity in this

446. RELEASED QUESTIONS

country. (B) is wrong because it would not justify the statute at issue. (C) is wrong because it overstates congressional power by failing to connect the activity to “commerce.”

Answer to Question 21

- (B) Congress has the power to regulate and limit the appellate jurisdiction of the Supreme Court. Thus, the statute here, which was enacted by Congress, properly authorizes direct appeal of a specified decision to the Supreme Court. (A) is incorrect because there is nothing to support the proposition that Congress has plenary control over matters involving energy use. Also, (A) does not address the issue of jurisdiction of the Supreme Court. (C) is incorrect because states possess no such sovereign right. Federal review of state acts (whether they be executive, legislative, or judicial) is well established. (D) is incorrect because Article III actually provides that the Supreme Court shall have appellate jurisdiction under such regulations as Congress shall make.

Answer to Question 22

- (A) Application (A) is the most clearly constitutional. Section 1 of the Fourteenth Amendment guarantees equal protection; it applies directly only to “state action,” which is most clearly indicated in answer (A). Thus, answers (B) and (C) are not as clearly constitutional. Answer (D) is incorrect because the Fourteenth Amendment does not directly apply to federal action. Congress’s power to prohibit federal acts would be easier to justify under Article I (*e.g.*, as necessary and proper to carry out the spending power). Thus, (D) is not as clear a Fourteenth Amendment case as (A).

Answer to Question 23

- (C) Race is a suspect classification under the Equal Protection Clause. However, the Fourteenth Amendment only applies if there is action by a state or local government office, or a private individual whose behavior meets the requirement of “state action.” State action exists where seemingly private individuals (i) perform exclusive public functions, or (ii) have significant state involvement in their activities. “State action” also exists where a state affirmatively facilitates, encourages, or authorizes acts of discrimination by its citizens. However, there must be some sort of affirmative act by the state approving the private action. It is not enough that the state merely permits the conduct to occur. Under these facts, several state officials serve on the Bar Association’s Board of Bar Governors. Furthermore, the state supreme court requires all lawyers to be members of the State Bar Association. Thus, the State Bar Association does not operate independently of the state and, therefore, Plaintiffs’ strongest argument would be to demonstrate that “state action” is involved in payment of dues by the Association to private clubs that discriminate. Thus, (C) is correct. (A) is wrong because “state action” is required to invoke the anti-discrimination protections of the Fourteenth Amendment. Only the Thirteenth Amendment’s ban on badges or incidents of slavery applies to purely private actions. (B) is wrong because the failure of the Association to pass a resolution forbidding discrimination does not, in and of itself, constitute a denial of equal protection, and the argument for state action being present is much weaker than in option (C). (D) is wrong because, unless it is shown that the Association is an instrumentality of the state or closely intertwined with state action, the mere fact of its payment of dues to such private clubs will not invoke the Equal Protection Clause. (C) is the only answer that clearly focuses on the state action issue.

Answer to Question 24

- (A) The court should hear the case on the merits. Federal judicial power extends to all cases and controversies arising under the Constitution, laws, or treaties of the United States. Because the

activities of the State Bar Association present a federal claim arising under the Equal Protection Clause of the United States Constitution, the federal district court should hear the case on its merits. Therefore, (A) is correct. (B) is wrong because it is the Fourteenth Amendment that applies to the states. The Fifth Amendment Due Process Clause forbids *federal* discrimination. (C) is wrong because the doctrine of abstention is applicable when a federal constitutional claim is premised on an unsettled question of state law. These facts present no such unsettled state law question. (D) is wrong because the Bar Association's activities encroach on federally protected constitutional rights and, therefore, are not solely within the domain of state law, nor are there any "adequate and independent state grounds" here.

Answer to Question 25

- (C) (C) is correct because the Thirteenth Amendment addresses private acts of racial discrimination. (D) is incorrect because the Supreme Court has not recognized any power of Congress to regulate private persons under Section 5 of the Fourteenth Amendment. (A) is incorrect because the Obligation of Contracts Clause prohibits states from impairing contractual obligations. Thus, this clause is inapplicable to this case. (B) is incorrect because the General Welfare Clause authorizes Congress to spend to provide for the common defense and general welfare. There is no connection between this clause and the statute at issue.

Answer to Question 26

- (A) Congress has the power to declare war, raise and support armies, provide for and maintain a navy, and spend to provide for the common defense and general welfare, as well as the power to make all laws that are necessary and proper for carrying into execution the foregoing powers or any other federal power (including the power of the President and Senate to enter into treaties in conformity with Article II). Pursuant to these enumerated powers, Congress can take preventive measures against activities that may cause international misunderstandings, which in turn may lead to war, as well as against endeavors to undermine the government. The statute here shows a congressional intent to ensure that only properly authorized persons negotiate with foreign governments, and it is a legitimate means of implementing Congress's powers. (B) is incorrect because, although the President has broad discretion in foreign affairs, it is doubtful that such discretion would include the authority to unilaterally punish citizens who encroach on that discretion, absent legislative authorization to impose such punishment. (C) and (D) are incorrect because they are based on the mistaken notion that laws dealing with foreign affairs need not pass constitutional muster.

Answer to Question 27

- (C) A challenge based on interstate commerce would be most effective. Sometimes a nondiscriminatory law that regulates commerce may place a burden on interstate commerce. Such a law will be invalidated if the burden on interstate commerce outweighs local interests. This is a case-by-case balancing test, and it is by no means clear that the law in question *would* be ruled invalid. However, the Commerce Clause issue is the only answer where there is any reasonable likelihood that the legislation could be declared invalid. Thus, (C) is the correct answer. (A) is wrong because no fundamental right is involved and, therefore, the mere rationality test is applied, and the law will be upheld if it is rationally related to any conceivable legitimate end of government. The seat belt law clearly meets this minimal standard and any challenge based on due process would surely fail. (B) is wrong because the legislation does not involve a fundamental right, a suspect classification, or a quasi-suspect classification. In equal protection analysis, if any other classification is involved, the action will be upheld unless the challenger proves that the action is not rationally

448. RELEASED QUESTIONS

related to a legitimate government interest. Transport Lines cannot carry such a burden of proof. (D) is wrong because a constitutional challenge should be based on the infringement of rights guaranteed by the Constitution. Difficulty of enforcement is not relevant here.

Answer to Question 28

- (B) Congress may regulate any activity, local or interstate, which either in itself, or in combination with other activities, has a substantial effect upon interstate commerce. Here, although most stolen bicycles remain within the state in which they were stolen, the cumulative effect of many instances of stolen bicycles being transported across state lines for resale could be felt in interstate commerce. It follows that (C) is incorrect. (A) is incorrect because Congress has the power to *spend* for the general welfare. The *property power* involves the disposal and acquisition of property belonging to the United States, and is not at all relevant to this question. (D) is incorrect because the Tenth Amendment reserves to the states those powers not delegated to the United States nor prohibited to the states by the Constitution. As noted above, the power to regulate commerce is conferred upon Congress by the Constitution. Thus, this matter is not reserved to the states.

Answer to Question 29

- (B) The purchase of contraceptives is encompassed by the fundamental right of privacy. Because this statute contains no procedural safeguards, it denies minors a fundamental right without due process. Because Drugs, Inc., may assert the minors' rights, (B) is the correct answer. (A) is incorrect because there does not appear to be an undue burden on interstate commerce. (C) is incorrect because the statute does not treat state residents differently from out-of-state residents. (D) is nonsensical. *Note:* Under the Supreme Court's decisions regarding the sale of contraceptives to minors, the best possible answer would have been that the statute violated equal protection because it denied a fundamental right to a class of persons (minors) without sufficient justification. Since that answer was not given, the due process answer (which mentioned fundamental rights) was the best choice.

Answer to Question 30

- (D) It has been held that the Property Clause empowers Congress to protect wildlife wandering onto federally owned lands. (B) is incorrect because the Privileges and Immunities Clause of Article IV pertains to discrimination by states against out-of-state citizens. (A) is incorrect because the commerce power is not as *easy a way to justify* the law as is the property power, which clearly and literally applies here (note the wording of the question). (C) is incorrect because the enabling clause of the Fourteenth Amendment gives Congress the power to enforce the amendment by appropriate legislation. The Fourteenth Amendment, which prevents the states from depriving any person of life, liberty, or property without due process of law and equal protection of the law, is not at issue here.

Answer to Question 31

- (C) A federal court will not decide political questions, which are: (i) those issues committed by the Constitution to another branch of government; and (ii) those issues inherently incapable of resolution and enforcement by the judicial process. Political questions include those regarding the conduct of foreign relations. Based on Supreme Court cases, the recognition of and establishment of diplomatic relations with a foreign country appear to be political questions. Thus, (D) is incorrect. (A) and (B) are incorrect because Dunn will be injured economically by the actions of

the President and Secretary of State. Therefore, Dunn can demonstrate such a concrete stake in the outcome of this controversy as to ensure the adversariness which sharpens the presentation of issues.

Answer to Question 32

- (A) Legislative power can be delegated to executive officers and/or administrative agencies. Any delegated power must not be uniquely confined to Congress. The delegation must include intelligible standards for action by the delegatee. The statutory provision here meets these criteria for a permissible delegation. It follows that (C) is incorrect. (B) is an incorrect statement of law. Even if the executive had the inherent power, that would not make the legislation constitutional. (D) is incorrect because this statute does not represent arbitrary governmental action. It serves a proper governmental purpose and provides for specific standards and procedures relative to its implementation.

Answer to Question 33

- (A) In addition to its enumerated powers, Congress possesses auxiliary powers that are necessary and proper to carrying out all powers vested in the federal government. The statute here at issue is necessary and proper to carry out Congress's property power. By proscribing even the hunting of animals that have left the federal park, the statute will help protect the wildlife, which is property belonging to the United States. (B) is not the "strongest ground" because nothing in the facts points to interstate commerce. (C) is incorrect because the police power is a power of state government, not the federal government. (D), as a general statement of law, is incorrect. Also, it apparently is based on the rejected "right" vs. "privilege" distinction relative to deprivation of liberty and property without procedural due process, an issue not raised by these facts.

Answer to Question 34

- (D) Jones's strongest defense is that the statute violates his free exercise of religion. The Free Exercise Clause forbids government from making laws that prohibit the free exercise of religion. The Court has held that this means that the government may not punish a person for his or her religious beliefs. In determining what is a religious belief, the court may delve into the sincerity of the belief, but it may not find religious beliefs to be false. Thus, the prosecution here may be unconstitutional because it was based on the alleged falsity of a religious belief. (A) could be correct but it is not as good a basis as (D). Under the Equal Protection Clause, government must not unreasonably discriminate against similarly situated people. If a law discriminates (on its face or in its application) on the basis of a suspect class or where a fundamental right is involved, the law will be held invalid unless it is narrowly tailored to achieve a compelling government interest. Here, the law interferes with freedom of religion (a fundamental right), but it is not clear from this one prosecution that the law is being applied in a discriminatory manner. Therefore, (D) is a better answer. (B) is incorrect because the Due Process Clause requires only that the prosecution prove each element of a crime. Once the prosecution proves an element, there is no due process violation in having the defendant rebut the evidence; otherwise no one could ever be convicted of a crime. (C) is wrong because it is not clear that there was a Contract Clause violation. The Contract Clause forbids the retroactive impairment of contract rights unless the impairment is narrowly tailored to meet an important government interest. Here, the statute was apparently in existence when Jones "contracted" with his donors (although presumably the donations were gratuitous and not contractual). Thus, there is no retroactive impairment of contract. Moreover,

450. RELEASED QUESTIONS

even if this were a retroactive impairment, it could be argued that it was justified because preventing fraud is an important government interest. In any case, this clearly is not as good a defense as (D).

CONTRACTS QUESTIONS

Questions 1-2 are based on the following fact situation:

Addie, who has been in the painting and contracting business for 10 years and has a fine reputation, contracts to paint Boone's barn. Boone's barn is a standard red barn with a loft. The contract has no provision regarding assignment.

1. If Addie assigns the contract to Coot, who has comparable experience and reputation, which of the following statements is correct?
 - (A) Addie is in breach of contract.
 - (B) Boone may refuse to accept performance by Coot.
 - (C) Boone is required to accept performance by Coot.
 - (D) There is a novation.

2. If Addie assigns the contract to Coot and thereafter Coot does not meet the contract specifications in painting Boone's barn, Boone:
 - (A) Has a cause of action against Addie for damages.
 - (B) Has a cause of action only against Coot for damages.
 - (C) Has a cause of action against Addie for damages, only after he has first exhausted his remedies against Coot.
 - (D) Does not have a cause of action against Addie for damages because he waived his rights against Addie by permitting Coot to perform the work.

Questions 3-5 are based on the following fact situation:

Johnston purchased 100 bolts of standard blue wool, No. 1 quality, from McHugh. The sales contract provided that Johnston would make payment prior to inspection. The 100 bolts were

shipped and Johnston paid McHugh. Upon inspection, however, Johnston discovered that the wool was No. 2 quality. Johnston thereupon tendered back the wool to McHugh and demanded return of his payment. McHugh refused on the ground that there is no difference between No. 1 quality wool and No. 2 quality wool.

3. Which of the following statements regarding the contract provision for preinspection payment is correct?
 - (A) It constitutes an acceptance of the goods.
 - (B) It constitutes a waiver of the buyer's remedy of private sale in the case of nonconforming goods.
 - (C) It does not impair a buyer's right of inspection or his remedies.
 - (D) It is invalid.

4. What is Johnston's remedy because the wool was nonconforming?
 - (A) Specific performance.
 - (B) Damages measured by the difference between the value of the goods delivered and the value of conforming goods.
 - (C) Damages measured by the price paid plus the difference between the contract price and the cost of buying substitute goods.
 - (D) None, since he waived his remedies by agreeing to pay before inspection.

5. Can Johnston resell the wool?
 - (A) Yes, in a private sale.
 - (B) Yes, in a private sale but only after giving McHugh reasonable notice of his intention to resell.

452. RELEASED QUESTIONS

- (C) Yes, but only at a public sale.
- (D) No.

Questions 6-8 are based on the following fact situation:

Duffer and Slicker, who lived in different suburbs 20 miles apart, were golfing acquaintances at the Interurban Country Club. Both were traveling salesmen—Duffer for a pharmaceutical house and Slicker for a widget manufacturer. Duffer wrote Slicker by United States mail on Friday, October 8:

I need a motorcycle for transportation to the country club, and will buy your Sujocki for \$1,200 upon your bringing it to my home address above [stated in the letter-head] on or before noon, November 12 next. This offer is not subject to countermand.

Sincerely,

[signed] Duffer

Slicker replied by mail the following day:

I accept your offer and promise to deliver the bike as you specified.

Sincerely,

[signed] Slicker

This letter, although properly addressed, was misdirected by the postal service and not received by Duffer until November 10. Duffer had bought another Sujocki bike from Koolcat for \$1,050 a few hours before.

Koolcat saw Slicker at the Interurban Country Club on November 11 and said: "I sold my Sujocki to Duffer yesterday for \$1,050. Would you consider selling me yours for \$950?" Slicker replied, "I'll let you know in a few days."

On November 12, Slicker took his Sujocki to Duffer's residence; he arrived at 11:55 a.m.

Duffer was asleep and did not answer Slicker's doorbell rings until 12:15 p.m. Duffer then rejected Slicker's bike on the ground that he had already bought Koolcat's.

- 6. In Duffer's letter of October 8, what was the legal effect of the language: "This offer is not subject to countermand"?
 - (A) Under the Uniform Commercial Code, the offer was irrevocable until noon, November 12.
 - (B) Such language prevented an effective acceptance by Slicker prior to noon, November 12.
 - (C) At common law, such language created a binding option in Slicker's favor.
 - (D) Such language did not affect the offeror's power of revocation of the offer.
- 7. In a lawsuit by Slicker against Duffer for breach of contract, what would the court probably decide regarding Slicker's letter of October 9?
 - (A) The letter bound both parties to a unilateral contract as soon as Slicker mailed it.
 - (B) Mailing of the letter by Slicker did not, of itself, prevent a subsequent effective revocation by Duffer of his offer.
 - (C) The letter bound both parties to a bilateral contract, but only when received by Duffer on November 10.
 - (D) Regardless of whether Duffer's offer had proposed a unilateral or a bilateral contract, the letter was an effective acceptance upon receipt, if not upon dispatch.
- 8. What is the probable legal effect of Koolcat's conversation with Slicker and

report that he (Koolcat) had sold his Sujocki to Duffer on November 10?

- (A) This report had no legal effect because Duffer's offer was irrevocable until November 12.
- (B) Unless a contract had already been formed between Slicker and Duffer, Koolcat's report to Slicker operated to terminate Slicker's power of accepting Duffer's offer.
- (C) This report had no legal effect because the offer had been made by a prospective buyer (Duffer) rather than a prospective seller.
- (D) Koolcat's conversation with Slicker on November 11 terminated Duffer's original offer and operated as an offer by Koolcat to buy Slicker's Sujocki for \$950.

Questions 9-10 are based on the following fact situation:

Tortfeasor tortiously injured Victim in an auto accident. While Victim was recovering in Hospital, Tortfeasor's liability insurer, Insurer, settled with Victim for \$5,000. Victim gave Insurer a signed release and received a signed memorandum wherein Insurer promised to pay Victim \$5,000 by check within 30 days. When Victim left Hospital two days later, Hospital demanded payment of its \$4,000 stated bill. Victim thereupon gave Hospital his own negotiable promissory note for \$4,000, payable to Hospital's order in 30 days, and also, as security, assigned to Hospital the Insurer settlement memorandum. Hospital promptly assigned for value the settlement memorandum and negotiated the note to Holder, who took the note as a holder in due course. Subsequently, Victim misrepresented to Insurer that he had lost the settlement memorandum and needed another. Insurer issued another memorandum identical to the first, and Victim assigned it to ABC Furniture to secure a \$5,000 credit sale contract. ABC immediately notified Insurer of this assignment.

Later it was discovered that Hospital had mistakenly overbilled Victim by the amount of \$1,000 and that Tortfeasor was an irresponsible minor.

- 9. If Victim starts an action against Insurer 40 days after the insurance settlement agreement, can Victim recover?
 - (A) Yes, because his attempted assignments of his claim against Insurer were ineffective, inasmuch as Insurer's promise to pay "by check" created a right in Victim that was too personal to assign.
 - (B) No, because he no longer has possession of Insurer's written memorandum.
 - (C) No, because Tortfeasor's minority and irresponsibility vitiated the settlement agreement between Victim and Insurer.
 - (D) No, because he has made at least one effective assignment of his claim against Insurer, and Insurer has notice thereof.
- 10. In view of Tortfeasor's age and irresponsibility when Insurer issued his liability policy, can Holder and ABC Furniture recover on their assignments?
 - (A) Neither can recover because Victim, the assignor, is a third-party beneficiary of the liability policy, whose rights thereon can be no better than Tortfeasor's.
 - (B) Neither can recover unless Insurer knowingly waived the defense of Tortfeasor's minority and irresponsibility.
 - (C) Neither can recover because the liability policy, and settlement thereunder, are unenforceable because of Tortfeasor's minority.
 - (D) Either Holder or ABC Furniture, depending on priority, can recover as

454. RELEASED QUESTIONS

assignee (or subassignee) of Victim's claim because the latter arose from Insurer's settlement agreement, the latter agreement not being vitiated by Tortfeasor's minority and irresponsibility when he obtained the policy.

Question 11

On January 15, Carpenter agreed to repair Householder's house according to certain specifications and to have the work completed by April 1. On March 1, Householder's property was inundated by flood waters which did not abate until March 15. Householder could not get the house in a condition which would permit Carpenter to begin the repairs until March 31. On that date Carpenter notified Householder that he would not repair the house.

Which one of the following facts, if it was the only one true and known to both parties on January 15, would best serve Carpenter as the basis for a defense in an action brought against him by Householder for breach of contract?

- (A) Carpenter's busy schedule permitted him to work on Householder's house only during the month of March.
- (B) Any delay in making the repairs would not seriously affect Householder's use of the property.
- (C) The cost of making repairs was increasing at the rate of 3% a month.
- (D) The area around Householder's property was frequently flooded during the month of March.

Question 12

In a telephone call on March 1, Adams, an unemployed, retired person, said to Dawes, "I will sell my automobile for \$3,000 cash. I will hold this offer open through March 14." On March 12, Adams called Dawes and told her that he had sold the automobile to Clark. Adams in fact had not sold the automobile to anyone. On March 14, Dawes learned that Adams still

owned the automobile, and on that date called Adams and said, "I'm coming over to your place with \$3,000." Adams replied, "Don't bother. I won't deliver the automobile to you under any circumstances." Dawes protested, but made no further attempt to pay for or take delivery of the automobile.

In an action by Dawes against Adams for breach of contract, Dawes probably will:

- (A) Succeed, because Adams had assured her that the offer would remain open through March 14.
- (B) Succeed, because Adams had not in fact sold the automobile to Clark.
- (C) Not succeed, because Dawes had not tendered the \$3,000 to Adams on or before March 14.
- (D) Not succeed, because on March 12, Adams had told Dawes that he had sold the automobile to Clark.

Question 13

Carver is a chemical engineer. She has no interest in or connection with Chemco. Carver noticed that Chemco's most recent publicly issued financial statement listed, as part of Chemco's assets, a large inventory of a certain special chemical compound. This asset was listed at a cost of \$100,000, but Carver knew that the ingredients of the compound were in short supply and that the current market value of the inventory was in excess of \$1 million. There was no current public quotation of the price of Chemco stock. The book value of Chemco stock, according to the statement, was \$5 per share; its actual value was \$30 per share.

Knowing these facts, Carver offered to purchase from Page at \$6 per share the 1,000 shares of Chemco stock owned by Page. Page and Carver had not previously met. Page sold the stock to Carver for \$6 per share.

If Page asserts a claim based on misrepresentation against Carver, will Page prevail?

- (A) Yes, because Carver knew that the value of the stock was greater than the price she offered.
- (B) Yes, if Carver did not inform Page of the true value of the inventory.
- (C) No, unless Carver told Page that the stock was not worth more than \$6 per share.
- (D) No, if Chemco's financial statement was available to Page.

Questions 14-15 are based on the following fact situation:

In a written contract Singer agreed to deliver to Byer 500 described chairs at \$20 each F.O.B. Singer's place of business. The contract provided that "neither party will assign this contract without the written consent of the other." Singer placed the chairs on board a carrier on January 30. On February 1, Singer said in a signed writing, "I hereby assign to Wheeler all my rights under the Singer-Byer contract." Singer did not request and did not get Byer's consent to this transaction. On February 2, the chairs, while in transit, were destroyed in a derailment of the carrier's railroad car.

- 14. In an action by Wheeler against Byer, Wheeler probably will recover:
 - (A) \$10,000, the contract price.
 - (B) The difference between the contract price and the market value of the chairs.
 - (C) Nothing, because the chairs had not been delivered.
 - (D) Nothing, because the Singer-Byer contract forbade an assignment.
- 15. In an action by Byer against Singer for breach of contract, Byer probably will:
 - (A) Succeed, because the carrier will be deemed to be Singer's agent.

- (B) Succeed, because the risk of loss was on Singer.
- (C) Not succeed, because of impossibility of performance.
- (D) Not succeed, because the risk of loss was on Byer.

Question 16

After several days of negotiations, Ohner wrote to Plummer: "Will pay you \$3,000 if you will install new plumbing in my office building according to the specifications I have sent you. I must have your reply by March 30." Plummer replied by a letter that Ohner received on March 15: "Will not do it for less than \$3,500." On March 20, Plummer wrote to Ohner: "Have changed my mind. I will do the work for \$3,000. Unless I hear from you to the contrary, I will begin work on April 5." Ohner received this letter on March 22 but did not reply to it. Plummer, without Ohner's knowledge, began the work on April 5.

Which of the following best characterizes the legal relationship between Ohner and Plummer as of April 5?

- (A) A contract was formed on March 20 when Plummer posted his letter.
- (B) A contract was formed on March 22 when Ohner received Plummer's letter.
- (C) A contract was formed on April 5 when Plummer began work.
- (D) There was no contract between the parties as of April 5.

Questions 17-18 are based on the following fact situation:

On January 15, in a signed writing, Artisan agreed to remodel Ohner's building according to certain specifications, Ohner to pay the agreed price of \$5,000 to Artisan's niece, Roberta Neese, as a birthday present. Neese did not learn of the agreement until her birthday on May 5.

456. RELEASED QUESTIONS

Before they signed the writing, Artisan and Ohner had orally agreed that their "written agreement will be null and void unless Ohner is able to obtain a \$5,000 loan from the First National Bank before January 31."

17. For this question only, assume that Ohner was unable to obtain the loan and, on January 31, phoned Artisan and told him, "Don't begin the work. The deal is off." In an action for breach of contract brought against Ohner by the proper party, will Ohner be successful in asserting as a defense his inability to obtain a loan?
- (A) Yes, because obtaining a loan was a condition precedent to the existence of an enforceable contract.
- (B) Yes, because the agreement about obtaining a loan is a modification of a construction contract and is not required to be in writing.
- (C) No, because the agreement about obtaining a loan contradicts the express and implied terms of the writing.
- (D) No, because Ohner is estopped to deny the validity of the written agreement.
18. For this question only, assume that Ohner obtained the loan, that Artisan completed the remodeling on May 1, and that on May 3, at Artisan's request, Ohner paid the \$5,000 to Artisan. If Neese learns of Ohner's payment to Artisan on May 5, at the same time she learns of the written Artisan-Ohner contract, will she succeed in an action against Ohner for \$5,000?
- (A) Yes, because she is an intended beneficiary of the written Artisan-Ohner contract.
- (B) Yes, because the written Artisan-Ohner contract operated as an assignment to Neese, and Artisan thereby lost whatever rights he may have had to the \$5,000.

- (C) No, because Neese had not furnished any consideration to support Ohner's promise to pay \$5,000 to her.
- (D) No, because on May 3, Artisan and Ohner effectively modified their written contract, thereby depriving Neese of whatever rights she may have had under that contract.

Questions 19-20 are based on the following fact situation:

When Esther, Gray's 21-year-old daughter, finished college, Gray handed her a signed memorandum stating that if she would go to law school for three academic years, he would pay her tuition, room, and board, and would "give her a \$1,000 bonus" for each "A" she got in law school. Esther's uncle, Miller, who was present on this occasion, read the memorandum and thereupon said to Esther, "and if he doesn't pay your expenses, I will." Gray paid her tuition, room, and board for her first year but died just before the end of that year. Subsequently, Esther learned that she had received two "As" in the second semester. The executor of Gray's estate has refused to pay her anything for the two "As" and has told her that the estate will no longer pay her tuition, room, and board in law school.

19. In an action by Esther against Miller on account of the executor's repudiation of Gray's promise to pay future tuition, room, and board, which of the following would be Miller's strongest defense?
- (A) The parties did not manifestly intend a contract.
- (B) Gray's death terminated the agreement.
- (C) The agreement was oral.
- (D) The agreement was divisible.
20. In an action against Gray's estate for \$2,000 on account of the two "As," if the only defense raised is lack of consideration, Esther probably will:

- (A) Succeed under the doctrine of promissory estoppel.
- (B) Succeed on a theory of bargained-for exchange for her father's promise.
- (C) Not succeed, because the \$1,000 for each "A" was promised only as a bonus.
- (D) Not succeed, because Esther was already legally obligated to use her best efforts in law school.

Question 21

Zeller contracted in writing to deliver to Baker 100 bushels of wheat on August 1 at \$3.50 per bushel. Because his suppliers had not delivered enough wheat to him by that time, Zeller on August 1 had only 95 bushels of wheat with which to fulfill his contract with Baker.

If Zeller tenders 95 bushels of wheat to Baker on August 1, and Baker refuses to accept or pay for any of the wheat, which of the following best states the legal relationship between Zeller and Baker?

- (A) Zeller has a cause of action against Baker, because Zeller has substantially performed his contract.
- (B) Zeller is excused from performing his contract because of impossibility of performance.
- (C) Baker has a cause of action against Zeller for Zeller's failure to deliver 100 bushels of wheat.
- (D) Baker is obligated to give Zeller a reasonable time to attempt to obtain the other five bushels of wheat.

Questions 22-23 are based on the following fact situation:

On May 1, Selco and Byco entered into a written agreement in which Selco agreed to fabricate and sell to Byco 10,000 specially

designed brake linings for a new type of power brake manufactured by Byco. The contract provided that Byco would pay half of the purchase price on May 15 in order to give Selco funds to "tool up" for the work; that Selco would deliver 5,000 brake linings on May 31; that Byco would pay the balance of the purchase price on June 5; and that Selco would deliver the balance of the brake linings on June 30.

On May 10, Selco notified Byco that it was doubtful whether Selco could perform because of problems encountered in modifying its production machines to produce the brake linings. On May 15, however, Selco assured Byco that the production difficulties had been overcome, and Byco paid Selco the first 50% installment of the purchase price. Selco did not deliver the first 5,000 brake linings on May 31, or at any time thereafter; and on June 10, Selco notified Byco that it would not perform the contract.

- 22. Which of the following correctly states Byco's rights and obligations immediately after receipt of Selco's notice on May 10?
 - (A) Byco can treat the notice as an anticipatory repudiation, and has a cause of action on May 10 for breach of the entire contract.
 - (B) Byco can treat the notice as an anticipatory repudiation, and can sue at once to enjoin an actual breach by Selco on May 31.
 - (C) Byco has no cause of action for breach of contract, but can suspend its performance and demand assurances that Selco will perform.
 - (D) Byco has no cause of action for breach of contract, and must pay the installment of the purchase price due on May 15 to preserve its rights under the contract.
- 23. Which of the following is *not* a correct statement of the parties' legal status

458. RELEASED QUESTIONS

immediately after Selco's notice on June 10?

- (A) Byco has a cause of action for total breach of contract because of Selco's repudiation, but that cause of action will be lost if Selco retracts its repudiation before Byco changes its position or manifests to Selco that Byco considers the repudiation final.
- (B) Byco can bring suit to rescind the contract even if it elects to await Selco's performance for a commercially reasonable time.
- (C) Byco can await performance by Selco for a commercially reasonable time, but if Byco awaits performance beyond that period, it cannot recover any resulting damages that it reasonably could have avoided.
- (D) Byco has a cause of action for breach of contract that it can successfully assert only after it has given Selco a commercially reasonable time to perform.

Questions 24-25 are based on the following fact situation:

The Kernel Corporation, through its president, Demeter Gritz, requested from Vault Finance, Inc., a short-term loan of \$100,000. On April 1, Gritz and Vault's loan officer agreed orally that Vault would make the loan on the following terms: (1) the loan would be repaid in full on or before the following July 1 and would carry interest at an annual rate of 15% (a lawful rate under the applicable usury law); and (2) Gritz would personally guarantee repayment. The loan was approved and made on April 5. The only document evidencing the loan was a memorandum, written and supplied by Vault and signed by Gritz for Kernel, that read in its entirety:

April 5

In consideration of a loan advanced on this date, Kernel Corporation hereby

promises to pay Vault Finance, Inc., \$100,000 on September 1.

Kernel Corporation
by /s/ Demeter Gritz
Demeter Gritz, President

Kernel Corporation did not repay the loan on or before July 1, although it had sufficient funds to do so. On July 10, Vault sued Kernel as principal debtor and Gritz individually as guarantor for \$100,000, plus 15% interest from April 5.

24. At the trial, can Vault prove Kernel's oral commitment to repay the loan on or before July 1?

- (A) Yes, because the oral agreement was supported by an independent consideration.
- (B) Yes, because evidence of the parties' negotiations is relevant to their contractual intent concerning maturity of the debt.
- (C) No, because such evidence is barred by the preexisting duty rule.
- (D) No, because such evidence contradicts the writing and is barred by the parol evidence rule.

25. At the trial, can Vault prove Gritz's oral promise to guarantee the loan?

- (A) Yes, because Gritz signed the memorandum.
- (B) Yes, because, as president of the debtor-company, Gritz is a third-party beneficiary of the loan.
- (C) No, because there was no separate consideration for Gritz's promise.
- (D) No, because such proof is barred by the Statute of Frauds.

Question 26

Osif owned Broadacres in fee simple. For a consideration of \$5,000, Osif gave Bard a written option to purchase Broadacres for \$300,000. The option was assignable. For a consideration of \$10,000, Bard subsequently gave an option to Cutter to purchase Broadacres for \$325,000. Cutter exercised his option.

Bard thereupon exercised his option. Bard paid the agreed price of \$300,000, and took title to Broadacres by deed from Osif. Thereafter, Cutter refused to consummate his purchase.

Bard brought an appropriate action against Cutter for specific performance, or, if that should be denied, then for damages. Cutter counterclaimed for return of the \$10,000.

In this action, the court will:

- (A) Grant money damages only to Bard.
- (B) Grant specific performance to Bard.
- (C) Grant Bard only the right to retain the \$10,000.
- (D) Require Bard to refund the \$10,000 to Cutter.

Questions 27-28 are based on the following fact situation:

Mater, a wealthy widow, wishing to make a substantial and potentially enduring gift to her beloved adult stepson, Prodigal, established with the Vault Savings and Loan Association a passbook savings account by an initial deposit of \$10,000.

27. For this question only, assume the following facts. The passbook was issued solely in Prodigal's name; but Mater retained possession of it, and Prodigal was not then informed of the savings account. Subsequently, Mater became disgusted with Prodigal's behavior and decided to give the same savings account solely to her beloved adult daughter Distaff. As permitted by the

rules of Vault Savings and Loan, Mater effected this change by agreement with Vault. This time she left possession of the passbook with Vault. Shortly thereafter, Prodigal learned of the original savings account in his name and the subsequent switch to Distaff's name.

If Prodigal now sues Vault Savings and Loan for \$10,000 plus accrued interest, will the action succeed?

- (A) Yes, because Prodigal was a third-party intended beneficiary of the original Mater-Vault deposit agreement.
- (B) Yes, because Prodigal was a constructive assignee of Mater's claim, as depositor, to the savings account.
- (C) No, because Prodigal never obtained possession of the passbook.
- (D) No, because Prodigal's right, if any, to the funds on deposit was effectively abrogated by the second Mater-Vault deposit agreement.

28. For this question only, assume the following facts. The passbook was issued by Vault to Mater solely in her own name. That same day, disinterested witnesses being present, she handed the passbook to Prodigal and said, "As a token of my love and affection for you, I give you this \$10,000 savings account." Shortly thereafter, she changed her mind and wrote Prodigal, "I hereby revoke my gift to you of the \$10,000 savings account with Vault Savings and Loan Association. Please return my passbook immediately. Signed: Mater." Prodigal received this letter but ignored it, and Mater died unexpectedly a few days later.

In litigation between Prodigal and Mater's estate, which of the following is a correct statement of the parties' rights with respect to the money on deposit with Vault?

460. RELEASED QUESTIONS

- (A) The estate prevails, because Mater's gift to Prodigal was revocable and was terminated by her death.
- (B) The estate prevails, because Mater's gift to Prodigal was revocable and was terminated by her express revocation.
- (C) Prodigal prevails, because he took Mater's claim to the savings account by a gratuitous but effective and irrevocable assignment from Mater.
- (D) Prodigal prevails, because his failure to reject the gift, even if the assignment was revocable, created an estoppel against Mater and her estate.

Questions 29-30 are based on the following fact situation:

On October 1, Toy Store, Inc., entered into a written contract with Fido Factory, Inc., for the purchase at \$20 per unit of 1,000 mechanical dogs, to be specially manufactured by Fido according to Toy Store's specifications. Fido promised to deliver all of the dogs "not later than November 15, for the Yule shopping season," and Toy Store promised to pay the full \$20,000 price upon delivery. In order to obtain operating funds, Fido as borrower entered into a written loan agreement on October 5 with the High Finance Company. In relevant part, this agreement recited, "Fido Factory hereby transfers and assigns to High Finance its (Fido Factory's) October 1 mechanical dog contract with Toy Store, as security for a 50-day loan of \$15,000, the advance and receipt of which are hereby acknowledged by Fido Factory. . . ." No copy of this agreement, or statement relating to it, was filed in an office of public record.

On October 15, Fido notified Toy Store, "We regret to advise that our master shaft burned out last night because our night supervisor let the lubricant level get too low. We have just fired the supervisor, but the shaft cannot be repaired or replaced until about January 1. We can guarantee delivery of your order, however, not later than January 20." Toy Store rejected this proposal as

unacceptable and immediately contracted with the only other available manufacturer to obtain the 1,000 dogs at \$30 per unit by November 15.

- 29. For this question only, assume that on November 1, Toy Store sues Fido for damages and alleges the above facts, except those relating to the Fido-High Finance loan agreement. Upon Fido's motion to dismiss the complaint, the court should:
 - (A) Sustain the motion, because Fido on October 15 stated its willingness, and gave assurance of its ability, to perform the contract in January.
 - (B) Sustain the motion, because Toy Store's lawsuit is premature in any case until after November 15.
 - (C) Deny the motion, because Toy Store's complaint alleges an actionable tort by Fido.
 - (D) Deny the motion, because Toy Store's complaint alleges an actionable breach of contract by Fido.
- 30. For this question only, assume that by November 16, Fido, without legal excuse, has delivered no dogs, and that Toy Store has brought no action against Fido. In an action brought on November 16 by Toy Store against High Finance Company because of Fido's default, Toy Store can recover:
 - (A) Nothing, because the October 5 assignment by Fido to High Finance of Fido's contract with Toy Store was only an assignment for security.
 - (B) Nothing, because no record of the October 5 transaction between Fido and High Finance was publicly filed.
 - (C) \$10,000 in damages, because Toy Store was a third-party intended beneficiary of the October 5 transaction between Fido and High Finance.

- (D) \$10,000 in damages, because the October 5 transaction between Fido and High Finance effected, with respect to Toy Store as creditor, a novation of debtors.

Question 31

In March, when Ohm was 17, Stereo delivered to Ohm a television set. At that time Ohm agreed in writing to pay \$400 for the set on July 1, when he would reach his 18th birthday. Eighteen is the applicable statutory age of majority, and on that date Ohm was to receive the proceeds of a trust. On July 1, when the reasonable value of the television set was \$250, Ohm sent Stereo a signed letter stating, "I'll only pay you \$300. That is all the set is worth."

In an action against Ohm for money damages on July 2, what is the maximum amount that Stereo will be entitled to recover?

- (A) Nothing.
- (B) \$250, the reasonable value of the set.
- (C) \$300, the amount Ohm promised to pay in his letter of July 1.
- (D) \$400, the original sale price.

Question 32

Ann leased commercial property to Brenda for a period of 10 years. The lease contained the following provision: "No subleasing or assignment will be permitted unless with the written consent of the lessor." One year later, Brenda assigned all interest in the lease to Carolyn, who assumed and agreed to perform the lessee's obligations under the terms of the lease. Ann learned of the assignment and wrote to Brenda that she had no objection to the assignment to Carolyn and agreed to accept rent from Carolyn instead of Brenda. Thereafter, Carolyn paid rent to Ann for a period of five years. Carolyn then defaulted and went into bankruptcy. In an appropriate action, Ann sued Brenda for rent due.

If Ann loses, it will be because there was:

- (A) Laches.
- (B) An accord and satisfaction.
- (C) A novation.
- (D) An attornment.

Questions 33-34 are based on the following fact situation:

Furrow leased in writing a 100-acre farm from Quark for five years at \$2,000 per year, with an option to purchase "five acres of the land for \$10,000 cash" at the end of the lease term. Before the lease was executed, Quark orally promised to have a five-acre parcel surveyed before the end of the lease term. Furrow took possession of the farm and paid the rent for five years. During the fifth year, having decided that he would exercise the purchase option, Furrow planted several fruit trees and built a large grain silo on the property. At the end of the term, Furrow tendered Quark \$10,000 and demanded a conveyance, but Quark repudiated the option agreement and retook possession of the farm. He had never had the five-acre parcel surveyed.

33. In an action by Furrow against Quark for specific performance of the option agreement, which of the following is Quark's best defense?
 - (A) The option part of the agreement is unenforceable because it lacked a separate consideration.
 - (B) The description of the property to be sold in the parties' written agreement is too indefinite to permit the remedy sought.
 - (C) Quark's failure to have the five-acre parcel surveyed was failure of a condition precedent to his own duty of performance.

462. RELEASED QUESTIONS

- (D) The option part of the agreement is unenforceable under the parol evidence rule.
34. Assume for this question only that Quark is not liable to Furrow for breach of a land-sale contract. In an action by Furrow against Quark for the reasonable value of the improvements that Furrow added to the farm, which of the following theories would best support Furrow's claim?
- (A) Quasi-contract, for benefits unofficiously and non-gratuitously conferred upon Quark by Furrow.
- (B) Tort, for conversion by Quark in retaking possession of the improvements.
- (C) Breach of trust by Quark as trustee of a resulting trust of the improvements.
- (D) Breach by Quark of an implied-in-fact promise (manifested by his retaking possession of the farm and improvements) to compensate Furrow for the improvements.

CONTRACTS ANSWERS

Answer to Question 1

- (C) Although this assignment of rights would result in the performance of personal services, the nature of the personal service described here appears to be routine rather than unique and thus the duty is delegable. Note also that the contract contains no language restricting assignment or delegation. (Note also that language “assigning the contract” may be construed to include a delegation of duties.) Thus, Boone (the obligee) would be required to accept performance by the delegate (Coot). Therefore, (B), which states that Boone may refuse to accept such performance, is incorrect. Because the contract does not prohibit Addie’s assignment thereof, (A) incorrectly states that such assignment renders Addie in breach. (D) is incorrect because a novation substitutes a new party for an original party to the contract, and requires the assent of all parties, and completely releases the original party. The facts here do not indicate that Boone agreed to any such new arrangement.

Answer to Question 2

- (A) The delegator remains personally liable on his contract, even if the delegate has expressly assumed the duties. Thus, Addie remains liable for any defective performance of the painting. (B) and (C) each are based on the incorrect assumption that the obligee is required to look to the delegate for a remedy in the event of defective performance. As explained above, the obligee (Boone) may hold the delegator (Addie) liable on the contract. (D) is incorrect because the facts do not indicate that Boone accepted performance by a new party with knowledge that there was an intent to substitute that party for an original party to the contract. Therefore, Boone did not waive his rights against Addie.

Answer to Question 3

- (C) Because Johnston promised to pay without inspecting the goods, he had no right to inspect *prior to payment*. If payment is due before inspection, the fact that the goods are defective does not excuse nonpayment, unless the defect appears without inspection or there is fraud in the transaction. However, the buyer is not prevented from inspecting the goods after making payment, and thereafter pursuing all available remedies for defective performance. (D) is incorrect because, as explained above, nothing prevents a buyer from promising to pay prior to inspection. (A) is incorrect because the contractual provision at issue does not constitute an acceptance. There is no acceptance until Johnston has had an opportunity to inspect. (B) also incorrectly implies that the provision effectuates a waiver of the buyer’s rights.

Answer to Question 4

- (C) Where the seller does not deliver or the buyer properly rejects or revokes acceptance of tendered goods, the buyer’s basic remedy is the difference between the contract price and either the market price or the cost of buying replacement goods (cover). (C) reflects the latter measure of damages. (A) is incorrect because specific performance is only available where the goods are unique or in other proper circumstances. Here, the wool does not appear to be unique. (B) is incorrect because it sets forth a measure of damages that is properly applicable where the buyer accepts goods that breach one of the seller’s warranties; here, the goods have not been accepted. (D) is incorrect because, as explained in the answer to the preceding question, agreeing to pay before inspection does not waive any of the buyer’s rights.

464. RELEASED QUESTIONS

Answer to Question 5

- (B) Where the buyer has paid for goods which are nonconforming, and the seller has refused the buyer's offer to restore the goods and the buyer's demand for repayment, the buyer may resell the goods and credit the proceeds to the amount owed by the seller (under the same rules that apply to a seller's resale of wrongfully rejected goods). The buyer may sell at either a public or private sale; but if it is a private sale, reasonable advance notice must be given to the seller. [U.C.C. §§2-711(3), 2-706(2), (3)] (A) and (C) each incorrectly limit the sale to being either private or public. (D) incorrectly states that the sale is not permitted at all.

Answer to Question 6

- (D) Generally, offers are revocable unless the offeror receives consideration to keep the offer open. If a *merchant* signs a written offer giving assurances that it will be held open, the offer is irrevocable for the stated period or for a reasonable time if no period is stated. Here, the language at issue would probably be interpreted as a promise not to revoke; however, the offeror (Duffer) is not a merchant (*i.e.*, he does not deal in goods of the kind being sold). Thus, in the absence of consideration being given for this promise, it remains revocable. (A) is incorrect because, although there is a sale of goods, neither of the parties is a merchant, and hence, the "firm offer" provision of the U.C.C. does not apply. (B) makes no sense because the very terms of the offer state that Slicker can accept prior to noon on November 12. (C) is incorrect because no consideration was given for the promise not to countermand.

Answer to Question 7

- (B) Duffer's letter would be construed as an offer that unambiguously calls for completion of performance, rather than a promise, as the only manner of acceptance. This would be an offer for a unilateral contract. An offer for a unilateral contract cannot be accepted by promising to perform. Hence, Slicker's letter of October 9 by itself wouldn't prevent Duffer from revoking his offer. (A) is wrong because a unilateral contract is created only on completion of performance of the bargained-for act, not by simply mailing a purported acceptance. (C) is wrong because the offer was for a unilateral contract. (D) is wrong because, as a response to an offer to enter into a unilateral contract, the promise to perform had no legal effect regardless of when it was received.

Answer to Question 8

- (B) An offer is effectively revoked when the offeree acquires knowledge that the offeror has made an inconsistent contract with another, whether such knowledge is obtained from the offeror or some independent source. (A) is wrong because there was no consideration for the promise to keep the offer open. (C) makes no sense. Whether Slicker's power of accepting the offer is terminated does not depend on the fact that the offer was made by a prospective buyer rather than a prospective seller. (D) is incorrect insofar as it states that the November 11 conversation was also an offer to purchase; the wording used by Koolcat ("would you consider . . .") seems too preliminary in nature and thus more an invitation than an offer.

Answer to Question 9

- (D) An assignor may not enforce rights against an obligor that have been previously assigned, as is the case here. An assignment establishes privity of contract between the obligor and the assignee while extinguishing privity between the obligor and assignor. Thus, the assignee replaces the assignor as the real party in interest, and the assignee alone is entitled to performance under the

contract. (A) is incorrect because a promise to pay by check does not create a right too personal to assign. An attempted assignment is invalid where the rights “assigned” would result in the obligor having to perform unique personal services to someone other than the original obligee. Paying by check does not constitute such a personal service. (B) is incorrect because possession of the memorandum of settlement has no bearing on the effectiveness of an assignment. (C) is wrong because minority does not vitiate a contract, but makes it *voidable* by the minor. Furthermore, insurance contracts usually cannot be voided by minors.

Answer to Question 10

- (D) Insurance contracts usually cannot be voided by infants. Thus, the liability insurance, and settlement agreement arising out of it, are valid. (A) seems to be based on the incorrect assumption that, because of Tortfeasor’s minority at the time the liability policy was issued, Insurer might not be bound on the contract of insurance. Actually, the effect of a contract entered into between an infant and an adult is that the contract is voidable by the infant but binding on the adult. Thus, there is no question that Tortfeasor has rights under the liability policy. (B) assumes that Tortfeasor’s minority constitutes a defense. As explained above, this is incorrect. (C) is incorrect for the same reason.

Answer to Question 11

- (A) If both parties knew of Carpenter’s schedule limitation at the time the contract was entered into, the supervening flood would discharge the duty to perform by impossibility, because no one could have performed during the month of March. The requirement that the impossibility must arise after the contract was entered into has been met. Since the impossibility is temporary, it could be argued that the impossibility only suspends contractual duties rather than discharging them. However, if it was specifically understood that the only time for performance was the month of March, then the contract should be discharged by impossibility. (B) is wrong because this would actually argue for a continuing duty on the part of Carpenter to make the repairs. (C) is wrong because it would not be relevant. With no additional facts, Carpenter could have begun performance in January and incurred no extra costs. (D) is wrong because it does not speak to whether Carpenter could have performed either before or after March.

Answer to Question 12

- (D) On March 12, Adams terminated his offer by communicating his revocation to the offeree before Dawes had accepted. Since the revocation was directly communicated to the offeree, it was immediately effective. Because the offer was revoked, Dawes no longer had any power of acceptance. (A) is wrong because Adams’s assurance did not create an option contract. Dawes gave no value for an option contract, and Adams did not assure Dawes that the offer would remain open to her personally until March 14, but only that the offer would remain open generally until that date. (B) is wrong because Adams’s failure to sell the car is of no import. Adams’s statement clearly communicated the intent to revoke the offer and thus terminated the offer to Dawes. (C) is wrong because even if Dawes had tendered the \$3,000 on March 13, Adams need not have conveyed the automobile because he had already terminated the offer.

Answer to Question 13

- (C) Carver had no duty to disclose to Page the true value of the stock. If, however, Carver had represented that the stock was not worth more than \$6 a share, this would have constituted material misrepresentation and no contract would result. (A) is wrong because Carver’s knowledge of the true value did not create a duty to disclose that knowledge. (B) is wrong because there was no

466. RELEASED QUESTIONS

duty to inform Page of the true value of the inventory. (D) is wrong because if Carver had misrepresented the value of the stock, availability of Chemco's financial statement to Page would not relieve Carver of liability.

Answer to Question 14

- (A) Since the contract stipulated F.O.B. Singer's place of business, the risk of loss passed to Byer on January 30 when Singer placed the chairs on board a carrier. Thus, the loss of the chairs must be borne by Byer, and Singer is entitled to the contract price. Wheeler, as Singer's assignee, is entitled to the contract price. (B) is wrong as this is the measure where the buyer refuses the goods and the seller then resells them to someone else. Here, since the chairs do not exist any more, the measure of damages would be the entire contract price. (C) is wrong because the contract stipulated F.O.B. Singer's place of business. If it had not so stated, the statement in (C) would be correct. (D) is wrong because, absent circumstances suggesting otherwise, a clause prohibiting the assignment of "the contract" will be construed as barring only the delegation of the assignor's duties, not the assignment of the right to receive payment.

Answer to Question 15

- (D) In a contract that specifies that delivery is F.O.B. (free on board) a particular point, the F.O.B. point is the delivery point. If the contract is F.O.B. the seller's place of shipment, the seller need only, at his expense and risk, put the goods in the hands of the carrier. If the contract is F.O.B. destination, the seller must, at his expense and risk, tender delivery of the goods at the designated destination. Here, the risk of loss had passed to Byer because the contract specifically stated that delivery was to be F.O.B. Singer's place of business. (A) and (B) are incorrect because, as explained above, the terms of the contract establish that the risk of loss was not on Singer. (C) is wrong because Singer had already performed by delivering the chairs to the carrier.

Answer to Question 16

- (D) No contract was formed between the parties because Plummer gave Ohner a counteroffer rather than an acceptance. If the language had been different, this might have been an acceptance conditioned on higher payment, but given the wording, there were no clear words of acceptance. The making of the counteroffer made acceptance of the original offer impossible, and since Ohner never accepted the counteroffer, no contract was formed between the parties. (A) is wrong because at that point Plummer no longer had power of acceptance on the original offer. (B) is wrong because if Plummer's writing had been a valid acceptance, it would have been valid upon posting under the mailbox rule. (C) is wrong because Ohner's original offer was to be accepted by reply rather than by conduct, and it terminated when Plummer made his counteroffer.

Answer to Question 17

- (A) A condition precedent is one which must occur before an absolute duty of immediate performance arises in the other party. Here, because performance was expressly conditioned upon Ohner's obtaining a loan and since that loan was refused, no duty to perform exists. (B) is wrong because the agreement was made before the signing of the contract. (C) is wrong because the agreement does not contradict and is in addition to the meaning of the written contract. (D) is wrong because Ohner is not attempting to deny the validity of the written agreement.

Answer to Question 18

- (D) Parties to a contract may modify it by mutual assent. While consideration is necessary to modify

a contract, courts usually find consideration to be present in that each party has limited his right to enforce the original contract on its own terms. On May 3, the parties modified the original contract by making other arrangements for payment which were then met. This modification served to discharge the terms in the original contract regarding payment, so Neese has no claim to the \$5,000. (A) is wrong because even though Neese was an intended beneficiary of the contract, her rights in it had not vested when the modification was made on May 3, because she had not yet learned of the contract. (B) is wrong because the contract was not assigned to Neese. Rather, she was an intended beneficiary of the contract. (C) is wrong because an intended beneficiary need not furnish any consideration, so long as the original contract is supported by consideration.

Answer to Question 19

- (C) Miller's strongest argument is that since the contract, by its own terms, could not be performed within a year, it was subject to the Statute of Frauds and should have been in writing. Since it was not, it is void under the Statute of Frauds. (A) would be a possible argument, but it is not as strong as the Statute of Frauds argument. Further, it would probably fail as there does appear to be manifest intent to contract. (B) is wrong because if there was a valid contract, it would not have been terminated by Gray's death. Rather, Gray's estate would have been liable for the monies owed. (D) is wrong because this was not a divisible contract.

Answer to Question 20

- (B) Esther's argument would be that her hard work academically constituted her consideration for the agreement. It is not required that consideration be economic in nature. (A) is wrong because if the only defense is lack of consideration, Esther should keep arguing on contractual terms. Even in arguing under the doctrine of promissory estoppel, Esther would have to establish that she relied on the promise to her detriment. (C) is wrong because the "bonus" provision was an integral part of the contract. (D) is wrong because there is no legal duty to try one's hardest in academic pursuits, so Esther had no preexisting duty to excel.

Answer to Question 21

- (C) Since Baker contracted for 100 bushels on August 1, Zeller had a contractual duty which was breached by the tendering of only 95 bushels. Baker has a cause of action for that breach. (A) is wrong because substantial performance does not excuse total performance of contractual duties. (B) is wrong because discharge by impossibility only occurs where impossibility is objective. The fact that Zeller only had 95 bushels created a subjective rather than an objective impossibility of performance, and thus did not excuse his breach. (D) is wrong because Baker was entitled to performance on August 1.

Answer to Question 22

- (C) Under Article Two of the U.C.C., Selco's notice of May 10 would be considered an action which increases the risk of nonperformance, but does not clearly indicate that performance will not be forthcoming. Thus, it will not immediately be treated as a repudiation. The notice constitutes reasonable grounds for insecurity, entitling Byco to demand adequate assurance of due performance. Until Byco receives such assurance, it may suspend its own performance. (C) is the only answer embodying these principles. (A) and (B) are incorrect because they treat Selco's notice as an anticipatory repudiation. (D) is incorrect because it implies that Byco may not suspend its own performance until receipt of adequate assurances.

468. RELEASED QUESTIONS

Answer to Question 23

- (D) Selco's notice of June 10 made it clear that it was unable or unwilling to perform. In such circumstance, the aggrieved party may: (i) await performance for a commercially reasonable time; (ii) resort to any remedy for breach even though he has also urged the other party to perform; or (iii) suspend his own performance. The repudiating party may, at any time before his next performance is due, withdraw his repudiation unless the other party has canceled, materially changed her position in reliance on the repudiation, or otherwise indicated that she considers the repudiation final. From the foregoing, (A), (B), and (C) are clearly correct statements of the parties' legal status after June 10. (D) is an incorrect statement (and, thus, the correct answer) because, in actuality, Byco may assert its cause of action immediately, without giving Selco a commercially reasonable time to perform.

Answer to Question 24

- (D) Where the parties to a contract express their agreement in a writing with the intent that it embody the full and final expression of their bargain, any other expressions made prior to or contemporaneous with the writing are inadmissible to vary the terms of the writing. This is the parol evidence rule. In this case, the memorandum clearly states the time of repayment as September 1. If Vault were permitted to prove Kernel's oral commitment to repay the loan by July 1, this would be permitting the introduction of an expression prior to the writing, to vary the terms of the writing. (A) is incorrect because the parol evidence rule bars evidence of the oral agreement regardless of whether such agreement was supported by consideration. (B) is incorrect because the memorandum contains no ambiguity requiring further exposition of the parties' intent. (C) is incorrect because the preexisting duty rule relates to the issue of consideration, which is not at issue here.

Answer to Question 25

- (D) The Statute of Frauds provides, *inter alia*, that a promise to answer for the debt or default of another must be in writing, except where the main purpose of the promisor is to serve a pecuniary interest of his own. Gritz's oral promise to guarantee the loan falls within the ambit of the Statute. Proof of such promise is barred, regardless of whether it was supported by separate consideration. Thus, (C) is incorrect. (A) is incorrect because Gritz signed the memorandum in his capacity as president of Kernel, not in an individual capacity. (B) is incorrect because Gritz, as president of Kernel, appears to be a mere employee, not someone with an ownership interest. There is no indication that Gritz will benefit from the loan.

Answer to Question 26

- (B) Specific performance is appropriate where the legal remedy is inadequate. The legal remedy is inadequate where land is the subject of the contract. Although theoretically the seller of land will be fully compensated by money damages, the courts will usually grant specific performance to the seller, because land is considered unique. Thus, (A) is incorrect. Although Bard did not have title to Broadacres at the time he entered into the option contract with Cutter, he did own the option to buy the property. By exercising his option under his agreement with Osif, Bard could have obtained title to Broadacres. This, in turn, would have enabled Bard to convey to Cutter, if the latter exercised his option. Thus, Bard could have been compelled to perform. Because Bard is able to perform, and Cutter has exercised his option for purchase of the land, the case is an appropriate one for specific performance. Only (B) reaches this conclusion.

Answer to Question 27

- (D) Prodigal was a third-party beneficiary of the original Mater-Vault deposit agreement. A third-party beneficiary's rights do not vest (*i.e.*, are modifiable) until he: manifests assent to the promise, brings suit to enforce the promise, or materially changes position in justifiable reliance on the promise. None of these vesting acts occurred before the modification here; in fact, Prodigal did not even know of the first contract until after the modification. Thus, his rights had not vested, and the terms of the second Mater-Vault deposit agreement control the disposition of the funds. Thus, (A) is incorrect. (B) is incorrect, because even if Prodigal were an assignee, this gratuitous assignment would be revocable. (C) is incorrect because Prodigal's rights could have vested without obtaining possession of the passbook.

Answer to Question 28

- (C) This question involves an assignment. Generally, a gratuitous assignment is revocable. However, an assignment is irrevocable if a token chose involving the rights to be assigned (*e.g.*, a savings account passbook) is delivered. In such a case, the assignor loses both the right and the power to revoke. (C) is the only alternative that embodies these principles. (A) and (B) are wrong because they are based on the revocability of the gift. (D) is wrong because there is no showing of detrimental reliance on the part of Prodigal. Thus, there is no estoppel.

Answer to Question 29

- (D) Where the other party's words, actions, or circumstances make it clear that she is unwilling or unable to perform, the aggrieved party may, *inter alia*, resort to any remedy for breach. By informing Toy Store that the shaft cannot be repaired or replaced until January, Fido has made it clear that it is unable to perform by the agreed-upon date of November 15. This is a material breach, because the contract indicates that delivery must be made in time for the Christmas shopping season. Thus, Toy Store is entitled to bring an action for damages. Thus, (B) is incorrect. (A) is incorrect because performance by January does not satisfy Fido's contractual undertaking. (C) is incorrect because, although Fido's night supervisor may have been negligent, it is clear that the appropriate cause of action against Fido is based on breach of its contractual agreement to deliver the dogs by November 15.

Answer to Question 30

- (A) An assignment of "the contract" or an assignment in similar general terms is an assignment of rights and, unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is also a delegation of performance of the assignor's duties. Here, the October 5 assignment constituted an assignment for security, pursuant to which only Fido's rights, not its duties, under its contract with Toy Store were transferred. (B) is incorrect because even if the October 5 transaction had been filed, this would not change the fact that High Finance had not assumed Fido's duties under the contract. (C) is incorrect because Toy Store was never intended to benefit from this assignment for security. (D) is incorrect because High Finance was not substituted as a new party in place of Fido, nor did Toy Store consent thereto, both of which are requirements for a novation.

Answer to Question 31

- (C) A contract entered into by a minor is voidable at his election. Upon reaching majority, the minor may affirm, *i.e.*, choose to be bound by the contract. If he retains the benefits of the contract after

470. RELEASED QUESTIONS

reaching majority, he is liable for the fair market value of the goods. Here, Ohm, who contracted to pay for the television while still an infant, could have chosen to avoid the entire contract. However, upon reaching majority, Ohm not only retained the set, but expressly affirmed the contract to the extent of \$300. Therefore, Stereo may recover against Ohm on the contract, but only to the extent that he has chosen to be bound (\$300). Thus, (C) is correct. (A) is wrong because Ohm affirmed the contract after reaching 18 and so must pay for the set. (B) is wrong because Ohm expressly agreed to pay more than fair market value. (D) is wrong because Ohm was not liable on the contract made while he was a minor.

Answer to Question 32

- (C) If Ann loses it will be because there was a novation. A novation occurs when a new contract substitutes a new party to receive benefits and assume duties that had belonged to one of the original parties under the terms of an old contract. All the parties must agree to the substitution. A novation discharges the old contract. The elements of a valid novation are: (i) a previous valid contract; (ii) an agreement among all parties, including the new party to the new contract; (iii) the immediate extinguishment of contractual duties as between the original parties; and (iv) a valid and enforceable new contract. When lessor Ann wrote to Carolyn agreeing to accept rent and Carolyn began to do so, a new contract was formed, and Ann's rights against Brenda were extinguished. (A) is incorrect because laches is not available here. Laches is an equitable defense available when a party delays in bringing an equitable suit and the delay prejudices the defendant. The action here (for back rent) is at law, not equity. Moreover, nothing in the facts indicates that Ann delayed in bringing her action. Thus, laches is not available. (B) is incorrect because there was no accord and satisfaction. An accord occurs when the parties to a contract agree to substitute a different duty for an existing duty under the contract. Satisfaction occurs when the new duty is performed. There was no new duty here; rather, the parties agreed to substitute a new party under an existing contract (a novation). (D) is incorrect because attornment arises when the tenant agrees to accept a new landlord, and here Ann remained the landlord at all times.

Answer to Question 33

- (B) Quark's best defense is that the description is too indefinite. Specific performance will not be granted unless there is an enforceable contract. For a contract for the sale of land to be enforceable, there must be an adequate description of the subject property. A description of "five acres" from a 100-acre tract is not sufficient because it does not describe which five acres were intended. Thus, specific performance will not be available. (A) is incorrect because the option agreement was a term of the contract between Quark and Furrow. As such, it was fully supported by the consideration (payment of the rent) on the contract. It was not an additional agreement requiring further consideration. (C) is incorrect because a condition precedent is one that must occur before an absolute duty of immediate performance arises in the other party. The survey was not such a condition. When Furrow tendered the \$10,000 for the five acres, Furrow had a duty to perform. Nowhere in the contract itself, or extrinsically, is there an indication that Furrow's option may not be exercised until a survey is made. (D) is incorrect because the option term of the contract is a part of the written contract and does not require proof via parol evidence.

Answer to Question 34

- (A) Quasi-contract is the best theory because it is the standard remedy to avoid unjust enrichment in the case of a failed contract. Here, Furrow did not intend to gratuitously confer a benefit on Quark, but rather he conferred the benefit in reliance on Quark's promise that Quark would convey five acres to Furrow. If Quark were allowed to keep the benefits under such conditions,

he would be unjustly enriched. (B) is incorrect because conversion deals with the wrongful taking or retention of chattels. Here, the fruit trees became part of the land and so were not chattels. Moreover, it was not wrongful for Quark to keep the trees since they were affixed to his property. (C) is incorrect because resulting trusts arise only where an attempted trust has failed. There was no attempt to create a trust here. (D) is incorrect because the general rule is that at the end of a lease, the owner is entitled to keep any improvements that the tenant has made that have become securely affixed to the premises. Retaining such property does not imply a promise to pay for the improvements.