

Constitutional Literacy

Answer Key to the Workbook Questions

Note to Parents and Teachers

For many of the questions in the *Constitutional Literacy* workbook, it is possible to have an answer that differs from the suggested answer but still deserves full or partial credit. If you have watched the series and read the book, you will generally be able to judge for yourself whether a student's answer is viable. But I would encourage you to tell your students that if they believe that their answer deserves credit, they should indicate the passage on the DVD or in the workbook that justifies their answer. You can evaluate their claim. Allowing students this kind of opportunity greatly increases their critical thinking skills.

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Episode 1

Introduction to the Constitution

Question 1

When we become aware of a gap between the requirements of the Constitution and the actions of our government, what is our responsibility as enlightened citizens?

Answer: We have a duty to act to ensure that our leaders follow the Constitution as written. Citizens have the most influence over their elected officials – the president, members of the House and Senate, and state legislators. We can tell them that we expect them to follow the Constitution by contacting them regarding specific pieces of legislation. If they don't follow the Constitution as written, it is our duty to replace them in the next election with candidates who will.

Question 2

What are the three aspects of constitutional knowledge?

Answer:

- 1. What does the Constitution actually say?*
- 2. What did the Founding Fathers mean by the words of each of the phrases and clauses?*
- 3. In the years since the drafting and ratification of the Constitution, how has the Supreme Court ruled on various parts of the Constitution?*

Question 3

Of the three aspects of constitutional knowledge listed above, one area of study (or, more specifically, our motive for studying that area) is quite a bit different from the other two. Explain the difference.

Answer: When examining the first two aspects – the text of the Constitution and the original meaning of the language for the Founding Fathers – we are seeking to determine what the Constitution really means. When examining the Supreme Court’s decisions, however, we do not necessarily view their conclusions as being an accurate interpretation of the Constitution. We read the Supreme Court decisions to determine whether the justices have been faithful to the original meaning of the Constitution.

Question 4

Why can a private citizen never violate the Constitution?

Answer: The Constitution does not control the actions of private citizens. The Constitution grants power to various agencies of government, limits that power, and secures the rights of people against abuses by the government. Only the government or a person acting with governmental authority can do something that is unconstitutional.

Question 5

What does it mean to say that the government has no rights?

Answer: Governments never have rights. Governments have authority. Either the government is acting within its authority or it is acting beyond the scope of its authority. When it acts beyond its authority as set forth in the Constitution, it has acted unconstitutionally.

Question 6

Explain the difference between the two kinds of unconstitutional acts.

Answer: The first kind of unconstitutional act involves the government acting beyond its authority. The second kind of unconstitutional act involves the government violating the constitutional rights of one or more persons. The first case is a matter of the government staying within its appointed limits. The second case is a matter of the government staying out of the "protected space" of American citizens.

Question 7

Why did Hamilton and the other Federalists believe that the Bill of Rights was unnecessary? Do you agree with him?

Answer: Hamilton and the other Federalists believed that the governmental limitations originally established by the Constitution were sufficient to protect the rights of citizens; in their view, if the government stayed within its constitutional limits, citizens would not have to worry about their rights ever being violated.

Episode 2

Article I, Section 1

Question 1

Look at the phrase “herein granted.” Who grants the legislative powers that Congress exercises?

Answer: The American people do. This is determined by reading Article I, Section 1 in light of the Preamble.

Question 2

How does the colonists’ concern about representation relate to Article I, Section 1 of the Constitution?

Answer: The taxes imposed on the colonists were imposed by a body that did not derive its power from (and was not accountable to) the colonists themselves. The colonists believed that the only just source of legislative power came from the people themselves or their elected legislative representatives.

Question 3

To what body have the American people – through the Constitution – delegated the power to make laws?

Answer: The United States Congress. This is, of course, only applicable to laws on the federal level. State constitutions delegate legislative power to state legislatures and various levels of local government.

Question 4

What does it mean to say that this body holds this power in “trust”?

Answer: A body that exercises power as a trust uses that power to benefit the people who entrusted the body with that power. Congress is supposed to use its legislative power not for its own benefit, but to benefit the American people.

Question 5

What language would Thomas Paine use to describe any entity besides the U.S. Congress making laws for the United States?

Answer: Paine would describe that entity as a usurper or a tyrant.

Question 6

What is really at stake when bureaucrats or judges hand down edicts that have “the force and obligation of a law”? What is the big deal?

Answer: Bureaucrats and judges aren't directly answerable to the American citizenry the way legislators are. They can't be thrown out in the next election. These are examples of tyranny.

Question 7

If “today always trumps yesterday,” why is it not acceptable for today's judges to overrule yesterday's legislators?

Answer: Today's leaders from each branch of government are given the power to lawfully change the decisions lawfully made by that branch. Today's legislators may change the laws passed by yesterday's legislators. Today's judges may overrule decisions made by yesterday's judges. When we use the Article V process properly, the people of today can overturn the constitutional rules established by the people of yesterday. But what is

improper is for judges of today to usurp either the power of the legislators or the people to just change laws according to their own whims.

Episode 3

Judicial Review and Original Intent

Question 1

What, according to Article VI, is the supreme law of the land?

Answer: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

Question 2

If a law passed by Congress is consistent with the Constitution, is it considered to be part of the supreme law of the land?

Answer: Yes. Such a law would be made "in pursuance thereof."

What about a law passed by Congress that is inconsistent with the Constitution? Is it to be considered part of the supreme law of the land?

Answer: No.

Question 3

Assuming that none of the laws conflict with the U.S. Constitution, circle the law that prevails in each of the conflicts described below (correct answers are underlined and italicized):

- A local law vs. *a state law*
- *A federal law* vs. a state law

- A law passed by Congress in 2013 vs. a law passed by Congress in 1813
- A law passed by Congress in 1813 vs. a law passed by a state legislature in 2013

Question 4

According to Article VI, who judges whether a state law or even a state constitution is in conflict with the U.S. Constitution?

Answer: State judges are explicitly bound to follow the U.S. Constitution instead of their state laws and state constitutions according to the language of Article VI. Federal judges can occasionally hear cases about the constitutionality of state laws (that is, whether the state laws violate the U.S. Constitution). Federal judges must follow the same rules in such circumstances.

Question 5

What are the two most important primary sources for discovering what the language of the Constitution meant to the generation who wrote and ratified it?

Answer: Transcripts of the Constitutional Convention and transcripts of the state ratifying conventions.

Question 7

In the video, I discuss three primary sources that demonstrate the original intent of the Supremacy Clause in Article VI. What are those three sources?

Answer: a) Oliver Ellsworth's remarks from the Connecticut Ratifying Convention, b) James Wilson's remarks from the Pennsylvania Ratifying Convention, and c) Federalist Paper No. 78. These all show that the Founders believed that judges would have the power and duty to declare laws to be unconstitutional if the law violated the rules of the Constitution.

Lesson 4

The Powers of Congress

Question 1

According to the Tenth Amendment, if a power is not expressly granted to Congress, who has that power?

Answer: Either the states or the American people.

Question 2

Why doesn't the Constitution give Congress the power to punish murder and robbery?

Answer: The Founders believed that criminal laws were more appropriately handled at the state and local level.

Question 3

If the Constitution doesn't give Congress the power to punish murder and robbery, why does it give Congress the power to punish counterfeiting and high-seas piracy? Did the Founders consider counterfeiting to be a more serious crime than murder?

Answer: Congress was given the exclusive power to regulate our system of coinage (money), and counterfeiting is a crime against that power. Piracy on the high seas is a crime in a zone where Congress has exclusive power (control of our military and international affairs). The Founders gave Congress criminal authority to protect the areas of its jurisdiction.

Question 4

According to Joseph Story, what were the two reasons that the Founders used for deciding which powers it gave to Congress? (NOTE: We shouldn't assume that the list is flexible. The Framers made permanent assignments of power to Congress. Congress can't just assume that it has the ability to add to its powers whenever these theories might warrant it.)

Answer: Congress was given power to legislate on topics where a) individual states were not viewed as competent to legislate, and b) state-by-state legislation would interrupt the harmony of the United States. This should be understood as the reasoning behind the allocation of power, not an excuse for Congress to add new powers to its authority.

Question 5

It is extremely rare for the Constitution to explicitly call for concurrent jurisdiction. Identify one instance (now repealed) in which the Constitution did call for it.

Answer: The Eighteenth Amendment (a.k.a. Prohibition), which banned the sale of alcohol for consumption. It gave both Congress and the states the power to legislate to enforce Prohibition.

Question 6

In public education, there are three levels of concurrent jurisdiction. For the public schools where you live, identify the three government entities (at the local, state, and federal) that exercise jurisdiction.

Answers will vary but should be along the lines of the county or city board of education, the state department of education and the U.S. Department of Education. Some states – New York, for example – have four or more levels of control.

Question 7

What is the connection between concurrent jurisdiction and our ballooning national debt? How would exclusive jurisdiction help solve this problem?

Answer: Concurrent jurisdiction means there's a lot of duplication and redundancy in government, which means extra governmental expense.

Episode 5

The Commerce and General Welfare Clauses

Question 1

What three kinds of commerce does Congress have the power to regulate according to the Commerce Clause?

Answer: Commerce with foreign nations, commerce between states, and commerce with the Indian tribes.

Question 2

What is the main purpose of the Commerce Clause as regards commerce between states?

Answer: To ensure that states do not erect trade barriers with other states, in order to preserve a nation that allows trade freely across state lines.

Question 3

Which of the following activities can Congress regulate according to the Commerce Clause? (Circle the correct answers.)

The correct answers are:

Exporting grain to Japan

Importing electronics from Japan

Shipping fishing poles from a factory in Iowa to Walmart stores across the country

Transporting crude oil from Texas to a refinery in Louisiana

Trucking gasoline from a Louisiana refinery to gas stations throughout the country

Question 4

Why does the Commerce Clause not give Congress any power to regulate what happens either on a chicken farm or in a chicken slaughterhouse?

A chicken farm, like a chicken slaughterhouse, exists in a single locality; its activities, therefore, are not interstate activities. (The shipping of chickens from one state to another is another matter.)

Question 5

Which of the three areas above is *not* in line with the original intent of the Commerce Clause? Which phrase used in this ruling significantly broadens the already too-broad phrase “direct effect” from the *Schechter* case?

Answer: “Economic activity that substantially affects interstate commerce.” The phrase “substantially affects” is quite a bit broader than “direct effect.”

Question 6

Does the General Welfare Clause empower Congress to spend on education initiatives? Why or why not?

Answer: No. Education initiatives are in the jurisdiction of the states.

Question 7

Does the General Welfare Clause empower Congress to spend on the space program?

Why or why not?

Answer: Yes. The space program is beyond the scope of an individual state and it is legitimately seen as advancing the general welfare of the whole country.

Episode 6

The Powers of the President

Question 1

Look back at the list of enumerated powers in Article I, Section 8. Which clause is violated when the president sends troops into combat without a formal declaration of war?

Answer: Clause 13 – Congress is authorized to declare war.

Question 2

Which section of the Constitution is violated when the Executive Branch gives orders and regulations that have the force of law? (Hint: This section is the subject of a prior lesson.)

Answer: Article I, Section 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Question 3

Working from the principles outlined above, how does Congress benefit from allowing the president to lead the country into war without a formal declaration of war?

Answer: Congress is shielded from accountability to the voters when they allow the president to usurp their power to declare war.

Question 4

On what grounds was the question in *Doe v. Bush* not a political question but a legal question?

Answer: The questions involved were constitutional questions regarding who has the authority to declare war. The questions were about the lawfulness of the war, not the wisdom of the policy choice. Wisdom questions are political questions, which courts should not answer.

Question 5

In the *Curtiss-Wright* case, the question was whether or not Franklin D. Roosevelt had overstepped his discretionary powers in issuing a ban on international arms shipments. What three factors suggest that in this case Roosevelt did not overstep his bounds?

Answer: a) This was a question of foreign rather than domestic policy, b) it was important for the nation to speak with one voice, and c) Congress had specifically authorized the president's action.

Question 6

In 1984 the Natural Resources Defense Council sued Chevron in connection with recently changed environmental regulations. The environmental group wanted the courts to issue new regulations. The EPA, on the other hand, argued that it had the power to interpret the rules. The EPA argued that it had the power to interpret the rules as it saw fit. What was the third, perhaps most appropriate option – an option that neither side argued for?

Answer: The most appropriate option would have been to recognize that neither the executive branch (the EPA) nor the judicial branch (the courts) had the authority to make rules on the matter. Only the legislative branch (Congress) should legislate (make rules).

Lesson 7

Does the Bill of Rights Apply to the States?

Question 1

In the case of *Barron v. Baltimore*, how was the Supreme Court able to rule in favor of the City of Baltimore without even hearing Barron's side of the story?

Answer: The Supreme Court ruled that the Bill of Rights was not applicable to local governments.

Question 2

Summarize Justice Marshall's argument that the U.S. Bill of Rights did not limit the powers of state and local governments.

Answer: According to Marshall, the whole reason the Bill of Rights even existed was that the state ratifying conventions "demanded security against the encroachments of a central government – not against those of the local governments." In other words, the original purpose of the Bill of Rights was to protect the people (primarily) and the states from the centralized power of the federal government.

Question 3

If the U.S. Bill of Rights does not limit the powers of state governments, where do such limits come from?

Answer: From each state's bill of rights in its own constitution.

Question 4

Read the text of the Fourteenth Amendment below and try to guess which part of the language caused the Supreme Court to decide that the Bill of Rights (but only certain provisions within the Bill of Rights) does indeed apply to the states and not just the federal government:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Answer: There is no "right" answer here, but most would say the first clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Supreme Court actually used the Due Process Clause.

Question 5

Slaughterhouse and *Cruikshank* were both argued within ten years of the ratification of the Fourteenth Amendment. What does this suggest about Congress's intent regarding states and the Bill of Rights when they passed the Fourteenth Amendment?

*Answer: The Supreme Court of the 1860s and '70s presumably was more in touch with the intent of the Congress that ratified the Fourteenth Amendment than Supreme Courts of the twentieth century. The fact that the Supreme Court in *Slaughterhouse* and *Cruikshank* both ruled that the Bill of Rights did not apply to state and local governments suggests that the Fourteenth Amendment was not intended to change this long-standing principle.*

Question 6

Look back at *Barron v. Baltimore* earlier in this lesson. What is the fundamental difference between the Supreme Court's handling of the *Barron* case in 1833 and its handling of the *Gitlow* case in 1925?

Answer: The Supreme Court heard Gitlow instead of throwing it out for lack of jurisdiction, as it did in the case of Barron.

Episode 8

The Establishment of Religion

Question 1

The most faithful and successful opponents of “established religion” were Christians, not atheists. Why was that the case?

Answer: Early opponents of “established religion” tended to be people who took the practice of their faith seriously but differed from the doctrines of those in control. Secular people were indifferent toward religion and not as motivated to oppose the established faith.

Question 2

What is the clearest historical evidence that the Founding Fathers didn’t consider prayer in Congress to be a violation of the Establishment Clause?

Answer: They prayed in the first Congress.

Question 3

The following questions provide guidance as to whether the Establishment Clause should restrict prayer in schools.

- Which body of government is directly controlled by the wording of the Establishment Clause?

Answer: Congress

- Can Congress pray out loud?

Answer: Yes

- Should the First Amendment be more restrictive on state and local institutions than on Congress?

Answer: No. The inference should be that if Congress can pray, then all other agencies of government should also be able to pray.

Question 4

There are really only two kinds of Supreme Court “tests” to interpret the Constitution. Fill in the blanks to describe these tests:

- **Test 1:** The court discovers the original meaning of the phrase as intended by the Founding Fathers (or those who wrote and ratified the later provisions).
- **Test 2:** The Court takes it upon itself to draw lines where the meaning is murky.

Question 5

For each of the following cases, identify which of the two cases above was applied (circle the appropriate test).

Marsh v. Chambers = Test 1

Lemon v. Kurtzman = Test 2

Wallace v. Jaffee = Test 2

Question 6

Why is it impossible for a private person to violate the Constitution?

Answer: The Constitution places limits on the powers of government, not on the rights of individuals.

Episode 9

The Free Exercise of Religion

Part 1

Question 1

How would you summarize the difference between the Establishment Clause and the Free Exercise Clause?

Answer: The Establishment Clause places limits on what the government can do to promote religion, whereas the Free Exercise Clause is designed to prevent the government from invading the beliefs of religious individuals and organizations. Broadly speaking, the Establishment Clause prevents the government from setting up religion, while the Free Exercise Clause prevents the government from tearing down religion.

Question 2

In the *Cantwell* case described earlier this lesson, the Cantwells were charged with violating two different local ordinances. One was an ordinance requiring a permit for door-to-door solicitation (a permit granted by a local official who judged whether or not a religious group was legitimate). The other was an ordinance against disturbing the peace.

- Which one of these two ordinances is unconstitutional on its face?

Answer: The ordinance requiring a permit for door-to-door solicitation.

- Which one of these two ordinances is unconstitutional as applied in the Cantwell case?

Answer: The ordinance against disturbing the peace.

Question 3

On what grounds do even deeply religious people agree that religious freedom cannot be absolute?

Answer: We cannot accept every belief and practice that claims to be based on religious conviction. We could never tolerate religiously motivated child sacrifice, for instance.

Question 4

Why can we not be satisfied with the idea that the “free exercise” of religion refers to freedom to believe and not freedom to act?

Answer: The word “exercise” is about action, not merely belief.

Question 5

What is the central problem with the “substantial burden” test?

Answer: The “substantial burden” test invites a judge to decide a matter that is both highly subjective and religious. How is a judge (or anyone else) qualified to say which of another person’s beliefs are major and which are minor beliefs?

Question 6

What are the two questions that the Supreme Court must answer when applying the “compelling interest” test?

Answer: a) How important is the goal of the law or government program that is in question (is it compelling), and b) Is there a less restrictive alternative available (can the

government achieve its objective in some other way that would not invade the religious rights in question)?

Episode 10

The Free Exercise of Religion

Part 2

Question 1

Justice Scalia arrived at the same decision in the *Smith* case that he would have arrived at if he had applied the Sherbert Test or examined documents from the Founders' generation. Since the drug counselors would likely lose either way, why was it necessary for Scalia to announce a new rule?

Answer: It wasn't necessary. Justice Scalia set a new precedent of ignoring both the precedents of the Supreme Court and the Founders' original intent with regard to the free exercise of religion.

Question 2

Name two surprising things about Scalia's choice to cite *Gobitis* in his decision.

Answer: First, Gobitis had a certain notoriety as a case that resulted in the widespread persecution of Jehovah's Witnesses. Three years later, the Supreme Court did a complete about-face, ruling in West Virginia Board of Education v. Barnett that the Free Exercise clause prohibited the West Virginia State Board of Education from forcing Jehovah's Witness children to salute the flag as a condition of attending public schools. Second, Justice Scalia scarcely mentioned this precedent and misrepresented it when he did, claiming it was decided "exclusively" on the basis of free speech and ignoring the fact that the Court used both the Free Exercise Clause and the Free Speech Clause in reaching its decision.

Question 3

In the case of the San Francisco organist described above, how would that case have been different if it had been argued after the *Smith* decision was handed down?

Answer: After Smith, the church would have lost if the case were exclusively argued on the grounds of free exercise.

Question 4

The RFRA was a direct and pointed response to the *Smith* decision. How were its two major tenets a corrective to Justice Scalia's rationale?

Answer: First, RFRA reinstated the Sherbert test that protected religious free exercise. Scalia had abandoned Sherbert. Second, RFRA allowed religious exemptions from laws that were general and neutral. This answered Scalia's ruling that the free exercise of religion could not be used to challenge the constitutionality of a neutral law of general applicability.

Note: The 2014 Hobby Lobby decision, issued after the publication of your textbook, was based on RFRA. The law requiring employers to pay for abortion insurance was a neutral and general law. But the Supreme Court used RFRA to hold that Hobby Lobby could get a religious exemption.

Question 5

Explain how the "hybrid rights" and "alternative claims" strategies above are inspired by the very Supreme Court ruling they are designed to combat.

Answer: Justice Scalia attempted to re-characterize all prior free exercise victories as hybrids, blending free exercise claims with other constitutional claims. The "hybrid rights" strategy seeks to win cases by doing just that: blending free exercise claims with other constitutional claims. The "alternative claim" strategy is also inspired by Smith.

Since Smith eviscerated free exercise as a legal claim, the alternative claim strategy ignores moves on to other constitutional claims, such as freedom of speech.

Episode 11

Freedom of Speech and Press

Question 1

According to James Wilson, there should be no “antecedent restraint” on the press. But what does Wilson say an author should be held responsible for?

Answer: A person is free to say or publish anything he wants without any need for advance approval by the government. But if he abuses those rights, he can be brought to account either criminally or civilly after the fact.

Question 2

Why are the rules for defamatory statements different for private citizens than they are for public figures?

Answer: The public has a right to know the truth about public figures. The rules are less strict for public figures so that media outlets will have more freedom to tell the truth about them – though, of course, media outlets still cannot legally tell lies knowingly or recklessly disregard the truth.

Question 3

What is “actual malice”?

Answer: “Actual malice” occurs when a person or organization publishes a deliberate falsehood or with a reckless disregard for whether the statement is true or false.

Question 4

What have been the two main obstacles to the punishment of obscenity in the United States? Which of these two obstacles do you think has been the most significant?

Answer: a) In the past there has been some difficulty in defining obscenity – a difficulty resulting in large part from a lack of interest in the Founders' original intent, and b) more importantly, prosecutors have been unwilling to pursue obscenity cases.

Question 5

What are two elements are necessary in order for speech to be punishable as “inciting violence”?

Answer: a) It must be “directed at inciting or producing imminent lawless action,” and b) it must be “likely to incite or produce such action.”

Question 6

What is the appropriate standard for determining whether speech is “hate speech” rather than just offensive speech?

Answer: True hate speech is speech that incites people to imminent lawless action.

Episode 12

Freedom of Association

Question 1

How did the State of Alabama's order to reveal the names and addresses of the NAACP's leaders and members amount to a violation of the freedom of association?

Answer: The State of Alabama wanted to discover the members' names in an effort to discourage and intimidate members of the NAACP.

Question 2

Going back to terminology from a previous lesson, in *NAACP v. Button*, when the Supreme Court struck down the Virginia law prohibiting NAACP lawyers from soliciting litigants, were they saying that the law was unconstitutional on its face or unconstitutional as applied?

Answer: Unconstitutional as applied.

Question 3

What were the competing claims in the Dale case in the New Jersey Supreme Court? (Fill in the blank.)

For the State of New Jersey: The public accommodations law prohibited discrimination based on sexual orientation.

For the Boy Scouts of America: the First Amendment's Freedom of Association protected their right to control their own leadership and membership standards.

Question 4

In *Boy Scouts of America v. Dale* the Supreme Court ruled in favor of the Boy Scouts, but not because they agreed that the Boy Scouts had the right to control their own standards of leadership and membership. On what grounds did they make their ruling?

Answer: They believed the Boy Scouts when they said that admitting homosexual leaders would send a message that they didn't want to send.

Note: This question is designed to make it clear that the Supreme Court didn't want to endorse the idea that organizations have a broad right to control their own standards. Additionally, the Court didn't want to be seen as endorsing the Boy Scouts' rules against homosexual leaders. The Court was afraid to favor strong views of either freedom or morality. Be lenient in grading this question. It can be confusing.

Question 5

What do we mean when we say that the Supreme Court's argument in this case is subjective?

Answer: The justices argument depends on their judgment of the sincerity of the Boy Scouts' position – in other words, it allows the Supreme Court to decide whether an organization's membership policies are appropriate or not – rather than appealing to an outside and objective standard.

Episode 13

The Right to Keep and Bear Arms

Question 1

In your own words, what has been the first question regarding the meaning of the Second Amendment?

Answer: Does the Second Amendment protect the rights of all individuals to keep and bear arms, or does it only give people who are a part of the official government militia the right to keep and bear arms in connection with their service? (Any answer that demonstrates a distinction between an individual's right and the rights of the militia should be considered correct.)

Question 2

We usually speak of the "right to bear arms." But the actual language of the Second Amendment refers to the people's right to "keep and bear arms." Why is this significant with regard to the central question we have been discussing?

Answer: "Bearing" arms could possibly refer only to soldiers who are issued guns that they can then use in a military situation. But "keeping" arms points more clearly to the individual ownership of guns.

Question 3

What phrase from the Second Amendment was key for Justice Scalia in his ruling that the right to bear arms is an individual right?

Answer: The "right of the people," which refers everywhere else in the Bill of Rights to an individual right.

Question 4

If the first question of the Second Amendment debates is whether or not the right to keep and bear arms is an individual right, what is the second question?

Answer: The second question is whether or not the Second Amendment applies to the states. In other words, do state and local governments have the right to enact stricter gun control regulations than the federal government?

Question 5

What fundamental right is behind the Second Amendment right to keep and bear arms?

Answer: The right of self-defense against tyrannical governments.

Chapter 14

The Fourth Amendment

Question 1

The Writs of Assistance amounted to open-ended warrants allowing British officials to enter colonists' homes at any time. According to the Fourth Amendment, what are the standards for issuing a warrant?

Answer: Quoting from the Fourth Amendment: "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Question 2

In each example below, a government official gathers information that is then used to secure a search warrant or an arrest warrant. For each example, check whether the government official has obtained this information by a search. (Remember our working definition of a search: "A search occurs when the government invades an area where you have a reasonable expectation of privacy.")

Note: This question is designed with the understanding that if an illegal search supplies the information used to get a warrant, then the warrant is illegal.

- Walking into a convenience store, a policeman notices drug paraphernalia on the dashboard of a car parked in front of the store. He writes down the car's license plate and applies for a warrant to search the car for drugs. Was looking in the window a search?

Answer: Not a Search

A mini-drone operated by the FBI looks into the uncurtained twelfth-story window of a suspected art thief and sees three van Goghs that have gone missing from a museum. On the strength of this information, the FBI asks for a search warrant. Was looking in the window a search?

Answer: Probably a Search

An undercover officer on a park bench overhears a suspected mob boss shouting threats into his cell phone as he walks his dog. The officer seeks an arrest warrant based on this information. Was listening to the phone call a search?

Answer: Not a Search

A DEA agent hacks into a dangerous drug lord's e-mail account and finds everything he needs to bring down the whole operation. He asks for warrants to arrest the drug lord and all his lieutenants. Was the invasion of the e-mail a search? *Answer: Search*

An FBI agent notices that a known gang member is bragging on Facebook about an assault that landed a member of a rival gang in the hospital. He seeks a warrant to arrest the gang member. Was reading the Facebook account a search?

Answer: Not a Search

An undercover policeman pays the entry fee to attend an illegal cockfight. He asks for a warrant to return the next week and arrest the ringleaders. Was going inside the building a search?

Answer: Not a Search

Question 3

What two things have to be true in order for evidence to amount to probable cause?

Answer: There's enough evidence to conclude it is probable that a) wrongdoing has occurred and b) the person being searched is responsible for that wrongdoing.

Question 4

What are the two exceptions to the rule that it is unreasonable for a government official to enter a private home without a warrant?

Answer: a) If the homeowner gives consent and b) if there are "exigent circumstances" – that is, an emergency requiring immediate government action.

Question 5

What two things have to be true in order for the "exigent circumstances" exception to apply?

Answer: a) There is evidence that there's an emergency justifying immediate government action and b) this evidence of "exigent circumstances" is truly evidence amounting to probable cause and not merely allegations.

Episode 15

Due Process

Question 1

Why are the rules of due process more elaborate in a murder case than in traffic court?

Answer: There is much more at stake for the defendant in a murder case. In normal judicial language, the risks at stake determine how much process is due.

Question 2

The state closes a highway near your house for repairs. It causes you considerable inconvenience and obviously takes away your freedom to drive on that highway. Does the government have to give you a hearing? Why or why not?

Answer: No. Due process applies only when the government is going to deprive you of life, liberty, or property. Making you drive more miles is not a deprivation of either liberty or property.

Question 3

A farmer in Iowa has been driving his own large truck to bring his products to market for several years. Then Iowa passes a law requiring people to take a six-week course in truck safety before they can get a license to drive a truck of this size. The farmer cannot take the course because of his farming duties. Therefore, he will lose his license to drive his own truck. Does the government have to give him a hearing? Why or why not?

Answer: Yes, the government must give the farmer a hearing. The new law is clearly impacting his property rights and his liberty.

Question 4

What do you think the Founding Fathers would think of “due process” being applied to government jobs, government benefits such as Medicare and welfare, and public school attendance?

Answer: They would probably consider these things to be privileges, not property rights.

Question 5

What is the exception to the principle that courts should not legislate?

Answer: Courts should be able to make the rules for the conduct of trials. This is based on the history of the power of courts.

Question 6

What is the exception to that exception?

Answer: If the legislature disagrees with any court rule, it can change it through ordinary legislation.

Episode 16

Property Rights

Question 1

The Fifth Amendment requires that the government pay for property that is taken for public use. The City of Tigard didn't want to pay for the Dolans' land. How were they trying to get it instead?

Answer: The city withheld a zoning permit and tried to force the Dolans to give up part of their property in exchange for the permit.

Question 2

The zoning requirement that the City of Tigard imposed on A-Boy Plumbing was not "roughly proportional" to the impact of the development. On the other hand, the zoning requirement by which Patrick Henry College donated the land for a new turn lane was roughly proportional. Explain the difference.

Answer: In Tigard, the bike path in question had nothing to do with the Dolans' zoning request. Their store expansion wasn't going to result in greater bike traffic. In the case of Patrick Henry College, on the other hand, the turn lane was not only necessary as a result of the rezoning, but Patrick Henry College would benefit from the turn lane quite a bit more than the general public would. So it is appropriate that the college, not the general public, should foot the bill.

Question 3

Why do you think the *Kelo* decision was so universally hated by people of every political persuasion?

Answer: People across much of the political spectrum react strongly when individual property rights are violated. But even the most liberal thinkers, who may not be as concerned about individual property rights, were offended at the way this decision so obviously benefitted corporate interests at the expense of the less privileged and less connected.

Question 4

What is the difference between “public use” and “public benefit”?

Answer: “Public use” refers to specific uses such as libraries, hospitals, schools, parks, etc. In other words, the government will own and operate the buildings erected on the land. “Public benefit” is a much broader term used to describe any general benefit from an increased tax base, from more jobs to private development.

Question 5

Why is “public benefit” such a dangerous justification for a government’s taking of private property?

Answer: “Public benefit” is so broad that it can be used to justify all sorts of takings. Private companies can provide public benefit by increasing economic output. But that was not the original purpose of the power of eminent domain.

Episode 17

Equal Protection

Question 1

The Supreme Court makes it clear that in matters of equal protection, it is necessary to distinguish between arbitrary differences and real differences. Is this an objective standard, or does it allow judges too much discretion to decide cases according to their own personal preferences?

Answer: This is not an objective standard. There's too much potential for the personal opinions of the justices to seep into their decisions using this approach.

Question 2

Strict Scrutiny, Mid-Level Scrutiny, and Minimal Scrutiny have become important categories in the Supreme Court's deliberations related to the Equal Protection Clause. What is the constitutional basis for these three levels of scrutiny?

Answer: There is no constitutional basis for these levels of scrutiny. The Supreme Court just made them up.

Question 3

I said in this lesson that there is "historical justification" for treating racial discrimination with special emphasis under the Equal Protection Clause. What did I mean by that?

Answer: Ending racial discrimination was the major goal of the Equal Protection Clause in the first place, and it's an appropriate goal.

Question 4

In *Regents of the University of California v. Bakke*, the Supreme Court ruled that Bakke had to be admitted to the University of California Medical School. Did that mean that race could no longer be a factor in admissions? Explain your answer.

Answer: Race can still be a factor in admissions, but it has to be one of many factors considered.

Question 5

Match the Supreme Court case to its description:

Said that slaves and descendants of slaves could never be citizens – an idea that was repudiated by the Fourteenth Amendment. *Answer: Dred Scott v. Sanford*

In this case, a white student challenged admission standards that favored black students. *Answer: Regents of the University of California v. Bakke*

Ended the “separate but equal” doctrine. *Answer: Brown v Board of Education*

Established the “separate but equal” Doctrine. *Answer: Plessy v. Ferguson*

While upholding the “suspect classification” doctrine, the Supreme Court ruled in this case that the emergency of war justified the government’s use of internment camps during World War II. *Answer: Korematsu v. United States*

Episode 18

Abortion Rights

Question 1

The abortion debate comes down to a disagreement regarding the rights that are protected under the Due Process Clause of the Fourteenth Amendment – specifically, a right of the mother and a right of her unborn child. If one of these rights is legitimate, then the other cannot be, and vice versa. What are these two rights?

Answer: a) The right of a woman to have an abortion and b) the right of her baby to live.

Question 2

Why do we ask what the term “person” meant in the year 1868? Why is this date relevant to the question of abortion rights?

Answer: 1868 was the year that the Fourteenth Amendment – which contains the Due Process Clause – was ratified. The Supreme Court correctly noted that the Fourteenth Amendment controls the decision of the case.

Question 3

Even pro-life activists can't claim that unborn children are citizens of the United States. An unborn child, by definition, hasn't been born in the United States, nor can an unborn child be naturalized. Does that mean that the Due Process Clause offers no protection to an unborn child? Why or why not?

Answer: The Due Process Clause protects the rights of “any person.” Therefore, an unborn baby has rights as a person even if he or she doesn't have the rights of a citizen. The Citizenship Clause is entirely separate.

Question 4

If a visitor from Canada is arrested for stealing a purse, can we just send her to prison without a trial? Or could we execute her for purse snatching? After all, she is not a citizen.

Answer: The Due Process Clause offers protection to all persons who are actually in the United States, whether or not they are citizens.

Question 5

Between 1791 and 1868, a small but significant change occurred in general attitudes concerning the personhood of an unborn child. What was that change?

Answer: Before that time, it was believed that a baby's life began with "quickening." After that time, it became apparent that a baby was alive (and a person) from the time of conception. This change in perspective came through advances in medical science.

Question 6

In the *Roe* decision, the Supreme Court cited nine cases to justify its ruling. What did these cases share in common?

*Answer: d) They shared nothing in common except that they are part of the Supreme Court's justification for its decision in *Roe v. Wade*.*

Question 7

In *Roe v. Wade*, the Supreme Court made rules pertaining to first, second, and third trimesters of pregnancy. Where did the Supreme Court derive the authority to make these trimester-specific rules?

Answer: The Supreme Court had no legitimate authority to make such rules.

Episode 19

Homosexual Rights

Question 1

Starting in the 1960s, anti-discrimination laws began to restrict employers' freedom to contract—that is, to hire whom they pleased. Employers were not allowed to discriminate on the basis of race, gender, or religion. Each of these three factors corresponds directly to one or more amendment. In the spaces provided, indicate which amendment(s) corresponds to which factor.

Answer:

Race: Thirteenth, Fourteenth, and Fifteenth

Gender: Nineteenth

Religion: First

Question 2

Fill in the blanks:

We used to think that the core question in looking at homosexual rights is this: Does society think that homosexuality is so important that we should change the basic rules of freedom to promote this lifestyle? But today, the core question is whether homosexuals will allow freedom for people who believe that this behavior is immoral?

Question 3

In *Lawrence v. Texas*, the homosexual community tried very hard to get their behavior held to be a fundamental right or a suspect classification so that the highest level of judicial review would be used. Instead, the Court used the lower standard and declared

that the law was unconstitutional because the preservation of morality was not a legitimate basis for any law. Many conservative legal scholars thought this decision was actually worse than if homosexuality had been declared to be a fundamental right. Why do you think that might be?

Answer: The Court said that morality is not a legitimate basis for any law. This is a very troubling and broad ruling.

Question 4

Why were so few (virtually zero) people convicted for violating anti-sodomy laws for engaging in private, consensual acts?

Answer: First, the rules of evidence say that a person cannot be convicted solely on the evidence of a co-conspirator. If an act is done in private, there will be no one else who could provide evidence. Second, because of the rules of the Fourth Amendment concerning searches and seizures, it's impossible for the police to enter a home to search out crimes of this sort unless they have probable-cause evidence that has been presented to a neutral magistrate. And again, unless the behavior is done in some public fashion, no one other than the people involved will ever procure the evidence needed for such warrants.

Question 5

What did I mean when I said that the victory that the homosexual community won in *Lawrence v. Texas* was not the right to be left alone in private? What was the victory instead?

Answer: The victory was that society could no longer condemn homosexual behavior as immoral.

Episode 20

Parental Rights

Question 1

Justice Scalia articulates the difference between his personal conviction and constitutionally protected rights. Explain that difference in your own words.

Answer: Though Scalia believes personally in the right of parents to make decisions about their children's upbringing – and though he believes in the right of a citizen to speak in favor of this issue either in legislative debate or electoral campaigns – he does not believe that the Constitution empowers him as a judge to oppose laws that violate his personal beliefs.

Question 2

What “government interest” was at stake in the Nebraska law forbidding the teaching of foreign languages to children who were not yet in high school? If the Court agreed that this was indeed a legitimate interest, why did they rule the law unconstitutional?

Answer: The compelling government interest was to require American school children to be fully competent in English. The Court held that teaching a Bible class in German would not diminish the students' ability to learn English.

Question 3

What is the difference between a “constitutional protection” and a “political solution”?

Answer: A constitutional protection is ensured by the Constitution and should not be a matter of debate. It should be above politics and above judicial interference. A political solution depends not on a constitutional foundation, but on the election of politicians

who will pass and enforce laws that protect freedoms not protected by the Constitution (or freedoms that have been eroded by judicial activism).

Question 4

The goal of the anti-private school coalition in Oregon was, to borrow a phrase from the justices, to “standardize” American schoolchildren. What is the higher goal and duty of parents, according to the Supreme Court opinion in *Pierce v. Society of Sisters*?

Answer: To “recognize and prepare him for additional obligations” – in other words, to prepare the child for life in a broad fashion.

Episode 21

International Law

Question 1

How would the ratification of these UN treaties violate the principle of self-government?

Answer: These international treaties would override domestic law. As a result, those who make laws for the American people would not be accountable to the American people. This is a fundamental violation of the principle of self-government.

Question 2

If the World Court has essentially no power to enforce its rulings, how do its rulings get enforced at all?

Answer: International law proceeds principally on the honor system, depending on nations to voluntarily keep the promises they have made to other nations. For most nations, the provisions of a treaty are enforceable in a domestic court only when the legislature of that nation passes a law that implements that particular treaty.

Question 3

When it comes to the domestic enforcement of treaty provisions, what is the biggest difference between the United States and the vast majority of other nations? (Hint: It involves the Supremacy Clause.)

Answer: Because of our Supremacy Clause, treaties made under the authority of the United States are part of the supreme law of the land.

Question 4

What is the fundamental difference between a peace treaty, a disarmament treaty, even a migratory bird treaty on the one hand and the human rights treaties of the UN on the other?

Answer: Peace treaties, disarmament treaties, and migratory bird treaties all regulate the way nations treat other nations. This is what international treaties were designed to do. The human rights treaties of the UN regulate domestic matters that should be regulated by domestic law.

Question 5

In the United States, virtually all law concerning parents and children are made at what level? How would the ratification of UN Convention on the Rights of the Child change that dynamic?

Answer: Such laws are made at the state and local level. The UN treaty would override state and local laws.

Question 6

What is the difference between being a signatory to a treaty and being a party to a treaty?

Answer: A nation is a signatory to a treaty if its representatives have signed a treaty. It is not a party to the treaty until its legislature ratifies the treaty. A nation is not bound to obey a treaty until it becomes a party.

Question 7

How does the doctrine of customary international law threaten American self-government, even in cases where the United States has refused to become a party to a UN human rights treaty?

Answer: All nations are bound to obey customary international law whether or not each has consented. The United States agreed to this arrangement when it became a member of the United Nations.

Episode 22

Is the National Debt Unconstitutional?

Question 1

The solution to our debt crisis lies in cutting spending rather than raising taxes. Why is this the case?

Answer: Because all of the money possessed by all Americans would not be enough to pay off all of America's liabilities. In other words, if we were to raise tax rates to 100% of everyone's earnings, the country would still be in debt.

Question 2

What is the difference between the national deficit and the national debt?

Answer: The deficit represents one year's budget shortfall. The debt is the accumulation of unpaid deficits throughout the years.

Question 3

Why do you think politicians keep spending money that they know we don't have?

Answer: Entitlement programs are designed to buy the votes of those who receive the entitlements. Few politicians dare to suggest that we do anything about these federal entitlements lest they face a backlash at the ballot box.

Question 4

How does the national debt violate the principle of securing “the Blessings of Liberty to ourselves and our posterity”?

Answer: The national debt takes away the liberty of our descendants by committing them to financial slavery.

Question 5

How is the national debt a form of “taxation without representation”?

Answer: The debt will have to be repaid with taxes collected from future generations, who have no representation in the legislature that is burdening them with those liabilities.

Question 6

What, according to Washington and Jefferson, is the link between national debt and revolution?

Answer: At some point, they believed, people will say, “We will no longer be enslaved for the spending of our ancestors,” and revolution will be the result.

Episode 23

Was the American Revolution an Ungodly Rebellion?

Question 1

What is the difference between power and authority?

Answer: Power is the raw ability to force another person to do something. Authority is the proper exercise of power. In constitutional terms, authority is power granted by the people over whom the power is exerted.

Question 2

How is the British idea of a constitution different from the American idea?

Answer: The British constitution is unwritten; it is the accumulation of practices and traditions over centuries. The American Constitution is a written document. Consequently, in Britain, the legislature is supreme. In the United States, the Constitution is supposed to be supreme.

Question 3

According to over 150 years of accumulated practice and tradition, who had the authority to levy taxes on the American colonies at the time of the Declaration of Independence?

Answer: The colonial legislatures.

Question 4

Why would Romans 13 come down on the side of the colonists in the question of whether it was lawful for them to oppose the taxes imposed by the British Parliament?

Answer: Romans 13 exhorts believers to obey "authority," not simply to submit to "power." The taxes imposed by the British Parliament may have been an exercise of power, but they were not an expression of authority. In opposing Parliament, the colonists were looking not to disobey authority, but rather, to restore the proper authority that results from self-determination. The colonists were siding with the British Constitution; the Parliament was violating it.

Question 5

In the French Revolution, there was no doubt that the revolutionaries were throwing off the existing ruling class and totally changing the rules. Was the American War for Independence the same kind of "revolution"? Why or why not?

Answer: In the United States, there were existing local governments called colonial governments. These colonial governments objected to the improper assertion of power by other levels of government. Both governments were legitimate in terms of their existence. But the question was which level of government was right concerning the proper allocation of power.

A dispute between levels of legitimate governments is very different from a revolution where some individuals overthrow the existing government. This is not to say that all revolutions are immoral. But it should be clear that the American Revolution was wholly different from the French Revolution in this regard.

Episode 24

Was the Constitution Illegally Adopted?

Question 1

If the end result were a good one, what would it matter if the process by which the Constitution was adopted turned out to be not quite legal?

Answer: If the process by which the Constitution was adopted turned out to be not quite legal, then we are not fully obliged to remain rigorously faithful to its provisions. We should always want to do the right thing in the right way.

Question 2

Congress didn't have the power to call a Constitutional Convention in 1787. Who did?

Answer: The state legislatures.

Question 3

Congress approved the Constitution unanimously and sent it on to the states. How does this suggest that the Constitutional Convention had not exceeded its mandate to revise the Articles of Confederation?

Answer: If Congress were not pleased with the outcome – or more specifically, if the outcome of the convention did not match up with Congress's purposes in endorsing the convention – it would not have approved the Constitution, and certainly not unanimously.

Question 4

Briefly explain why the change from unanimous approval (thirteen states) to 2/3 approval (nine states) did not mean the Constitution was illegally adopted.

Answer: The big change was not in the number of states but in the fact that conventions, not state legislatures, were being asked to ratify the Constitution. Before the conventions could be called, the state legislatures had to agree. All thirteen state legislatures agreed to the new process and called conventions. Thus, the new process was legally approved unanimously.

Episode 25

Reclaiming Our Country

Question 1

What is the difference between saying that our government is not operating “under the Constitution” and our government is not operating “under the Constitution as it was written”?

Answer: Operating “under the Constitution” has come to mean operating under the Constitution as interpreted by the Supreme Court. Operating “under the Constitution as it was written” suggests a commitment to the Founders’ original meaning.

Question 2

In your own words, summarize George Mason’s concerns about the original draft of Article V, which led to the addition of a second, state-centric means of creating amendments to the Constitution.

Answer: Mason feared that the day might come when the federal government became so drunk with power that it could no longer be trusted to check itself. He feared that it would not be safe to leave the ability to initiate amendments for the Constitution solely in the hands of Congress.

Question 3

What are some indicators that Mason’s concerns have indeed come to pass?

Answer: The General Welfare Clause is being used to say that Congress can spend money on anything it wants. The Commerce Clause is being used to justify crushing

regulations. And the Supreme Court has come untethered from the original meaning of the Constitution and is checked only by the justices' sense of self-restraint.

Question 4

Why is the Convention of States movement focusing on forty states?

Answer: Ten of the fifty states would be a very hard sell due to their political climate. That leaves forty states. But it would only take thirty-four states to make a Convention of States possible and thirty-eight states to ratify proposed amendments.

Question 5

In your own words, explain how three million people – less than one percent of the American public – could effectively make the Convention of States happen.

Answer: There are four thousand legislative districts in the forty target states. To push through a proposal to call a Convention of States would require the votes of a simple majority of the legislators in thirty-four states. If 75 percent of the legislators are getting strong messages of support from their constituents, it is very likely that a simple majority will support a Convention of States. Thus, 75 percent of 4,000 districts equals 3,000 legislative districts. A thousand people can have a huge impact in one legislative district. Three thousand districts times one thousand constituents would give us three million involved Americans.