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THE SUPREME COURT'S USE OF HYPOTHETICAL QUESTIONS AT ORAL ARGUMENT

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There was a time, not many years ago, when a lawyer could feel reasonably confident as he approached oral argument in the United States Supreme Court if he had thoroughly absorbed the record in his case and had obtained a working knowledge of all relevant cases. No longer. Today, an advocate must, more than ever before, prepare himself for a stream of hypothetical questions touching not only on his own case but on a variety of unrelated facts and situations.

To illustrate the point, I have picked a series of hypotheticals from oral arguments chosen somewhat at random and reaching back over the last several years. Hopefully, these will prove an aid to the advocate facing his first, as well as his fifteenth, argument before the Court. Some of the hypotheticals should have been expected from Justices—and were not. Some were so remote and complex that hardly anyone could have foreseen them. Yet a few obviously were foreseen, and the answers prepared in advance. The necessity to foresee and prepare is why I urge at least one, and possibly several, moot courts before argument in the Supreme Court. Even the most junior associate in a firm can sometimes develop a hypothetical situation that the advocate, in the midst of busy preparation, is not able to anticipate. Finding the answer not only will help in preparing for similar questions when the real argument comes but will force the advocate to become used to answering hypotheticals generally.

I recall a moot court some years ago when a young associate in my office came up with a hypothetical that had never occurred to me and for which I had no answer. It was an extremely difficult one. I stewed over it for a week before finally developing an answer that satisfied me. On argument day, I had completed my presentation and was about to sit down when Justice Stevens said, "By the way, counselor, what if * * *," and he pro-

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ceeded to ask the very hypothetical previously posed by my associate. My ready response belied the fact that if that same question had been asked of me without preparation, I would have been—at best—tongue-tied.

In the cases that follow, I have, by and large, listed questions only. Answers, in fact, have been included only where they are necessary to bridge the gap between questions or where they are particularly significant for some reason peculiar to themselves. (In one case, for example, the answer is included to show that the advocate had precisely anticipated the hypothetical posed to him.) I recognize that it is somewhat frustrating to read questions without answers, but the purpose of this exercise is not to show how (or how not) to give answers but rather to demonstrate the *type* of inquiries the Justices are engaged in during this most recent period of the Court's development.

The reader may well wonder why the Court is placing such a heavy emphasis on hypotheticals—as opposed to the specifics of the cases confronting the Justices. There could be several answers. One may be that during prolonged periods of listening to argument, good and bad, the Justices are simply reaching for anything that varies the routine, dispels the gloom, enlightens the proceedings, or adds lustre to an otherwise unvarying occasion. A more generous view is that the Court is testing the outer reaches both of what the advocate is asking it to declare and of what the Court may, in fact, have to decide. "If we take this tack," the Justices are asking, "how will it affect a different set of facts?" "What happens if we add this or that variant?" "What are the outer limits of what you are proposing?" "What will the next case look like?" "And the next?" "How narrowly must we construct our decision in order to avoid all kinds of problems?" "Or how broadly must we fashion it in order to cover the essential points that may be troubling the lower courts?" It is a testing, a probing, an evolving process that hopefully will illuminate the whole.

Then too, many hypotheticals are not addressed to counsel at all but to fellow Justices. A hypothetical from one wing of the Court to another may be a way of saying: "Look, if you start down that road, this is where it will lead you." Or: "Do you really want to go as far as I think you are heading, even if you have the votes?"

In any event, regardless of *why* hypotheticals are being used with increasing frequency, they have indeed become a way of life in today's Court, and no serious advocate can consider himself or herself even remotely prepared unless this aspect of the argument has been faced and dealt with. And so we turn to the cases, and their sometimes sharp, sometimes convoluted questions.

I. THE HYPOTHETICALS

In *Board of Education v. Pico*,[1] the Court faced for the first time the issue of whether a public school board, in order to promote the community's "moral, social, and political values," could remove books which it found to be objectionable from the shelves of junior and senior high school libraries. The books removed in this case included *The Naked Ape, Soul on Ice, Slaughterhouse Five*, and *Best Short Stories by Negro Writers*. The Board's decision was attacked by students as being in violation of their First Amendment rights. Among the questions asked of counsel:

> Q. Suppose they [the Board] barred the St. James version of the New Testament, and the Constitution of the United States, and the Declaration of Independence?
>
> Q. * * * Suppose some of these books were assigned as outside reading, and the children were told, you can get it in the public library?
>
> Q. Suppose you had a book, counsel, that had been the subject of criminal proceedings, and conviction of someone in connection with that book had been sustained, a criminal conviction. Would you say that the book comes under this broad authority you suggest?
>
> * * *
>
> Q. * * * [E]ven though it has been found to be criminally pornographic, obscene?
>
> Q. * * * Would you say that it would be appropriate to remove all books in the library that contained any disparaging remarks about blacks or Jews?
>
> Q. Supposing they just removed one book. Would there be ever any federal review of removal of one book?
>
> * * *
>
> Q. Well, supposing the one book you removed is removed because it has disparaging remarks about Jews and blacks in it?
>
> Q. If the board chose to remove books containing favorable references to Republicans because it was a good Democratic board, we should not let that go on to be examined?
>
> Q. Do you concede that when a school board puts a book in its library, it puts a stamp of approval on that book?
>
> Q. Is it your position that a school board could remove a book from the library solely on the grounds that it was offensive to a particular religion?
>
> Q. Let me put to you in that connection the question I put to

1. 457 U.S. 853 (1982).

your friend. Suppose that a particular book is involved which has already been found to be in violation of the criminal law as obscene, pornographic. Could that be eliminated from the library?

* * *

Q. Why is the judgment of the jury in that case determinative other than theoretically it expresses the community's standard? Is that your theory?

Q. * * * [U]nder New York law, if a school board took on the responsibility which it has been suggested they haven't the time to do it, but suppose they did take the responsibility and said, here are 2,000 books that should be in the library, and no books are to be added except if they are cleared with the school board. Could they lawfully do that under New York law?

Q. Suppose it were agreed that the school board decided to take off the shelves all books that they thought were vulgar, and that there is an agreement that, yes, these books are vulgar by anybody's standards. Your position is, I take it, that those books could not be removed consistent with the First Amendment.

* * *

Q. Yes, it is short of obscenity, but let's just say that it is full of words that most people would think are vulgar words.

Q. If a pupil disagrees with the outline used by the teacher, I take it she would have standing or he would have standing.

Q. Yes. I assume you would say they can remove obscene books from the library, if they are illegal. I think you answered that. But are there any other books that they may remove from the library?

Q. Well, * * * supposing that these nine books had been acquired by the school district, say, in 1970 or 1971 as a representative collection of the kind of protest literature of the sixties, * * * and they had been kept there for ten years, and then there was a series of books published about the history of early New York, and there was a shelf space problem, and the school board decided to get rid of this collection of the sixties because it was somewhat passe, and to expose the students to the history of early New York, since they couldn't do both. Now, there, there is no problem of motivation at all, but you are getting rid of precisely the same books.

Q. * * * [I]f the school board had appointed a committee, as they did here, and they said, find out if there is too much—read the book as a whole and consider its literary value, see if it has any relevance to course material, and they had two or three other

> guidelines in there. Supposing the committee had come back, as they did, and they maybe wrote a full report on each book, and then the committee followed the recommendations, as they did not here, and removed three books and kept five, or six, or whatever the number is. You would say that was still unconstitutional. Is that correct? And say that you can't dispute their judgment. Each one, any impartial observer, a teacher, a book expert would agree that they had faithfully followed the standards. * * * What constitutional right of whom has been violated?

The Court was unable to reach a definitive resolution of the problems in this case. Three Justices thought that if the School Board was motivated by a dislike of the ideas in the removed books, it violated the students' constitutional rights, and therefore the case should proceed to trial. One Justice essentially agreed with this view but wrote separately. Another also agreed that there should be a trial but did not want to decide the extent of the Board's discretion. Four Justices dissented in four separate opinions.

The Court, in *United States v. Ross*,[2] was confronted—both philosophically and literally—with a small brown paper bag. A representative of the Solicitor General's Office held it up to demonstrate the type of container the Government claimed was not protected from warrantless searches, because it was not likely to contain personal effects. The defendant's lawyer argued that the bag, which had been seized from the trunk of his client's car and which contained narcotics, came within the purview of the Fourth Amendment. Counsel was asked:

> Q. Is that bag stapled together?
>
> A. No, it is not.
>
> Q. Would it make any difference in your argument?
>
> Q. * * * [S]uppose what they were hunting for was, say, a waffle iron, a stolen waffle iron, or something else that couldn't go in the paper bag. You might have probable cause to search the car for the waffle iron, but if you got to the paper bag, you wouldn't be searching it, would you?
>
> Q. Are there problems being created in the application of the rules that we are discussing here by the change in the structure of automobiles, that is, the hatchbacks, the newer types of cars where they do not have a trunk which is distinct from the rest of the interior?
>
> Q. Is that a problem, in terms of definitions, the change in

2. 456 U.S. 798 (1982).

structure of cars? If not in this case, it conceivably would be in some other cases, would it not?

Q. Suppose * * * that when they actually opened and tested this container, this brown paper bag, and found that it was just powdered sugar and nothing else, or some other innocuous subject, or substance, how much damage has the —have the privacy interests of the person been impinged? How serious would that be, if they have made a mistake?

Q. Supposing there had been a blanket over everything in the trunk. Would they have been authorized to pick up the top of the blanket and look underneath?

Q. * * * [W]ould you agree that had the paper bag been located on the back seat of the vehicle, the police could have opened it and examined the contents?

* * *

Q. And if it had been in the locked glove compartment, the police could have opened the bag and examined the contents.

A. Correct.

Q. All right, and just because there is some little partition between the back seat and the trunk, there should be a different rule. Is that it?

By a ruling of six to three, the Court upheld the government's position. Since the officers had probable cause to stop the car and to believe that contraband was concealed within it, the search could be as thorough as a magistrate could have authorized in a warrant if he had issued one.

Thomas v. Review Board[3] involved a Jehovah's Witness who quit his job at an armaments factory after he was transferred to a department where he would have had to help manufacture parts for tanks. When his unemployment benefits were denied, he brought suit, claiming that his action had been taken because of sincerely held religious beliefs, and the denial violated his First Amendment right to the free exercise of religion.

Q. * * * [S]uppose that Mr. Thomas [the Jehovah's Witness] had reached the point where all work was against his religious convictions. Would you still be here?

Q. What [about] the Selective Service cases that were decided in the late 60's and early 70's where it was held that an ethical or sincerely held moral belief, even though nonreligiously founded, was adequate for conscientious objection. What if his views stemmed from that rather than from his membership in Jehovah's Witnesses?

3. 450 U.S. 707 (1981).

Q. * * * [W]hat if the Referee at the conclusion of the hearing had said, I don't believe Mr. Thomas?

A. Well, then he could have concluded that Thomas quit for personal reasons, but he didn't do that. In fact he said, the Referee, oh, I can understand, I can see your difficulty, and I have the utmost respect for your religious principles. And I'm quoting from the transcript. Those are the words of the Referee.

Q. And what if the Supreme Court of Indiana had said after the Referee said what you have just quoted him as saying, we find that the Referee committed reversible error in believing Thomas?

Q. Is it a federal question on the narrow hypothetical Mr. Justice White has just posed, that the state court has reversed the Referee on what could be his credibility findings? Now, let's assume, hypothetically, that reversing on credibility of witnesses unseen by the reviewing court would be an error of some kind. Is it a federal question error?

Q. Could the connection be so tenuous that the reviewing courts could reverse? Let me take a hypothetical * * * in the mean between some of the hypotheticals suggested. Suppose he was working in a factory making threshing machines for farms and he reasoned that threshing machines would be used to produce wheat which might go to Russia and he does not want, his religious belief forbids his doing anything to help the communist world. Would that be in your view too tenuous and speculative to sustain a religious claim?

Q. What is the status of people, if any, in many of the courts, who would have a religious objection and scruple against participating in social security?

Q. * * * [W]hat if at the time that your Mr. Thomas applied for work at the foundry he was told that as a matter of company policy someone who is in the roll mill automatically at the end of six months would be placed, rotated to the tank production department?

Q. Could I ask you, suppose that his request to the Jehovah's Witnesses had been answered by the religious body saying, there's nothing contrary to our religion to work in the turret factory. And he said, well, that's maybe your view of it as a group, but my own personal religious beliefs prevent me from doing so.

Q. * * * What if he says, well, I just don't believe I should—I just don't believe in war.

A. Well, that is consistent with the tenet of the Jehovah's

> Witnesses and would also be a belief protected by the First Amendment.
>
> Q. And you would say the same thing, then, if a person went to his employer and said, I can't work in a turret factory, I'm going to quit, and the employer said, well, why? I have a religious belief. And his employer said, well, what religion are you a member of? And he says, none except mine. I'm a one-man, I have a one-man religion. And—but it's religious. I think it's contrary to the laws of God to go to war or to even work on the implements of war. * * *
>
> Q. What if he said, I'm an atheist but I'm opposed to all wars?
>
> Q. But does that necessarily follow? Supposing you had a Catholic nurse employed in a hospital and was transferred into the abortion ward, and she said, well, it's against my religion to work in abortions and then they defend it on the grounds, well, some other Catholics will perform these services, therefore your belief is not religious, is not sincere.

The Court, eight to one, agreed with Mr. Thomas and held that it violated the First Amendment for the state to deny him compensation benefits because of his religious beliefs.

The Court in *Village of Hoffman Estates v. Flipside*[4] faced the constitutionality of a "head shop" law under which an Illinois village attempted to regulate the sale of drug paraphernalia. The Seventh Circuit had held the law too vague as applied to a boutique called Flipside that sold cigarette rolling paper, water pipes, and other items that might have fallen within reach of the law.

> Q. Suppose * * * the proprietor of Flipside is in the store, and two people come in and say, we use marijuana considerably, * * * and tells him some specific item that they want to use in connection with using marijuana, in which case there is no question about what the use is going to be, and if Mr. Flipside sells the article requested, would there be any question in his mind or could there be that the ordinance would forbid that?
>
> Q. What if this ordinance, instead of reading the way it did, had simply regulated the sale of hypodermic needles?
>
> Q. Well, if you hold the belief that the sale of morphine ought to be lawful, does that make the Harrison Act[5]

4. 455 U.S. 489 (1982).

5. The Harrison Narcotic Act, ch. 1, 38 Stat. 785 (1914) (current version at 21 U.S.C. §§ 801-969 (1982)), is a narcotics control act. It is designed to regulate the use of certain psychotropic substances for nonscientific and nonmedical purposes. Its provisions restrain

unconstitutional?

Q. Would you think it would be unlawful if there was an ordinance or a statute that prohibited the public display, sale without a license of pistols with barrels less than five inches?

A. It certainly would not be vague. Whether or not it is unlawful is, I think—

Q. Well, it is a lawful instrument if a policeman is using it, is it not?

Q. Would you say it would have some impact on your case if along with all this paraphernalia they had a sign reading generally, forget your troubles, escape from you anxieties, et cetera?

The Court upheld the ordinance (eight to zero), ruling that it was not facially overbroad or vague, and it was reasonably clear in its application to Flipside. The ordinance regulated the commercial marketing of items that the labels revealed might be used for an illicit purpose.

The issue before the Court in *Pennhurst State School and Hospital v. Halderman*[6] was whether, as contended by Pennsylvania, the Developmentally Disabled Assistance and Bill of Rights Act constituted simply a statement of federal policy, encouraged by federal funding, or whether it established a right to individually determined habilitation in the least restrictive environment, as contended by a resident of the Pennhurst facilities.

Q. Then you don't agree with your friend that the State of Pennsylvania could, or any other state, could close all of its institutions and simply say, people will have to take care of their own, as they did 100 or 200 years ago?

Q. What if * * * the state simply had never set about to create any sort of institution for the mentally retarded? Would you say that the federal Constitution required them affirmatively to set up such?

Q. Can Congress in 1960 say, we grant you *X* million dollars on these conditions and the state accepts the money on those conditions and complies with the conditions, and then in 1970 can Congress come along and impose additional conditions upon the 1960 grant? * * *

Q. May I ask a question along those lines? May a state withdraw entirely, now, from any federal support for this sort of program?

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the illicit trafficking of a variety of drugs, including morphine, and impose criminal sanctions on those violating its provisions. For a discussion of the effect of the Act, see United States v. Moore, 423 U.S. 122 (1975).

6. 451 U.S. 1 (1981).

Q. What if Congress cut off appropriations for the [Section] 6010-type programs?

* * *

Q. I'm talking about the Chief Justice's hypothetical. Congress cut off the money. And you say you'd go into court. For what?

* * *

Q. Now, then, take it one more step. When the State of Pennsylvania stops appropriating money, just say, we can't afford this program, or we think it's wasteful, or whatever, the Legislature just doesn't give it any more money. What then?

Q. May I interrupt long enough to ask you a question about how you think [section] 6010(3) would actually operate under these circumstances? Let's assume it would take $100 million for the state to comply with the obligations, the conditions, the requirements of section 6010(3). And let's assume further, the federal government was willing to put up $1 million, leaving $99 million to be put up by the state legislature. And let's assume the state legislature said, we don't have $99 million, we have—say—$79 million. May a federal court issue an injunction against the state legislature to borrow the money and put the additional funds up?

Q. But I'm asking what is a hypothetical question. I want to know under what circumstances may a federal court issue an injunction against the legislature of Pennsylvania to provide such additional state funds as may be necessary to meet these standards?

* * *

Q. Now, let's assume the money, this state money just stops, and no more state money is available, and what's the remedy then?

The following exchange indicates where hypotheticals such as these can take the advocate, even to the chagrin of another Justice:

Q. Well, if [section] 6010 was enacted exclusively under Congress's spending power, then I suppose the state could withdraw, and not accept any federal spending.

A. Yes, Your Honor, that is—

Q. If on the other hand it were enacted under section 5 of the Fourteenth Amendment, then perhaps a state couldn't withdraw.

A. Yes, Your Honor.

Q. And that's your position?

A. Yes, it is.

Q. They cannot quit.

Q. [Another Justice] Well, he doesn't need to take a position.

A. Exactly, Your Honor, and—

Q. But he has taken a position. * * *

The Court held, six to three, that Congress, acting pursuant to its spending power, created no substantive rights to "appropriate treatment" in the least restrictive environment. Nor did the Act condition the grant of federal funds on the State's agreeing to underwrite certain obligations to the developmentally disabled.

In re R.M.J.[7] raised the question of whether Missouri could, consistent with the First Amendment, prohibit an attorney from advertising the courts in which he was admitted to practice, advertising that he practiced law in certain fields designed by terms not approved by the State, and mailing announcements of his office opening to persons with whom he was not acquainted.

Q. * * * [A]s to the particular facts of this case, supposing we were to conclude that under *Bates [v. State Bar of Arizona*[8]], the rules adopted by the Supreme Court of Missouri were unconstitutional. Would we be free to roam at large beyond this particular rule and say that *A, B, C, D* are permitted, but *E, F, G* are not?

Q. Would it be appropriate in your view for a lawyer who practiced personal injury law to say that my average verdicts over the past twelve months have been $129,000, assuming that is a fact?

Q. * * * [T]hinking about mail advertising, let's assume that a lawyer had access to the names of people who were admitted to the emergency room of a great hospital in a large city. Could he use that list of names to send invitations to come to see him when they got well enough?

A. I thought I might be asked that question, Your Honor. * * *

Q. * * * [H]ow far does that Rule 20 go? Under our Rule 5, after you have paid your $100, you get a nice, pretty certificate. You have it framed, and you hang it on your office wall or hang it in your window, or on the front door. Does this Rule prohibit that?

Q. What about a young lawyer sending out an advertisement that he had never lost a case?

Q. * * * Suppose you are employed in the Solicitor Gen-

7. 455 U.S. 191 (1982).

8. 433 U.S. 350 (1977).

eral's office. We have had members of that staff who have argued as many as fifty cases here. Now, if they go back to practice in Missouri, you don't think they would be qualified to advertise that they are admitted to practice here, and have?

A. You might have an ad in which one says, I have argued fifty cases in the Supreme Court. * * *

Q. But that is very different from the hypothetical I was suggesting to you. I said that the possession of that certificate standing alone, by which I meant to exclude any experience in this Court, doesn't add anything to the person's qualifications except that it is a representation by this Court that we found that he was admitted in the state of Missouri or wherever.

Q. * * * Do you think that it would be proper and not subject to state bar regulation for an attorney to send out letters to people who are listed in the newspaper as being widows of recently deceased spouses, listing an area of expertise or practice as representation of widows? Is that something that the state could not properly reach?

Q. * * * [W]hat about the certificate of admission to the bar of this Court that you post in your office? Does that come within the prohibition?

Q. And here in Washington, every firm has a string that people asterisk, licensed to practice in California, but not in the District, and so forth and so on, right on their letterhead. * * * Is this all right? Would it be all right under your Missouri bar rules?

* * *

Q. In Justice Blackmun's question, with the asterisks showing admitted to practice in California but not in the District, might not that supply an additional element of truth, if the firm's letterhead says Washington, D.C., and lists these people as partners, but then the asterisks show that they are not actually admitted to practice in the District, but only in California?

Q. * * * Suppose a state bar accuses someone, a lawyer, of doing *A* and *B*, and whoever is the adjudicator finds that he does both *A* and *B*, and they suspend him for doing *A* and *B*. It happens that they may not constitutionally prevent him from doing *A*, but they can prevent him from doing *B*. Well, he has done both of them. Now, did you agree with * * * Justice Brennan that the *Stromberg [v. California*[9]], rule would apply in that situation, that the suspension must be lifted?

The Court unanimously concluded that none of the restrictions imposed

9. 283 U.S. 359 (1931).

by the State could be sustained in light of the attorney's First Amendment rights. There was nothing inherently misleading, or misleading in practice, about the challenged conduct.

The name of the case, *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*,[10] was indicative of the length and complexity of its hypotheticals. It was a Sherman Act case involving a Blue Cross policy that required a hospital, before applying for Blue Cross membership, to obtain a certificate of need from a federally authorized health services planning group—in this case, Mid-America Health Systems Agency, or MAHSA. The Eighth Circuit found this policy by Blue Cross to be impliedly immune from antitrust attack by virtue of the underlying federal health care statute.

> Q. Well * * *, what if the Missouri Legislature had taken up a proposal for the formation of a state regulatory body and come to the conclusion that 95% of Missourians were Christian Scientists, and so they simply didn't want anything to do with this and they didn't want any hospital building in the state; and so they enacted a statute saying, there will be no hospitals constructed in the state for two years?
>
> Q. You wouldn't think that, apparently, that Justice Rehnquist's hypothetical enactment was a valid zoning ordinance?
>
> Q. * * * I take it there's no provision or indication in the federal law that if Blue Cross had chosen to make a contract with this hospital, despite the refusal of a certificate of need from MAHSA that there would have been no violation of federal law?
>
> A. Well, let me say, MAHSA never refused to issue a certificate of need.
>
> Q. Well, assume it had, though.
>
> A. Assume it had? That would be simply two private groups agreeing together that they would—
>
> Q. Yes, but suppose MAHSA had refused to certify this, what did it do that led Blue Cross to refuse to make the contract?
>
> Q. Well, what if it had read it as meaning that this facility wasn't needed, exactly the way it read it now, but had said, well, nevertheless, we're going to make a contract with the—that would not have violated any federal law?
>
> Q. * * * [S]upposing, though, that Missouri had authorized the program and then the planning agency, whatever its proper name is, refused to designate the hospital, give it the certificate, and thereafter Blue Cross entered into the contract with them.

10. 452 U.S. 378 (1981).

Then would it have violated federal law? In other words, if you had a state program in place and the state program did not certify a new hospital, would the federal statute be violated if Blue Cross decided to insure the hospital?

Q. Would it violate the statute for Blue Cross to say, well, we'll go ahead and insure you anyway?

* * *

Q. Well, let me rephrase the question. Supposing you had a state agency and it granted one hospital a certificate of need and another one it did not. And I assume the first one could get federal funding and all sorts of things. The second one, I assume, would not be eligible for federal funds but would it violate any federal law if it nevertheless went ahead and offered its hospital services available to the general public?

* * *

Q. Nor would it violate a federal law if Blue Cross made a contract with it?

Q. What is the scope * * * of the implied repeal. In other words, would it cover a group, say, a group of contractors who refuse to enter into a contract with a new hospital unless it first got a certificate of need?

Q. Would it cover then, say, a group of contractors who refuse to build a hospital or a group of doctors who refuse to offer their services unless they get—would it cover all kinds of collusive activity or cooperative activity designed to prevent the construction of a new hospital?

Q. Anything that MAHSA could talk anybody into doing, whether they were required to do it or not, is exempt?

Q. Could * * * Blue Cross turn it over to a subsidiary called the Hospital Opportunists Association?

Q. * * * For example, if MAHSA appeared at the statewide meeting of the druggists, the wholesale druggists in Missouri, and said, we recommend that you all agree not to sell this hospital any drugs, and they thought that was a good idea since they wanted to—so they passed a resolution, and everybody agreed that they wouldn't sell any. Do you say that that would be exempt because MAHSA had recommended it, because they were authorized to seek the cooperation of private parties? They sought the cooperation and they got it. That's the end of it.

Q. Could Blue Cross have acted without MAHSA and you still have your same position?

Q. Suppose * * * that a state law set up a state health planning agency and authorized it to make some plans about hospi-

tals and avoid having too many hospital beds and authorized it to seek the cooperation of private interests in effecting its recommendations. And this state agency went around to a group of pharmaceutical people and recommended that they refuse to sell to a new hospital. Now, certainly, that wouldn't be within the *Parker v. Brown*[11] exemption, would it?

A. * * * I say that that's what Congress said in the 1974 act in the twenty-eight words. * * * There's no doubt about those twenty-eight words being the basis of our position.

Q. If you lose one of them, do you lose?

A. Pardon me?

Q. Suppose you've only got twenty-six of them.

Q. So you're saying this is no different than if the statute had authorized the secretary of one of the departments to go out in the field and try to talk people, private parties into preventing excess hospital beds, and the Secretary of Health went out to the pharmaceutical convention and persuaded them not to sell to the new hospital?

Q. And so you think, then, that the pharmaceutical people, although they weren't required to do that at all, by the federal law, and couldn't have been told to do it by the Secretary, they're nevertheless exempt?

Q. * * * [S]uppose—I'll try a hypothetical—that the federal government, the Congress, developed the idea erroneously or otherwise, that the country needed more lawyers, and provided for $500 million for matching grants to the states to build additional law schools but required that no grant would be made to a state unless the bar association of that state certified that there was a need for a law school and specified the size and capacity of that law school. Would you think there'd be some analogy with what you've got here?

* * *

Q. Well, is there any analogy with respect to a bar association being a private entity as against a governmental entity, and yet having in mind that the bar association would probably be about as qualified to determine need for a new law school as anyone could possibly be?

Q. Well, is your suggestion that after Blue Cross had sat on the board of MAHSA and the MAHSA as a unit had said, the number one priority is oversupply of bids, it would have been in effect reneging on its role in MAHSA if it had gone ahead and paid the plaintiff in this case?

11. 317 U.S. 341 (1943).

The Supreme Court unanimously reversed and held against the Blue Cross policy. Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system, which was lacking here.

The Establishment Clause was pitted against the Free Exercise, Free Speech and Free Association Clauses of the Constitution in *Widmar v. Vincent*,[12] a Missouri case involving a tax-supported university's ban against a student group's use of campus facilities for religious services and training. Did the usage sought by the students merely accommodate religion, as contended by a student religious group, or did it advance religion by appearing to give university approval and providing aid with tax dollars?

> Q. The university system in Missouri has recognized the right of a gay rights unit, as I understand [it], to meet on the campus and hold discussions and exchange views, has it not?
>
> Q. * * * How about the Young Marxists League, if they had one on the campus, would they be permitted to meet to make attacks on the Democratic system of government and express their views?
>
> Q. Could they sign up Jerry Falwell for once a month for a regular appearance on the campus?
>
> Q. How about someone like William Kuntzler or someone who had defended one of the groups in the late sixties?
>
> Q. * * * Well, what if the program consisted of a reading of, say, four chapters of one of the gospels, followed by a student discussion of the content of those chapters and criticism and exchange and so forth?
>
> Q. In one of the hypotheticals presented, you said it would depend upon the content of what the speaker said. Do you not run afoul [of] the free speech question by the fact that this Court has spoken often of the fact that if an individual is deprived of religious worship opportunities by something that the government has done; *i.e.*, a soldier in the field a prisoner—
>
> A. * * * I think the Court has often held that that would be hostile to religion to not permit the opportunity for those individuals to worship just because of the fact that they have been deprived of their other already-immediate access to such services.
>
> Q. Well, what if the campus is out in the middle of the desert or something like that?
>
> Q. Well, do you think a religious service could be banned in

12. 454 U.S. 263 (1981).

a public park in Kansas City? Or, as someone suggested, the Reverend Falwell from speaking there?

Q. Let's assume it's exactly like the student building involved here; it's open for all other groups, as your answers to other questions have indicated. Could the city foreclose use for religious purposes of a public park of that character?

Q. What about services which begin at the Lincoln Memorial sometimes with prayers and hymns being sung, and then even more specifically a religious service, the Mass held on the Mall when Pope John Paul II was here several years ago?

Q. How about the Christmas tree on the Mall every Christmas?

* * *

Q. And the creche.

Q. [D]oes it disturb you that members of the Congress of the United States have prayer breakfasts in the National Capitol Building on a regular basis?

Q. * * * I assume you were here at 10:00 o'clock this morning when the Marshal of the Court in announcing the Court pronounced, in effect, a very short benediction when he said God save the United States and this honorable Court. Is that any different from a ten-minute prayer?

Q. Could the university preclude the use of those meeting rooms for all purposes if it wanted to, except classes of the university?

Q. Let me ask you, suppose a group of students organize a denomination of a particular religion on the campus, and they say well, we have to have someplace regularly to meet like others. And they have a minister who will come and preach to them at these meetings, and they want the university to let them use, say, one of its buildings as their church. And they frankly say, we can't afford a church but if we had a church, we would meet in it, but we don't, and we want to use your building as a church. Now, you would be making the same argument, wouldn't you? Or would you?

Q. Would there be anything to interfere with the university saying that there would be a fixed fee for the use of the room by any group including this church group that is hypothesized?

Q. What if the Missouri Constitution contained a clause saying that there shall be no requirement of freedom of speech or that the state shall allow freedom of speech in its state and it shall regulate it as it sees fit. Would you think that that would be a

compelling state interest for defense against a claim that the federal First Amendment was being violated?

* * *

Q. But what if a state had a constitutional provision diametrically opposite to the First Amendment that said the state shall be able to freely regulate discussion of public topics? Would you think that was a compelling state interest if the state were charged with violating the federal First Amendment?

Q. I take it, for example, a Roman Catholic Church couldn't have a Mass under this regulation, but what about the Holy Name Society having a meeting?

Q. But if the university rents its facilities to off-campus groups for a fee, your position would be, I take it, that if the Catholic Church wanted to rent one of its buildings on a regular basis to hold its church services, that the university would have to rent it.

Q. * * * [D]o you see any differences between the circumstances here involving a university and the use of its premises as opposed to that of a high school or a grammar school?

The Court, with only one dissent, sided with the students, holding that their free exercise of religion under the First and Fourteenth Amendments had been violated. The university, having made its facilities generally available for the activities of registered student groups, could not close its facilities just because a group wanted to use them for religious worship and discussion. In other words, the Establishment Clause does not bar a policy of equal access.

The Court in *Bullington v. Missouri*[13] was asked to decide whether the Double Jeopardy Clause of the Fifth Amendment prevented the State of Missouri from seeking a death penalty for the second time after the defendant's conviction had been reversed and the jury, at a separate proceeding following the first trial, had turned down the death penalty and imposed life imprisonment.

Q. * * * [W]hat if your client had been convicted by the jury or the judge and sentenced to the death penalty in the first proceeding and it was set aside on the *Duren [v. Missouri]* ground?[14]

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13. 451 U.S. 430 (1981).

14. 439 U.S. 357 (1979). In *Duren* the petitioner, convicted of first degree murder and robbery in a Missouri court, challenged the jury selection process, arguing that it failed to comply with the "fair-cross-section" requirement set forth by the Court in Taylor v. Louisiana, 419 U.S. 522 (1975).

The Supreme Court held that the jury-selection system, which provided women with an

Q. Supposing your procedure required the jury to make special verdicts, and they had found that pursuant to Instruction No. 38 even though the mitigating circumstances do not outweigh the aggravating circumstances, as a matter of leniency we will not impose the death penalty.

Q. My question is, what is your position if the jury had * * * articulated a basis for a decision that it was pursuant to this instruction rather than to any deficiency in the prosecutor's proof?

Q. Well, what if the original conviction had been reversed for failure to suppress testimony secured in violation of *Miranda*? Would you say that the double jeopardy provision barred retrial with the possibility of the death penalty?

Q. Well, what about the situation where you have another panel of twelve jurors and this panel of twelve jurors happens to believe three or four prosecution witnesses that the earlier panel did not believe?

Q. * * * Suppose there was a jury [that] came in and said, we find, we impose life because the mitigating circumstances outweigh the aggravating ones?

Q. Well, what if they said, we find that aggravating circumstance *A* was not present? Could you then on retrial press that same aggravating circumstance?

Q. Well, if you assume that the jury imposed life because they found there were no aggravating circumstances you have a problem about pressing the same aggravating circumstances, if you just assumed that that's what the jury did. I would take your case as not so clear either if the jury said there are both aggravating and mitigating circumstances, but the mitigating circumstances outweigh the aggravating circumstances and the State on retrial says, we're going to present precisely the same evidence.

Q. * * * [S]uppose the statute said that you can be guilty of first degree murder and second degree murder, which I assume you have in Missouri. * * * And if you're convicted of second degree murder, you're acquitted on first.

* * *

A. Yes, sir.

Q. So why isn't it automatically true that if you are found

---

option to be exempted on request from the jury *venire*, violated the "fair-cross-section" requirement of the Sixth Amendment. The Court determined that women constituted a sufficiently distinct group in the community and that the system, which resulted in *venires* composed of only 15% women in a county composed of 54% women, unconstitutionally denied petitioner Sixth Amendment protection.

guilty of life imprisonment you are acquitted as to death? When you boil it down, that's what they're arguing, isn't it?

Q. Well, what would be the difference if they said that you can get life for one [degree of crime] or 100 years for the other, and it was the degree [that] was used? * * * [Y]ou'd go with the first, wouldn't you?

Q. Well, if Missouri says, if you killed somebody with aggravating circumstances, you are subject to conviction of first degree murder and death. If you are guilty of homicide without those problems, you are guilty of second degree murder and sentenced to life. Right? Are you with me?

A. Yes.

Q. And the jury brings in a second degree verdict, life. Can you try him again on first degree?

A. No.

Q. So the only difference is words?

* * *

Q. I hope you realize that my hypothetical didn't say anything about limited to death.

Q. To put the question more directly, supposing Missouri had a procedure that if the jury does what it did in this case, find no death penalty is appropriate, would it be constitutionally permissible for the state to say, well, there shall be an appeal to an appellate court which could reverse that determination and decide that, well, we think there should be a death penalty, evidence of aggravating circumstances are pretty strong, and so forth?

Q. What about a procedure that said, we'll have a bifurcated hearing except that if the jury finds no death penalty we'll have a second jury empaneled and have them take another look at it and have a trial? I suppose that'd be permissible too. To just specifically say, the state shall have two chances to persuade someone that the death penalty is appropriate? That's, I guess, what they have in Florida?

A. Well, sort of.

Q. Would you think that would be permissible constitutionally?

* * *

Q. You would have exactly the same issue as you have in this case, wouldn't you?

Q. Suppose, counsel, that you had gone for a new trial on the grounds that through some mistaken inadvertence one of the twelve jurors that had rendered the verdict was not a citizen of

> the United States and therefore there was not a duly constituted jury. Then your claim would be there was no verdict at all, wouldn't you?

The Court accepted the defendant's argument five to four, ruling that the State could not seek a death penalty for the second time. Great emphasis was put on the fact that Missouri's separate presentencing hearing was like a trial on the question of guilt or innocence, so that the protection available under the Double Jeopardy Clause attached.

In *American Textile Manufacturers Institute, Inc. v. Donovan*,[15] the Court was faced with a standard promulgated by the Occupational Safety and Health Administration (OSHA) limiting worker exposure to cotton dust. The textile industry argued that the underlying Act required OSHA to demonstrate that its standard reflected a reasonable relationship between the costs and benefits involved, whereas the government contended that the Act mandated the most protective standard possible to eliminate a material health impairment.

> Q. [I]f while the Benzene case[16] was pending here, the Board had revoked its carcinogen policy, as you say it now has, would we have remanded that Benzene case for reconsideration?
>
> Q. * * * [C]an you hypothesize circumstances in which a major industry, producing things we regard as necessary, that is, the entire automobile industry and the entire lumber industry, the entire cotton industry—can you hypothesize any situation in which it could be simply closed down and stopped, by operation of law?
>
> Q. Could it be done that way? Could the Congress of the United States, through its mechanisms such as we have here, in effect say, no more automobiles shall be produced because automobiles kill 63,000 people a year and injure two million people a year * * *?
>
> Q. * * * How much of the industry must be destroyed before it's no longer feasible [because the industry is destroyed]? Supposing that—say the figure is 25% and supposing 25% of the firms would go out of business but the remaining 75% would be able to expand their production and continue to produce the same aggregate amount of goods. Would that be feasible or not feasible under your standard?
>
> * * *

15. 452 U.S. 490 (1981).

16. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980), which had been heard the previous Term, had presented the same issues, but the Court had not decided them.

> Q. Let me pursue the hypothetical question I put to you earlier * * *. In your view, would Congress have the constitutional authority to bar cigarettes, for example, unless they can demonstrate that all negative health factors were eliminated? Could Congress do that itself via statute?
>
> * * *
>
> Q. Second question: could they delegate that, by a structure somewhat like the usual pattern of creating a commission like OSHA, could they delegate that to a commission on tobacco hazards?
>
> Q. [Is there] [a]nything to prevent Congress from, or OSHA, from providing that no imports would be permitted in this country unless the sources complied with OSHA's standards?
>
> * * *
>
> Q. Well, do you mean by that, that if the record showed that compliance would increase the cost of cotton to the ultimate consumer by 500%, that then we could go ahead?
>
> Q. * * * I'd like to come back with a question that I put to [your opponent], is it the government's position that this standard would be perfectly valid under the act if it destroyed 50% of the cotton industry in the United States, whether you measure it by number of companies or by total output, was that the government's position?

In an extraordinarily complex and technical opinion, the Court ruled five to three that OSHA was not required to conduct a cost-benefit analysis, because Congress had already struck a balance by requiring only that the standard be "feasible."

H.L. v. Matheson[17] involved a Utah statute which required every physician in the state, under threat of criminal penalties, to attempt to notify a minor female's parents before performing an abortion on her. The plaintiff was a fifteen-year-old unmarried female who lived with her parents but did not want them informed that she was seeking an abortion in the first trimester of her pregnancy. She had made her decision after consulting others, including a social worker. The statute was attacked as invading the plaintiff's right of privacy under the Due Process Clause.

> Q. [You] have emphasized the importance of getting counsel and advice and assistance, lawyers, social workers, doctors. And you rest on the fact that she had the advice and counsel of all these people? * * * What if she has the advice of no one? Just walked in off the street and said, I want to have an abortion, and the doctor said, not unless I notify the parents. No other factors.

17. 450 U.S. 398 (1981).

Would this be any different from the points that you have got here?

* * *

Q. * * * It would make no difference, would it?

A. No. If she has the right of privacy, to go ahead on her own, then she has that right.

* * *

Q. Suppose she were twelve? Same?

* * *

Q. What about ten years of age?

Q. In Utah, under Utah law, if she had walked in, a girl of ten, eleven, twelve, fifteen, whatever, and said, I want my tonsils taken out but my parents won't send me to a doctor and won't agree to it, would the doctor be legally permitted to perform the tonsillectomy?

Q. Had the doctor written a letter simply stating the simple, direct fact that your daughter has come to me to have an abortion performed and I'm prepared to do it, and under the statute I'm giving you notice that I will proceed with this procedure seven days from today, would he have complied with the statute?

Q. Does the minor living at home have standing to challenge the statute on the ground that it's overbroad as to minors who are not living at home?

Q. * * * [L]et's assume that the Supreme Court of your state has already decided that the statute on its face is constitutional. On the other hand, the federal court out in your state has decided that as applied to an emancipated minor the statute, if it does apply to an emanicipated minor, is unconstitutional.

Q. * * * [I]s it possible that it's inherent in the case, that the parents might be able to give something of the medical history and background of the child which would be relevant to the doctor and his decision?

Q. * * * Suppose he's about ready to perform the abortion. Before he does he picks up the telephone, he gets hold of the mother of the girl, and he says, I have your daughter here, I'm about to perform an abortion. Goodbye. Does that do it?

Q. What if the mother in that hypothetical case then said, are you aware, doctor, that our daughter has been under psychiatric care for the last seven years, and the doctors says, no, I'm not aware of that. * * *

Q. So you'd say it would be equally unconstitutional if there was a requirement that two hours after an abortion is performed they notify the parents because they might be unhappy about it?

The Court, with four opinions, held the Utah statute constitutional by a vote of six to three. The statute was deemed to be narrowly drawn to protect important state interest, since it was restricted to minors, contained only a notice requirement, and gave no veto powers to the parents. The majority stressed that the statute provided the parents an opportunity "to supply essential medical and other information to a physician."[18]

An example of how one hypothetical can be woven and expanded by one Justice and then picked up and changed by others transpired in *J. Truett Payne Co. v. Chrysler Motors Corp.*,[19] a Robinson-Patman case. As an incentive, Chrysler gave a rebate on cars sold by dealers who in turn met certain sales quotas. A dealer who did not meet the quotas charged price discrimination. The issue revolved around the type of evidence needed to prove injury.

> Q. Well, counsel, suppose before a discrimination takes place, two competitors are each selling 500 cars a year and then the manufacturer lowers the price to one of the dealers but not to the other. Afterwards, they are both selling 500 cars a year, and the only thing that's happened is that the disfavored dealer is not making the same profit as his competitor, and he has lost profits, but he hasn't lost any sales. He's lost profits. Now is that enough to give rise to injury?
>
> * * *
>
> Q. Well, my example to you, though, the 500-car example, the disfavored dealer is making the same profit, after the discrimination. He just isn't making the profit his competitor is. Can you say he lost profits?
>
> * * *
>
> Q. The fact is, though, that after the discrimination, in my example, the favored dealer didn't pick up any sales.
>
> * * *
>
> Q. Well, what about in my example of the two dealers with each selling 500 cars? Suppose I vary that. Each of them is selling 500 cars before a discrimination takes place. And then the manufacturer raises the price to the disfavored dealer, keeps the price the same to the favored dealer, and afterwards they both sell exactly the same number of cars; the only thing is, the disfavored dealer isn't making the same unit profit, net profit, that he was before. Is that proof of injury to his business?
>
> * * *
>
> Q. Well, they were both competing with one another. I cer-

18. *Id.* at 411.
19. 451 U.S. 557 (1981).

tainly will put that in it. But the only thing that happens, they both sell the same number of cars afterwards, but the disfavored dealer isn't making—he's just lost profits, that's all.

* * *

Q. Therefore, in answer to my brother White's question, your answer would be that in his hypothetical case there wouldn't be a violation of the Robinson-Patman Act, because there would not be injury to competition, since each dealer continued to sell the same number of cars as he had in the past.

* * *

Q. Let me ask you, * * * supposing that the two dealers handled both the Chrysler cars and also General Motors cars, and General Motors and Chrysler agreed to charge a higher price to one than the other. And they did that, and they nevertheless continued to sell 500 cars apiece. Would there be any violation of law?

* * *

Q. You've got a violation of the Sherman Act. Would you have any injury to either one of them?

* * *

Q. Well, how can you say that? If there had been no incentive programs, maybe we would just have had a uniform price reduction to both. Instead of charging initially a higher price followed by rebate, you might start out with a lower net price in the first instance to avoid the violation.

* * *

Q. I suppose instead of initially charging $5,000 and later rebating $500, you might initially just charge $4,500. That would be—and if you did that, instead of having a rebate program, I suppose that the disfavored purchaser would have been better off.

* * *

Q. Would the case be different if instead of a rebate you originally had a list price of $4,500 and then without announcing it publicly they wrote a letter to Payne [the dealer] that said that we've decided to charge you $5,000 a car from now on, and they just raised the price to Payne without—Payne never did know what his competitors were getting, anything like that? Secretly, he had to pay a higher price. Would he have a cause of action? He still sold the same amount of cars, just made less money on each one.

* * *

Q. But if they raised the price by agreeing with their competitor to do it, why then, of course he would have an injury?

* * *

> Q. But it is applicable to suggest that my hypothetical, or maybe Justice White's hypothetical, that sales to two different prices, where there is no transfer of business back and forth, would violate the Robinson-Patman Act in a proceeding brought by the Commission?
>
> * * *
>
> Q. Well, he says, I own the business, I know how many cars I've been selling lately, and I know that I haven't been able to sell as many cars as I used to.
>
> * * *
>
> Q. Well, if he had just said, by the way, and what I mean is, I lost twenty sales. That would be enough?
>
> * * *
>
> Q. Or does he—should he have to call an accountant and get out his records, that sort of thing?
>
> * * *
>
> Q. Well, he says, I lost sales in the amount of $80,000, out of which I could have made $80,000 in profit. Is that enough?
>
> * * *
>
> Q. Well, if the judge were to say to him, I believe you all right, but you have to prove it with some papers. Is that what you suggest?
>
> Q. Conclusory is something that one usually hears applied to pleadings rather than evidence. Suppose in a personal injury action, a plaintiff gets on the stand and says, I paid out-of-pocket $2,500 in medical bills, and he's not cross-examined about it and it's a bench trial and the judge makes a finding of fact, the plaintiff paid out of pocket $2,500 in medical bills. The plaintiff has never produced a single bill. * * * Could the judge give him damages? Of course he could.

The Court vacated and remanded five to four, holding that a plaintiff under section 4 of the Clayton Act must make some showing of actual injury in order to recover damages, but that the Court of Appeals had failed to pass upon whether Chrysler was such a "wrongdoer" as to be unable to insist upon a rigorous standard of proof.

The kind of case in which the Court can have a field day with hypothetical questions is illustrated by *United States v. Turkette*,[20] involving the question of whether the Racketeer Influenced and Corrupt Organizations Act (RICO) applies when the "enterprise" is not partly illegal but entirely so. The First Circuit held not—that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and did not

20. 452 U.S. 576 (1981).

make it illegal to participate in an entirely illegal enterprise. This led to the Bridge Club Hypothetical.

> Q. Under the First Circuit theory, on which side of the line would fall an enterprise that had an apparently legitimate front, that is, a truck line, or whatever, but was * * * engaged 75% or 90% in shooting for hire, killing for hire, arson for hire, and extortion and loan sharking. Where would the First Circuit case take us?
>
> A. * * * In your hypothetical, for example, as I understand it, it's impossible to know what are the salient considerations or the proportion of legal and illegal activities—
>
> Q. You think that's irrelevant? What the proportion is?
>
> Q. After your answers to my colleagues' questions, I get back to the question I asked you * * *. If an individual may be an enterprise and a group of persons who commit a pattern of activities, that is, two predicate acts, may also be an enterprise, then how—what is the difference between them and an illegal enterprise?
>
> A. * * * Well I think if you had some informal group of individuals who formed a civic association or a bridge club or something like that, there would be no entity in the legal sense.
>
> * * *
>
> Q. This even reaches bridge clubs, does it?
>
> * * *
>
> Q. But even as my brother White just suggested, what if they play for money?
>
> * * *
>
> Q. The bridge club might be prosecuted under RICO?
>
> Q. Tell me, * * * does that go this far—say two men robbed a bakery * * *. They never see one another for another eight years and then they run into one another and they decide, let's go ahead and rob another one. So they rob a second bakery eight years later. Are they vulnerable to a RICO prosecution?
>
> * * *
>
> Q. But how about [section] 1961 subsection 5, where it defines pattern of racketeering activity as at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years, including any period of imprisonment. Wouldn't my brother Brennan's example come under that?
>
> * * *
>
> Q. * * * [L]et's go into the business of robbery. * * * That then would be an enterprise. * * * But the hypothetical I gave

you, they were just isolated acts with no agreement between them to make this a regular pattern of living.

* * *

Q. Let's take another one. A single individual who talks to no one, but simply goes around to a series of pharmacies and says to the proprietor, I want to buy *X* number of certain drugs, cocaine and some others, without a prescription and you either give them to me or your windows will be broken as fast as you can replace them. And he goes around to ten establishments and gets the cocaine and sells it. Is that an enterprise?

A. I think it would be, yes. I think it would be.

Q. Whether there's one, two or ten, it's an enterprise, is that right?

Q. Well then in that bridge example we were talking about earlier. The ladies would have to agree on the pattern of gambling, would they, over the years?

Q. * * * [W]hy does your distinction between victim and criminal enterprise itself necessarily answer our problem? Because is it not conceivable that you might have say, a neighborhood numbers game, or a neighborhood prostitution business, something like that. And a larger criminal element comes in and by racketeering activities takes over that more or less local enterprise. Why doesn't the statute apply there and there the one taken over would be the victim?

Q. Well maybe it wasn't an extortion, maybe it was just a—using whatever these racketeering activities as defined in the statute are, just to take over an illegal enterprise? And I don't understand why your distinction between victim and criminal helps us at all in our analysis, because it seems to me you can have an illegal enterprise, that would also be a victim of a takeover by a larger illegal enterprise.

Q. In the hypothetical I put to your friend about the individual, just one man, who goes around to the—a dozen pharmacies and says you sell me 500 units of cocaine every week, or your windows will be broken. You say that would not be covered because that's one person, and it's totally illegal from the start, it has no legal front. What do you say about that?

Q. * * * [T]he first category under Subsection (4) is an individual, partnership, and then the whole array, seriatim. Why weren't they trying to get at this one strong-armed extortionist?

Q. In your *ejusdem* argument, or argument under the definition, you assume as I understand it, the first listed things like partnership, corporation, association, would necessarily be legiti-

mate. But is it not possible that a corporation could be organized and do nothing but deal in goods or stolen securities or something like that, and be wholly illegitmate. Would you say that even a corporate, a corporation so organized and totally illegitimate would not be an enterprise within the meaning of the statute?

Q. Let's suppose something less. Let's suppose that if some group, one or twenty-one people, set up a specialty of collecting illegal debts. That is, usurious debts, gambling debts, any other kind, and that's all they do. You say they are not covered?

A. I say they are not covered.

Q. You mean, they can't be prosecuted under this statute?

With one dissent, the Supreme Court reversed, holding that the term "enterprise" in RICO encompasses both legitimtate and illegitimate businesses. In doing so, the Court rejected the application of the rule *ejusdem generis*.

One of the most interesting cases from the standpoint of hypothetical questions was *Plyer v. Doe*.[21] The issue was relatively simple: could Texas, consonant with the Equal Protection Clause, pass a statute denying a free public education to undocumented alien children?

Q. Let me ask one question, counsel. If the Equal Protection Clause is not protective of undocumented aliens, could the State of Texas impose harsher criminal penalties upon them?

Q. * * * [I]f you are dealing with commuters, people who reside outside the district and come across just to go to school, couldn't you handle that problem by just saying you must be a resident of the district in order to attend the school?

Q. Well, does that mean that you assume * * * that these children will remain in the school district because it is just too much of an administrative burden to get them deported, so they are going to be part of the community anyway, and you would rather have them uneducated than educated?

Q. Suppose you say to INS [Immigration and Naturalization Service], here are a dozen illegal aliens, why don't you deport them and have them take their children with them? And they say, sorry, we are too busy. And those dozen people buy property. And I suppose there are a good many illegal aliens that aren't destitute.

* * *

Q. Could Texas deny them fire protection?

* * *

21. 457 U.S. 202 (1982).

Q. Could Texas pass a law and say they cannot be protected [from fire]?

A. I don't believe so.

Q. Why not? If they could do this, why couldn't they do that?

A. Because—I am going to take the position that this is an entitlement of the—Justice Marshall, let me think a second. You—that is—I don't know. That is a tough question.

Q. Somebody's house is more important than his child.

Q. You are talking about denying them all rights that every other similarly situated person has, such as fire protection, police protection, garbage collection, things like that. You could take all those things away, it seems to me, under the state's argument.

Q. Let me suggest this. If a Virginian went to Texas to spend a year, but had no intention of becoming a domiciliary of Texas, would you allow him or her to attend a Texas public school for free? * * * Let's say six months. To make it realistic, let's say six months, for one term. Would you allow the Virginian to go to the University of Texas tuition-free?

Q. Would you hazard a guess as to whether if one came to Virginia from Texas, and his house was on fire three days after he arrived, that Virginia would have any obligation to put the fire out?

Q. Somebody who—if somebody can acquire a residence in a day, whenever they come to the university, they become a resident immediately, don't they?

Q. * * * [B]efore you sit down, please, how do you compare the children of the undocumented or illegal alien with the illegitimate children that the Court considered in *Lalli [v. Lalli*[22]]? The children themselves have a status over which they have no control, the children of these illegal aliens. Does the Texas statute then punish these children for something over which they have absolutely no control?

* * *

Q. Well, if the Court were to find that [the] Equal Protection Clause applies to these children, then how do we deal with the question of these children with relation to children such as illegitimate children? Do we have to apply then a heightened standard if equal protection applies?

Q. * * * Suppose we have Mr. Justice Powell's Virginian going down to the University of Texas as a visiting professor, but

22. 439 U.S. 259 (1978).

he has three elementary school children. He is going to be there for six months. Do you let them into your public schools?

A. Absolutely.

Q. Do you charge them for it?

A. No.

Q. Why not?

A. The father and family has a legal right, a legal residence, and a legal domicile within our borders.

Q. Well, he doesn't intend to stay there.

* * *

Q. So if he were a visiting professor from the University of Mexico in Mexico City, you would have no problem?

Q. Could Texas pass a law denying admission to the schools of children of * * * escaped convicts? * * *

* * *

A. I am sure they could pass a law. I don't know—

Q. Would it be constitutional?

A. No, it would not. I don't see a rational basis. You are talking about all kinds of constitutional problems.

Q. We are dealing with children. I mean here is a child that is the son of a murderer, but he can go to school, but the child that is the son of an unfortunate alien cannot?

A. Basically—

Q. Who even pays his taxes. The aliens, you know, they pay taxes, too.

Q. All right. Can a child of an alien who has no authority to be in the United States of any kind, and the child is not born here, can that child become a domiciliary?

* * *

Q. But can any person who is here in violation of an Act of Congress be a de facto legal resident if the Act of Congress says he is not a legal resident.

Q. May I ask you, would it be contrary to federal law if state authorities when they found aliens who were illegally in the country to escort them to the border and tell them to go home? Is that contrary to federal law?

* * *

Q. * * * But suppose just as a self-held matter, the state escorted people to the border. Do you think that is contrary to—they would have no authority to do that?

Q. What about a posse comitatus, where a judge is theoretically, he may have difficulty doing it, but he is entitled to call upon bystanders to enforce an order of a court. Wouldn't the

people escorting these people to the border be much like a posse comitatus? They are not officially endowed with status, but they are helping to enforce a federal statute?

Q. So you think if the State of Texas passed a law that said aliens illegally in the country may not be employed, that it would be unconstitutional?

Q. If Texas is giving—is required to give free bilingual education to all the illegals who want to come to the United States from Mexico, which they apparently can do almost without any limit or hindrance, does that tend to encourage or discourage the continuance of this illegal migration north?

Q. * * * [A]re you arguing that even if this statute were to be regarded as implementing a federal policy to exclude illegal aliens, even so regarded, that nevertheless, you are entitled to a holding that the Equal Protection Clause renders the statute unconstitutional, even if it is implementing of a federal policy?

A. If there were an express federal policy excluding—

Q. I know. Take my hypothetical. Not if there were. Assume that there is an express federal policy, and that this statute implements that policy.

A. If there were an express federal policy saying undocumented children should not attend school, then it would be our position that Texas might well be able to—

Q. That is not my question * * *. My question is, if the federal policy is to exclude illegal aliens from the United States, and this statute is to be regarded as implementing that federal policy, are you arguing that nevertheless the statute violates the Equal Protection Clause?

Q. * * * [L]et me interrupt you to ask a refinement of Justice Brennan's question. You answered, when he said, supposing that the state statute implements the federal policy of keeping aliens, unlawfully admitted aliens out, you said you would nevertheless make the equal protection claim. Would you make the same argument if you—if it were demonstrated that the state statute substantially implements the federal policy, not just theoretically or minimally, but if it could be shown that there is a substantial deterrent as a result of a state statute?

* * *

Q. I am not talking about—if this statute, just denying them an education, substantially furthered that federal policy, would you say that still was a violation of equal protection? You can just say yes or no.

Q. I take it then you would say that if Congress passed a law

> saying, pursuant to our power to control immigration and naturalization, we hereby forbid states to offer education to illegal alien persons, people who are here illegally, would you say that would violate equal protection? Would it be the equal protection component of the Fifth Amendment, or not?
>
> Q. * * * The federal government passes a law that says no illegal aliens shall be educated by the states. Would that violate equal protection?
>
> Q. You spoke a while ago of a fifteen-year-old who came to the country when he was six. Is Texas required to grant him admission to all its state universities and graduate schools as a resident, or could they charge him nonresident tuition?
>
> * * *
>
> Q. I am just asking about university, undergraduate and graduate schools. If they charge nonresidents of Texas three times as much as residents of Texas to make the stakes high, must they admit this illegal [alien] on a Texas residence rate?

The Court ruled five to four that the Texas statute was unconstitutional. Undocumented aliens are persons "within the jurisdiction" of Texas, as provided in the Equal Protection Clause, and therefore entitled to the full range of obligations imposed by the state's civil and criminal laws. This is particularly true when applied to education and to minor children who have not themselves engaged in unlawful conduct.

The case illustrates that hypotheticals and the answers to them can become significant in the minds of the Justices. In a footnote in its opinion, the Court observed:

> Appellant School District sought at oral argument to characterize the alienage classification contained in § 21.031 as simply a test of residence. We are unable to uphold § 21.031 on that basis. Appellants conceded that if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler [County] with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. * * * It is thus clear that Tyler's residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protecton Clause, merely by defining a disfavored group as nonresident.[23]

This process of posing hypotheticals can sometimes be turned on the

23. *Plyler*, 457 U.S. at 227 n.22 (citations omitted).

Court. During the argument in *Nebraska Press Association v. Stuart*,[24] I was attempting to demonstrate why the courts should not countenance a prior restraint on the press, prohibiting it in advance from publishing the facts surrounding a crime during the defendant's preliminary hearing. I posed this to the Court:

> Let us just suppose for a moment that every minister, priest, and rabbi in Lincoln County had gotten—every one of them had gotten together a couple of weeks before this gentleman's trial and they had decided that [the defendant] was the embodiment of the devil and that they were going to have to do something about him, were going to make him a symbol, and that they were going to get together on Sunday and Saturday in their pulpits and they were going to reveal his confession, they were going to reveal the sexual nature of his crimes, they were going to condemn him as guilty, and they were going to ask for the death penalty.
>
> And in order for me to make my point, if you will assume with me that the overwhelming majority of the people in Lincoln County went to their churches and synagogues that next Sunday, is there any question [as to whether] this Court would sanction a prior restraint on the giving of those sermons. I don't think any judge would say that you can enjoin those people from getting up in their pulpits and talking about his confession.
>
> * * * And yet, as you pointed out, Mr. Justice Stewart, in your Yale speech, the press is the one private organization that is singled out and mentioned specifically as entitled to protection under the First Amendment.

My hypothetical must at least have gotten the Court's attention, because these follow-up questions were immediately asked:

> Q. What if the president of the Lincoln County Bar Association had done what your hypothetical calls for the priests, rabbis, and pastors doing—had a meeting of the Lincoln County Bar Association?
>
> * * *
>
> Q. * * * [W]hat if your ministers had also agreed that they would advocate lynching the man, could a prior restraint be permitted then?
>
> * * *
>
> Q. Well, how is the president of the Lincoln County Bar Association any better off if he is called up on contempt and fined

24. 427 U.S. 539 (1976).

> $500 than if he is preliminarily enjoined, cited for contempt when he makes the speech, and fined $500 for civil contempt?

I considered these questions as offering a real opportunity to expand on my views. Yet when the attorney representing the pregnant minor in the *Matheson* case, cited above, attempted the same tactic of posing his own hypotheticals, here is how he was met:

> A. * * * The statute said she gains her majority. But in terms of the question I was asked, what happens if she is sixteen, marries someone who is sixteen, and you send notice to the sixteen-year-old husband * * *. Okay. If three weeks later they get a divorce, it's determined that the marriage was a mistake. Then it's not—
>
> Q. Well, we don't have that case.
>
> A. We don't. No, we don't. But the problem is that this statute says, you notify the parents of all women, including—this case, let's say there's that sixteen-year-old, if there is a divorce and she now suddenly finds out she's pregnant three or four weeks later, who do you notify? The statute says, her parents.
>
> Q. We don't need to worry about that problem now, do we?

III. Conclusion

Even from the relatively few hypotheticals cited in the cases above, one can generalize about what the advocate must anticipate from today's Court.

Some questions are quite complex. In *Pennhurst State School and Hospital*, the attorney had to grasp a hypothetical fact situation involving $100 million, $1 million, $99 million, and $79 million. In *Bullington*, counsel was asked to absorb the fact that a jury was finding both aggravating and mitigating circumstances, with the mitigating outweighing the aggravating, and the state pressing the same evidence on retrial. And in *J. Truett Payne Co.*, a Justice posed two dealers selling both Chrysler and General Motors cars, with Chrysler and General Motors agreeing to charge higher prices to one dealer than to the other, but with both dealers continuing to sell 500 cars apiece.

Similarly, some questions are confusing, particularly for counsel engaged in the heat of argument. In *Pico*, there was the long query about the school board appointing a committee with guidelines, the committee reporting back, the board removing three books and keeping five or six, and an impartial observer agreeing that the standards had been followed—all ending with, "What constitutional right of whom has been violated?" In *In re R.M.J.*, an attorney was accused of doing *A* and *B*, it was found that

he had done *A* and *B*, but he constitutionally could be prevented from doing only A—after which, the question was whether the *Stromberg* rule would apply. And this one from *Turkette*: "If an individual may be an enterprise and a group of persons who commit a pattern of activities, that is, two predicate acts, may also be an enterprise, then how—what is the difference between them and an illegal enterprise?"

Many hypotheticals are short and to the point, but others can be quite lengthy. Only one-half hour is alloted to each side for oral argument in today's Supreme Court. This may be reduced if argument on one side is divided. These time restrictions pose special problems for the advocate.[25] There is often a limited opportunity to make a cohesive and coherent statement and still answer all of the Court's questions—hypothetical or otherwise. Therefore, in preparing for argument, counsel must take into account that much time will be devoted to questions, and that some questions may take a good deal of time simply to state—time that is treated as "counsel time." One of the questions cited above in the *Pico* case, for example, was 142 words long.

One cannot help but be impressed with how far removed some hypotheticals are from the facts before the Court. In *Ross*, the brown paper bag case, one Justice had the police hunting for a waffle iron. In *Flipside*, dealing with head shops, an ordinance was posed that prohibited the sale without a license of pistols with barrels of less than five inches. In the health services case, *Blue Cross of Kansas City*, a Justice came up with $500 in matching grants to build additional law schools. The ban against students' use of campus facilities for religious services in *Widmar* turned into Pope John Paul II's Mass on the Mall. And *Plyler*, the undocumented alien children case, developed into a Texan having his house on fire in Virginia, state authorities escorting aliens to the border and telling them to go home, followed by a judge calling on a *posse comitatus* to get rid of them.

Some questions, such as those relating to the ten-year-old girl with medical or psychiatric problems in *Matheson*, could have and should have been anticipated. But what of the sign reading, "Forget your troubles, escape from your anxieties," in *Flipside*; the campus in the middle of the desert in *Widmar*; or the jury with one member who was not a citizen in *Bullington*? Certainly the Court deserves high marks for imagination. Not every judge would have come up with the bridge clubs playing for money

25. *See* Prettyman, *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 LITIGATION MAG. No. 2, 1978, at 16.

in *Turkette*, the Hospital Opportunists Association in *Blue Cross of Kansas City*, the one-man religion in *Thomas*, or the murderer's child in *Plyler*.

Finally, one must recognize the difficulty involved in answering some of these questions. How does one respond to the issue of privacy interests when powdered sugar is found in a brown paper bag, in *Ross*? And the two men who robbed a bakery, never saw each other for eight years, and ran into each other and agreed to rob a second bakery posed serious problems for both sides in *Turkette*. The same applies to the individual, also in *Turkette*, who bought drugs on threat of breaking windows from ten different establishments. Almost all of the hypotheticals in *Plyler* were difficult, not so much as a matter of law, but as a matter of common sense. How to defend denying a free education to the children of undocumented aliens while at the same time putting out fires in their houses or educating the children of murderers?

All in all, this trend to hypotheticals makes for a more difficult time on the part of the advocate and a more scintillating, enervating time on the part of the observer. The ultimate winners are the Justices, who really are advanced by this probing technique to test the outer limits of their potential decisions.