Multiple Choice — thirty-six minutes (36:00) — twenty (20) questions
(one minute and forty-eight seconds (1:48) per question)

On your scansheet, please indicate the best answer to each of the following questions. There is no penalty for wrong answers. No credit will be given for explanations.
1. Bartlett, an African-American woman, applies for a job with XYZ Inc., a private company. Before her interview begins, an officer of the corporation informs her that XYZ is no longer hiring. The next day, she learns that in fact XYZ was hiring when she went in for an interview. Bartlett brings suit against XYZ for violating a federal law that prohibits “discrimination on the basis of race in employment.” A potential constitutional basis for this law would be:

   II. The Enforcement Clause of the Thirteenth Amendment.
   III. The Equal Protection Clause of the Fourteenth Amendment.
   IV. The Enforcement Clause of the Fourteenth Amendment.

   A. I only.
   B. II only.
   C. II, III, and IV.
   D. III and IV.

2. On October 15, an officer of the local board of health inspects Alice’s restaurant. Alice hears nothing from the board until the day before Thanksgiving, when the board informs her that the food in her restaurant is unfit for human consumption and orders her to close her doors until the next inspection occurs, which is scheduled for mid-January. Alice’s best argument against this order is that:

   A. It denies her equal protection of the laws.
   B. It deprives her of liberty or property without due process of law.
   C. It impairs her contractual obligation to serve customers who made reservations for Thanksgiving.
   D. It violates her constitutional right to engage in her chosen livelihood.
3. The Liberation Party, a Marxist group that has recently gained popularity in Cineplex City, obtains a permit entitling it to march down the main street of the city to celebrate May Day. Brown, who strenuously opposes Marxism, jumps into the middle of the parade, holding a sign that reads “Better John Lennon than V.I. Lenin, better Groucho than Karl Marx.” Brown leaves the parade after the Party’s leaders tell him not to march with them. Brown later sues the Party for violating his rights under the First and Fourteenth Amendments. The Party’s best defense is:

A. That it is not bound by those amendments.

B. That the street became a non-public forum as soon as the parade began.

C. That the Party’s exclusion of him from the parade was a valid regulation of the time, place or manner of speech.

D. That his sign constituted incitement.

4. Abel seeks to join the “Gamma Society,” an organization whose membership is limited to people of a particular race other than Abel’s race. Which of the following sources of law might successfully support his effort?

I. The Equal Protection Clause, provided the Gamma Society is a state actor.

II. The Equal Protection Clause, regardless whether the Gamma Society is a state actor.

III. The First Amendment, regardless whether the Gamma Society is a state actor.

IV. A municipal ordinance that forbids racial discrimination in “places of public accommodation” and that defines that phrase to include an organization like the Gamma Society.

A. I and II.

B. II and III.

C. I and IV.

D. I, III, and IV.
5. Assume that a particular statute would apply constitutionally to conduct of “A,” but would not apply constitutionally to the conduct “B.” Which of A or B, if either, could challenge the statute on its face as unconstitutional?

A. B only, provided the statute is substantially overbroad and infringes upon freedom of speech.

B. B only, because one may not challenge a statute on its face if it can be constitutionally applied to one’s conduct.

C. Either A or B, provided the statute is substantially overbroad and infringes upon freedom of speech.

D. Neither A nor B under any circumstances.

6. Under the law of Cineplex, custody of the minor children of divorced parents is presumptively awarded to the children’s mother. The state defends this presumption on the ground that “women tend to be better parents than men.” The state also cites a psychological study that lends some, although not much, empirical support to this claim. If a father challenged this law, a court would most likely:

A. Uphold the law as rationally related to a legitimate governmental interest.

B. Uphold the law as resting on an exceedingly persuasive justification, given the difficulty of determining which fathers happen to be better parents than their ex-wives.

C. Strike down the law as not being rationally related to a legitimate governmental interest.

D. Strike down the law as not being substantially related to an important governmental interest.
7. On May 15, 2000, Polymer, a five-star general in the United States Army, is found to have turned traitor against the United States in the course of an undeclared war between the United States and the Kingdom of Nutria. That same day, Polymer is killed by U.S. soldiers while he (Polymer) is leading a group of Nutrian guerillas against a U.S. outpost in Alaska. After the battle, in which the U.S. successfully defends the outpost, Polymer’s body lies in the middle of field. Seeking to make an example of Polymer, Congress enacts a statute providing that “no person shall bury the body of Polymer, lest that person shall be subject to imprisonment for one year.” But Polymer’s sister, Aliquippa, cannot bear the thought of her brother’s body lying in a field. Moreover, her religion — which centers on a belief in communication between the dead and the living — absolutely requires burial within one week of death. Accordingly, she goes to Alaska and buries her brother. Which of the following is her best defense to prosecution?

A. That the requirement that Polymer’s body be buried within a week of death is central to her religion.

B. That the statute is not generally applicable.

C. That she sincerely believes that Polymer’s body must be buried soon after death.

D. That the Free Exercise Clause does not apply to the federal government.

8. On January 15, 2000, the Cineplex State Police (“CSP”) announces a new “Internet Policy,” pursuant to which officers may use CSP computers for personal business, provided they do so during breaks, and provided they avoid “Web sites” that the CSP classifies as “pornographic, violent, or hateful.” On August 15, 2000, a routine inspection of sites visited by personnel of the CSP reveals that CSP Captain Don Krebs has often visited sites that the CSP classifies as pornographic, but not obscene. On September 15, 2000, his supervisor, Rae Dawn Brubaker, suspends Krebs from duty with pay, pending resolution of formal disciplinary proceedings against him. Which of the following is Captain Kreb’s best constitutional defense against these proceedings?

A. That the CSP violated his right to procedural due process by not giving him notice of the disciplinary proceedings against him.

B. That he had a legitimate interest in enforcing the law when he was investigating these sites.

C. That the CSP’s Internet Policy unconstitutionally differentiates between various forms of legally protected speech.

D. That the sites he visited were not pornographic, notwithstanding the CSP’s classification.
9. The Cineplex City Council enacts an ordinance forbidding the distribution of leaflets to patients and visitors at the city’s municipal hospital. A religious group that sincerely believes in the power of prayer to restore physical health, and that has habitually distributed leaflets to patients in the municipal hospital, brings suit in federal court to have the ordinance declared unconstitutional. The court will:

A. Strike down the ordinance, because it prohibits free exercise of religion.

B. Strike down the ordinance, because it abridges freedom of speech or of the press.

C. Uphold the ordinance, because the regulation is reasonable and does not discriminate between points of view.

D. Uphold the ordinance, provided it is necessary to satisfy a compelling governmental interest.

10. The word “slavery” or one of its cognates (for example, the word “slave”) appears how many times in the original, unamended Constitution?

A. Four.

B. Two.

C. One.

D. Zero.
11. Three of the following statements reflect the same principle. The fourth reflects a different principle. Please identify the fourth statement.

A. The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

B. We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State — indeed, in almost every western democracy — it is a crime to assist a suicide. The States’ assisted suicide bans are not innovations.

C. [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition[.]”

D. The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.

12. Cyrus has a master’s degree in public policy and is a talented writer. For some reason, however, he cannot convince anyone to publish his dissertation, *How to Reform the Economy.* On March 1, 2018, he brings suit against the Director of the Government Publishing Office (“GPO”), a unit of the federal government, to compel publication of his book. Cyrus relies on the First Amendment. The Director moves to dismiss. The court will:

A. Deny the motion, because the First Amendment precludes Congress from “abridging the freedom . . . of the press.”

B. Deny the motion, because the general public needs to hear from a wide variety of sources in exercising its role as the true sovereign in our political system.

C. Grant the motion, because the government has no duty to help pay for the exercise of constitutional rights.

D. Grant the motion, unless Cyrus establishes that he asked *every* publisher in the United States to bring out his book.
13. On June 1, 2018, officers of the Department of the Interior, an agency of the federal government, adopt a rule whereby “canoers, rowers, and kayakers” making their way down the Cineplex River in Cineplex River National Park, may proceed through the “central” (as opposed the “eastern” or “western” channel of the river only if they are “through travelers,” meaning that they entered the park, on the river, beyond its northern perimeter, and intend to leave the park, on the river, beyond its southern perimeter. The Department adopts this rule because it seeks to limit human disruption of the central channel and because the central channel is five miles shorter than either of the other two. On July 1, 2018, the “Central Channel Day Trippers” bring suit against the Secretary of the Interior, arguing that the rule denies them equal protection of the laws. The Secretary moves for summary judgment. The court will:

A. Grant the motion, if the Secretary can provide a “close and careful” explanation for the rule.

B. Grant the motion, if the rule plausibly serves a valid governmental interest.

C. Deny the motion, because any one canoe, rowboat or kayak is just as potentially disruptive as another.

D. Deny the motion, because people have a fundamental right to travel.

14. From which of the following cases comes the following language?

We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.

A. *Darcy v. Allin.*

B. *Barron v. Baltimore.*

C. *The Slaughter-House Cases.*

D. *Bolling v. Sharpe.*
15. When did the Supreme Court decide *Plessy v. Ferguson*?

A. 1833.

B. 1886.

C. 1896.

D. 1948.

16. In 1884, Congress authorizes the Secretary of War to regulate the height of bridges over “the navigable waters of the United States” “for purposes of ensuring the passage of military and other craft.” In 1891, the Oak Bridge Company, a private entity, obtains a permit from the State of Cineplex to build a span across the Oak River. The state also authorizes the company to collect a toll for use of the bridge. Because use of the river is minimal, and because the company wants to save money, the bridge as built is quite low. In fact, when the Oak is at its highest, the bridge is only 20 feet above the water. In 2011, a new factory is built upriver from the bridge, and many boats that would otherwise serve this factory cannot pass safely under the bridge. Sally, who owns one of these boats, asks the Secretary of Defense (the Secretary of War’s successor) to make the company modify its bridge. On May 1, 2016, the Secretary tells the company to raise its bridge ten feet “by November 1, 2017,” lest it be subject to prosecution, which federal law authorizes. The company takes no action. On November 15, 2017, a federal grand jury indicts the company for failure to comply with the order. The company moves to dismiss the indictment on the ground that the order constitutes an uncompensated taking of its property. Which of the following is the Secretary’s best response?

A. The Takings Clause does not apply to criminal prosecutions.

B. The fact that the company must spend money to comply with the order does not make the order a taking.

C. The Takings Clause only protects land.

D. Because Congress has power to regulate interstate commerce, and because navigation is part of commerce, the company never “owned” the right to have a low bridge in the first place.
17. On September 30, 2018, the legislature of Cineplex enacts a statute whereby “the board of directors of all publicly traded corporations with charters from this state must include at least one woman, if it has four or fewer members, two women if it has five members, and three if it has six or more members.” Corporations that fail to comply are liable to having their charters revoked. The Cineplex Association of Manufacturers promptly brings an action in federal court against the appropriate defendant attacking this statute. The judge will:

A. Ask if the statute is rationally related to a legitimate public interest, because the structure of a corporate board is entirely an economic matter.

B. Ask if the statute is rationally related to a legitimate public interest, because woman constitute a “discrete and insular minority” for constitutional purposes.

C. Dismiss the case, because the guarantee of equal protection does not apply to corporations in the private sector.

D. Ask if the statute rests upon an “exceedingly persuasive justification” because it makes distinctions according to sex or gender.

18. Little Lake Cineplex is a small body of water, about a quarter mile wide and half a mile long. It is owned entirely by Little Lake Cineplex Co-op (“LLC”), whose members own the homes around the lake. Although Little Lake Cineplex is near Big Lake Cineplex, it is not connected to the larger lake. On June 1, 2017, however, LLC decides to cut a narrow channel between the two lakes. A month later, the Army Corps of Engineers, which has jurisdiction over “the navigable waters of the United States,” informs LLC that it does not need a permit to cut this channel. After LLC cuts the channel, however, the Corps informs LLC that it has now made the smaller lake part of “the navigable waters of the United States,” meaning that it must allow any and all water-borne craft through the channel and into the smaller lake. LLC promptly brings an action against the United States in the Court of Federal Claims, arguing that it has been subjected to a taking. The court will most likely:

A. Hold for the United States, because Congress has plenary power to regulate commerce, which includes navigation, and it has empowered the Corps to exercise that authority.

B. Hold for the United States, because title to smaller lake will remain in LLC.

C. Hold for LLC, because “distinct, investment-backed expectations” underlay the cutting of the channel.

D. Hold for LLC because, although the United States may have a valid interest in regulating the use of navigable water, it has no demonstrable interest in depriving LLC of its right to exclude others.
19. The Bureau of Highways in Cineplex City “thinks ahead” on tobacco. In 1970, it prohibits the use of tobacco in its offices. The rest of the city’s government does not follow suit until later. Also in 1970, however, the Bureau allows a “short break, not to exceed five minutes” every two hours for employees who use such products. At that time, all but one of its civil engineers are male, and everyone uses tobacco. By 2018, the Bureau has fifteen such employees, six of whom are female, yet all who take this “short break” are male. Ann, one of the Bureau’s female civil engineers, objects to the break because it enables her male colleagues who take breaks to discuss “official matters” without women’s participation. On May 1, 2018, she states her objections to Max, the Chief Engineer, who undertakes a “full study” of the issue. A month later, Max, who is male, decides to retain the policy. If Ann were to attack the policy in court:

A. The court would ask if it is necessary to serve a compelling public interest.

B. Because of its disparate impact, the court would ask if the policy rests on an “exceedingly persuasive justification.”

C. If Ann were to establish that Max’s decision was in part the product of negative animus toward women, Max would have to show that he would have retained it even without such animus.

D. The court would ask if the policy is rationally related to a valid public purpose.

20. Congress enacts a statute allocating the airspace above the “minimum safe altitude of flight,” as set by an administrative agency, to “the public domain.” The agency then sets this altitude at 500 feet for most purposes. Ava is a farmer in Cineplex who is annoyed by military planes that fly over her property (although always more than 500 feet from the ground) on their way to and from a nearby base. She brings an action against the United States in the Court of Federal Claims for “taking” her property. The United States moves for summary judgment. The Court will most likely:

A. Deny the motion, because Ava’s property extends to the edges of the universe.

B. Deny the motion, because the general public does not have access to military planes.

C. Grant the motion, because the legislature has complete power to define the contours of property.

D. Grant the motion.
Answers

1. B Because XYZ is not a state actor, the statute on which Bartlett is suing must rest on a constitutional provision that reaches private conduct. The substantive provisions of the Thirteenth Amendment are not limited to state action, so the Section 2 of that amendment could provide a constitutional basis for Bartlett’s cause of action. You may be interested to note that some statutes predicated on Section 5 of the Fourteenth Amendment do reach private conduct, but we have not discussed this much (if at all) in the course, and these applications have historically been somewhat limited. The Contract Clause could not provide a basis for Bartlett’s cause of action because it applies only to state action.

2. B Alice’s best argument is that the Board should have given her notice and an opportunity to be heard before shutting her down. Answer A is not appealing because the distinction drawn here — between restaurants that stay open because their food is fit for consumption and those that must close because their food is not — is not a suspect classification. Answer C is not appealing because the Contract Clause has never been understood to effect a relinquishment by the state of its police power — that is, its power to legislate for the health, welfare, safety, and morals of the population. Answer D is not appealing because it’s essentially Lochnerist, and because no one’s telling her she can’t run a sanitary restaurant.

3. A The Liberation Party is not a state actor. Therefore it is not bound by either the First or the Fourteenth Amendments. This fact pattern is reminiscent of Hurley, in which the Supreme Court held that the South Boston Allied War Veterans Council did not have to allow a group to march in its parade whose message it did not approve.

4. C Option I is plausible, because a state actor almost never may discriminate on the basis of race. Options II and III are not plausible, because the Equal Protection Clause and the First Amendment require state action. (As noted earlier, in certain rare instances federal statutes predicated on the Fourteenth Amendment reach private conduct, but no statute is cited in Options II and III.) Option IV is plausible, because municipal ordinances may reach private conduct, depending on the rules governing such ordinances in the jurisdiction in question. In our course, we saw several local laws (usually enacted by states) that applied to private conduct. (Think about the laws at issue in Roberts, Hurley, and Dale.)

5. C If a statute is substantially overbroad and arguably in violation of the First Amendment, any party charged under the statute may challenge the statute’s constitutionality. This is especially true of “B,” whose conduct the First Amendment protects, but it is also true of “A,” whose conduct the First Amendment would not protect. This is because the “A’s” of the world are often “chilled” from speaking by overly broad statutes. Therefore courts want the “B’s”
of the world to be able to challenge such statutes for the benefit of “chilled” “A’s.”

6. D This presumption constitutes discrimination on the basis of sex, and would therefore provoke intermediate scrutiny. Although Answers B and D both use the language of intermediate scrutiny, Answer B is implausible because we know from *Frontiero v. Richardson* that administrative convenience will not justify discrimination on the basis of sex.

7. B Since *Employment Division v. Smith*, religiously inspired conduct receives less protection under the Free Exercise Clause than the regime of *Sherbert v. Verner* would seem to have required. Under *Smith*, a neutral law of general applicability is subject to only minimum rationality review. Therefore, Aliquippa’s first objective is to establish (if possible) that the statute at issue here is not neutral and generally applicable. This may be hard to do, but if she cannot succeed the issues implicated by Answers A and C will never become relevant. Answer D is incorrect because it’s not true, and because, if it were true, it would not be good for Aliquippa.

8. C Answer A is incorrect because it appears that the CSP has respected Kreb’s right to procedural due process. He has been suspended with pay pending a formal hearing. Answers B and D are incorrect because they don’t constitute constitutional defenses. Answer C is correct because it’s the only answer left, and because it’s at least plausible. The First Amendment protects non-obscene, sexually oriented speech.

9. C A municipal hospital is a non-public forum. The government may regulate speech in such a forum provided its regulation is reasonably designed to preserve the forum for its intended use, and provided it is viewpoint-neutral. This ordinance satisfies this test.

10. D Neither the word “slavery” nor any of its cognates appears in the original, unamended Constitution. The word first appears in the Thirteenth Amendment, which was ratified in 1865.

11. D The first three statements reflect the intensively historical approach of such individuals as Chief Justice Rehnquist and Justice Scalia. The fourth statement, by contrast, reflects the approach of such individuals as Justice Kennedy, who was certainly willing to look at history to ascertain the contours of substantive due process, but who was willing to look at other sources as well.

12 C The government has no general duty to pay to help people exercise constitutional rights. For example, the Court has held that the government need to make public funds available for abortions. Answer A is true, but neither Congress, nor the government as a whole, is “abridg[ing]” Cyrus’ rights. Answer B is also true, and
helps to explain why the First Amendment is important, but, still, the government has no obligation to facilitate this process by appropriating money. Answer D is not the answer because, even if Cyrus could establish that no one would publish his book, the government would not be obliged to do so.

13 B The court would apply only minimum rationality. Although the phraseology here is not exact — “plausibly” and “valid” instead of “rationally” and “legitimate” — the words have approximately the same meaning. Answer A is invalid because it is a made up test. Answer C is invalid because the Secretary has an explanation, apart from the nature of through travelers’ craft, for adopting the rule — through travelers are on a long journey, whereas “day trippers” are not. Answer D is incorrect because, although people do have a “fundamental right to travel,” it does not include a right to go wherever they want in a national park, any more than it would include a right to trespass on private property.

14 B This is the holding of Barron v. Baltimore.

15 C The Court decided Plessy v. Ferguson in 1896.

16 D This is an imperfect question, but I think one can still learn a lot from it. Answer D is correct because it illustrates the so-called “nuisance exception” to Lucas v. South Carolina Coastal Council (1992). That is, because Congress declared that bridges over navigable water are subject to regulation by the Secretary of War (or Defense) “for purposes of ensuring the flow of military and other craft” before the company built its bridge, the company cannot argue that its interest in keeping its bridge is “property” that the government may not “take” without compensation. (Frankly, the government could have announced this rule after the company built the bridge, as it simply codifies the police power.) Answer A sounds good, but query whether it would withstand analysis. Surely a criminal defendant could raise any provision of the Constitution that actually applied to his or her case as a bar to prosecution. Answer B is true, but it is not as good an answer as Answer D. This is because Answer B reflects only a factor in Penn Central, whereas Answer D would not only make Lucas inapplicable, but would probably also make Penn Central inapplicable as well. Answer C is not accurate. The clause protects “private property,” which is not limited to land. I describe this as an “imperfect question” because there’s a little too much speculation in this analysis for this to be an appropriate question on an actual exam.

17 D The distinction the government is making turns on sex or gender. Therefore, the test from Mississippi University for Woman v. Hogan (1982) would apply. Answer A is incorrect because, although most aspects of corporate law do make a mere “economic” distinction, this one does not. Answer B is incorrect because the Court has subjected all laws that make distinctions on the basis of sex or gender to heightened scrutiny, not just laws that affect woman adversely. See, for example, Craig v. Boren (1976). Answer C is incorrect because, although a
corporation’s own decisions may be purely private, the government here stands ready to revoke a corporation’s charter if it does not comply with the statute.

18   D Answer D is correct because the Corps has not said why it needs an easement into LLC’s lake. This question is unlike Question 16. In that case, the government’s need was clear (and also self-evident). To put this question in terms of Nollan v. California Coastal Commission (1987), the Corps here not only fails to establish a nexus between its exaction and a valid public purpose, but it has not set forth such a purpose at all. Answer A is incorrect because, although Congress does have these powers, and may delegate power to the Corps, it still may not “take[]” “private property” “without just compensation.” Answer B is incorrect because depriving LLC of its right to exclude others from the lake is a stick in the bundle of rights that constitutes property. See generally Dolan v. City of Tigard (1994). Answer C is incorrect because the presence or absence of “distinct, investment-backed expectations” pertains to so-called “regulatory” takings, not possessory takings. It comes up under Penn Central, not Nollan and Dolan.

19   C This answer reflects the analysis of Arlington Heights (1978), most particularly footnote 21. If Ann were to establish that an improper motive underlay Max’s decision, at least in part, the onus would then be on Max to establish, if he can, that he would have kept the policy nonetheless. Answer A is incorrect because, even if Ann is correct that Max making distinctions according to sex or gender, strict scrutiny would not literally apply (although the requirement of an “exceedingly persuasive justification” is arguably the same thing). Answer B is incorrect because it assumes, contrary to Arlington Heights, that disparate impact alone is sufficient to establish a quasi-suspect classification, and the evidence here cannot really support such a claim. Answer D is incorrect because it assumes, conclusively, that Ann cannot establish a quasi-suspect classification. Although doing so may be difficult, it would not be impossible.

20   D The Court will most likely grant the motion because the statute in question simply codifies the holding of United States v. Causby (1949). Answer A is incorrect because the doctrine according to which “Ava’s property extends to the edges of the universe” is no longer valid, as per Causby itself. Answer B is incorrect because the general public need not have access to property that the government “takes” for there to be a “taking.” Moreover, even if the general public does have access to private property because of something the government does, even then there might not be a taking. Justice Scalia himself observed in Nollan v. California Coastal Commission (1987) that, if the Commission reasonably concluded that the Nollans’ expanded bungalow would impair visibility of the beach from the highway, it could require them to grant an easement for the public on their property to facilitate the beach’s visibility. Whether the general public has access to the property isn’t even a requirement for public use. See Kelo v. City of New London (2005). Answer C is incorrect because the government does
not have “complete” power to define property. Otherwise, the legislature could simply define property out of existence and never have to compensate for takings.