

Midterm Review

Midterm Format

Optional four-hour, take-home, open-book exam.

Will only affect your final grade in the course if your midterm grade is higher than your final exam grade.

Students can take the exam at any time during the week of March 11-15.

No class on March 12.

Two parts to the exam. Character count of 10,000 characters for each part.

Part 1: Short answer questions.

Part 2: Essay question.

Possible topics: Everything from the semester to date, except for the criminal procedure unit we started this week.

What topics have we covered so far?

- State and Federal Power
- Theories for Construing State Constitutions
- Equality and Equal Protection
- Procedural Due Process
- Substantive Due Process

State and Federal Power

The Commerce Clause

Gonzales v. Raich

545 U.S. 1 (2005)

The Spending Power

NFIB v. Sebelius

567 U.S. 519 (2012)

Exclusive State Power

United States v. Lopez

514 U.S. 549 (1995)

Anti-commandeering principle

Printz v. United States

521 U.S. 898 (1997)

Federal Limitations on State Power

U.S. Term Limits Inc. v. Thornton

514 U.S. 779 (1995)

Gregory v. Ashcroft

501 U.S. 452 (1991)

Theories for Construing State Constitutions

What are some reasons to follow the U.S. Supreme Court's interpretation of a similarly worded provision?

What are some reasons *not* to follow the U.S. Supreme Court's interpretation of a similarly worded provision?

Cases - Similarly Worded Provisions

Sitz v. Department of State Police

506 N.W.2d 209 (Mich. 1993)

State v. Hempele

576 A.2d 793 (N.J. 1990)

State v. Wright

961 N.W.2d 396 (Iowa 2021)

Blum v. Merrell Dow Pharmaceuticals Inc.

626 A.2d 537 (Penn. 1993)

Four-Part Test (in Pennsylvania)

- 1) text of the Pennsylvania Constitutional provision;
- 2) history of the provision, including Pennsylvania case law;
- 3) related case law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Cases - Differently Worded Provisions

Racing Association of Central Iowa v. Fitzgerald

675 N.W.2d 1 (Iowa 2004)

State v. Jordan

156 P.3d 893 (Wash. 2007)

State v. Mixton

478 P.3d 1227 (Ariz. 2021)

State v. Scottize Danyelle Brown

930 N.W.2d 840 (Iowa 2019)

State court rulings that address both federal and state bases for decision

Ohio v. Robinette

653 N.E.2d 695 (Ohio 1995)

Sequencing

In what order should a state court resolve state and federal constitutional claims?

1. “Primacy” approach
2. “Dual sovereignty” approach
3. “Interstitial” or “Secondary” approach

Equality

**Why put equality in a state
constitution?**

What's the purpose?

Conceptions of Equality

Equal treatment → Non-discrimination from the state

Equal opportunity → Minimum state obligation to address existing inequality

Equal outcome → State guarantee to fix existing inequality

Tiers of scrutiny

Rational basis

Applies when no suspect classification is at issue.

To survive judicial review, the law must serve a *legitimate* government interest and there must be a *rational connection* between the law's means and that interest.

Intermediate scrutiny

Applies to quasi-suspect classifications such as gender.

To survive judicial review, the law must further an *important* government interest and must do so by means that are *substantially related* to that interest.

Strict scrutiny

Applies to suspect classifications such as race, national origin, and religion.

To survive judicial review, the law must further a *compelling* government interest and law must be *narrowly tailored* to achieve that interest.

Equality: Race

Sheff v. O'Neill

678 A.2d 1267 (Conn. 1996)

Malabed v. North Slope Borough

70 P.3d 416 (Alaska 2003)

Equality: Gender

Commonwealth v. Penn. Interscholastic Athletic Ass'n
334 A.2d 839 (Pa. Commw. Ct. 1975)

State v. Rivera
612 P.2d 526 (Haw. 1980)

Equality: Age

Driscoll v. Corbett

69 A.3d 197 (Pa. 2013)

Arneson v. State

864 P.2d 1245 (Mont. 1993)

Equality: Sexual Orientation

Gartner v. Iowa Dep't of Public Health
830 N.W.2s 335 (Iowa 2013)

Equality: Economic

AFSCME Iowa Council 61 v. State
928 N.W.2d 21 (Iowa 2019)

Due Process

Procedural Due Process

Substantive Due Process

Procedural Due Process

State v. Veale

972 A.2d 1009 (N.H. 2009)

M.E.K. v. R.L.K.

921 So.2d 787 (Fla. App. 2006)

Procedural Due Process Inquiry

1. Is this a legally protected interest?
2. If so, what process is due?

Substantive Due Process

Federal Backdrop

Due Process Clause of the Fourteenth Amendment protects

1. Rights specified within the bill of rights
2. “Fundamental” rights that are not specified within the Constitution.

Fundamental rights are only recognized if they are “deeply rooted in our history and tradition” and “essential to the nation’s concept of ordered liberty.”

Questions to guide us

How should we understand the differences between policy preferences and constitutional interpretation?

How should a constitution be interpreted?

What constitutional provisions are a legitimate source for a particular right? What is too much of a stretch?

What should be the role of history in our understanding of constitutional provisions? How should stare decisis factor into the analysis?

Right to Privacy

What is it? Do we want a constitutional right to privacy? What should the right protect?

Substantive Due Process: Reproductive Autonomy

Strict Scrutiny

Does the law further a “compelling governmental interest,” and is it “narrowly tailored” to achieve that interest?

Undue Burden

Does the law have the purpose or effect of imposing an “undue burden,” defined as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability?”

Rational Basis

Does the law serve a “legitimate” government interest, and is there a “rational connection” between the law’s means and that interest?

Substantive Due Process: Reproductive Autonomy

Davis v. Davis

842 S.W.2d 588 (Tenn. 1992)

In re T.W.

551 So.2d 1186 (Fla. 1989)

Hodes & Nauser, MDs, P.A. v. Schmidt

440 P.3d 461 (Kan. 2019)

Planned Parenthood of the Heartland Inc. v. Reynolds ex rel. State

975 N.W.2d 710 (Iowa 2022)

Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services

(Pa. 2024) (Wecht, concurrence)

Potential constitutional sources of right to reproductive autonomy

- Due process
- Right to privacy
- Inalienable natural rights
- Equal protection / ERA
- Religious liberty / freedom of conscience
- Explicit provision that recognizes right to reproductive autonomy

Substantive Due Process: Right of Intimate Association

State v. Saunders

381 A.2d 333 (N.J. 1977)

Commonwealth v. Bonadio

415 A.2d 47 (Pa. 1980)

Commonwealth v. Wasson

842 S.W.2d 487 (Ky. 1992)

Substantive Due Process: Civil Union and Same-Sex Marriage

Baker v. State

744 A.2d 864 (Vt. 1999)

Goodridge v. Department of Public Health

798 N.E.2d 941 (Mass. 2003)