

State Constitutional Law 23 - Review Session

Justiciability in State Courts

- Standing
- Mootness
- Political Questions
- Advisory Opinions

Advisory Opinions

State of Kansas ex rel. Morrison v. Sebelius
179 P.3d 366 (Kan. 2008)

Request for an Opinion of the Justices
274 A.3d 269 (Del. 2022)

Questions for Delaware Supreme Court

1. May “reasonable cause” include an indictment?
2. Does the authority to remove a public official implicitly include the authority to take a lesser action, such as suspension of that public official? If so, must the General Assembly address the Governor on the lesser action?
3. Does the process require a hearing prior to a vote?
4. Does the 10-day notice requirements apply for only the first House or are separate notices required for each House? May those notices be issued concurrently?
5. Is there a mechanism for an appeal?

Advisory Opinions

If you were a drafter at a state constitutional convention and you had to decide whether to allow advisory opinions, what would you choose? What are the benefits and drawbacks?

Constitutional Amendment

Two views on constitutional amendment

Jeffersonian View

Madisonian View

How are state constitutions amended?

- Legislative proposals
- Constitutional conventions
- Constitutional commissions
- Voter initiatives

California

Course Review

Final Format

- In-class, open-book exam
- Four hours
- Four essay questions, 5,000 character limit on each
- Cumulative exam, questions may address any topic from the course

Topics

- State and Federal Power
- Theories for Construing State Constitutions
- Equality and Equal Protection
- Procedural Due Process
- Substantive Due Process
- Criminal Procedure
- Property Rights
- School Funding
- Unique State Rights
- Justiciability in State Courts

State and Federal Power

Congress's authority under Art I., § 8

- commerce clause
- spending power
- tax power

Anti-commandeering principle

Federal limitations on state power

Theories for Construing State Constitutions

Reasons to follow the U.S. Supreme Court interpretation of federal constitution

Reasons *not* to follow the U.S. Supreme Court interpretation of federal constitution

Sequence of addressing state and federal constitutional claims

- Primacy
- Dual sovereignty
- Interstitial / Secondary

Equality and Equal Protection

Tiers of scrutiny

- Rational basis
- Intermediate scrutiny
- Strict scrutiny

Disparate treatment vs. disparate impact

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

Procedural Due Process

Is this a legally protected interest?

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.”

Substantive Due Process

Privacy

Reproductive autonomy

Intimate association

Civil union and same-sex marriage

Criminal Procedure

- Search and seizure
 - Probable cause
 - Good faith exception
 - Warrant requirement
 - Automobile searches
- Double jeopardy
- Cruel and unusual punishment

Probable cause

People v. Griminger

524 N.E.2d 409 (N.Y. 1988)

State v. Tuttle

515 S.W.3d 282 (Tenn. 2017)

Probable cause

Aguilar / Spinelli Test

To establish probable cause, a search warrant affidavit must demonstrate:

1. the basis of the informant's knowledge, and
2. the credibility of the informant or the reliability of the information.

Gates Test

To determine whether an affidavit establishes probable cause, a magistrate should consider the totality of the circumstances.

Good faith exception

State v. Koivu

272 P.3d 483 (Idaho 2012)

Commonwealth v. Edmunds

586 A.2d 887 (Pa. 1991)

Warrant requirement

State v. Earls

70 A.3d 630 (N.J. 2013)

State v. Bryant

950 A.2d 467 (Vt. 2008)

State v. Leonard

943 N.W.2d 149 (Minn. 2020)

Warrant requirement

What constitutes a search?

- Trespass
- Reasonable expectation of privacy
- Defendant had an expectation of privacy
- This expectation of privacy is one that society finds reasonable

Automobile Searches

State v. Cora

167 A.3d 633 (N.H. 2017)

State v. Villela

450 P.3d 170 (Wash. 2019)

State v. Arreola-Botello

451 P.3d 939 (Or. 2019)

Double Jeopardy

People v. Aranda

437 P.3d 845 (Cal. 2019)

Cruel and Unusual Punishment

Washington v. Gregory

427 P.3d 621 (Wash. 2018)

State v. Santiago

122 A.3d 1 (Conn. 2015)

Property Rights

Takings

Kelo v. City of New London

545 U.S. 469 (2005)

City of Norwood v. Horney

853 N.E.2d 1115 (Ohio 2006)

Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery

136 P.3d 639 (Okla. 2006)

Goldstein v. New York State Urban Dev. Corp.

921 N.E.2d 164 (N.Y. 2009)

Property Rights

Takings

- public use
- just compensation

Other property-related rights

Just Compensation

**Bayou Bridge Pipeline, LLC v. 38.00 Acres, More or Less,
Located in St. Martin Parish, Et Al.**

320 So.3d 1054 (La. 2021)

Other Property-Related Rights

Patel v. Texas Dep't of Licensing
469 S.W.3d 69 (Tex. 2015)

**Texas Department of State Health Services v. Crown
Distributing LLC**
647 S.W.3d 648 (Tex. 2022)

School Funding

- Equality
- Adequacy
- Justiciability / Remedies

Constitutional claims that plaintiffs might bring:

- Equal protection
- Fundamental right
- Legislature failing its constitutional duty

Equality Cases

Rodriguez v. San Antonio Indep. Sch. Dist.

406 U.S. 966 (1972)

Hornbeck v. Somerset County Board of Education

458 A.2d 758 (Md. 1983)

Horton v. Meskill

376 A.2d 358 (Conn. 1977)

Vincent v. Voight

614 N.W.2d 388 (Wis. 2000)

Adequacy Cases

Edgewood Independent School Dist. v. Kirby
777 S.W.2d 391 (Tex. 1989)

DeRolph v. State
677 N.E.2d 733 (Ohio 1997)

DeRolph v. State
754 N.E.2d 1184 (Ohio 2001)

Adequacy Cases

Columbia Falls Elementary Sch. Dist. No. 6 v. State
109 P.3d 257 (Mont. 2005)

Abbott v. Burke
971 A.2d 989 (N.J. 2009)

Citizens for Strong Schools Inc. v. Florida State Board of Ed.
262 So.3d 127 (Fla. 2019)

Uniformity Clauses

Bush v. Holmes

919 So.2d 392 (Fla. 2006)

Teacher Tenure

Vergara v. California

209 Cal. Rptr. 3d 558 (2016)

Remedy

Hoke County Board of Ed. v. State
599 S.E.2d 365 (N.C. 2004)

Claremont School District v. Governor
794 A.2d 744 (N.H. 2002)

Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.
176 S.W.3d 746 (Tex. 2005)

Unique State Rights

- Privacy
- Free speech
- Civil jury trial
- Environmental rights
- Crime victims' rights
- Right to hunt and fish

Privacy

York v. Wahkiakum School District No. 200
178 P.3d 995 (Wash. 2008)

Free Speech

Fashion Valley Mall v. NLRB
172 P.3d 742 (Cal. 2007)

State v. Stummer
194 P.3d 1043 (Ariz. 2008)

Civil Jury Trial

Sofie v. Fibreboard Corp.
771 P.2d 711 (Wash. 1989)

McCool v. Gehret
657 A.2d 269 (Del. 1995)

Environmental Rights

Penn. Env. Def. Found. v. Commonwealth
161 A.3d 911 (Pa. 2017)

Crime Victims' Rights

Common goals:

- restitution for victims
- ensure legal system is sensitive to victim's distress and privacy
- protect victims from intimidation
- encourage and include victims' participation in prosecution

Crime Victims' Rights

State v. Strom

921 N.W.2d 660 (N.D. 2019)

State v. Damato-Kushel

173 A.3d 357 (Conn. 2017)

Right to Hunt and Fish

Cabot v. Thomas

514 A.2d 1034 (Vt. 1986)

Justiciability in State Courts

- Standing
- Mootness
- Political Questions
- Advisory Opinions

Standing

Gregory v. Shurtleff

299 P.3d 1098 (Utah 2013)

Benson v. McKee

273 A.3d 121 (R.I.)

Mootness

Couey v. Atkins

355 P.3d 866 (Or. 2015)

In re Guardianship of Tschumy

853 N.W.2d 728 (Minn. 2014)

Political Questions

Berry v. Crawford

990 N.E.2d 410 (Ind. 2013)

In re Abbott

628 S.W.3d 288 (Tex. 2021)

Burt v. Speaker of the House of Representatives

243 A.3d 609 (N.H. 2020)

Advisory Opinions

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That's it!

*Slides from Midterm Review for
Reference*

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

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2. “Fundamental” rights that are not specified within the Constitution.

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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)