PROFESSOR GOULD’S SHOPPING LIST OF ISSUES FOR CONSTITUTIONAL LAW ESSAYS

I. JUSTICABILITY / FEDERALISM.

II. PLAINTIFF’S STANDING.

III. GOVERNMENTAL POWERS.

IV. GOVERNMENTAL IMMUNITY.

V. STATE ACTION.

VI. CONSTITUTIONAL CLAIMS OF PLAINTIFF.

Articles.
Commerce Clause.
Dormant Commerce Clause.
Supremacy Clause.
Privileges and Immunities Clause.
Impairment of the Obligation to Contract.

First Amendment.
Free Expression.
Religious Establishment.
Religious Practice.
Association.

Fifth Amendment.
Takings Clause.

Fourteenth Amendment.
Equal Protection Clause.
Substantive Due Process.
Procedural Due Process -- Deprivation of Property.
Procedural Due Process -- Deprivation of Liberty.
Privileges and Immunities Clause.
JUSTICABILITY / FEDERALISM

JUSTICABILITY.
Article III, Section 2.
Case or Controversy.

FEDERALISM.
Tenth Amendment.
State’s Rights.

PLAINTIFF’S STANDING

PLAINTIFF’S STANDING.

Injury in Fact.
Direct or Imminent Harm.

Causation.

Individuated Harm.
Taxpayer’s Suits.
Organizations and Associations.
Third-Party Rights (Jus Tertii).

Court Remedy.
Declaratory Judgments.

Mootness.
Capable of Repetition Yet Evading Review.
Voluntary Cessation by Defendant.
Collateral Consequences.

Ripeness.
GOVERNMENTAL POWERS

States.

10th Amendment.
Police Powers.
Health, Safety and General Welfare.

Federal.

Congress.
Grant of Power.
Not Violate Other Parts of Constitution.

Powers.
Article I, Section 8.
Interstate Commerce.
Taxing and Spending.
Regulation of Washington D.C.
Regulation and Disposal of Federal Property.
Declaration of War and Establishment and Funding of the Armed Forces.
Enforcement of Civil Rights Amendments.

Article IV, Section 3.
Make all Needful Regulations Regarding Federal Property.

GOVERNMENTAL IMMUNITY

State Immunity.

11th Amendment.
Bars Claims Against States for Damages.

Exceptions.
Claims Against State Sub-Divisions Such as Towns and Municipalities.
Non-Damage Claims such as Injunctions and Declaratory Relief.

Federal Congress.
Speech and Debate Clause. Congress has a broad legislative immunity from civil or criminal actions relating to legislative actions.

Intergovernmental Immunities.
Federal Immunity from State Taxation.
State Immunity from Federal Taxation.
STATE ACTION

State Action.
   Public Function Doctrine.
   State Involvement Doctrine.

THE COMMERCE CLAUSE,

THE DORMANT COMMERCE CLAUSE,

AND THE SUPREMACY CLAUSE

Federal Commerce Clause.
   Article I.
   Interstate Commerce.
      Channels.
      Instrumentalities.
      Articles.
      Substantial Effect.

State Dormant Commerce Clause.
   Mere Rationality Test.
      Legitimate State Objective.
      Rational Relation.
      Burden of Persuasion. Plaintiff.
      Effect on Outcome. Government almost always wins.
      Regulatory Burden Must be Outweighed by State’s Interest in Enforcing Regulation.
      Discrimination Against Out-of-Staters.
      Market Participation Exception.

Supremacy Clause.
   Article IV, Section 2. Direct Conflict. Federal Occupation / Pre-Emption of a Field.
FREEDOM OF EXPRESSION

Freedom of Expression
1st Amendment.

Unprotected Rights.
Government may regulate or ban.
  Advocacy of Illegal Conduct.
  Fighting Words.
  Defamation.
  Offensive Language.
  Hate Speech.
  Obscenity.

Protected Right.
  Content Based.
    Viewpoint Regulations.
    Strict Scrutiny.
  Non-Content Based.
    Time, Place, Manner Restrictions. Prior Restraints, Fees, etc.
    Content-Neutral.
    Mid-Level / Intermediate Review.
      Forum of Speech.
        Non-Public Forums.
        Public Forums.
        Private Property.

Overbreadth Doctrine.
Vagueness Doctrine.

SPECIFIC AREAS
Defamation.
    Public Figure / Official.
    Private Figures.

  Truthful Speech.
    Mid-Level Review
  False, Deceptive or Illegal Speech.
    May Be Banned.
  Lawyers.
**Media Speech.**

Prior Restraints. Not Allowed, Normally.
Gag Orders. Not Allowed, Normally.
Subpoenas by Government.
Right of Access.
  Right to Attend Trials.

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**FREEDOM OF ASSOCIATION**

**Freedom of Association.**

1st Amendment.

**Group Membership.**

Partisan Political Activity.
Patronage Hiring.
Speech Critical of Superiors or Inappropriate.

**Public Benefits or Employment**

Loyalty Oath.
Disclosure of Associational Activity.

**Strict Scrutiny Review Test.**

Compelling Governmental Objective.
Necessary Means.
Effect on Outcome. The government will almost always fail.
FREEDOM OF RELIGION

The Religious Establishment Clause.
First Amendment.
The Lemon Test.
1. Secular Purpose.
2. Primary Effect.
3. Excessive Entanglement.
   Application of the Lemon Test.

The Free Exercise of Religion Clause.
First Amendment.
Bona Fide Religious Belief. Sincerely Held.
Strict Scrutiny Review Test.
Compelling Governmental Objective.
Necessary Means.
Effect on Outcome. The government will almost always fail.
Exemptions.
Criminal Statutes.
Danger to Others.
Conscientious Objection.
Public Health.
THE TAKINGS CLAUSE

OF

THE FIFTH AMENDMENT

The Fifth Amendment Takings Clause.

Taking for a Public Purpose.

Economic Regulation vs. Compensable Taking.
   Economic Impact on Plaintiff.
   Interference with Invest-Backed Expectations.
   Character of the Government Action.

Just Compensation.
THE EQUAL PROTECTION CLAUSE
OF
THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the 14th Amendment.

Non-Fundamental Rights / Non-Suspect Classes.
   Mere Rationality Review.

Gender or Illegitimacy -- Quasi-Suspect Classes.
   Mid-Level / Intermediate Review.

Fundamental Right or Suspect Classification.
   Strict Scrutiny.

Non-Fundamental Rights / Non-Suspect Classes. Not based on a Suspect Classification, Fundamental Right or a Quasi-Suspect Class. Includes Economic Regulations, Age, Wealth, and Necessities such as Public School Education, Food and Shelter, and money for these necessities may be distributed unevenly.

   Sexual Orientation. Mere Rationality with Bite.

   Alienage: Representative Government Exception.
      Mere Rationality Review. A court will apply a mere rationality review, and will ask whether it is possibly conceivable the classification has a Rational Relationship to a Legitimate Governmental Objective not prohibited by the Constitution, and it must not be Arbitrary or Irrational.
         Effect on Outcome. Normally in favor of government.

Gender or Illegitimacy -- Quasi-Suspect Classes. Used for classifications based on Gender (refers to the sex of an individual and not to their sexual orientation) and Illegitimacy (refers to the nature of how an individual was born).

Other Unpopular Groups. Traditionally unpopular groups such as the elderly, disabled, or homosexual people may someday be allowed a mid-level review, if it is established that they are an unpopular and frequently discriminated against group.
**Mid-Level / Intermediate Review.** The government regulation must be Substantially Related to Meeting an Important Governmental Objective. No hypothetical objectives of the government are allowed, rather the government must show that they actually considered certain objectives which motivated their decision.

  **Burden of Persuasion.** Either party.
  **Effect on Outcome.** About 50-50

**Fundamental Right or Suspect Classification.** Relates to classifications which impair a Fundamental Right (Voting, Political Candidacy, Access to Courts, Interstate Migration) or to Suspect Categories (Race, National Origin, Alienage). For Suspect Classes, Strict Scrutiny only applies where the governmental action of Differential Treatment against a Suspect Class is Intentional, and unintended effects which burden a Suspect Class will not get Strict Scrutiny. However, circumstantial evidence may be used to show there was actually an intentional differential treatment

  **Strict scrutiny.** The classification must be Necessary to a Compelling Governmental Objective, and there must be no Less Restrictive Alternatives.
  **Burden of Persuasion.** On government.
  **Effect on Outcome.** Normally fatal to government, and in favor of Plaintiff.

**Race Conscious Affirmative Action.** Where governmental action prefers one racial group over another, Strict Scrutiny will be used under EP.

  **Past Discrimination -- Compelling.** Regulation must redress past discrimination.
  **Quotas -- Necessary.** There are often other alternatives.
SUBSTANTIVE DUE PROCESS

UNDER THE

FIFTH AND FOURTEENTH AMENDMENTS

Substantive Due Process.
14th Amendment.

Fundamental Rights.
Right to Autonomy or Privacy in Personal Matters.
Derived from Penumbra of Rights Inherent in 1st, 4th, 9th and 14th Amendments.

Strict Scrutiny.
Compelling Objective.
Effect on Outcome. Almost always fatal to government.

Quasi-Fundamental Rights.
Right to Die.
Abortion.
Allowed Regulations of Abortion.
Informed Consent.
Parental Consent.
Exception: Judicial Bypass or Emancipation / Maturity.
Public Funding.
Abortion Counseling.
Types of Abortion.
Dis-Allowed Regulation of Abortion.

Middle-Level or Intermediate Review.
Important Objective.
Substantially Related Means.
Effect on Outcome. About 50 / 50.
PROCEDURAL DUE PROCESS

UNDER THE FIFTH

AND

FOURTEENTH AMENDMENTS

**Procedural Due Process for Protected Property Interest**
- 5th and 14th Amendments.

**Protected Property Interest**
- Legitimate Expectation of Continuation of Benefit.
- Includes Tenured Governmental Employment, Welfare Benefits, etc.

**Types of Due Process Protections**
- Witnesses, Questioning, Lawyer, Meaningful Time and Place, etc.

**The Level of Process Due**
1. Importance of Liberty Interest to Plaintiff.
2. Likelihood that more Protections would Avert an Erroneous Deprivation.
3. Administrative Burden in Extra Protections.

**Conclusion**. Should Plaintiff have Received more Due Process Protections.
MINOR ISSUES

Interstate Privileges and Immunities Clause.
Article IV, Section 2.
Regulations which Treat Non-Residents Differently.
Fundamental Rights of National Unity.
Right to Employment.
Right to Practice a Profession.
Right to Engage in Business.
Right to Engage in Commerce.
Applies to Citizens.
Does Not Apply to Aliens and Corporations.
Test - Non-Residents a Particular Source of Evil State is Seeking to Avoid.
State Must Have Substantial Reason for the Regulation.

Fourteenth Amendment Privileges and Immunities Clause.
Protects Individuals from Interference with Rights of National Citizenship.
Rights of National Citizenship.
Right to Interstate Travel.
Right to Vote in National Elections. Applicable where new state resident is treated less favorably than in-staters.

The Impairment of the Obligation to Contract Clause.
Article I, Section 10.
Public Contracts.
Mid-Level Review.
Private Contracts.
Mere Rationality Review.

Ex Post Facto Laws.
Article I.
Retroactive Punitive Criminal Effect.
Act Cannot be Punished which was Not Punishable at Time of Act.
Punishment May Not be Increased.

Bills of Attainer.
Article I.
Laws which Punish Individuals without a Trial and Prohibited.

Thirteenth Amendment.
Abolishes Badges and Incidents of Slavery and Involuntary Servitude.
Includes Private Action to Discriminate Against All Racial Minorities.
No State Action Needed.