Due Process
Objectives

• While studying this chapter, the student will learn to:
• 1. Compare and contrast procedural due process and substantive due process.
• 2. Distinguish the rights that are categorized as fundamental and non-fundamental.
• 3. Explain how the Supreme Court establishes and defines fundamental rights through the “liberty” concept of the Due Process Clause.
• 4. Understand and apply the strict scrutiny and rational basis tests to due process issues.
Due Process

• The Due Process clause reads in part “…nor shall any person be deprived of life, liberty, or property without due process of law…”

• As you know the due process clause applies to the states through the 14th amendment and to the federal government through the 5th amendment.

• Due process is categorized into three classes:
Due Process

1. Due Process incorporates specific protections defined in the Bill of Rights.
2. Due Process contains a substantive component (Substantive Due Process)
3. Due Process includes a guarantee of fair procedures, called Procedural Due Process.
Procedural Due Process

• Pay careful attention:
• Procedural Due Process is not a deprivation of property or liberty that is unconstitutional!
• It is a deprivation without Due Process of Law without adequate Procedures!
• Determining which interest gets protected as a property or liberty right is the tough question!
• An only the supreme court can determine what those interests are!
The Supreme Court has determined that the following are liberty or property interest:
- Right to receive welfare benefits;
- Parole revocation;
- Transfer of an inmate from a prison to a mental institution;
- Discharge of tenured teacher from a state university;
Procedural Due Process

• Termination of Parental rights;
• Corporal punishment in a public school;
• Suspension in public school;
• Suspension of drivers license;
• Suspension of professional license.
Procedural Due Process

• Areas where the Supreme Court *has not* found a liberty or property interest:
  • Discharge of non-tenured teacher from a state university;
  • Transfer of inmate from one prison to another;
  • Denial of an inmate’s visitation rights;
  • Injuries sustained by inmates caused by the negligence of prison officials;
  • Right to one’s reputation/pictures appearing on fliers stating you are a convicted felon.
Procedural Due Process

• In the Paul v. Davis case the Supreme Court stated that there are a variety of interest that are not included in the bill of rights that within the meaning of liberty and property as meant in the Due Process clause.

• These interest attain constitutional status by virtue that the fact that the states or federal government initially have recognized and protected them by law.
Procedural Due Process

• Other factors that determine constitutional status are the severity of the loss suffered and whether the interest has been protected in the nation’s history and traditions.

• Liberty was described in the Meyer v. Nebraska, as “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience…”
Procedural Due Process

• If the right is found to be contained within the meaning of the Due Process clause the question becomes, **What process is due?**
• The process varies depending on what is at stake.
• For example for a Felony requirements are more stringent. Why because your actual liberty is at stake. (4\textsuperscript{th}, 5\textsuperscript{th}, 6\textsuperscript{th} and 8\textsuperscript{th} amendment rights)
• For a two day suspension from school the process may be just inquiring as to what happened with an explanation.
Substantive Due Process

• There are only a few rights that get enhanced protection under the liberty portion of the 14th amendment. The bill of rights are included.

• But there are other rights that are not articulated in the Constitution.

• In substantive due process issues, you need to know that there only a few selected interest have been held by the court to be fundamental in order to get special protection.
Substantive Due Process

• How does a court determine those rights?
• In Poe v. Ullman Justice Harlan stated in a dissenting opinion that “due process protections are not limited to those rights contained in the Bill of Rights but include interests deemed to be fundamental…in as much as this context is one not of words, but one of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees provided in the Constitution.”
Substantive Due Process

• When states pass laws that interfere with these fundamental protected liberties it is the job of the court to scrutinize and strike down these laws.

• Marriage is a fundamental right.

• It is not in the Constitution.

• Why is marriage a fundamental right?

• Harlan in the case of Loving v. Virginia stated:
Substantive Due Process

• “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe and of the mystery of human life.”
Substantive Due Process

• The Michael case, what was that about?
• Paternity case.
• Give me the facts.
• What did Justice Scalia say?
• No substantive due process in the right in a natural fathers relationship to a child whose mother was married to another man and whose child resulted from an adulterous affair.
Substantive Due Process

• Scalia stated that society has never protected such a right!!!!
• Justice Brennan dissented. What was his dissent?
• His question was whether society traditionally protected the rights of a father's relationship with his child?
Other Fundamental Rights

• The Supreme Court has over time established other Constitutional rights that are seen as fundamental rights although they are not mentioned in the Constitution.
• One of those is the case of Roe v. Wade.
• The Supreme Court has determined over the years that there are certain fundamental rights protected by due process based on our history, culture and values.
• There are not that many so far they are the following:
Other Fundamental Rights

• Privacy
• Use of contraceptives-married individuals
• Use of contraceptives-single individuals
• Abortion
• Procreation
• Parental decisions
• Right to marry-heterosexuals
• Right to live as a family
Other Fundamental Rights

- Right to travel
- Right to vote
- Right to access to the courts
- Right to refuse medical attention
- First amendment rights and all other rights of the bill of rights
- When the Supreme Court hears a case concerning one of the above they use the Strict Scrutiny test.
- When the right they are looking at is not one of the above they use the rational basis test.
Other Fundamental Rights

- What is the strict scrutiny test?
- That the law passed by the legislature must be necessary to serve a compelling state interest and must be the least restrictive way to achieve that interest.
- If the law can not show the above then the court will nullify it even though a majority of the state legislators approved it.
Other Fundamental Rights

• What is the rational basis test?
• If no fundamental right is at issue then the law passed has only to be rationally related to a legitimate state interest. The court will seldom strike this type of law because the majority of the legislators passed it and is the will of the people.
• Before either test can be used by the court the court has to determine whether the conduct prohibited is it a fundamental right or not.
Other Fundamental Rights

- Homosexual right to engage in sodomy did not make it as a fundamental right. Bowers v. Hardwick, the court stated that homosexual acts were not part of our traditions!
- Bowers was overturned by the Lawrence case, how so?
- Privacy in the bedroom!!!!
- Although it did not elevate the sexual act of homosexuals as consenting adults to a fundamental right.
THE END