

THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

By Nathan S. Chapman and Kenji Yoshino¹

The Due Process Clause of the Fourteenth Amendment is the source of an array of constitutional rights, including many of our most cherished — and most controversial. Consider the following rights that the Clause guarantees against the states:

- procedural protections, such as notice and a hearing before termination of entitlements such as publicly funded medical insurance;
- individual rights listed in the Bill of Rights, including freedom of speech, free exercise of religion, the right to bear arms, and a variety of criminal procedure protections;
- fundamental rights that are not specifically enumerated elsewhere in the Constitution, including the right to marry, the right to use contraception, and the right to abortion.

The Due Process Clause of the Fourteenth Amendment echoes that of the Fifth Amendment. The Fifth Amendment, however, applies only against the federal government. After the Civil War, Congress adopted a number of measures to protect individual rights from interference by the states. Among them was the Fourteenth Amendment, which prohibits the states from depriving “any person of life, liberty, or property, without due process of law.”

When it was adopted, the Clause was understood to mean that the government could deprive a person of rights only according to law applied by a court. Yet since then, the Supreme Court has elaborated significantly on this core understanding. As the examples above suggest, the rights protected under the Fourteenth Amendment can be understood in three categories: (1) “procedural due process;” (2) the individual rights listed in the Bill of Rights, “incorporated” against the states; and (3) “substantive due process.”

Procedural Due Process

“Procedural due process” concerns the procedures that the government must follow before it deprives an individual of life, liberty, or property. The key questions

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are: What procedures satisfy due process? And what constitutes “life, liberty, or property”?

Historically, due process ordinarily entailed a jury trial. The jury determined the facts and the judge enforced the law. In past two centuries, however, states have developed a variety of institutions and procedures for adjudicating disputes. Making room for these innovations, the Court has determined that due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *Mullane v. Central Hanover Bank* (1950).

With regard to the meaning of “life, liberty, and property,” perhaps the most notable development is the Court’s expansion of the notion of property beyond real or personal property. In the 1970 case of *Goldberg v. Kelly*, the Court found that some governmental benefits—in that case, welfare benefits—amount to “property” with due process protections. Courts evaluate the procedure for depriving someone of a “new property” right by considering: (1) the nature of the property right; (2) the adequacy of the procedure compared to other procedures; and (3) the burdens that other procedures would impose on the state. *Mathews v. Eldridge* (1976).

“Incorporation” of the Bill of Rights Against the States

The Bill of Rights—comprised of the first ten amendments to the Constitution—originally applied only to the federal government. *Barron v. Baltimore* (1833). Those who sought to protect their rights from state governments had to rely on state constitutions and laws.

One of the purposes of the Fourteenth Amendment was to provide federal protection of individual rights against the states. Early on, however, the Supreme Court foreclosed the Fourteenth Amendment Privileges or Immunities Clause as a source of robust individual rights against the states. *The Slaughter-House Cases* (1873). Since then, the Court has held that the Due Process Clause “incorporates” many—but not all—of the individual protections of the Bill of Rights against the states. If a provision of the Bill of Rights is “incorporated” against the states, this means that the state governments, as well as the federal government, are required to abide by it. If a right is not “incorporated” against the states, it applies only to the federal government.

A celebrated debate about incorporation occurred between two factions of the Supreme Court: one side believed that all of the rights should be incorporated wholesale, and the other believed that only certain rights could be asserted against the states. While the partial incorporation faction prevailed, its victory rang somewhat

hollow). As a practical matter, almost all the rights in the Bill of Rights have been incorporated against the states. The exceptions are the Third Amendment's restriction on quartering soldiers in private homes, the Fifth Amendment's right to a grand jury trial, the Seventh Amendment's right to jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines.

Substantive Due Process

The Court has also deemed the due process guarantees of the Fifth and Fourteenth Amendments to protect certain substantive rights that are not listed (or "enumerated") in the Constitution. The idea is that certain liberties are so important that they cannot be infringed without a compelling reason no matter how much process is given.

The Court's decision to protect unenumerated rights through the Due Process Clause is a little puzzling. The idea of unenumerated rights is not strange—the Ninth Amendment itself suggests that the rights enumerated in the Constitution do not exhaust "others retained by the people." The most natural textual source for those rights, however, is probably the Privileges and Immunities Clause of the Fourteenth Amendment, which prohibits states from denying any citizen the "privileges and immunities" of citizenship. When *The Slaughter-House Cases* (1873) foreclosed that interpretation, the Court turned to the Due Process Clause as a source of unenumerated rights.

The "substantive due process" jurisprudence has been among the most controversial areas of Supreme Court adjudication. The concern is that five unelected Justices of the Supreme Court can impose their policy preferences on the nation, given that, by definition, unenumerated rights do not flow directly from the text of the Constitution.

In the early decades of the twentieth century, the Court used the Due Process Clause to strike down economic regulations that sought to better the conditions of workers on the ground that they violated those workers' "freedom of contract," even though this freedom is not specifically guaranteed in the Constitution. The 1905 case of *Lochner v. New York* is a symbol of this "economic substantive due process," and is now widely reviled as an instance of judicial activism. When the Court repudiated *Lochner* in 1937, the Justices signaled that they would tread carefully in the area of unenumerated rights. *West Coast Hotel Co. v. Parrish* (1937).

Substantive due process, however, had a renaissance in the mid-twentieth century. In 1965, the Court struck down state bans on the use of contraception by married couples on the ground that it violated their “right to privacy.” *Griswold v. Connecticut*. Like the “freedom of contract,” the “right to privacy” is not explicitly guaranteed in the Constitution. However, the Court found that unlike the “freedom of contract,” the “right to privacy” may be inferred from the penumbras—or shadowy edges—of rights that are enumerated, such as the First Amendment’s right to assembly, the Third Amendment’s right to be free from quartering soldiers during peacetime, and the Fourth Amendment’s right to be free from unreasonable searches of the home. The “penumbra” theory allowed the Court to reinvigorate substantive due process jurisprudence.

In the wake of *Griswold*, the Court expanded substantive due process jurisprudence to protect a panoply of liberties, including the right of interracial couples to marry (1967), the right of unmarried individuals to use contraception (1972), the right to abortion (1973), the right to engage in intimate sexual conduct (2003), and the right of same-sex couples to marry (2015). The Court has also declined to extend substantive due process to some rights, such as the right to physician-assisted suicide (1997).

The proper methodology for determining which rights should be protected under substantive due process has been hotly contested. In 1961, Justice Harlan wrote an influential dissent in *Poe v. Ullman*, maintaining that the project of discerning such rights “has not been reduced to any formula,” but must be left to case-by-case adjudication. In 1997, the Court suggested an alternative methodology that was more restrictive: such rights would need to be “carefully descri[bed]” and, under that description, “deeply rooted in the Nation’s history and traditions” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg* (1997). However, in recognizing a right to same-sex marriage in 2015, the Court not only limited that methodology, but also positively cited the Poe dissent. *Obergefell v. Hodges*. The Court’s approach in future cases remains unclear.