CHAPTER

DUE PROCESS AND
EQUAL PROTECTION

Outline

I. Due Process
   A. Incorporation
      1. Fourteenth Amendment makes Bill of Rights guarantees applicable to the states by its language
         a. Only federal government bound before this
            (1) Barron v. Mayor of the City of Baltimore
                (a) “Constitution . . . not [ordained and established] for the government of the individual States”
                (b) Federal courts unable to ensure state government compliance with constitutional requirements
         b. Started to change with passage of Civil War Amendments
         c. Fourteenth Amendment relevant to due process and equal protection
            (1) Designed to protect African Americans from the states’ power to discriminate
      2. Court rejected position that Fourteenth Amendment applied to states soon after its passage
      3. Two positions on applicability to individual states
         a. Selective incorporation
            (1) Fourteenth Amendment does not automatically incorporate all of the Bill of Rights guarantees
            (2) States may choose the level of liberty to grant citizens
                (a) State rights may be no less than that granted in the Bill of Rights
                (b) Individual states may grant citizens greater protection than the Bill of Rights
         b. Test employed
            (1) Whether the guarantee is “implicit in the concept of ordered liberty,” Palko v. Connecticut
            (2) Weaknesses of the test
                (a) It allows the individual justices to decide the scope
                (b) It is vague
      4. Total incorporation doctrine
         a. Fourteenth Amendment Due Process Clause specifically makes the Bill of Rights applicable to the states
         b. It is not widely accepted
         c. Weaknesses
            (1) Constrains the states’ ability to reform policies and legislation
            (2) It is vague
      5. Selective incorporation approach holds sway
         a. Analysis changed over time
            (1) Fundamental guarantees should be incorporated
                (a) Those rights necessary in the context of the judicial process
6. Applicability of due process
   a. Fifth Amendment Due Process Clause binding on the federal government
   b. Fourteenth Amendment governs state action
   c. Coextensive interpretation

B. Substantive due process
1. State legislation can be found to violate the Constitution under the Fourteenth Amendment
2. Fourteenth Amendment limits the states’ substantive power to intervene in citizens’ lives
   a. In the economic sphere
   b. In the social sphere
3. Where the Court intervenes in state legislation, analysis is based on the interpretation of “liberty”
4. Applied irregularly over time
   a. First challenge in the *Slaughterhouse Cases*
      (1) Factors involved in Court’s decision to address the question:
         (a) Acceptance of national law doctrine
         (b) Laissez-faire economic policy
         (c) Fourteenth Amendment
      (2) Court rejected substantive due process review
   b. Changed over time
      (1) Between 1899 and 1937, Court held 1,259 state statutes unconstitutional
      (2) Question was whether the state law violated citizens’ freedom of contract
         (a) *Lochner v. New York*
            i. Statute limiting hours one could work in a bakery
            ii. Court found unconstitutional
            iii. Majority test
               a) Whether real and substantial relationship between statute and objective
               b) Less restrictive measures could be applied
            iv. Dissents
               a) Harlan—insufficient evidence that statute promoted health and safety
               b) Holmes—Court without right to impose its views on economic theory on states
               c) In other cases, legislation’s need for special protection in regulating hours would be upheld
                  1) Women in need of special protection
      v. Later years of substantive due process analysis
         a) Factors leading to greater deference toward legislative intervention in economic affairs:
            1) Election of Franklin D. Roosevelt
            2) Great Depression
            3) Change in Court personnel
         b) Court abandons strict scrutiny test of *Lochner*
            1) *U.S. v. Carolene Products, Company*
               i) Even in absence of specific legislative findings, it must be presumed that facts support the legislative judgment to regulate
            2) Burden of proof shifted to those challenging the legislative
            3) Deference to legislative authorities
               (i) Standard—minimal rationality
               (ii) Presumption of constitutionality
               (iii) Police power defined broadly
               (iv) Standard also applied to social welfare cases
            4) Different standard if fundamental rights involved

C. Procedural due process
1. Requirement that citizens be provided a fair process before deprivation of “life, liberty or property”
   a. If the government is not taking one of these, then it may act arbitrarily or unfairly
2. Liberty and property interests
   a. Before 1970 Court broadly interpreted liberty and property interests
      (1) Court unlikely to find liberty or property interest in government benefits
      (2) Through the 1970s, contradictory opinions on the scope of entitlements
   b. More recently Court has found a liberty interest in privacy
      (1) \textit{Lawrence v. Texas}
         (a) “Realm of personal liberty which the government may not enter”
         (b) Protected by the Constitution
3. Requisite procedures
   a. \textit{Goldberg v. Kelly} examined what procedures are required before welfare benefits may be terminated
      (1) Welfare is a right protected by the Constitution
         (a) Notice and hearing must be given before termination
   b. Retreat from \textit{Goldberg} during the 1970s
   c. Current analysis
      (1) Balancing test to define requisite procedures
         (a) \textit{Matthews v. Eldridge}, factors to be balanced:
            i. Strength of interest
            ii. Risk of erroneous deprivation
            iii. Government interest including function involved
II. Equal Protection
A. Underlying goal of Equal Protection Clause is to ensure equal treatment for former slaves
   1. Courts have interpreted it as a restraint on the use of classification in government regulation
B. Used mainly where classification is based on race and national origin
   1. If not based on race or national origin, then rational relationship analysis is used
      a. Legislative purpose is not part of the analysis
C. Change in analysis with the Warren Court
   1. Use of strict scrutiny in cases of “suspect” classification
      a. Politically powerless
      b. Unpopular minorities
   2. Impact on fundamental rights
      a. No specific delineation of a fundamental rights
      b. Cases indicated that fundamental rights were restricted to voting, criminal appeals, and interstate travel
   3. Statute upheld only if necessary to achieve a compelling state interest
D. Burger-Rehnquist Court continued approach but declined to expand it
   1. Moved away from strict two-tiered analysis
      a. Imposed third level applicable usually in gender, illegitimacy, and alienate cases
         (1) Intermediate or mid-level scrutiny
            (a) More than rational relationship test
            (b) Less than strict scrutiny
   2. Fourteenth Amendment equal protection only applies to state and local governments
      a. Under Fifth Amendment, courts analyze whether the federal government uses classification that would violate the Fourteenth Amendment if used by the states
   3. Applies only to making of classification
      a. Does not address whether an individual falls into a classification
   4. Statute may be applied in a way that demonstrates drawing classificatory lines
   5. Guarantees that individuals similarly situated be treated similarly
      a. Determination of whether two people are similarly situated made with reference to statutory objectives
(1) *Michael M. v. Superior Court*
   (a) Court willing to defer to the legislature regarding the classification
      i. Rational relationship standard for most economic and social welfare cases
         a) Determined by
            1) Looking at statutory language
            2) Conceivable basis for legislation
   (2) Where claimed purpose motivated by animus or hostility, it will not be upheld
      (a) *Romer v. Evans*
      (b) *Lawrence v. Texas*

III. Summary
A. Due Process Clauses restrict the government from depriving a person of life, liberty, or property without due process
B. Guarantees of the Bill of Rights were not applicable to the states prior to the passage of the Fourteenth Amendment
C. Selective incorporation doctrine makes the provisions of the Bill of Rights applicable to the individual states
   1. Strict scrutiny applicable analysis for fundamental rights
   2. Each provision examined to determine whether it is fundamental to the concept of society
D. Restrains the government’s substantive power to infringe on constitutional liberties
E. Distinction made between fundamental and nonfundamental rights
   1. Strict scrutiny analysis is applicable to fundamental rights
   2. With nonfundamental rights, rational relationship analysis is used
   3. Economic regulation and social welfare cases are within rational relationship analysis
F. Guarantee of procedural due process
   1. Government must employ fair procedures in taking citizens’ life, liberty, or property
   2. Procedures determined by using balancing test, weighing individual interest in specific procedure against state interest in administrative and fiscal costs
G. Equal Protection Clause restrains government from discriminatory classifications
   1. Fifth Amendment due process is coextensive with Fourteenth Amendment equal protection in restraining the federal government
   2. Three standards of review:
      a. Suspect classification and fundamental rights requires strict scrutiny
         (1) Usually results in finding of unconstitutionality
      b. Gender and illegitimacy employs mid-level scrutiny
         (1) Important state interest and classification substantially related to governmental goal
      c. All other classifications are subject to rational relationship analysis

**Key Terms and Definitions**

*de facto:* (Latin) In fact; actual; a situation that exists in fact whether or not it is lawful.

*due process of law:* The Due Process Clauses of the Fifth and Fourteenth Amendments is that a person should always have notice and a real chance to present his or her side in a legal dispute and that no law or government procedure should be arbitrary or unfair.

*entitlement:* Absolute (complete) right to something (such as Social Security) once you show that you meet the legal requirement to get it.

*equal protection of laws:* The constitutional requirement that a state government not treat equals unequally, not set up illegal categories to justify treating persons unfairly, and/or not give unfair or unequal treatment to a person based on that person’s race, religion, disability, color, sex, age, or national origin.
freedom of contract: The constitutionally protected right to make and enforce contracts, as limited only by reasonable laws about health, safety, and consumer protection.

hearing: A trial-like proceeding conducted by an administrative agency or in another noncourt setting.

liberty: Freedom from illegal personal restraint; Personal rights under law; A liberty interest is a right protected by due process of law.

natural law: Rules of conduct that are thought to be the same everywhere because they are basic to human behavior; Basic moral law.

notice: Formal receipt of the knowledge of certain facts.

selective incorporation: The principle that only certain provisions of the Bill of Rights, which protects persons against certain actions of the federal government, also protects against state action by way of the Fourteenth Amendment.

suspect classification: Making choices (in employment, etc.) based on factors such as race or nationality. These choices, only rarely are legitimate, must be strongly justified if challenged.

Review Questions

1. What is selective incorporation? What rights have been selectively incorporated? What do the incorporated rights have in common?

2. What is substantive due process? How has the Court changed its position on substantive due process issues over time?

3. The Fifth Amendment requires the government to provide citizens with a fair procedure before depriving them of life, liberty, or property. What have the Court’s varying definitions of liberty and property been?

4. In Goldberg v. Kelly the Court set forth the extent of procedural due process protections. What did the Court require? How has this changed?

5. The Equal Protection Clause restrains the government from setting up classifications that result in discriminatory treatment of similarly situated individuals. Set forth the test imposed and the classifications to which each applies.

Internet Connections

1. For more information on the Fourteenth Amendment Due Process and Equal Protection Clauses, see Findlaw: United States Constitution, Fourteenth Amendment at http://caselaw.findlaw.com.
