

Due Process and State Action

Due Process Clause

**Both 5th and 14th Amendment
provide that:**

**no person shall be deprived of
“life, liberty or property without
due process of law”**

Magna Carta, Art. 39 (1215)

“No free man shall be taken, or imprisoned, or desseized, or outlawed, or exiled, or any wise destroyed ... but by lawful judgment of his peers or by the law of the land.”

Two Forms of Due Process

Procedural: a person must be given notice and a fair hearing before a neutral decision-maker before adverse action

Substantive: Laws must be based in real needs and the means chosen to serve those needs must be based in both logic and evidence

Barron v. Baltimore (1835)

Bill of Rights only applies to federal government

Adopted for fear that federal government threatened those rights already recognized by states

Slaughterhouse Cases (1873)

14th Amendment only protects rights held by individuals as federal citizens, not as state citizens. Cannot replicate basic rights of free speech, defendants' rights, etc as those are protected by states

Twinning v. New Jersey (1908)

Rights may be incorporated “not because they are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of the due process of law.”

Incorporated Amendments

Complete Incorporation:

First, Fourth, Sixth, Ninth

Partial Incorporation

Fifth (except Grand Jury)

Eighth (except excessive bail or fines)

Non-Incorporated:

Second, Third, Seventh

Palko v. CT (1937)

Fundamental Rights

Natural law definition:

“very essence of a scheme of ordered liberty”

Customary law definition:

“rooted in the traditions and conscience of our people”

Application of Bill of Rights to States

Amend	Right	Supreme Court Case
First	Speech	<i>Gitlow v. New York (1925)</i>
	Press	<i>Near v. Minnesota (1931)</i>
	Assembly	<i>DeJonge v. Oregon (1937)</i>
	Free Exercise of Religion	<i>Cantwell v. Connecticut (1940)</i>
	Establishment of Religion	<i>Everson v. Board of Education (1947)</i>
Fourth	Search & Seizure	<i>Wolf v. Colorado (1949)</i>
	Exclusionary Rule	<i>Mapp v. Ohio (1961)</i>

Application of Bill of Rights to States

Amend	Right	Supreme Court Case and Year
Fifth	Just Compensation	<i>Chicago, Burlington, & Quincy RR. v. Chicago</i> (1897)
	Self-Incrimination	<i>Malloy v. Hogan</i> (1964)
	Double Jeopardy	<i>Benton v. Maryland</i> (1969)
Sixth	Public Trial	<i>In re Oliver</i> (1948)
	Assistance of Counsel	<i>Gideon v. Wainwright</i> (1963)
	Confrontation	<i>Pointer v. Texas</i> (1965)
	Impartial Jury	<i>Parker v. Gladden</i> (1966)
	Speedy Trial	<i>Klopfer v. No. Carolina</i> (1967)
	Jury Trial	<i>Duncan v. Louisiana</i> (1968)

Levels of Scrutiny

Strict Scrutiny

State must show “compelling governmental interest” & means are “narrowly tailored”

Intermediate or Heightened Scrutiny

State must show “important governmental interest” & means are “substantially related”

Ordinary Scrutiny

State must show “legitimate governmental interest” & means are “rationally related”

City of Richmond v. J.A. Croson (1989)

“The purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”

Justice Sandra Day O’Connor

Strict Scrutiny

Applies to Fundamental Rights

Policy must address a real, not speculative, problem, government has least discretion

Civil Liberties: Speech, Press, Assembly, Petition, Association, Defendants' Rights, Interstate Travel, Right to Vote

Equal Protection: Race, National Origin, Legal Residents (states), Poverty when relates to fundamental rights

Intermediate or Heightened Scrutiny

Applies to rights of intermediate importance, allows government some discretion

State must show “important governmental interest” & means are “substantially related”

Civil Liberties: Privacy

Equal Protection: Gender, Legitimacy of Birth, Illegal Aliens (states)

Ordinary Scrutiny

Permits government to exercise greatest discretion

State must show “legitimate governmental interest” & means are “rationally related”

Civil Liberties: Religious Establishment, Religious Free Exercise, economic due process

Equal Protection: Age, Disability, Sexual Orientation, Resident and Illegal Aliens (federal), Wealth/Income

State Action Doctrine

Constitutional rights only apply against government (except for 13th Amendment)

Rights against private persons provided through statute authorized under proper government powers or through private agreements (contracts)

State Action Implicated in Private Law

**State asked to enforce private rights
(through courts, cops)**

State resources used by private parties

**Private party pervasively regulated by
state as a utility or franchise providing
“public goods”**

**Private entity exercises state functions:
private jails, Valley Mental Health**

Section 1983 Actions

42 U.S.C. § 1983 provides damages for actions “under color of state law”

Extends civil rights protections to private parties who are carrying out state functions

Also used to sue municipalities (which are corporations, not sovereigns)

Traditional Public Fora

Streets, sidewalks, parks, grounds of “public” government buildings.

No exclusions based on viewpoint or subject matter (except Establishment)

Time, place, and manner regulations must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”

Marsh v. Alabama (1946)

Jehovah's Witness wished to leaflet in company town, told it was private property

Town had no general restrictions on public access, streets were always open

Supreme Court: "The owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the state."

Venetian Casino v. Culinary Workers (9th Circuit, 2001)

Casino promised city that it would “dedicate [a] necessary right-of-way ... [and] construct thereon a sidewalk” to replace sidewalk on public right of way that was eliminated to widen street to accommodate the Venetian

***Venetian Casino v. Culinary
Workers (9th Circuit, 2001)***

**Union uses sidewalk to protest lack of
contract**

**Venetian insists Union stay off its
property, even though dedicated as
right of way**

Venetian Casino v. Culinary Workers (9th Circuit, 2001)

9th Circuit found for union because of:

“The historically public character of the Venetian’s sidewalk, the sidewalk’s continued use by the general public, the fact that the sidewalk is connected to and virtually indistinguishable from the public sidewalks to its north and south, and the dedication of the sidewalk to public use”