

## SUBSTANTIVE DUE PROCESS

*Erwin Chemerinsky\**

*Honorable George C. Pratt:*

Professor Erwin Chemerinsky is one of the leading scholars on constitutional law. We are delighted to have you here. Erwin, you have the floor.

*Professor Erwin Chemerinsky:*

There is no concept in American law that is more elusive or more controversial than substantive due process. Substantive due process has been used in this century to protect some of our most precious liberties. Still, there are now and have always been Justices of the Supreme Court who believe there is no such thing as substantive due process.

During my time this morning, I would like to address four questions. First, what is substantive due process? Second, what is the history of substantive due process? Third, when does substantive due process apply and fourth, what are the elements of a substantive due process claim?

I start briefly with the first question, what is substantive due process, because, strangely enough, if you look through Supreme Court opinions you will never find a definition. Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.

Consider this simple illustration. The Supreme Court has said that under the word liberty in the due process clause, parents have a fundamental right to the custody of their children.<sup>1</sup>

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Procedural due process means that the government must give notice and a hearing before it can permanently terminate custody.<sup>2</sup> Substantive means the government must show a compelling reason that would demonstrate an adequate justification for terminating custody.<sup>3</sup>

With this definition in mind, I want to address, briefly, the second question – what is the history of substantive due process? The reality is if you are a plaintiff in court and you are asserting a substantive due process claim, you have an uphill battle. Why? The answer is historical.

Substantive due process was used, as you know, in the first third of this century to aggressively protect economic liberties from government interference. *Lochner v. New York*<sup>4</sup> is the quintessential case from that era. In *Lochner*, the Supreme Court

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remarks given at the Practicing Law Institute program on the Supreme Court, November, 1998. I am grateful to Patricia Rooney for all her hard work in preparing this article for publication.

<sup>1</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In *Santosky*, the Supreme Court explained that a parent's "fundamental liberty interest" with regard to the "care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* The Court stated:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

*Id.* at 753-54.

<sup>2</sup> *Id.* at 758-59 (quoting *Lassiter v. Department of Soc. Svcs.*, 452 U.S. 18, 27 (1981) (stating that a "parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right.") (internal quotation citation omitted).

<sup>3</sup> *Id.* at 762 (noting "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.").

<sup>4</sup> 198 U.S. 45 (1905), *overruled in part*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

standard.<sup>153</sup> Thus, the Court chooses the “shocks the conscious” standard. However, by implication, in other situations where there is the opportunity for deliberation and reflection, deliberate indifference should be enough for substantive due process violation. Thus, *Sacramento v. Lewis* offers plaintiffs an additional tool in lower courts clarifying when due process claims are available.

Let me then turn to a fourth and final question. What are the elements of a substantive due process claim? I suggest to you that there are three elements that must be met. First, there must be a deprivation, second, it must be of life, liberty or property, and third, it must be shown that the government did not have an adequate justification for its action.<sup>154</sup> If the plaintiff can show a deprivation of life, liberty or property without an adequate justification, the plaintiff has then set out a substantive due process claim.

There are a couple of contexts in which the Supreme Court has had to consider what is a deprivation. One context has been whether or not a negligent government action is sufficient for a deprivation. The 1986 case of *Daniels v. Williams*<sup>155</sup> and its companion case *Davidson v. Cannon*<sup>156</sup> are the leading decisions in this area.

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<sup>153</sup> *Id.*

<sup>154</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court set forth three factors that must be considered in a due process analysis. *Id.* at 334. The Court explained:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

<sup>155</sup> 474 U.S. 327 (1986).

<sup>156</sup> 474 U.S. 344 (1986).

## B. *Substantive Due Process*

The due process clause does more than guarantee fair procedures. It also has a substantive component.<sup>82</sup> The concept of substantive due process is rooted in the term “liberty” found in the due process clause. The Fourteenth Amendment confers broad protection on liberty—protection that goes beyond mere freedom from personal restraint. The text of the Fourteenth Amendment, nevertheless, does not define the liberties protected by the Fourteenth Amendment. This is the role of substantive due process. Substantive due process serves to protect “fundamental rights” from arbitrary deprivation by state governments<sup>83</sup> and also to hold state government officials accountable for egregious misconduct that is not addressed by any of the more specific provisions of the Constitution.<sup>84</sup>

### 1. Protection of Fundamental Rights

Some rights are so fundamental to the liberty of free citizens that they cannot be denied without a compelling reason. These rights are called “fundamental rights.” The label of a fundamental right has been reserved for important choices that are central to an individual’s self-concept, dignity, and autonomy. Rights that have been recognized as fundamental include the right to marry,<sup>85</sup> to have children,<sup>86</sup> to direct their upbringing and education,<sup>87</sup> to enjoy privacy,<sup>88</sup>

<sup>82</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). For a discussion of substantive due process, see generally Erwin Chemerinsky, *Substantive Due Process*, 15 *Touro L. Rev.* 1501 (1999); Rosalie Berger Levinson, *Protection against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?* 16 *U. DAYTON L. REV.* 313 (1991).

<sup>83</sup> See authorities cited in notes 85–93 *infra*.

<sup>84</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (holding that police conduct must “shock the conscience” to state a claim for denial of substantive due process).

<sup>85</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (invalidating law prohibiting marriage between persons of different races); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).

<sup>86</sup> See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (invalidating law requiring sterilization of felons after third conviction of an offense involving ‘moral turpitude’).

<sup>87</sup> See, e.g., *Troxel v. Granville*, *supra* note 70 (overturning court order granting visiting rights to grandparent as a violation of a parent’s fundamental rights “to make decisions concerning the care, custody, and control of their children”); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (invalidating law prohibiting teaching of foreign language to students below the eighth grade as undue interference with fundamental right of parents to make decisions about the education of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (invalidating law requiring parents to educate their children in public schools as undue interference with fundamental right of parents to make decisions about the education of their children).

## Who Is Considered a Person?

Both substantive and procedural due process rights are granted to "persons." Over the years, the Supreme Court had to decide if "person" includes corporations, non-citizens, or states.

### Corporations

Several Supreme Court cases involved corporations claiming their due process rights were violated. Whether a corporation is considered a "person" depends on the specific type of interest the corporation seeks to protect. Where the right is personal in nature, such as the rights of criminal defendants, the Court usually says that a corporation is not a person. "The liberty referred to in that Amendment is the liberty of natural, not artificial, persons." *Northwestern Natl. Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906). Thus, in criminal cases, corporations have no right under the Due Process Clause to claim the privilege against self-incrimination. On the other hand, where the interest is a property interest, such as the operation of a business, the Court generally holds that a corporation is a person. Thus, a corporation operating a private school could challenge a state law requiring that children attend a public school. The corporation maintained that this deprived them of property without due process. In agreeing with them, the Court said:

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the 14th Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255. . . . But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The Court also held that a newspaper corporation was a person in a case involving freedom of the press:

Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a "citizen" within the meaning of the privileges and immunities clause . . . . But a corporation is a "person" within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

### Non-citizens

Both the Fifth and Fourteenth Amendments use the word *person* rather than *citizen*. It is not surprising, therefore, that due process claims have been made by those who are not citizens. In an early case, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court described the Fourteenth Amendment in this way: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Later cases clarified that this statement was limited to persons residing within the United States, even if they were illegally here.

Since the events of September 11, 2001, and the following war on terror, the question of due process rights of those designated as "enemy combatants" has received serious consideration. Prior to 2001 the Court had considered only a few cases dealing with this

issue. The following is an excerpt from a case involving due process claims by nonresident enemy aliens, who were tried for war crimes by a military tribunal rather than in a court of law. They claimed that denial of a court trial violated their constitutional due process rights. The Court made it clear that the Constitution did not apply to them because they were not apprehended on American soil. Language in the case suggested that due process claims by enemy aliens residing in the United States would be treated the same, at least during war.

In extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.

Courts in peace time have little occasion to inquire whether litigants before them are alien or citizen.

It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is far more humane and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment. We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

After the events of September 11, the Supreme Court again addressed the issue of due process rights of those held in custody as enemy combatants. In *Hamdi v. Rumsfeld*, decided in 2004 the Court found that such individuals do have due process rights. In reaching its conclusion, the Court stressed the fact that these individuals, unlike those in earlier cases, were not citizens of nations with whom the United States was at war and they were not seized on a traditional battlefield. The Court also emphasized that the procedures required by due process may differ from procedures required in other custodial situations. The following is an excerpt from the case.



### Hamdi v. Rumsfeld

— U.S. — (2004)

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual

assertions before a neutral decisionmaker. See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and op-

### States

One category definitely not included in “person” is the state. In the case of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), South Carolina challenged a federal law (the Voting Act of 1965) claiming that it violated the state’s due process rights. The Court disagreed saying, “the word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.”



#### A Point of Law

##### *Supreme Court Definitions of “Person”*

Through a series of cases the Supreme Court has held that the term “person” includes more than individuals. It includes corporations if a property interest is involved [*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)] as well as resident aliens, even if illegally in the country [*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)]. It also includes those who are detained and accused of being enemy combatants as a result of the events of September 11 [*Hamdi v. Rumsfeld*]. However the term “person” does not include corporations if the interest is a personal one such as the right against self-incrimination [*Northwestern Natl. Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906)]; it does not include enemy aliens who are citizens of nations with whom the United States is at war [*Johnson v. Eisentrager*, 339 U.S. 763 (1950)]; and does not include the states [*South Carolina v. Katzenbach*, 383 U.S. 301 (1966)].

### What Constitutes Government Action?

Due process, like equal protection, applies only to actions by government. However, the Court finds government action in private conduct where a strong connection between the state and a private party exists. In *Brentwood Acad. v. Tennessee Sch. Ath. Assn.*, 531 U.S. 288 (2002), a statewide private association that regulated interscholastic athletic competition among public and private schools was held subject to due process requirements. The facts indicated that most of the State’s public high schools were members of the Association, representing eighty-four percent of the Association’s membership. School officials made up the voting membership of the Association’s governing council and control board, which typically held meetings during regular school hours. The Association staff, although not state employees, could join the state retirement system. The Association set membership standards and student eligibility rules and had the power to penalize any member school that violated those rules. The State Board of Education acknowledged the Association’s role in regulating interscholastic competition in public schools, and its members sat as nonvoting members of the Association’s governing bodies. When the Association penalized Brentwood Academy for violating a recruiting rule, Brentwood sued the Association and its executive director claiming the rule’s enforcement was state action that violated the Fourteenth Amendment. In upholding the right of Brentwood to pursue their claim the Court said:

Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not. The

judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control, but also to assure that constitutional standards are invoked when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.

In this case the Court found the action of the board to be state action:

The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.



#### A Point of Law

*Brentwood Acad. v. Tennessee Sch. Ath. Assn.*, 531 U.S. 288 (2002)

Actions by private parties are considered government action under the Fifth and Fourteenth Amendments where the private parties have a strong connection to a governmental entity. Thus, the actions of a private interscholastic athletic organization were held to be government action and subject to due process where the association regulated athletics at public schools and the officials and members of the organization were public school officials or employees.

## How Liberty and Property Are Interpreted

The Fifth and Fourteenth Amendments protect interests that are included in the terms “life, liberty, or property.” Sometimes determining if a specific interest is included in these terms is difficult. For example, is the right to choose an abortion a type of liberty? Is a driver’s license a type of property? Is the right to employment a type of property? The Supreme Court, in interpreting the Due Process Clauses, has held that the terms *liberty* and *property* include many different interests. In early cases, the Supreme Court held that liberty includes the right or freedom to enter into contracts or agreements. This became known as *liberty of contract*. Recently, personal freedoms such as the right to use contraceptives, the right to an abortion, and the right to withdraw medical care have all been included in the concept of liberty. In a 1999 case, *Connecticut v. Gabbert*, 526 U.S. 286, the Supreme Court summarized its interpretation of liberty as follows:

The liberty guaranteed by the Fourteenth Amendment denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in

### liberty of contract

The constitutionally-protected right to make and enforce contracts, as limited only by reasonable laws about health, safety, and consumer protection.

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, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Like the term *liberty*, the term *property* has been given a broad interpretation by the Supreme Court. Not only does it include traditional real and personal property, but under some circumstances includes such interests as employment rights, government benefits, driver's licenses, and the right to attend school. See Table 9-1.

**Table 9-1** Liberty and Property

Liberty Interests	Property Interests
Freedom from physical restraints	Real property
Freedom to contract (economic liberty)	Personal property
Freedom of personal choice	Government benefits
	Government employment
	Driver's license
	Right to attend school

## Substantive Due Process

SUBSTANTIVE DUE PROCESS REFERS TO the concept that the Fifth and Fourteenth Amendments prevent both federal and state government from enacting laws that deprive a person of life, liberty, or property, unless those laws meet due process requirements. The concept is controversial and has many critics who believe the Supreme Court uses this concept to protect rights that should not be constitutionally protected. In spite of the criticism, substantive due process plays an important role in the Supreme Court's protection of economic and personal freedoms. Although the concept no longer has much significance in the protection of economic interests, it continues to play an important role in the protection of personal freedoms.

### Standard for Determining Substantive Due Process Violations

Not all laws that deprive a person of life, liberty, or property violate substantive due process. Neither the Constitution nor the Court requires this. Ultimately, whether any specific law violates substantive due process is determined by the courts. To make the decision, the Supreme Court developed various tests. In determining if any state or federal law violates substantive due process the Court first addresses two questions:

1. Does the law actually deprive a person of life, liberty, or property?
2. If it does, is the law a proper exercise of government power?

In answering the second question, the Court analyzes the law in the same way as it does when a law is claimed to be a violation of equal protection. It evaluates the law by weighing