Selected Excerpts from:

American Constitutional Law
An Overview, Analysis, and Integration

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Revisiting Constitutional Law and Higher Education

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A.3. The U.S. Constitution

The origins of the U.S. Constitution are traced in Sections A.1. and A.2 above. The U.S. Constitution is best understood in the light of those origins and what they reveal about the nature and functions of the document. In particular, it is critical to note two basic points. First, the Constitution was adopted by the People, not by the states or any other pre-existing government (Story, Commentaries, supra. §362, pp. 261–262 (5th ed., Melville Bigelow ed.) (Wm. S. Hein & Co., 1994 (footnotes omitted)). As the Constitution's preamble itself makes clear, "the People of the United States...do ordain and establish this Constitution..." Second, the Constitution was created for "ourselves and our posterity" (U.S. Const., preamble; emphasis added). The document was thus "designed to approach immortality as nearly as human institutions can approach it" (Cohns v. Virginia, 19 U.S. 264, 387 (1821)). The U.S. Supreme Court has captured these two essential characteristics of the Constitution in this way: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one" (Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 901 (1992)).

Viewed in this light, the U.S. Constitution is a "constituent act" of the People by which a new federal government is "called into life" (Missouri v. Holland, 252 U.S. 416, 433 (1920). It is "the basic charter of our society, setting out...the principles of government" (Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting). Among the foremost of these principles, implicit in the entire document, is "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if


6. The text of the U.S. Constitution is set out in Appendix A at the end of this book.
under rules" (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 646 (Jackson, J., concurring)).

As the nation’s "basic charter," the U.S. Constitution has three central functions. (1) It establishes the structures and mechanisms through which the federal government operates and by which it interfaces with the separate governments of the states. (2) It delineates the powers of the federal government or, more particularly, of its three branches, as juxtaposed against the powers of the states. (3) It imposes limits upon the powers of the federal government as well as upon the powers of the states. The first two of these functions predominate in the original Constitution of 1788; the third function predominates in the Bill of Rights and subsequent amendments, most especially the Fourteenth Amendment. The first function is carried out in the document primarily through the "housekeeping" clauses; the second function primarily through the "power" or "empowerment" clauses; and the third function primarily through the "rights" clauses (see Sec. C below).

The Constitution also serves a fourth function, less pervasive than the other three but still critically important: the function of ordering relationships among the states. Most of the pertinent provisions that serve this function are in Article IV, in particular sections 1 and 2 and section 3, paragraph 1. Section 1 is the full faith and credit clause, providing that each state will give "Full faith and Credit...to the public Acts, Records, and judicial Proceedings of every other State." Section 2, paragraph 1, is the interstate privileges and immunities clause, which is discussed in Chapter 7, Section E. Another clause, outside Article IV, that is important to relations among the states is Article I, section 10, paragraph 3, which provides that a state may not "enter into any Agreement or Compact with another State" unless it obtains "the Consent of the Congress." Yet another pertinent clause is in Article III, section 2, paragraph 1, which makes the federal courts a forum for the resolution of "Controversies between two or more States...." A state cannot claim immunity from such a suit brought by another state, since "the States by adoption of the Constitution, acting in their highest sovereign capacity...waived their exemption from judicial power" (Principality of Monaco v. State of Mississippi, 292 U.S. 313, 328–329 (1934) (citations omitted); see also Alden v. Maine, 527 U.S. 706, 755 (1999)).

Beyond the theoretical characteristics of the Constitution emphasized in Sections A.1 and A.2 above, there are three other theoretical—but also very practical—characteristics that will usefully guide the study and application of constitutional law: (1) the Constitution is fundamental law; (2) the Constitution is supreme law; and (3) the Constitution is hard law.

First, the U.S. Constitution is fundamental law because it is the original act of the sovereign power—the People—whose purpose was to establish a new political community and set forth the first principles by which it would be governed. The Constitution is the repository for the aspirations and core values that define the United States

as a nation. As Chief Justice Marshall recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Constitution contains the “principles...on which the whole American fabric has been erected” (id. at 176). These principles derive from “the original right” and supreme authority of “the people” to establish a government; the “exercise of this right is a very great exertion” that cannot and ought not “to be frequently repeated”; thus the document is “designed to be permanent” (id.). “The principles...so established [therefore] are deemed fundamental,” and the Constitution that contains these principles forms “the fundamental and paramount law of the nation...” (id. at 176–177; emphasis added).

Second, the U.S. Constitution is *supreme* law because it is the expressed will of the supreme sovereign, the People. “[T]heir will, thus promulgated, is to be obeyed as the supreme law.” Joseph Story, A Familiar Exposition of the Constitution of the United States, §42, p. 37 (American Book Co., 1840). The Constitution is therefore the highest and most authoritative law in the nation’s legal system, taking precedence over any other law or legal act of the federal government or any state or local government, and taking precedence over all the state constitutions. In *Marbury* (above), Chief Justice Marshall emphasized that “the constitution is superior to any ordinary act of the legislature” (5 U.S. (1 Cranch) at 178) and that “an act of the legislature, repugnant to the constitution, is void” (id. at 177). The whole structure and theory of the constitution supports this conclusion, said Marshall, as does the supremacy clause (Art. VI, ¶2) itself: “[I]n declaring what shall be the *supreme* law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank” (5 U.S. (1 Cranch) at 180; emphasis in original).

Third, the U.S. Constitution is “hard law” because, unlike the constitutions of some other nations, it is a *legal* and not merely a *political* instrument, and as such it may “be invoked in court [and] used by judges” in actual cases (William Van Alstyne, “The Idea of the Constitution as Hard Law,” 37 J. Legal Educ. 174, 180 (1987)). Chief Justice Marshall also made this point clear in *Marbury*. “The framers of the constitution contemplated that instrument as a rule for the government of courts” as well as the other departments of government, he asserted, and the “courts, as well as other departments, are bound by that instrument” (5 U.S. (1 Cranch) at 179–180 (emphasis in original)). “[B]oth a law and the constitution [may] apply to a particular case,” and the court must then determine whether they are in conflict. “This is the very essence of judicial duty.” If there is a conflict, “the constitution, and not such ordinary act, must govern the case to which they both apply” (id. at 178).

The Constitution is also hard law in the fuller sense of being “reliable law [that] is not easily altered...” (Van Alstyne, supra, at 179–180), and that may therefore provide stability and consistency of judicial rulings over time. To achieve this purpose, there must be a strong judiciary, with substantial independence from the political branches. Unlike the Constitutions of some other countries, the U.S. Constitution fits this characterization because it is “readily enforceable in accessible and professionally serious courts” (id. at 181).

8. This result is dictated by the second principle above: the Constitution is supreme law.
"Enumeration") every ten years (Art. I, sec. 2, ¶3); the President has a duty to faithfully execute the laws (Art. II, sec. 3); and "the United States" has a duty to "guarantee...a Republican Form of Government" for each of the states (Art. IV, sec. 4). Even though the duty may not be accompanied by an express grant of power to fulfill the duty, such power is implicit in the duty itself. Congress, for instance, may enact laws which are "necessary and proper as means to carry into effect...duties expressly enjoined" upon it by the Constitution. "[T]he power flows as a necessary means to accomplish the end." (Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539, 618619 (1842).) The general principle, then, is that when the Constitution assigns a "duty" to the federal government, "the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted" (IId. at 615). Thus the difference between a constitutional power unaccompanied by a duty, and a constitutional power to fulfill a duty, is simply that the former is discretionary while the latter is mandatory. "The national government . . . is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the...duties imposed upon it by the [C]onstitution" (IId. at 616; emphasis added).

For the federal government, there is a necessary interrelationship between the Constitution's power clauses and its rights clauses. A branch or agency of the federal government may or may not have power, under one of the power clauses, to undertake a particular action. If it did not have such power, the action would be unconstitutional. If the government branch or agency did have power, the action could nevertheless be unconstitutional if the power were exercised in such a way as to violate a rights clause. Congress may have power under the commerce clause to regulate the sale of newspapers across state lines, for example, but if Congress exercised this power by regulating the content of newspapers, the regulation would be unconstitutional under the First Amendment's speech and press clauses.

Thus an act of the federal government may be challenged in two basic ways: (1) that it is beyond the scope of the federal government's constitutional powers (legislative, executive, or judicial, as the case may be); and (2) that it violates an individual rights

15. The same principle may apply to Congress' power to enforce individual rights granted by the federal Constitution (see Prigg 41 U.S. at 615-620). In Prigg, Justice Story used the example of the habeas corpus clause (Art. I, sec. 9, ¶2) to make this point. "No express power is given to [C]ongress to secure this invaluable right," said Story, yet such power is "deemed, by necessary implication, within the scope of the legislative power of [C]ongress" (41 U.S. at 619620). For some other constitutional rights, however, in particular those in the Thirteenth, Fourteenth, and Fifteenth Amendments, the constitutional text expressly grants Congress the power to enforce the right (see Chap. 6, Sec. E).

16 Constitutional duties—or what are sometimes called mandates—are more prominent in state constitutions and state constitutional law than in the federal Constitution and federal constitutional law. It is common, for instance, for state constitutions to assign to the legislature a duty to maintain a state-wide system of free public education. State constitutions may also authorize the legislature to impose duties or mandates on local governments.
guarantee or otherwise transgresses some limitation that the Constitution imposes upon the exercise of federal power. An act of a state or local government, however, may be challenged only in the second way: that it violates individual rights or otherwise transgresses some limitation (especially a federalistic limit as discussed in Chapter 7) that the Constitution imposes on the exercise of state and local power.

When the governmental act being challenged is a statute or other written law or policy, the challenge may be either a “facial” challenge or an “as applied” challenge. In the former situation, the law is challenged “on its face” and in its entirety; in the latter situation, it is challenged only as applied to particular persons and particular sets of circumstances. See, e.g., *Maryland v. Munson*, 467 U.S. 947, 965–968 (1984); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796–797 (1984). *Bowen v. Kendrick*, 487 U.S. 589 (1988), illustrates the distinction. The case concerned the federal Adolescent Family Life Act, 42 U.S.C. § 300z et. seq., which authorizes grants to public and private organizations, including religiously affiliated organizations, for counseling adolescents on sexual relations and pregnancy. The plaintiffs challenged the Act’s coverage of religious organizations as a violation of the establishment clause (see Chap. 13, Sec. B). The U.S. Supreme Court, like the district court, considered both facial and as applied challenges to the Act. The Supreme Court held that the Act’s provisions covering religious organizations were constitutional on their face. But it remanded the case for further proceedings on whether these provisions were unconstitutional as applied to particular grants that funded activities involving particular risks of promoting religion.

There are some provisions in the Constitution that do not fall neatly into either the powers category or the rights category. These are the “housekeeping provisions” (Alexander Bickel, *The Least Dangerous Branch* 36 (Yale Univ. Press, 2nd ed. 1986)—those governing the internal operations of the respective branches and establishing the mechanisms through which the government operates. Examples would include Article I, section 2, paragraphs 1–3, which establish the electoral system for House members; Article I, section 2, paragraph 5; Article I, section 3, paragraphs 6 and 7; and Article III, section 2, paragraph 3, which govern impeachment; Article I, section 3, paragraph 4, which makes the Vice President the President of the Senate; Article I, section 5, paragraph 4, which establishes rules for the adjournment of Congress; Article II, section 1, paragraphs 2 and 3, and the Twelfth Amendment, which provide for the operation of the Electoral College; and Article II, section 1, paragraph 5, and the Twenty-second Amendment, which establish qualifications for eligibility for the Office of President. Although such clauses are as important as the power and rights clauses, they are seldom litigated and are discussed only infrequently in most constitutional law courses.

The Constitution’s power and rights provisions do not simply empower and limit “the Government of the United States” as such. Thus, just as it is important to determine whether a particular provision is a power or a rights provision, it is equally important to determine what officials or entities (e.g., Congress? the lower federal courts? federal administrative agencies? the states?) are empowered or limited by each such provision. These and other matters concerning power clauses and rights clauses are the subject of section D below.
Sec. F. A First Look at the Process of Constitutional Interpretation *

F.1. Overview

The process of constitutional interpretation is the process by which interpreters apply the Constitution to, and thereby resolve, particular problems regarding the scope and allocation of government power and the rights of individuals. There are two foundational questions to ask about this process: who are the “official” interpreters of the Constitution, and how do these interpreters undertake to interpret the Constitution? The two questions are interrelated, such that exploration of the “how” question will at points intersect exploration of the “who” question. The “who” question is addressed in Chapter 5, especially Section C; a first look at the “how” question is presented here.

Since the late 1950s, and especially since the 1980s, scholars and jurists have continually expanded the theoretical scholarship on how to interpret the Constitution. What in older times was a debate about strict versus liberal construction of the Constitution, or about judicial restraint versus judicial activism, has given way to a more helpful and sophisticated debate about sources for constitutional interpretation and the interpretive approaches that emerge from these sources. These sources and approaches are introduced in Sections F.2 and F.3 below.

F.2. Sources of Constitutional Interpretation *

In law, as in other disciplines concerned with interpretation, the sources of interpretation may be classified as either primary or secondary. Primary sources in law are the root sources — the original raw materials from which all interpretation derives. Each such source must stake its own claim to legitimacy. Secondary sources in law are those derived from the primary sources. Their legitimacy depends on the legitimacy of the primary sources on which they are based.

There are four sources that plausibly qualify as primary sources for constitutional interpreters to consult. These four sources are (1) the constitutional text, (2) original constitutional history, (3) the overall structure of the Constitution and the inferences that may be drawn from this structure; and (4) the values that are embedded in or reflected in the

Constitution. Although most commentators would acknowledge the legitimacy of the first three interpretive sources (text, history, structure), and many would acknowledge the legitimacy of the fourth (values), there is no consensus on the appropriate use of these sources. Just as there are strict and liberal “textualists,” for instance, there are strict and moderate “originalists” (users of original constitutional history); and there are values interpreters who would substantially confine their identification and use of values (sometimes called “supplementers”) as well as those who would engage in wide-ranging explorations of moral goodness (sometimes called “noninterpretivists”). Nevertheless, each of these four sources is represented in opinions of the United States Supreme Court, and each is reflected in the evolutionary growth of constitutional law. Taken together, these four sources provide an appropriate basis for a model of constitutional interpretation.

The major secondary source for constitutional interpretation is precedent. Precedents are derived over time from the four primary sources. Precedents are more concrete than the primary sources and are more frequently utilized in modern interpretation. They are the lawyer’s (and the student’s) day-to-day tools of the trade. The most accessible and most utilized body of precedent, of course, is that which courts develop on a case-by-case basis and adhere to under the doctrine of “stare decisis.” Precedent, however, may also be developed by other constitutional interpreters. The Congress may create precedent, for example, when it accepts or rejects a bill provision partly on the basis of documented constitutional issues; a President may create precedent when vetoing a bill for constitutional reasons; or an attorney general of the United States or of a state may create precedent when releasing a legal opinion advising another government official about certain constitutional issues.

A type of precedent may also be created when the Congress or the Executive has, over a long period of time, implemented or applied a constitutional clause in a particular way, or consistently acquiesced in the other branch’s implementation or application. (See, for example, the discussion of Justice Frankfurter’s historical gloss theory in Chapter 7, Sections A and D.1.) The same principles may also apply to the consistent application of a particular clause by the state governors, or the consistent acquiescence of the state governors in a particular constitutional interpretation of the Congress or the Executive. In *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. (16 Pet.) 539, 620-621 (1842), for instance, as the Court was interpreting the fugitive-from-justice clause (Art. IV, sec. 2, ¶2), it declared that “every executive in the Union has constantly acted upon and admitted [the] validity” of a federal law implementing the clause; and that [t]his very acquiescence . . . of the highest state functionaries, is a most decisive proof . . . that the act is founded in a just construction of the [C]onstitution.”

**F.3. Approaches to Constitutional Interpretation**

From the four primary sources of constitutional interpretation emerge four interpretive approaches or methodologies for deriving meaning from the Constitution: the


textual approach, the historical approach, the structural approach, and the values approach. These four approaches, in turn, provide the basis for four generic types of constitutional argument: arguments from text, arguments from history, arguments from structure, and arguments from values. The first approach, textual interpretation, is the starting point for most interpretive efforts. It is discussed immediately below. The other three approaches, which are subordinate to the text, are discussed in later chapters (Chap. 4, Sec. C, Chap. 9, Sec. B, and Chap. 15, Sec. D). No one of these other three approaches—historical interpretation, structural interpretation, and values interpretation—controls or has priority over the other two. Instead, these approaches are often used in combination with each other and with the textual approach. The applicability and utility of each approach will depend on the constitutional provision that is being interpreted and the particular problem being addressed.

In the world of modern law study and practice, of course, interpretation will usually begin with and proceed from judicial precedents, a secondary source, rather than the primary sources of history, structure, and values (see Section F.2 above). In other words, the “precedential approach” will usually be the predominant modern approach to constitutional interpretation and problem-solving. But even when this approach is followed, text, history, structure, and values can still be pertinent considerations. An argument drawn from precedent may be more forceful when couched as an argument based on the constitutional text, or on original history, structural inference, or constitutional values. Particular judicial precedents may be understood more completely when they are viewed from the perspective of the constitutional text that the court addresses, the original history that the court finds pertinent, the inferences that the court draws from the Constitution’s structure, or the constitutional values that the court identifies and applies to the issue at hand. And particular precedents may be critiqued more persuasively by considering whether the court made appropriate use of text, history, structure, and values and had suitable support for any statements it made concerning these sources. 20 (Chapter 3 below includes further discussion on analyzing judicial precedents.)

20. Although the interpretation of state constitutions must be clearly distinguished from interpretation of the federal Constitution, the sources and approaches set out in this section may nevertheless have parallels in the process of state constitutional interpretation. See generally, G. Alan Tarr, Understanding State Constitutions, ch. 6 (Princeton Univ. Press, 1998).
Chapter 9

The Context for Considering Constitutional Rights
Questions

Sec. A. An Overview of Federal Constitutional Rights*

A.1. In General

This Chapter and Chapters 10–13 explore the terrain of constitutional rights. The distinction between constitutional power clauses and constitutional rights clauses (Chap. 2, Sec. C) is the starting point for a study of the materials in these chapters. The power clauses provide only one measure, an incomplete measure, of the constitutionality of federal government action; the individual rights clauses are also a necessary part of the picture. Moreover, even though the states are empowered by their own state constitutions rather than the federal Constitution, the actions of state and local governments are nevertheless subject to the federal Constitution’s individual rights clauses.

Shifting the focus from powers issues to rights issues does not mean that federalism and separation of powers considerations (see Chap. 4, Sec. B) drop out of the picture. These considerations are less pervasive and prominent in rights analysis than in power analysis, but they are nevertheless an important part of the mix that one must take account of in order to do comprehensive and creative analysis. Federalism and separation-of-powers considerations, for example, were an essential aspect of the debate on incorporation of the Bill of Rights into the Fourteenth Amendment (see Chap. 11, Sec. A.2). These considerations are also a critical backdrop for the “state action” issues that are a threshold concern in some rights cases (see Sec. E below). In addition, federalism or separation-of-powers considerations sometimes lead courts to accord more deference to legislative and executive actions than they otherwise would in rights cases. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), for example, in rejecting an equal protection challenge to the Texas system for funding public education (see Chap. 10, Sec. D.8), the Court emphasized that “the Texas system is affir


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mative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution” (Id. at 39). Similarly, expanding its reasoning for denying the rights claim, the Court asserted: “[I]t would be difficult to imagine a case having greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State” (Id. at 44).

The individual rights clauses that typically receive the most attention from the courts and commentators, and also from instructors in constitutional law courses, are: the equal protection clause of the Fourteenth Amendment (Chap. 10), which binds the states and whose guarantees are also implicit in the Fifth Amendment due process clause, thus binding the federal government as well; the due process clauses of the Fourteenth and Fifth Amendments (Chap. 11), the former binding on the states and the latter on the federal government; the free speech and press clauses of the First Amendment (Chap. 12), directly applicable to the federal government and applicable to the states through “incorporation” (see Chap. 11, Sec. A.2) into the Fourteenth Amendment; and the First Amendment’s religion clauses (Chap. 13), applicable to the federal government and the states in the same way as the free speech and press clauses.

The Fourth, Fifth, Sixth, and Eighth Amendment clauses concerning the criminal process also receive substantial attention from courts and commentators, and in criminal procedure and criminal justice courses. Of particular importance are the search and seizure provisions of the Fourth Amendment, the privilege against self-incrimination in the Fifth Amendment, the jury trial and right-to-counsel provisions of the Sixth Amendment, and the cruel-and-unusual punishment clause of the Eighth Amendment. Cruel-and-unusual punishments and Fourth Amendment searches and seizures are addressed in Sections A.2 and A.3 below. These and other criminal process provisions are also briefly discussed in various other sections (see Chap. 2, Sec. G (jury trial), Chap. 5, Sec. B (Fourth Amendment) and Chap. 11, Sec. A.2 (jury trial)), and in sections B and E below. Otherwise, however, the criminal process provisions are not a focus of this book.
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Sec. D. The State Action Doctrine *

D.1. Origins of the State Action Doctrine

It has long been accepted that the provisions of the Bill of Rights limit only the federal government and do not reach private (non-governmental) action. (See, e.g., Barron v. Baltimore, Section B above, under 1833.) The provisions of the Fourteenth Amendment, and other rights amendments, are subject to a comparable understand-

ing: they limit only state governments and their local governments, and do not limit private actors. This understanding arises from the text of the amendments themselves. The Fourteenth Amendment, for example, provides that “No State shall” abridge privileges and immunities, “nor shall any State” deprive persons of due process or deny equal protection. The U.S. Supreme Court confirmed this construction of the Fourteenth Amendment in the Civil Rights Cases, 109 U.S. 3 (1883). In the Reconstruction era, Congress had enacted a public accommodations law, the Civil Rights Act of 1875, providing that all “inns, public conveyances on land and water, theatres, and other places of public amusement” must be open “alike to citizens of every race and color, regardless of any previous condition of servitude.” The Act’s constitutionality was challenged on grounds that the Fourteenth Amendment limits only the states; that Congress could therefore enforce the Amendment only against the states; and that inns and other such places of public accommodation were private, not public or state, entities. The Court agreed with this argument and invalidated the Act because it regulated private activity rather than “State action.” The Fourteenth Amendment prohibits the states from violating certain individual rights, said the Court; but “[i]ndividual invasion of individual rights is not the subject matter of the amendment,” “It is State action of a particular character” that is prohibited; Thus, “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings” (109 U.S. at 11,17 (emphasis added)). The Civil Rights Cases continue to be cited as the source of the modern “state action” doctrine.

3. The exception is the Thirteenth Amendment, which is stated as a general prohibition on slavery and thus limits private actors as well as the federal and state governments. See The Civil Rights Cases, 109 U.S. 3, 20–22 (1883).
Sec. B. The Distinction Between Substantive Due Process and Procedural Due Process *

A study of due process will be enhanced by early attention to the conceptual distinction between *substantive* due process and *procedural* due process (see Sec. A.1 above). This Section provides a starting point for drawing this distinction. It is also important to distinguish these two concepts of due process from the concept of equal protection; Section E of Chapter 10 elucidates that distinction. An exercise near the end of this Chapter (Chap. 11, Sec. E) provides further assistance in differentiating and interrelating these three areas of law.

To understand the difference between substantive and procedural due process, one must first understand the difference between substantive and procedural *decisions or actions*:

A distinction is commonly taken in constitutional law between procedural and substantive decisions, as they are called; and it is generally valid, because procedural decisions for the most part point to infirmities that are curable. They deal with the “how” of governmental action, whereas substantive decisions go to ends, dealing with the “what.” [Alexander Bickel, *The Least Dangerous Branch*, p. 233 (Yale Univ. Press, 2nd ed. 1986).]

The validity of substantive governmental decisions is the province of substantive due process, and the validity of government’s procedures for enforcing its substantive decisions is the province of procedural due process:


1. These eight Justices split 4 to 4, however, on whether jury unanimity is a feature of the Sixth Amendment jury trial clause. Four Justices concluded that the clause required jury unanimity both for the federal government and the states; the other four concluded that the clause did not require jury unanimity for either the federal government or the states. Justice Powell’s vote for *not* applying jury unanimity to the states was thus the deciding vote. Notice the irony: eight of the nine Justices agreed that the Sixth Amendment meant the same for the states as the federal government; yet the *result* of the case was that jury unanimity applied to the federal government but not the states (see *Apodaca*, 406 U.S. at 395 (Brennan, J., dissenting)).
[S]ubstantive due process comprises whatever norms the Supreme Court has invoked, formally in the name of the due process clauses, to limit the sorts of policy choices governmental officials, in particular legislators, may make. Procedural due process, by contrast, comprises the norms the Court has invoked, in the name of due process, to limit the ways in which, the procedures through which, officials, in particular those charged with administering law, may enforce policy choices once made. [Michael Perry, The Constitution, the Courts, and Human Rights, p. 117, fn. (1982).]

The U.S. Supreme Court has recognized this dichotomy between substantive and procedural due process at least since the 1880's. As the Court majority explained in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992):

Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas, 123 U.S. 623, 660–661 (1887), the Clause has been understood to contain a substantive component as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, “[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.” Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion). “[T]he guaranties of due process, though having their roots in Magna Carta’s ‘per legem terrae’ and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’” Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)). [505 U.S. at 846–847.]

Substantive and procedural due process thus differ markedly in their application and import. Substantive due process limits the legal standards or requirements that government may establish in its laws, and the substantive results or objectives that government may achieve through its laws. The goal is “to prevent governmental power from being ‘used for purposes of oppression’” (Daniels v. Williams, 474 U.S. 327, 332 (1986) (quoting Murray’s Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)). Procedural due process limits the types of procedures that government may use when applying its legal standards or requirements to particular persons. The goal is to establish “appropriate procedures” that promote “fairness” to individuals whom government agents may deprive of their life, liberty, or property (id. at 331). Substantive due process limits apply regardless of how much procedural protection government may provide for individuals subjected to the law at issue. Thus, “identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right” (Washington v. Harper, 494 U.S. 210, 220 (1990)).
Consider, for example, a public school board rule providing that any student who has a child out of wedlock (as a mother or as a father) will be suspended from school. If the board provides no procedural protections for students charged with a violation of this rule, the rule’s application could be challenged on procedural grounds. But even if the board were to provide a full-blown hearing to accused students, the rule itself may nevertheless be challenged on substantive grounds. The predominant problem, in other words, may be the standard the board has set and the objective it seeks to achieve rather than the procedure it uses to enforce the rule.