

# The Barroom Door Swings Both Ways

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When I started practicing law, we brought many due process challenges to the actions of government.

Due process is found in the Fifth Amendment to the United States Constitution. The Fourteenth Amendment, according to the United States Supreme Court jurisprudence imposed due process requirements on the states. An individual is entitled to a fair and impartial hearing from the government when the citizen is deprived of his or her rights.

With the evolution of the law from the mid-1970s into the new century, due process was given less respect. Akin to due process is what is sometimes referred to in the law as “substantive” due process. This concept requires the government to act in a rational fashion, and to make decisions that have a discernible relationship to the issues confronting government.

The courts routinely dismissed due process and rational relationship claims. The courts gave the government the benefit of a very high hurdle that no horse could jump. The courts said that government actions are “presumed” to be constitutional. It was necessary that there be proof of an intent to deprive a person of constitutional liberties. If the courts could find any articulable “rational relationship” between the harm and government action, the complaining citizen was thrown out of court. Successful due process and rational relationship substantive due process claims became rare.

At the same time that hurdles to Fifth and Fourteenth Amendment claims were being erected, the First Amendment was being used to prevent the government from impinging upon the First Amendment religious rights of others. School sponsored prayer and a moment of silence were disallowed. A wall separating church and state was erected as an impenetrable barrier.

Then something unique and remarkable happened. Conservative thinkers and writers realized that the Constitution applied to all Americans.

When the Tea Party movement developed, there was a new assertion awareness that the United States Constitution could aid conservative causes. The Second Amendment was eventually interpreted by conservative United States Supreme Court Justices as going beyond merely protecting the right to organize a militia, a job now relegated to the National Guard. Private gun ownership was said to be encompassed within the halo of the Second Amendment. The debate between the Founders over the Second Amendment shows that even they were split as to how much protection it afforded an individual with respect to the private ownership of weapons.

In recent times, the right to religious freedom has been utilized to protect those who oppose abortion or who seek funding for private religious schools. Why should a religious person be penalized in the exercise of their religious rights? The shift in First Amendment case law has been from preventing the establishment of religion to protecting the free exercise thereof. This dramatic change has led to many cases protecting the rights of private religious schools to be funded along with public schools and for those who oppose gay marriage or abortion to refrain from participating in government programs which may be found to be advocating for those causes.

The same thing is beginning to happen with due process and equal protection. A good example of that is *County of Butler v. Thomas W. Wolf*, written by the Honorable William S. Stickman, IV, and filed September 14, 2020. The decision struck down many of Governor Wolfe's COVID-19 restrictions. Judge Strickman relied upon precedent with respect to restrictions on personal liberty which are protected by the broad sweeping of the language utilized by the Framers of this Republic. The Court found, for example, that defendants "congregate limits are not narrowly tailored. Rather, they place substantially more burdens on gatherings than needed to achieve their own stated purpose." This is language found in much case law asserted by the liberal judicial community 30 years ago and eventually rejected by conservative judges. There is an abundance of case law which holds that restrictions on civil liberties must be narrowly tailored, that there must be a rational relationship between the harm and the government restrictions and that appropriate due process must be afforded when the restrictions are imposed. The greater the emergency, the more power is given to government.

Let us not forget that during World War II, the United States Supreme Court put its stamp of approval on the rounding up of Japanese American citizens and their placement in interment camps. The current Patriot Act and other legislation enacted since 9/11 permits intrusive spying on American citizens without the traditional safeguards found in our Constitution.

Will a decision strongly protecting the citizens against irrational and arbitrary government action be acceptable during the next emergency or in another context favored by a different constituency of our citizens? Is it even possible for the rules to be clean, regardless of whether the cause is liberal or conservative?

What we have learned in the last 30 years is that our Antique, but well-respected Constitution, was written in broad terms in order to assure the citizen a robust degree of liberty without impairing the obligation of the state to protect its citizens. Many of the COVID-19 restrictions, while well meaning, were hard to reconcile with reality. Part of the problem is that the epidemiology concerning the disease has yet to be written. We probably will not know for 5 or 10 years what really did or did not work in stemming the tide of the virus. What we do know is that, regardless of the circumstances, American

freedoms should be denied only when absolutely necessary, consistent with our constitutional safeguards and with appropriate, prompt judicial review. A simple declaration of emergency by a governor or president should not be utilized to justify sweeping restrictions on American civil liberties without a constituent appreciation for what is necessary and what is extreme. There also needs to be a way to challenge government restrictions on civil liberties without impoverishing the American citizens restricted.

The next time you leave the bar, notice that the door swings both ways.

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