**Constitutional Interpretation of Fundamental Liberties**

**Under the Due Process Clause**

**Abstract:**

This lesson engages students in the interpretation of the Constitution in the way that Justices of the Supreme Court would conduct such interpretation. The lesson focuses on the Due Process clause of the 14th Amendment. As a class, the students will determine the definition of “liberty” under the 14th Amendment. Working in groups, the students will decide whether certain hypothetical laws enacted by the state violate the 14th Amendment. Students can role play Supreme Court Justices deciding whether a law is constitutional, and can engage in discussion/debate with each other in doing so.

**Objectives:**

* Students will gain a deeper knowledge of the U.S. Constitution and how the Supreme Court interprets/understands it.
* Students will understand the process by which laws are determined unconstitutional.
* Students will gain critical thinking and issue debate/discussion skills and learn how to “think like a lawyer”.
* Students will be introduced to the fundamental rights of “Life, Liberty, and Property” as the Supreme Court has understood them in its case law.

**Grade level:** 12

**Time to complete:** One 60-minute class period.

**Materials needed:**

* 1 handout with short hypotheticals per student or group
* Handout of abridged versions of relevant cases for instructor
* Whiteboard/Chalkboard and markers/chalk

**Procedure:**

1. Introduce the Due Process Clause by reading over the text, writing it on the board, and explaining where it came from. Explain how it is “ambiguous” and purposefully designed to be very broad so it is not under-inclusive. Judges’ jobs are to decide what it means. In doing so, they look to things like the actual text, the Framers’ intent, the tradition and history of the nation, the evolution of rights, and the Court’s own precedence.

1. Ask the students to put on their "judges hats" for a moment and, focusing on the phrase "liberty,” determine, as a class, what the word means. Ask a number of questions to draw out thoughtful answers from the students regarding the history and tradition of liberties in this country, the restrictions placed on these liberties, and to narrow their focus to issues of personal autonomy and privacy. Write these out on the board as the class brainstorms. It is helpful to create a “liberty” column and a “restrictions” column.
2. Present students with handout containing hypotheticals. Ask students to read them over and then (in groups of 3-5) discuss how they are/are not like certain cases and what the Court might say about these particular hypotheticals. Instruct them to decide whether, as justices, they would “uphold” or “strike down” the laws and explain why using the reasons the class came up with or their own.
3. Reconvene as a class. Discuss what the students have come up with for their laws and tally whether the class would have upheld or struck down the hypothetical laws. After each hypothetical is discussed, use the instructor handout to inform students of what the court actually said about the laws.

**Method of evaluation and results:**

The instructor can observe the class discussion and the group discussions to determine whether the objectives have been met. Since the students will also come up with their determinations of whether the hypothetical laws are valid, the instructor can determine whether the students correctly grasped the concept of liberty through their answers. The handouts may be collected for this purpose.

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**Handout 1 – Student Hypotheticals**

**HYPOTHETICALS:**

Which, if any, of the following situations would not be allowed because it violates a liberty right under the 14th Amendment’s Due Process Clause? Decide whether you, as judges, would “uphold” or “strike down” each law and explain why or why not. You may use the definition and restrictions of liberty we discussed as a class or your own.

1. A state law bans any person under the age of 18 years and any unmarried persons from possession or use of contraceptives.
2. A state law bans convicted felons from getting married.
3. A state law criminalizes polygamy.
4. A state law bans anyone who has been married three or more times from being married again in that state.
5. A state law requires sterilization of anyone convicted of a crime of “moral turpitude.”

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**Handout 2 – Instructor Handout**

**Foundational cases (for discussion portion):**

* + - 1. Lochner v. New York, 198 U.S. 45 (1905): Court found that a NY law which limited the hours a bakery employee could work to 10 per day and 60 per week was invalid because it violated what the Court found to be a 14th amendment right of “**liberty to contract.**”
      2. Griswold v. Connecticut, 382 U.S. 479 (1965): Court invalidated a Connecticut statute which made the use of contraceptives a criminal offense. The statute also forbade aiding or counseling of others in the use of contraceptives. The Court found that the Constitution guarantees a “penumbra” or “zone” of **privacy** stemming from the fundamental right to liberty.
      3. Eisenstadt v. Baird, 405 U.S. 438 (1972): Court invalidated a statute which, by permitting contraceptives to be distributed only by registered physicians and pharmacists, and only to married persons, discriminated against the rights of the unmarried. The Court stated “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” The right to privacy expanded into a right to **“personal autonomy”** or “reproductive autonomy.” The Court recognized an “autonomy of self that includes…certain intimate conduct.”
      4. Roe v. Wade, 410 U.S. 113 (1973): Court held that a woman’s right to privacy is a “fundamental right” under the 14th. The Court invalidated, on privacy grounds, Texas’ nearly-complete ban on abortions. Premised on the **right to privacy**, the Court found that such a right was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”
      5. Zablocki v. Redhail, 434 U.S. 374 (1978): Court held that there is a “fundamental **right to marry**” and that any substantial interferences with that right will therefore not be sustained merely because they are “rational”. The Court invalidated a Wisconsin law which required that any parent under court ordered child-support could not marry.
      6. Lawrence v. Texas, 539 U.S. 558 (2003): Court held that Texas sodomy law was unconstitutional because laws like it have far-reaching consequences “touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.” Justice Kennedy determined that recent law pointed toward “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Ultimately, the Court found that “liberty presumes an **autonomy of self** that includes freedom of **thought, belief, expression, and certain intimate sexual conduct**.”

**Court’s likely reaction to hypothetical laws:**

1. A state law bans any person under the age of 18 years and any unmarried persons from possession or use of contraceptives.

Supreme Court has said that states cannot prevent persons from possession or use of contraceptives. (See Eisenstadt v. Baird for unmarried persons and Carey v. Population Services, International for minors.)

1. A state law bans convicted felons from getting married.

Supreme Court has said that inmates, too, have the fundamental right to marriage. (Turner v. Safley)

1. A state law criminalizes polygamy.

Supreme court has not directly addressed the issue of polygamy but excluded polygamy from the right to marriage expressed in Griswold. (Griswold v. Connecticut)

1. A state law bans anyone who has been married three or more times from being married again in that state.

This specific issue has not been presented to the Supreme Court but the Court struck down a Wisconsin law prohibiting fathers who did not pay child support to marry. (Zablocki v. Redhail)

1. A state law requires sterilization of anyone convicted of a crime of “moral turpitude”.

The Supreme Court struck down this Oklahoma law because it violated a fundamental right to marriage and procreation. (Skinner v. Oklahoma)