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Attorney Bermingham is a professor who teaches Constitutional Law, Government Law, Business Law, and various Health Law classes, among others for Purdue University, Saint Leo University, Centenary University and Felician University. Professor Bermingham received his Bachelor of Science in Justice Studies at Arizona State University, his MBA with a Concentration in Criminal Justice at Saint Leo University and his Juris Doctor at Catholic University in Washington, DC.

In 2013, Centenary College awarded Professor Bermingham with the Adjunct Excellence Award as voted on by students in the program, he received Adjunct Professor of the Year for Purdue University in 2015 and voted as Adjunct Professor of the Year by the students at Purdue University in 2020. He has created course curriculums for the classes Health Care Legislation and Regulation, Legal Method and Process, Organization and Function of State Government at Purdue University, the course curriculum for Personnel Law and Ethics at Saint Leo University and the course curriculum for Business Law I and II and Employment Law for Felician University.

Furthermore, John Bermingham was elected by the people of Upper Mount Bethel, Pennsylvania in the November, 2015 General Election to the Board of Supervisors and has been Chairman of the Board of Supervisors for the Township for over five years.

John has authored two children's books, Our Gift from God and Our Family Picture.

He lives in Upper Mount Bethel with his wife Laura, their five-year-old son John ("JC"), and two-year-old son Michael. He has published articles for the National Association of Legal Assistants/Paralegals (NALA) and worked on their examination questions for paralegals.

# THE 5<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENTS

By John A. Bermingham, ESQ.



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## OBJECTIVE OF TODAY'S SEMINAR

- Detailed discussion and understanding of the 5<sup>th</sup> Amendment and the protections afforded under this Amendment.
- Detailed discussion and understanding of the 14<sup>th</sup> Amendment, why this Amendment was written and what the incorporation doctrine means.
- Analysis and comprehension of Supreme Court cases decided under the 5<sup>th</sup> and 14<sup>th</sup> Amendments.

## QUESTION

Why does society need 5<sup>th</sup> Amendment protections?



## 5<sup>TH</sup> AMENDMENT

The Fifth Amendment creates rights relevant to both criminal and civil actions. In criminal cases, one is guaranteed:

- the right to a grand jury
- protection against “double jeopardy”
- protection against self-incrimination
- requirement of “due process of law”
- requirement of “just compensation” when government takes private property for public use.

## 5<sup>TH</sup> AMENDMENT

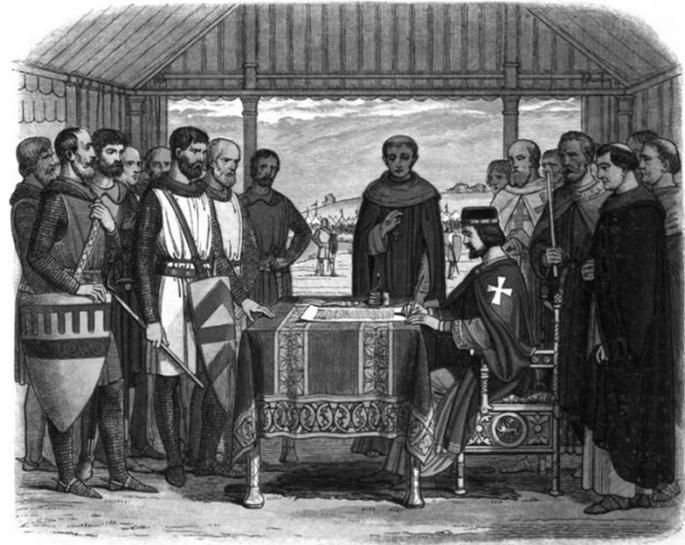
- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## 5<sup>TH</sup> AMENDMENT

- The clauses incorporated within the Fifth Amendment outline basic constitutional limits on police procedure.
- The Framers derived the Grand Juries Clause and the Due Process Clause from the Magna Carta, dating back to 1215.

# MAGNA CARTA

- Is a charter agreed by King John of England at on 15 June 1215.
- It promised the protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown.
- To be implemented through a council of 25 barons.



## MAGNA CARTA INFLUENCE

- The Constitution's Fifth Amendment guarantees that "no person shall be deprived of life, liberty, or property, without due process of law", a phrase that was derived from Magna Carta.
- In addition, the Constitution included a similar writ in the Suspension Clause, Article I, Section 9: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

## DOUBLE JEOPARDY

- The Double Jeopardy Clause of the Fifth Amendment prohibits state and federal governments from re-prosecuting for the same offense a defendant who has already been acquitted or convicted.
- It prevents state and federal governments from imposing more than one punishment for the same offense.



## DOUBLE JEOPARDY

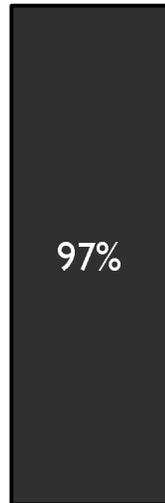
- The U.S. legal system has two primary divisions, criminal and civil. Criminal actions are designed to punish individuals for wrongdoing against the public order.
- Civil actions are designed to compensate victims with money damages for injuries suffered at the hands of another. An individual who has been acquitted in criminal court of murder can, without violating the Double Jeopardy Clause, be required in civil court to pay money damages to the family of a victim.
- The successive criminal and civil trials of O. J. Simpson, regarding the deaths of Nicole Brown Simpson and Ronald Goldman, did not constitute double jeopardy.

## BURDEN OF PROOF

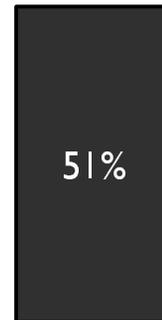
- Criminal Trial – beyond a reasonable doubt
- Civil Trial – preponderance of the evidence
- How does one differentiate the different levels of proof needed for each type of trial?

# BURDEN OF PROOF

BYRD



Preponderance



## CONSTITUTIONAL PROTECTIONS *NOT* AVAILABLE IN CIVIL COURT

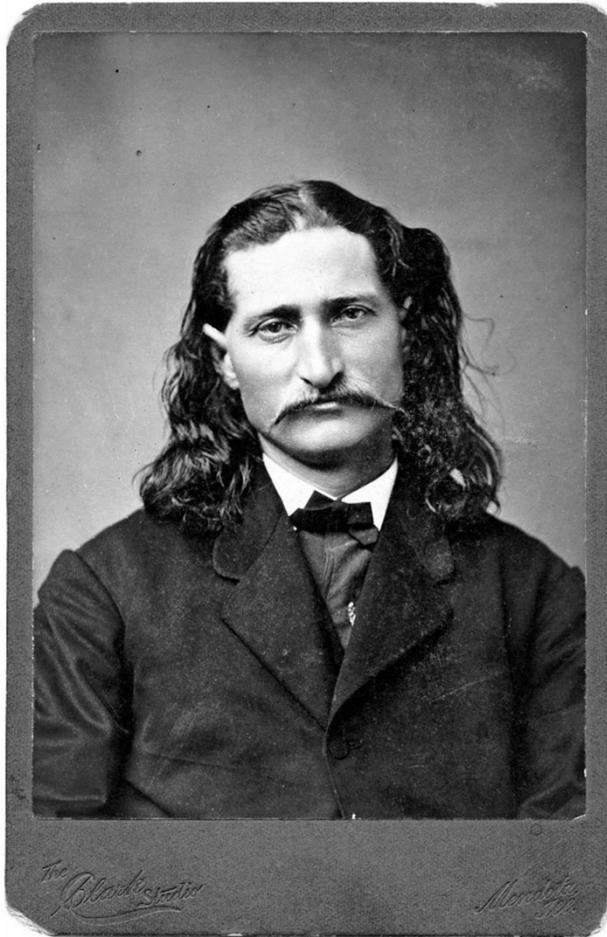
- No ex post facto law.
- Prohibition against "unreasonable searches and seizures."
- Prohibition of double jeopardy.

This protection takes two forms:

- A defendant who is found "not guilty" of a more serious charge can *not* have a second trial on a lesser included offense. For example, if D is found "not guilty" on a charge of felony murder (e.g., incidental killing of someone during the commission of a felony, such as robbery), then D can *not* be tried for the underlying felony (e.g., robbery).
- Prohibition against compelled self-incrimination. Amendment V
- The right to a speedy trial. Amendment VI
- The right to the assistance of counsel. Amendment VI
- Indigent defendants have the right to an attorney who is paid by the state. Amendment V

## WHY HAVE THE DOUBLE JEOPARDY PROTECTIONS?

- (1) preventing the government from employing its superior resources to wear down and erroneously convict innocent persons;
- (2) protecting individuals from the financial, emotional, and social consequences of successive prosecutions;
- (3) preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes;
- (4) restricting prosecutorial discretion over the charging process; and (5) eliminating judicial discretion to impose cumulative punishments not authorized by the legislature.



## THE CASE OF JACK MCCALL

- One of the most famous **5th Amendment Double Jeopardy Clause** cases is the case of Jack McCall, the murderer of Wild Bill Hickok. McCall shot Hickok in the back of the head in a saloon in Deadwood, South Dakota, apparently because he was insulted the day before when Hickok offered to pay for McCall's breakfast. McCall had lost all his money in a poker game the night before.

## THE CASE OF JACK MCCALL

- Deadwood was technically not in the United States, it was in Indian territory where the jurisdiction of the United States did not apply. After the killing, a group of townspeople held an impromptu trial and found McCall not guilty. McCall then fled to Wyoming where officials captured him and returned him to Dakota Territory, which was a part of the United States.

## THE CASE OF JACK MCCALL

- McCall was tried again and the South Dakota Territory court found that the **Double Jeopardy Clause** was not violated by trying him a second time because the city of Deadwood was not in the United States. Because it was not in the United States, there was no legal protection there against **double jeopardy**. McCall was found guilty and became the first person to be executed in Dakota Territory.

## THE BLOCKBURGER TEST

- If a person has violated more than one law with only one criminal act, the **Double Jeopardy Clause** applies in some cases, and in some cases it does not.
  - For example, if a person was tried and convicted of assault, he could not later be tried, using the exact same evidence, for murder. He could however, be tried later for murder, if new evidence came to light in addition to the evidence from the first trial.
- He would be tried for two separate crimes, with two separate sets of evidence. If he was tried for both crimes, in two separate trials, using the same evidence, it would be a violation of the **Double Jeopardy Clause**, because he was tried twice with the same evidence.

## THE BLOCKBURGER TEST

- Derived from *Blockburger v. United States*, 1932. It states basically that a person cannot be tried for lesser and greater crimes using the same evidence in subsequent trials.
- A person can be tried on lesser and greater crimes using the same evidence if the crimes are tried together in one trial.

## SELF-INCRIMINATION CLAUSE

- The Fifth Amendment's right against self-incrimination permits an individual to refuse to disclose information that could be used against him or her in a criminal prosecution.
- The purpose of this right is to inhibit the government from compelling a confession through force, coercion, or deception.
- The Self-Incrimination Clause applies to any state or federal legal proceeding, whether it is civil, criminal, administrative, or judicial in nature.
- This privilege is frequently invoked during the trial phase of legal proceedings, where individuals are placed under oath and asked questions on the witness stand.

## MIRANDA WARNINGS

- The U.S. Supreme Court has interpreted the Self-Incrimination Clause more broadly than many of the Framers probably would have. *MIRANDA V. ARIZONA*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), illustrates this point.
- In *Miranda* the Court held that any statements made by defendants while in police custody before trial will be inadmissible during prosecution unless the police first warn the defendants that they have:
  - (1) the right to remain silent,
  - (2) the right to consult an attorney before being questioned by the police,
  - (3) the right to have an attorney present during police questioning,
  - (4) the right to a court-appointed attorney if they cannot afford one, and
  - (5) the right to be informed that any statements they do make can and will be used in their prosecution.

## MIRANDA V. ARIZONA (1966)

- In a 5-4 majority, the Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial
- Only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination before police questioning
- And that the defendant not only understood these rights, but voluntarily waived them.

## QUESTION

What is the difference between "custody" and "interrogation?"



## MIRANDA WARNINGS

- The circumstances triggering the Miranda safeguards, i.e. Miranda rights, are "custody" and "interrogation".
- Custody means formal arrest or the deprivation of freedom to an extent associated with formal arrest.
- Interrogation means explicit questioning or actions that are reasonably likely to elicit an incriminating response.

## THOUGHT

- Although the *Miranda* warnings are not provided in the Fifth Amendment's Self-Incrimination Clause, the Court has ruled that they constitute an essential part of a judicially created buffer zone that is necessary to protect rights that are specifically set forth in the Constitution.



## QUESTION

Are Miranda Warnings fair protections to suspects?

## *DICKERSON V. UNITED STATES (2000)*

- The U.S. Supreme Court concluded that the *Miranda* decision was based on Fifth Amendment principles and therefore that it could not be over-turned legislatively.
- Congressional anger at the *Miranda* decision had led to the passage in 1968 of a law, 18 U.S.C.A. § 3501, that had restored voluntariness as the test for admitting confessions in federal court.

## CHAVEZ V. MARTINEZ (2002)

- A decision of the United States Supreme Court, which held that a police officer does not deprive a suspect of constitutional rights by failing to issue a *Miranda* warning.

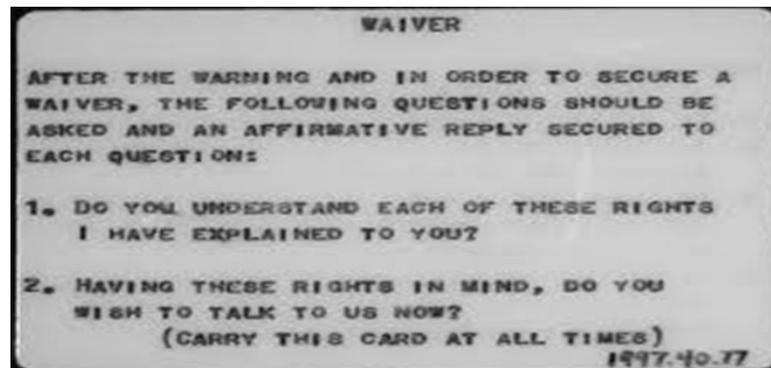


## CHAVEZ V. MARTINEZ

- While respondent Martinez was being treated for gunshot wounds received during an altercation with police, he was interrogated by petitioner Chavez, a patrol supervisor.
- Martinez admitted that he used heroin and had taken an officer's gun during the incident.
- At no point was Martinez given *Miranda* warnings.
- Although he was never charged with a crime, and his answers were never used against him in any criminal proceeding, Martinez filed a 42 U.S.C. § 1983 suit, maintaining, among other things, that Chavez's actions violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself," and his Fourteenth Amendment substantive due process right to be free from coercive questioning.

## CHAVEZ V. MARTINEZ

- Supreme Court said, “The text of the Self-Incrimination Clause simply cannot support the view that the mere use of compulsive questioning, without more, violates the Constitution.”



## *BERGHUIS V. THOMPkins* (2010)

- Per the U.S. Supreme Court decision criminal suspects who are aware of their right to silence and to an attorney, but choose *not* to "unambiguously" invoke them, may find any subsequent voluntary statements treated as an implied waiver of their rights, and which may be used in evidence.

## EMINENT DOMAIN

- The power to take private property for public use by a state, municipality, or private person or corporation authorized to exercise functions of public character, following the payment of just compensation to the owner of that property.



## EMINENT DOMAIN

- Federal, state, and local governments may take private property through their power of eminent domain or may regulate it by exercising their Police Power.
- The Fifth Amendment to the U.S. Constitution requires the government to provide just compensation to the owner of the private property to be taken.
- A variety of property rights are subject to eminent domain, such as air, water, and land rights.
- The government takes private property through condemnation proceedings.
- Throughout these proceedings, the property owner has the right of DUE PROCESS.

## EMINENT DOMAIN

- The U.S. Supreme Court has ruled that a municipality can use its power of eminent domain to take unblighted property that will be used for private development, so long as that local government determines that the development benefits the entire community.

## KELO V. CITY OF NEW LONDON

- In 2000, New London, Conn., which had suffered an extended period of economic decline, approved an economic development plan designed to create jobs and expand the city's tax base. The plan called for the conversion of a closed naval base and an adjoining 115 private homes into an urban village. The city bought 100 of the affected properties but was unable to reach agreements with the remaining owners. It then used its power of eminent domain to condemn the 15 properties.

## KELO V. CITY OF NEW LONDON

- The property owners filed a suit, claiming that the taking violated the public-use provisions of eminent domain as outlined in the Fifth Amendment to the U.S. Constitution. The trial court issued a permanent restraining order against the taking but was reversed by the Supreme Court of Connecticut. The state court ruled that the taking was valid under state statutes as part of an economic development plan.

## KELO V. CITY OF NEW LONDON

- The U. S. Supreme Court affirmed this finding. The Fifth Amendment allows government to take property from one private individual and transfer it to another private individual if the taking is for a public use. In the case of *Kelo v. City of New London, Conn.*, the Supreme Court determined that rulings in earlier cases had deferred to local legislative judgments as to what constituted the public good and thus justified a taking.
- The property owners had argued that takings for economic development purposes should be legal only if there was reasonable certainty that the city would receive the expected public benefits. However, the court determined that this standard was too high and would create an impediment to all such development plans. It also stated that its ruling did not prohibit states from passing laws to limit government rights to take private property.

## ELEMENTS OF EMINENT DOMAIN

- To exercise the power of eminent domain, the government must prove that the four elements set forth in the Fifth Amendment are present: (1) private property (2) must be taken (3) for public use (4) and with just compensation. These elements have been interpreted broadly.

## PRIVATE PROPERTY

- **Private Property** The first element requires that the property taken be private. Private property includes land as well as fixtures, leases, options, stocks, and other items. The rifle that was used to kill President JOHN F. KENNEDY was considered private property in an eminent domain proceeding.

<http://legal-dictionary.thefreedictionary.com/Elements+of+Eminent+Domain>



## TAKING

- The second element refers to the taking of physical property, or a portion thereof, as well as the taking of property by reducing its value. Property value may be reduced because of noise, accessibility problems, or other agents. Dirt, timber, or rock appropriated from an individual's land for the construction of a highway is taken property for which the owner is entitled to compensation. In general, compensation must be paid when a restriction on the use of property is so extensive that it is tantamount to confiscation of the property.

<http://legal-dictionary.thefreedictionary.com/Elements+of+Eminent+Domain>

## PUBLIC USE

- The third element, public use, requires that the property taken be used to benefit the public rather than specific individuals. Whether a particular use is considered public is ordinarily a question to be determined by the courts.

## JUST COMPENSATION

- The last element set forth in the Fifth Amendment mandates that the amount of compensation awarded when property is seized or damaged through condemnation must be fair to the public as well as to the property owner.
- Because no precise formula for determining it exists, just compensation is the subject of frequent litigation.

# 14<sup>TH</sup> AMENDMENT

## **Section 1.**

Privileges and Immunities Clause

Civil Rights

Slaughterhouse Cases

Due Process

Substantive Due Process

Right of Privacy: Personal Autonomy

Territorial Jurisdiction

Equal Protection

Plessy v. Ferguson (1896)

Plyer v. Doe (1982)

## **Section 4.**

Debt

## **Section 5.**

Enforcement Power

Commerce Clause

## INCORPORATION DOCTRINE

- The Framers of the Fifth Amendment intended that its provisions would apply only to the actions of the federal government.
- After the Fourteenth Amendment was ratified, most of the Fifth Amendment's protections were made applicable to the states.
- Under the Incorporation Doctrine, most of the liberties set forth in the Bill of Rights were made applicable to state governments through the U.S. Supreme Court's interpretation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
- All states must provide protection against Double Jeopardy, Self-Incrimination, deprivation of due process, and government taking of private property without just compensation.

## BROWN V. BOARD OF EDUCATION

- Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment -- even though the physical facilities and other "tangible" factors of white and Negro schools may be equal.

## BROWN V. BOARD OF EDUCATION

- The "separate but equal" doctrine adopted in *Plessy v. Ferguson*, 163 U.S. 537, has no place in the field of public education.

## ROE V. WADE

- State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy.

## OBERGEFELL V. HODGES

- The majority held that state same-sex marriage bans are a violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.



## OBERGEFELL V. HODGES

- "The Constitution promises liberty to all within its reach," the Court declared, "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."
- Citing *Griswold v. Connecticut*, the Court affirmed that the fundamental rights found in the Fourteenth Amendment's Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs", but the "identification and protection" of these fundamental rights "has not been reduced to any formula."

## DUE PROCESS

- The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive a person of life, liberty, or property.
- Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.
- While the Fifth Amendment only applies to the federal government, the identical text in the Fourteenth Amendment explicitly applies this due process requirement to the states as well.
- Due Process consists of Procedural Due Process and Substantive Due Process.

## TWO KINDS OF DUE PROCESS

- Procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment.
- Substantive due process has developed during the 20th century as protecting those right so fundamental as to be "implicit in the concept of ordered liberty."

## QUESTION

- What is the difference between Procedural Due Process and Substantive Due Process?



## 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.
- looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.

## SUBSTANTIVE DUE PROCESS EXAMPLE

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.

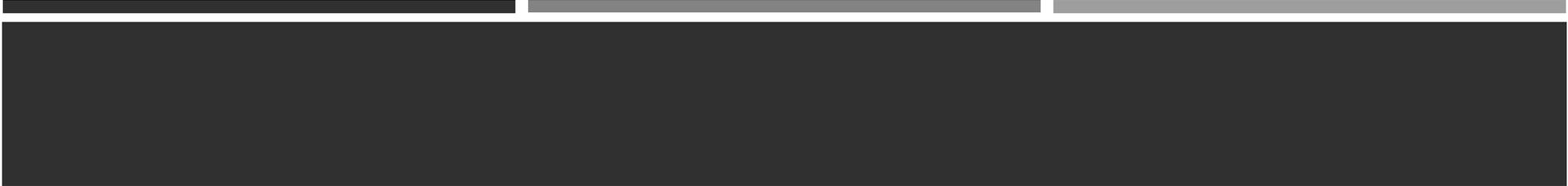
- Procedural due process means that the government must give notice and a hearing before it can permanently terminate custody.
- Substantive due process means the government must show a compelling reason that would demonstrate an adequate justification for terminating custody.

## SUBSTANTIVE DUE PROCESS & GAY MARRIAGE

- Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights.
- Denying marriage to anyone is depriving a bunch of American citizens the freedom to marry without due process of law.
- As five out of nine Supreme Court judges decided, denying gay couples the right to marriage is not equal treatment under the law.

## CONTACT ME

- I am on LinkedIn and Facebook, so please feel free to send me a request to connect on LinkedIn or a friend request on Facebook. I use both for networking purposes and a way to stay in touch. (My email for LinkedIn is [johnabermingham@aol.com](mailto:johnabermingham@aol.com)). Additionally, my Facebook page is [www.facebook.com/john.bermingham.7737](http://www.facebook.com/john.bermingham.7737)
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THANK YOU!