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**SUBSTANTIVE AND PROCEDURAL DUE PROCESS
IN PUBLIC SECTOR EMPLOYMENT LAW**

BY

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I. SCOPE OF THE PRESENTATION

- A. This presentation addresses the juridical concepts of substantive and procedural due process in public sector employment law.
- B. The intention is to provide an overview of the due process clauses contained in the in the United States Constitution, specifically the Bill of Rights, and to trace their development by the U.S. Supreme Court.
- C. This exercise will begin with some speculation about the pre-constitutional origins of the juridical concept of due process.
- D. The presentation will then trace the development of the due process clauses over time, and explain the application of due process in the context of employment law.

II. WHAT IS DUE PROCESS?

- A. The short answer to this is that due process is a requirement of notice and an opportunity to be heard before a final judgment or decision is rendered against one's interests. This is typically known as procedural due process.
- B. But due process has also come to include a notion known as substantive due process. Substantive due process is more akin to an absolute privilege, or immunity, or natural right that cannot be overridden or overturned by anyone.
- C. The most common reference to substantive and procedural due process in our jurisprudence is the reference to the Magna Carta.
- D. The popular understanding of the Magna Carta is that it is one of the first written documents in which the rights of individuals are established as against a sovereign entity.
- E. The Magna Carta is in fact an early 13th century (1215 C.E.) between King John of England and a group of barons who demanded certain protections from and limitations on the royal sovereign.
- F. A closer review of the history of this document reveals that it was drafted by the then Archbishop of Canterbury, Stephen Langton, who was an English Cardinal of the Roman Catholic Church.
- G. The Magna Carta was an effort to secure peace by the use of a negotiated pact between a sovereign and a local ruling class. The agreement made express that which was implied by the fact of King John's need to negotiate -- that the ruling sovereign was limited in its authority. Or, put another way, that the subject class had certain privileges and immunities from the authority of the sovereign in specified subject matter areas.

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- H. The deeper context that is usually left out of this story, is that this effort occurred at a time of the Roman's Church's rise in political power, particularly with the development of canon law principles.
- I. Consequently, to the extent that canonists of the medieval period were developing canon law principles, many of them derived from Holy Scripture, there is another source of authority for the juridical concept of due process of law.
- J. Johannes Monachus (d.1313) a medieval French canonist, argued that the concept of due process was reflected in Genesis, in the story of Adam and Eve. Monachus noted that in the biblical story of God's judgment on Adam and Eve for violation of the proscriptive commandment, even God abided by the principles of due process. *See "A Short History of Canon Law" at pp. 68-69 by Kenneth Pennington (Catholic University of America, Washington, D.C.).*
- K. First, God looked for, and summoned, Adam, after Adam was attempting to hide from God. In other words, Adam was provided procedural due process. Secondly, even after pronouncing judgment on the first couple, God allowed them to live. He did not destroy humankind. This is substantive due process. *Id.*
- L. Regardless of whether you agree with or abide by the biblical origins of juridical due process, it is an undeniable fact that the concept of due process has been honored and developed in the West.
- M. By the time of the founding of the American colonies, and later the United States, it was a concept well embedded in the culture, both legally and culturally as a basic component of fairness and ethics.

III. THE BILL OF RIGHTS AND DUE PROCESS

- A. It is a noteworthy feature of the U.S. Constitution that it was conditionally ratified by many states. The conditional ratification called for the inclusion of a Bill of Rights, intended to provide limits on the sovereign.
- B. Only ten of the original twelve amendments were in fact ratified as amendments to the Constitution.
- C. Of the first ten amendments, nine of those reference some guarantee, proscription, limitation, privilege, or immunity that can easily be rooted in a juridical concept of either procedural, or substantive, due process.

IV. THE STATE ACTION REQUIREMENT

- A. Implicit in this topic is the requirement of state action. Because the ideas of due process implicate only the actions of a governing sovereign, the discussion is necessarily limited to the actions of government as an employer.

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- B. The requirement of state action under the enabling statute known as the Civil Rights Act of 1871 (codified as 42 U.S.C. §1983) is the same as the state action requirement contained in the 14th Amendment. *See Lugar v Edmondson Oil Co, Inc.* 457 U.S. 922 (1982).
- C. In other words, this presentation does not address at all any private sector employment law issues, whether under state or federal law, because such actions do not, by definition, arise out of the action of a government.
- D. There are, of course, state and federal labor and employment laws that govern private employer actions against employees. However, the state laws are rooted in state legislative authority. Likewise, many of the federal laws are rooted in constitutional provisions other than the Bill of Rights.
- E. This presentation is limited to the due process protections and guarantees arising under the U.S. Constitution, and specifically the Bill of Rights, as applied to either the state or federal government in its capacity as an employer.
- F. The subject of state action becomes subtle and complex when it arises in claims that depend on the conduct of state agents who, under certain circumstances, fail to act, as opposed to those who affirmatively exercise sovereign power. This notion is well illustrated in *DeShaney v Winnebago County*, 489 U.S. 189 (1989).
- G. However, I will not spend more time than this on the contours of what is state action because in the context of labor and employment, any actions by a government employer necessarily qualify as state action.
- H. But *DeShaney* makes it clear that the concept of constitutional due process is intended to guard against certain types of state action against individuals. It was not intended necessarily to protect individuals from private actions against each other, no matter how tortious.
- I. Finally, the state action doctrine necessarily covers not only state, but also local government units as “persons” to whom the Civil Rights Act of 1871, and the applicable constitutional provisions, applies. *Monell v Department of Social Services*, 436 U.S. 658 (1978)(overruling *Monroe v Pape*, 365 U.S. 167 (1961)).
- J. In the context of public employment, there is never an issue about whether personnel action constitutes “state action”. Therefore, the body of law that addresses what constitutes state action need not be addressed here in further detail.

V. THE INCORPORATION DOCTRINE

- A. Originally, the Bill of Rights did not speak at all to employment relationships. In *Barron v Baltimore*, 32 U.S. 243 (1833), Chief Justice John Marshall, writing for the Court, held that the Bill of Rights did not apply to the states. They applied only to the federal government.

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- B. There is no obvious jurisprudence from the early era that addresses the applicability of due process to federal employees, unless one wants to treat *Marbury v Madison*, 5 U.S.137 (1803) as a federal employment case.
- C. *Marbury*, involved the withholding of a commission for a Justice of the Peace in the District of Columbia after a change in executive branch administration. *Marbury* is better known for establishing the power of judicial review by the Court over actions of the federal government, and does not directly address due process concepts.
- D. The applicability of due process concepts to the area of employment did not gain traction until the passage of the civil war era constitutional amendments, and specifically the 14th Amendment.
- E. Although today, it is commonly accepted that the 14th Amendment expanded the protections of the Bill of Rights beyond the federal government, this was not a foregone conclusion in the early days of this civil war era amendment.
- F. Despite some legislative commentary that the privileges and immunities guaranteed by the Bill of Rights would now be carried over to the states, the Court in the *Slaughterhouse Cases*, 83 U.S. 36 (1873) held that there was no wholesale incorporation of the Bill of Rights under the privileges and immunities clause of the 14th Amendment as against state action.
- G. After the rejection of the 14th Amendment's privileges and immunities clause as the basis for a wholesale incorporation of the original Bill of Rights provisions as now applicable to the states, a new basis for the piecemeal expansion of specific provisions of the Bill of Rights became available under the concept of Due Process.
- H. This paper traces that development over time generally, and specifically as it came to apply to public sector employment at both the state, and the local government level.
- I. Listed in the next section are those cases that established the incorporation of specific provisions of the Bill of Rights to the states, including local government entities.

VI. INCORPORATION OF CONSTITUTIONAL RIGHTS MOST RELEVANT TO EMPLOYMENT CONTEXT

- A. 1st Amendment – free exercise of religion. Incorporated against the states by *Cantwell v Connecticut*, 301 U.S. 296 (1940).
- B. 1st Amendment – freedom of speech. Incorporated against the states by *Gitlow v New York*, 268 U.S. 652 (1925).
- C. 1st Amendment – freedom of assembly. Incorporated against the states by *DeJonge v Oregon*, 299 U.S. 353 (1937).

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- D. 1st Amendment – freedom of expressive association. Conceptually applied against the states in *NAACP v Alabama*, 357 U.S. 449 (1958); elaborated on in *Roberts v United States Jaycees*, 468 U.S. 609 (1984).
 - E. 2nd Amendment – right to keep and bear arms. Incorporation against the states via the 14th Amendment Due Process clause by *McDonald v City of Chicago*, 561 U.S. 742 (2010)(recognizing a fundamental right subject to strict scrutiny).
 - F. 4th Amendment – unreasonable search and seizure. Incorporated against the states by *Mapp v Ohio*, 367 U.S. 643 (1961). But see *Wolf v. Colorado*, 338 U.S. 25 (1949), recognizing that security of one’s privacy against arbitrary intrusion by police is at the core of the 4th Amendment. 338 U.S. at 27.
 - G. 5th Amendment – privilege against self-incrimination. Incorporated against the states by *Malloy v Hogan*, 378 U.S. 1 (1964); *see also Griffin v California*, 380 U.S. 609 (1965).
 - H. 5th Amendment – taking of private property with compensation. Incorporated against the states by *Chicago, Burlington v. City of Chicago*, 166 U.S. 226 (1897).
 - I. 6th Amendment – right to notice of accusations. Incorporated against the states by *In re Oliver*, 333 U.S. 257 (1948); *see also Rabe v. Washington*, 405 U.S. 313 (1972).
 - J. 6th Amendment – right to confront adverse witnesses. Incorporated against the states by *Pointer v. Texas* 380 U.S. 400 (1965).
 - K. A more detailed discussion of those provisions that relate directly, and particularly those bearing the most on employment relationships, are discussed below.

VII. FIRST AMENDMENT – FREEDOM OF RELIGION

- A. Incorporated against the states by *Cantwell v Connecticut*, 301 U.S. 296 (1940). *Cantwell* involved a challenge to a state licensing statute.
- B. The Cantwells, members of a proselytizing religion, were arrested for not complying with the licensing statute. They argued that the state did not have the right to determine whether their proselytizing efforts constituted a religion subject to licensing regulations.
- C. *Cantwell* held in summary, the licensing efforts violated a religious liberty interest in contravention of the 1st and the 14th Amendment. *See also Wisconsin v Yoder*, 406 U.S. 205 (1972)(compulsory education laws)
- D. Application of this incorporation of religious freedom, for our purposes, next arises at the U.S. Supreme Court in the case of *Sherbert v Verner*, 374 U.S. 398 (1963),

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- E. *Sherbert* involved a public employee who was a Seventh Day Adventist who had a religious objection to working on a Saturday. Because of this, she was denied unemployment benefits.
- F. *Sherbert* held that the disqualification of benefits imposed an burden on Sherbert's religious convictions that were not otherwise justified by a legitimate state interest. 374 U.S. at 402-405.
- G. The holding in *Sherbert* was not extended to a similar fact pattern stated in *Employment Division v Smith*. 494 U.S. 872 (1990).
- H. *Smith* involved a claim by public employees who had been discharged from public employment because of their religious use of peyote, that the denial of their unemployment benefits violated their Free Exercise rights as per *Sherbert*.
- I. *Smith*, departing from the holding in *Sherbert*, and declined to apply the balancing test articulated in *Sherbert*.
- J. Probably because of language in *Smith*, that acknowledged that authority of legislatures to pass laws that enhanced religious freedom, so long as these did not violate constitutional principles, the congressional reaction to the ruling in *Smith* was passage of The Religious Freedom Restoration Act, known as RFRA.
- K. RFRA purported to go back to the religious freedom accommodation established by *Sherbert*.
- L. However, in *City of Boerne v Flores*. 521 U.S. 507 (1997), harkening back to *Marbury v Madison*, the Supreme Court held that RFRA had overstepped its constitutional limits.
- M. Specifically, *Flores* held that RFRA was not an appropriate exercise of enforcement legislation under Section 5 of the 14th Amendment, but rather a substantive declaration of what the 1st Amendment right was.
- N. *Flores* did clarify what the scope of congressional Section 5 enforcement powers were, replacing a prior standard that had been set in *Katzenbach v Morgan*, 384 U.S. 641 (1966).
- O. The net result was passage of the Religious Land Use and Institutionalized Persons Act, whose constitutional premise was the Spending Clause, as opposed to the 1st and 14th Amendment.
- P. In *Burwell v Hobby Lobby*, ___ U.S. ___, 134 S.Ct. 2751 (2014), the Court analyzed the developments against the mandatory contraceptive provisions of the Patient Protection and Affordable Care Act.
- Q. Citing prior 1st Amendment caselaw, as well as legislative responses to prior rulings, *Hobby Lobby* held that the HHS regulations failed to satisfy the least restrict means test..

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- R. I would point out too that a state law version of RFRA was adopted by the Texas Legislature in 1999, currently codified in Chapter 110, Texas Civil Practice & Remedies Code.
- S. Section 110.003(a), TCP&RC provides. Religious Freedom Protected. (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.
- T. There is little or no current appellate case law development under this statute, but it appears to be one that could generate some jurisprudence.

VIII. FIRST AMENDMENT – FREEDOM OF SPEECH

- A. Incorporated against the states by *Gitlow v New York*, 268 U.S. 652 (1925).
- B. *Gitlow* involved the criminal prosecution of a defendant under a state's anti-anarchy laws. The precise question presented was whether the defendant was deprived of a freedom of expression in violation of the due process clause of the 14th Amendment. 268 U.S. at 664.
- C. The Court specifically held that both freedom of speech and of the press were protected by the First Amendment as fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the States. 268 U.S. at 666. The "incidental statement" in *Prudential Insurance Co. v Cheek*, 259 U.S. 530, 536 (1922) to the contrary was disavowed. 268 U.S. at 666.
- D. In an employment context, we next have *Keyishian v Board of Regents*, 385 U.S. 589 (1967), which involved a set of laws requiring "loyalty oaths" and barring employment for failure to disavow treasonable or seditious words or acts by educators.
- E. Previously, in *Adler v Board of Education*, 342 U.S. 485 (1952), the Court had held that similar laws were constitutional. *Id.*
- F. Next is *Pickering v Board of Education*, 391 U.S. 563 (1968), which coined the concept of 1st Amendment protection from adverse personnel action based on speech on matters of public concern. 381 U.S. at 574.
- G. A close review of *Pickering* reveals that the constitutional test fashioned there was done against the backdrop of the *New York Times v Sullivan*, 376 U.S. 254 (1964), which addressed the appropriate standard for libelous speech critical of public figures.
- H. The *Pickering* ruling later served as the basis for the claim in *Connick v Myers*, 461 U.S. 138 (1983)(free speech balancing test). *Connick* is useful because of the summary of caselaw development.

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- I. Whether the action or communication at issue is a matter of public concern must be assessed by reviewing the entirety of the context. The issue is a question of law. 461 U.S. at 147-148 & n.7.
- J. In *Givhan v WLC School District*, 439 U.S. 410 (1979), the Court clarified that even private speech by a public employee on a matter of public concern, in this case, racial discrimination in the workplace, is constitutionally protected.
- K. In *Rankin v McPherson*, 483 U.S. 378 1987, the Court held that political speech was also protected under the 1st and 14th Amendment.
- L. McPherson was a nineteen year old African American female working as a data entry clerk in the office of Harris County Constable McPherson's office. Shortly after the assassination attempt against then President Reagan was reported in the news, shot, she made a comment to a co-worker that "if they go for him again, I hope they get him." When the Constable learned of the comment, confronted her about the comment, which she did not deny making. Rankin then fired McPherson.
- M. *Rankin* held that "the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. 483 U.S. at 387. Finding that it was undisputed that Rankin fired McPherson because of the content of her speech, the Court affirmed decision of the 5th Circuit to remand the case for further development of the balancing of interests and the adverse impact of the comment on the operations of the office by this low level clerical employee.
- N. We begin to see a contraction of this area in *Garcetti v Ceballos*, 547 U.S. 410 (2006). In a fact pattern similar to *Connick v Myers*, the Court found that speech made pursuant to a public employee's official duties does not, as a matter of law, constitute speech on a matter of public concern.
- O. These types of claims have moved more into a statutory context, governed by whistleblower statutes and/or anti-retaliation provisions found in state and federal law.

IX. FIRST AMENDMENT – FREEDOM OF ASSEMBLY AND ASSOCIATION

- A. Incorporated against the states by *DeJonge v Oregon*, 299 U.S. 353 (1937).
- B. In the criminal law context, most recently applied in *Brandenburg v Ohio*, 395 U.S. 444 (1969)(association and advocacy).
- C. Developed in *NAACP v Alabama*, 357 U.S. 449 (1958), involving state compelled production of records of members. See also *NAACP v Button*, 371 U.S. 415 (1963) related to state statutes controlling legal solicitation in connection with rights of African Americans.

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- D. See also *Roberts v United States Jaycees*, 468 U.S. 609 (1984) for latest permutations. *Roberts* involved challenge to a male only non-profit group in a challenge by women under a statutory anti-discrimination lawsuit. *Roberts* held that the state had a legitimate interest in overcoming discrimination against women and declined to apply the alleged First Amendment right to sanction the exclusive conduct.
- E. Most of the development in this area as it relates to labor organizing arises under a statutory context. See *City of Round Rock v Rodriguez*, 399 S.W.3d 130 (Tex. 2013)(addressing rights of representation in due process context under the Texas Labor Code and the federal case of *NLRD v Weingarten*, 420 U.S. 251 (1975)(interpreting 29 U.S.C. §157)).
- F. In the public employment context, association rights are implicated in the context of labor organizing and labor unions. Because this is an area that has long been the subject of statutory development, 1st Amendment caselaw developments occur under the statute as opposed to the Constitution.
- G. However, in the 5th Circuit at least, there exists a 1st Amendment right of association that is actionable under a Section 1983 claim. See *Hitt v Connell*, 301 F.3d 240 (5th Cir. 2002)(holding that the 1st Amendment protects a public employee's rights to associate with a union. 301 F.3d at 245.
- H. To prevail on such a claim, a public employee must prove that 1) he/she suffered an adverse personnel action; 2) his/her interests in "associating" with a union outweighed the public employer's interest in efficiency, and 3) the protected activity was a substantial or motivating factor in the adverse employment action. 301 F.3d at 246.
- I. See also *Murphy v Butler*, 512 F.Supp.2d 975 (S.D. Texas 2007), treating the protected conduct as speech on a matter of public concern and adding a "but for" requirement. 512 F.Supp.2d at 979 (that is, but for the protected conduct, would the adverse employment action have occurred anyway).

X. FOURTH AMENDMENT – SEARCH, SEIZURE, AND PRIVACY

- A. Incorporated against the states by *Mapp v Ohio*, 367 U.S. 643 (1961).
- B. See also *Wolf v. Colorado*, 338 U.S. 25 (1949), recognizing that security of one's privacy against arbitrary intrusion by police is at the core of the 4th Amendment. 338 U.S. at 27.
- C. The Court has specifically recognized an expectation of privacy in one's office workplace against intrusions by law enforcement. See *Mancusi v DeForte*, 392 U.S. 364 (1968)(holding that Mancusi had standing to assert a 4th Amendment expectation of privacy in his office and also that the search of the office was unreasonable as a matter of law).

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- D. Although 4th Amendment claims usually arise in a criminal law context, the privacy interests embedded in the 4th Amendment via the 14th Amendment have been addressed in the public sector employment context. *O'Connor v Ortega*, 480 U.S. 709 (1987).
- E. *Ortega* held that searches by government employers or supervisors of the private property of public employees are subject to 4th Amendment restraints. 480 U.S. 709.
- F. However, recognizing the employer's interest in the efficient operations of the workplace, the Court adopted a rule of reasonableness, balancing the employee's legitimate expectation of privacy against the government employer's legitimate need for supervision, control, and efficiency of operations. 480 U.S. 710.
- G. An application of this principle can be found in *Lowe v City of Macon, Georgia*, 720 F.Supp. 994 (M.D. Ga. 1989)(making distinction in search of personal property at work between search for criminal law investigative purposes, or search for purposes of assessing workplace misconduct).

XI. FIFTH AMENDMENT – RIGHT AGAINST SELF-INCRIMINATION AND THE GARRITY DOCTRINE.

- A. Incorporated against the states via the 14th Amendment Due Process Clause by *Malloy v Hogan*, 378 U.S. 1 (1964); *see also Griffin v California*, 380 U.S. 609 (1965).
- B. Both of these cases involve a proscription against the state, i.e. a prosecutor, from highlighting to a jury about a criminal defendant's failure to testify. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the right against self-incrimination was recognized in the context of questioning by police of a target suspect.
- C. The right of self-incrimination has been recognized to exist for public sector employees when being questioned about misconduct allegations which, if true, carry criminal liability.
- D. This scenario usually presents itself in the law enforcement context, where the nature of the work necessarily involves the power to detain, to arrest, and, under appropriate circumstances, to use deadly force.
- E. There is therefore a tension between a law enforcement officer's right against self-incrimination, and the duty of that officer, as a public sector employee, to respond to questions about allegations of misconduct.
- F. Although this tension manifests itself primarily in the law enforcement context, it technically exists in any situation involving a public employee who is accused of engaging in criminal misconduct.

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- G. The U.S. Supreme Court addressed this tension in *Garrity v. New Jersey*, 385 U.S. 493 (1967). *Garrity* recognized the constitutional rights against self-incrimination of public employees. Justice Douglas, writing for the majority, held that “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
- H. *Garrity*, established a Garrity warning, analogous to the Miranda warning established the year before.
- I. In practice, a statement given under a Garrity warning is equivalent to a compelled statement, with the added guarantee that the statement may not, and will not, be used against the employee in any subsequent criminal prosecution. *See Uniformed Sanitation Men Ass’n v Comm’r of Sanitation*, 392 U.S. 280 (1968); *see also Gardner v Broderick*, 392 U.S. 273 (1968).
- J. *Uniformed Sanitation Men* held that a public employee may not be fired for refusing to sign waivers of immunity or for invoking their privilege against self-incrimination. 392 U.S. at 280; *see also Gardner v Broderick*, 392 U.S. 273 (1968); *and Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).
- K. The practice has evolved to where a statement may be compelled under a Garrity warning, but this necessarily carries with it the responsibility of the public employee to protect the compelled statement from disclosures or production to a prosecuting authority. *See Lingler v Fechko*, 312 F.3d 237 (6th Cir. 2002)(compelled statements related to workplace not in violation of 5th Amendment even if made under threat of dismissal so long compelled statement not used in a criminal proceeding).

XII. SIXTH AMENDMENT – RIGHT TO NOTICE OF ACCUSATIONS

- A. The right to notice of accusations was incorporated against the states by *In re Oliver*, 333 U.S. 257 (1948)(involving criminal contempt charges before a grand jury); *see also Rabe v Washington*, 405 U.S. 313 (1972)(involving an impermissibly vague penal law related to showing of movie in adult theatre).
- B. The right to confront adverse witnesses was incorporated against the states by *Pointer v. Texas*, 380 U.S. 400 (1965). *Pointer* held that the 6th Amendment’s right of an accused to confront witnesses is a fundamental right and is therefore obligatory on the states via the 14th Amendment.
- C. There is no caselaw development in the public sector employment context addressing these two 6th Amendment rights. However, some notion of confrontation is embedded under the procedural due process provisions of the 14th Amendment whenever a liberty or a property interest is at stake.

XIII. FOURTEENTH AMENDMENT – PERSONAL LIBERTY - PRIVACY

- A. Constitutional right of privacy, as currently articulated, is discussed in *Roe v Wade*, 410 U.S. 113 (1973).
- B. *Roe* looked to prior decisions involving civil and criminal restrictions or regulations surrounding birth control and contraception. *Griswold v Connecticut*, 381 U.S. 479 (1965); see also *Eisenstadt v Baird*, 405 U.S. 438 (1972)(regulation of contraceptives).
- C. For employment purposes, privacy interests are covered under the 4th Amendment protection from unreasonable search and seizure. Privacy consideration in the public sector workplace are limited.

XIV. FOURTEENTH AMENDMENT – LIBERTY AND PROPERTY INTEREST IN EMPLOYMENT – PROCEDURAL DUE PROCESS – NAME CLEARING

- A. Protections from taking of private property were incorporated as against state action in the late 19th century. See *Chicago, Burlington*, 166 U.S. 226 (providing for just compensation for taking of private property).
- B. In a line of cases decided in the early 1970's, the Court recognized the existence of due process rights in public employment context. *Bishop v Wood*, 426 U.S. 3341 (1976); *Board of Regents v Roth*, 408 U.S. 564, 573 (1972).
- C. The Court has made clear a distinction between an adverse personnel action based on the exercise of a free speech claim, as opposed to the denial of procedural due process for denial of liberty or denial of property claim. See *Perry v Sinderman*, 408 U.S. 593, 598 (1972).
- D. Discharge from public employment under circumstances that put employee's reputation, honor or integrity at stake gives rise to a liberty interest under the 14th Amendment to a procedural opportunity to clear one's names. *Bishop v Wood*, 426 U.S. 341, 348 (1976); *Board of Regents v Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v Constantineau*, 400 U.S. 433, 437 (1971); *Wieman v Updegraff*, 344 U.S. 183, 191 (1952).
- E. If a government discharges an employee under circumstances that will cause special harm to the person's reputation and the employee does not get an opportunity to clear his name, this state a claim for relief under the 14th Amendment. *Owen v City of Independence*, 445 U.S. 622, 633 n.13 (1980).
- F. This does not apply to a claim of defamation in and of itself. See *Paul v Davis*, 424 U.S. 693 (1976)(reputation alone is not constitutionally protected). However, stigmatizing publications can trigger a right to a name-clearing hearing. See *Rosenstein v City of Dallas*, 876 F.2d 392, 395-96 (5th Cir. 1989)(providing an overview of the difference between mere defamation and stigmatization).

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- G. A court must look to state law to determine the existence *vel non* of a property interest. If no such interest exists, as a matter of law, then no procedural due process obligations are triggered. *See Roth*, 408 U.S. at 576-79. In *Roth*, the Court held that the plaintiff had not stated any such claim, either as a liberty interest or as a property interest. 408 U.S. at 579.
- H. The sources of a property interest under state law include things such as ordinances related to employment, personal contracts of employment, collective bargaining contracts, civil service status, personnel policy manuals, and other law based expectations of continued employment. *See Bishop v Wood*, 426 U.S. at 344-45;
- I. Civil service law creates a property right, as can a personnel manual or other policy manuals. *See Perry v Sinderman*, 408 U.S. at 600-601; *see also Moulton v Beaumont*, 991 F.2d 227 (5th Cir. 1993)(addressing whether a property right was created, and maintained, in a personnel policy manual that had been amended).
- J. The seminal case outlining the specifics of what the minimum requirements of procedural due process entail is *Cleveland Board of Education v Loudermill*, 470 U.S. 532 (1985)(addressing pre-termination and post-termination procedures).

XV. FOURTEENTH AMENDMENT – EQUAL PROTECTION- RACE AND EMPLOYMENT

- A. The equal protection clause of the 5th and the 14th Amendment prohibit the use of racial classifications in public sector employment. *Washington v Davis*, 426 U.S. 229, 239 (1976)(challenge by African American applicants for law enforcement officer positions).
- B. However, *Davis*, held that disparate impact, or disproportionate impact was not encompassed by the constitutional provisions. 426 U.S. at 239-240. The standard of proof for a constitutional equal protection challenge was not necessarily that same as what it might be under a statute, such as the Civil Rights Act of 1964 (Title VII). 426 U.S. at 242 (disproportionate impact is not irrelevant to the constitutional validity of a hiring scheme, but is not the sole touchstone of an invidious racial discrimination claim forbidden by the Constitution).
- C. Consequently, because the state and federal statutory schemes that address racial discrimination in terms of impact are more comprehensive, constitutional challenges tend to be limited to intentional claims of racial discrimination. *See Ricci v Stefano*, 557 U.S. 557, 576 (2009)(because petitioners raise a statutory claim under Title VII that encompasses the Equal Protection Claim, the statutory claim is addressed first).
- D. In other words, adhering to a general practice of constitutional jurisprudence, the Court will not decide a constitutional question if there is some other ground upon which to dispose a case. 557 U.S. at 577.

XVI. FOURTEENTH AMENDMENT – EQUAL PROTECTION- MARRIAGE AND IMPACT ON GENDER CLAIMS IN EMPLOYMENT

- A. Fundamental right to marry determined to be guaranteed to same-sex couples by both the Due Process Clauses of the 5th and the 14th Amendments. *Obergell v Hodges*, ___ U.S. ___, 135 S.Ct. 2584 (2015) (citing *Griswold v Connecticut*, 381 U.S. 479 (1965)(identifying a constitutional right to privacy).
- B. This is a logical extension of *Loving v Virginia*, 388 U.S. 1 (1967)(invalidating laws prohibiting inter-racial marriage) and *Lawrence v Texas*, 539 U.S. 558 (2003)(striking down a criminal sodomy law that criminalized sodomy conduct for only same sex couples).
- C. What is the public sector employment connection? Look at *Baldwin v Foxx*, Look at the EEOC regulations on same sex bathrooms, benefits, etc.
- D. But the EEO position is in fact supported by *Oncale v Sundowner Offshore Services Inc.*, 523 U.S. 75 (1998), which recognized that same sex gender discrimination claims were viable under Title VII.

XVII. CONCLUDING REMARKS

- A. While public sector employment law has deep constitutional roots, the trend has been for employment rights to be regulated by legislative action. Therefore, the trend for active development of constitutional law has been muted somewhat.
- B. Nonetheless, an understanding of how the ethos of individual civil rights and civil liberties has been, and continues to be, developed through our Constitutional jurisprudence, provides a much richer understanding of the statutory schemes.
- C. Knowledge of this background is useful to practitioners, whether as plaintiff counsel or as defense counsel, or in an advisory capacity, in assessing and evaluating public sector employment cases.

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