

Substantive Due Process

Fundamental Rights

1) Enumerated Fundamental Rights
(specifically mentioned in the Constitution,
especially the Bill of Rights)



2) Non-enumerated Fundamental Personal
Liberty Rights
(such as Fundamental Privacy Rights)

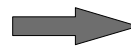


If the infringement on the fundamental right is less than absolute, the law may be subjected to an undue burden analysis (as with the right to marry and the right to terminate a pregnancy). If the infringement on the right is an undue burden, the analysis will continue using the strict scrutiny test. If it is not an undue burden, the law will be scrutinized using rational basis review.

More than Undue Burden



Less than Undue Burden



Challenges to government actions that infringe on Fundamental Rights (in general) are reviewed using strict scrutiny review which requires that the government prove that the challenged law (the means) is narrowly tailored (or necessary) to accomplish a compelling governmental objective (the ends). For a means to satisfy the narrowly tailored or necessary prong of the test, there must be no less restrictive alternative means available. Under this test, the law is presumed to be unconstitutional and the burden is on the government to prove to the contrary, something it is very difficult to do.

Non-Fundamental Rights

1) Non-Enumerated Economic
Liberty and Property Rights



2) Non-enumerated Non-
Fundamental Personal Liberty
Rights



Challenges to government actions that infringe on Non-Fundamental Rights are reviewed using minimum scrutiny review (rational basis) which requires that the challenged law (the means) be rationally related to a legitimate governmental objective (the ends). Under this test, the law is presumed to be constitutional and the burden is on challenger to prove to the contrary, something it is almost impossible to do.