Due Process

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Introduction

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures. Most of this essay concerns that promise. We should briefly note, however, three other uses that these words have had in American constitutional law.

Incorporation

The Fifth Amendment's reference to "due process" is only one of many promises of protection the Bill of Rights gives citizens against the federal government. Originally these promises had no application at all against the states (see *Barron v City of Baltimore* (1833)). However, this attitude faded in *Chicago, Burlington & Quincy Railroad Company v. City of Chicago* (1897), when the court incorporated the Fifth Amendment's Takings Clause. In the the middle of the Twentieth Century, a series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights and made them applicable to the states. If a Bill of Rights guarantee is "incorporated" in the "due process" requirement of the Fourteenth Amendment, state and federal obligations are exactly the same.

Substantive due process

The words "due process" suggest a concern with procedure rather than substance, and that is how many--such as Justice Clarence Thomas, who wrote "the Fourteenth Amendment's Due Process Clause is not a secret repository of substantive guarantees against unfairness"--understand the Due Process Clause. However, others believe that the Due Process Clause does include protections of substantive due process--such as Justice Stephen J. Field, who, in a dissenting opinion to the Slaughterhouse Cases wrote that "the Due Process Clause protected individuals from state legislation that infringed upon their "privileges and immunities" under the

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federal Constitution. Field's dissenting opinion is often seen as an important step toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not mentioned in the Constitution."
Substantive due process has been interpreted to include things such as the right to work in an ordinary kind of job, marry, and to raise one's children as a parent. In *Lochner v New York* (1905), the Supreme Court found unconstitutional a New York law regulating the working hours of bakers, ruling that the public benefit of the law was not enough to justify the substantive due process right of the bakers to work under their own terms. Substantive due process is still invoked in cases today, but not without criticism (See this Stanford Law Review article to see substantive due process as applied to contemporary issues).

<u>The promise of legality and fair procedure</u>

Historically, the clause reflects the Magna Carta of Great Britain, King John's thirteenth century promise to his noblemen that he would act only in accordance with law ("legality") and that all would receive the ordinary processes (procedures) of law. It also echoes Great Britain's Seventeenth Century struggles for political and legal regularity, and the American colonies' strong insistence during the pre-Revolutionary period on observance of regular legal order. The requirement that government function in accordance with law is, in itself, ample basis for understanding the stress given these words. A commitment to legality is at the heart of all advanced legal systems, and the Due Process Clause often thought to embody that commitment.

The clause also promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is "due" would be unconstitutional. Suppose, for example, state law gives students a right to a public education, but doesn't say anything about discipline. Before the state could take that right away from a student, by expelling her for misbehavior, it would have to provide fair procedures, i.e. "due process."

How can we know whether process is due (what counts as a "deprivation" of "life, liberty or property"), when it is due, and what procedures have to be followed (what process is "due" in those cases)? If "due process" refers chiefly to procedural subjects, it says very little about these questions. Courts unwilling to accept legislative judgments have to find answers somewhere else. The Supreme Court's struggles over

how to find these answers echo its interpretational controversies over the years, and reflect the changes in the general nature of the relationship between citizens and government.

In the Nineteenth Century government was relatively simple, and its actions relatively limited. Most of the time it sought to deprive its citizens of life, liberty or property it did so through criminal law, for which the Bill of Rights explicitly stated quite a few procedures that had to be followed (like the right to a jury trial) — rights that were well understood by lawyers and courts operating in the long traditions of English common law. Occasionally it might act in other ways, for example in assessing taxes. In *Bi-Metallic Investment Co. v. State Board of Equalization* (1915), the Supreme Court held that only politics (the citizen's "power, immediate or remote, over those who make the rule") controlled the state's action setting the level of taxes; but if the dispute was about a taxpayer's individual liability, not a general question, the taxpayer had a right to some kind of a hearing ("the right to support his allegations by arguments however brief and, if need be, by proof however informal"). This left the state a lot of room to say what procedures it would provide, but did not permit it to deny them altogether.

Distinguishing Due Process

Bi-Metallic established one important distinction: the Constitution does not require "due process" for establishing laws; the provision applies when the state acts against individuals "in each case upon individual grounds" — when some characteristic unique to the citizen is involved. Of course there may be a lot of citizens affected; the issue is whether assessing the effect depends "in each case upon individual grounds." Thus, the due process clause doesn't govern how a state sets the rules for student discipline in its high schools; but it does govern how that state applies those rules to individual students who are thought to have violated them — even if in some cases (say, cheating on a state-wide examination) a large number of students were allegedly involved.

Even when an individual is unmistakably acted against on individual grounds, there can be a question whether the state has "deprive[d]" her of "life, liberty or property." The first thing to notice here is that there must be state action. Accordingly, the Due Process Clause would not apply to a private school taking discipline against one of its students (although that school will probably want to follow similar principles for other reasons).

Whether state action against an individual was a deprivation of life, liberty or property was initially resolved by a distinction between “rights” and “privileges.” Process was due if rights were involved, but the state could act as it pleased in relation to privileges. But as modern society developed, it became harder to tell the two apart (ex: whether driver's licenses, government jobs, and welfare enrollment are "rights" or a "privilege." An initial reaction to the increasing dependence of citizens on their government was to look at the seriousness of the impact of government action on an individual, without asking about the nature of the relationship affected. Process was due before the government could take an action that affected a citizen in a grave way. In the early 1970s, however, many scholars accepted that “life, liberty or property” was directly affected by state action, and wanted these concepts to be broadly interpreted.

Two Supreme Court cases involved teachers at state colleges whose contracts of employment had not been renewed as they expected, because of some political positions they had taken. Were they entitled to a hearing before they could be treated in this way? Previously, a state job was a “privilege” and the answer to this question was an emphatic “No!” Now, the Court decided that whether either of the two teachers had "property" would depend in each instance on whether persons in their position, under state law, held some form of tenure. One teacher had just been on a short-term contract; because he served "at will" — without any state law claim or expectation to continuation — he had no “entitlement” once his contract expired. The other teacher worked under a longer-term arrangement that school officials seemed to have encouraged him to regard as a continuing one. This could create an “entitlement,” the Court said; the expectation need not be based on a statute, and an established custom of treating instructors who had taught for X years as having tenure could be shown. While, thus, some law-based relationship or expectation of continuation had to be shown before a federal court would say that process was "due," constitutional “property” was no longer just what the common law called “property”; it now included any legal relationship with the state that state law regarded as in some sense an “entitlement” of the citizen. Licenses, government jobs protected by civil service, or places on the welfare rolls were all defined by state laws as relations the citizen was entitled to keep until there was some reason to take them away, and therefore process was due before they could be taken away. This restated the formal “right/privilege” idea, but did so in a way that recognized the new dependency of citizens on relations with government, the “new property” as one scholar influentially called it.

<u>When process is due</u>

In its early decisions, the Supreme Court seemed to indicate that when only property rights were at stake (and particularly if there was some demonstrable urgency

for public action) necessary hearings could be postponed to follow provisional, even irreversible, government action. This presumption changed in 1970 with the decision in *Goldberg v. Kelly,* a case arising out of a state-administered welfare program. The Court found that before a state terminates a welfare recipient's benefits, the state must provide a full hearing before a hearing officer, finding that the Due Process Clause required such a hearing.

What procedures are due

Just as cases have interpreted when to apply due process, others have determined the sorts of procedures which are constitutionally due. This is a question that has to be answered for criminal trials (where the Bill of Rights provides many explicit answers), for civil trials (where the long history of English practice provides some landmarks), and for administrative proceedings, which did not appear on the legal landscape until a century or so after the Due Process Clause was first adopted. Because there are the fewest landmarks, the administrative cases present the hardest issues, and these are the ones we will discuss.

The *Goldberg* Court answered this question by holding that the state must provide a hearing before an impartial judicial officer, the right to an attorney's help, the right to present evidence and argument orally, the chance to examine all materials that would be relied on or to confront and cross-examine adverse witnesses, or a decision limited to the record thus made and explained in an opinion. The Court's basis for this elaborate holding seems to have some roots in the incorporation doctrine.

Many argued that the *Goldberg* standards were too broad, and in subsequent years, the Supreme Court adopted a more discriminating approach. Process was "due" to the student suspended for ten days, as to the doctor deprived of his license to practice medicine or the person accused of being a security risk; yet the difference in seriousness of the outcomes, of the charges, and of the institutions involved made it clear there could be no list of procedures that were always "due." What the Constitution required would inevitably be dependent on the situation. What process is "due" is a question to which there cannot be a single answer.

A successor case to Goldberg, *Mathews v. Eldridge,* tried instead to define a method by which due process questions could be successfully presented by lawyers and answered by courts. The approach it defined has remained the Court's preferred method for resolving questions over what process is due. *Mathews* attempted to define how judges should ask about constitutionally required procedures. The Court said three factors had to be analyzed:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Using these factors, the Court first found the private interest here less significant than in Goldberg. A person who is arguably disabled but provisionally denied disability benefits, it said, is more likely to be able to find other "potential sources of temporary income" than a person who is arguably impoverished but provisionally denied welfare assistance. Respecting the second, it found the risk of error in using written procedures for the initial judgment to be low, and unlikely to be significantly reduced by adding oral or confrontational procedures of the Goldberg variety. It reasoned that disputes over eligibility for disability insurance typically concern one's medical condition, which could be decided, at least provisionally, on the basis of documentary submissions; it was impressed that Eldridge had full access to the agency's files, and the opportunity to submit in writing any further material he wished. Finally, the Court now attached more importance than the *Goldberg* Court had to the government's claims for efficiency. In particular, the Court assumed (as the *Goldberg* Court had not) that "resources available for any particular program of social welfare are not unlimited." Thus additional administrative costs for suspension hearings and payments while those hearings were awaiting resolution to persons ultimately found undeserving of benefits would subtract from the amounts available to pay benefits for those undoubtedly eligible to participate in the program. The Court also gave some weight to the "good-faith judgments" of the plan administrators what appropriate consideration of the claims of applicants would entail.

Matthews thus reorients the inquiry in a number of important respects. First, it emphasizes the variability of procedural requirements. Rather than create a standard list of procedures that constitute the procedure that is "due," the opinion emphasizes that each setting or program invites its own assessment. About the only general statement that can be made is that persons holding interests protected by the due process clause are entitled to "some kind of hearing." Just what the elements of that hearing might be, however, depends on the concrete circumstances of the particular program at issue. Second, that assessment is to be made concretely and holistically. It is not a matter of approving this or that particular element of a procedural matrix in isolation, but of assessing the suitability of the ensemble in context.

Third, and particularly important in its implications for litigation seeking procedural change, the assessment is to be made at the level of program operation,

rather than in terms of the particular needs of the particular litigants involved in the matter before the Court. Cases that are pressed to appellate courts often are characterized by individual facts that make an unusually strong appeal for proceduralization. Indeed, one can often say that they are chosen for that appeal by the lawyers, when the lawsuit is supported by one of the many American organizations that seeks to use the courts to help establish their view of sound social policy. Finally, and to similar effect, the second of the stated tests places on the party challenging the existing procedures the burden not only of demonstrating their insufficiency, but also of showing that some specific substitute or additional procedure will work a concrete improvement justifying its additional cost. Thus, it is inadequate merely to criticize. The litigant claiming procedural insufficiency must be prepared with a substitute program that can itself be justified.

The *Mathews* approach is most successful when it is viewed as a set of instructions to attorneys involved in litigation concerning procedural issues. Attorneys now know how to make a persuasive showing on a procedural "due process" claim, and the probable effect of the approach is to discourage litigation drawing its motive force from the narrow (even if compelling) circumstances of a particular individual's position. The hard problem for the courts in the Mathews approach, which may be unavoidable, is suggested by the absence of fixed doctrine about the content of "due process" and by the very breadth of the inquiry required to establish its demands in a particular context. A judge has few reference points to begin with, and must decide on the basis of considerations (such as the nature of a government program or the probable impact of a procedural requirement) that are very hard to develop in a trial.

While there is no definitive list of the "required procedures" that due process requires, Judge Henry Friendly generated a list that remains highly influential, as to both content and relative priority:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

This is not a list of procedures which are required to prove due process, but rather a list of the kinds of procedures that might be claimed in a "due process" argument, roughly in order of their perceived importance.