

The Breakfast Club

Constitutional Minute for 10 May 2022

The 14th Amendment and Due Process

We've been exploring features of the 14th Amendment of late: the Incorporation Doctrine and the Citizenship Clause to be precise. Since we're in the neighborhood, let's look at another controversial feature of the 14th: its Due Process Clause.

Due Process used to be a rather simple concept tracing its history at least back to Magna Carta. There, Article 39 read:

39. No free-man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. (emphasis added)

The phrase "By the law of the land" was understood to mean that before someone could be "stripped of his rights or possessions" there had first to be a law passed that would permit such seizure, and a process followed in implementing and adjudicating that law; i.e., someone's possessions could not be seized by arbitrary command of the King as had been the practice of King John and others before him. Now there had to be a fair and impartial judicial procedure (normally an indictment and trial) before your rights could be curtailed.

Over time, "By the law of the land" came eventually to be called "due process of law." I've never encountered an explanation of how or why that change took place, just that it did. To erase any doubt that Magna Carta's "By the law of the land" meant the same thing as "due process of law" the Supreme Court erased any doubt in the 1855 case of *Murray's Lessee v. Hoboken Land & Improvement Co.*

America's founders inherited their understanding of the term from the British legal tradition. During America's founding period, "due process of law" was primarily thought of as being procedural. The Fifth Amendment to the Constitution protects Americans from arbitrary actions by the federal government:

No person shall be ... deprived of life, liberty, or property, without due process of law;...

Remember the Incorporation Doctrine?" That invention of the Supreme Court was not needed to apply the 5th Amendment against the states because the 14th Amendment, on which the incorporation doctrine rests, contained its own Due Process Clause, which applied directly to the states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

But by the time the 14th Amendment was ratified in 1868 the understanding of “due process” had begun to change. There began to emerge a feeling in the legal profession that certain fundamental rights unrelated to procedure should be protected even if a law was passed allowing infringement of the right to take place and a prescribed legal procedure was followed. Over time, due process became less focused on procedure and more on the “substance” of what transpired when a legal process was followed. It took quite a while for the new term to be coined in legal opinions, but “substantive due process” eventually was added to purely “procedural due process.” But realize what has happened here: without asking the owners of the Constitution their opinion, the Supreme Court took it upon itself to invent yet another doctrine. Of course, to the Court it was a necessary step to protect our “fundamental” rights, but still, (all together now: “Whose document is it?") nowhere in the Constitution is the Supreme Court given the explicit task of protecting individual rights, as wild as that sounds; their explicit tasking in Article 3 is to wield the “judicial power” over “cases and controversies.”

So what has been the result of this new “Substantive Due Process” idea? Has it been used for good or evil? Has it improved our lot or worsened it?

In 1905’s [Lochner v New York](#) the Supreme Court struck down a New York law limiting the working hours of bakers, deciding that your natural right of contract must be protected. New York had passed a law limiting bakers to 60 work hours per week. Seems reasonable, right? But what if I want to work 65 hours in a week? Why shouldn’t I be allowed to negotiate a contract with my employer to do just that?

On the other hand, [Roe v Wade](#) was a substantive due process case which relied on the earlier [Griswold v. Connecticut](#) decision to conclude that the “right to privacy” should be extended to encompass the ability to abort an unborn baby.

So it appears that substantive due process has a mixed “goodness” record.

Make no mistake, procedural due process has not disappeared, legal procedure must still be followed and will be penalized when it is not. But following legal procedure or passing arbitrary laws is not sufficient if doing so results in the infringement of “fundamental” rights.

But neither should you assume that the “due process” question is settled law, it is not; substantive due process is still [the subject of much debate](#).

What should we discuss next? Drop me a line.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216