The Breakfast Club

Constitutional Minute for 25 April 2023

Right #14: Due Process of Law Guarantee

We continue this week with our examination of another clause in the Fifth Amendment. "No person shall be … deprived of life, liberty, or property, without due process of law;"

Great, what is "due process of law?"

Harken back to 1215 and Magna Carta (note: many of today's Americans have lost their native ability to harken, someone should fix that!), there you will find three references to "proceed" or "proceeding" (#39, #44, and #55). A proceeding implies a process or sequence of steps, which implies a procedure; so "due process of law" connotes a process or sequence of steps in which the law is applied. It must be applied the same way with all people, each and every time. This process should be known (or knowable) and anticipated. If the government is going to take your property, it must follow a stated process of law in doing so. We saw a glimpse of this concept in the "Warrants" clause of the Fourth Amendment; before a legal search can occur, a warrant must usually first be obtained. Step 1: obtain a warrant, Step 2: search the house, Step 3: steal the leftover pizza; this is the process of applying the law that you have a right to expect; you are "due" it, so to speak (maybe not the pizza part).

Sir William Blackstone writes in his 1765-1770 *Commentaries on the Laws of England* that "Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and *the law be duly administered* therein." (Emphasis added) "Duly administered." Once again, this speaks of a process, a uniformity in the administration of the law.

Virginia formed the first representative government in the American colonies in 1619. Two years later the legislature passed the Ordinance and Constitution, Article 5 of which stated "WHEREAS in all other Things, we require the said General Assembly, as also the said Council of State, to imitate and follow the Policy of the Form of Government, Laws, *Customs*, and *Manner of Trial*, and other *Administration of Justice*, used in the Realm of England…." (Emphasis added)

In ratifying the Constitution, only one state, New York, suggested adding anything similar to the Due Process clause. They offered: "That no Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law." It would appear that Madison took this lone suggestion in crafting the Due Process clause.

Seventy-seven years later, the Fourteenth Amendment changed everything. In order to give the recently freed slaves their rights as citizens the drafters of the Fourteenth Amendment decided it needed its own Due Process Clause, aimed at the states, which read:

No State shall … deprive any person of life, liberty, or property, without due process of law." (Emphasis added)[i]

But not only did the ambiguous wording of the Fourteen Amendment allow the Supreme Court to invent the Incorporation Doctrine, which we've previously discussed, it also allowed the Court to invent the doctrine of "substantive due process." A legislature may pass a law which, even though due process is followed, ends up denying someone what the court defines as fundamental rights that are "implicit in the concept of ordered liberty."[ii] This, the Court decided, is not acceptable.

The focus shifts from procedure to "results" of a law. *Obergefell v Hodges*, which legalized homosexual marriage across the country was based on substantive due process, as was *Lochner v New York*, which decided that a "right of contract" was part of "ordered liberty" even if not mentioned in the Constitution.

Originally, the word "liberty" referred to whether a person was free to move about at will. To deny someone their liberty meant to incarcerate them, to deny them free movement. But we also say we have the "liberty" to speak freely, the "liberty" of doing as we please, and so on. In other words, the Court (and the people) began to see our rights, collectively as our "liberties." Substantive Due Process had to protect these liberties from infringement by government, even if due process was followed. Over time, a whole list of that the Court saw as fundamental "rights," whether enumerated in the Bill of Rights or not, required protection.

We went from 1833's *Barron v Baltimore* where the Bill of Rights "must be understood as restraining the power of the *general* government, not as applicable to the states," to 1897's *Chicago, Burlington & Quincy Railroad Company* where the court decided the Takings Clause (we'll cover that clause next week) applied to the states as well as the "general government," to 1905s *Lochner v New York*, where the Court decided people had a fundamental right negotiate the terms of a contract without government interference.

Substantive Due Process is still being debated by constitutional scholars today despite the growing list of court cases based upon it. Associate Justice Clarence Thomas has encouraged the court to revisit the doctrine.

For further reading:

What Is Due Process? (Cato Unbound Book Kindle Edition,
by Ryan Williams, Gary Lawson, and Lawrence Rosenthal. 2012.

The Ninth Amendment: A Constitutional Tool for States to Challenge Substantive Due Process under the 14th Amendment, by David E. Fowler Esq, 2020.

Next week: Right #15: Protection Against "Takings"

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[i] 1833's *Barron v Baltimore* ruling in which the Supreme Court affirmed that the Bill of Rights only constrained the national government, not the state governments, reinforced the conclusion of Congress that another Due Process Clause was needed.

[ii] *Palko v. Connecticut*, 302 U.S. 319 (1937)