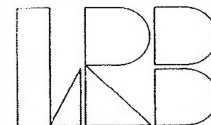


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LRB Notes

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DUE PROCESS

By Mark Rosen

The due process clauses of the 5th and 14th Amendments to the United States Constitution, and Article I, Section 5 of the Hawaii Constitution, are designed to ensure that laws will be reasonable both in terms of substance and in their means of implementation. These clauses have been used to challenge arbitrary or excessive governmental actions. There are probably no two words that have had and still have a broader or stronger impact on the range, scope, and application of American law. This Note will discuss due process generally.

Q1: Why are there two due process clauses in the U.S. Constitution?

A1: The 5th Amendment of the United States Constitution is designed to prohibit the deprivation of "life, liberty, or property, without due process of law...". This clause prohibits unreasonable and arbitrary actions by the federal government. The due process clause of the 14th Amendment contains similar language that is aimed at arbitrary and unreasonable actions taken by the State governments. The 14th Amendment was added after the Civil War, and was intended primarily to protect the civil rights of former slaves.

The United States Supreme Court has used the due process clause of the 14th Amendment as a basis for making applicable to the states, a number of provisions in the first ten amendments to the United States Constitution (the original bill of rights) that previously had been interpreted as applying only to the federal government.

Q2: What is the reason for requiring "due process of law"?

A2: Generally, due process serves to protect the individual against arbitrary government actions and to prevent abusive governmental power. It helps to assure the tradition

that it is better for the guilty to go free than for an innocent person to be deprived of life, liberty, or property. The guarantee of due process has been described as one of the most important constitutional provisions to ensure fairness and justice, and is one of the primary foundations of individual freedom in the United States.

Q3: *What is "substantive" due process?*

A3: "Substantive" due process is concerned with the reasonableness of the content of governmental policy and actions. Substantive due process claims are designed to protect individuals from unreasonable and arbitrary government action. Substantive due process protects only fundamental rights, and involves balancing a person's liberty or property against government interests. Generally, these claims may be brought under the theory that state action has deprived a protected liberty or property interest, or that the state's action "shocks the conscience". Substantive due process is generally narrower in scope than procedural due process.

This "narrower" concept has nevertheless arisen as an issue in one form or another, and continues to have at least some bearing in a variety of areas that are almost breathtaking in scope. These include, among others, the power of government to: (1) tax, (2) regulate businesses, trades, and professions, (3) condemn property, (4) conserve resources, (5) protect public health and safety, (6) affect people's privacy, and (7) regulate the ability of people to marry, have (or not have) children, choose where to live, and whether or not to die. Most if not all laws in these areas can in one way or other impinge upon people's liberty or property interests. The due process clauses serve a critical role in assuring that the laws in these areas are not arbitrary or unreasonable.

Q4: *What is "procedural" due process?*

A4: "Procedural" due process focuses on the procedures and methods by which government policies are implemented, and guarantees fairness in carrying out laws. Areas in which procedural due process issues have arisen and may arise include: (1) whether or not courts can take jurisdiction over an issue or a party in any case, (2) whether laws (particularly criminal laws) are unreasonably vague or overbroad, (3) specific procedures in governmental actions (e.g., admissibility of evidence), and (4) nearly every procedural aspect of criminal cases ranging from identification of suspects to the rights of convicted persons to appeal. While the scope of procedural due process issues may not appear at first glance to be as broad as that of substantive due process, it is important to remember that procedural due process considerations are potentially relevant in nearly every aspect of every instance in which a government seeks to apply or enforce a law. Evaluating a procedural due process claim involves a

two-part test: a court first determines whether a person has been deprived of a protected liberty or property interest, and then determines what constitutional process is due. Generally, once it has been determined that a liberty or property interest has been deprived, the person must be given reasonable notice and an opportunity to be heard and present a claim or defense before an impartial tribunal.

Q5: *What process is due in procedural due process claims?*

A5: Procedural due process is flexible and requires procedural protections as the situation demands. Determining the appropriate form of the protections depends on the facts of the case, and requires an evaluation of all of the circumstances and competing interests that weigh the individual's right to fairness against the court's need to act quickly and decisively. For example, in some cases procedural due process may require a full trial-type evidentiary hearing, including timely and adequate notice, an opportunity to confront adverse witnesses and present oral evidence, the right to appear with counsel, a determination based solely on the record and that states the reasons for the decision, and an impartial decision maker. In other cases, due process may require fewer procedural safeguards.

Q6: *What is the distinction between an invalid law and a valid law under the due process clause?*

A6: The answer depends on whether the law is challenged on substantive or procedural due process grounds.

If the law is challenged on substantive due process grounds, the analysis is similar to that under the equal protection clause of the Constitution. Generally, where no fundamental rights or suspect classifications are involved, a court will find a violation of the due process clause only if there is no "rational basis" to sustain the statute that is being challenged. Under the "rational basis" test, a court will ask whether the statute rationally furthers a legitimate state interest. Unless a court finds the statute to be unconstitutional, it will not second-guess the legislature as to the wisdom or rationality of the statute if there is some reasonable justification for its enactment. Hawaii courts have found laws ranging from promoting detrimental drugs to the state workers' compensation statute to be rationally related to a legitimate governmental purpose.

If, on the other hand, a law is challenged on procedural due process grounds, the basic elements, as discussed earlier, require notice and an opportunity to be heard at a meaningful time and in a meaningful manner. A determination of the specific procedures that are needed to satisfy due process requires a balancing of three factors: (1) the private interest that will be affected; (2) the risk of an "erroneous

deprivation" of that interest through the procedures that are actually used, and the probable value (if any) of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that would result from providing additional procedural safeguards.

To illustrate the two types of review -- substantive versus procedural due process -- constitutional law professors John Nowak and Ronald Rotunda have used the example of a state law that imposes the death penalty on anyone who has been found guilty of double parking a car after a determination of guilt through trial by jury and appellate review. They argue that such a law would comply with the procedural restrictions of the due process clause. Cruel and unusual punishment issues aside, as long as the process by which the death penalty was handed out was a fair one, the statute could not be found to violate procedural due process. By contrast, under a substantive due process review, a court is concerned about the constitutionality of the underlying rule instead of the process by which the state applies that rule to a particular person. In this case, the court would have to decide whether the death penalty was an irrational and arbitrary abuse of the government's power to protect against traffic hazards.