***We the People: the Citizen & the Constitution***

2019-2020 High School Hearing Questions

Information, Tips, Analysis, & Resources from the Oregon high school We the People community

Unit 3 / Q. 2

**What is the difference between procedural and substantive due process, and what are the origins of these principles?**

* Are the protections of procedural due process more fully guaranteed in an adversarial or inquisitorial system of justice? Explain your position.
* Does procedural or substantive due process cause more conflict between the national and state governments? Why? Give examples.

**Comments from Justice Jack Landau:**

*Wow, this question covers a lot of territory. "Due process" generally refers to a guarantee that government cannot act in an arbitrary way. It is modernly understood to have both procedural and substantive components. Procedural due process often is traced by to Chapter 39 of Magna Carta (historians generally don't say "the" Magna Carta"), which declared that no freeman may be seized or his property taken except "by the lawful judgment of his peers or (some translations say "and") the law of the land," that is, the customary practices of the courts. Magna Carta got reaffirmed and restated a number of times in the next couple of hundred years. In 1354, a statute of King Edward III rephrased Magna Carta to change "law of the land" to "due process of law." (The full sentence is "[n]o man of what estate or condition that he be shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.")*

*Parliament enacted the statute in response to Edward III's tendency to skip courts and summarily call offenders directly before him. It didn't do much good, as kings continued to ignore court proceedings. In the early seventeenth century, Charles I imposed taxes and enforced failure to comply without going through courts. This, among other things, resulted in the 1628 Petition of Right, which included a statement that no man can be "taken or imprisoned . . . without being brought to answer by due process of law." This phrasing was picked up in the Fifth Amendment. The Fifth Amendment, however, applied only to limit the authority of the federal government. The Fourteenth Amendment made clear that states as well could not deprive anyone of life, liberty or property without due process.*

*"Procedural" due process is most directly linked historically to Magna Carta and the Petition of Rights. It refers to the idea that government may not take certain actions -- deprive one of life, liberty or property -- arbitrarily. (Note that due process applies only to those government actions. If there's no taking of life, liberty, or property, the requirement of due process doesn't apply.) It must act in accordance with certain procedures that ensure that any action that the government takes is fair. The leading case on what procedures are required is Matthews v. Eldridge (1976). In brief, the process that is due depends on balancing the value of the private interests involved, the risk of error in the absence of certain processes and the cost to the government of providing them. That usually requires at least reasonable notice, an opportunity to be heard by an unbiased adjudicator, and an explanation for the government action. There are tons of cases involving court determinations of the precise process that is due in particular circumstances.*

*Whether adversarial or inquisitorial systems better protect procedural due process depends on your point of view. The basic assumption of the adversarial system is that having competing adversaries maximizes the possibility that all relevant information will be put before the judge and, as a result, the correct decision will be obtained. Supporters if the inquisitorial system -- in which judges act as both investigators and adjudicators -- argue that the adversarial system is expensive and relies on the unwarranted assumption that adversaries are of equal ability. Trained judges, they say, minimize disparities in ability and resources available to adversaries and are more likely to get at the correct decision.*

*"Substantive" due process is something of an oxymoron. It's the term that courts use to explain that some rights and interests are so fundamental that government cannot take them at all -- or at least not without a demonstrated "compelling" government interest -- even if procedural safeguards are followed. Thus, there are certain substantive areas of legislation that are subject to special protection. Government cannot act in those areas without a sufficient justification.*

*What are those substantive areas? Good question. For a while, the courts focused on economic rights, typified by Lochner v. New York (1905). The courts recognized that a "freedom of contract" was so important that legislation regulating employment conditions were generally unconstitutional. Between 1905 and 1937, over 200 state economic regulations were struck down. That changed in 1937, when the US S Ct repudiated Lochner in West Coast Hotel v. Parrish (1937). In the meantime, courts generally refer to non-economic "fundamental rights," those enumerated in -- or implicit in -- the Bill of Rights, rights of political process, and rights of "discrete and insular minorities." See US v. Carolene Products (1938). Among the rights that the courts regard as fundamental -- thus triggering strict, compelling interest justification -- are the right of parents to control the upbringing of their children, Meyer v. Nebraska (1923); freedom of speech and the press, Gitlow v. New York (1925); the right to privacy, Roe v. Wade (1973); property rights, BMW v. Gore (1996); the right to marry, Loving v. Virginia (1967); among others.*

*The phrase "substantive due process" actually didn't appear until the twentieth century. And it's the subject of sustained criticism as a usurpation of the legislative function. Scalia and Thomas, in particular have argued that the doctrine is illegitimate.*