

What is due process?

Why is it important?

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Due Process Clause

Fifth Amendment:

“nor be deprived of life, liberty, or property, without due process of law...”

Fourteenth Amendment:

“nor shall any State deprive any person of life, liberty, or property, without due process of law:”

What are the historical and philosophical sources of due process?

- Magna Carta 1215—King John promised not to imprison, exile, or destroy any free man or his property “except by the lawful judgment of his peers or by the law of the land.”
- Magna Carta, which became part of the “law of the land” (along with common law, statutory law and custom) not only required the monarchy to obey the law of the land but also limited how the monarchy could change the law of the land.
- From this emerged
 - Writ of habeas corpus (court order that prisoner must be brought before judge to determine if detention is lawful)
 - Right to a speedy and public trial
 - Government must follow known and established procedures and may not act arbitrarily in negatively altering or destroying life, liberty or property.
 - Colonists experienced injustice of general warrants and writs of assistance (power to search & seize property without restrictions) issued by British officials

Procedural due process

- Procedural Due Process—deals with the way information is gathered and the fairness of the way a decision is made.
- Members of all branches of government must use fair procedures or methods when carrying out their responsibilities.
- Procedural due process is especially important in criminal trials: the right against unlawful search and seizure (4th Amendment), the right to trial by jury (7th Amendment), and freedom from self-incrimination (5th Amendment) are all examples of procedural due process.

What are fair procedures?

The extent of “due process” depends on the extent of the right involved:

- If you may potentially lose your liberty and go to jail, your procedural due process is much greater than if you are a student who has been suspended for a day because of getting into a fight.
- Potential jail term would require a lawyer, a trial, the opportunity to cross examine.
- Suspension would require notice and a hearing.

What are fair procedures?

- ✓ Notice
- ✓ Opportunity for a fair hearing
- ✓ Opportunity to present evidence
- ✓ Opportunity to appeal



Mock Court Hearing

- From *Foundations of Democracy: Justice* (Center for Civic Education)
- George and Dan Brown (7 and 8 years old) playing in Mr. Dellinger's garage made a fire in a small bbq grill that caught fire on nearby canvas and ended up causing damage to the house and garage.
- Divide into three groups:
 - Group 1 = Judges
 - Group 2 = Attorneys for Mr. Dellinger
 - Group 3 = Attorneys for the Browns
- Provide rules for the hearing and have the three groups prepare for the court hearing
- Or have several simultaneous mini-court hearings with one student from each group in each hearing
- Ask the judges to announce their decisions and to explain their reasons

Due Process involves property as well as life and liberty

- Taxes may only be taken for public purposes
- Property may be taken by the government only for public purposes
- Owners of taken property must be fairly compensated
- In criminal cases, many of the due process protections overlap with procedural protections provided by the 5, 6, 7 and 8th Amendments:
 - Right to a fair and public trial conducted in a competent manner
 - Right to be present at the trial
 - Right to an impartial jury
 - Right to be heard in one's own defense
 - Laws must be written so that a reasonable person can understand what is criminal behavior

Substantive due process

- Substantive due process means that the PURPOSE and CONTENT of laws must be constitutional (e.g., the government cannot regulate matters of personal privacy)
- The purpose is to limit the powers of government in order to protect individual rights

Substantive Due Process

- The constitution prohibits certain kinds of laws altogether because some rights are so fundamental that the government must have a compelling reason to interfere with them.
- This concept is based on Locke's idea that people have basic natural rights that the government should protect.
- Due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder v. MA*, 1934)
- Courts have viewed the due process clause as embracing those fundamental rights that are "implicit in the concept of ordered liberty" (*Palko v. CT*, 1937)

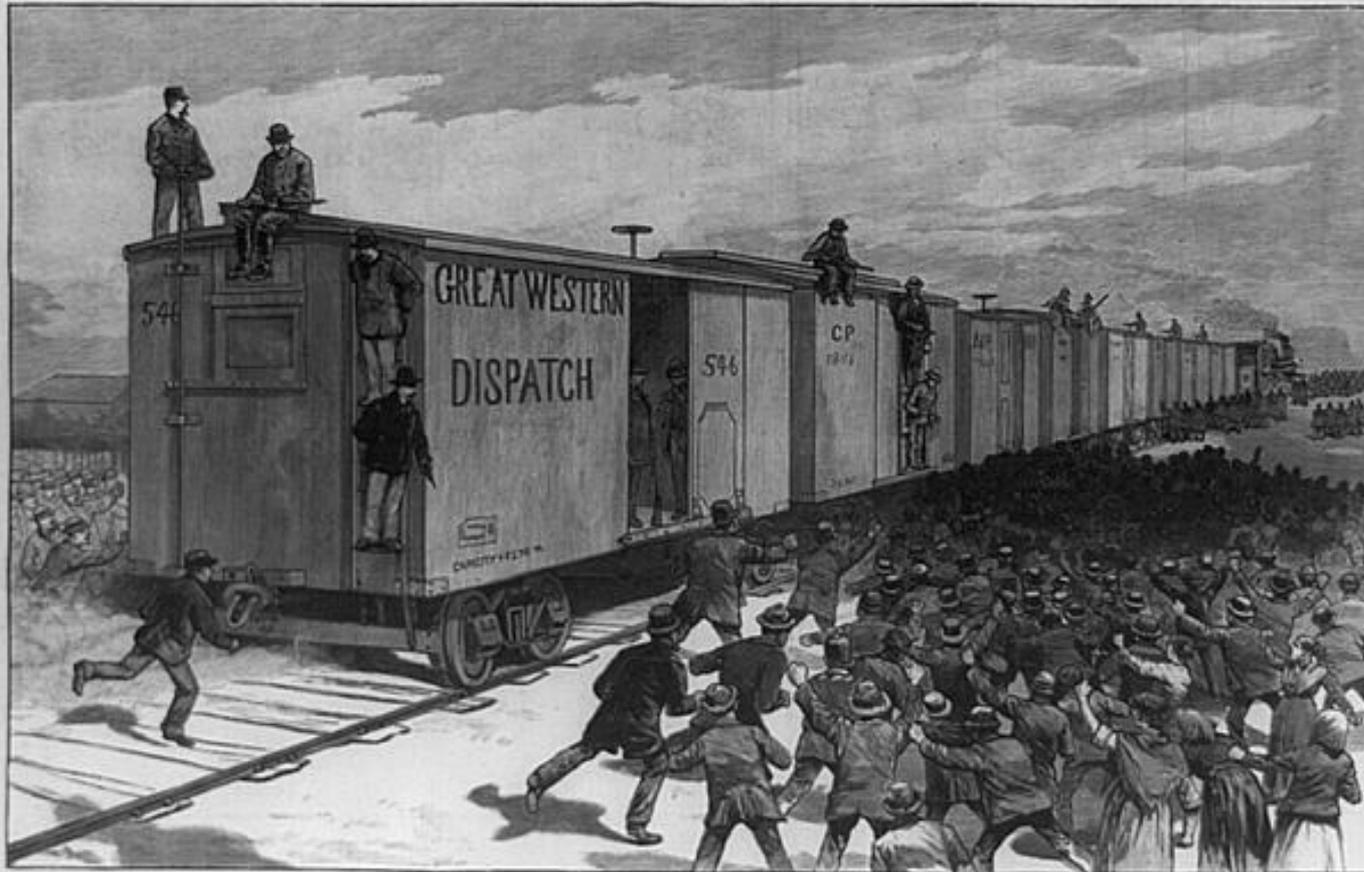
Substantive due process

Requires that a law be:

- Publicly promulgated
- Equally enforced
- Independently adjudicated
- Fair
- Consistent with constitutionally guaranteed individual rights

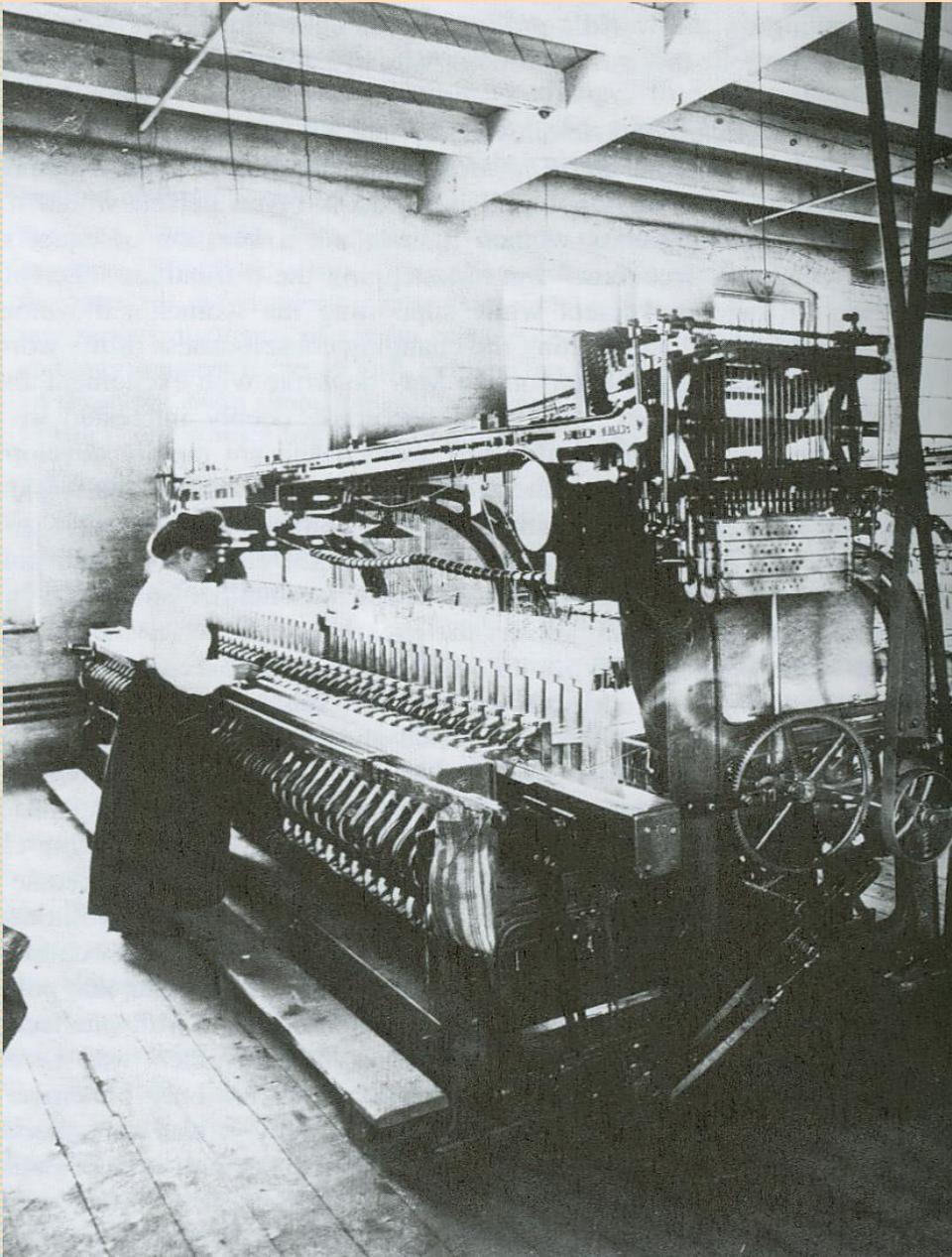
Substantive Due Process

- The US Supreme Court's view of what rights are fundamental has changed over time.
- For example, the right to private property was seen as so fundamental that Framers did not want to outlaw slavery (which obviously interferes with the liberty rights of slaves) at the Federal Convention in 1787.
- Following the Civil War, the 14th Amendment's due process clause prompted substantive due process interpretations to be urged on the Supreme Court as a limitation on state legislation.
- Initially the Supreme Court rejected this in the Slaughterhouse Cases (1872).



THE GREAT RAILWAY STRIKE.—ATTEMPT TO START A FREIGHT TRAIN, UNDER A GUARD OF UNITED STATES MARSHALS, AT EAST ST. LOUIS, ILLINOIS.
FROM A SKETCH BY G. J. BARNHART.—SEE PAGE 110.

During late 1800s until the 1930s, the right to buy and sell one's labor was held to be so fundamental that strikes (a group agreeing to withhold labor) were outlawed.



Laws establishing minimum wages and maximum hours were held unconstitutional until the 1930s when this view of economic due process abandoned.

What do you think?

Would the following meet the criteria of substantive due process (explain why or why not):

- The school district sets a regulation that only girls can have lunch in school.
- The town establishes an ordinance that only people who live in town may drive cars in town.
- The Congress decides that a secret committee rather than the courts will decide criminal cases.
- The President uses Executive Orders to require immigrants from selected countries to pay \$50,000 in order to enter the United States.

Why would a free society be impossible without procedural due process?

- ✓ No rule of law
- ✓ Unlimited governmental intrusion into individual's private affairs
- ✓ No protection for individual rights
- ✓ No fair way to determine guilt of those accused of criminal acts or to determine fair punishment

How are the powers of all branches of government limited by procedural due process?

- ✓ Constitutional limitations for all three branches of government
- ✓ Procedures for judges to follow
- ✓ Opportunity to appeal decisions
- ✓ Judicial review to limit legislative and executive branches