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The Abiding Appeal of the Concept of Legislative Due Process

WHEN LEGISLATURES DELEGATE their lawmaking function to administrative agencies, there are safeguards to ensure the adequacy of agency deliberations and judicial scrutiny of the resulting decisions to ensure rational decision making. Ironically, none of these safeguards apply to the legislative process itself. Should they? Perhaps as a matter of constitutional "legislative" due process?[1]

Legislative due process sets minimum constitutional requirements for the deliberative process in order to protect the right of the people generally to fair deliberation before the enactment of laws that affect life, liberty, or property. As early as 1856, the U.S. Supreme Court suggested that due process is sufficiently broad to encompass legislative procedure:

> The Constitution contains no description of those processes which [the due process clause] was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will.[2]

The most prominent current advocate of legislative due process is Justice John Paul Stevens. In *Fullilove* v. *Klutzni*ck, Justice Stevens wrote in dissent:

> I see no reason why the character of [the legislature's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.[3]

Justice Stevens found that "'establishing essential rules for the political process'" is a proper function of judicial review under the Fifth Amendment and even suggested that constitutional scrutiny of legislative process is a conservative method of constitutional review:

> A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the [legislative] decision is not "narrowly tailored to the achievement of that goal."[4]

Justice Stevens also concluded that such judicial review would not violate the separation of powers. This makes sense. The authority of the courts to declare a law unconstitutional is established. As a result, there should be no objection to courts engaging in a judicial review limited to the process by which a law is enacted.

Despite the logic of legislative due process, there is strong resistance to judicial due process scrutiny of legislative procedure. For example, the Supreme Court, in *United States* v. *Locke*, held:

> [A] legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.[5]

And, California prohibits inquiry behind a duly enacted law. In *Longval* v. *Workers' Compensation Appeals Board*, for example, the court observed that "[a]n act of the Legislature, 'as it is enrolled and authenticated…cannot be impeached by showing defects and irregularities in the proceedings…before the Legislature.'"[6]

Constitutional scrutiny of the legislative process furthers the public interest in thorough deliberation over proposed laws.

There are also questions concerning the effectiveness and even the desirability of imposing due process requirements on legislative deliberation. Would legislative due process improve the quality of lawmaking? Would legislative due process put too much power into the hands of the judiciary? Would any test for legislative due process prove difficult to administer in practice?

Despite these questions and the resistance of the courts, there is an instinctive appeal to the concept of legislative due process. Constitutional scrutiny of the legislative process furthers the public interest in thorough deliberation over proposed laws, without intruding upon the substance of the laws enacted. The question, therefore, should not be whether legislative due process is a good idea, but how best to ensure that legislation receives all the process it is due. ■

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[1] Legislative due process has been addressed in a number of scholarly articles. *See, e.g.*, Frickey & Smith, *Judicial Review, the Congressional Process and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); Goldfeld, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367 (2004); Laehn, *Legislative Deliberation and the Rhetorical Foundations of Democracy*, DRAKE UNDERGRADUATE SOCIAL SCIENCE J., *available at* http://www.drake.edu/artsci/Polsci/ssjrnl/2004/ssjournal04.html (last visited Oct. 10, 2005); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

[2] Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1855).

[3] Fullilove v. Klutznick, 448 U.S. 448, 550 (1980) (Stevens, J. dissenting).

[4] *Id.* at 551.

[5] United States v. Locke, 471 U.S. 84, 108 (1985). *See also* Horn v. County of Ventura 24 Cal. 3d 605, 612 (1979).

[6] Longval v. Workers' Comp. Appeals Bd., 51 Cal. App. 4th 792, 804 (1996) (quoting Sherman v. Story, 30 Cal. 253, 269 (1866)).

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