# Chapter 4

## Basic Due Process

### What is substantive due process?

#### What is an example of a substantive due process question from a United States Supreme Court case?

#### How does it differ from procedural due process?

### Takings (property)

#### What is a "taking" under the Takings Clause of the Constitution?

#### What due process is required?

#### What about compensation?

#### How is compensation measured?

#### What is a regulatory taking?

##### Why isn’t compensation required in most cases where regulations reduce the value of property, such as designating private property endangered species habitat and thus limiting the uses to which it can be put?

### Accidental deprivations

#### Is it a taking when the postman runs over your dog or hits your car?

#### Why or why not?

### New Property

#### What is the "bitter with the sweet" doctrine? Is it still good law?

#### What is the "new property"? (Examples?)

#### How are the rights different for new property versus old property?

##### As a matter of constitutional law, as opposed to potential statutory protections and contracts, what are you entitled to if the legislature abolishes your government job or your welfare entitlement?

##### Assume that governor and legislature of Louisiana, following the philosophy of Milton Freedman (a noted free market economist) decide to abolish law licenses and allow anyone to practice law. Do you have any constitutional entitlement to compensation as a licensed lawyer? Think carefully and explain the constitutional basis for this being different from welfare or a job at governmental agency, if it is.

### *Goldberg*

#### What makes a benefit an entitlement?

#### What is a matrix regulation?

#### What was the fight in *Goldberg* over the timing of the hearing, i.e., what was plaintiff's argument for a pre-termination versus post-termination hearing?

#### What was the informal process for terminating benefits that the plaintiffs wanted to change?

##### Why was it subject to serious bias problems?

##### What did plaintiff argue could help cure this inherent bias?

##### What sort of proceeding did plaintiffs want the court to look to when it analyzed their constitutional claims?

#### What are the procedural rights established in *Goldberg v. Kelly*?

##### How they differ from the rights given indigent criminal defendants?

##### How the rights are specifically tailored to the special problems posed in providing due process to an indigent welfare population?

#### In general, how does right to counsel different in agency and criminal cases?

#### What was the impact on the state welfare system of creating the *Goldberg* rights?

#### How did the Welfare Reform Act of 1996 eliminate welfare as an entitlement?

##### What does TANF stand for?

##### This ended the benefits for all welfare recipients under the old program – did they have a right to any due process?

### Cost Benefit Analysis and Due Process

#### *Matthews v. Eldridge*

##### What benefit was at issue in *Matthews*?

##### How were the facts determined for making the benefits determination in *Matthews*?

###### How is this different from *Goldberg*?

##### What is the role of the claimant’s testimony in *Matthews*?

###### How is this different from *Goldberg*?

##### Why does it not matter whether the claimant can personally present the case in writing?

###### How is this different from *Goldberg*?

##### Why did the court believe that a post-termination hearing was OK in *Matthews* and not in *Goldberg*?

##### Did the *Matthews* court overrule *Goldberg*?

##### Has *Goldberg* been applied in cases after *Matthews*?

#### The *Matthews* balancing test

##### Explain each of the three *Matthews* factors and how the test works.

###### C < P x V

##### How is this analysis different from the due process analysis in criminal cases?

##### Why is *Matthews* a break from the Warren Court?

###### How is it a response to the effect of *Goldberg*?

##### How does the *Matthews* analysis dovetail with discretionary decisionmaking as a defense to tort claims against the agency? (You will not be able to answer this until we finish the last part of the course on suing agencies.)

## The Employment Cases

### Do private employers owe employees constitutional due process?

### What should a university learn from *Roth*?

### What should a university learn from *Sinderman*?

#### What do these cases tell us about why LSU did not comment or explain its position on the merits of the *Van Heerden* case?

#### How do they explain why LSU might still lose in court, even if van Heerden did not have tenure and was not doing his job? (How can you screw up a proper firing and harm the employee?

### Why didn’t the suicidal policeman get a hearing?

#### What does this tell us about the key requirement for getting a hearing?

#### Why did the court find that putting his dismissal in his employment file meant that it was public?

#### Was it defamation?

### Even if the basic facts are not in issue, what does *Loudermill* tell us about facts in mitigation and explanation?

#### When are mitigation and explanation relevant?

#### Why weren’t they relevant for the suicidal policeman?

#### What is the de minimis test?

### Recommendation letters

#### What if government employer gives an employee a bad recommendation that causes him to lose a subsequent job?

#### Is this stigma+?

#### What would the employee have to show to get stigma+?

#### What do you tell your employer client about what goes in recommendation letters? (Assume it wants to give as much information to the next employer as they can, without violating the employee’s rights.)

## The School Cases

### What is the *Matthews* analysis in the school suspension and paddling cases?

#### Use these cases to show how the rights diminish as the injury caused by the punishment decreases.

### Melissa

#### If Melissa, an LSU student, admits to plagiarism, does she still get a hearing on whether she plagiarized?

#### What if she says that she copied the work, but she thought it was properly cited?

#### What if she is suspended from school after being arrested by the Baton Rouge police for attempted murder?

#### What if she is suspended from school because someone posts on Facebook that she was cheating?

#### Melissa fails administrative law and thus flunks out of law school. She thinks she did a good job on the exam. She does not claim that the anonymous grading system failed – does she get a hearing?

#### Melissa is accused of stealing from another student’s locker and is expelled from law school – does she get a hearing?

##### Is the analysis different for flunking out versus being expelled for stealing?

##### Why?

## Bias in administrative hearings

### What evidence of bias did you see in the Well Founded Fear movie?

#### How might this develop?

### What does it mean for an agency to take official notice of information?

#### How can this affect the impartiality of the proceeding?

#### How does this complicate the defendant's ability to get proper judicial review of the process?

#### What must be in the record to resolve these problems?

##### For example, what if the physician members of a medical licensing board use their own expertise and determine that the physician whose license they are reviewing was engaging in substandard practice.

##### What do they need to put in the record?

### Why is separation of functions a problem for agencies such as the FCC where decisions are made by the commissioners themselves?

#### What does APA section 554(d) provide in these circumstances?

#### Does this mean that there are no separation of function requirements in these hearings?

#### What must the commissioners avoid?

### What is the United States Supreme Court standard for disqualifying an administrative decisionmaker for bias?

#### What happened in *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964) that allowed defendants to challenge the decisionmaker?

#### How might this have affected the comments by the EPA Secretary during the BP spill?

#### What if the EPA Secretary says that she thinks fracking poses real risks to the environment and should be limited?

##### Would this disqualify her making decisions in environmental adjudications?

#### What is the Doctrine of Necessity?

## What is congressional casework? (Think of examples.)

### What did the *Pillsbury* case tell us about the limits on Congressional meddling in adjudications?

### What does *Pillsbury* tell us about the allowable limits of congressional case work?

## Building the Record

## Liberty Interests

### What are examples of liberty interests?

### Privacy as a protected liberty interest: What do the cases of the drunkard and the shoplifter tell us?

### How do the "perverts R us" WWW site cases modify this? (*Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160, (2003); *Smith v. Doe*, 123 S.Ct. 1140 (2003)

#### How were the facts determined in the perverts R us cases?

#### Why does this undermine the basis for demanding a hearing?

#### Why isn't this an ex post facto law situation?

### What rights does a prisoner retain and why should we care?

#### When does prison disciple trigger a hearing?

#### What is the most important consideration in whether the prisoner gets a hearing?

#### Assume you have been hired to develop a new set of prison regulations for Angola.

##### What are the tradeoffs you must deal with?

##### What happens if prisoners have lots of rights?

##### What is the risk if prisoners have no rights?

## Alternative Remedies

### What are alternative remedies to due process claims?

### What does the United States Supreme Court tell us is the remedy if your client believes she has been wrongly put on the "perverts R us" WWW site?

### Why are these alternatives sometimes better for you client?

### What are the disadvantages of an alternative remedy?

### For example, the case of the medical student who did not get the internship she bargained for - what was her alternative remedy, and why might it better than a due process right?

### If you win the right to a hearing, does this mean you will prevail in the hearing?