Constitutional "Equal Process" and the Problem of Poverty

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Brandon L. Garret, *Wealth, Equal Protection, and Due Process*, Duke Law School Public Law & Legal Theory Series No. 2019-14 (Jan. 14, 2019), available at SSRN.

It is a constitutional law truism that wealth and class are not suspect classifications, nor does the government have a substantive due process obligation to fund abortions or provide most government benefits. This is because our Constitution is generally seen as containing negative rights, not affirmative obligations. But there are exceptions. For example, the Sixth Amendment means that the government must pay for an indigent criminal defendant's attorney. In his new article, *Wealth, Equal Protection, and Due Process*, Brandon Garrett argues that there are more exceptions than we usually think there are. Garrett shows that the Supreme Court has ruled that poor individuals are entitled to fair government treatment, creating a wider swath of government obligations to fund than we generally assume. The article's reasoning and conclusions are powerful, especially at a time of great social inequality. Moreover, Garrett's careful doctrinal analysis commendably avoids overreach.

Specifically, the article develops a concept called "equal process." This term highlights the synergy between equal protection and due process in certain cases. Though not a completely new idea, the nomenclature is a useful descriptive tool, especially given some of the doctrinal complexity in this area. Garrett focuses in part on the underappreciated legacy of the U.S. Supreme Court decision in *Bearden v. Georgia*. In that case, the Court held that a judge could not reverse the grant of probation to a defendant, because of an unpaid fine or costs, unless the judge concluded after a hearing that the defendant willfully refused to pay, or had made an inadequate effort to obtain the resources. The judge also had to find that there were no suitable alternative remedies. In effect, the Court ruled that such a reversal must satisfy due process by fairly accounting for the defendant's potentially suspect financial status.

Garrett shows how this kind of individual claim has succeeded in cases involving the setting of bail, driver's license suspensions, and the imposition of various court costs. Recently, the Department of Justice even adopted a consent decree that required Ferguson, Missouri, the well-known site of a horrific shooting and race-based riots, to cease its regressive practice of imposing arbitrary court fines and costs. In 2018, a federal judge used similar due process reasoning to rule that Virginia could not just unilaterally suspend the driver's licenses of 600,000 people who had not paid court fines or costs. Moreover, state actions like those in Virginia can also can have an impact on whether individuals with financial problems are eligible to vote, since such persons may not appear on driver's license lists. One of the foundational cases supporting Garrett's argument is Matthews v. Eldridge, which required the state to provide a sufficiently timely hearing regarding social security disability termination decisions and provided a general procedural due process formula depending on the costs, benefits, and risks of error.

Garrett suggests that the United States Supreme Court's decision in the same-sex marriage case, *Obergefell v. Hodges*, could have more effectively used this equal process reasoning. *Obergefell* cites *Zablocki v. Redhail*, where the Court struck down a Wisconsin law that prohibited prisoners from getting married who were behind in child support. According to Garrett, *Obergefell* relied on *Zablocki's* due process and equality components. Garrett argues that *Obergefell* could have emphasized the synergy of the equality and due process concerns even more clearly, and that doing so would have built a stronger precedent protecting LGTBQ individuals.

Garrett acknowledges that a major problem with his thesis is *San Antonio Independent School District v. Rodriguez*, where the Supreme Court upheld the state of Texas's public school financing scheme, in which some schools received much less money per students than others. The Court said this was not intentional and that it was not a

wealth classification. After all, wealthy kids live in poor school districts and poor kids live in wealthy school districts. Thus, the Court could use rationality review. Moreover, regarding due process, the Court said there was no fundamental right to a particular quality of education.

In a sense, the Court engaged in a "divide and conquer" strategy regarding the equality and due process claims. This reflects the kind of formalism that generally rules out conceptual "inter-sectionality." The Court was also pre-occupied with not violating Texas federalism interests. Garrett's generally excellent article could have devoted greater attention to Justice Marshall's dissent in that case, which advocated a sliding-scale approach to judicial scrutiny when these two important interests are at stake. Marhsall's proposal was even more fluid than the one Garrett offers, and perhaps superior.

The Court later negated a Texas rule, in *Plyler v. Doe*, that barred a free public education for undocumented children. The Court said it would be irrational for Texas to create a permanent underclass based on parental misdeeds. This is "rationality with bite." The Court also explained how undocumented immigrants pay taxes and have low crime rates. Nonetheless, *Rodriguez* and some other cases remain problematic for Garrett's approach.

Garrett's article goes on to propose several creative potential uses of an equal process doctrine. In *Trump v. Hawaii*, the Supreme Court upheld travel restrictions applied by the federal government to individuals and refugees traveling to the United States from certain hostile nations. Though most of these people are Muslim, the Court found the directive to be a valid exercise of executive power over immigration. Importantly, the restrictions exempted green card holders, contained waiver provisions, and did not just cover Muslim nations. Garrett argues, however, that plenty of consular officials used their discretion to make decisions improperly "based on religion and ethnicity."

Interestingly, Garrett also argues that equal process could have been used by the Court more clearly in *Whole Women's Health v. Hellerstedt*. There, the Court struck down Texas requirements that abortion clinics renovate and become hospital-like facilities and that clinic doctors have admitting privileges at a nearby real hospital. These requirements meant that many Texas clinics would have to close, and that some women would have to travel hundreds of miles for an abortion, as well as satisfy a waiting period. The majority found that these restrictions imposed an undue burden on women, especially since most abortions are in the first trimester and have far fewer complications than childbirth. Garrett points out that this was an opportunity for the Court to show that the burden was especially unfair to indigent women, thus placing the wealth issue in the foreground and making clear once again the intersection between due process rights, wealth, and inequality.

Garrett concludes:

> These cases exemplify why sometimes joint harms really are more problematic and deserve more careful scrutiny. The equal process connection is at the forefront of litigation concerning the constitutionality of fines, fees, cash bail, and perhaps also soon to involve challenges to voting procedure. The connection between equality and procedure will be all the more important if provision of social benefits are reconsidered and expanded.

It is an interesting, insightful, and attractive argument. Unfortunately for its supporters, however, the Supreme Court's current composition will surely stand in the way of such developments.

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