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COMMENTARY ON ALEXANDER: SUBSTANCE, PROCEDURE, AND THE MEASURING OF MARGINS

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Professor Larry Alexander makes a number of related claims: that "the meaning of procedural due process is determined by . . . substantive constitutional values at stake when rules and policies are applied in particular cases"; that if we are realistically concerned with "substance" then we must also be concerned with procedure; that procedure is not a "free-standing" or "independent" value; that "procedure" is part and parcel of substantive constitutional guarantees; that "[p]rocedural constitutional guarantees are entailed by and derived from substantive constitutional guarantees"; that "[t]he general rule or policy being applied and the procedure by which it is applied should be viewed as constituting a single package"; that "*[w]hether* procedure is due depends upon whether substantive constitutional values are at stake"; and that concern with substance and concern with procedure are "linked." I will assume that these various claims are intended as alternative formulations of a single thesis, but first I want to be sure I have a grasp of that thesis.

Let me, if I may, set aside the metaphorical formulations that would have substantive and procedural due process in a "package" or "linked together," or "part and parcel" one of another, or that would deny that procedural due process is "free-standing." The trouble is that metaphors can be cashed many ways into non-metaphorical language. For example, it is not clear from his use of the term "packages" whether Alexander claims that no distinction exists between substantive constitutional values and the value of procedural due process; or that, for some reason, the distinction is constitutionally insignificant; or that one cannot understand procedural due process without first understanding substantive constitutional value; or that inevitably when we discuss the one we are led to a discussion of the other; or that we cannot defend one without defending the other.

Let me also set aside the "meaning" formulation. If the meaning of "due process" *is* determined by constitutional values at stake when rules and policies are applied in particular cases, then we can no longer meaningfully ask whether due process *ought to be* so determined. I

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think that Professor Alexander does want to be able to raise that question and to answer it affirmatively.

This leaves three formulations of the thesis: (1) that we cannot realistically be concerned with substantive constitutional values unless we are concerned with the procedure by which rules are applied; (2) that procedural constitutional guarantees are entailed by and derived from substantive constitutional guarantees; and (3) that whether procedure is due and what kind of procedure is due depends upon which substantive constitutional values are at stake. While these claims are obviously related, it is useful to point out differences in their force and significance. The first claim provides us with a test of our commitment to substantive constitutional values. Our concern with the procedure for the application of rules is a necessary condition of the presence of that commitment. The sentence, "I am concerned about substantive constitutional values but not concerned about procedure," is, hence, incoherent. But I will assume that the remark about genuineness of concern is derivative from a more fundamental underlying thesis or theses.

We must still know why a supposed concern for substance does not fit together with lack of concern about procedure. The second and third claims provide two answers. One answer is that an entailment relation exists between sentences like, "*S* is a substantive constitutional guarantee," and sentences like, "*P* is a procedural constitutional guarantee." That is, if some sentence like the first one is true, then some sentence like the second one must be true. A difficulty with this formulation is that while it seems logically precise, it does not really tell us anything about *which* sentence must be true if which other sentence is true. We do not know what is entailed by what.

A second answer, using the language of "dependence," is that given certain substantive constitutional values, and given what is constitutionally at stake in a particular case, we have everything we need to determine whether any, and if any what kind of, procedure is due. This more loosely formulated, more intuitively acceptable version of Professor Alexander's thesis is the one that I will discuss. I will assume, however, that an implication of the thesis, from Professor Alexander's remarks about "independence," is that there is no *other* ground for the determination of what procedure is due than substantive constitutional values or guarantees, combined with the facts that reveal "what is at stake." I will assume further that when the question is whether procedure is due, and if so what sort of procedure, a sufficient condition for the truth of the claims that procedure is due and that a particular procedure is due, is that there are "substantive constitutional values" that, given the facts, require or make permissible the procedure in question.

Professor Alexander offers an "affirmative case" and a "negative case" in support of this position. The affirmative case may best be understood by pursuing his analysis of his hypothetical Roth-like case. We are to suppose that the university in question adopts a "constitutionally innocuous standard": that the teaching, scholarship, and community service of the candidate for renewal "are of high quality and superior to what the university could likely obtain by hiring someone else from the pool of applicants." But we are also to suppose that, instead of instituting peer review of scholarship, visits to classes, and student evaluations, the university's procedure is to submit the teacher's and other candidates' resumés to the John Birch Society and to act on the Society's evaluation, or to determine who is most qualified by measuring the margins of resumés. This, Professor Alexander holds, is unconstitutional. It is unconstitutional not because the standard subscribed to is so, but because the combination of the standard and the procedure is unconstitutional. While the governmental benefit in question is not a constitutionally required one, it is constitutionally permissible. The standard adopted is permissible; however, it is not constitutionally permissible to distribute the benefit according to the procedures mentioned. I will call this hypothetical case *Roth-1*.

I am not qualified to say whether it is unconstitutional to determine high quality by the measuring of margins, supposing that all applicants' margins are carefully measured. I can say with some assurance, however, that the hypothetical case presents a paradigm of unfair treatment, supposing that Roth and other applicants did not understand in advance the idiosyncratic version of "high quality" the university would employ. The treatment would be unfair not because the procedure was biased, but because it was arbitrary: based, however impartially administered, on a criterion of quality that in academic life there is good reason to reject. Since this matter of arbitrary treatment by government may arguably have inspired the relevant portions of the fifth and fourteenth amendments, and their subsequent development in legal precedent, and since Professor Alexander's hypothetical case is so useful in bringing the question of the nature of arbitrariness to focus, I will devote most of the remainder of this article to that notion as it is highlighted by his example.

Professor Alexander's "negative case" is that due process, by itself, "free-standing," has "little to recommend it." It is costly and time consuming. We must have a good reason to take all that time and go to all that effort or it is not worthwhile. "A free-standing constitutional right to 'procedure,' " Professor Alexander argues, "would be a loose cannon on the jurisprudential deck." The "significant positive benefits of procedure [are] those associated with substantive constitutional values."

Professor Alexander's position, if I have understood it, has much to commend it, but it makes me uneasy. That there must be reasoned limits to due process, both to the right to some procedure, and to the right to a particular sort of procedure, makes sense. It is obviously impossible to accord to everyone every sort of procedure he demands for the adjudication of his claims. We cannot spend all of our time, or even most of it, dancing procedural minuets. Although they have their important uses, those uses should be within understood boundaries, and those boundaries should be drawn with reference to prior constitutional values.

The right to due process may obtain even if the benefit in question is "constitutionally optional." *Roth-1* has no constitutional right to reappointment. But he may have a constitutional right to a procedure that is appropriately designed to discover his academic qualifications, a procedure that will determine the degree to which he measures up to the standard set by the university rule that only the best of the candidates for the position may be appointed.

Still, Professor Alexander's paper leaves me uncomfortable for several reasons. The first reason is that I do not know what Professor Alexander would consider a substantive constitutional value, and thus I do not know where to start in evaluating a claim to due process. Professor Alexander states that the terms "life, liberty, and property" are "best thought of as referring to all interests the deprivation of which can implicate substantive constitutional values." The right to due process must then rest upon the rights to life, liberty, and property. We are not told, however, how Professor Alexander would determine what the "substantive constitutional values" are that are implicated by life, liberty, and property. This is a matter for intense debate. It would be unreasonable to expect a theory of constitutional interpretation to be incorporated in a short article on due process, but were I *Roth-1*, I would earnestly desire from Professor Alexander some indication of how he would determine whether a claim to procedural due process is justified.

Second, and I put the question with deference, why, if the right to procedural due process is derivable from substantive constitutional values, did the founding fathers feel it necessary to add the relevant portions of the fifth and fourteenth amendments? These additions could quite consistently have been added, on Professor Alexander's interpretation, if their derivation from "substantive constitutional values" had been obscure or difficult to trace. But part of his argument is that there is no obscurity, that it ought to be obvious that "failure to justify the procedure for applying the rule is every bit as much a substantive constitutional defect as failure to justify the rule itself." Is it mere redundancy for emphasis that informed the decision to incorporate the

due process clause? Or might there have been other motives? For example, might not the unhappy experience of slavery and racial prejudice have made clear the need for unambiguously stating in the fourteenth amendment that the law of the land may not, in the states or in the federal government, be applied arbitrarily?

Third, how are we to understand the object and the nature of procedural due process, on Professor Alexander's analysis? In the context of *Roth-1*, he speaks of the superior *accuracy* of the usual academic procedure to the procedure of measuring margins. We are more likely to determine correctly whether *Roth-1* should be retained by the former procedure than by the latter. If accuracy were the sole object of the procedure used, however, academic procedure might not be the only viable option among practices for determining retention. Suppose a crystal ball gazer could predict with greater success than academic committees that a candidate for retention would be a good professor of philosophy or law, or would be better than other candidates. Would there then be no case for academic procedures? Suppose that it had been established over thousands of cases and hundreds of universities that a positive correlation exists between the width of margins on resumés and the academic success of applicants for academic positions — where success is measured, say, by a weighted count of pages published in law journals.

I offer this implausible hypothesis to suggest that there may be something questionable in Professor Alexander's conception of the proper goal and consequent nature of procedural due process. If accuracy were the reason-for-being of procedure, there could then be no objection to the margin-measuring procedure. Is it only because it would be a less accurate method than the usual academic procedure that we draw back from margin measuring? Or is it also because we expect procedure to exhibit a non-contingent relationship to the purpose for which it is brought into play? Do we not want the relationship to be clear because we want assurance of non-arbitrary treatment by government? And can one reduce non-arbitrariness to an accurate determination under a rule? I suspect not, since at least a part of the conception of non-arbitrariness is that discriminations made be *reasonable* ones. A reason for non-continuance is that a person has not published anything of value. It is unclear how, even on the hypothesis, the size of margins can serve in the same sense as a reason. That is, it is unclear how the person interested in non-arbitrary treatment can be reassured by contingent correlations between margins and performance when the issue is the use to which such correlations are put, who uses the correlations, and under what constraints.

Professor Alexander believes that procedural due process derives all of its value from underlying "substantive constitutional values."

Due process achieves substantive value because its underlying constitutional values can be of some value, practically speaking, only if they are brought to bear on actual cases through appropriate procedures. Were it not for this transmitting or applicational value, procedural due process would be devoid of value. It has no value on its own. However, I am not quite persuaded.

It still seems at least plausible that the due process clauses articulate a separate value: the requirement of non-arbitrary treatment by a government that, because of its power over us, might otherwise do with us what it wills. Were I in *Roth-1's* shoes, I would be a good deal more comfortable if I could appeal directly to that value than if I had to find a way to it down the winding corridors opened by appeals to life, liberty, or property. I sympathize with Professor Alexander's reluctance to multiply constitutional "values." But this particular value, the right of individuals who are subject to governmental power to not be treated arbitrarily, but to be subject only to the rational application of the rules of government, does seems to have some claim to be itself "substantive."