

ABSTRACT

Paul R. Verkuil
Privatizing Due Process

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Abstract by Nicolas A. Reyes

In this article, Professor Paul Verkuil examines the discordant relationship between growing privatization of government activities and procedural due process protections. The article begins by indicating that case law has limited the reach of the Due Process Clause to questions concerning state action. In the absence of state action, litigants cannot rely on Constitutional guarantees of procedural due process.

The author asserts that a conceptual problem arises when the government privatizes an activity by delegating public power to a private actor, but fails to address concomitant procedural issues. Those subject to the delegation no longer enjoy Constitutional due process protection. In the face of increasing privatization of government activity over the last few decades, the goal of this article is to survey non-constitutional procedural protections that have developed to fill the void left by privatized government functions, and to propose solutions for normalizing the nature and application of private procedural protections.

The first section of this article discusses the nature and history of the public-private due process dichotomy. Part II of the article examines due process alternatives developed by state law, namely within the context of universities, medicine, and managed care regimes. Part III discusses particular private actors that must adhere to federally established procedural standards. Part IV explores Alternative Dispute Resolution as a source of private due process. In Part V, the author proposes solutions for creating and fostering private sources of due process for private actors with delegated public authority.