

Procedural and Substantive Due Process: A Basic Guide

The Constitution contains two Due Process Clauses: one in the Fifth Amendment, which limits the national government, and the other in the Fourteenth Amendment, which limits state governments. This handout uses the Fourteenth Amendment version as an example, but the analysis of the Fifth Amendment version is the same.

The Due Process Clauses can be read in one of two ways: in the procedural sense, which is the traditional way going back several hundred years, and the substantive sense, which the courts began using within the past century and a half.

The actual wording of the Fourteenth Amendment Due Process Clause:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”

The way the courts read the Fourteenth Amendment Due Process Clause when applying procedural due process (the traditional reading):

“[N]or shall any State deprive any person of life, liberty, or property, unless it follows proper legal procedures.”

Examples of procedural due process:

- The state may execute you (deprive you of life), but only after following the proper legal processes (arrest, charging, fair trial, appeals, etc.).
- The state may imprison you (deprive you of liberty), but only after following the proper legal processes (arrest, charging, fair trial, appeals, etc.).
- The state may condemn and take your house in order to build a road, or impose regulations on your business operations (deprive you of property), but only after following the proper legal processes (holding a condemnation hearing, or duly passing a law requiring business licenses, etc.).

The way the courts read the Fourteenth Amendment Due Process Clause when applying substantive due process (the “new” reading):

“[N]or shall any State deprive any person of life, liberty, or property.”

This means that you may have certain life, liberty, or property rights that the state may not take away from you regardless of what processes it follows.

Historical examples of substantive due process:

- The legislature may not violate a slaveowner’s right to own slaves in federal territory (depriving the slaveowner of his property rights).
- The legislature may not violate the right of a worker to make a contract that is injurious to his health or interests (liberty of contract).
- The legislature may not violate the right of a woman to have an abortion (liberty).
- The legislature may not violate the right of same-sex couples to marry (liberty).

Procedural and Substantive Due Process: A Basic Guide (continued)

Procedural due process usually focuses on executive or judicial action (was the arrest legal? Did the trial court apply the right rules?) while substantive due process often involves judicial review of the legislative branch (did the legislature pass a law that deprives someone of a substantive right?).

Decisions that are based on substantive due process are usually considered to be activist (i.e., they use using the Due Process Clause to impose the judges' subjective views of government and society despite what the people have declared in the legislature). Further, judges often resort to substantive due process in controversial, "hot-button" cases in which there is widespread social disagreement (slavery; abortion; gay and lesbian issues). As a result, these decisions are usually strongly criticized by some element of society.