

# Due Process

The Due Process Clause of the Fourteenth Amendment, adopted in 1868, states:

*"nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."*

Before a person can be executed, imprisoned or fined for a crime, he must get a fair trial, based on legitimate evidence, with a jury, *etc.* These are **procedural rights**. However, the US Supreme Court has also recognized **substantive rights**. The doctrine of Substantive Due Process holds that the Due Process Clause not only requires "steps or procedures to be followed, but that it also protects basic *substantive* rights. "Substantive" rights are those general rights that reserve to the individual the power to possess or to do certain things, despite the government's desire to the contrary. These are rights like freedom of speech and religion. In comparison "Procedural" rights are special rights that protect people from discrimination for example. The substantive due process would mean that a person's life, freedom and property cannot be taken without appropriate governmental justification, *regardless* of the procedures used to do the taking.

In the original U.S. Constitution itself, there are not that many express restrictions on the power of the states. Most are in Article I and in Article VI. The Bill of Rights was added in 1791, but by its own wording applies only to the federal government. The Bill of Rights contains both substantive and procedural rights designed to limit the power of the federal government. After the adoption of the 14th Amendment in 1868, the Supreme Court eventually determined that many of the *procedural* provisions of the Bill of Rights (like the Fourth and Fifth Amendments) would also be protected by the 14th Amendment's Due Process Clause, which was directed at the states. However, the Court also used the theory of Substantive Due Process to apply ("incorporate") many of the *substantive* provisions of the Bill of Rights (like the First Amendment) to the states as well. See *Gitlow v. NewYork*,(1925).

NOTE: While there actually are two slightly different "Due Process" clauses in the U.S. Constitution, one in the Fifth Amendment, applying to the federal government, and the second in the Fourteenth Amendment, applying to the states, it is the 14<sup>th</sup> Amendment's Due Process Clause which is really important here, *because* it applies to the states. The Supreme Court has generally interpreted them to be identical in meaning. While substantive due process applies to both clauses, it has been applied to the states through the 14th Amendment in-particular. It should be noted that there is a history (and precedent) of substantive due process in American federal and state court systems well before the adoption of the Fourteenth Amendment in 1868.