

## THE FIFTH AMENDMENT DUE PROCESS CLAUSE

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The principle that the government should be limited in how it makes decisions that are detrimental to private people is very old in Anglo-American law. The Magna Carta, a statement of subjects' rights issued by King John of England in 1215, became well known over the centuries. Chapter 39 provided that "[n]o free man shall be arrested or imprisoned . . . except by lawful judgment of his peers or by the law of the land." This language and its subsequent refinements gave rise to the concept of "due process of law," and influenced the drafters of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Although the Fifth Amendment Due Process Clause is brief, important parts of the Supreme Court's constitutional doctrine rest on it. At the most general level, the clause reiterates the principle of the rule of law: the government must act in accordance with legal rules and not contrary to them. A more specific application of the Clause is the doctrine today called "procedural due process," which concerns the fairness and lawfulness of decision making methods used by the courts and the executive. Governmental actors violate due process when they frustrate the fairness of proceedings, such as when a prosecutor fails to disclose evidence to a criminal defendant that suggests they may be innocent of the crime, or when a judge is biased against a criminal defendant or a party in a civil action. Likewise, fair notice and the opportunity to be heard are due process requirements in criminal, civil, and other proceedings. The Court also attributes to the Due Process Clause a notice requirement that applies to statutes rather than executive and judicial action. A statute that is extremely unclear can be, in the Court's terms, void for vagueness. This is because it does not give people sufficient or fair notice of what the law requires.

Another, more controversial application of the Clause is the doctrine today called "substantive due process," which extends beyond the methods government institutions use to make decisions, and places *substantive* limits on governmental authority. There are long-standing debates regarding whether the text and history of the Fifth Amendment Due Process Clause support the concept of "substantive due process" that has been embraced by most of the current Supreme Court justices in varying degrees. These differences of opinion necessarily are informed by interpretations of the meaning and relevance of the historical evidence, the meaning of the words used by the Framers in the Clause and whose understanding of that meaning is relevant, and more fundamental views of whether the meaning of the Constitution

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was fixed when written or can change over time. Despite the lack of consensus over the scope of substantive due process, the meaning of the Fifth Amendment Due Process Clause in the procedural context is relatively settled as a matter of Supreme Court jurisprudence.

Although both the Fifth and Fourteenth Amendments have Due Process Clauses (the Fifth Amendment Due Process Clause constraining the authority of the federal government and the identical Due Process Clause of the Fourteenth Amendment constraining only *state* governments), there is only one Equal Protection Clause, and it applies only to the States. The Court has also found that the Due Process Clause of the Fifth Amendment imposes on the federal government restrictions that are almost identical to those imposed on the States by the Equal Protection Clause of the Fourteenth Amendment.