The Due Process Clause first appears in the middle of the Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

It is also found in the Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first mention, in the Fifth Amendment, applies only to the national government. The Fourteenth Amendment extends the Due Process Clause to state and local governments.

Overview—There are two, nearly identical due process clauses in the U.S. Constitution. One applies solely to the national government; the other to the states (see sidebar). Both provisions are interpreted in the same way. However, for more than a century, the Supreme Court has simultaneously recognized two completely different meanings of due process. These are known as “procedural due process” and “substantive due process.”

Procedural due process—Procedural due process is the interpretation most faithful to the actual wording of the text. Read literally, the due process clause doesn’t prohibit the government from taking away a person’s life, liberty, or property—American governments have the power to do these things. Rather, it simply requires the government to use fair legal procedures (“due process of law”) when it takes serious action against a person. Essentially, it prohibits arbitrary and capricious action. If the government does not act fairly a court may void the action and order new proceedings. Procedural due process controversies typically revolve around three questions: (1) who is protected; (2) what type of deprivations trigger due process rights; and (3) what procedures satisfy due process. The Supreme Court answers the first question fairly broadly. The Constitution uses the term “person” and the Court has ruled that this includes children, non-citizens, and even artificial business entities like corporations. Second, due process rights arise in a wide variety of contexts—not just criminal settings. This is because the Supreme Court interprets “liberty” and “property” quite broadly. For example, property includes intangible things such as the right to public benefits (e.g., unemployment compensation, welfare, scholarships), licenses (e.g., drivers’ licenses, occupational certification, liquor licenses), and public employment. This means that whenever the government interferes with such interests (e.g., revokes a license or fires a public employee), it must proceed fairly. The final issue—what is fair—does not have a single answer, but rather depends upon the context. When the government is attempting to impose serious criminal penalties, the minimum standards for due process are quite high. For example, a defendant is entitled to an attorney, a jury trial, and much more. However, when the government is simply denying benefits, lesser protections suffice. At a minimum, procedural due process requires the government to give the affected party: (1) notice, and (2) an opportunity to object.

Substantive due process—The second meaning of due process is less literal. Essentially, substantive due process forbids the government from interfering with a fundamental constitutional liberty. In other words, it looks to the content (“substance”) of the law itself, not the procedures used to enforce it. The controversial part is that the Court gets to define what constitutes a fundamental liberty (see below). Substantive due process was invented by a conservative, pro-business Supreme Court in the late nineteenth century. The Court was seeking a way to strike down state labor and business regulations that it didn’t like. Nothing in the Constitution actually barred such laws, so the Court creatively ruled that the laws interfered with the “freedom to contract”—a fundamental liberty purportedly protected by the due process clause. After a while, this interpretation was discredited. Ironically, however, substantive due process was subsequently adopted by liberal justices to strike down state laws that interfere with personal freedoms. Critics argue that substantive due process allows judges to “rewrite the constitution” and install their own policy preferences over those of elected officials who represent the majority. Defendants argue that it allows judges to interpret the 18th century Constitution in accordance with modern sensibilities, and protect the interests of unpopular, powerless minorities. It is an ongoing debate.

“Fundamental constitutional liberties”—The Supreme Court has used substantive due process to strike down state laws that interfere with a variety of different personal interests. In fact, this is the way that key provisions in the Bill of Rights have been
extended to state and local governments. Beginning in 1897, on a case-by-case basis, the Supreme Court began declaring most of the provisions in the Bill of Rights to be “fundamental constitutional liberties” also protected by the 14th Amendment’s due process clause. As a result, state and local governments are now held to essentially the same standard that applies to the national government. (For more detail, see my Nationalization of the Bill of Rights.)

Today, most Americans readily accept this application of substantive due process. However, the Supreme Court has also used substantive due process to protect liberties that are not mentioned anywhere in the Constitution. This is more controversial, because the Court is accused of “making up” such liberties. For example, in 1969, the Supreme Court recognized the right to travel as a fundamental right, and struck down a state law that imposed a one-year residency requirement for receiving welfare benefits. Other fundamental liberties recognized by the court include the right to procreate, the right to marry, the right to send children to private schools, the right to teach foreign languages, and a qualified right to die (see sidebar). This list is not complete, and the Court is continually being asked to recognize other liberties and thereby insulate them from state regulation. To date, the most controversial liberty recognized by the Supreme Court is the “right of privacy” outlined below.

The right of privacy—The Constitution does not contain an express right of privacy. The Supreme Court first recognized such a right in a 1965 landmark case, Griswold v. Connecticut. At issue was a Connecticut law making it a crime to use contraceptives. The justices viewed the law as “uncommonly silly.” However, judges are not legislators; they can only strike down a law if it conflicts with the U.S. Constitution. Needless to say, there is no right to use contraceptives in the nation’s charter. However, By a vote of 7-2, the Supreme Court voided the statute on the ground that it invaded marital privacy—which according to the Court was a fundamental constitutional liberty. While most Americans would probably support the Griswold decision, the next extension of the right of privacy was (and remains) far more controversial: Roe v. Wade (1973) ruled that the right of privacy recognized in Griswold was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Accordingly, Roe v. Wade struck down all state laws that banned abortions in the first six months of pregnancy (or afterwards if the woman’s life or health was at stake). As with contraceptive use, there is no express abortion right in the Constitution. However, the Court wound up protecting it from state interference using substantive due process. Finally, in 2003, the Supreme Court further extended the right of privacy: It struck down a Texas law that criminalized private, consensual sex between homosexuals. Lawrence v. Texas (2003) concluded that the petitioners’ “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”

2. Skinner v. Oklahoma (1942) (striking down an Oklahoma law that mandated sterilization for certain repeat offenders.)
3. Loving v. Virginia (1966) (striking down a Virginia law that made interracial marriage a felony. At the time, fifteen other states—including Arizona—had similar antimiscegenation laws.)
6. The justices did not agree on where in the Constitution this privacy right was located. The opinion proposed multiple locations, including privacy “penumbras” emanating from the 1st, 3rd, 4th, and 5th Amendments, the reserved rights of the 9th Amendment, and the due process clause of the fourteenth amendment. Subsequent privacy decisions have based the right of privacy almost exclusively on substantive due process.
7. Conservative federal judge Robert Bork was one person who didn’t. He was nominated to the Supreme Court by Ronald Reagan in 1987. During his confirmation hearings, Judge Bork candidly testified that there was no generalized right of privacy in the Constitution. He also criticized the reasoning in Roe v. Wade (1973). These views triggered a massive campaign against his nomination, and the Senate rejected Bork’s nomination by a vote of 58 to 42. Subsequent Supreme Court nominees pay lip service to the right of privacy to avoid getting “borked.”
8. Planned Parenthood v. Casey (1992) abandoned Roe’s trimester approach, substituting “viability” as the cut-off point for an abortion unless the woman’s life or health is at risk. It remains the current standard.