

be followed in state proceedings. Relevant issues, as discussed in detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, although also based on principles of “fundamental fairness,” is used to evaluate whether a law can be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due process has had greater political import, as significant portions of a state legislature’s substantive jurisdiction can be restricted by its application.

Although the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th, and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens,³⁹ and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the Due Process Clause.⁴⁰ Through the process of “selective incorporation,” most of the provisions of the first eight Amendments, such as free speech, freedom of religion, and protection against unreasonable searches and seizures, are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

Definitions

“Person”.—The Due Process Clause provides that no states shall deprive any “person” of “life, liberty or property” without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word “person” to mean only natural persons, or whether the word

³⁹ The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges—“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” See AKHIL REED AMAR, *THE BILL OF RIGHTS* 163–180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. See *Privileges or Immunities*, *supra*. Instead, the Due Process Clause, though selective incorporation, became the basis for the Court to recognize important substantive rights against the states.

⁴⁰ See *Bill of Rights, Fourteenth Amendment*, *supra*.