

further right to contest the state comptroller's estimate of those receipts and his adding to his estimate the 10 percent penalty permitted by law.⁵³³

Eminent Domain

The Due Process Clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment.⁵³⁴

Fundamental Rights (Noneconomic Substantive Due Process)

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has come to include disparate lines of cases, and various labels have been applied to the rights protected, including "fundamental rights," "privacy rights," "liberty interests" and "incorporated rights." The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,⁵³⁵ serves as the basis for some of the most significant constitutional holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the "incorporation" of fundamental rights.⁵³⁶ Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion,⁵³⁷ remain controversial.

Development of the Right of Privacy.—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of "privacy" relate to protecting physical spaces such as one's home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was

⁵³³ Pullman Co. v. Knott, 235 U.S. 23 (1914).

⁵³⁴ See analysis under "National Eminent Domain Power," Fifth Amendment, *supra*.

⁵³⁵ See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Cambridge: 1977).

⁵³⁶ See Bill of Rights, "Fourteenth Amendment," *supra*.

⁵³⁷ See Roe v. Wade, 410 U.S. 113, 164 (1973).