

Faculti Summary

<https://faculti.net/guns-abortion-and-courts/>

This video discusses the evolution of substantive due process and incorporation doctrines in U.S. constitutional law, primarily focusing on how these doctrines protect individual rights against state actions, particularly through the lens of the 14th Amendment.

Initially, before 1947, these doctrines were unified and centered on economic rights. However, significant developments occurred post-1947, particularly with Justice Hugo Black's idea of "total incorporation," suggesting that the Bill of Rights should apply to the states, which the Supreme Court did not fully adopt. Instead, the Court established "selective incorporation," applying clauses of the Bill of Rights to the states gradually through various decisions from 1948 to 1971.

The revival of substantive due process in the 1960s marked a shift toward protecting rights related to privacy and autonomy, particularly in relation to contraception and abortion. The paper highlights pivotal Supreme Court cases, including "McDonald v. City of Chicago" (2010), which incorporated the Second Amendment against states and restricted state power regarding gun laws, contrasting this with the recent "Dobbs v. Jackson" (2022) decision that removed federal abortion protections.

The author critiques the current judicial approach favoring enumerated rights under incorporation doctrine (like gun rights) while limiting unenumerated rights (like abortion), arguing this leads to arbitrary distinctions and shifts power from elected legislatures to federal courts. Throughout, the text points out the inconsistency and potential for rights, such as the right to bear arms, which might not universally meet the criteria for fundamental rights recognized by international human rights standards.

Finally, the paper concludes that the frameworks for determining which rights are fundamental could benefit from an approach that includes international human rights law, to provide a more objective basis for decision-making in contentious areas like gun rights and abortion.