

The Constitution, Incorporated

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

One very intriguing case on the Supreme Court’s 2018-2019 docket is unlikely to make big headlines or be featured on the Sunday news shows. In fact, it’s likely you’ll only hear about it from this podcast!

Timbs v. Indiana illustrates a phenomenon that even lawyers can forget: that the Constitution’s first 10 amendments (commonly known as the “Bill of Rights” and including freedom of speech, press and religion, protection against unreasonable searches and seizures, and other important civil- and criminal-rights protections) do not on their own terms apply to state and local governments. Instead, the 1791 Bill of Rights only sought to constrain the *federal* government.

Until the late 1800’s, the extent to which a state or local government couldn’t suppress speech or religious freedoms or abridge other Bill-of-Rights-type protections was generally left up to each state’s constitution and laws. Beginning in 1894, however, the Supreme Court has decided a series of cases holding that particular constitutional protections are “incorporated” and applied to state and local governments under the Civil-War-era 14th Amendment’s requirement that state and local governments provide “due process of law.”

Because the Court’s approach to determining which Bill of Rights provisions are essential to “due process” proceeds right-by-right, the process is called “selective incorporation.” I joke that the process should really be called “not-very-selective” incorporation, because at present almost all Bill of Rights provisions have been applied to state and local governments.

Timbs v. Indiana involves one of the few rights the Court has yet to rule on. Along with its better-known ban on “cruel and unusual” punishments – which was applied to the states in 1962 -- the 8th Amendment also prohibits levying “excessive fines” against convicted criminals. In deciding whether it was constitutionally “excessive” for Indiana to seize a truck used by convicted-heroin-dealer Timbs, the Court will confront the difficult threshold question Bill-of-Rights-incorporation cases always raise: what yardstick should the Court use to measure whether protection against excessive fines is so essential that “due process of law” would be incomplete without it?

The last big incorporation case was in 2010. In *McDonald v. City of Chicago*, a bare majority of justices surprised decades of observers by finding that the Second Amendment ban on abridgment of the “right to bear Arms” applied to state and local governments. This launched a new round of litigation over state and local gun-control laws.

In his opinion in that case, Justice Alito noted that “the Court [has] used different formulations in describing the boundaries of due process.” Alito’s opinion referenced at least five different formulations, including “immutable principles of justice which inhere in the very idea of free government,” rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and protections that are “the very essence of a scheme of ordered liberty.”

With these varying and subjective formulations, it’s easy to see why parsing which Bill-of-Rights protections are essential enough to bind state and local governments generates its share of controversy. It is difficult for the justices to avoid the appearance that the answer ultimately boils down to judicial policy preferences and the personal values of the jurists.

(By the way: The modern Court has engendered even more controversy by using similarly value-laden standards to determine that some implied privacy rights like abortion choice are “fundamental”, thus deserving especially strong judicial protection, and that some rights are not fundamental (such as physician-assisted suicide).

Against this backdrop, it will be very interesting to see how the justices determine *which* flavor (or flavors) of selective incorporation apply and what the correct answer is under the chosen approach(es).

Stay tuned...