TIMBS

V.

STATE OF INDIANA

Brief for the Petitioners

Max Franz & Larissa Chan

Gerrit Koepping A2

Lake Oswego High School

Lake Oswego, Oregon, 97034

Oral Argument: https://www.youtube.com/watch?v=Xl4rR66tETY&t=9s

QUESTION PRESENTED

SHOULD THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE BE INCORPORATED THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

Sarah Stillman & Sarah Stillman, Punishment Without Crime The New Yorker https://www.newyorker.com/magazine/2013/08/12/taken (2017) ……..... 8

Asset Forfeiture Abuse, American Civil Liberties Union, https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse (last visited Feb 18, 2019) ……..... 8

"Congress Debates the Fourteenth Amendment (1866).", Congress Debates the Fourteenth Amendment (1866) The Columbia Encyclopedia, 6th ed (2019), https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/congress-debates-fourteenth-amendment-1866 (last visited Feb 15, 2019) ……..... 9, 10

Cong. Globe, 39th Cong., 1st Sess. (1866) ……..…..... 10, 11, 12, 13

Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871) ……..……. 10

BACKGROUND

In 2013, Tyson Timbs was arrested for buying and transporting heroin between Marion and Richmond, Indiana using his 2012 Land Rover LR2. Two years later, Timbs pled guilty to charges of dealing and conspiracy to commit threat, to which he paid subsequent fees to the state. After being criminally charged, Timbs was sued by a private law firm, on behalf of the state, who sought forfeiture of Timbs's Land Rover. The forfeiture was refused, however, when the trial court and Indiana Court of Appeals stated that the action was a violation of the Excessive Fines Clause of the Eighth Amendment because the forfeiture was deemed grossly disproportionate to the weight of Timbs's offense. The Indiana Supreme Court ruled to overturn the trial court and the Indiana Court of Appeals, reversing their statement and ruling that the Excessive Fines Clause does not apply to the states.

SUMMARY OF ARGUMENT

Civil Forfeiture is a Threat to Liberty.

> In civil forfeiture, property is seized and held by the state. The property owner must prove their property was not involved in a crime by a preponderance of evidence in order for it to be returned.
>
> The legal environment is so permissive of civil forfeiture that arbitrary seizure has become a means through which large portions of law enforcement perpetuate and fund themselves. The state's dependence on the seizure of property through questionable means from Citizens for its functioning constitutes a threat to the liberty of the American people.

A diligent textual and historical understanding of the Fourteenth Amendment leads to the conclusion that the Privileges or Immunities Clause is Best Suited to incorporate protections of the Bill of Rights

> The antebellum interpretation of the Privileges and Immunities Clause of Article IV, Section 2 was inconsistent. In the absence of a definitive meaning of Article IV's Privileges and Immunities Clause, the Fourteenth Amendment's Privileges or Immunities Clause should be evaluated based on the intent of its authors.
>
> Representative John Bingham, in the Congressional Debates surrounding the Fourteenth Amendment's ratification, specifically states that the purpose of the Fourteenth Amendment is, essentially, to incorporate the Bill of Rights against the states. Bingham, a principal author of the Privileges or Immunities Clause, did everything he could to ensure this came to pass, even

rewriting his original draft of section 1 to ensure the privileges or immunities clause would be interpreted to apply the bill of rights, including the Excessive Fines Clause, to the states.

The constant pursuit of Reconstruction Congress was to protect civil rights from the states. This contradicts Justice Miller's interpretation in the *Slaughterhouse Cases* that incorporation through the Privileges or Immunities Clause was not intended in the Fourteenth Amendment. Because *Slaughterhouse* so flagrantly disregards the intent of the Fourteenth amendment, it should be abandoned or overturned.

The language of the Excessive Fines Clause of the Eighth Amendment demands a substantive, rather than procedural, protection that must be provided through the Privileges or Immunities Clause of the Fourteenth Amendment.

The Due Process Clause of Fourteenth Amendment ensures that none are to be deprived of life, liberty, or property without fair judicial proceedings.

The Excessive Fines Clause cannot be incorporated using this procedural protection, as the language of the Due Process Clause of the Fourteenth Amendment states, "nor excessive fines imposed," which grants a substantive protection against excessive fines. Incorporation of the Excessive Fines Clause of the Eighth Amendment through the Due Process Clause of the Fourteenth Amendment, therefore, would necessarily rest on the basis of Substantive Due Process.

Substantive Due Process is an inappropriate method for incorporation of protections of the Bill of Rights, including the excessive fines clause. Justice Thomas' concurrence in *Chicago v. Mcdonald* and the court's explications in *Planned Parenthood v Casey* point out the contradictory nature of Substantive Due Process. Incorporating the Eighth Amendment this way would be another heinous misuse of the Due Process Clause.

ARGUMENT I. CIVIL FORFEITURE

BECAUSE OF ITS NATURE AND GROWING TREND OF ABUSE, CIVIL FORFEITURE IS A THREAT TO LIBERTY

Civil forfeiture occurs when the government seizes property suspected of being involved in a crime (Stephanie Jurkowski, Civil Forfeiture LII / Legal Information Institute (2017), (last visited Feb 18, 2019)). These *in rem*, or against the property, proceedings do not require criminal charges to be filed against the owner of the property *Id*. This distinction is important because it allows the government to conduct the forfeiture in a civil trial and avoid strongly worded mandate for presumption of innocence in *Coffin v. United States* that "[presumption of innocence is] axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law" (*Coffin v. United States, 156 U.S. 432, 453 (1895))*. Despite this fantastical notion of punishing objects, the owner is still deprived of his property rights. After seizure, the property owner "must prove that the property was not involved in nor obtained as a result of illegal activity" in order for the property to be returned *Jurkowski, Supra*.

This legal environment has allowed civil forfeiture to play an ever increasing role in policing. A US Attorney General once boasted "It's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation" (*Sarah Stillman & Sarah Stillman, Punishment Without Crime The New Yorker (2017)).* The Police' use of these dubious procedures for a large portion of their funding is dangerous. Institutions, by their nature, seek to perpetuate themselves. The fact that the police can use forfeitures as a means of self-perpetuation is a threat to to private property rights. The amount of property taken through civil forfeiture has been increasing year over year, and the property disproportionately comes from minorities and the poor (Asset Forfeiture Abuse, American Civil Liberties Union, (last visited Feb 18, 2019)).

Because of the threat civil forfeitures pose to our rights, they constitute a threat to American Liberty and must not be allowed to continue.

ARGUMENT II. PRIVILEGES OR IMMUNITIES CLAUSE

A DILIGENT TEXTUAL AND HISTORICAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT LEADS TO THE CONCLUSION THAT THE PRIVILEGES OR IMMUNITIES CLAUSE IS BEST SUITED TO INCORPORATE PROTECTIONS OF THE BILL OF RIGHTS

Though the application of the Privileges or Immunities Clause of the Fourteenth Amendment has essentially been eradicated by Supreme Court precedent, there still remains a historical and textual grounding for its importance and appropriateness as a means of incorporation over the Due Process Clause of the Fourteenth Amendment.

Antebellum case law did not provide a consistent definition for the Privileges and Immunities described in Article IV, Section 2. Clause 1 reads, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States” (U.S. Const. art. IV, § 2, cl. 1.). In *Corfield v Coryell,* the Privileges and Immunities of Citizens mentioned here were interpreted by a circuit court judge to include things like “The right of a citizen of one state to pass through, or to reside in any other state… to claim the benefit of the writ of habeas corpus… and an exemption from higher taxes or impositions that are paid by the other citizens of the state” (Corfield v. Coryell: (C.C.E.D. Pa.) 6 Fed. Case 546, 551-552 (No. 3230) 1825). Significantly, the ruling in *Corfield* declined to include the rights enumerated in the Bill of Rights amongst the Privileges and Immunities of Citizens. There can be little doubt that *Dred Scott v Sandford*, in which Justice Taney writes that “the Rights and Privileges of the Citizen are regulated and plainly defined by the Constitution itself” before listing protections of the Bill of Rights among those Privileges (specifically including Free Speech, Right of Petition, Free Exercise, and Immunity from Anonymous Witnesses amongst others), was in the front of drafters’ minds when crafting the Fourteenth amendment (Dred Scott v. Sandford, 60 U.S. 393, 449-450 (1856)). These rulings contradict one another in their interpretations of the Privileges of Citizenship, though *Scott* does not overturn *Corfield.* This demonstrates an ambivalence as to the meaning of Privileges and Immunities on the part of the justice system *prior* to the Fourteenth amendment.

In lieu of an authoritative declaration on the meaning of the ‘Privileges and Immunities’ guaranteed by Article IV, we must look to the intent of the Fourteenth Amendment’s authors to determine the meaning and scope of the Privileges or Immunities Clause of the Fourteenth Amendment. The congressional debates surrounding the passage of the Fourteenth Amendment show that its authors intended for the Privileges or Immunities Clause to incorporate the Bill of Rights against the states. Representative John Bingham (R-OH), who helped draft Section 1 of the Fourteenth Amendment, describes it as “a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of the Union,” and states during the debates that “[the Fourteenth amendment] is to apply to other states also that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution” (*"Congress Debates the Fourteenth Amendment (1866)."*, *Congress Debates the Fourteenth Amendment (1866)* The Columbia Encyclopedia, 6th ed (2019)). Bingham emphasizes the application of the Bill of Rights over the states, delineating that “the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows

Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all" (*Id*). This idea that the federal government would restrict state action that violates a person's civil rights and liberties was a radical attitude at the time. Bingham represented this transformative mindset, calling the current state of affairs a 'defect' and demanding more control over the states through section 1 of the Fourteenth Amendment *Id.*

Representative Bingham was the principal author of Section 1 of the Fourteenth Amendment and wrote an original draft that was later changed in order to better serve Bingham's goals for full incorporation. This original draft of the section read "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property" (Cong. Globe, 39th Cong., 1st Sess. 1034 (1866)). Bingham intended that the Fourteenth Amendment should "not transfer the laws of one State to another State," but should "secure to the citizens of each State all the privileges and immunities of the citizens of the United States in the several states" (Cong. Globe, 39th Cong., 1st Sess. 1095 (1866)). After receiving critique regarding the clarity of his original draft from a fellow congressman, Bingham became convinced that "Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them" (Cong. Globe, 39th Cong., 1st Sess. 1095 (1866)) because the courts would be unwilling to go beyond the very minimum of what the constitution could be construed to demand.

To this end, Bingham wrote a more clear and explicit version that became Section 1 of the Fourteenth Amendment. Beyond collegial critiques, Bingham's examination of the case *Barron v. Baltimore* (32 U.S. (7 Pet.) 243 (1833)) also prompted him to revise his draft, which read "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" (U.S. Const. Amend. XIV § 1). The language was altered as to address the court's finding in *Barron v. Baltimore* that "[h]ad the framers of [the bill of rights] intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention" more explicitly (Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871) (quoting *Barron*, *Id*. at 243)). With this consequence in mind, Bingham took great care to specifically delineate the limiting effect of the Fourteenth Amendment on the states. Every sentence in Section 1 was crafted with intent, the intent to extend federal power over the states. To ignore any aspect or nullify any meaning of the amendment is an egregious betrayal of its intent.

Among what Bingham considered “Privileges or Immunities” was the Bill of Rights: “Gentlemen admit the force of provisions in the Bill of Rights, that the citizens of the United States shall be entitled to all the Privileges and Immunities of citizens of the United States in the several States” (Cong. Globe, 39th Cong., 1st Sess. 1089 (1866)). The amendment, under Bingham’s explicit intent, then “arm[s] the Congress [...] with the power to enforce the Bill of Rights as it stands in the Constitution [...]” (Cong. Globe, 39th Cong,, 1st Sess. 1088 (1866)), including the Excessive Fines Clause of the Eighth Amendment. Senator Jacob Howard (R-MI), in his speech to the Senate about the Fourteenth Amendment, similarly interpreted the scope of the definition of Privileges or Immunities, concluding that the phrase meant “the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; [...] here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, [...] some by the first eight amendments of the Constitution” (Cong. Globe, 39th Cong., 1st Sess. 2765 (1866)). Both Bingham and Howard represent the will of the draftees and the intent of the Fourteenth Amendment to wield the Bill of Rights against the states through the Privileges or Immunities Clause. The Excessive Fines Clause, as a result, is also applied to the states

If the actions of Congress during the period of early reconstruction following the elections of 1866 were to be summed up, they could be aptly described as sharing a singular purpose: protection of civil rights and liberties *from* the states. As they seized the reigns of reconstruction from President Johnson, who they believed was allowing the South to reestablish racial control, the 39th Congress passed "[a]n Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their vindication" (April 9, 1866 14 Stat. 27), better known as the Civil Rights Act of 1866. In 1868, the Fourteenth Amendment, which granted citizenship for African Americans, promised equal protection of the law, and gave Congress enforcement power for these transformative provisions, amongst others, was adopted (see U.S. Const. Amend. XIV § 1, 5). In 1867, Congress divided the rebellious states into military districts to ensure the rights of African Americans would be protected, even providing for the trial of civilians in military courts (see March 2, 1867, 14 Stat. 428-430). Through the passage of these acts and amendments, Congress demonstrated through action that it was bent on ensuring the protection and security of Civil Rights and liberties from *State* violation through *Federal* law.

The Fourteenth Amendment’s Privileges or Immunities Clause states “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” (U.S. Const. Amend. XIV, § 1). In the *Slaughterhouse* decision, Judge Miller asks “Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of… civil rights… from the States to the Federal government?... was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?”

(Slaughterhouse Cases, 83 U.S. 36, 77 (1872)). As previously discussed, the purpose of the Fourteenth Amendment according to Bingham was to "arm the Congress… with the power to enforce the Bill of Rights as it stands in the Constitution" for the purpose of protecting Civil Rights and Liberties (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)).

Disregarding the original intent of the Reconstruction Congress, Justice Miller improperly "draw[s] from the consequences" rather than the text to make his decision in *Slaughterhouse* (Slaughterhouse Cases, 83 U.S. 36, 78 (1872)). Miller expresses fears that striking down the Louisiana statute would make the court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights." *Id.* Pondering this "departure from the structure and spirit of our institutions" that would produce "[radical] changes in the theory of the relations of the State and Federal governments to each other and of both these governments to the people," Miller balks-- concluding that "no such results were intended by the Congress which proposed these amendments," *Id* and writing a decision that doctrinally castrates the Fourteenth Amendment's core protection.

The *Slaughterhouse* decision wholly disregards the intent of the Fourteenth Amendment. Reflective of a desire to preserve the status quo and avoid the radical change demanded by the Fourteenth Amendment, the decision has left the Amendment's text mutilated for almost 150 years. Despite *Slaughterhouse,* the Fourteenth Amendment has *still* made the Federal Courts "a perpetual censor upon all legislation of the States" (See *Planned Parenthood v. Casey, Brown v. Board of Education,* and countless others) and has dramatically changed "the theory of the relations of the State and Federal governments to each other and both… to the people." *Id.* As a result, Miller's worst fears for the transformative impact of the Fourteenth Amendment's text are a fait accompli. The only reason this court still adheres to *Slaughterhouse* is an attachment to precedent. Such an attachment is important-- common law is the currency of our legal system. This acknowledged, clinging to a 150 year old ruling that *mocked* the intended meaning of the Privileges or Immunities Clause of the Fourteenth Amendment and paralyzed the progress of Civil Rights and liberties rings patently unwise.

ARGUMENT III. DUE PROCESS CLAUSE

THE LANGUAGE OF THE EXCESSIVE FINES CLAUSE DEMANDS A SUBSTANTIVE RATHER THAN A PROCEDURAL PROTECTION THAT MUST BE PROVIDED THROUGH THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE

The Due Process Clause of the Fourteenth Amendment states “nor shall any State deprive any person of life, liberty, or property, without due process of law” (U.S. Const. Amend. XIV § 1). Bingham (R-OH), the principal drafter of Section 1, assumed its Due Process Clause, though applied to the states, would have an identical meaning to the Fifth Amendment’s Due Process Clause: “nor be deprived of life, liberty, or property, without due process of law” (U.S. Const. Amend. V). Indeed, as Justice Frankfurter would cogently note later, “[t]o suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection” (*Malinski v. New York*, 324 U.S. 401, 415 (1945), (Frankfurter, J., concurring). When Bingham was asked what was meant “by ‘due process of law,’” he replied that “the courts had settled that long ago” (Cong. Globe, 39th Cong., 1st Sess. 1089 (1866)). A plain textual reading of the clause “nor be deprived of life, liberty, or property, without due process of law” (U.S. Const. Amend. V, see also *Planned Parenthood v. Casey,* 505 US 833, 847 (1992)) leads us to conclude that none can be deprived of “life liberty or property,” except by appropriate judicial proceedings.

The excessive fines clause cannot be incorporated using this procedural protection. Procedural protections incorporated through the Due Process Clause of the Fourteenth Amendment, such as the Sixth amendment’s guarantee of a “speedy and public trial” (U.S. Const. Amend. VI), merely ensure a procedure is followed before deprivation of life, liberty or property (*See Klopfer v. North Carolina, 386 U.S. 213, 386 (1967)).* While Due Process is required for the issuance of a fine, the language “nor excessive fines imposed” grants a substantive rather than a procedural protection against excessive fines. In other words, the language of the clause provides that under no circumstances can an “excessive fine” be issued (U.S. Const. amend. VIII), just as the first amendment affirms that we cannot “abridge the freedom of speech” (U.S. Const. Amend I). Because this protection is substantive rather than procedural, incorporation of the Excessive Fines Clause of the 8th Amendment through the Due Process Clause of the Fourteenth Amendment would have to rely on the doctrine of Substantive Due Process.

Substantive due process, a doctrine that is used to secure so many of our fundamental liberties, is oxymoronic. “Substance” and “process” have contradictory meanings. This court concedes that “a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty,” but recalls that procedural protections “have in this country ‘become bulwarks also against arbitrary legislation’” *(Planned Parenthood v. Casey,* 505 US 833, 847 (1992)). In plainer terms, *procedural* protections have been used to adjudicate *substantive* limits on governments. The phrase “Substantive due Process” is an unholy matrimony of two terms with as much internal consistency as “honest thief,” “peacekeeper missile,” or “wise fool.” As Justice Thomas notes in concurrence, Substantive Due Process is “a legal fiction. The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains

credulity for even the most casual user of words" (*Chicago v. Mcdonald, 561 US 742* (2010) (Thomas, concurring).

This use of a procedural protection to protect substantive rights is problematic because the text of the Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const. Amend. XIV § 1) says nothing of substantive protections. The court has used this faulty doctrine of substantive procedural protection in the past to incorporate essential protections-- among them freedom of speech (See *Gitlow v. New York*, 268 U.S. 652 (1925)) and symbolic protest (See *Texas v. Johnson* 491 US 397 (1989)). The persistent presence of a fictitious and self contradictory doctrine at the heart of American Civil liberties protection, despite alternative avenues firmly rooted in text and intent, undermines the legitimacy of the American legal system by providing ammo for cynics who would claim judges rule however they feel rather than how the law demands.

CONCLUSION

Stripped of the doctrinal mirage that obfuscates its meaning, the Fourteenth Amendment's Privileges or Immunities clause was *clearly* the instrument meant to incorporate the substantive protections of the Bill of Rights against the states-- including the Eighth Amendment's Excessive Fines Clause. We respectfully ask that the court abandon its erroneous *Slaughterhouse* precedent and proceed with incorporation of those substantive portions of the Bill of Rights using the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause.