
IN THE
SUPREME COURT OF THE UNITED STATES

TIMBS

V.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS .

BRIEF OF THE RESPONDENT
LENA DYAL AND LANE DUCKETT

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QUESTION PRESENTED

Should the Eighth Amendment Excessive Fines Clause be incorporated through the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment?

STATEMENT OF ARGUMENT

The Eighth Amendment statement, “...nor excessive fines imposed..”has yet to be incorporated on the state level, therefore people have only protection against excessive fines on the federal level. The case *Timbs v. State of Indiana* clearly outlines that constitutional provisions against excessive fines would be best applied under the Due Process clause, and ineffective if

applied under the Privileges or Immunities clause. *The Slaughterhouse Cases* rendered the Privileges or Immunities clause essentially impotent due to Judge Miller's assertion that it did not apply to substantive rights. For example, the case *Wolf v. Colorado* ruled that evidence obtained in violation of the fourth amendment could be included in trial (and was later overturned by *Mapp v. Ohio*). It had a greatly diminished chance of success because protections from search and seizures are, by their very nature, procedural rights and very difficult to attack. The Since the *Slaughterhouse Cases* were decided in 1873, each and every incorporated right has used the Due Process clause. Prior to the *Incorporation Doctrine*, the Supreme Court decided in *Barron v Baltimore* that the rights enumerated in the Bill of Rights applied only to federal government and not the states. Since the Fourteenth Amendment and the subsequent development of the *Incorporation Doctrine*, the sentiment of the Court is to slowly incorporate rights from the Bill of Rights to the states under the Due Process Clause. The Due Process Clause has precedent and a strong legal foundation to protect the rights of individuals, not just citizens. Because of this, we should incorporate the Eighth Amendment Excessive Fines Clause under Due Process as it it more inclusive and protective.

SUMMARY OF CASE

After the petitioner Timbs was charged with a class B felony (two counts of dealing a controlled substance, one of which was dropped in a plea deal, and one count of conspiracy to commit theft) he agreed to pay multiple fees and the appropriate fine for his crime. He served a year of house arrest, and is continuing to serve his five years on parole. However, several months after he was sentenced, a civil case was leveled against him to force him to forfeit a truck valued at \$42,058.32 just two years before. The judge of the bench trial found the states actions to be egregious under the excessive fines clause. After appeal, the Indiana Supreme Court found that because it was unincorporated, the clause did not hold. The Supreme Court is now considering incorporating excessive fines in *Timbs v. State of Indiana*. Whether they use the due process clause or the privileges or immunities clause is yet to be decided.

ARGUMENTS

THE WORD ‘PERSONS’ IN THE DUE PROCESS CLAUSE LIMITS THE POWERS OF STATE GOVERNMENTS

The language of the Due Process Clause is far more inclusive than that of the Privileges and Immunities Clause. Having the prohibition of excessive fines and bail apply to ‘any person’ rather than ‘citizens’ would be in line with the general sentiment of the purpose of the due process clause. During the first *Continental Congress*, it was John Dickinson’s intention to enumerate the privileges and immunities clause in the *Articles of Confederation* to “the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizen in the several states...” Though this intention was lost in the drafting of both the Articles and the Constitution, and the Privileges and Immunities clause became tailored to “citizens”. Every person under US jurisdiction should have the right to be protected from excessive fines, non-citizens being some of the most vulnerable people in the country. When considering incorporation we should also consider who benefits from each side; under the Privileges or Immunities clause, only citizens would be protected from excessive fines, whereas under Due Process no one on US soil can be taken advantage of by the government. This would include visa holders, students and travellers as well as immigrants who are waiting in the long citizenship line. No one should be excluded from such a basic right, especially people who are so vulnerable to governmental discrimination as it is. The case *Dred Scott v. Sandford* is a prime example of the consequences for non-citizens. The ruling held that, regardless of servitude status, African Americans could not be citizens. As such, the population had no capability to sue or vote, and no possible way to remedy this under the system. Even though the ruling was deemed invalid after the Fourteenth Amendment was passed, it demonstrated the terrifying possibility of non-citizens being outside the protection of the law. Rights incorporated under the Due Process clause will never run into this issue, regardless of what may happen in the future. The language “all persons” is critical to the effectuality of the intent behind incorporating rights.

THE DUE PROCESS CLAUSE PROTECTS MORE VERSATILE PROCEDURAL RIGHTS

Because the Due Process clause is procedural at its heart, the use of these cases in future arguments would give the incorporated excessive fines right a much greater chance of holding at the state level. The Incorporation Doctrine is just one example of this, applying one reasoning to the first ten amendments. Justice Clarence Thomas reasoned; “the Fourteenth Amendment’s Due Process Clause is not a secret repository of substantive guarantees against unfairness”. The clause, however, is a procedural protection and therefore more likely to hold at the state level. Procedural rights are far more protective than substantive rights, as seen in *Wolf v Colorado*. This inclusivity would not allow federal overreach, further protecting anyone under US

jurisdiction by granting access to rights incorporated from the Bill of Rights. An example of federal overreach being trumped by the Due Process Clause can be seen in *New York v US*, in which Congress enacted a bill to coerce states into controlled radioactive disposal. The bill was found unconstitutional because it violated the Tenth Amendment. However, because it was a violation of procedural instead of substantive rights, the case facts regarding waste disposal were irrelevant to the fundamental violation of the procedure to take the right of the Tenth Amendment away. This demonstrates the clear advantage of procedural rights, and the potential reach of protection of procedural rights founded in the due process clause. When the standard to take a right away has nothing to do with special circumstances and only the black and white of ‘did you follow the rules or not’, it limits the government’s ability to ignore procedure and focus on circumstance. Another advantage of using the due process clause is the versatility of application. Legal questions can be answered more easily because the reasoning of the due process clause is prescriptively universal. This means that the reasoning of the due process clause is not vulnerable to misinterpretation or changing tides of opinion in the courts. The specificity that has been honed after almost one hundred fifty years of application allows for the due process clause have exceeding amounts of precedent to rely on. This is especially important when considering the aforementioned importance of explicitly inclusive language.

PRECEDENT ALLOWS FOR INCORPORATION UNDER DUE PROCESS

The Due Process Clause holds favor in terms of precedent, creating an incredibly strong legal foundation to rest on, whereas the Privileges or Immunities Clause falters. For example, many rights that citizens consider essentially sacred were once unincorporated and little known. For example, the holding in *McDonald v. Chicago* incorporated the Second Amendment right to keep and bear arms through the Due Process clause. *Gitlow v. New York* also used the Due Process clause to rule, in 1925, that the First Amendment right to free speech was legally protected. Politically, America would be in an extremely different place if not for the incorporation of rights such as these, once unheard of by the general public, through the Due Process Clause. With the history and precedent that these landmark cases provide, the Due Process Clause has a considerably more trustworthy foundation. Allowing excessive fines to follow in the footsteps of rights such as these would lead to a more protected form of ‘higher law’. The Excessive Fines Clause truly reaches its Constitutional power in that it cannot be overruled by the states, and takes first priority in terms of protection. Until this clause is as protected as other rights enumerated in the Bill of Rights, it will remain less protected and more vulnerable to future attack. In *Palko v Connecticut*, Justice Cardozo introduced the concept of the “scheme of ordered liberty.” He explained that certain rights were held fundamental to the polity and that their quintessential meaning lay at the, “base of all our civil and political institutions.” To incorporate a right was to decide that it finally held enough weight to qualify under these terms. The only way to determine this status was to assess the needs of the current polity, and

understand the incorporation of an individual right's impact. Under this logic, the principle of slow, piecemeal incorporation came alive. The Excessive Fines Clause has finally risen to a level of importance which merits incorporation. *Timbs v. State of Indiana* demonstrates the costs of a polity without it, and the individual right to liberation from excessive fines critical role in justice.

THE PRIVILEGES AND IMMUNITIES CLAUSE IS IMPOTENT, USING IT FOR INCORPORATION WOULD BE INEFFECTIVE

The Privileges or Immunities clause is legally impotent due to the rulings in the *Slaughterhouse Cases*; this alone would make it harder to redefine what Privileges or Immunities means. In the *Slaughterhouse cases*, it was determined that the Privileges or Immunities Clause applies only to freedmen being protected from state discrimination. The Privileges or Immunities Clause originates from the *Articles of Confederation*, giving citizens of the United States the same rights among all the states (a Connecticut farmer could purchase land in Virginia). Madison defines the clause in *Federalist 42*, stating: "Those who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter; that is, to greater privileges than they may be entitled to in their own State..." Historically the definitions of the Article IV section ii Privileges and Immunities and the Fourteenth Amendment Privileges or Immunities Clauses have been in line with Madison's thinking, but if the Excessive Fines Clause is incorporated under this umbrella, it will subsequently change both definitions. These clauses in both sections of the Constitution have to mean the same thing according to the *Slaughterhouse Cases*, which suggests that the true meaning of both clauses is in line with Madison's thinking in *Federalist 42*. The definition is specific to intrastate discrimination, as the clause's origin is in the *Articles of Confederation* when people were not guaranteed the rights to own property or operate businesses if they were not a citizen of that state. Unfortunately this clause is bound in too much history and too narrow a definition to be applicable today. Ruling in favor of the Privileges or Immunities Clause would be an absolute mess to sort through because of the requirement to redefine not only what the clause in the Fourteenth Amendment means, but also the same phrase used in the body of the Constitution. If this occurs, there could be an effect on the impact and future interpretation of the Privileges and Immunities enumerated in Article IV, section 2 of the Constitution. There is also the issue of having to violate *Stare Decisis* in order to change the meaning of the clause. What would it mean to accommodate a new definition to the legal standard being argued here? The same clause would repeat itself in Article IV Section ii and be too specific a standard to mean anything in the body of the Constitution. This would create a whole other mess of legal questions and leave the phrase utterly meaningless except in applying to excessive fines. When it comes

down to it, Privileges or Immunities does not have the strength or universality of the Due Process Clause because it is bound to an entirely different phrase and required to have a single definition.

Conclusion

The Due Process clause is the only effective way to incorporate the Excessive Fines Clause. If we are to follow rules of *Stare Decisis* and the *Incorporation Doctrine*, Due Process will be far more effective and realistic than incorporating through the long dead Privileges or Immunities Clause. Furthermore, the Due Process Clause has inherently more inclusive language than the Privileges or Immunities Clause, wouldn't we rather the prohibition of excessive fines apply to 'all people' rather than 'citizens'? The Due Process Clause has the strength of multitudes of Supreme Court decisions to give it a strong foundation, whereas for nearly one hundred fifty years the Privileges or Immunities Clause has had virtually no meaning. No incorporation case has won using the Privileges or Immunities clause because it's definition is too narrow and is tied to another article of the Constitution altogether. The clause's origin is in the *Articles of Confederation* where it had a similarly narrow definition of protecting individuals from discrimination between states. Changing this definition to accommodate the legal question being argued today would also call into question the validity of Supreme Court decisions going all the way back to the *Slaughterhouse Cases in 1873*. Alternatively Due Process has won citizens nearly every right in the first Ten Amendments. Precedent and history have left the Due Process Clause the strongest possible clause to incorporate the protection against excessive fines.