

In the Supreme Court of the United States
February Term, 2019

TYSON TIMBS, PETITIONER
v.
STATE OF INDIANA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SUPREME COURT OF INDIANA

RESPONDENT'S OPENING BRIEF

Eric Snell & Peter Di Re,
Counsel for Respondent

Lake Oswego High School
Room 213
Lake Oswego Oregon, 97034
(503) 534-2313

Oral argument: <https://youtu.be/vWkNszKjQA0>

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 14th Amendment?

TABLE OF CONTENTS

Question Presented 1

Table of Authorities 3

Statement of Argument 4

Arguments 4

- The Excessive Fines Clause is a procedural protection 4
- Justice Thomas’s reasoning in *McDonald v. Chicago* does not apply to this case 6
- Incorporation via the Privileges or Immunities Clause would be inconsistent with this court’s previous rulings extending legal protections to all persons 9

Conclusion 11

Table of Cited Authorities

Cases

<i>Austin v. United States</i> , 509 U. S. 602 (1993)	4
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	10
<i>Lawrence v. Texas</i> , 539 U. S. 558 (2003)	7
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010)	6, 8
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	10
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	9
<i>Robinson v. California</i> , 370 U. S. 660 (1962)	10
<i>Saenz v. Roe</i> , 526 U.S. 489 (1999)	9
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998)	4, 5, 7, 8
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649 (1898)	9
<i>Waters-Pierce Oil Company v. Texas</i> , 212 U.S. 86 (1909)	4, 5, 7, 9
<i>Zadvydas v. Davis</i> , 533 US 678 (2001)	9

Amendments

U.S. Const. amend. V	9
U.S. Const. amend. XIV	6, 9

State Law

Cal. Pen. Code § 374.4	5
Cal. Pen. Code § 337.2	5

Other Authorities

Henry Wheaton & William Beach Lawrence, <i>Elements of International Law</i> (1857)	
Superior Court of California - County of Sacramento, <i>How Fines are Calculated</i> https://www.saccourt.ca.gov/traffic/how-fines-are-calculated.aspx	
Julia Hollreiser & Benjamin Rodd, <i>Timbs v. Indiana / Legal Information Institute</i> (2018), https://www.law.cornell.edu/supct/cert/17-1091	
USSC Office of General Counsel, <i>Fines Under the Organizational Guidelines</i> (2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Organizational_Fines.pdf	
United States Sentencing Commission, <i>Organization</i> (2019), https://www.ussc.gov/about/who-we-are/organization	

STATEMENT OF ARGUMENT

As this Court has long held, the Excessive Fines Clause is a procedural protection. This Court defines an excessive fine as “so grossly excessive as to amount to a deprivation of property without *due process* of law” (emphasis added). Were the Excessive Fines Clause reexamined, this Court would find that it is still a guarantee of due process; federal and local jurisdictions have well-defined procedures to calculate fines, and hence an excessive fine is an overt deviation from this due process. The principal argument against incorporation through due process lies in the concept of substantive due process. As Justice Thomas writes in his *McDonald v. Chicago* concurrence, the Due Process Clause has been stretched beyond its original meaning. However, the argument against substantive due process does not apply to this case because the Excessive Fines Clause is a procedural protection rather than a substantive right, and thus fits within the narrow intended scope of due process. The understanding of the Excessive Fines Clause as procedural is supported by both historical consideration of the origins of the clause and a reading of Justice Thomas’s opinion in *United States v. Bajakajian*. Regardless, incorporation via Privileges or Immunities would extend the Excessive Fines Clause only to citizens, which would be inconsistent with other rights in the Bill of Rights, which extend to all people. The Excessive Fines Clause should be incorporated using due process, as this is consistent with precedent and the argument against substantive due process does not apply to this case.

ARGUMENTS

Under both *stare decisis* and an understanding of the current, formulaic nature of fine assessments, the Excessive Fines Clause is a procedural protection

This Court has long held that the protection against excessive fines is a procedural protection. This Court defines an excessive fine as a fine “so grossly excessive as to amount to a deprivation of property without *due process* of law” (emphasis added). *Waters-Pierce Oil Company v. Texas*, 212 U.S. 86 at 111 (1909). See, also, *Austin v. United States*, 509 U. S. 602, at 622-623 (1993), in which this Court adopted the standard of proportionality, and *United States v. Bajakajian*, 524 U.S. 321 (1998) in which the “grossly disproportionate” standard was adopted. Proportionality is determined by a court procedure that must consider the gravity of the offense as well as mitigating or aggravating factors (USSC Office of General Counsel), a concept reaffirmed by *U.S. v. Bajakajian* when it states that the respondent’s culture does not “mitigate the gravity of his offense.” *Id.*, at 338.

Were this Court inclined to reexamine the Excessive Fines Clause, it would find that the Excessive Fines Clause is a guarantee of due process. Standardized procedures are used to determine fines. The United States Sentencing Commission, or USSC, created in 1984 as an

independent agency of the judicial branch, routinely publishes and updates guidelines for determining fines for federal crimes (United States Sentencing Commission). The procedure uses a formulaic approach to calculate maximum and minimum fines, described in the USSC Guidelines Manual. As mandated in the 2016 primer on “Fines Under the Organizational Guidelines,” the court “first determines the total offense level by calculating the base offense level and any applicable enhancements” (USSC Office of General Counsel). An example process is provided: “if the base fine is \$85,000 and the culpability score is 5, the base fine is multiplied by 1.00 to determine the minimum fine and by 2.00 to determine the maximum fine, resulting in a guideline fine range of \$85,000 to \$170,000” *id.* Lastly, the primer instructs that courts must consider whether “there exists an aggravating or mitigating circumstance of a kind” that ought to have an influence on the fine, such as whether “the offense resulted in death or bodily injury, or involved the foreseeable risk of death or bodily injury (§8C4.2)” (USSC Office of General Counsel). This Court references the process set forth by the USSC in *U.S. v. Bajakajian*, reaffirming the role of procedure in determining a fine proportionate to a crime.

Local jurisdictions also employ written, standardized procedures to determine fines. *E.g.*, the Superior Court of California, County of Sacramento publishes a formula to determine traffic fines, also using the system of determining a base fine and undergoing additional assessments to determine the resulting total (Superior Court of California). Similar processes exist for other crimes. For the first conviction of littering in California, “A person, firm, or corporation... shall be punished by a mandatory fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000).” Cal. Pen. Code § 374.4. Horse racing has a maximum fine legislated by the California Penal Code, set at \$500. Cal. Pen. Code § 337.2.

While these laws appear to set substantive limits on fines, courts bear the responsibility of correctly applying these laws as well as considering mitigating or aggravating factors (USSC Office of General Counsel), and can impose fines greater than the “maximum” fine depending upon these mitigating or aggravating factors. As shown, the federal government and local jurisdictions both use well-established, formulaic processes to determine a fine proportionate to the crime. Hence, an excessive fine is an overt deviation from this due process used to determine a proportionate fine, whether it results from an incorrect application of the law or a failure to justly consider mitigating or aggravating factors. The protection against excessive fines laid out in the Excessive Fines Clause is therefore a guarantee of due process when determining a fine, a fact this Court stated in *Waters-Pierce Oil Co.*, in which it defined an excessive fine as “a deprivation of property without due process of law.” *Ibid.*, at 111.

With the understanding of the procedural nature of fine determinations and the *stare decisis* set out in *Waters-Pierce Oil Co.*, this Court must find that the Excessive Fines Clause is a procedural protection from breaches of due process. *Ergo*, the Excessive Fines Clause should be

incorporated using the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law” (U.S. Const. amend. XIV).

Justice Thomas’s reasoning in *McDonald v. Chicago* does not apply to this case, as the substantive right to keep and bear arms is fundamentally different from the procedural right in the Excessive Fines Clause; Justice Thomas himself refers to the Excessive Fines Clause as a due process protection in *United States v.ajakajian*

In *McDonald v. Chicago*, 561 U.S. 742 (2010), this Court held that the Second Amendment applies to states under the Fourteenth Amendment. While the plurality argued that the Second Amendment was incorporated via the Due Process Clause, Justice Thomas, in a concurrence, argued that the Second Amendment applies to states via the Fourteenth Amendment’s Privileges or Immunities Clause.

Justice Thomas writes in his concurring opinion in *McDonald v. Chicago* that “the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment ‘fully applicable to the States.’” *Id.*, at 3059. Thomas continues that he cannot agree, however, that it should be incorporated “through a clause that speaks only to ‘process’” because “the right to keep and bear arms is a privilege of American citizenship that applies through the... Privileges or Immunities Clause.” *Id.*, at 3059. Justice Thomas argues against the concept of substantive due process, stating that “any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court’s cases no claim it does.” *Id.*, at 3062. This Court, Justice Thomas notes,

came to conclude that certain Bill of Rights guarantees *were* sufficiently fundamental to fall within §1’s guarantee of ‘due process.’ These included not only procedural protections listed in the first eight Amendments, see, *e.g.*, *Benton v. Maryland*, 395 U. S. 784 (1969) (protection against double jeopardy), but substantive rights as well, see, *e.g.*, *Gitlow v. New York*, 268 U. S. 652, 666 (1925) (right to free speech); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (same). *Id.*, at 3061.

Justice Thomas railed against the “lack of a guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not,” wishing to return to the much clearer system of determining whether a right is substantive or procedural. *Id.*, at 3062. As a substantive right, the Second Amendment question posed in *McDonald v. Chicago* offered “an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.” *Id.*, at 3063.

The appellant proposes, as Justice Thomas does in *McDonald v. Chicago*, that the case before this Court presents an opportunity to reverse the determination of the *Slaughter-House Cases*, 83 US 36 (1873), and return meaning to the the Privileges or Immunities Clause by using it to incorporate the Excessive Fines Clause. The appellant may contend that the precedent set since *Slaughter-House* is an important consideration, but “not an inexorable command.” *Lawrence v. Texas*, 539 U. S. 558 at 577 (2003).

The question presented is whether the Excessive Fines Clause is a “substantive right,” or a “procedural protection.” Under *stare decisis*, it is clear that this Court has deemed the Excessive Fines Clause a procedural protection, as the government *may* impose fines, as long as it follows a fair, appropriate procedure:

The fixing of punishment for crime and penalties for unlawful acts is within the police power of the state, and this Court cannot interfere with state legislation in fixing fines, or judicial action in imposing them, unless so grossly excessive as to amount to deprivation of property without due process of law. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 at 111 (1909).

Yet, as *stare decisis* is “not an inexorable command,” the question shall additionally be tackled through two modes: first, a historical understanding of the origin of the Excessive Fines Clause, and, second, a reading of *United States v. Bajakajian*, 524 U.S. 321 (1998), a case considering the Excessive Fines Clause in which Justice Thomas himself authored the majority opinion.

The phrasing of the Eighth Amendment stems from the English Bill of Rights, passed in 1689, which reads that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Furthermore, “fines and forfeitures of particular persons before conviction are illegal and void,” a guarantee of a court procedure justifying the fine. These similar declarations each represent a concern for due process: the latter requires due process when assessing fines, as one must be convicted of the crime for which the fine is imposed, and the former requires due process when determining the amount of the fine.

In *U.S. v. Bajakajian*, the respondent failed to report that he was carrying money in excess of \$10,000 on an international flight. The government sought a forfeiture of \$357,144, the total amount the respondent was carrying. Justice Thomas, writing the majority opinion of *U.S. v. Bajakajian*, ruled in favor of the respondent, noting, “the maximum penalties that could have been imposed under the Sentencing Guidelines, a 6-month sentence and a \$5,000 fine, confirm a minimal level of culpability and are dwarfed by the \$357,144 forfeiture sought by the Government.” *Id.*, at 323. Justice Thomas continues that there was minimal harm done by the

respondent's actions, which were solely a reporting offense. Hence, no aggravating factor existed to justify the vast amount by which the \$357,144 fine exceeded the maximum fine of \$5,000.

Furthermore, Justice Thomas noted, the money could not be forfeited because the previous arguments in favor of the full forfeiture argued that the money was "instrumental" to the crime. Justice Thomas declared,

Because instrumentalities historically have been treated as a form of 'guilty property' forfeitable in civil *in rem* proceedings, it is irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for its excessiveness involves solely a proportionality determination. *Id.*, at 322.

This Court found that the law by which the government considered instrumentality was incorrectly applied. The true test for the fine's excessiveness did not include instrumentality, instead "solely a proportionality determination." The government had incorrectly applied the law. Hence, the excessive fine was a result of an unfairly applied statute, or, alternatively, a failure of due process. Furthermore, as previously mentioned, the excessive fine was a deviation from the procedure required because the previous courts failed to consider mitigating factors, such as that the respondent's actions caused "minimal harm."

Justice Thomas's argument against substantive due process in *McDonald v. Chicago* relies on differentiating substantive rights from procedural protections. Keeping in mind this distinction, Justice Thomas's arguments against substantive due process do not apply to this case because the Excessive Fines Clause, unlike the substantive right to keep and bear arms, is a procedural protection that fits under the limited scope of the Due Process Clause. Justice Thomas's own argument in *U.S. v. Bajakajian* illustrates that the excessive fine was a result of a lack of due process in considering proportionality (the respondent's actions caused minimal harm) and the applicable law (the concept of instrumentality did not apply because the forfeiture was punitive in nature). Likewise, precedent in *Waters-Pierce Oil Co.* and the historical concerns about due process with regards to fines in the 1689 English Bill of Rights all point to the same determination: the Excessive Fines Clause is a procedural protection. As a procedural protection, the Excessive Fines Clause fits into the narrow category of protections that must be incorporated using the Due Process Clause.

Indeed, the appellant seeks to use the Privileges or Immunities Clause in a way that Justice Thomas himself warns against:

We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The

majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights. *Saenz v. Roe*, 526 U.S. 489 at 527–28 (1999) (Thomas, J. dissenting)

Incorporation of the Excessive Fines Clause using the Privileges or Immunities Clause would ignore the distinction between substantive rights and procedural protections and simply replace substantive due process with “yet another convenient” judicial tool—perhaps to be termed “procedural privileges.” Instead, this Court must consider the key difference between *McDonald v. Chicago* and this case: the right to keep and bear arms is a substantive right, whereas the protection from excessive fines is a procedural protection.

Incorporation via the Privileges or Immunities Clause would apply the Excessive Fines Clause only to citizens, breaking with this Court's long standing precedent of extending procedural rights to all persons

One must also consider the impact of incorporation via the Due Process Clause versus using the Privileges or Immunities Clause. A key difference lies between the phrasing of the two clauses: the Due Process Clause refers to “any person,” whereas the Privileges or Immunities Clause refers to “citizens of the United States” (U.S. Const. amend. XIV). Incorporation using the Due Process Clause would extend the Excessive Fines Clause to all persons, while the Privileges or Immunities Clause would grant protections to only citizens.

Because the Eighth Amendment's Excessive Fines Clause does not include any stipulations about citizenship, incorporation via the Privileges or Immunities Clause would create an arbitrary qualification for the protections of the Eighth Amendment. Moreover, changing the “doctrinal basis of incorporation from the Due Process Clause to the Privileges and Immunities Clause would lead” to confusion over “which constitutional rights apply only to citizens” (Hollreiser and Rodd).

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) this Court ruled that the term “person” in the Fifth Amendment includes aliens residing the United States, a sentiment repeated in *Plyler v. Doe*, 457 U.S. 202 (1982). See, also, *Zadvydas v. Davis*, 533 US 678 (2001), in which this Court asserted that “the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.” As such, noncitizens have protection against any deprivation “of life, liberty, or property, without due process of law” (U.S. Const. amend. V), a right that encapsulates the Excessive Fines Clause, which protects from “a deprivation of property without due process of law.” *Waters-Pierce Oil Co.*, at 111. Hence, incorporation using the Privileges or Immunities Clause would create

inconsistent standards on whether noncitizens can be unilaterally deprived of property without reason.

Ignoring the other differences between the Excessive Fines Clause and the Due Process Clause, this Court is presented with an additional question: should noncitizens enjoy equal protection against excessive fines? As mentioned previously, *stare decisis* demonstrates that they must. Yet on a strictly hypothetical level, the answer is the same: a visa holder, as well as every other noncitizen, must enjoy the equal protection of the Eighth Amendment.

In 1854, Secretary of State William L. Marcy expounded upon the duty the federal government owes to noncitizens, especially those permanently living within the states:

This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and, if he breaks them, incurs the same penalties. He owes the same obedience to the civil laws. His property is, in the same way and to the same extent as theirs, liable to contribute to the support of the Government. In nearly all respects, his and their condition as to the duties and burdens of Government are undistinguishable. (Wheaton and Lawrence)

With this understanding of the rights owed to noncitizens, this Court has ruled that many legal protections apply to all people. Miranda rights apply to all persons equally, *Miranda v. Arizona*, 384 U.S. 436 (1966), as do the rights enumerated in the Fourth¹, Fifth², and Sixth Amendments³. *Habeas corpus* rights have been held to apply not only to noncitizens, but even to noncitizens on foreign soil. *Boumediene v. Bush*, 553 U.S. 723 (2008). The protections against cruel and unusual punishment, another clause of the Eighth Amendment, applies to aliens as well. *Robinson v. California*, 370 U. S. 660 (1962). As it is this Court's understanding and precedent that other sections of the Eighth Amendment apply to all people, limiting the Excessive Fines

¹ See *Aguilar v. Texas*, 378 U. S. 108 (1964) (warrant requirement); *Mapp v. Ohio*, 367 U. S. 643 (1961) (exclusionary rule); *Wolf v. Colorado*, 338 U. S. 25 (1949) (freedom from unreasonable searches and seizures)

² See *Benton v. Maryland*, 395 U. S. 784 (1969) (Double Jeopardy Clause); *Malloy v. Hogan*, 378 U. S. 1 (1964) (privilege against self-incrimination); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897) (Just Compensation Clause)

³ See *Duncan v. Louisiana*, 391 U. S. 145 (1968) (trial by jury in criminal cases); *Washington v. Texas*, 388 U. S.

14 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U. S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U. S. 400 (1965) (right to confront adverse witness); *Gideon v. Wainwright*, 372 U. S. 335 (1963) (assistance of counsel); *In re Oliver*, 333 U. S. 257 (1948) (right to a public trial)

Clause to apply only to citizens would create contradictory and confusing standards; given that no person shall be subjected to cruel and unusual punishments, it follows that no person ought to suffer the burden of an excessive fine.

Additionally, since noncitizens have the same due process rights as all citizens of the United States under the Fifth Amendment (save in matters of immigration) denying to noncitizens the very specific due process protection against excessive fines would be a strange, illogical choice. No need or justification drives such a choice, save the unjust extortion of funds from such noncitizens, including lawful residents with visas. Yet this is precisely what incorporation via the Privileges or Immunities Clause would do: posit that, even though noncitizens have the same due process rights as citizens (in all matters except immigration), noncitizens lack the specific protection against excessive fines, even in non-immigration matters--an untenable argument indeed.

As a procedural civil right, the Excessive Fines Clause ought to match the scope of other procedural civil rights and the precedent set by *Wong Kim Ark*, *Zadvydas v. Davis*, *Boumediene v. Bush*, and many other cases. Incorporation through the Privileges or Immunities Clause would allow only citizens the protections of the Excessive Fines Clause, an untenable distinction; noncitizens, since they have the Fifth Amendment right to due process, ought to also have the more specific due process protection against excessive fines.

CONCLUSION

This Court defines an an excessive fine as “so grossly excessive as to amount to a deprivation of property without *due process* of law.” *Waters-Pierce Oil Co.* This understanding, that the Excessive Fines Clause is a procedural protection, is supported by precedent, the historical origins of the clause, and an examination of the procedures by which fines are determined. The central argument against incorporation using due process lies in the idea that the Due Process Clause has been stretched beyond its original intent, as Justice Thomas and others argue. However, this argument does not apply to this case because the Excessive Fines Clause is a procedural protection rather than a substantive right and thus fits within the narrow intended scope of the Due Process Clause. Incorporation through the Privileges or Immunities Clause would create contradictory, confusing standards by only extending the Excessive Fines Clause to citizens. *Habeas corpus*, Miranda rights, and the rights of the Fourth, Fifth, and Sixth Amendments apply to all people. Hence, ruling only citizens enjoy protections against excessive fines would be inconsistent. Ruling that noncitizens are protected by some parts of the Eighth Amendment but not others--despite the amendment itself having no mention of citizenship--would be contradictory and untenable. This Court, to agree with *stare decisis* and

establish logical and consistent law, should incorporate the Excessive Fines Clause using the Fourteenth Amendment's Due Process Clause.