

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 SEVENTH CIRCUIT

RESPONDENT'S OPENING BRIEF

Danielle Nead-Work & Maya Clydesdale

Counsel of Record

Lake Oswego High School

Room 213

Lake Oswego Oregon, 97034

(503) 534-2313

Counsel for Respondent

Oral argument: <https://youtu.be/jjsR42vGqfg>

QUESTION PRESENTED

**WHETHER THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE SHOULD BE
INCORPORATED THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT OR THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE 14TH
AMENDMENT?**

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Statement of Argument

The Excessive Fines Clause of the 8th amendment should be incorporated through the due process clause of the 14th amendment. As established in the Slaughterhouse Case, state citizenship is different than federal citizenship. Additionally the Slaughterhouse case looked past the Privileges Immunities Clause and instead used Due Process as the current means for incorporating rights. Due process requires a procedure for a right to be incorporated. By continuing with Due Process this will institute consistency within the court because the court has always ruled through Due Process not Privileges Immunities. With the establishment of the standard of using Due Process the court should continue to follow precedent and use the due process clause when incorporating parts of amendments into the Bill of Rights.

Arguments

1. **The due process clause of the fourteenth amendment allows the excessive fines clause to be incorporated, as decided in the Slaughterhouse Cases.**

Before the *Slaughterhouse Cases* 83 U.S. 36 (1872), the fourteenth amendment written out by the Constitution’s Founders was relatively new and had not been widely interpreted. Then, in a 5-4 decision, the Slaughterhouse Cases limited the power of the

Privileges and Immunities Clause for the states. Due Process would be the standard used to incorporate amendments, or parts of amendments into the states, as found in the Due Process Clause of the Fourteenth Amendment. This was first done in *Gitlow v. New York*, 268 U.S. 652 (1925) to incorporate the First Amendment. In Justice Samuel Miller's majority written opinion, he wrote "This court is thus called upon for the first time to give construction to these articles." The first line of the fourteenth amendment states that "All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside" (14th amendment section 1). This shows that there is a written distinction between state and federal citizenship, and therefore there is also a distinction between the two for protection of the laws. Justice Miller makes this even clearer by explicitly stating that "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." The Fourteenth Amendment also states that "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" (14th amendment section 1). The fourteenth amendment does not guarantee that all citizens of the states should receive equal economic protections, such as protection from excessive fines in the Eighth Amendment of the Constitution, but specifically citizens of the United States, implying that it is currently only a federal protection. This distinction matters in relation to the Privileges and Immunities Clause because the petitioner's argument "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States." Only United States citizens have privileges and immunities, and therefore they do not apply to citizens of the individual state. The Federal Constitution only protects the privileges and immunities of the United States citizen, which according to Justice Miller, "It is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose" by the Framers. Using this reasoning, Justice Miller limited this Privileges and Immunities Clause in his majority opinion of the Slaughterhouse Cases, and wrote, "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens" *Slaughterhouse Case* 83 U.S. 36 (1872). Privileges and Immunities does not provide security for state rights, leaving due process to do so. In relation to this case of *Timbs v. Indiana*, this reasoning establishes that privileges and immunities cannot be used to enforce a right for a state citizen, and due process must be used if a federal protection is to be extended to state citizens. For example, in the case of *City of New York v. Miln* 36

U.S. 102 (1837), the defendant was prosecuted for failing to comply with a New York Statute requiring every master of a vessel arriving in New York City from a foreign port to report all passengers' names, ages, occupations, last places of settlement, and places of birth. Justice Miller wrote that "this act was an invasion of the exclusive right of Congress to regulate commerce." However, due to the previous unincorporation and was for the state citizens, not United States citizens, it was "unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce. [p64]," regardless of the validity of this argument. Privileges and Immunities does not automatically apply certain rights to the states, and it is only once an amendment or part of an amendment is incorporated through due process individually that it then is incorporated and applies to the states, as the Courts have done with the 1st, 2nd, 4th, and 6th Amendments, as well as parts of the 5th and 8th Amendments. Evidence for this can be found in the Fourteenth Amendment, which states that due process can be used to protect state citizens' life, liberty, and property. Miller concluded his majority opinion by stating that "we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts," in which he was referring to the decision that since the Privileges and Immunities Clause would not be used to extend rights to state citizens, the Courts in the future would be left to determine what should be incorporated, known as the selective incorporation theory that would come along as certain protections would be deemed necessary at the state level. The first time this would be ruled on was in *Gitlow v. New York*, 268 U.S. 652 (1925), in which the Supreme Court ruled to incorporate the First Amendment through the Due Process Clause. The Due Process Clause has also been used to incorporate the 1st, 2nd, 4th, and 6th Amendments, as well as vital parts of the 5th and 8th Amendments, when they came up as a right that would need to be extended to state citizens. Due Process is a procedural right not a substantive right, and is a process that must be used on a clause by clause basis if there is a need to decide whether part of an amendment should be incorporated to ensure equal protection of the laws.

2. The right to protection against excessive fines is fundamental to the American scheme of justice/ordered liberty.

As established in the first argument, amendments or parts of amendments can be incorporated into the states through due process as deemed necessary by the Supreme Court. In order to prove that the excessive fines clause of the eighth amendment should be incorporated in this manner through due process, it has to be proven as well that it is one of those parts necessary to be incorporated at all. The modern standard, as decided in cases including *Duncan v Louisiana* 391 U.S. 145 (1968), is that the parts of the Bill of Rights that are "fundamental to the American scheme of justice," for example the right to

trial by jury in a serious criminal case, are made applicable to citizens of each state by the Due Process Clause in the Fourteenth Amendment. This standard emerges when Justice Benjamin Cardozo held that the Due Process Clause protected only those rights that were "of the very essence of a scheme of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319 (1937)). On the other hand, rights that are not fundamental to the scheme of ordered liberty, such as the right to a jury trial in a civil case involving more than \$20 were not made applicable to the states through due process. To be fundamental to the American scheme of justice means that a right needs to be a vital need for each American citizen to have in order to be treated fairly in a trial in the United States Justice system. The most recent incorporation decision was in *McDonald v Chicago* 561 U.S. 742 (2010), which was a case challenging the strict gun control legislation in Chicago. *District of Columbia v. Heller*, 554 U.S. 570 (2008) had previously, clearly ruled that "the 2nd Amendment guaranteed an individual right to bear arms," however this was still only a federal right and was not applicable to the states at the time. However, a 5-4 vote in *McDonald v Chicago* 561 U.S. 742 (2010) made this right applicable to the states through due process, because the judges believed that the ratifiers of the Fourteenth Amendment would have found this right to be "among those fundamental rights necessary to our system of ordered liberty." This extended the second amendment protection to citizens of each individual state, because the right was so extremely necessary, following the standard in *Duncan v Louisiana* 391 U.S. 145 (1968). Additionally in *Duncan v Louisiana* 391 U.S. 145 (1968), Justice White further defined this standard by explaining that the Fourteenth Amendment only "incorporates certain fundamental provisions, but not other non-fundamental provisions," which was named the selective incorporation theory. It has also been called a "Total Incorporation Plus" by justice Murphy in *Adamson v. California*, 332 U.S. 46 (1947). The fourteenth amendment is clear in that it calls for certain, fundamental rights to be incorporated through due process at the necessary time, but it also prohibits others from being incorporated, if they are deemed otherwise. To follow these precedent standards in *McDonald v Chicago* 561 U.S. 742 (2010) and *Duncan v Louisiana* 391 U.S. 145 (1968), the excessive fines clause must also be proved as a fundamental provision for state citizens "to our system of ordered liberty" *McDonald v Chicago* 561 U.S. 742 (2010). The excessive fines clause was written to protect citizens from having to pay excessive fines as a punishment for a crime. The fine of the car was about four times the amount of the maximum fine amount for the crime committed by the defendant, \$10,000, and this is a protection absolutely necessary to protect citizens of each individual state as well. Even England's Magna Carta required that financial penalties "be proportioned to the wrong." Even though the car is property, it's value still counts as an excessive fine because the excessive fines clause applies to civil forfeitures of property, as held in *Austin v. United States*, 509 U.S. 602 (1993). As discussed in *United States v. United Mine Workers*, 330 U.S. 258 (1947), the defendant's economic

status and position must also be considered when deciding what is excessive, and seeing how the car is Mr. Timb's only mode of transportation, and he is not extremely well-off, an amount four times the amount of the maximum is "grossly disproportionate to the gravity of defendant's offense," the standard defined in *United States v. Bajakajian*, 524 U.S. 321 (1998). The due process clause of the fourteenth amendment allows this part of the eighth amendment to be incorporated into the states, to extend this fundamental protection.

3. The due process clause has been used in many similar instances to incorporate these fundamental rights, and it is important the court continues to stick to precedent.

Based on Precedent the excessive fines clause of the 8th amendment should be incorporated through the due process clause of the 14th amendment. As established by the Slaughterhouse cases, the privileges and immunities clause has been replaced by due process as the current standard for incorporating rights. Rights such as the 1st, 2nd, 4th, and 6th amendments have all been fully incorporated into the bill of rights by due process. The establishment of religion in the first amendment was incorporated through the case of *Everson v Board of Education*, 330 U.S. 1 (1947). Freedom of speech was incorporated through *Gitlow v. New York* 268 U.S. 652 (1925). Freedom of press was incorporated through *Near v. Minnesota* 283 U.S. 697 (1931), and finally freedom of assembly was incorporated through *DeJonge v. Oregon* 299 U.S. 353 (1937). The second amendment right to bear arms became fully incorporated in the case of *Mcdonald v Chicago* 561 U.S. 742 (2010). The 4th amendment freedom from unreasonable searches and seizure was incorporated in *Mapp v. Ohio*, 367 U.S. 643 (1961), and the requirements for a warrant were incorporated in *Aguilar v. Texas*, 378 U.S. 108 (1964). Finally the 6th amendment, right for to a trial, jury, and testimony, and more specific aspects of those rights have also been fully incorporated through due process of the 14th amendment. Aspects of the 8th amendment have also been incorporated using due process. The case of *Robinson v California*, 370 U.S. 660 (1962) incorporated protection against cruel and unusual punishment. In each one of the cases stated above the process used to incorporate these rights was done under the due process clause. Since this is a question relating to the 8th amendment it is important that the court stays consistent. The excessive fines clause of the 8th amendment should be incorporated using due process because that is how the other parts of the 8th amendment were incorporated. Based on Stare decisis it is important that the court continue to make decisions based on precedent. Precedent helps judges to make decisions that are consistent and makes sure that the rules are clear and followed. Justice Breyer elaborates on the significant precedent has on the structure of our nation when he says "Every one of us understands that if you change the

law too often, even when it was wrong before, people cannot live their lives. They can't plan how to live; they can't plan their societies.” In order for the courts to remain in a stable position where their decisions Due process is the established standard and it is important that the courts not only follow precedent but that they stay consistent with their decisions.

Conclusion

It is important that the court follows precedent and is consistent with their decisions. The Privileges and Immunities clause was limited by the Slaughterhouse Cases and is no longer used for incorporating rights. Due process has developed and become the current means used. Previous instances where rights have been incorporated such as the first, 2nd, 4th, and 6th amendments were all incorporated using due process. The privileges and immunities only protects rights of the federal state but not to individuals of several states. It does not provide any security for the rights, whereas when rights are incorporated through due process those rights become protected rights at the state level. Additionally due process is a procedural right, thus when rights are incorporated they must be done so through a specific process. Having a procedure to incorporate rights is crucial because it helps to institute consistency because the process will be the same each time. The court should stay consistent with its decisions because that helps to make sure decisions are decided on a fair level. The court should incorporate the excessive fines section of the 8th amendment through due process because that is consistent with the courts previous rulings. The due process clause ensure security for the rights once they are incorporated and secures them as both federal and state rights. There has been no previous use of the Privileges and Immunities clause, only Due Process. It is important the court continues to use Due Process to ensure that our nation maintains a stable court system that can be trusted.