Respondent's Brief—Lee and Von Arx

To be in the Supreme Court of the United States in

November Term 2018

Tyson Timbs, Petitioner v. State of Indiana, Respondent

Lake Oswego High School

Respondent's Opening Brief

Elena Lee and Sydney Von Arx

Counsel of Respondent

QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause should 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 CITED AUTHORITIES

CASES

CONSTITUTIONAL AMENDMENTS AND STATUTES

ADDITIONAL SOURCES

STATEMENT OF AUTHORITY

The Eighth amendment to the Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This clear prohibition of excessive fines has long been presumed to apply to the states and ought to be incorporated via the Due Process Clause of the Fourteenth Amendment. While some debate exists as to whether Due Process or Privileges or Immunities should be used for incorporation, the extensive amount of precedent for incorporation via due process as well as the many problems that would follow from using Privileges or Immunities for incorporation render due process the correct vehicle for incorporation. In addition, the original intent of the Privileges or Immunities Clause was not necessarily to incorporate the Bill of Rights against the states, as has been frequently argued. In terms of this case, the state of Indiana charged Timbs with multiple counts of heroin dealing, a serious offense. After pleading guilty, Timbs was sentenced to a $1,203 fine, a year of house arrest, and five years of parole. Additionally, they confiscated the vehicle Timbs used to commit the crime under civil forfeiture. Timbs' car was seized consistent with due process. It was not taken as a punitive fine and was not excessive. The Excessive Fines Clause applies to the states, but it does not apply to Timbs.

ARGUMENTS

I: FINES ARE A PROCESS

Often, opponents of incorporation via due process cite Justice Thomas's concurrence in *McDonald v. Chicago* (2010), in which Justice Thomas raises an objection[1] to the application of the Due Process clause in incorporating certain amendments he views as substantive rights. In this case, however, we are not considering a substantive right. We are considering whether or not a state must employ a due process when it

[1] "But I cannot agree that [the right to bear arms] is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause" (561 U.S. 742).

fines someone—a process, in other words, that ensures the fine is reasonable and not excessive. In *Waters-Pierce Oil Co. v. Texas* (1909), the court clearly defined "excessive fines" as fines "so grossly excessive as to amount to a deprivation of property without *due process of law*" (emphasis added)(212 U.S. 86). This wording is practically identical to that of the clause in question, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." A fine is the deprivation of property, and it is only egregious when administered without due process.

In Timbs' case, the applicability of the due process clause is even more clear. Due process *of law*, at its most basic and textual level, means states must adhere to the law, provided that the law allows the citizens to retain their basic rights. The State of Indiana has done this; their seizure of property was fully authorized under Indiana Code Title 34. Civil Law and Procedure § 34-24-2-4. The law lays out a reasonable and just due process of law:

> Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order … the prosecuting attorney or the inspector general shall bring an action for forfeiture … If an action under subsection (c) is not filed within thirty (30) days after receiving notice from any person claiming a right, title, or interest in the property, the claimant:
> (1) is entitled to file a complaint seeking:
> (A) replevin;
> (B) foreclosure; or
> (C) other appropriate remedy; and
> (2) shall immediately obtain a hearing on the complaint as provided in subsection
> …
> The person whose right, title, or interest is of record may at any time file a complaint seeking:
> (1) replevin;
> (2) foreclosure; or

(3) another appropriate remedy;[2]

An excessive fine is simply any fine not sanctioned by (lacking due process of) the laws of the state[3], a clear-cut definition that relieves the court of having to draft an arbitrary definition of "excessive". This also creates a clear distinction between the Due Process Clause and the Privileges or Immunities Clause. Privileges or Immunities says, "No State shall make or enforce any law which shall abridge the Privileges or Immunities of citizens of the United States." In the case of Timbs, the question is not whether all forfeiture laws are in the abstract unconstitutional. The question is whether or not the due process of law was followed by the Indiana state agents enforcing the law in this particular instance. We believe the state agents did so.

Due process of law has always meant that the law is not arbitrary and that the state must be scrupulously adhere to the law. This is what the same phrase means in the Fifth Amendment when it says "nor be deprived of life, liberty, or property, without due process of law," and in the Magna Carta when it proclaims, "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[4] This interpretation of the Magna Carta and the Fifth Amendment was highly influential in drafting the Fourteenth Amendments. As fines are a question of property being "taken", especially in this case of civil forfeiture wherein the state seized Timbs's Land Rover as part of civil procedure and not criminal procedure, the due process clause clearly applies.

---

[2] This quote has had many sections omitted for brevity, but the rest of the law is of a similarly fair and reasonable nature. If this law permitted excessive fines, the state of Indiana would have voided it under their own state constitution, which includes an Excessive Fines Clause. The Fourteenth Amendment is merely asserting that the State of Indiana cannot take property arbitrarily; only as a law consistent with the Constitution permits.

[3] Other possible cases of excessiveness may exist in cases of truly abusive laws, such as ones which involve large forfeitures for misdemeanors or which exist for the sole purpose for generating revenue and not justice. These issue do not apply, however, to Timbs.

[4] This exact wording dates back to a version of the Magna Carta from 1354, a clarification of line "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land" in the original document.

The entire Eighth Amendment is a matter of the government following an appropriate judicial process. For this reason, the rest of this amendment was incorporated via the Due Process Clause. Though the excessive bail clause has not been formally ruled upon yet, the court's statement in *Schilb v. Kuebel* (1971), is clear: "Bail, of course, is basic to our system of law, and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment" (404 U.S. 357). The Court assumed the excessive bail clause to be incorporated under due process since, in *Schilb*, it upheld an Indiana law allowing the state to retain 1% of an accused's bail on the grounds that "No due process denial results from retention of the 1% charge," implying that due process of law is the standard by which the Indiana law would be declared unconstitutional (404 U.S. 357). Although the state of incorporation of the excessive bail clause is in dispute because the Court's opinion gives no justification for the statement (so the incorporation of the excessive bail clause is in dicta only), Footnote 12 in *McDonald v Chicago* indicates that the Court considers *Schilb* to have incorporated the excessive bail clause. In *Robinson v. California* (1962), the Court incorporated cruel and unusual punishment. While Justice Stewart's opinion never explicitly states that Due Process (as opposed to Privileges or Immunities) is being used, Justice Douglas's concurring opinion explaining further why he considers the California law to be "cruel and unusual punishment" explains that "the Eighth Amendment...is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment" (370 US 660). Thus, it is safe to assume that Justice Stewart and the Court incorporated the "cruel and unusual punishment" clause of the 8th amendment through due process. This case should be resolved in the same manner: with due process.

The Eighth amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," speaking "excessive bail" and "cruel and unusual punishments" in the same breath and pattern as "excessive fines." These parallel clauses are parallel issues of the government not following an appropriate process in punitive measures. The only difference is whether

the punishment is bail, something unusual, or a fine. Naturally, they should be analyzed in a parallel manner. That is why the court went so far as to presume the Excessive Fines Clause was already incorporated under due process in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc* (2001).[5] Moreover, the language about depriving citizens of "life, liberty, or property" clearly permits the Court to apply the Eighth Amendment to civil forfeitures, as civil forfeitures are easily classified as a deprivation of property but may not always be considered a fine.[6]

II: PRECEDENT (STARE DECISIS)

The debate about whether or not to incorporate the Excessive Fines Clause is essentially over. The incorporation of the rights in the Bill of Rights depends on the standard set in *Duncan v. Louisiana* that stipulates a right must be "fundamental to the American scheme of justice" to be incorporated. The Excessive Fines Clause surely meets this criterion; without such a protection, state governments could exact unreasonably damaging fines from the people, leading to a judicial system that is more interested in meting out punishment than in maintaining order and fairness. The Court has come to the same conclusion in a variety of previous cases, even assuming the Excessive Fines Clause was already incorporated through *due process* in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc* (as mentioned earlier), so the main issue at hand is whether to incorporate using due process or Privileges or Immunities.

Before comparing Privileges or Immunities to Due Process, one must consider the immense body of precedent that points to using due process for incorporation of the Bill of Rights. Stare decisis has always been one of the Court's primary sources of guidance in deciding cases and controversies, and the Court should hardly deviate from such guidance now. After all, almost every liberty in the Bill of Rights has already been

[5] "Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States" (532 US 424).

[6] See United States v. Bajakajian, 524 U.S. 321 (1998).

incorporated through due process, a trend that should continue with the Excessive Fines Clause of the Eighth Amendment.

The Supreme Court has a long history of using the due process clause for incorporating the rest of the Constitution. Beginning with the incorporation of the takings clause in *Chicago, Burlington & Quincy Railroad Company v Chicago* (1897) and moving to a more expansive interpretation of "due process" with the incorporation of the freedom of speech in *Gitlow v. New York* (1925), in which the Court asserted that the freedom of speech was "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states," the Court has subsequently used due process to incorporate almost every other provision of the Bill of Rights. The exceptions are the Third Amendment, the Sixth Amendment's right to a jury composed of residents of the region where the crime occurred, the Fifth Amendment's grand jury indictment requirement, the Seventh amendment's guarantee of a jury trial in civil cases, and, of course, the Eighth amendment's right to be free of excessive fines, according to Footnote 12 of *McDonald v. Chicago* (2010) (561 U.S. 742). Given the Supreme Court's adherence to the principle of stare decisis, it would be unreasonable to urge the Court to overturn decades of precedent by using Privileges or Immunities for incorporation.

Some have expressed skepticism as to whether the "substantive due process" used in *Gitlow v. New York* to incorporate free speech, as well as in other cases involving the incorporation of the Bill of Rights, is a legitimate interpretation of due process given that the incorporated rights do not involve legal procedure. While we have previously argued that excessive fines is in fact a procedural right (so this dilemma is not an issue), it is worth pointing out the historical background surrounding "due process of law." Many sources indicate that "due process of law" was, at the time the Constitution was written, intended to ensure that the laws *themselves* were just. Thus, it is not enough for the government to *follow* the law it makes, but rather, that law must be just. Otherwise, the government could simply make any law and potentially infringe on its citizens' rights, and as long as it followed that law, "due process" would be

followed. Clearly, this line of thinking does not provide much protection at all from the excesses of government that harm people.

In a defense of substantive due process in the Emory Law Journal, Frederick Gedicks of BYU University Law School points out the strong influence of classical natural law theory upon the framers of the Constitution. Citing Thomas Aquinas's opinion that a law violating natural law and fundamental rights "is no longer a law but a corruption of law," Gedicks explains, "To call a legislative act a 'law' during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather signified that it conformed to substantive limitations on legislative power represented by natural and customary rights...In other words, such an act might have given 'due process,' but the process owed and given by the act would not have been a process of law." Gedicks goes on to quote Justice Marshall in *Marbury v. Madison* (1803), who clearly reflected this line of thinking when he said "An act of the legislature, repugnant to the constitution, is void" (5 U.S. 137).

Justice Marshall is the creator of judicial review, and judicial review itself is founded on the principle that some laws are *not* constitutional. Thus, if a certain law interferes with a constitutional right, it is *not* a law, and thus due process *of law* is not being followed. As a result, the "substantive due process" approach is perfectly legitimate, for the question is not whether or not the right being incorporated is procedural, but whether or not the procedure that the law dictates is constitutional.

Although some have raised doubts as to whether the original intent of the Due Process clause was to incorporate the Bill of Rights to the states, the Court has repeatedly found that stare decisis outweighs these concerns. Indeed, Justice Scalia, who was the dominant originalist on the Court, found in his concurrence in *Chicago v. McDonald* (2010) that "I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'" *Albright* v. *Oliver*, 510 U. S. 266, 275 (1994) (Scalia, J., concurring)" (561 U.S. 742). Furthermore, Scalia's concerns surround *substantive* due process, not *procedural* due process, and as argued earlier, excessive fines fall under the *procedural* due process

category. Thus, from both an originalist standpoint and a doctrinalist standpoint, the Excessive Fines Clause should be incorporated through due process.

III: ORIGINAL INTENT OF FOURTEENTH AMENDMENT

In order to distinguish between the Privileges or Immunities Clause and the due process clause, it is first necessary to determine what "Privileges or Immunities" means in the context of the Fourteenth amendment. The phrase appears in the Comity Clause of Article IV Section 2 of the Constitution:

> The free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof.

In *Corfield v. Coryell* (1823), Justice Washington interprets the Comity Clause to protect, among other rights not applicable in this case, "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole* " (emphasis added)(6 Fed. Cas. 546, (E.D. Pa. 1823). According to *Corfield*, the "privileges and immunities" to which the Comity Clause refers are the more general, fundamental rights of humankind, of the variety to which the Bill of Rights refers. Yet, the original intent of the Comity Clause is *not* to guarantee those fundamental rights to citizens of a state, but rather, to ensure that citizens of one state receive the same fundamental rights in another state as the other citizens of that latter state. The Court reinforces this perception by holding that such fundamental rights are subject to "such restraints as the government may provide," indicating that individual state governments do have the ability to regulate which "privileges and immunities" to allow. Indeed, in Madison's Federalist No. 42, he states, "*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 . . . .". As Madison uses the phrasing "entitled...to all the privileges of free citizens in [every other State]" to describe citizens of one state entering a different state, just as in the Comity Clause, it is clear that he is referring to the said clause. Yet, he does not stipulate what privileges a state owes its citizens; the emphasis is merely on being *entitled to* or having access to whatever privileges exist in that other state. Therefore, the Comity Clause is referring to protecting citizens of *one state against another state*, not protecting *citizens' fundamental rights in general against the states.*

In *Paul v Virginia* (1869), the Court confirms this interpretation of the Comity Clause:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the *same footing* with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States...it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws (emphasis added) (75 U.S. 168).

Again, the goal of the Comity Clause, even though it refers to fundamental rights, is not to guarantee citizens certain freedoms, but merely to guarantee citizens of different states the *same* freedoms regardless of their native state. Indeed, in Footnote 13 of *Paul*, the Court says that "the privileges and immunities secured to citizens of each State in the several States by the provision in question are those privileges and immunities which are common to the citizens in the latter States under the constitution and laws by virtue of their being citizens." The "privileges and immunities" granted the citizens of the States via the Comity Clause are therefore *dependent on a particular State's* "consitututions and laws"; the Comity Clause thus does not protect specific privileges

and immunities, but rather, grants the ones a state chooses to grant to all citizens of all states, when they happen to be in that state.[7]

Much of the debate surrounding the use of the Privileges or Immunities Clause for incorporation involves the *Slaughter-House Cases* (1873). While *Slaughter-House*'s narrow distinction between federal and state citizenship (which prevented the butchers from receiving protection of their "right to exercise their trade" since federal rights are distinct from state rights) is under dispute, *Slaughter-House* does clearly establish one thing: the "Privileges or Immunities" of the Fourteenth Amendment are not involved with the incorporation of the Bill of Rights, but with equality of citizenship (83 U.S. 36). According to *Slaughter-House*, the privileges and immunities of *federal* citizenship are limited to those that are dependent upon being a U.S. citizen, encompassing the freedom to access seaports, navigate waterways, access the court system, hold office, and, most importantly, to "of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with *the same rights as other citizens of that State*" (emphasis added)(83 U.S. 36). Therefore, while the federal "privileges" and "immunities" defined in *Slaughter-House* seem narrow, the mere *possession* of the "Privileges or Immunities" of a United States citizen enable him or her to be on an equal footing with all other citizens of a state.

Now, let us consider the case that the *Slaughter-House* interpretation is wrong and that the privileges and immunities "of the several states" in the Comity Clause are, in fact, the same as the privileges and immunities of citizens "of the United States." Regardless of which position one chooses, the historical context of the Fourteenth Amendment supports the idea that the Privileges or Immunities Clause is not about incorporation of the Bill of Rights; it is about ensuring equality for all citizens. As Professor Philip Hamburger of the Northwestern Law School asserts, "Long-forgotten evidence clearly shows that the Clause was an attempt to resolve a national dispute

[7] *Slaughter-House* (1873) supports this interpretation of *Paul v. Virginia* and the Comity Clause: "[The clause's] sole purpose was to declare to the several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction" (83 U.S. 36).

about the Comity Clause rights of free blacks. In this context, the phrase 'the Privileges or Immunities of citizens of the United States' was a label for Comity Clause rights, and the Fourteenth Amendment used this phrase to make clear that free blacks were entitled to such rights." In 1868, when the Fourteenth Amendment was ratified, African American freedmen were experiencing discrimination across the country and especially in the South. Many states denied that African Americans were citizens at all, thus refusing them the protections to which they were entitled under the Comity Clause. The attorney general William Wirt in 1821 attempted to deny African Americans the shared "privileges and immunities" protected under the Comity Clause, asserting that "no person is included in the description of citizen of the United States who has not the full rights of a citizen in the State of his residence"—and thus implying that a black freeman was not a part of this shared federal citizenship if he resided in a state opposed to black citizenship (i.e. many Southern states). Most famously, in *Dred Scott v. Sandford* (1857), the Court ruled that "A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States," so "the special *rights and immunities guaranteed to citizens* do not apply to them" (emphasis added)(60 U.S. 393). In 1858, free African-Americans in Massachusetts sent a message to the legislature complaining that, in failing to assert the rights of black citizens in the South, Massachusetts "lacked the courage to vindicate the rights of her colored citizens, leaving them a prey to the oppressor."

The Civil Rights Act of 1866, presumably intended to rectify this inequality, states, "[S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right...to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." The act says nothing about *expanding* those "laws and proceedings...enjoyed by white citizens" with respect to the states; instead, it expresses the need for "full and equal benefit" of these "laws and proceedings." The distinction

was not about *what* the "rights and immunities guaranteed to citizens" are, but about who had them—and who did not.

In Justice Thomas's concurrence to *McDonald v. Chicago* (2010), in which he argues for incorporation of the Second amendment through the Privileges or Immunities Clause, he quotes John Bingham, one of the primary proponents and authors of the Fourteenth Amendment:

> Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person. (561 U.S. 742)

Yet, if Bingham objected to the position of *Barron ex rel. Tiernan v. Mayor of Baltimore* (1833), which states that the amendments in the Bill of Rights "restrain...the power of the General Government, not as applicable to the States," why would he use the same phrase "Privileges or Immunities" in the Fourteenth Amendment as in the Comity Clause to incorporate the Bill of Rights, when the Comity Clause itself does not explicitly name the rights in the Bill of Rights? That is especially true if he believed the Comity Clause did not guarantee adequate "Privileges or Immunities" to African Americans and citizens in general (32 U.S. 243)! The similarity of the phrasing implies that the "privileges and immunities" discussed in the Comity Clause are the same as those in the Privileges or Immunities Clause—and thus, it is reasonable to assume that the Privileges or Immunities Clause was an attempt to resolve the issue presented in the Comity Clause, namely that African Americans did not *have* access to those "Privileges or Immunities," whatever they were, because states refused to recognize their rights of citizenship. If Bingham believed the rights themselves were the issue as encompassed by "Privileges or Immunities," the Fourteenth Amendment would presumably use a different phrase more specific to the Bill of Rights, but it does not. Instead, the part that changes from the Comity Clause is "citizens of the several states,"

which becomes "citizens of the United States" in the Privileges or Immunities Clause, ensuring that any citizen of the United States would have the same rights granted citizens in each state and thus taking away power from the states to discriminate in granting rights guaranteed by the Comity Clause because section one of the Fourteenth Amendment unequivocally grants US citizenship to all those born in the U.S. under its jurisdiction (so states could no longer deny Comity Clause rights by denying state citizenship)[8]. Bingham does *not* say "securing to all the citizens in every State...the rights enumerated in the Bill of Rights," but rather, "the Privileges or Immunities of citizens"—i.e. whatever Privileges or Immunities citizens in that state are *supposed* to have. The last clause of his speech, "to all the people all the sacred rights of person," can be construed as applying to the due process clause of the Fourteenth Amendment, which refers to *all* people and not simply citizens.

Therefore, arguments that the original intent of the Privileges or Immunities Clause was to incorporate the Bill of Rights against the states are erroneous. Furthermore, one must consider a key point: the "privileges and immunities of citizens of the several States" have been interpreted to include, in *Corfield v Coryell*, the right to property, one of the fundamental rights[9]. Yet, if the Privileges or Immunities Clause in the Fourteenth Amendment were intended to incorporate the Bill of Rights—which includes, in Amendment V, the phrase, "No person shall...be deprived of life, liberty, or property, without due process of law"—why would the Privileges or Immunities Clause *forbid* states from "abridging" such rights when the following due process clause allows for restriction of such rights as long as "due process of law" is followed? Therefore, it follows that the Privileges of Immunities clause is not dealing with the incorporation of specific rights in the Bill of Rights but, as mentioned earlier, is ensuring that whatever rights citizens *do* have in the states apply to everybody. The due process clause states,

[8] One might wonder, then, if the clause in question is redundant. Yet, in its historical context, the Privileges or Immunities Clause ensured the protections of the Comity Clause were no longer under state discretion, so the states could not discriminate against African Americans. Also, liberties need to be protected with redundancy. After all, the Federalists believed the entire Bill of Rights to be redundant!
[9] "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety" (6 Fed. Cas. 546, (E.D. Pa. 1823)).

"nor shall any state deprive any person of life, liberty, or property, without due process of law"—practically the same phrasing as in Amendment V, except with a restriction on the state government instead of the federal government. Since the Privileges or Immunities Clause cannot contradict the due process clause, and the latter *expressly* parallels a crucial portion of the Bill of Rights, the latter must be the proper vehicle for incorporation, particularly for a procedural right such as the Excessive Fines Clause. In addition, one must note that the Bill of Rights never refers to *citizens*; instead, it always refers to "people" whom it protects against actions of the federal government.[10] Therefore, if the original intent of the Privileges or Immunities Clause was to incorporate the Bill of Rights to the States, the clause would not have referred specifically to "citizens of the United States" and would instead have referred to "the people" as in the Bill of Rights. Instead, the due process clause is the one that refers more generally to a "person," indicating that it is the proper clause to use for the extension of civil liberty protections against the states. After all, civil liberties as in the Bill of Rights apply to all people equally; civil rights apply to only specific *groups* of people, that group being "citizens of the United States" in the case of the Privileges or Immunities Clause.

IV: ISSUES OF INCORPORATION THROUGH PRIVILEGES OR IMMUNITIES CLAUSE

Even setting aside the issue of the original intent of the Privileges or Immunities Clause, the fact remains that the use of Privileges or Immunities for incorporation is highly problematic. If one assumes that "Privileges or Immunities" refers strictly to the enumerated fundamental rights in the Bill of Rights, then using it to incorporate one of the fundamental rights contained in the Bill of Rights would immediately incorporate the *entire* Bill of Rights against the States. This consequence would have many negative

[10] First Amendment: "the right of the people peaceably to assemble"; Second Amendment: the right of the people to keep and bear arms; Fourth Amendment: "The right of the people to be secure"; Fifth Amendment: "No person shall be het to answer"; Sixth Amendment: "The accused shall enjoy"

implications. Of the amendments which have not yet been fully incorporated, the Fifth and Seventh Amendments render this occurrence especially objectionable.

First of all, the Fifth Amendment asserts that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Given the fact that the Speedy Trial Act guarantees an indictment filed within 30 days from the day of arrest, the requirement for an indictment by Grand Jury (which requires 12-23 people) could make the Speedy Trial Act untenable and hamper an efficient legal process—as well as ironically inhibiting the accused's right to a "speedy and public trial" as guaranteed by the Sixth Amendment. Furthermore, capital offenses vary from state to state, so the incorporation of this tenet of the Fifth Amendment would lead to ambiguity in the administration of the law at the state level. In *Hurtado v. California* (1884), the Court rules that pretrial proceedings in line with the principles of liberty and justice are constitutional even without a grand jury:

> We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. (110 U.S. 516)

Therefore, according to Court precedent, the Fifth Amendment grand jury requirement is not essential to the fundamental rights of the people against the states.

The Seventh Amendment is also problematic in that it guarantees "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Given the low minimum value required for a jury trial, a great risk exists for an explosion of civil cases demanding trial by jury, should this amendment be incorporated against the states. The state courts may not have the resources to meet this demand, leading to a backlog of civil cases requiring trial by jury and stretching the resources and time of state court judges. In addition, the number of people required for jury duty at any one time would increase, also adding to the number of jurors experiencing difficulties due to missing work or not being able to procure

child care. Indeed, a trial by jury for a case as trivial as a $20 dispute seems ridiculously excessive; assuming a conservative estimate of juror pay of $10 per day for each juror, the cost of a one-day trial could well exceed the disputed amount of money! Furthermore, in *Minneapolis & St. Louis R. Co. v Bombolis* (1916), the Court held that "the Seventh Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same" (110 U.S. 516). As the Court has not since overturned this ruling, it is reasonable to assume that the Court views the Seventh Amendment right of trial by jury for civil cases to be unnecessary for incorporation.

In addition, Due Process is a more gradual, orderly process of incorporation when compared to Privileges or Immunities. "Privileges or Immunities" is a vague phrase whose exact meaning is still in dispute. As such, it could lead to unchecked expansion of the rights of citizens of the United States, particularly as no precedent exists for incorporation using the Privileges or Immunities Clause. After all, in *Corfield v. Coryell* (1823), Justice Washington interprets the "privileges and immunities" of the States to be extremely numerous; after listing many such fundamental rights, he refers to "many others which might be mentioned," implying that *if* such fundamental rights are incorporated using the Privileges or Immunities Clause, those rights could be expanded inappropriately (6 Fed. Cas. 546, [E.D. Pa. 1823]). On the other hand, due process, as established in the case *Benton v. Maryland* (1969), asserts that "Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana, supra,* at 149, the same constitutional standards apply against both the State and Federal Governments" (395 U.S. 784). In other words, due process and selective incorporation allow the Court to weigh the value of incorporating a right against the States. Justice Thomas, in his dissent in *McDonald v. Chicago* (2010), insists that Privileges or Immunities would not necessarily incorporate all of the enumerated rights in the Constitution, yet he also puts forth as evidence historical documents that "shows that the ratifying public understood the Privileges or

Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms" (561 U.S. 742). If the Court relies on such an understanding of the original intent of the Privileges or Immunities Clause, then it would have no choice but to incorporate the remaining clauses in the first through eighth amendments—with the consequences demonstrated above. Furthermore, why would the Excessive Fines Clause be "special"? Nothing distinguishes the Excessive Fines Clause from the other amendments to the Constitution, so one cannot, as Timbs argues, simply incorporate the Excessive Fines Clause and none of the other unincorporated amendments with Privileges or Immunities. While Justice Thomas also rejects the idea that Privileges or Immunities would lead to more unchecked expansion of rights than due process, the extensive body of precedent governing incorporation by due process is far more likely to ensure that the rights incorporated are truly "fundamental", since incorporation via Privileges or Immunities would set a precedent which strips the court of its ability to only incorporate those amendments "fundamental to the American scheme of justice."

Most importantly, the use of due process for incorporation ensures that *everyone* in the United States receives protection of those rights deemed 'fundamental to the American scheme of justice', not simply citizens of the United States. As mentioned earlier, the Bill of Rights never mentions the word "citizen," instead referring to "the people." The Bill of Rights therefore protects everyone's rights against the intrusion of the government, not simply citizens of the United States. On the other hand, the Privileges or Immunities Clause singles out "citizens of the United States" for protection against encroachment by the States. Therefore, by using Privileges or Immunities, it would seem that in some cases, only U.S. citizens would receive protection against the States. For example, in state court cases involving excessive fines (if the right were to be incorporated using Privileges or Immunities), international college students, not being citizens, would not be able to defend themselves against an exorbitant, punitive fine. This would clearly be a violation of the equal protection clause, which states, "No state shall...deny to any person within its jurisdiction the

equal protection of the laws."[11] If Due Process is rejected in favor of Privileges or Immunities, the equality and protection against discrimination established in the Fourteenth amendment is completely undermined. While some might argue that "within its jurisdiction" refers only to citizens of the United States, this interpretation is erroneous when one considers the text of Article IV Sec. 2, which states, "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Clearly, "jurisdiction" is referring to criminal prosecution of *any* "person," not simply a citizen of the United States. In a parallel manner, the equal protection clause deals with "protection of the laws" for "any person," again suggesting that this equal protection applies to any person subject to the legal statutes of the States. Finally, John Bingham, a primary author of the Equal Protection Clause, expressed the view "that all persons, *whether citizens or strangers, within this land*, shall have equal protection in every State in this Union in the rights of life and liberty and property." It seems eminently conclusive that the original intent of the Equal Protection Clause was to ensure fundamental rights—including those incorporated under due process—for U.S. citizens *and* noncitizens alike.

In fact, in a multitude of cases involving aliens, the Court has expressed this view; in *Fong Yue Ting* v. *US* (1893), the Court stated, "Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal

[11] See Yick Wo v. Hopkins, 118 U.S. 356 (1886): "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says:
"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."
These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws….The questions we have to consider and decide in these cases, therefore, are to be treated as invoking the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

responsibility" (149 U.S. 698). Clearly, constitutional rights apply to aliens as well as to citizens. If, for example, the right to a jury trial for civil cases were incorporated using Privileges or Immunities, then aliens would not have this right—which is part of their "civil…responsibility."[12] As access to courts is under strict scrutiny in the Equal Protection clause, and incorporation of the entire Bill of Rights via Privileges or Immunities would grant the right to a trial by jury to *citizens of the United States* only, the government would be subject to violation of the Equal Protection Clause if Privileges or Immunities were used to incorporate the Bill of Rights. Additionally, in *Bernal v. Fainter* (1984), the Court held that "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny" (467 U.S. 216). By incorporating the remaining rights in the Bill of Rights using Privileges or Immunities, the Court would open the door to state government discrimination against non-citizens in the United States, in violation of the Equal Protection Clause. The only feasible path out of this dilemma is to continue to use due process, which confers the necessary fundamental rights upon *all* people in the United States of America in accordance with the values of liberty and equality so inherent to the nation.

V: TIMBS'S VEHICLE WAS SEIZED LEGALLY

Despite a 1993 precedent in *Austin v US* (1993) stating that "forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,' *Browning Ferris*, 492 U. S., at 265, and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause," the ruling does not mean that civil forfeitures are *never* appropriate as punishment under the Excessive Fines Clause; it simply means that forfeitures as punishment must not be excessive (509 US 602). In *United States v Bajakajian* (1998), the Court ruled that a forfeiture is excessive if it is "grossly disproportional to the gravity of [the] offense" (524 U.S. 321). As a result, it would seem that many forfeitures are appropriate as long as they are not "grossly disproportional."

[12] Also, if the excessive fines clause were to be incorporated, aliens would be denied their "rights…of property".

Furthermore, in *United States v Ursery* (1996), the Court held that the "*in rem* civil forfeitures [in question] are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause," seeming to conclude that civil forfeitures are constitutional when a person's property is used in a crime (518 U.S. 267). In fact, in his concurrence to *Austin v. US*, Justice Scalia argues that one should measure "excessiveness" not by the value of the forfeiture, but by the extent to which the property forfeited was instrumental to the crime, since civil forfeitures are not part of criminal procedure against a person but actually deem the property as the defendant. Scalia clearly states, "The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." Civil forfeitures are clearly still appropriate under the Excessive Fines Clause if they are reasonably proportional to the crime, and more so if the person is using the property in question to commit the crime.

Timbs relied on his car to purchase and sell drugs. That Land Rover was quite literally the vehicle he used in committing the crime. Without it, Timbs is at lower risk for dealing drugs again. The court should perhaps ensure that states do not abuse forfeiture for the sole purpose of revenue or apply it to petty misdemeanors. Timbs, however, had an established pattern of using his vehicle to commit felonies. Seizing the vehicle was a result of the vehicle's status as an accessory to a felony and not as a means of enriching the state. As such, the seizure of Timbs' car was a civil forfeiture and not a criminally punitive measure; the defendant was the vehicle itself. The official name of this case, after all, is *Tyson Timbs and a 2012 Land Rover LR2 v Indiana*, so the land rover is a petitioner! While the petitioner argues that the vehicle, which was worth $42,058.30 when Timbs purchased it, exceeds the maximum statutory fine of $10,000 for his Class B felony, the petitioner is ignoring the fact that the vehicle is a civil and not a criminal forfeiture and is thus subject to different restrictions than criminally punitive fines. As a result, the state followed due process of law when seizing the Land Rover.

CONCLUSION

Given the amount of precedent in support of incorporation of the Excessive Fines Clause, the central question is not *whether* to incorporate, but rather, *how* to incorporate. Since the other portions of the Eighth Amendment have been incorporated using due process, and the Excessive Fines Clause can be construed as a procedural right, it is only reasonable to incorporate the Excessive Fines Clause using due process as well. Even disregarding the interpretation of the Excessive Fines Clause as a procedural civil liberty, the Court should recognize that the concept of "substantive due process" is not, in fact, a paradox; it is a rational interpretation of the phrase "due process of law" to mean that due process only occurs when the law in question is legitimate and constitutional. Furthermore, the original intent of the Privileges or Immunities Clause, in addition to precedent-setting cases such as *Slaughter-House*, render Privileges or Immunities the wrong vehicle for incorporation. The issues of unincorporated rights and the subsequent violation of the Equal Protection Clause that would occur with Privileges or Immunities seal the argument against Privileges or Immunities and in favor of due process.

Timbs was stripped of his property in a just and lawful manner that did not violate the Excessive Fines Clause of the Eighth Amendment. Nevertheless, his case brings the issue of excessive fines to light, and the Due Process of Law Clause clearly obligates the court to apply the Excessive Fines Clause in this question of the process of forfeiture. The Court would be wise to incorporate the Eighth Amendment's Excessive Fines Clause to all states in this case using the Due Process of Law Clause, in accordance with what it has done for numerous other amendments, in accordance with what countless scholars have already presumed it to have done, and in accordance with what the Constitution mandates it does.