

Petitioner Brief - Anushka and Lucinda

To be in the Supreme Court of the United States

April Term, 2019

TIMBS, PETITIONER

V.

STATE OF INDIANA, RESPONDENT

PETITIONER'S OPENING BRIEF

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Oral argument: <https://www.youtube.com/watch?v=AjVIGB92vOA>

QUESTION PRESENTED

WHETHER THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE SHOULD BE INCORPORATED AGAINST THE STATES UNDER THE FOURTEENTH AMENDMENT'S PRIVILEGES AND IMMUNITIES OR DUE PROCESS CLAUSE?

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Statement of Argument

The Privileges or Immunities Clause of the Fourteenth Amendment is the clear mechanism of incorporation of the Excessive Fines Clause of the Eighth Amendment. The Due Process Clause of the Fourteenth Amendment was designed with the original intent to be a protection on procedural rights, with the Privileges and Immunities Clause protecting substantive rights. After the cessation of Privileges and Immunities Clauses power through the Slaughterhouse Cases, the Due Process Clause shouldered the weight of incorporating all rights : procedural and substantive. Yet, while examining historical context it is abundantly clear that the Privileges or Immunities Clause is not being interpreted as originally intended. Though compared with the Privileges and Immunities Clause of Article 4 of the Constitution, radical historical differences between the integration of the Reconstruction Congress and the Articles of Confederation depict the inaccurate ruling of the Slaughterhouse cases. Furthermore, through the Privileges and Immunities Clause historical connection to the Civil Rights Act of 1866, it is demonstrated that the Privileges and Immunities Clause was created as a way of regulating the fair distribution of state rights to racial minorities. As the central issue of *Timbs v. Indiana*, it is apparent that the Privileges and Immunities Clause is the true mechanism of incorporation. The Respondents fail to identify an avenue in which the Due Process Clause is originally intended for the incorporation of substantive rights or establish the court's boundaries of what basis a substantive right is incorporated. As the Excessive Fines Clause of the Eighth Amendment is a substantive right, it stands that the Privileges or Immunities Clause of the Fourteenth Amendment offers a stronger rationale of its incorporation.

Argument 1 : HISTORICAL ARGUMENT

In *Barron v. Mayor of Baltimore*¹, the defining 1833 case about the scope of the Bill of Rights, it was ruled that the Bill of Rights exclusively regulated the powers and actions of the federal government, not state governments. In wake of this decision, the legal field turned to the privileges and immunities clause of the 14th amendment as a way of incorporating the Bill of Rights, yet this hope was eviscerated in the wake of the Slaughterhouse cases². In the court's first opportunity to interpret the 14th amendment, the Slaughterhouse Cases decided that the Privileges and Immunities clause of the 14th amendment applied exclusively to the federal government, not state governments³. The principal argument of the Slaughterhouse Cases focused on the repetitive language of the privileges and immunities in both the body of the constitution and the 14th amendment⁴. Using the argument of two types of citizenship, the court ruled that the rights of being of citizen of the United States were protected by the 14th amendment, yet rights of state citizens were protection by the Privileges or Immunities clause in Article 4 of the United States Constitution^{5,6}. In *US v. Cruikshank*, the court reiterated its opinion by rejecting the claim that the right to keep and bear arms, the second amendment of the Bill of Rights, was able to be incorporated on the basis of the privileges and immunities of citizenship⁷. With the combination of these two cases, the privileges and immunities clause was eviscerated, unable to have any protective power over substantive rights. In the wreckage of the court's decision came *Saenz v. Roe*, which clearly delineated that privileges and immunities could only be employed in certain cases⁸. Consistent with the Slaughterhouse cases interpretation, *Saenz v. Roe* further reduced the privileges and immunities clause to matters of travel⁹. In Justice John Paul Steven's Majority Opinion, he states, "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in...the Slaughter-House Cases (1873), it has always been common ground that this Clause protects the third component of the right to travel.¹⁰" Yet, in Justice Thomas dissent of *Saenz v. Roe*, he argues, "It comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because..the Slaughter-House Cases sapped the Clause of any meaning..the majority...fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case.¹¹"

Examining the historical context behind the 14th amendment demonstrates the validity of Justice Thomas's argument. One of the first mentions of "privileges" and "immunities" in national legislative history was the Articles of Confederation¹². Created in an effort to limit federal jurisdiction of states, Congress had neither the power to regulate commerce or limit internal state policy.¹³ In lieu of that power, it built in protections for both internal state policy and commerce into the Articles of Confederation. The Articles of Confederation provided: "The free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges or immunities of free citizens in the several states; and the people of each state shall have free ingress and regress 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 respectively."¹⁴ The driving force behind the protection of privileges and immunities enumerated in the constitution differs radically from the purpose of the privileges and immunities protected under the Fourteenth amendment. At the time of the ratification of the Fourteenth amendment, the country was reeling from the effects of the Civil War¹⁵. In the era of a Reconstruction Congress, the legislative focus lied on aligning the constitution with the principles of racial equality, or at least protecting the freedman¹⁶. In a nation clearly divided over matters of slavery and race, the intent of the subsequent constitutional amendments adopted were clearly to attempt to repair the nation after the era of slavery.

At the end of the Civil War, many southern states started to enact "black codes" meant to prohibit the rights of African Americans¹⁷. These laws, "prohibited blacks from renting land, provided for the seizure of those who breached labor contracts, . . . [and] made certain conduct criminal only when done by blacks."¹⁸ As a result, the Civil Rights Act of 1866 was created as a way of protecting newly freed slaves from the actions of states and was sent into the legislative process¹⁹. From this we can take away the importance and need for a legislative process. Yet, many legislators were wary of Congress's ability to pass the law and decided to reenforce its message with the Fourteenth Amendment in order to constitutionalize the act.²⁰ The Civil Rights Act of 1866 relied on Congress's ability to define the privileges of states that it was concerned were going to be abused with as privileges of the federal government. A second founder John Bringham created and stands behind the promise of "equal protection of the laws." It is law that our substantive rights are protected as well as our procedural, but it is still important to uphold that the framers wanted substantive to be used with privileges or immunities. Substantive rights are immediate right rather than a procedural one which takes a while to process, many of the substantive rights occur immediately, especially when they are deserved. One of the core causes of the Fourteenth Amendment was to protect the Civil Rights Act of 1866, meant to prevent states from granting state privileges on the basis of race²¹. As stated by Yale Professor John Harrison, "That purpose was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866. The Act guaranteed that black and white citizens would be equal with respect to a list of vitally important rights."²²As the ratification of

the Fourteenth Amendment was meant to allay that fear, it demonstrates that Congress intended for the amendment to be used as a way of regulating the privileges and immunities of states.

The historical background of the “privileges and immunities of the citizens of the United States” in the Fourteenth Amendment clearly proves the Slaughterhouse decision was inconsistent with the understood intent, at the time of ratification. Firstly, the historical context and purpose behind the Privileges and Immunities clause of the Fourteenth Amendment and the Privileges or Immunities Clause of Article 4 are radically different, therefore declaring their purpose synonymous as a way of restricting the powers of the Fourteenth amendment violates the intent of protecting those who have been wronged, by the system. Secondly, the ruling that the Privileges or Immunities Clause of the Fourteenth Amendment was not meant to interfere with state privileges ignores the fact the historical purpose behind its enactment relied heavily on its ability to regulate state privileges.

Argument 2 : THE PRIVILEGES OR IMMUNITIES CLAUSE WAS INTENDED TO INCORPORATE THE BILL OF RIGHTS

One of the largest debates about the nature of the Fourteenth Amendment's Privileges or Immunities Clause is the nature of the "privileges or immunities" and "citizens" that it protects.

Historically, regarding the terminology of "privileges or immunities," the terms "privileges" and "immunities" were commonly understood to refer to "rights." In the decision of the Slaughterhouse Cases, the court chose to ignore the legal precedent of defining "privileges" and "immunities" decided in *Corfield v. Coryell*, Justice Bushrod Washington's circuit opinion, defined the "privileges and immunities" as "in their nature, fundamental; which belong, of right, to the citizens of all free governments" and "which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."²³ This is the fundamental definition of the Bill of Rights protections. Yet, the conflation of "privileges or immunities" and "rights" has a far deeper historical background. In medieval times, both terms were defined as "legal benefits granted 'by special grace of the king himself' to particular individuals within a large community."²⁴ Examining the dictionary definition of both terms during colonial times, Professor Robert G. Natelson of the Independence Institute, states the majority of legal dictionary definitions of "privilege" in Colonial America state that a "privilege is: (1) a benefit or advantage; (2) conferred by positive law; (3) on a person or place; (4) contrary to what the rule would be in absence of the privilege."²⁵ Natelson further states that on the basis of legal definition, 'it appears that 'immunity' and 'privilege' were reciprocal words for the same legal concept. Because an immunity was a benefit, otherwise contrary to law, given to a person or place by special grant, it was a privilege.' These rights are synonymous with the rights enumerated in the Bill of Rights. A privilege to act in a certain way necessarily implied an exemption from the normal consequences of so acting-hence, an immunity."²⁶

"Privileges" and "immunities" were terms both used in the Magna Carta and the English Bill of rights in 1689.²⁷ William Blackstone describes these privileges and immunities of English citizens as, "The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals."²⁸ As Englishmen, colonists

were granted the same “privileges” and “immunities,” or rights, afforded to English Subjects, or so they hoped.

The phrasing of privileges or immunities continued in multiple colonial charters. One of which, the Charter of Maryland, states, “. . . with all and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever . . .”²⁹ This vernacular is further continued into the verbiage of multiple state constitutions. In Georgia’s post Civil War constitution, it states, “All rights, privileges and immunities which may have vested in, or accrued to any person or persons, in his, her, or their own right, or in any fiduciary capacity, under and in virtue of any act of the General Assembly, or any judgment, decree, or order, or other proceeding of any Court of competent jurisdiction in this State, since the first day of January, A. D. eighteen hundred and sixty-one, shall be held inviolate by all Courts.”²⁹ The historical documentation demonstrates how “privileges” and “Immunities” were both phrases used often interchangeably with rights. Although slaughterhouse cases do give them a separate meaning, the use of the words now tend to be more interchangeable which follow along with the judicial theory, developmentalism.

Furthermore, from Colonists rights as English citizens under the Magna Carta, to colonial charters, to state constitutions, their privileges or immunities guaranteed colonists the same rights they possessed as English citizens. The constitution was later amended with the creation of the Bill of Rights in order to protect those same fundamental rights from the United States government.³¹ With this interpretation, the “privileges and immunities of the citizens of the United States” are the parallel fundamental rights that were translated from Colonist’s citizenship to England, now rights protected by the Bill of Rights. After the ratification of the amendment, John Bingham, the creator of the Fourteenth Amendment, supports this interpretation through his statement, “I hope the gentleman now knows why I changed the form of the amendment of February, 1866. Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States...are chiefly defined in the first eight amendments to the Constitution of the United States.”³²

The phrasing of the Privileges or Immunities Clause of the Fourteenth Amendment states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”³³ Privileges and immunities have both been defined as synonyms for rights. With this substitution, the amendment states, “No state shall make or enforce any law which shall abridge the rights of citizens of the United States.” The Bill of Rights is a document created in order to delineate the rights afforded to citizens of the United States. With that apparent logic and historical context, the amendment reads, “No state shall make or enforce any law which shall abridge the Bill of Rights.” Through the historical context, it becomes clear that the Privileges and Immunities Clause of the 14th amendment are synonymous with the Bill of Rights, and the creation of the amendment was meant as a way to incorporate those same rights to states.

**Argument 3 : THE PRIVILEGES OR IMMUNITIES CLAUSE SHOULD BE USED AS A
METHOD OF INCORPORATION SUBSTANTIVE RIGHTS AND DUE PROCESS
CLAUSE SHOULD BE USED TO INCORPORATE PROCEDURAL RIGHTS**

After the evisceration of the Privileges or Immunities Clause due to the *Slaughterhouse Cases*, the court looked for an alternative way to protect fundamental rights.³⁴ As Professor Harry F. Tepker argues, “After the Supreme Court rejected the idea that the right to work was among the privileges and immunities of citizenship in the *Slaughterhouse Cases*, the Supreme Court gradually transformed due process into a doctrinal body of economic policies. Due process became a means to evade *Slaughterhouse* and a flexible, potent protection for corporations, businesses, and property rights.”³⁵

In *Palko v. Connecticut*, a case regarding whether double jeopardy is a fundamental right, defined the appropriate use of trial, by dealing with trying someone for the same crime. While at first the right, to no double jeopardy appeared to be solely procedural, through the emergence of substantive due process cases, the view changed. The court began employing the due process clause as a basis of incorporating not only the procedural rights enumerated in the Constitution, but the substantive rights as well. Justice Thomas states in his concurring opinion on *McDonald v. Chicago*, “only those ‘fundamental’ aspects of the right required the Due Process Clause.”³⁸ Yet, the definition of “fundamental” has been, at most, loosely defined. In *Lawrence v. Texas*,³⁹ a civil liberties case involving the right to privacy, struck down the sodomy law in Texas by protecting the substantive right to freedom of privacy. Furthermore, in *Roe v. Wade*,⁴⁰ the court ruled the right to personal privacy that was protected under the Due Process Clause included the right of a women to choose to have an abortion. Both of these cases included the use of the Due Process clause to protect substantive rights that were not historically defined as “fundamental.” As Justice Souter writes for *Betts v. Brady*, a case about procedure, “The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.”⁴¹ Though the flexibility of due process is advertised as a benefit to the legal system, the lack of a bright-line test makes it a concept of construct to the United States judicial system.⁴² With increasingly arbitrary and unwarranted applications of the Due Process Clause to substantive rights under an undefined judicial philosophy, there is a danger that substantive rights will not be ruled on the basis of law, but opinion. The procedural protections enumerated in the due process

clause have been inappropriately stretched to assume the role of the now neutral privileges or immunities clause. Without a protection in place for substantive rights, Due Process shouldered the responsibility. The current application of the Due Process Clause is not consistent with its intent at the time of ratification. The Due Process Clause is overreaching its textual protections without originalist basis. We argue that excessive fines is a substantive right, as the facts of the case do not indicate a procedural violation, but a lack of protection of a fundamental right. As such, the Due Process clause should not be used for the incorporation of substantive rights, therefore it should not be used to incorporate the substantive right protected in the 8th amendment. It is necessary to keep in mind that the 8th amendment is not just regarding the death penalty it is also about excessive fines. *Furman v Georgia* establishes that the death penalty is a procedural right, given to the citizens of the United States. We know from this case that the intent of 8th amendment when it deals with the death penalty is to use the privileges and immunities as due process, but when it comes to substantive rights that deals with a different issue. A crucial part to defining a substantive right is having a contract, in this situation, as it deals with a car that has been bought that means that there is a contract that guarantees the sale of the car. By having this contract it seals that there has been a deal that allows Timbs to own the car, so therefore this contract leads us to substantive law rather than procedural. After the contract Timbs now owns the vehicle, so if it is taken away then it is considered a civil forfeiture. Initially the legal intent to punish criminal for the crimes they have committed, and it would match what they deserved. Now civil forfeiture has become an issue for the common man, as the government can seize any materials that are used in a criminal act. Those who have their car stolen often face this issue as it becomes material of the government as the trial progresses. If people want their valuables returned to them it cost a large sum of money which is very cruel to a regular citizen. Although it is a little less cruel when it comes to criminals if the money is too much is is unfair punishment to them. As both historical context and textual basis assert that the privileges and immunities clause is intended as a protection of substantive rights, it should be used as the mechanism of incorporating the 8th amendment in *Timbs v. Indiana*.

Conclusion

The Privileges or Immunities Clause of the 14th amendment should be used to incorporate the Eighth Amendment due to its original intent and the inappropriateness of the Due Process Clause for the incorporation of substantive rights. In light of a historical context to the Privileges and Immunities Clause of the Fourteenth Amendment, the Slaughterhouse decision that eviscerated the Privileges and Immunities Clause is clearly an erroneous ruling. Enacted in a Reconstruction Congress as a protection of substantive rights against states abuse of privileges, the Privileges and Immunities Clause was created with the intention of protecting the same rights as those at stake in *Timbs v. Indiana*. Intended to regulate privileges that are provided within the states that include, the Privileges or Immunities Clause is the clear mechanisms for the incorporation of the Eighth Amendment Excessive Fines Clause.

Incorporation of the Eighth Amendment Excessive Fines Clause through the Privileges or Immunities Clause of the Fourteenth Amendment protects the court from unclear legal definitions of “fundamental rights.” As the Court has not delineated the true basis of incorporation of substantive rights through the Due Process Clause, its apparent “flexibility” is instead a danger to the United States legal system. The extent that the Privileges or Immunities clause has been stretched too, especially when it is used in situation where it would not be obvious to use has disrupted the American legal system. The Privileges or Immunities Clause of the Fourteenth Amendment was originally intended to protect substantive rights and incorporate the Bill of Right. With that historical basis, the Privileges and Immunities Clause is clearly enacted for that purpose, making it the originally intended mechanism for incorporation.

Examining the historical context of the Privileges or Immunities Clause and the illusion that the current legal ways are the way the founders intended, currently employed in using the Due Process clause to incorporate substantive rights, the State of Indiana has clear cause to incorporate Eighth Amendment excessive fines clause through the Privileges or Immunities clause of the Fourteenth Amendment. Incorporation through Due Process Clause would violate the original intent of the Constitution and allow the Due Process Clause to overreach its intent in the Constitution. As the framers intended it is kept that the privileges or immunities clause can be used in situations with substantive rights. In order to define a substantive right, there is a contract that is agreed upon.

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