Timbs v. Indiana: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?

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> "Here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on."
>
> —Justice Neil Gorsuch to Indiana Solicitor General Thomas M. Fisher during oral argument in *Timbs v. Indiana*.

Introduction

To anyone familiar with the story of how selected parts of the Bill of Rights have become "incorporated" against the states, Justice Gorsuch's incredulous remark during the argument in *Timbs v. Indiana* is likely to resonate. When the Fourteenth Amendment was ratified in 1868, the well-understood purpose of its Privileges or Immunities Clause was to require, for the first time, that state governments observe the protections for individual liberty set forth in the Bill of Rights—protections that until then had restricted only the federal government. Yet 150 years later, the Supreme Court still had not resolved whether all of the constitutional protections in the Bill of Rights apply to the states. And so there was the Indiana solicitor general, standing before the justices and arguing that the Excessive Fines Clause of the Eighth Amendment does not limit Indiana's conduct in the same way it limits that of the federal government.

While Justice Gorsuch directed his dismay at counsel, it's no secret that the real culprit behind this state of affairs is the body of which

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Gorsuch is a member. It was the Supreme Court that subverted the meaning and purpose of the Fourteenth Amendment just a few years after its ratification, stymying the efforts of a nation that sought to reform the structure of our government in the wake of the Civil War and the South's ongoing refusal to respect fundamental rights. And it was the Supreme Court that never forthrightly corrected this misstep. Instead, for decades now, the Court has opted to "selectively" enforce certain protections from the Bill of Rights against the states, one by one, under the authority of the Fourteenth Amendment's Due Process Clause. The Court's stubborn adherence to that course is why, in the 21st century, several Bill of Rights protections still remain unincorporated.

That number got smaller with *Timbs*. Unanimously, the justices ruled that the Excessive Fines Clause applies equally to the states and the federal government. The decision, moreover, reaffirmed the Court's earlier holding that the clause extends its protection not only to straightforward monetary fines but also to civil asset forfeitures, like the one at issue in *Timbs*, when they are used at least in part to punish.

Putting aside the question of why the incorporation of the Excessive Fines Clause was still up for debate, the more interesting question is why the matter was finally decided now. On the one hand, incorporating the clause helps clean up the untidiness of the Court's Fourteenth Amendment jurisprudence. And in that sense, as Tyson Timbs's counsel told the justices at oral argument, the case was in part simply "constitutional housekeeping." But on the other hand, when one considers the factors that prompted the Court to take this case and rule so decisively in Timbs's favor, it becomes clear that much more was going on—and much more was at stake. The truth is that *Timbs* is a promising step in reviving a long-neglected constitutional safeguard to meet the challenges posed by a new breed of government abuses.

In recent decades, federal and state governments have dramatically ramped up their use of civil forfeiture proceedings, while altering the rules of these proceedings in ways that deny basic fairness to the individuals caught up in their webs. Particularly at the state and local level, forfeiture has become a cash cow, a tool used to fill the gaps of declining law-enforcement budgets without formally raising taxes. Meanwhile, the incentive structures in place under federal and state law permit police departments to retain much of the value of the assets

they seize—a moral hazard that fosters aggressive and unseemly tactics that blur the line between law enforcement and profiteering. And the spread of abusive civil forfeiture has not occurred in isolation. Rather, it has accompanied a more general rise in the use of exploitative fines and fees to generate revenue, largely on the backs of minority and low-income communities least equipped to resist.

Thanks to investigative journalists and the work of advocacy organizations, these unsavory tactics have been exposed to scrutiny in recent years. And that exposure has prompted a growing effort to curb abuses, one that increasingly spans the ideological spectrum.

The *Timbs* case exemplifies both the spread of civil-forfeiture abuse and the mounting strength of the movement against it. The Institute for Justice identified an outrageous case in which the Indiana courts allowed the state to seize the vehicle of a defendant who pled guilty to a small-time drug offense, even though his vehicle was worth four times more than the highest fine he could have received for his crime. At the certiorari stage and on the merits before the Supreme Court, Timbs's counsel mustered a broad coalition of amici—remarkable in its ideological diversity but united against oppressive civil forfeitures—that helped demonstrate the legal necessity of incorporating the Excessive Fines Clause against the states and the practical importance of doing so.

The resulting Supreme Court decision should add even more momentum to the movement against exploitive financial penalties. For a variety of reasons, the Court's clarification that all states must obey the Excessive Fines Clause should promote the development of more uniform and detailed standards concerning what is "excessive," making it easier for such challenges to succeed. And for that reason, *Timbs* is an important step toward the creation of a robust excessive-fines jurisprudence capable of reining in a host of modern injustices.

I. Legal and Historical Context

A. The Excessive Fines Clause: Curbing the Potential for Abuse of the Government's Power to Punish

One of three "parallel limitations"[1] that make up the Eighth Amendment, the Excessive Fines Clause is sandwiched between a

[1] Ingraham v. Wright, 430 U.S. 651, 664 (1977).

prohibition on excessive bail and the more familiar ban on cruel and unusual punishments:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The clause was not widely discussed when the First Congress proposed the Bill of Rights, nor in the state debates over ratification.[2] Remarkably, not until 1998 did the Supreme Court first apply the clause, and only a few decisions before that had discussed its meaning and scope.[3] Nonetheless, its origin and purpose are "undisputed."[4]

The Excessive Fines Clause, along with the rest of the Eighth Amendment, came essentially "verbatim" from the English Bill of Rights of 1689.[5] Like many constitutional safeguards, the clause is rooted in a series of notorious government abuses in England that spurred the entrenchment of countervailing legal rules.

After King Charles I dismissed the Parliament in the 1620s, he found himself—not unlike many U.S. states and localities today—in need of creative new ways to raise funds. And so the king "turned 'to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law.'"[6] Despite a tradition of prohibiting disproportionate fines that stretched back to the Magna Carta, the Star Chamber began to "'impose[] heavy fines on the king's enemies.'"[7] And while the statute that eventually abolished that court "prohibited any court thereafter from . . . levying . . . excessive fines," this problem again became a "flashpoint" later in the century.[8] Once more, courts began to "impose[] ruinous fines on the critics of the crown,"[9] a practice that "became even more excessive and

[2] United States v. Bajakajian, 524 U.S. 321, 335 (1998).

[3] *Id.* at 327 (citing examples).

[4] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

[5] Bajakajian, 524 U.S. at 335.

[6] Timbs v. Indiana, 139 S. Ct. 682, 693 (2019) (Thomas, J., concurring in the judgment) (quoting 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 462 (1827)).

[7] *Id.* at 694 (quoting Lois G. Schwoerer, The Declaration of Rights, 1689 91 (1981)).

[8] *Id.* at 693–94 (quoting Schwoerer, *supra* at 91).

[9] *Id.* (quoting Schwoerer, *supra* note 7, at 91).

partisan,"[10] as when the sheriff of London, for instance, was fined over $10 million in present-day dollars for "speaking against the Duke of York."[11]

These excesses formed a key part of "the constitutional and political struggles between the king and his parliamentary critics" that culminated in the Glorious Revolution and the 1689 Bill of Rights.[12] That declaration of the "ancient rights and liberties" of English subjects contained a familiar-sounding provision: "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[13]

Those precise words, decades later and an ocean away, were included in the Virginia Declaration of Rights just as the American colonists were preparing to declare their independence from Great Britain.[14] And in 1789, when the new United States Congress proposed a federal bill of rights, its framers used Virginia's provision as their model for the Eighth Amendment—being "aware and [taking] account of the abuses that led to the 1689 Bill of Rights."[15] By then a majority of the states had some version of a similar ban in their own constitutions, and the clause prompted little "controversy or extensive discussion" in Congress or during ratification.[16]

Consistent with its origin and purpose, the clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[17] Its focus is curbing "the potential for governmental abuse of its prosecutorial power."[18]

[10] Browning-Ferris, 492 U.S. at 267 (quoting Schwoerer, *supra* note 7, at 91).

[11] Timbs, 139 S. Ct. at 694 (Thomas, J., concurring in the judgment).

[12] *Id*. at 693 (quoting Schwoerer, *supra* note 7, at 91).

[13] English Bill of Rights of 1689, http://avalon.law.yale.edu/17th_century/england.asp.

[14] Virginia Declaration of Rights, http://avalon.law.yale.edu/18th_century/virginia.asp.

[15] Browning-Ferris, 492 U.S. at 267.

[16] *Id.* at 264; see Timbs, 139 S. Ct. at 696 (Thomas, J., concurring in the judgment) (citing 1 Annals of Cong. 754 (1789)).

[17] Austin v. United States, 509 U.S. 602, 609–10 (1993) (emphasis and quotation marks omitted).

[18] Browning-Ferris, 492 U.S. at 266 (quotation marks omitted).

B. Civil War, Reconstruction, and the Black Codes: The South's Violations of Fundamental Rights

Throughout the antebellum period in American history, the Excessive Fines Clause—like the rest of the Bill of Rights—was generally understood as curbing only abuse by the *federal* government.[19]

That omission had consequences. Starting around 1830, Southern states enacted laws restricting freedom of speech and the press to suppress anti-slavery efforts; in at least one state, writing or publishing abolitionist literature was punishable by death.[20] And the consequences of this omission were particularly acute in the aftermath of the Civil War. At that time, the "overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union."[21] Complicating the task, those states remained defiant in their suppression of former slaves and their persecution of white Unionists who had opposed secession, blatantly violating fundamental liberties in the process.

In response, "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union."[22] Composed of members of the House and Senate, the committee conducted fact-finding, took testimony, and controlled the framing of legislation and constitutional amendments concerning Reconstruction.

The joint committee submitted to Congress a report based on its exhaustive investigation into conditions in the South that "extensively catalogued the abuses of civil rights in the former slave States."[23] The report confirmed the systematic violation of fundamental rights by Southern states and demanded "changes of the organic law" to

[19] See Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250 (1833).

[20] See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 160–61 (1998); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 30, 40 (1986).

[21] David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 383 (2008).

[22] McDonald v. City of Chicago, 561 U.S. 742, 827 (2010) (Thomas, J., concurring in part and in the judgment) (citing Cong. Globe, 39th Cong., 1st Sess. 6, 30 (1865)).

[23] *Id.*

secure the "civil rights and privileges of all citizens in all parts of the republic."[24]

Of central concern to the joint committee and other members of Congress were the Black Codes. Enacted across the South, these legislative measures were an attempt to re-institutionalize slavery in a different guise—systematically violating the rights of the newly freed slaves to force them into conditions replicating the pre-war plantation system. Under "the barbarous codes which have been passed in all the rebel States," said one lawmaker, blacks were in "a condition of nominal freedom worse than a condition of actual slavery."[25] As one observer put it in a report read aloud to the Senate, "the South is determined to have slavery—the thing, if not the name."[26]

The "centerpiece" of these codes "was the attempt to stabilize the black work force and limit its economic options apart from plantation labor. Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers."[27] Beginning in 1865, for instance, many localities "adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to rent or purchase real estate and engage in skilled urban jobs."[28] Indeed, "[v]irtually all the former Confederate states enacted sweeping vagrancy and labor contract laws" that required freedmen to be privately employed under terms supervised by the state.[29]

Failure to comply with these contractual obligations was a crime, and, like other violations of the Black Codes, was punished with harsh penalties that included fines, imprisonment, lashings, forced

[24] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. xxi (1866).

[25] Cong. Globe, 39th Cong., 1st Sess. 1839 (1866) (Rep. Clarke).

[26] Cong. Globe, 39th Cong., 1st Sess. 94 (1865) (Sen. Sumner).

[27] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 199 (1988).

[28] *Id.* at 198.

[29] *Id.* at 200; see Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (Rep. Donnelly) ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor."); Report of the Joint Committee on Reconstruction, *supra* note 24, Pt. II, at 240 (statement of Capt. Alexander P. Ketchum).

labor, and forfeiture of property.[30] As contemporary observers could readily see, these measures were "calculated to virtually make serfs of the persons that the [Thirteenth Amendment] made free."[31]

C. Excessive Fines as a Tool of Oppression

The spread of the Black Codes and the denigration of individual rights in the post-war South have been widely recounted. But particularly notable here is the extent to which Southern governments used outlandish fines as a tool of oppression.[32] The infliction of these unpayable fines supplied the pretext under which slavery conditions were reinstituted, as freedmen convicted of vagrancy were "auctioned off as contract laborers to white employers who paid their fines."[33]

For instance, Florida law demanded that a vagrant "be punished by a fine not exceeding $500 and imprisoned for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court."[34] Mississippi law similarly decreed that "freedmen, free negroes and mulattoes" who were found "without lawful employment or business, or found unlawfully assembling themselves together," were to be fined up to $50.[35] The law further specified that "all fines and forfeitures collected under the provisions of this act shall be paid into the county treasury for general county purposes," and that, should anyone fail to pay, the county sheriff was obligated "to hire out said freedman, free negro or mulatto, to any person who will, for the shortest period of service, pay said fine or forfeiture."[36]

[30] See Foner, *supra* note 27, at 205.

[31] Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke).

[32] For more detail, see Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2012) (No. 17-1091), https://www.theusconstitution.org/wp-content/uploads/2018/03/Timbs-CAC-Merits-Brief-FINAL.pdf.

[33] Garrett Epps, The Antebellum Political Background of the Fourteenth Amendment, 67 Law & Contemp. Probs. 175, 204 (2004).

[34] Cong. Globe, 39th Cong., 1st Sess. 1621 (Rep. Myers).

[35] An Act to Amend the Vagrant Laws of the State § 2 (Nov. 24, 1865), reprinted in S. Exec. Doc. No. 39-6, at 192 (1867).

[36] *Id.* § 5.

Similar measures swept the South. Thus, when the commissioner of the Freedmen's Bureau compiled a synopsis of laws concerning people of color, he called "special attention" to the South's vagrancy laws, the terms of which "will occasion practical slavery."[37] The commissioner had received vivid evidence of such abuses, such as this report from Nashville, Tennessee:

> [T]he police of this city arrested some forty or fifty young men and boys (colored) on various pretexts, mostly for vagrancy, and they were thrown into the work-house to work out fines of from $10 to $60 each. By an arrangement with the city recorder . . . [two] residents of this city . . . by paying their fines, induced the prisoners, as is claimed, to consent to go to Arkansas to work on a plantation. . . . Many of them are minors, and were taken away without the knowledge or consent of their parents.[38]

Vagrancy, moreover, was only one of the "crimes" for which Southern governments levied oppressive fines. These jurisdictions criminalized a wide range of offenses to justify arresting freedmen and consigning them to forced labor to repay their fines. One critic described the measures as "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude."[39]

It quickly became clear to Congress that Southern states could not be trusted to respect the fundamental rights of their own citizens. As one senator noted, "They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."[40] Lawmakers viewed these abuses as violating core freedoms identified in the Bill of Rights. Condemning these laws as abridgements of fundamental liberties, they decried the lack of "protection to life, liberty, or property."[41] Something needed to be done.

[37] Letter from Maj. Gen. O.O. Howard to Sec'y of War E.M. Stanton (Dec. 21, 1866), reprinted in S. Exec. Doc. No. 39-6, *supra* note 35, at 2–3.

[38] Report from Brevet Brigadier Gen. J.R. Lewis, Assistant Comm'r, to Maj. Gen. O.O. Howard (Nov. 1, 1866), reprinted in S. Exec. Doc. No. 39-6, *supra* note 35, at 129.

[39] Cong. Globe, 39th Cong., 1st Sess. 1123 (Rep. Cook); see, e.g., *id.* at 516–17, 651, 1621, 2777.

[40] *Id.* at 474 (Sen. Trumbull).

[41] *Id.* at 1617 (Rep. Moulton).

D. The Fourteenth Amendment: Forcing the States to Respect the Bill of Rights and Other Fundamental Liberties

Congress first responded through legislation, enacting the Civil Rights Act of 1866 and later an expansion of the Freedmen's Bureau—both of which took aim at excessive and discriminatory penalties.[42] Proponents of these bills explicitly linked the freedoms denied to blacks in the South with the "inalienable rights" enshrined in America's founding documents.[43] According to one congressman, "the civil rights referred to in the bill are . . . the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence."[44]

Ultimately, however, Congress "deemed these legislative remedies insufficient."[45] Among other problems, doubts were raised about the federal government's constitutional authority to impose such remedial measures. All told, "Southern resistance, Presidential vetoes, and [the Supreme Court's] pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks."[46] As one senator explained, the freed slaves needed to be guaranteed "the essential safeguards of the Constitution."[47]

Therefore, "to provide a constitutional basis" for the protection of fundamental rights in the South,[48] Congress crafted the Fourteenth Amendment to fundamentally transform our federal system. The debates in Congress over the amendment confirm that its first section—in particular the Privileges or Immunities Clause—was understood to secure against state encroachment the individual liberties enumerated in the Constitution and the Bill of Rights.

[42] See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27; Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176–77.

[43] Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke).

[44] *Id.* at 632 (Rep. Moulton); see also *id.* at 475 (Sen. Trumbull) (describing "[t]he great fundamental rights set forth in this bill").

[45] McDonald, 561 U.S. at 775.

[46] *Id.*

[47] Cong. Globe, 39th Cong., 1st Sess. 1183 (Sen. Pomeroy).

[48] McDonald, 561 U.S. at 775.

Section 1 of the Fourteenth Amendment was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. Introducing his draft of the amendment in February 1866,

> Bingham began by discussing [the Supreme Court's] 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."[49]

Bingham "emphasized that § 1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.'"[50]

In April, the joint committee unveiled a revised draft of the amendment that contained in its present form the amendment's sweeping guarantee of fundamental rights and liberties:

> 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.[51]

"Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'"[52] Howard "explained that the Constitution recognized 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,'

[49] *Id.* at 829 (Thomas, J., concurring in part and in the judgment) (quoting Cong. Globe, 39th Cong., 1st Sess. 1089–90).

[50] *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088).

[51] U.S. Const. amend. XIV, § 1; see Cong. Globe, 39th Cong., 1st Sess. 2764.

[52] McDonald, 561 U.S. at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2765).

and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States."[53] He then "stated that 'the great object' of § 1 was to 'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.'"[54]

Finally, "Representative Thaddeus Stevens, . . . acting chairman of the Joint Committee on Reconstruction," made the same point, explaining that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States."[55] Together, "these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States."[56]

Once the Fourteenth Amendment was sent for ratification to the states in June 1866, ratification became the key political issue of the day. The 1866 elections "became a referendum on the Fourteenth Amendment," resulting in a landslide victory for its supporters in the Republican Party.[57] These decisive results turned the tide in favor of ratification, which was finally achieved in July 1868.

As more and more states voted on ratification, "the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea."[58] The amendment's proponents stressed that its protection of rights against state abridgment would be "coextensive with the whole Bill of Rights."[59] Tellingly, among the "constitutional law treatises published after

[53] *Id.* at 831–32 (opinion of Thomas, J.) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765).

[54] *Id.* at 832 (quoting Cong. Globe, 39th Cong., 1st Sess. 2766).

[55] *Id.* at 762 n.9 (majority opinion) (quoting Cong. Globe, 39th Cong., 1st Sess. 2459).

[56] *Id.* at 833 (Thomas, J., concurring in part and in the judgment).

[57] Foner, *supra* note 27, at 267; see Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866, 101 Geo. L.J. 1275, 1279 (2013).

[58] Lash, *supra* note 57, at 1326. The records of the ratifying legislatures, though sparse, are "fully consistent with an intent to apply the Bill of Rights to the states." Curtis, *supra* note 20, at 147.

[59] Foner, *supra* note 27, at 267 (quoting N.Y. Times, Nov. 15, 1866).

the Fourteenth Amendment was proposed but before it was adopted, which . . . spoke to the question of the meaning of the Amendment," all of them "indicated the Amendment would enforce the Bill of Rights against the states."[60]

E. The Supreme Court's Evisceration of the Privileges or Immunities Clause

It was well understood, therefore, that the Fourteenth Amendment's Privileges or Immunities Clause was being adopted to effect a radical constitutional transformation—one that would "restrain the power of the States" by compelling them to respect the individual liberties enumerated in the federal Bill of Rights.[61]

Such clarity, however, escaped a majority of justices on the Supreme Court. Called upon to interpret the Privileges or Immunities Clause in the now-infamous *Slaughter-House Cases*, those justices swiftly cast aside the understood public meaning of the clause—reducing it, in the words of a dissenting justice, to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[62]

Embracing the jurisprudence of incredulity, the Court simply refused to admit that the purpose of the clause was to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[63] Instead, the Court declared that the only privileges or immunities the clause was meant to protect were the limited set of rights that owe their existence to the federal government, like "the right of free access to its seaports."[64] With that, the Court banished reality from its view—not for the last time—and effectively wrote the Privileges or Immunities Clause out of the Constitution.

The decision in *Slaughter-House* was immediately condemned by former members of the 39th Congress as "a great mistake,"[65] reflecting an interpretation of the Privileges or Immunities Clause

[60] Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the *Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 632 (1994).

[61] Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard).

[62] Slaughter-House Cases, 83 U.S. 36, 96 (1872) (Field, J., dissenting).

[63] *Id.* at 78 (majority opinion).

[64] *Id.* at 79.

[65] 2 Cong. Rec. 4116 (1874) (Sen. Boutwell).

that "radically differed" from its framers' intent.[66] But no matter. A string of later decisions continued this retreat from the clause's text and meaning—notably *United States v. Cruikshank*, which explicitly held that the rights to peaceably assemble for a lawful purpose and to keep and bear arms remained guarantees against Congress only, not the states.[67]

Expressing the national mood of a white majority that had grown weary of Reconstruction, the Supreme Court's failure of principle "reflected America's loss of will to memorialize the reforms begun in the late-1860s."[68]

F. Due Process and the Winding Road to Incorporation

The Court's throttling of the Privileges or Immunities Clause was, fortunately, not the end of the story. Later in the 19th century, "the Court began to consider whether the [Fourteenth Amendment's] Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights."[69] The Court "viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship," holding that the only rights protected were those "'of such a nature that they are included in the conception of due process of law.'"[70] Using a variety of formulations to describe which rights met that standard, the Court "selectively" incorporated individual protections from the Bill of Rights into the Due Process Clause, one at a time, in a series of cases decided through the 1960s.[71]

Eventually the Court settled on the standard it would use to decide if a particular right is incorporated against the states, asking whether that right is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."[72] By 2018,

[66] Curtis, *supra* note 20, at 177 (quoting Sen. Edmunds); see also Michael Anthony Lawrence, Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 Mo. L. Rev. 1, 29–35 (2007).

[67] 92 U.S. 542 (1875).

[68] Lawrence, *supra* note 66, at 38.

[69] McDonald, 561 U.S. at 759.

[70] *Id.* (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

[71] *Id.* at 760–63 (citing cases).

[72] *Id.* at 767 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (emphasis omitted).

the Court had incorporated nearly all of the protections in the Bill of Rights.[73] Among the handful remaining: the Eighth Amendment's safeguard against excessive fines.

II. The *Timbs* Case—Background and Lower Courts

A. Small-Time Drug Deals and a High-End SUV

Tyson Timbs's journey to the Supreme Court began with a personal story that has become all too familiar. Timbs became addicted to an opioid medication prescribed to him for a painful physical condition; once his prescription ran out, he began buying pills illegally. And that eventually led to heroin. The death of his father around this time left him with about $73,000 in life-insurance proceeds. After using roughly $42,000 of this money to buy a Land Rover SUV ("a salesman steered him from the used vehicle Timbs intended to buy"[74]), he squandered the rest on his addiction. When his money ran out, selling heroin became a way to fund his habit. A confidential informant brought him to the attention of Indiana law enforcement, and undercover officers completed two controlled purchases of heroin from Timbs, after which he was arrested and charged. These were not large-scale transactions: each sale was for two grams of heroin, and Timbs's biggest haul from them was $225.[75]

Timbs eventually pled guilty to one count of dealing in a controlled substance and a related count of conspiracy. He was sentenced to one year of home detention followed by five years of probation, which included mandatory participation in an addiction-treatment program. Timbs also paid various fees associated with the costs of his prosecution and conviction.[76]

That was not enough for Indiana, though, which set its sights on Timbs's pricey SUV. Before his criminal prosecution was even resolved, the state filed a civil forfeiture action seeking to obtain

[73] *Id.* at 764–65 & n.13.

[74] Mark Walsh, What can states seize? SCOTUS will decide whether the excessive fines clause applies to states, ABA Journal (Dec. 2018), http://www.abajournal.com/magazine/article/scotus_excessive_fines_timbs_indiana.

[75] Brief for the Petitioner at 4–5, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief for the Respondent at 2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[76] State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017).

ownership of Timbs's vehicle based on his alleged use of the vehicle to transport heroin.[77] Unlike the criminal prosecution, however, the forfeiture proceedings were not handled by government lawyers. Instead, that work was contracted out to a private law firm that would be entitled to a cut of whatever Indiana recovered. That's because Indiana, alone among the 50 states, "allows prosecutors to outsource civil-forfeiture cases to private lawyers on a contingency-fee basis,"[78] creating what is essentially an "institutionalized bounty hunter system in which state DAs contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit."[79]

Indeed, Indiana had developed a notorious reputation for its aggressive and at times unethical use of civil forfeiture, as Timbs's attorneys would later highlight before the Supreme Court. In one especially egregious example, "prosecutors sued to forfeit a teenager's car, after it was found with 'a large quantity of Gatorade bottles and assorted snacks and candies' stolen from a playground concession stand."[80] Multiple investigations by state and federal officials have uncovered rampant misuse of forfeited funds by local police departments, along with blatant conflict-of-interest violations stemming from Indiana's unusual contingency-fee arrangements with private lawyers.[81] A trial court in one county uncovered mishandling of forfeited assets and "secret agreements" that amounted to a "fraud on the court."[82]

[77] *Id.* at 1181–82, 1184–85.

[78] Brief for the Petitioner, *supra* note 75, at 32; see Ind. Code § 34-24-1-8.

[79] David P. Smith, Prosecution and Defense of Forfeiture Cases ¶ 1.01, at 1-13 (2017) (quoted in Brief for the Petitioner, *supra* note 75, at 30).

[80] Brief for the Petitioner, *supra* note 75, at 34 (quoting Pls.' Mot. Summ. J., State v. Jaynes, 2012 WL 12974140 (Ind. Super. Ct. May 23, 2012)).

[81] See, e.g., Petition for Certiorari at 31–32, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (citing, inter alia, In re McKinney, 948 N.E.2d 1154, 1155–56 (Ind. 2011), and Office of the Inspector Gen., U.S. Dep't of Justice, Audit of Henry County Sheriff's Office's Equitable Sharing Program Activities, New Castle, Indiana, at 4 (Feb. 2017), https://oig.justice.gov/reports/2017/g5017001.pdf).

[82] Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court, at 6 (Ind. Cir. Ct., Delaware Cty. Aug. 18, 2008), http://www.fear.org/JudgeDaileyReport.pdf.

B. Timbs in the Indiana Courts

In Timbs's case, an Indiana Superior Court judge rebuffed the state's overreaching. Although Timbs had transported drugs in his vehicle, the judge noted that the maximum fine for the felony to which he had by then pleaded guilty was $10,000, and that his SUV was worth almost four times that amount.[83] Forfeiting the vehicle, the judge concluded, would violate the Excessive Fines Clause, as "[t]he amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense."[84] "While the negative impact on our society of trafficking in illegal drugs is substantial," the judge acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct."[85] The state was ordered to return Timbs's vehicle immediately.

Instead, the state appealed. But the Indiana Court of Appeals affirmed the dismissal of the forfeiture action. Comparing the severity of Timbs's offense with the value of his vehicle, it agreed that this forfeiture went too far.[86]

Not satisfied, the state took the case to the Indiana Supreme Court, where it found a more hospitable audience. That court reversed, but not because it disagreed that the forfeiture was excessive. Instead, the court declared that states like Indiana are not bound by the Excessive Fines Clause at all.

The Indiana Supreme Court's opinion is remarkable—and not in a good way. Timbs and Indiana agreed that the clause applies to the states; they disagreed only about the excessiveness of this particular forfeiture. But because the U.S. Supreme Court had never expressly held that states are bound by the Excessive Fines Clause, the state supreme court justices believed they could "decline to find or assume incorporation until the [U.S.] Supreme Court decides the issue authoritatively." And that's precisely what they did. Without even bothering to analyze for itself whether the Excessive Fines Clause met the standards for incorporation, the court simply pronounced

[83] Pet. App. 28–29, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (Judgment Order of the Ind. Super. Ct., Indiana v. Timbs, Aug. 28, 2015).

[84] *Id.* at 30.

[85] *Id.*

[86] State v. Timbs, 62 N.E.3d 472, 476–77 (Ind. Ct. App. 2016).

that "Indiana is a sovereign state within our federal system" and "we elect not to impose federal obligations on the State that the federal government itself has not mandated."[87] This rhetoric seemed more suited to a world in which the Civil War, Reconstruction, and the ratification of the Fourteenth Amendment had never taken place.

C. Securing Supreme Court Review

Timbs's attorneys from the Institute for Justice then petitioned the Supreme Court to answer the following question: "Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment."[88]

The timing was auspicious. Timbs's certiorari petition offered not only a chance to correct a gap in the Supreme Court's incorporation precedents but also an opportunity to advance the cause of placing appropriate constitutional limits on the use of civil forfeiture.

Over the preceding years, the widespread abuse of civil forfeiture had blossomed into public view, partly as a result of in-depth investigative reporting. News outlets uncovered outrageous incidents in which people carrying substantial amounts of cash for perfectly legitimate reasons had their money seized in dubious highway stops, and law enforcement officers had pressured them into surrendering their rights through threats of imprisonment. The media also showed how forfeiture can benefit private entities, such as companies that specialize in teaching profiling techniques to police departments, thus creating an interlocking network of perverse financial incentives.[89] Given the disproportionate impact of these rapacious policies on low-income communities and racial minorities, left-leaning social justice organizations joined with right-leaning property rights advocates to condemn the trend and call for reform. In a 2017 opinion respecting the denial of a certiorari petition, Justice Clarence Thomas noted the "well-chronicled abuses" arising from

[87] Timbs, 84 N.E.3d at 1183–84.

[88] Petition for Certiorari, *supra* note 81, at i. Documents from the case are available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1091.html.

[89] See, e.g., Michael Sallah et al., Stop and Seize, Wash. Post (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.22f5d8898ca0; Sarah Stillman, Taken, New Yorker (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken.

a system in which "police can seize property with limited judicial oversight and retain it for their own use," and lamented how these operations "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings."[90]

Indeed, in a sign of the cross-ideological support that Timbs's case inspired, his petition was supported by five amicus briefs representing a diverse array of organizations, from the Southern Poverty Law Center and the National Association of Criminal Defense Lawyers to the Cato Institute and the U.S. Chamber of Commerce. Our own amicus brief for the Constitutional Accountability Center focused on reminding the Court of the history recounted above—that the Fourteenth Amendment was intended to apply the Bill of Rights to the states—and on documenting how the Southern states' use of oppressive fines during Reconstruction was one of the central forces motivating the framers of that amendment. While the Supreme Court's granting of certiorari was not a foregone conclusion, neither was it a surprise.

III. *Timbs* at the Supreme Court

At the merits stage, Timbs's opening brief demonstrated beyond cavil that the right to be free of excessive fines met the standards for incorporation under the Due Process Clause—being both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[91]

Indeed, so unassailable was this point that Indiana did not try to deny it. Instead, the state labored mightily to reframe the question. Rather than ask as a general proposition whether the Excessive Fines Clause is incorporated against the states, Indiana argued that the Court should focus on the particular type of fine at issue—a civil *in rem* forfeiture. So narrowed, the issue would be whether America's legal tradition embraces a "right to be free of disproportionate *in rem* forfeitures."[92] According to Indiana, the answer was no.

[90] Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (statement of Thomas, J.).

[91] McDonald, 561 U.S. at 767 (citing Duncan, 391 U.S. at 149, and Glucksberg, 521 U.S. at 721) (emphasis omitted). Timbs also argued for incorporation under the Privileges or Immunities Clause, though the brief spent much more time on the due process argument.

[92] Brief for the Respondent, *supra* note 75, at 4.

But this tack created problems of its own. The Supreme Court had already decided, in 1992's *Austin v. United States*, that civil *in rem* forfeitures conducted pursuant to federal law qualify as "fines" under the Excessive Fines Clause.[93] If the Court were to hold that civil forfeitures conducted by the states were *not* fines for Eighth Amendment purposes, it would be creating an obvious and perhaps inexplicable disparity between federal and state standards, something the Court typically declines to do absent some exceptional justification.[94] Thus, Indiana had to persuade the Court to either embrace this unabashedly "two-tiered" approach to incorporation or else reverse the *Austin* decision.

Indiana's strategy produced an unusual oral argument, to say the least. At the outset of his remarks, state solicitor general Thomas Fisher was asked to concede the very question on which certiorari had been granted: whether the Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment. Interrupting Fisher's opening comments, Justice Neil Gorsuch asked: "Before we get to the *in rem* argument and its application to this case, can we just get one thing off the table? We all agree that the Excessive Fines Clause is incorporated against the states? Whether this particular fine qualifies because it's an *in rem* forfeiture, [that's] another question. . . . Can we at least agree on that?"[95] Fisher's resistance prompted an incredulous rejoinder: "[M]ost of these incorporation cases took place in like the 1940s. And here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on, General."[96] To similar effect, Justice Brett Kavanaugh asked: "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?"[97] Justice Sonia Sotomayor later piled on, "Just so I'm clear, you're asking us to overrule *Austin*? Because that's the only way that you can win with a straight face?"[98]

[93] Austin, 509 U.S. at 604. The Court reasoned that forfeitures, even when they are civil in nature, qualify as "fines" when they serve, at least in part, to punish. *Id.* at 618.

[94] See McDonald, 561 U.S. at 765–66.

[95] Transcript of Oral Argument at 31, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_4h25.pdf.

[96] *Id.* at 32–33.

[97] *Id.* at 33.

[98] *Id.* at 53.

The oral argument left little doubt which side would prevail, and it was not surprising when the justices unanimously ruled in Timbs's favor three months later. Justice Ruth Bader Ginsburg's opinion for the Court was joined by everyone except Justice Thomas, who wrote a lengthy opinion concurring in the judgment. Justice Gorsuch also wrote a short concurrence.

A. Justice Ginsburg's Majority Opinion

Writing for the Court, Justice Ginsburg's opinion was characteristically efficient. It first held that the Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment's Due Process Clause, concluding that the prohibition against excessive fines is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[99] In eight crisp paragraphs, Justice Ginsburg canvassed the history presented by Timbs and his amici, demonstrating that "the protection against excessive fines has been a constant shield throughout Anglo-American history."[100] Based on the broad consensus that has surrounded this right from its medieval origins through the Founding, Reconstruction, and right up to the present, the opinion declares that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming."[101]

Having decided that matter, the opinion then disposes of Indiana's attempt to reframe the question. Although parties are entitled, "in their brief in opposition, to restate the questions presented," that prerogative "does not give them the power to expand [those] questions,"[102] and so the Court "decline[d] the State's invitation to reconsider [its] unanimous judgment in *Austin*."[103]

Nor were the justices persuaded by Indiana's "fallback" argument—that the Excessive Fines Clause should not be incorporated with respect to *in rem* forfeitures because its "application

[99] Timbs, 139 S. Ct. at 689 (quoting McDonald, 561 U.S. at 767).

[100] *Id*.

[101] *Id*. at 688.

[102] *Id*. at 690 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 279, n.10 (1993) (alteration in *Timbs*)).

[103] *Id*.

to such forfeitures is neither fundamental nor deeply rooted."[104] This proposition "misapprehends the nature of our incorporation inquiry," which asks "whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted."[105] Otherwise, the Court explained, every time it construed the scope of a Bill of Rights protection that already had been incorporated against the states, the Court would have to ask whether its new application of that protection was fundamental or deeply rooted. That was something the Court had never done.[106]

B. Justice Thomas's Opinion Concurring in the Judgment

Justice Thomas concurred in the judgment only, writing separately to discuss his disagreement "with the route the Court takes to reach this conclusion." Instead of relying on the Due Process Clause, Thomas explained, he "would hold that the right to be free from excessive fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.'"[107]

Thomas's opinion first briefly recaps his concurrence from *McDonald v. Chicago*, the 2010 decision which held that the newly recognized individual right to bear arms under the Second Amendment is incorporated against the states.[108] That concurrence had explained at length how the Supreme Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century, leading the Court to later find a substitute in the Due Process Clause, "a most curious place."[109] Having already covered that ground in *McDonald*, the bulk of Justice Thomas's *Timbs* opinion is devoted to showing that, when the Fourteenth Amendment was adopted, the ratifying public considered the Eighth Amendment's prohibition on excessive fines to be one of the "inalienable rights" of citizens that would be protected by the Privileges or Immunities Clause.

[104] *Id*. at 689–90.

[105] *Id*. at 690.

[106] *Id*. at 690–91 (citing as examples the First Amendment right recognized in Packingham v. North Carolina, 137 S. Ct. 1730 (2017), and the Fourth Amendment right recognized in Riley v. California, 573 U.S. 373 (2014)).

[107] *Id*. at 691 (Thomas, J., concurring in the judgment).

[108] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[109] *Id*. at 809 (opinion of Thomas, J.).

First, the opinion traces the development of the protection against excessive fines throughout English history.[110] Next, it describes "the widespread agreement about the fundamental nature of the prohibition on excessive fines" in America when the Constitution and Bill of Rights were adopted.[111]

Finally, Thomas's opinion demonstrates that the prohibition on excessive fines "remained fundamental at the time of the Fourteenth Amendment."[112] Drawing heavily on our amicus brief for the Constitutional Accountability Center, the opinion describes the oppressive fines levied as a tool of social control by the Black Codes, which "informed the Nation's consideration of the Fourteenth Amendment."[113] As Thomas concluded: "The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship."[114]

For Justice Thomas, this historical record "overwhelmingly" demonstrated that the Eighth Amendment's ban on excessive fines is "a constitutionally enumerated right understood to be a privilege of American citizenship," which therefore "applies in full to the States."[115]

C. Justice Gorsuch's Concurring Opinion

Given the changes in the Court's membership since *McDonald*—the last case addressing an incorporation question—one point of speculation in *Timbs* was whether the self-proclaimed originalist Justice Gorsuch, or his newer colleague Justice Kavanaugh, would follow Justice Thomas's lead in rejecting the Due Process Clause as a means for incorporating fundamental rights against the states. As it turned out, neither justice felt compelled to stake out such a position.

Justice Kavanaugh did not write separately but simply joined the majority opinion. Justice Gorsuch penned a one-paragraph concurring opinion, stating that the majority opinion "faithfully applies

[110] Timbs, 139 S. Ct. at 695 (Thomas, J., concurring in the judgment) (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

[111] *Id.* at 696.

[112] *Id.* at 697.

[113] *Id.* at 698.

[114] *Id.*

[115] *Id.* at 693, 698.

our precedent" and agreeing that, "based on a wealth of historical evidence," the Fourteenth Amendment incorporates the Excessive Fines Clause against the states.

Citing Justice Thomas's concurrences in *McDonald* and *Timbs*, Gorsuch also noted, "As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause." But "nothing in this case turns on that question," and "regardless of the precise vehicle," there is "no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment."[116]

IV. The Impact of *Timbs*

The outcome in *Timbs* was overdue, but just how significant is the decision? During oral argument, Timbs's counsel sought to reassure the justices: "Your Honors, this case is about constitutional housekeeping." Given the Court's prior suggestions that freedom from excessive fines is incorporated against the states, he continued, "all that remains to do is to expressly so hold."[117]

Moreover, almost all of the protections in the Bill of Rights already have been incorporated, with only a "handful" remaining.[118] And it seems that the only reason most of these protections remain unincorporated is that the Supreme Court has never had any cases presenting the question.[119] Thus, a case of "constitutional housekeeping"

[116] *Id*. at 691 (Gorsuch, J., concurring).

[117] Transcript of Oral Arg., *supra* note 95, at 63.

[118] McDonald, 561 U.S. at 764–65. By now "the only rights not fully incorporated" are (1) "the Third Amendment's protection against quartering of soldiers," (2) "the Fifth Amendment's grand jury indictment requirement," (3) "the Sixth Amendment right to a unanimous jury verdict," and (4) "the Seventh Amendment right to a jury trial in civil cases." *Id*. at 765 n.13. But see Englbom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (concluding that the Third Amendment is incorporated against the states).

[119] While simple neglect may explain why most of the unincorporated provisions remain so, there is one exception: The Supreme Court has expressly held that the Sixth Amendment right to a unanimous jury verdict in criminal prosecutions is not fully incorporated, applying only to federal, not state, proceedings. See Apodaca v. Oregon, 406 U.S. 404 (1972). But that ruling "was the result of an unusual division among the Justices," McDonald, 561 U.S. at 766 n.14, and the Court has agreed to revisit that question during the October 2019 term. See Ramos v. Louisiana, 231 So. 3d 44 (La.App. 4 Cir., Nov. 2, 2017), cert. granted, 139 S. Ct. 1318 (Mar. 18, 2019) (No. 18-5924).

like *Timbs* could easily look like a mere tidying up of dusty corners in the Court's jurisprudence, the delayed but inevitable attending to an overlooked task.

On a practical level, too, one could question the decision's significance. Besides Indiana, only three other states (at most) had declined to enforce the Eighth Amendment's Excessive Fines Clause to state action.[120] And all 50 states have their own constitutional provisions prohibiting the imposition of excessive fines.[121] Many of those states interpret their own prohibitions to be identical to the Eighth Amendment.[122] In fact, Indiana itself is one of those states—its constitution specifies that "[e]xcessive fines shall not be imposed" and that "[a]ll penalties shall be proportioned to the nature of the offense,"[123] standards that the Indiana Supreme Court has indicated are "the same" as the Eighth Amendment's.[124] For reasons that aren't evident, Timbs relied only on federal law in challenging his forfeiture,[125] and no one addressed the Indiana Constitution on appeal.[126]

It is also far from clear how robust one can expect the protections of the Excessive Fines Clause to be. The Supreme Court has refused to require "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense," instead adopting "the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents."[127] In *Timbs*, the justices did not decide whether forfeiture of Timbs's vehicle would be "excessive," but at least some justices suggested that the answer to that question was not, in their view, obvious. After all, Timbs could have been sentenced to six years' imprisonment for his offence. "Is it possible," asked Justice Samuel Alito, "that six years' imprisonment is not an Eighth Amendment violation, but a fine of $42,000 is . . . ?"[128]

[120] Petition for Certiorari, *supra* note 81, at 19–21.

[121] Brief in Opposition to Petition for Certiorari at 8, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[122] *Id*. at 9 (citing examples).

[123] Ind. Const. art. 1, § 16.

[124] Norris v. State, 394 N.E.2d 144, 150 (Ind. 1979).

[125] Timbs, 84 N.E.3d at 1184.

[126] Timbs, 62 N.E.3d at 475 n.4.

[127] Bajakajian, 524 U.S. at 336.

[128] Transcript of Oral Argument, *supra* note 95, at 14.

Justice Elena Kagan drove the point home: "We've made it awfully, awfully hard to assert a disproportionality claim with respect even to imprisonment. And if it's at least equally hard to assert a disproportionality claim with respect to fines, we could incorporate this tomorrow and it would have no effect on anybody."[129]

Despite all this, downplaying the impact of *Timbs* would be a serious mistake. While it's true that only a few states had actually declined to enforce the Excessive Fines Clause in their courts, the vast majority of states had never weighed in at all.[130] By settling the matter, *Timbs* prevents a wider bloc of states from withholding this fundamental protection from their residents, while saving innumerable future plaintiffs (many of whom may be in dire straits financially) from wasting time and lawyers' fees litigating the issue.

Moreover, because the Eighth Amendment now governs punitive fines across the country, plaintiffs need not rely on the excessive-fine protections of individual state constitutions, with their potential variations in scope.[131] That, in turn, should encourage the development of more uniform standards for measuring "excessiveness" in state and federal courts. Reducing local variation should make it easier for attorneys everywhere to research and rely on cases from other jurisdictions in advocating for their clients. It also should make it simpler for impact-litigation nonprofits like the Institute for Justice to conduct strategic, nationwide efforts to secure excessive-fines precedent protecting individual rights.

In addition, even in states that have construed their own excessive-fine protections as being coextensive with the Eighth Amendment, state court judges will increasingly have to reckon with the federal version itself, including the possibility of Supreme Court review of their decisions. That prospect may help curb any tendencies by state judges, some of whom are elected on tough-on-crime platforms,[132]

[129] *Id.* at 24.

[130] Petition for Certiorari, *supra* note 81, at 14–18 (identifying only 14 states as having held that the Clause applies to the states).

[131] See, e.g., *id.* at 20 (citing the "unique . . . four-part test" used by Mississippi courts to evaluate excessive-fine claims under the state constitution).

[132] See, e.g., Joanna Cohn Weiss, Tough on Crime: How Campaigns for State Judiciary Violate Defendants' Due Process Rights, 81 N.Y.U. L. Rev. 1101 (2006); Keith Swisher, Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification, 52 Ariz. L. Rev. 317 (2010).

to reflexively side with law enforcement in the inevitably subjective task of appraising a fine's excessiveness.

Some justices expressed concern in oral argument about whether the Excessive Fines Clause is capable of imposing meaningful limits on monetary penalties—particularly given the harsh prison sentences permitted by the Cruel and Unusual Punishments Clause. That concern may be misguided, or at least overblown. The Cruel and Unusual Punishments Clause does not refer to "excessive" punishments. Based on history and that textual distinction, some believe that the clause simply bans "'certain *methods* of punishment'" outright, "without reference to the particular offense" or whether the two are proportional.[133] Moreover, forbidding disproportionate fines makes sense even without a comparable limit on prison sentences or other penalties. Because "the State stands to benefit" from fines, they are more likely to be abused, as Justice Antonin Scalia once noted: "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue."[134] Notably, some early American state constitutions banned excessive fines "without placing any restrictions on other modes of punishment."[135]

It is therefore premature to assume that applying the Excessive Fines Clause to the states will be a hollow victory merely because the Supreme Court has approved draconian prison sentences under a different portion of the Eighth Amendment.

Together, the changes wrought by *Timbs* hold out the prospect that our state and federal judiciaries will flesh out more robust rules capable of restraining the worst excesses of overbearing financial sanctions. Such rules could help curb not just unfair forfeitures but the full range of exploitive fines and fees that have undergone a

[133] Harmelin v. Michigan, 501 U.S. 957, 978–79 (1991) (opinion of Scalia, J.) (quoting Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 842 (1969) (emphasis added by Justice Scalia)). Even some who believe the clause contains a "proportionality principle" have described it as being "narrow." *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

[134] *Id*. at 978 n.9 (opinion of Scalia, J.).

[135] *Id.* (citing examples).

"dramatic increase in the last few decades" as local governments have turned to "criminal justice debt as funding sources."[136] Indeed, the mercenary practices on display in places like Ferguson, Missouri—raising revenue by issuing fines "for staying at a boyfriend's house, having tall grass, wearing saggy pants, or failing to sign up for a designated trash collection service"[137]—strikingly echo the Black Codes of the Reconstruction era, under which Southern governments imposed fines for things like entering town limits without special permission, being on the streets after 10 p.m. without a pass, preaching without a license, and being "stubborn or refractory."[138]

Such advancement of the law is sorely needed, given how underdeveloped the standards for Eighth Amendment "excessiveness" still are. The Supreme Court has not weighed in since adopting the "gross disproportionality" standard more than 20 years ago,[139] a standard that "has not given clear or meaningful guidance" about what "should be deemed 'excessive.'"[140] The result "has been a patchwork of inconsistent tests" among the circuits that have only "muddled the issue."[141] Even with respect to civil forfeiture alone, "lower courts have articulated many excessive fines tests . . . but no test is dominant."[142] Under these divergent approaches, basic questions remain.

For instance, does a person's wealth and income (or lack thereof) bear on whether a fine is excessive?[143] History suggests that the

[136] Neil L. Sobol, Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses, 88 U. Colo. L. Rev. 841, 859–60 (2017); see generally Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2 (2018).

[137] Sobol, *supra* note 136, at 861.

[138] Cong. Globe, 39th Cong., 1st Sess. 1621 (Rep. Myers); *id*. at 516–17 (Rep. Eliot).

[139] Bajakajian, 524 U.S. at 336.

[140] David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 542 (2017).

[141] *Id*. at 543–44.

[142] Brent Skorup, Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases, 22 Geo. Mason U. C.R. L.J. 427, 431 (2012).

[143] See, e.g., Transcript of Oral Arg., *supra* note 95, at 28 (Chief Justice Roberts: "What if the person doing this, you know, was a multimillionaire? Forty-two thousand dollars doesn't seem excessive to him. . . . And yet, if someone is impoverished, it is excessive? Does that matter?").

answer is yes.[144] Among other things, the English jurist William Blackstone summarized the law as requiring that "no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear,"[145] and the Magna Carta directed that financial penalties "not be so large as to deprive [a person] of his livelihood."[146] But to date the Supreme Court has "tak[en] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine."[147] An Eighth Amendment jurisprudence that truly protects "the poor and other groups least able to defend their interests"[148] from exploitive financial penalties may require a favorable answer to this question. By spurring on the progress of the law in this area, the *Timbs* decision could help speed up such a development.

In short, *Timbs* not only mends a significant hole torn long ago into the constitutional fabric. It also represents an important step forward in the development of a jurisprudence that better protects individuals from unfair and exploitive fines.

V. *Timbs* in Context

At this point we can step back and try to assess how *Timbs* fits within the big picture. While it may be a historical accident that the Excessive Fines Clause remained unincorporated for so long, it's no accident that this omission is finally being corrected now. Ultimately, the force behind the Supreme Court's belated action was an emerging, broad-based effort to combat the increasingly rapacious use of civil forfeiture—and other fines and fees—by state and local governments. Indeed, all signs suggest that the clause is being reinvigorated at this moment precisely because it holds the promise of addressing a pernicious new threat to individual liberty.

[144] See Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 835 (2013); Beth A. Colgan, Reviving the Excessive Fines Clause, 102 Cal. L. Rev. 277, 279–81, 331 (2014).

[145] 4 William Blackstone, Commentaries on the Laws of England 372 (1770).

[146] Browning-Ferris, 492 U.S. at 271 (discussing the Magna Carta).

[147] Timbs, 139 S. Ct. at 688 (citing Bajakajian, 524 U.S. at 340 n.15, as reserving this question).

[148] Leonard, 137 S. Ct. at 848 (statement of Thomas, J., respecting the denial of certiorari).

There was irony in Indiana's attempt to win this case by distinguishing forfeiture of property from standard monetary fines. The first time the Supreme Court ever applied the Excessive Fines Clause was in a forfeiture case.[149] All told, the Court has construed the clause in only five decisions, finding it applicable in four of them, including *Timbs*. All four of those decisions were forfeiture cases.[150] Challenges to forfeitures have thus been the driving force of the Court's Excessive Fines Clause jurisprudence, such as it is. And, far from being an accident, this looks like the revival of a long-dormant safeguard to meet new exigencies.

Recent decades have seen "the number and size" of asset forfeitures "skyrocket,"[151] both at the federal and state levels. Originally propelled by the effort to combat sophisticated drug-smuggling operations, these new regimes have increasingly been criticized for their procedural injustice and for the egregious examples of overbearing conduct they have enabled. In turn, an ever-growing backlash has called for a restoration of basic concepts of fairness and restraint in how the government treats its citizens. A promising tool in this new endeavor is the Excessive Fines Clause, whose appearance in the Supreme Court has been a direct reaction to the rise of aggressive forfeiture.

As the Court itself has observed, "It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."[152] Before that, "this mode of punishment . . . had long been unused in this country," and Congress recognized that criminal forfeiture was "an innovative attempt to call on our common law heritage to meet an essentially modern problem."[153] While *civil* forfeiture has a much stronger footing in traditional American practice,[154] its use

[149] Bajakajian, 524 U.S. at 332.

[150] Besides *Bajakajian* and *Timbs*, the other two cases were Austin v. United States, 509 U.S. 602 (1993), and Alexander v. United States, 509 U.S. 544 (1993).

[151] Pimentel, *supra* note 140, at 542.

[152] Bajakajian, 524 U.S. at 332 n.7 (citing the Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a)).

[153] *Id.* (quoting S. Rep. No. 91-617, at 79 (1969)).

[154] See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683–86 (1974); Austin, 509 U.S. at 613–14.

has changed in recent times, a phenomenon noted by the justices as early as 1993.[155]

"Starting in the 1970s and continuing through the 1980s, the Government came to believe that asset forfeiture could be a powerful tool in its efforts to curtail drug trafficking."[156] As recounted by one of the amicus briefs in *Timbs*, the idea was that "forfeiture could be used to confront the 'high echelon criminal elements who are isolated from the distribution of drugs but who direct, control, and profit from the drug traffic.'"[157] Over time, "Congress significantly broadened the categories of assets state and federal officers could seize." Predictably, it also expanded the use of forfeiture beyond drug trafficking to many other crimes. Perhaps the most fateful development, however, was that, "in an effort to incentivize enforcement agencies," Congress "began to permit the agencies to retain forfeited assets" while also authorizing the attorney general "to transfer to state or local law-enforcement agencies a share of forfeiture proceeds, through a program referred to as 'Equitable Sharing.'" That program "allows state and local law enforcement to receive up to eighty percent of forfeiture proceeds."[158]

This incentive structure triggered the danger always lurking in the government's power to levy fines. Instead of costing a state money, "fines are a source of revenue."[159] More than a desire to stop crime was now on the table; the state stood to benefit financially from successful forfeitures.

"The federal experiment inspired many states to enact their own forfeiture statutes," which likewise have permitted law enforcement to retain some or all of the assets seized.[160] As a result, Justice Thomas noted in 2017, "civil forfeiture has in recent decades become widespread and highly profitable."[161]

[155] See United States v. James Daniel Good Real Prop., 510 U.S. 43, 56, 82 n.2 (1993).

[156] Brief of Drug Policy Alliance et al. as Amici Curiae Supporting Petitioner at 4, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[157] *Id.* at 5 (quoting a 1984 Department of Justice strategy document).

[158] *Id.* at 5–7.

[159] Harmelin, 501 U.S. at 978 n.9.

[160] Brief of Drug Policy Alliance et al., *supra* note 156, at 8.

[161] Leonard, 137 S. Ct. at 848 (statement of Thomas, J., respecting the denial of certiorari) (citing Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. 2015)).

Unsurprisingly, this regime in which "police can seize property with limited judicial oversight and retain it for their own use" has "led to egregious and well-chronicled abuses."[162] Those abuses have been documented in numerous investigative reports,[163] which various amici brought to the justices' attention in *Timbs*.[164] Indeed, Timbs himself showed how the profusion of scandals and abuse under Indiana's forfeiture regime "vividly illustrates these national problems."[165] After Indiana gave law enforcement a financial stake in civil forfeiture in the 1980s, for example, one prosecutor effused that "the statute is limited only by your own creativity."[166] In *Timbs*, the Court's majority opinion endorsed these concerns about the "scarcely hypothetical" danger of fines and fees.[167] That recognition, and the signal it sends to lower-court judges, should prove valuable to future litigants.

The victory in *Timbs* also casts light on a growing and increasingly confident left-right alliance that has united in advancing a libertarian approach to core individual rights. At the Supreme Court, for instance, Timbs was supported by 19 amicus briefs representing more than 75 organizations that ran the ideological gamut. (Indiana, by

[162] *Id.*

[163] See, e.g., Dick M. Carpenter II et al., Institute for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. 2015)), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf; American Civil Liberties Union of California, Civil Asset Forfeiture: Profiting from California's Most Vulnerable (May 2016), https://www.aclunc.org/docs/aclu_california_civil_asset_forfeiture_report.pdf; Rebecca Vallas et al., Center for American Progress, Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color (Apr. 1, 2016), https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream; Southern Poverty Law Center & Alabama Appleseed Center for Law & Justice, Forfeiting Your Rights: How Alabama's Profit-Driven Civil Asset Forfeiture Scheme Undercuts Due Process and Property Rights (Jan. 2018), https://www.splcenter.org/sites/default/files/com_civil_asset_forfeiture_report_finalnocrops.pdf.

[164] See Brief of Drug Policy Alliance et al., *supra* note 156; Brief of American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of DKT Liberty Project et. al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Juvenile Law Center et al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Scholars as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[165] Petition for Certiorari, *supra* note 81, at 30.

[166] *Id.* (quoting Joseph T. Hallinan, Police can take crime cash but can't dish it out, Indianapolis Star, Feb. 2, 1986, at 6B).

[167] Timbs, 139 S. Ct. at 689.

contrast, had but one amicus brief, representing the interests of cities and counties.[168]) This emerging alliance is pressing the Court to correct past decisions that have wrongly facilitated government overreach and impunity, typically employing an arsenal of historical and originalist arguments. Along with the movement to curtail exploitive fines, fees, and forfeitures, examples of this alliance in action can be seen in efforts to scale back qualified immunity, prevent new technology from being used to undermine Fourth Amendment privacy safeguards, and—also at the Court this term—eliminate the "dual sovereignty" exception to the Double Jeopardy Clause. While it remains to be seen how successful these efforts will be,[169] they are certainly forcing the justices to consider these issues from a new perspective and with a new urgency.

VI. A Final Note on the Indiana Supreme Court's Decision—Are Some Framers More Equal than Others?

Before concluding, it's worth taking one last look at how the Indiana Supreme Court handled Timbs's case, because the court's attitude exemplifies a flaw that continues to plague discussions about the Constitution's meaning, both inside and outside the courts.

As explained earlier, the Indiana Supreme Court refused to enforce the Eighth Amendment's Excessive Fines Clause against the state until the U.S. Supreme Court "mandated" that it do so.[170] The court peppered its discussion with declarations that "Indiana is a sovereign state within our federal system" and that "we decline to subject Indiana to a *federal* test."[171] That rhetoric, with its states-rights overtones, betrayed an incomplete understanding of the Constitution and how it has been amended since 1789. And that reflects a broader, more common mistake in constitutional debate: the tendency to privilege the original 1789 text and its Framers over the landmark amendments that "We the People" have since adopted to improve that flawed document.

[168] See Brief of the Nat'l Association of Counties et al. as Amici Curiae Supporting Respondent, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[169] By a lopsided margin, the Court reaffirmed the "dual sovereignty" exception to the Double Jeopardy Clause, allowing the federal and state governments to separately prosecute a person for the same conduct. See Gamble v. United States, 139 S. Ct. 1960 (2019). Justices Ginsburg and Gorsuch both dissented. See also the article covering the case by Anthony J. Colangelo in this volume.

[170] Timbs, 84 N.E.3d at 1184.

[171] *Id.* at 1183–84.

The Indiana Supreme Court began its discussion with this statement: "The framers' original conception was settled long ago that the Bill of Rights applies only to the national government and cannot be enforced against the States."[172] Having rhetorically elevated the "framers' original conception . . . settled long ago," the opinion then subtly portrays incorporation of the Bill of Rights as a modern whim of the Supreme Court: "Only after ratification of the Fourteenth Amendment did the Supreme Court, in the early twentieth century, begin to apply various provisions of the Bill of Rights to the States through the doctrine of selective incorporation."[173]

Completely missing from the court's summary was any acknowledgment that "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system."[174] Ignoring the import of the Reconstruction Amendments—and the seismic shift they caused in the relationships among citizens, states, and the federal government—simply gets the Constitution wrong, subverting rather than respecting the document's "original meaning."

As *Timbs* illustrates, our nation is still reckoning with that history and its implications.

Conclusion

Upon ratification of the Fourteenth Amendment in 1868, it should have been clear—indeed, it *was* clear[175]—that the Constitution no longer permitted states to impose excessive fines on their citizens. Yet it took the Supreme Court more than a century and a half to definitively settle this proposition. That the Court finally took this belated step now is no accident. Rather, the change was prompted by the spread of a distinctly new set of government abuses and the corresponding rise of a cross-ideological movement aimed at checking those abuses. While it may have taken a century and a half too long to get here, the Excessive Fines Clause, after *Timbs*, offers a chance to help restore certain basic concepts of fairness and restraint in how the government treats its citizens.

[172] *Id.* at 1182.

[173] *Id.*

[174] McDonald, 561 U.S. at 754.

[175] See *supra* notes 3–14.