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EIGHTH AMENDMENT PROTECTION IN THE 21ST CENTURY

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In *Timbs v. Indiana* the Supreme Court considered whether the Eighth Amendment's bar on "excessive fines" (https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf) is incorporated against the states under the Fourteenth Amendment. *Timbs v. Indiana* addressed another persistent question that has appeared on bar exams for years: "What provisions in the Bill of Rights have not yet been 'incorporated'" ([https://www.westlaw.com/Document/I8cad2c2c149f311db99a18fc28eb0d9ae/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I8cad2c2c149f311db99a18fc28eb0d9ae/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)), against the States?"



Tyson Timbs (<https://ij.org/case/timbs-v-indiana/>).

Tyson Timbs was convicted in Indiana for selling four grams of heroin (https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf). The state sought forfeiture of his \$42,000 Land Rover because it had been used to transport the drugs. The state trial court ruled that "[w]hile the negative impact of [drug] trafficking ... is substantial ... a forfeiture of approximately four times the maximum monetary fine is disproportional" under the Eighth Amendment (maximum

permissible fine of \$10,000). The Indiana Court of Appeals agreed that the excessive fines clause ([https://1.next.westlaw.com/Document/I172645db978411e6b92bf4314c15140f/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.Default\)&userEnteredCitation=62+N.E.3d+472](https://1.next.westlaw.com/Document/I172645db978411e6b92bf4314c15140f/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=62+N.E.3d+472)), should be applied (incorporated) against the states. But the Indiana Supreme Court reversed ([https://1.next.westlaw.com/Document/I172645db978411e6b92bf4314c15140f/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.Default\)&userEnteredCitation=62+N.E.3d+472](https://1.next.westlaw.com/Document/I172645db978411e6b92bf4314c15140f/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=62+N.E.3d+472))—ruling that it would not “impose federal obligations on the State that the federal government itself has not mandated.” A persistent split on the question, involving at least 18 states’ courts ([https://www.westlaw.com/Document/Ia01d68914b3611daa926e0f707ed0a55/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/Ia01d68914b3611daa926e0f707ed0a55/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)), and two federal courts of appeals, led the U.S. Supreme Court to grant certiorari. Until *Timbs v. Indiana*, the U.S. Supreme Court (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) had never specifically ruled that the excessive fines clause applies to the states through incorporation.

“Incorporation” is the legal doctrine that holds certain protections found in the federal Bill of Rights may also be applied to conduct by the states (<https://1.next.westlaw.com/Document/I8cad2c2c149f311db99a18fc28eb0d9ae/View/FullText.html?transitionType=Default&contextData=%28sc.Default%29>), by “incorporating” those protections into the “[n]o State shall ... deny due process” guarantee of the 14th Amendment. In *McDonald v. Chicago*, the court ruled that the Second Amendment applies against the states (<https://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>). Now only three provisions in the Bill of Rights have not been explicitly incorporated. *Timbs* addressed one of these: the “no excessive fines” provision in the Eighth Amendment. The other two are the grand jury clause and the Thirteenth Amendment’s rule against quartering troops in times of peace.

The Eighth Amendment encompasses three “parallel limitations” ([https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)), on government’s power to punish: the Cruel and Unusual Punishments Clause, the Excessive Bail Clause, and the Excessive Fines Clause. Together these clauses operate to secure a single, fundamental right to be free from excessive punishments. *Timbs* now eliminates any further ambiguity—the context is criminal asset forfeiture ([https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)).

In the winter of 2012, after his father died, Tyson Timbs received around \$73,000 in life-insurance proceeds (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf). He used \$41,558.30 to buy a car—the Land Rover LR2. He had recently moved to Marion, Indiana, intending to live with an aunt while he worked on rebuilding his life. Back home in St. Mary’s, Ohio, he became addicted to hydrocodone—an opioid medication—prescribed to him for an injury suffered at work. When he could no longer find the drug on the street, he began using heroin.



Land Rover LR2. Photo by Kelly Blue Book

After his father's death, he began using heroin heavily. With a new Land Rover and in excess of \$31,000 left to spend, Timbs began driving the vehicle to Richmond, Indiana, and Ohio—sometimes on a daily basis—to buy heroin for his personal use. When his money ran out, he began looking for new ways to fund his addiction. With the help of a confidential informant, he arranged several drug transactions with undercover officers.

On the first occasion, Timbs drove across Marion in the Land Rover and sold officers two grams of heroin for \$225. A few days later, he walked from his aunt's house to a nearby gas station, where he sold officers another two grams for \$160. While driving to a third transaction, Timbs was pulled over and arrested yet no drugs were found in the vehicle. The Land Rover was seized. The State of Indiana charged Timbs with two counts of dealing a Schedule I controlled substance and one count of felony conspiracy to commit theft. Timbs pleaded guilty to one count of dealing and to the count of conspiracy to commit theft. The trial court sentenced (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) him to six years, with the first year to be served in home detention and the remaining five years on probation. The state court also ordered Timbs to forfeit his Land Rover on the theory that he had used the car to transport drugs.

In the Supreme Court, Timbs argued that protection from excessive fines has a long history in our legal tradition, dating as far back as the reign of King Henry II (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf), who ruled England in the 12th century.

(<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>). When the Eighth Amendment was ratified in the 1790s, Timbs noted, “nine of the 13 states (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf), at the time had constitutional provisions guarding against excessive fines.” In 1868, when the 14th Amendment was ratified, all of the states included protection from excessive fines in their constitutions, and “all but two of the 37 states (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) did so using language that mirrored the language of the federal constitution’s excessive fines clause.”

Timbs further argued that the 14th Amendment was ratified to “combat the tactics deployed by southern states (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>) in the years after the Civil War to oppress their African American citizens, including a variety of fines and forfeitures.” For example (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>), Alabama law imposed a fine of “up to \$1,000 and six months in jail for performing an interracial marriage,” while teaching at African American schools without a special license was “punishable by a fine of up to \$500 in Florida.” The right to be free from excessive fines is still a fundamental right, Timbs proclaimed. Some states will go so far as to jail people who do not pay their fines on time (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>). And, even if people do not lose their freedom as a result of fines, the fines can have serious repercussions (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>)— including the loss of driving privileges or the right to vote.

Timbs argued that states are likely to abuse the right to be free from excessive fines, because they can’t resist the temptation to use fines as an opportunity to raise revenue (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>) without raising taxes. In 2012, he told the justices, “agencies in 26 States and the District of Columbia took in more than \$254 million (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) through forfeiture under state laws alone.” Excessive fines are a particular problem in Indiana, he noted, “where state laws allow prosecutors to outsource forfeiture (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) cases to private lawyers, who take the cases on contingent fees and pocket hundreds of thousands of dollars every year based on forfeitures.” The First Circuit has grappled ([https://www.westlaw.com/Document/I9a91d5dfd88311e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/I9a91d5dfd88311e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)) with this problem and has required courts to consider an additional factor as well— would the contemplated fine or forfeiture be so severe as to destroy a defendant’s livelihood? This additional analysis of the excessiveness inquiry represents a major departure taken by the majority of courts.

The State of Indiana suggested that the excessive fines clause does not apply to Timbs' case because he is complaining about the forfeiture of property used to violate the law, known as an "in rem" forfeiture, which was not traditionally regarded as a penalty.

([https://www.westlaw.com/Document/Ia01d68914b3611daa926e0f707ed0a55/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/Ia01d68914b3611daa926e0f707ed0a55/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)). Indiana maintained the clause applies only to payments imposed as punishment. The state argued this is consistent with the problem that the excessive fines clause was intended to target, which was "to prevent judges from incarcerating individuals on the basis of unpayable discretionary fines."

The State of Indiana advised that even if the excessive fines clause does extend to in rem forfeiture, there is no reason to interpret the clause to apply to the states. Indiana argued the Supreme Court should not look generally at whether there is a right to be free of excessive fines, but instead should look at the specific right that Timbs is asserting in the case at bar – "the right to be free of forfeitures of property whose value far outweighs the seriousness of the crime." The state maintained there is no deeply rooted historical tradition (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>), supporting such a right. To the contrary, property forfeitures have been common, even when the consequences have been "draconian" (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) and even when the owner of the property is innocent." For example, the Supreme Court upheld the forfeiture of nonobscene material in *Alexander v. United States* ([https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/I9982bd115a2a11dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)). The defendants owned several pornography stores and the conviction resulted from the possession of several magazines and videos. The defendant was sentenced to six years in prison, fined \$100,000 and the entire enterprise was forfeited. The enterprise included nine million dollars he had received as proceeds from the enterprise.

The state further argued, despite the harsh results of forfeitures, courts did not apply the excessive fines clause to property forfeitures (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>) until 1992, which "strongly implies that no one understood the Excessive Fines Clause to impose a proportionality" (https://www.supremecourt.gov/DocketPDF/17/17-1091/33939/20180131162915070_Petition%20for%20a%20Writ%20of%20Certiorari%20Timbs%20et%20al%20v%20State%20of%20Indiana.pdf) requirement on these forfeitures." For example, property owners have challenged the constitutionality of forfeitures under other provisions in the Constitution, such as the right to a jury trial or due process, but not the excessive fines clause (<http://www.scotusblog.com/2018/11/argument-preview-justices-to-consider-whether-eighth-amendment-ban-on-excessive-fines-applies-to-the-states/>).



Timbs' petition for review garnered support from a wide range of groups (<http://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/>). The U.S. Chamber of Commerce argued in an amicus curiae brief that "state and local legislatures are authorizing – and executive officials are seeking – excessive fines and forfeitures for relatively modest violations of the law." Although the Eighth Amendment's excessive fines clause acts as a check on excessive fines imposed by the federal government (<http://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/>), the Chamber explained, the "lack of a uniform, similar constraint on the governments in the 50 states is needlessly driving up costs for businesses, increasing prices for consumer goods and services, and undermining economic growth."

The Southern Poverty Law Center added in a separate amicus curiae brief that state governments are using fines and forfeitures simply to generate revenue to fund a "burgeoning prison population" (<http://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/>) without needing to raise taxes. The SPLC argued this focus on revenue generation (<http://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/>) can lead to "unconstitutional and racially motivated behavior by law enforcement and municipal employees." The center asserted, "fees and fines mean that even the most casual encounter with the criminal justice system can have catastrophic results (<http://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/>)." This can ultimately have implications on everything, from ability to pay child support to credit ratings and even leading to incarceration for failing to pay the fines.

Ultimately, the U.S. Supreme Court held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection (https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf), applicable to the states. Justice Ruth Bader Ginsburg authored the opinion, agreeing with Timbs that the Excessive Fines Clause has a historic tradition dating back to the colonial era. Ginsburg reasoned that the clause is so "fundamental to our ordered liberty" and so "deeply rooted in this Nation's history and tradition" that its incorporation is required.

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