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# *Timbs v. Indiana:* A Modest Victory and a Missed Opportunity

David B. Smith and Jed M. Silversmith

On February 20, the U.S. Supreme Court handed down its decision on the Eighth Amendment's excessive fines clause. In *Timbs v. Indiana*, 2019 DJDAR 1337, Justice Ruth Bader Ginsburg authored a unanimous decision holding that the excessive fines clause is an incorporated protection applicable to the states under the Fourteenth Amendment's due process clause. A few state supreme courts, most recently Indiana's, remarkably had concluded that the clause did *not* apply to state forfeiture actions because the U.S. Supreme Court had not yet squarely *held* that it did apply. The U.S. Supreme Court easily cleared that up in *Timbs* but stopped short of providing additional guidance as to what constitutes an excessive fine in this context or otherwise protecting property owners from civil forfeiture's constant abuse. The decision is disappointing for what it did not say, given that there was ample opportunity to point out why Indiana's drug civil forfeiture system is uniquely abusive and blatantly unconstitutional, as explained below.

The opinion's thorough and illuminating discussion of the 800-year history of the excessive fines clause (and the much longer and fascinating history provided in Justice Clarence Thomas' concurring opinion) are quite helpful to anyone

raising an excessive fines issue. The history of the clause shows that at common law a fine or forfeiture exceeding the defendant's *current* ability to pay or depriving him of his livelihood (for example by taking away a farmer's land or farming equipment) would be considered unconstitutionally excessive.

No court watchers were surprised by the unanimous decision, especially after the November 28, 2018, oral argument went very badly for Thomas M. Fisher, Indiana's solicitor general. For example, Justice Sonia Sotomayor asked Fisher, "Are we trying to avoid a society that's like the Star Chamber? And if we look at these forfeitures that are occurring today...many of them seem grossly disproportionate to the crimes being charged." And Justice Neil Gorsuch expressed surprise that Fisher was "still litigating incorporation of the Bill of Rights. Really? Come on, General." Justice Brett Kavanaugh then asked Fisher, "Isn't it too late in the day to argue that any of the Bill of Rights is not incorporated?"

Fisher was fortunate that Justice Thomas was characteristically silent at oral argument. Thomas, the justice who has been most troubled by civil forfeiture abuse, would have heaped scorn on Fisher's argument. Thomas has eloquently explained—at length—why the court *should*



*not tolerate* the modern-day applications of this particularly harsh and unfair historical practice, which developed in the colonial era to deal with the unique problem of holding foreign-based ship owners (and pirate ships) accountable for smuggling and brigandage. “These [contemporary] forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings...Perversely, these same groups are often the most burdened by forfeiture.

They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.” *Leonard v. Texas*, 137 S. Ct. 847-48 (2017) (Statement of Justice Thomas respecting denial of certiorari). The court missed an opportunity to say *something* about rampant forfeiture abuse in this opinion on the merits.

*Timbs* involved two legal actions initiated in Indiana. First, the petitioner, Tyson Timbs, pled guilty to one count of dealing in a controlled substance and one count of conspiracy to commit theft. In a second legal action, the county, through a private attorney, initiated a civil forfeiture suit against Timbs's Land Rover SUV, which he had purchased with proceeds from a life insurance policy that he received when his father passed. In the civil forfeiture suit, the government only charged one drug transaction as the basis to forfeit the vehicle. The trial court found that there was a legal basis to forfeit the vehicle, but it determined that forfeiture of the new vehicle would violate the excessive fines clause. The trial court noted that the vehicle cost approximately \$42,000, but the maximum fine under state law for a drug transaction was \$10,000. A ratio of more than 3-to-1 often leads courts to find that the forfeiture is excessive in violation of the Eighth Amendment.

Justice Ginsburg's opinion provided no analysis of these issues. It did mention that the county's case was prosecuted for personal profit by a private attorney hired by the district attorney's

office to handle all of the office's forfeiture suits, but did not explain its constitutional significance. It also acknowledged the 4-to-1 ratio of the value of the vehicle to the maximum fine under Indiana law but did not explain the significance of that fact either. Most of the court's analysis was spent chastising Indiana for arguing that the excessive fines clause should not apply to civil forfeitures. The opinion noted that, even if the protection against excessive fines is not "deeply rooted" with regard to civil forfeitures, it is still incorporated against the states, because once a right is incorporated, it is fully incorporated.

The court missed a good opportunity to provide additional insight into Indiana's unique practice of paying private attorneys to bring civil forfeiture suits on behalf of the local district attorney on a *contingent* fee basis, thereby converting forfeiture into another opportunity for the plaintiff's bar. The court likewise said nothing about the due process violation inherent in earmarking a significant part of the forfeited money for the prosecutor's office, as Indiana and half of the states do. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

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Perhaps the most significant development in *Timbs* was that two justices, Gorsuch and Thomas, wrote concurring opinions, in which they argued that the excessive fines clause should be incorporated by the obscure privileges or immunities clause of the Fourteenth Amendment, not the due process clause. Thomas expresses concern that “because the Court’s substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court’s most notoriously incorrect decisions... The present case illustrates the incongruity of the Court’s due process approach to incorporating fundamental rights against the States.”

If Thomas and Gorsuch can bring three more justices to their view, the *Timbs* case may be viewed as a harbinger for a more profound constitutional change, which could have important and unforeseen impacts on our society. 🏠

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