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Will the Supreme Court Rein in "Excessive Fines" and Forfeitures? Don't Rely on *Timbs v. Indiana*

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Will the Supreme Court Rein in "Excessive Fines" and Forfeitures? Don't Rely on *Timbs v. Indiana*

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I. Introduction

The U.S. Supreme Court's decision in *Timbs v. Indiana*[1] buoyed the hopes of those who saw it as a powerful signal to states and municipalities to rein in excessive fines and forfeitures. One commentator deemed it "a blow to state and local governments, for whom fines and forfeitures have become an important source of funds."[2] That may have been an overstatement. The Court seems disinclined to fill the term *proportionality* with robust meaning or wrestle with Eighth Amendment challenges to fines and fees. Those steps would be required for the Excessive Fines Clause to function as an effective backstop against revenue-raising and increasingly abusive local and state practices. In the end, state courts and state legislative changes may be more likely to address effectively the essential question of what is *excessive* and to restrain criminal justice actors from imposing ever heavier financial burdens on those caught up in the system.

This article first sets out the Supreme Court's decision in *Timbs* in light of the incorporation debate and prior case law in the area. Next it turns to the underlying but unaddressed contours of the term *excessive* in the context of fines and forfeitures. The article then provides a broader look at forfeiture, including the interplay between state and federal law enforcement in the area. Both sides rely on forfeited funds to support current law enforcement practices. Finally, the article addresses state and local fines and fees, which will also now be subject to Eighth Amendment analysis. The Court, however, rejected the first opportunity to take a challenge. At least for now, litigants may be more successful in reining in abusive fines and forfeitures in state legislatures and state courts.

II. *Timbs v. Indiana*: The Decision and Its Background

In contrast to the acrimony surrounding some of the Supreme Court decisions during the last Term, *Timbs v. Indiana* provided a respite. The Court held unanimously that the Eighth Amendment's Excessive Fines Clause applies to the states as well as the federal government. The majority deemed it incorporated under the Fourteenth Amendment.

The outcome of the case never seemed in doubt. During oral argument, Justice Gorsuch invited Indiana's lawyer to concede the incorporation question at the outset. "And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General."[3] The Court's decision moved the Eighth Amendment from the partial into the full incorporation category. Now every part applies to the states, too.

Tyson Timbs was a self-declared "junkie" and a minor drug dealer in rural Indiana.[4] He pled guilty in state court to one count of dealing in controlled substances and theft. His six-year sentence for the Class B drug felony was suspended for five years, with one year to be served in home confinement. In addition, Timbs agreed to pay various fines and fees, for a total of $1203. The court did not impose any additional fine, which would have been permitted up to the statutory maximum of $10,000.

Timbs's appeal pertained to Indiana's seizure of his 2012 Land Rover LR2, which he had bought for $42,058.30 with the proceeds from his father's life insurance. He used the car to transport heroin for personal use and for two small controlled buys within Indiana. The car was seized about five months after he purchased it. Even though this was technically a civil in rem forfeiture against the property, every court that heard the case considered it clearly punitive.[5]

The state trial and intermediate appellate courts both considered the federal Excessive Fines Clause applicable and found the forfeiture extreme. The courts compared the maximum fine for any Class B felony—$10,000—to the amount seized and held the amount of forfeiture "excessive and . . . grossly disproportional to the gravity of the Defendant's offense."[6]

At the state supreme court level, Timbs did not fare so well. The Indiana Supreme Court summarily noted that the U.S. Supreme Court had not incorporated the Excessive Fines Clause, even though Indiana's lower courts had applied it. It would not constrain state law development in that manner but rather await such a ruling by the U.S. Supreme Court. The state supreme court was therefore left to determine whether this forfeiture was permissible under Indiana law. The court focused on Timbs's testimony that he had used the car multiple times to transport heroin, which rendered the car an instrumentality in the commission of a serious offense. State law enumerated crime tools in the forfeiture statute, and the court declined to find the value of the car disproportionate.

The U.S. Supreme Court granted certiorari solely on the question of incorporation. All justices agreed that the

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Excessive Fines Clause is incorporated because it is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[7]

The Clause previously had been interpreted to encompass punitive forfeitures. The term *fine*, as the Supreme Court noted in *United States v. Bajakajian*, "mean[s] a payment to a sovereign as punishment for some offense."[8] The payment does not have to be officially declared a fine and can be in cash or in kind. In *Austin v. United States* the Court held forfeiture to fall under the Eighth Amendment as long as it was even partially punitive.[9]

Despite unanimity on the outcome of the case, Justice Thomas penned a concurrence in the judgment. He reiterated his position that the Fourteenth Amendment's Due Process Clause is not a suitable vehicle for incorporation.[10] Instead he would have held the Excessive Fines Clause to apply to the states under the Fourteenth Amendment's Privileges and Immunities Clause. In his concurrence, Justice Gorsuch indicated that he may agree with that approach, though in his view the specific vehicle for incorporation did not have any bearing on the outcome in this case, allowing him to join the majority opinion.

Justice Thomas's reliance on the Privileges and Immunities Clause has been heralded as a new era for the Clause.[11] Some legal historians, however, have challenged the Justice's analysis.[12] Others have indicated concerns about the stability of the law and unforeseen interpretative challenges should his approach become preeminent.[13]

Stare decisis may bind most members of the Court to consider the Due Process Clause the appropriate vehicle for incorporation. Changing the relevant approach, after all, may unsettle broad areas of constitutional interpretation.

The difference in the scope of the two clauses became an issue during oral argument when Justice Ginsburg highlighted it. While the Privileges and Immunities Clause includes only "citizens," the Due Process Clause speaks of "residents." For Tyson Timbs that difference would not have mattered, but for millions of noncitizen immigrants it may. After all, should we assume that states could forfeit the property of permanent residents and other noncitizens without any protection available to them under the U.S. Constitution?

Unanimity on incorporation camouflaged broader disagreements on issues the Court did not have to resolve in *Timbs* in light of the limited question on which the writ of certiorari had been granted.

III. "Excessive"

Much of the discussion during oral argument centered around a matter not squarely before the Court: the definition of *excessiveness*. Justice Alito and the Chief Justice, for example, asked about standards to determine what is excessive, and compared the inquiry to that applicable to the level of imprisonment considered "cruel and unusual" under the Eighth Amendment.

The state appellate court analyzed whether this forfeiture was "excessive," which under the U.S. Supreme Court's *Bajakajian* holding requires a proportionality analysis to determine whether the amount forfeited stands in "some relationship to the gravity of the offense."[14] In that case the Court indicated that, as with the Cruel and Unusual Punishment Clause, it would generally defer to the legislature and acknowledged the imprecise contours of proportionality analysis. Still, the Court found the forfeiture in *Bajakajian* utterly disproportionate. The government had moved to forfeit $357,144 for a violation of what the Court called merely a reporting statute. The owners had gainfully earned the money but failed to report its transport out of the United States. The offense carried a maximum six-month sentence and a $5000 fine under the Sentencing Guidelines in effect at the time.

The lower state courts similarly found the forfeiture of Timbs's Land Rover grossly disproportionate. Their analysis focused on the discrepancy between the maximum statutory fine and the value of the car. Even though the appellate court was careful not to declare any forfeiture above the maximum fine excessive, it deemed the fourfold difference unacceptable. After all, Timbs had not used any drug proceeds in the purchase of the vehicle. These courts provide some guidance to proportionality analysis.

On the other hand, the dissenting appellate judge highlighted the gravity of the offense and the use of the vehicle in transporting heroin. The latter was also the linchpin of the state supreme court's decision, which relied on a state statute allowing for the forfeiture of the instrumentality of a crime. Because of the role the car played in the offense, that court failed to see its forfeiture as disproportionate.

Even though incorporation now makes the federal constitutional protection available in state courts, it is the content of *excessive* that will determine how much of a protection the Clause can provide. After *Bajakajian* a number of federal courts struck down forfeitures in light of the Court's rough proportionality requirement.[15] Some of these cases involved the same reporting statute at issue in *Bajakajian*, though the amounts and the government's arguments differed.[16] In another case, the government moved for millions of dollars in forfeitures in a RICO conspiracy prosecution based on a multistate gambling operation. In a searching analysis, the district court ultimately declared a number of these forfeitures disproportionate in light of the defendants' involvement in the operation and their culpability.[17] In other forfeiture cases, the court found no violation of the Eighth Amendment.[18] Yet the broad contours leave these assessments largely within the purview of individual judges.

As the justices indicated in oral argument, the interpretation of the Cruel and Unusual Punishment Clause may set out some guidance with respect to the proportionality analysis. Generally the Court has provided only the most rudimentary protection against lengthy imprisonment. In a number of cases the Court deferred to the assessment of state legislatures as to the gravity of an offense or the impact prior convictions should have on the

penalty level.[19] Only in the context of life-without-parole sentences for juveniles has the Court delineated some concrete limitations on the states.[20]

It would be surprising if the Supreme Court policed excessiveness of fines and forfeitures more narrowly and more carefully than the deprivation of liberty. Yet the Court indicated that greater watchfulness was required when the state and municipalities derive resources from a penalty rather than being required to pay for it, such as in the case of imprisonment. Still, it is difficult to imagine the Court creating a robust and detailed framework to determine what *excessive* means for fines and forfeiture without ultimately being forced to do the same in the context of imprisonment.

State courts do not have to rely on the newly incorporated Excessive Fines Clause to develop their own vibrant jurisprudence assessing disproportionate sentences. Many had already applied the Clause, and state courts can take recourse to their state constitutions, all of which include a prohibition on excessive fines or a proportionality condition.

On remand Indiana courts will determine (again) whether the forfeiture of the Land Rover was excessive. Even though the vehicle was used to transport drugs, its forfeiture may still be excessive. Yet its use may remain an important consideration in determining excessiveness. On that issue the lower courts were split. The trial court recognized the reality of geography, deeming the vehicle's role as an instrumentality of crime secondary because Timbs, himself a user, could gain access to drugs only by traveling to a larger city. Whether the state supreme court accepts that assessment remains to be seen.

In *Bajakajian* the Court held the forfeiture itself disproportionate in light of the amount, the legality of the underlying conduct that allowed the defendant to save the money seized, and the severity of the violation. The Court characterized the latter as "solely a reporting offense."[21] Less than a decade later, though, Congress declared the violation a serious crime, presumably a potential precursor of a terrorist offense.[22] Today, *Bajakajian* itself might come out differently. Proportionality, as the Court defines it, remains a crude tool to weigh the severity of a sentence, yet it is subject to cultural, social, and legislative assessment of the threat the conduct at issue poses.

Despite its practical limits, *Timbs* shone a light on forfeiture, a practice that has increased in importance during the War on Drugs and annually reaps billions for the federal government and the states.

IV. Forfeiture

Despite its long history and origins in Roman and medieval English law, in recent years civil forfeiture has attracted the negative attention of criminal justice reformers and property rights advocates. Originally civil forfeiture was restricted to cases in which the court could not gain personal jurisdiction over the owner of the property who had violated maritime laws.[23] That limitation no longer applies. In effect, civil forfeiture has increasingly become an economic sanction, independent of any criminal conviction, used to fund government services.

In the federal system, the practice started to take off in the early 1990s after having been authorized for drug offenses by the Comprehensive Drug Abuse Prevention and Control Act of 1970.[24] Between 2000 and 2015, deposits into federal forfeiture funds and net assets in those funds skyrocketed.[25] That growth occurred after the Supreme Court announced that the Excessive Fines Clause applies to civil forfeiture[26] and that gross proportionality provides a limit.[27] After setting out the general standard, the Supreme Court left its development to the lower courts. Since then, the latter have struggled to create and implement a coherent framework.[28]

A. Limits on Forfeitures Encounter Resistance

To respond to public concerns about forfeitures, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which effectively codified *Bajakajian* and established a procedural structure for a determination of excessiveness in individual cases.[29] The federal law stated that the burden is on the claimant to establish that the forfeiture was excessive. The court will be required to compare the gravity of the underlying offense with the forfeiture and to establish gross disproportionality by a preponderance. Only if those requirements are met will the judge be able to reduce or stop the forfeiture. Overall, despite some limitations on civil forfeitures, CAFRA expanded the power of the federal government to forfeit private property.[30]

To gauge proportionality, federal and state courts have frequently turned to the statutory fine limit, declaring forfeitures within the fine limit proportionate. At the same time, those outside the fine limit were not deemed automatically disproportionate.[31] The lower courts in *Timbs*, for example, looked to the state statutory limit and found the fourfold differential disproportionate.

In many cases, though, the courts do not reach the excessiveness inquiry. Instead they focus on the language in Justice Scalia's concurrence in *Austin*. He deemed the relevant inquiry to be whether "the relationship of the property to the offense [w]as . . . close enough to render the property, under traditional standards, 'guilty' and hence forfeitable. . . ."[32] The dissenting judge on the intermediate appellate court echoed that analysis in his focus on the role of the vehicle in Timbs's drug purchases and sales. Once that connection was established, forfeiture in offenses deemed to have a substantial negative impact seemed almost a foregone conclusion. Despite the ostensible limitation the Excessive Fines Clause provides on forfeitures, so far it has proved an insufficient backstop on most federal civil forfeitures.

It is unlikely to play a more robust role in the states going forward. Most of the states permit civil forfeitures.[33] In a number of states, investigative reports have called into question the legitimacy of forfeiture as a valid law-enforcement tool.[34] Some police forces appear to use it to

procure resources rather than fight crime. They proceed against property owners without sufficient proof of criminal conduct. Yet the property owners often lack the resources to dispute a forfeiture.[35] The procedural setup creates a substantial burden to dispute a forfeiture. In the forfeiture of cell phones or items of similar or lower price, the cost of disputing the forfeiture can be substantially higher than the replacement cost, which provides a disincentive to challenging the police action.[36]

Most problematically, law enforcement agencies in most states have a direct stake in forfeitures. They are permitted to retain a substantial percentage of the proceeds from forfeitures, and in some cases all the proceeds.[37] Those incentives may even change the emphasis of police work. For example, police may become more interested in seizing cash proceeds of drug exchanges than in seizing the drugs themselves.

Because of the abuses documented in recent years, numerous states have changed their laws.[38] Some have addressed the burden of proof and set up other procedural protections for innocent owners. Yet the obstacles remain high for the latter. Other states provide greater transparency in the practice and have altered the incentives to law enforcement to forfeit property. Despite the limitations imposed in some states, federal forfeitures continue unabated, allowing state law enforcement agencies to circumvent state law restrictions.

B. The Federal Honey Pot: Equitable Sharing

Through federal-state joint task forces, state agencies share regularly in federal forfeitures. The practice has become well established and has expanded well beyond narcotics investigations. Equitable sharing funds are available through both the Treasury and the Department of Justice Forfeiture Funds. The former is the repository of forfeitures conducted by law enforcement agencies within the Treasury Department and those in the Department of Homeland Security.

The federal government has defended the so-called equitable sharing practice as a way to reimburse and reward states for providing their resources in joint investigations. The amounts at stake have become so substantial that it may be financially more attractive for state agencies to support federal investigations than to focus on local crime.[39]

Recently, the states' litigation against the federal government over border-wall funding highlighted the importance of forfeiture funds to state law enforcement.[40] At issue in the litigation was the Treasury Forfeiture Fund, which pays $150–200 million annually to other federal, state, and local law enforcement entities. In the complaint, every state plaintiff detailed how much money its law enforcement agencies had received from the Forfeiture Fund to "supplement and enhance. . . . State appropriated funding."[41] The amounts varied substantially between the states and over time.

Equitable sharing has been styled a reimbursement to the states for law-enforcement assistance. Perhaps for that reason, the practice overall has found few critics. That is the case even though equitable sharing payouts to state agencies are closely connected to the restrictiveness of state forfeiture laws. The more restrictive state law, the greater the federal payout.[42]

One aspect of equitable sharing has been widely criticized. So-called adoptive forfeiture came under attack during the Obama administration. It allows state agencies to ask the federal government to adopt state seizures and forfeit them under federal law, with 80% of the proceeds being returned to the seizing agency. These forfeitures do not require any collaborative venture, though the alleged underlying offense has to violate federal law.[43]

Attorney General Holder ended the practice in 2015 because it lends itself to substantial abuse.[44] Not surprisingly, state law enforcement agencies, especially in states that had abolished or restricted forfeitures, took advantage of adoptive forfeitures, ostensibly to circumvent state laws. Following the Attorney General's decision, equitable sharing fell.

In 2017 Attorney General Sessions permitted adoptive forfeitures again, though with a set of restrictions.[45] Since then, equitable sharing amounts have again gone up.[46] That trend may accelerate, given that state legislatures around the country have limited civil forfeiture, with more legislation pending. Even though the House of Representatives has passed a law abolishing equitable sharing,[47] it is unlikely to advance in the Senate.[48]

C. The Corrosive Impact of Forfeitures on Communities and Law Enforcement

Civil forfeitures fall disproportionately on minorities and the poor. Anecdotal accounts and some in-depth studies show troubling racial disparities, with more innocent minority owners losing their property and being impacted by excessive forfeitures. Yet the Supreme Court's decision in *Timbs* is unlikely to move the dial sufficiently, given that property owners will challenge forfeitures only when the cost of retrieval is lower than the value of the property. Therefore, forfeiture cases will remain limited to expensive items such as high-value vehicles and residences, substantial amounts of cash, and other valuables. Proportionality restrictions may be helpful in select individual cases but are unlikely to curb the overall practice.

Despite claims that forfeitures are a necessary tool to decrease crime and increase public safety, no study has ever substantiated that assertion, and the Office of Inspector General has challenged it.[49] If forfeitures are ineffective as a crime-fighting tool, they may become indefensible other than as another revenue source.

After *Timbs*, some commentators speculated that the Court may be willing to scrutinize other aspects of the revenue-raising component of the criminal justice system.

V. Beyond Forfeiture: Fines and Fees

During the seventeenth century, the Stuart kings used large fines "to raise revenue, harass their political foes, and indefinitely detain those unable to pay."[50] Subsequently the prohibition on excessive fines was included in the English Bill of Rights and replicated in the colonies. Ultimately it found its way into the Bill of Rights.

Resembling the reign of the Stuarts, today fines and forfeitures are being used to raise revenue. In the days of old, they fell directly to the Crown. In many states and local governments today, a large percentage of such payments falls to the municipality that imposed the fine or the law enforcement agency that seized the property.

While English courts often imposed these ruinous fines on the king's political enemies, today fines, fees, and forfeitures mostly burden the politically unconnected. They have become an important revenue tool, one that impacts the poor disproportionately. In some jurisdictions, an increasing array of fines and fees has effectively led to recreating the debtor's prison the Excessive Fines Clause was designed to prevent.[51]

Fines have a troubled history in this country. After the Civil War, southern legislatures passed high fines for crimes they deemed African Americans more likely to commit, and courts were more likely to impose high fines on African American defendants. Vagrancy statutes, in particular, included high fines whose nonpayment would lead the alleged offender straight back into forced labor upon nonpayment.[52] Today's enforcement practices are less extreme but equally troubling, a point Justice Ginsburg noted in *Timbs*, citing the American Civil Liberties Union's amicus brief.

A. Will the Supreme Court Stop Debilitating Fines and Fees?

The report by the Department of Justice Civil Rights Division following the killing of Michael Brown in Ferguson, Missouri, found that the riots following his death were in part a response to long-simmering discontent over abuses in the municipal administration and the local criminal justice system that centered around exploitative fees and fines used to fund city operations.[53] The Department also concluded that the practices used in Ferguson were not restricted to the city but rather were widespread within the area. Fines and related fees came due for violations of municipal orders and for traffic violations, and for use of the court system. Nonpayment could result in incarceration. In many parts of the country, states and municipalities now impose usage fees for the criminal justice system, for public defenders, for jail, for probation service, for drug testing, for sealing applications, for prosecutions, and for prison occupancy. It seems the sole limit is the creativity of the local court system.[54]

After *Timbs*, some court watchers questioned whether the court would be willing to police excessive fees and fines. All eyes were on the petition for a writ of certiorari in *Lovelace v. Illinois*, which challenged the state's 10% bond forfeiture fee, payable even upon an acquittal.[55] In *Lovelace* that fee amounted to $35,000. Generally, this fee practice has been upheld widely. In Illinois, state law caps the total fee amount in Cook County to $3000 but does not provide a similar limit for the rest of the state. Still, the Supreme Court passed on the case.

Despite the hope of some commentators that *Timbs* may lead to changes, broadscale reform based on that decision is unlikely. First, smaller municipalities and police departments feel—or are—stretched for funds. Whether tax cuts have made it virtually impossible to provide even basic services or whether a reallocation of priority spending could address these funding shortages differently remains an open question. Second, user fees may be more protected from a challenge unless they appear to camouflage (excessive) fines. Even challenges to the proportionality of fines are relatively limited.[56] Third, the Supreme Court in *Timbs* did not hold the forfeiture disproportionate. It merely ordered Indiana's courts to address that issue. It is likely that Indiana courts will consider the severity of the offense and the vehicle's role in it, though both lower courts favored Timbs in their initial rulings on excessiveness. Similarly, state legislatures have broad discretion to assess fine levels, as do judges in determining the fine to be imposed.

B. Ways Forward: Avenues for Fine and Fee Reforms

Still, there is substantial movement for reform. The American Bar Association, for example, recently adopted Guidelines on Fines and Fees limiting the amount payable as well as the potential ramifications. In case of nonpayment, individuals should never face incarceration, be deprived of fundamental rights, or be punished disproportionately, which includes loss of a driver's license. Perhaps even more importantly, fees should never exceed a person's ability to pay.[57] It may be time to reconsider the European "day fine" model, in which the amount of the daily fine is based on the individual's income.[58] Even for those less concerned about the negative ramifications on individuals, the impact of revenue-raising practices on public safety should be disconcerting. Municipalities that finance more of their operations through criminal justice revenues have a higher percentage of violent crimes that remain unsolved. The attention of law enforcement there appears to be more on bringing in funds than on guaranteeing public safety.[59]

VI. Conclusion

Even though some have declared *Timbs* a landmark case in the jurisprudence surrounding the Excessive Fines Clause, it is not, at least for now. Incorporation of the Clause has been long overdue.

The Court reiterated the line of cases that define proportionality but seems unlikely to bring to life a vibrant proportionality analysis. State courts can set such limits but did not need the Supreme Court's guidance. They could have, and some had, already declared themselves bound by

the federal Excessive Fines Clause, and all have a state constitution to expound. Whether the legislatures are willing and able to provide effective limits to forfeitures, fines, and (equally urgently) fees remains to be seen.

Increasingly, civil forfeitures, excessive fines, and rampant fees seem far removed from the goals of the criminal justice system. They are ineffective as crime-fighting tools; they distort law-enforcement priorities; they raise revenue on the backs of those with the least resources; they are an ongoing reminder of the unequal enforcement of the laws. It will take more than a Supreme Court decision to challenge these systemic problems.

Notes

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1 139 S. Ct. 682 (2019).

2 Amy Howe, *Opinion Analysis: Eighth Amendment's Ban on Excessive Fines Applies to the States*, SCOTUSBLOG, (Feb. 20, 2019, 12:22 PM), https://www.scotusblog.com/2019/02/opinion-analysis-eighth-amendments-ban-on-excessive-fines-applies-to-the-states/. *But see* Lisa Soronen, *Timbs vs. Indiana Civil Forfeiture Case Won't Have Much Impact*, THE NCSL BLOG (Apr. 10, 2019), http://www.ncsl.org/blog/2019/04/10/timbs-vs-indiana-civil-forfeiture-case-wont-have-much-impact.aspx.

3 Transcript of Oral Argument at 32, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

4 Mark Alesia, *Tyson Timbs, Former 'Junkie' from MARION, Is Namesake of Important U.S. Supreme Court Case*, INDIANAPOLIS STAR, Oct. 29, 2018, https://www.indystar.com/story/news/2018/10/29/tyson-timbs-institute-justice-civil-asset-forfeiture-us-supreme-court-eighth-amendment/1646693002/.

5 *Cf.* United States v. Bajakajian, 524 U.S. 321, 331 (1998).

6 Timbs v. Indiana, 62 N.E.3d 472, 474 (2016).

7 Timbs v. Indiana, 139 S. Ct. 682, 690 (2019).

8 524 U.S. at 327.

9 509 U.S. 602 (1993).

10 *See* McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring).

11 *See, e.g.,* Ilya Shapiro & Josh Blackman, *The Once and Future Privileges of Immunities Clause* (2018), https://ij.org/wp-content/uploads/2018/09/Blackman_Shapiro_14at150_DRAFT.pdf.

12 *See, e.g.,* Philip Hamburger, *Privileges or Immunities*, 105 NORTHWESTERN U. L. REV. 61 (2011).

13 Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998).

14 United States v. Bajakajian, 524 U.S. 321, 333 (1998). *See* Austin v. United States, 509 U.S. at 622–23.

15 *See, e.g.,* United States v. Beras, 183 F.3d 22, 28–29 (1st Cir. 1999) (remanded for proportionality analysis under *Bajakajian* after forfeiture of $138,794); United States v. Ford Motor Co., 442 F. Supp. 2d. 429, 436 (E.D. Mich. 2006); United States v. $293,316 in U.S. Currency, 349 F. Supp. 2d 638, 645, 650 (E.D.N.Y. 2004).

16 *See, e.g.,* Beras, 183 F.3d at 28–29; $293,316 in U.S. Currency, 349 F. Supp. 2d at 645, 650 (forfeiture of over $500,000 from multiple defendants).

17 United States v. King, 231 F. Supp. 3d 872, 1004–1005 (W.D. Okla. 2017).

18 *See, e.g.,* United States v. Viloski, 814 F.3d 104 (2d Cir. 2016) (forfeiture of about $1.3 million not disproportionate to defendant's multi-year conspiracy even when court considered whether forfeiture would deprive defendant of his livelihood); United States v. Wallace, 389 F.3d 483 (5th Cir. 2004) (forfeiture of airplane for failure to register plane upheld).

19 *See* Ewing v. California, 538 U.S. 11 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Rummel v. Estelle, 445 U.S. 263 (1980). *But see* Solem v. Helm, 436 U.S. 277 (1983) (singular decision striking down a life-without-parole sentence as disproportionate).

20 *See generally* Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 136 S. Ct. 718 (2016). In *Helm*, 436 U.S. 277 (1983), the Supreme Court struck down an adult's life-without-parole sentence as clearly disproportionate under the Eighth Amendment. Helm stood convicted of a minor property offense but saw his sentence enhanced under a recidivist statute that was almost unique in the nation. All of his prior convictions had been for minor, nonviolent property offenses.

21 United States v. Bajakajian, 524 U.S. 321, 337 (1998).

22 USA PATRIOT Act § 371, 31 U.S.C. § 5332 (2018). Courts, in construing the statute, have subsequently indicated that it reflects congressional perception that bulk smuggling "constitutes a significant harm." United States v. Jose, 499 F. 3d 105, 112 (1st Cir. 2007). *See also* United States v. Del Toro-Barboza, 673 F.3d 1136, 1154 (9th Cir. 2012).

23 State v. Timbs, 62 N.E.3d 472, 475 (Ind. Ct. App. 2016).

24 Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801–971 (2018).

25 DICK M. CARPENTER II ET AL., INSTITUTE FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, 2nd edition (Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

26 Austin v. United States, 509 U.S. 602 (1993).

27 United States v. Bajakajian, 524 U.S. 321 (1998).

28 The Supreme Court also addressed the "innocent owner" defense in civil forfeiture cases. *See* Bennis v. Michigan 516 U.S. 442 (1996). That issue did not apply to *Timbs v. Indiana*, as Timbs was the sole owner of the vehicle at issue.

29 18 U.S.C. § 983(g)(1) (2018).

30 Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGISLATION 97 (2001).

31 *See, e.g.,* United States v. Wagoner Cty. Real Estate, 278 F.3d 1091 (10th Cir. 2002).

32 Austin v. United States, 509 U.S. 602, 628 (1993) (Scalia, J., concurring). *See, e.g.,* United States v. 829 Calle de Madero, 100 F.3d 734 (10th Cir. 1996); Hofe v. United States, 492 F. 3d 175 (2d Cir. 2007).

33 Three states have recently passed legislation abolishing civil forfeiture. *See* ANNE TEIGEN & LUCIA BRAGG, NATIONAL CONFERENCE OF STATE LEGISLATURES, EVOLVING CIVIL ASSET FORFEITURE LAWS (Feb. 2018), http://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx.

34 *See, e.g.,* Anna Lee, Nathaniel Cary & Mike Ellis, *TAKEN: How Police Departments Make Millions by Seizing Property*, THE GREENVILLE NEWS, Jun. 12, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/; William H. Freivogel, *No Drugs, No Crime and Just Pennies for School: How Police Use Civil Asset Forfeiture*, ST. LOUIS PUBLIC RADIO, Feb. 18, 2019, https://pulitzercenter.org/reporting/no-drugs-no-crime-and-just-pennies-school-how-police-use-civil-asset-forfeiture; JACOB RYAN, KENTUCKY CENTER FOR INVESTIGATIVE REPORTING, *SEIZED: FEW KENTUCKY POLICE AGENCIES REPORT WHAT THEY TAKE THROUGH ASSET FORFEITURE* (Nov. 29, 2018), https://kycir.org/2018/11/29/seized-kentucky-asset-forfeiture/.

35 *See, e.g.,* CARPENTER ET AL., *supra* note 25, at 12.

[36] High-stakes forfeitures often lead to lengthy litigation. For a recent example, see the litigation surrounding the seizure of a skyscraper in Midtown Manhattan, *In re: 650 Fifth Avenue & Related Properties*, No. 17-3258(L), (2d Cir. Aug. 9, 2019).

[37] See "Grading State & Federal Civil Forfeiture Laws," in Carpenter et al., *supra* note 25. In some states, the proceeds go into a general fund, while in others they support K–12 education; *see* Teigen & Bragg, *supra* note 33.

[38] *See, e.g.*, Teigen & Bragg, *supra* note 33; Jarrett Skorup, *Civil Asset Forfeiture Reform Is Sweeping the Nation*, The Hill (Mar. 3, 2018, 7:30 AM), https://thehill.com/opinion/civil-rights/376961-civil-asset-forfeiture-reform-is-sweeping-the-nation.

[39] Carpenter et al., *supra* note 25, at 25 tbl. 2 (documenting growth in equitable sharing payments between 2000 and 2013).

[40] Amended Complaint for Declaratory and Injunctive Relief, California v. Trump, No. 4:19-cv-00872-HSG (N.D. Cal. Mar. 13, 2019).

[41] *Id.* at 16 (describing Plaintiff State of Massachusetts).

[42] Jefferson E. Holcomb et al., *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17(1) Criminology & Public Policy 101 (2018), https://doi.org/10.1111/1745-9133.12341. Similarly, researchers have indicated a direct connection between an increase in forfeiture funds and cuts in municipal funding for police forces.

[43] Carpenter et al., *supra* note 25, at 25–29.

[44] Office of the Att'y Gen., Order, Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies (Jan. 16, 2015), https://www.justice.gov/file/318146/download.

[45] Office of the Att'y Gen, Order No. 3946-2017, Department of Justice, Federal Forfeiture of Property Seized by State or Local Law Enforcement Agencies (July 19, 2017), https://www.justice.gov/opa/press-release/file/982611/download.

[46] Department of Justice, 5-yr Summary of Seizure and Forfeiture Trends (Feb. 14, 2019), https://www.justice.gov/afp/file/5-yr_forfeiture_trends.pdf/download.

[47] H.R. 3055, 116th Cong. (as passed by House, June 25, 2019).

[48] The Bill was received by the Senate on July 8, 2019. It has been read twice, but placed on the calendar under General Orders. *All Actions H.R.3500-116th Congress*, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/3055/all-actions?overview=closed#tabs (last visited Aug. 17, 2019).

[49] *See* Office of the Inspector General, U.S. Department of Justice, Review of the Department's Oversight of Cash Seizure and Forfeiture Activities (Mar. 2017), https://oig.justice.gov/reports/2017/e1702.pdf.

[50] Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

[51] *See, e.g.*, U.S. Commission on Civil Rights, Targeted Fines and Fees Against Communities of Color (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

[52] *See, e.g.*, David F. Forte, *Spiritual Equality: The Black Codes and the Americanization of the Freedmen*, 43 Loy. L. Rev. 569, 600 (1998). A vagrancy conviction carried a $50 fine plus ten days imprisonment in Mississippi in 1866. Nonpayment within five days would lead to forced employment. *Id.* That amounts to approximately $800 in today's money.

[53] U.S. Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[54] *See* Fines & Fees Justice Center, https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true (providing reports on different charges and legal reforms).

[55] The case was unusual in many ways. It involved a murder prosecution of a former prosecutor, eight years after his wife's death. The issue was whether the wife had died a natural death. The first trial ended in mistrial; the jury acquitted Lovelace on retrial. With bond set at $3.5 million, supporters of Lovelace put up 10% in cash. Under state law, the intermediate appellate court affirmed that upon Lovelace's acquittal 10% of the bond amount would be retained as a bond fee.

[56] *See, e.g.*, State v. Cotton, 198 So.3d 737 (Fla. Dist. Ct. App. 2016) (upholding $5000 fine in misdemeanor solicitation case).

[57] American Bar Association, Ten Guidelines on Court Fines and Fees (Aug. 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf.

[58] *See, e.g.*, Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 Am. Crim. L. Rev. 333 (2018); Douglas C. McDonald, Judith Greene & Charles Worzella, National Institute of Justice, Office of Justice Programs, Day Fines in American Courts: The Staten Island and Milwaukee Experiments (Apr. 1992), https://www.ncjrs.gov/pdffiles1/Digitization/136611NCJRS.pdf; Sally T. Hillsman, *Fines and Day Fines*, 12 Crime & Justice 49 (1990).

[59] *See* Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Services*, Urban Affairs Rev. (Aug. 11, 2018), https://hyeyoungyou.files.wordpress.com/2018/08/finesandpolicing.pdf.