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# The Forfeiture Forecast After *Timbs*: Cloudy with a Chance of Offender Ability to Pay

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# THE FORFEITURE FORECAST AFTER *TIMBS*: CLOUDY WITH A CHANCE OF OFFENDER ABILITY TO PAY

**Abstract:** On February 20, 2019, the United States Supreme Court handed down a landmark decision in *Timbs v. Indiana* by unanimously holding that the Eighth Amendment's Excessive Fines Clause applies to states as incorporated by the Fourteenth Amendment's Due Process Clause. In so doing, the Court armed state litigants with a seemingly powerful constitutional protection against civil asset forfeiture. In reality, however, the *Timbs* decision raised far more questions than it resolved. Justice Ginsburg's majority opinion implicitly endorsed Court precedent that would limit forfeiture assessment to a gross disproportionality standard. Yet the opinion also chronicled the history of civil forfeiture to emphasize the long-established practice of considering a defendant's ability to pay when imposing fines. In practice, these two metrics—the Court's past treatment of forfeitures and customary Anglo-American safeguards in assessing individual fines—conflict with one another. Thus, the *Timbs* decision provides little guidance for practitioners with respect to the manner in which state courts will apply the U.S. Constitution's Excessive Fines Clause to civil *in rem* forfeitures. By affording state courts the option to consider an offender's financial capability in an Excessive Fines Clause analysis, without outlining a concrete test for *how* to do so, the Court only has exacerbated the existing widespread divergence among lower courts. This Note argues that the Supreme Court missed a critical opportunity to right the sinking ship of civil forfeiture, by failing to anchor its analysis squarely within the Eighth Amendment framework and leaving unchecked the significant power of this prosecutorial tool. Given the renewed doctrinal confusion that is likely to emerge from *Timbs*, now is an optimal time for litigants to challenge civil forfeiture actions. Through precise legal actions, individuals finally may compel the Court to adopt a clear and holistic Excessive Fines Clause analysis, in which an offender's ability to pay is rightfully recognized.

## INTRODUCTION

*Public trust in the police is one of the most vital elements in a civilized society, but for many Americans, that trust has been undermined by a procedure called civil forfeiture. Now I know it sounds like a Gwyneth Paltrow euphemism for divorce, but incredibly it's actually even worse than that.*[1]

[1] *Last Week Tonight with John Oliver: Civil Asset Forfeiture* (HBO television broadcast Oct. 5, 2014), https://www.youtube.com/watch?v=3kEpZWGgJks [https://perma.cc/T7WK-9D4T]. Civil asset forfeiture enables the government to bring an *in rem* action against property tied to illegal activi-

This witty line appeared during a 2014 segment of *Last Week Tonight with John Oliver*, in which the late night comedian examined the highly prevalent practice of civil asset forfeiture in the United States.[2] The United States Justice and Treasury Departments reportedly obtained approximately $4.5 billion from forfeiture proceeds during 2014, whereas individual states acquired up to $46 million in just a year through asset seizure.[3] Even more surprising than the rise in incidents of civil forfeiture, however, is the growing bipartisan criticism of the practice, in response to continued reports of law enforcement agencies' unrestrained and abusive use of forfeiture power.[4]

Recently, civil forfeiture has gained renewed attention after a challenge to an Indiana asset seizure appeared on the United States Supreme Court's 2019 docket in *Timbs v. Indiana*.[5] In *Timbs*, the Court considered whether the Eighth

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ty. *Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019). Through this practice, the government has the power to seize "guilty" property without securing a conviction or filing a criminal charge beforehand. STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 3-3, at 104–05 (2d ed. 2013).

[2] *See Last Week Tonight with John Oliver*, *supra* note 1 (describing the legal underpinnings of civil forfeiture and highlighting numerous cases in which law enforcement agencies abused the procedure); *see also* Ryan Reed, *John Oliver Amplifies the Absurdity of Civil Forfeitures*, ROLLING STONE (Oct. 6, 2014), https://www.rollingstone.com/tv/tv-news/john-oliver-amplifies-the-absurdity-of-civil-forfeitures-191049/ [https://perma.cc/YZK6-2ZNB] (commenting on John Oliver's remarks about a 2014 report, which found that, since September 11, 2001, law enforcement confiscated nearly $2.5 billion in 61,998 cash seizures from individuals that had not been charged with violating the law).

[3] DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10–11 (2d ed. 2015), http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf [https://perma.cc/9DA2-T4PY]. These statistics, though incomplete, reflect the harrowing prevalence of forfeiture in the United States, given that inadequate reporting requirements make it challenging for researchers to sufficiently gauge forfeiture revenues. *See id.* at 34–36 (detailing the reporting demands of each individual state and further specifying how the omittance of certain information makes it difficult to discern the success of forfeiture efforts).

[4] *See* Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), https://nyti.ms/2jRAsXl [https://perma.cc/Yd86-N2WW] (discussing the widespread criticism of civil forfeiture from congressional members of both political parties, libertarians, and civil rights proponents); *see also* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."); *Asset Forfeiture Abuse*, ACLU, https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse [https://perma.cc/PRS2-4EFW] (detailing how the civil forfeiture system is rife with abuse, given that law enforcement can often be motivated by profit and state and federal laws fail to provide individuals with adequate protections); Inst. for Justice, *End Civil Forfeiture*, END FORFEITURE, http://endforfeiture.com/ [https://perma.cc/7N6K-RF7L] (compiling information on civil forfeiture, including cases, statistics, and reports in an effort to raise awareness and to eradicate abusive policing for profit practices); Jason Snead, *Stopping America's Runaway Civil Forfeitures*, HERITAGE FOUND. (Feb. 26, 2016), https://www.heritage.org/crime-and-justice/commentary/stopping-americas-runaway-civil-forfeitures [https://perma.cc/22Z6-PLFB] (outlining legislative reforms aimed at curbing civil asset forfeiture abuse).

[5] *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (extending the Eighth Amendment's Excessive Fines Clause to the states, thereby providing individuals with a constitutional protection from excessive forfeitures by state authorities). In *Timbs*, the Court declined to re-examine the underlying

Amendment's Excessive Fines Clause, then one of the few remaining unincorporated portions of the Bill of Rights, should be incorporated against the states by virtue of the Fourteenth Amendment's Due Process Clause.[6] Given the scarcity of Supreme Court precedent involving asset forfeitures and the Excessive Fines Clause, commentators speculated on the historic potential of *Timbs* as a prospective end to civil asset forfeiture.[7]

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issue of whether civil forfeitures constitute fines and thus fall under the purview of the Excessive Fines Clause because the State of Indiana failed to properly raise the matter. *Id.* at 690. In so doing, the Court appeared to open the door for future litigants to raise such challenges. *See* Larry M. Elkin, *Putting a Lid on the Seizure Business*, PALISADES HUDSON FIN. GROUP LLC (Feb. 28, 2019), https://www.palisadeshudson.com/2019/02/putting-a-lid-on-the-seizure-business/ [https://perma.cc/VG8V-DD7P] (asserting that the Supreme Court's ruling in *Timbs* ushers in the opportunity for future deliberation over the ill-defined concept of forfeiture and current landscape of civil forfeiture practices).

[6] *Timbs*, 139 S. Ct. at 686, 687 n.1. Incorporation is the process by which states become bound to specific provisions of the Bill of Rights. *Incorporation*, BLACK'S LAW DICTIONARY, *supra* note 1. Since 1897, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause as incorporating the First, Fourth, Sixth, and Ninth Amendments, and thus subjected the states to their protections. *Id.* Additionally, in accordance with the selective incorporation doctrine, the Court determined that states will be subject to Bill of Rights provisions when those provisions are found to be "fundamental to the American scheme of ordered liberty or deeply rooted in this nation's history." F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 164 (2019); *see* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (delineating the Supreme Court's test for determining when Bill of Rights guarantees are properly incorporated against states through the Fourteenth Amendment); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1327 (1977) (stating that the selective incorporation doctrine instructs that any protection deemed fundamental must be completely integrated into the Fourteenth Amendment and applied to the states in the same manner as applied to the federal government). The U.S. Constitution's Eighth Amendment comprises the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishment Clause—all of which originate from the English Bill of Rights. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 997 (2019). Numerous legal scholars, academics, judges, practitioners, and other commentators have fervently debated the meaning of the Eighth Amendment's language since its ratification in 1791. *Id.* at 990; *see, e.g.*, Gregg v. Georgia, 428 U.S. 153, 177 (1976) (holding that the Eighth Amendment's text indicates that the Framers intended for the death penalty to be an appropriate means of punishment for certain crimes); Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 523 (2017) (stating that no less than thirty-five judges have found the death penalty to be intrinsically unconstitutional). In particular, the Excessive Fines Clause, which restricts the government's authority to collect payments as penalty for a crime, has spurred significant debate. *See* United States v. Bajakajian, 524 U.S. 321, 327–28 (1998) (interpreting the Excessive Fines Clause as a formidable check on the government's power); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 295 & n.92 (2014) (discussing how the Excessive Fines doctrine and jurisprudence has led to substantial confusion among lower courts over what constitutes a fine and when a fine is excessive).

[7] *See* Timbs v. Indiana*: The End of Civil Asset Forfeiture?*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Oct. 4, 2018) [hereinafter *The End of Civil Asset Forfeiture?*], https://harvardcrcl.org/timbs-v-indiana-the-end-of-civil-asset-forfeiture [https://perma.cc/ULR2-Q9LD] (noting that the Supreme Court's granting of certiorari in *Timbs* presents a critical opportunity for dismantling the system of civil forfeiture, given Congress's prior suppression of reforms to civil forfeiture laws); *infra* notes 70–

This Note analyzes the implications of the Supreme Court's holding in *Timbs*, in which the Court extended the Excessive Fines Clause to the states, and argues that the *Timbs* ruling is eclipsed by what the Court left unresolved.[8] This Note thus predicts that increased litigation is on the horizon due to the Court's failure to hold affirmatively that civil forfeitures are tantamount to fines—thereby leaving it for another court, in another case, to further develop Excessive Fines Clause jurisprudence.[9] Part I of this Note provides an overview of the history and contemporary evolution of civil asset forfeiture in the United States.[10] Part I also explores the collision between the Excessive Fines Clause and civil forfeiture by examining the origin of the Clause and chronicling Supreme Court jurisprudence addressing its application to forfeiture disputes, as well as surveying subsequent lower court interpretations of the Court's open-ended precedent.[11] Lastly, Part I briefly outlines the facts and procedural history of *Timbs*.[12] Part II then discusses the achievements and limitations of the *Timbs* decision, as well as the varied reactions among commentators considering its impact (or lack thereof) upon civil forfeiture abuse.[13] Finally, Part III surmises that *Timbs* offers little guidance to lower courts in applying the Excessive Fines Clause to civil *in rem* forfeitures, and thus tasks courts with interpreting the Supreme Court's vague jurisprudence against their own state precedent.[14] Consequently, the *Timbs* decision is likely to spawn litigation, with mixed outcomes, as individuals seek to prevent the government from effecting excessive forfeitures.[15] Part III concludes by averring that, despite the failure of *Timbs* to articulate a clear "excessiveness" test for adjudicating civil forfeitures, the opportunity is ripe for litigants to bring forth actions challenging unconstitutional forfeitures.[16] In so doing, the natural progression of forfeiture jurisprudence will force courts to recognize that consideration of an individual's ability to pay is a necessary component of an Excessive Fines Clause analysis, and prompt more robust statutory protections to curb abusive forfeiture practices by state and local authorities.[17]

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89 and accompanying text (reviewing the limited number of Supreme Court cases in which the Court addressed the application of the Excessive Fines Clause to criminal and civil forfeitures).

[8] *See infra* notes 127–181 and accompanying text.

[9] *See infra* notes 150–197 and accompanying text.

[10] *See infra* notes 18–47 and accompanying text.

[11] *See infra* notes 48–106 and accompanying text.

[12] *See infra* notes 107–126 and accompanying text.

[13] *See infra* notes 127–181 and accompanying text.

[14] *See infra* notes 182–197 and accompanying text.

[15] *See infra* notes 193–197 and accompanying text.

[16] *See infra* notes 193–197 and accompanying text.

[17] *See infra* notes 196–197 and accompanying text.

## I. CIVIL FORFEITURE AND THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE

Civil asset forfeiture is a powerful tool that allows law enforcement agencies to seize and hold property suspected of being tied to criminal activity.[18] With respect to both civil and criminal forfeiture, federal and most state laws enable law enforcement bodies to supplement their budgets by collecting the profits derived from forfeited property.[19] Civil and criminal forfeiture are,

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[18] Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2388 (2018) [hereinafter *How Crime Pays*]; *see supra* note 1 and accompanying text (defining civil asset forfeiture and the power such practices instill in the government). Presently, law enforcement agencies employ civil forfeiture most frequently to confiscate assets tied to drug-related offenses. Chet Little, Note, *Civil Forfeiture and the Excessive Fines Clause: Does* Bajakajian *Provide False Hope for Drug-Related Offenders?*, 11 U. FLA. J.L. & PUB. POL'Y 203, 204 (2000).

[19] Angela Erickson, Jennifer McDonald & Mindy Menjou, *Forfeiture Transparency & Accountability*, INST. FOR JUST. (May 3, 2019), https://ij.org/report/forfeiture-transparency-accountability/ [https://perma.cc/ET9X-TLNE]. There is a wide array of federal and state laws that govern forfeiture practices. *How Crime Pays*, *supra* note 18, at 2388–89. Although many similarities exist between state and federal forfeitures, state laws differ extensively in the protections they afford to individuals that are subject to forfeiture. *Id.* at 2389; *see, e.g.*, CARPENTER ET AL., *supra* note 3, at 150–51 (noting that the federal government, along with twenty-five states, permits law enforcement to retain as much as 100% of forfeiture proceeds, while another seven states authorize collection ranging anywhere from 85% to 95%, and a mere seven states and the District of Columbia prohibit law enforcement from keeping forfeiture proceeds). Overall, state legislation aimed at restraining the power of civil forfeiture has primarily focused on the establishment of reporting requirements, the heightening of the standard of proof, and in some cases the elimination of civil forfeiture altogether. *How Crime Pays*, *supra* note 18, at 2392. In spite of these efforts, the federal government developed a formidable program, known as equitable sharing, that permits circumvention of local civil forfeiture laws. *See* CARPENTER ET AL., *supra* note 3, at 28 (explaining that equitable sharing allows law enforcement agencies to apply federal, rather than state, *in rem* forfeiture measures to complex seizures). Equitable sharing can happen either when a state or local agency hands over forfeited property to a federal agency for "adoption" or when local authorities cooperate with a federal agency on a joint investigation or task force. *Id.* at 25. By participating in this program, state and local authorities become qualified to receive as much as 80% of their forfeiture proceeds. *Id.* In 2015, Attorney General Eric Holder enacted several restrictions on the equitable sharing program. *See* U.S. DEP'T OF JUSTICE, PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (Jan. 16, 2015), https://www.justice.gov/file/318146/download [https://perma.cc/PEZ8-MGPM] (limiting federal adoption of assets seized by state and local authorities to four precise classifications of property); *see also* Robert O'Harrow Jr. et al., *Holder Limits Seized-Asset Sharing Process That Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html [https://perma.cc/7k5F-DEW8] (stating that approximately 42% of law enforcement agencies participated in equitable sharing and that, for hundreds of those departments, the forfeiture proceeds from the program made up for at least 20% of their annual funds). In July of 2017, however, Attorney General Jeff Sessions restored equitable sharing, thereby undercutting much of the state-imposed statutory limits on forfeiture which had been enacted in the interim. *See* U.S. DEP'T OF JUSTICE, ORD. NO. 3946-2017, FEDERAL FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (July 19, 2017), https://www.justice.gov/opa/press-release/file/982611/download [https://perma.cc/UP3A-HPAW] (re-establishing federal adoption as a tool for reducing criminal activity).

however, distinct from one another.[20] The latter occurs after a property owner has been convicted of a crime, thereby operating as a punitive action.[21] Civil forfeiture, conversely, occurs prior to any determination of criminal guilt or the institution of criminal proceedings.[22] As a result, civil forfeiture proceedings are subject to *in rem* jurisdiction, in which civil actions are filed against the property itself.[23]

There are three distinct classifications of forfeitures: (1) pure contraband, (2) proceeds of unlawful activity, and (3) tools or "instrumentalities" used in the commission of a crime.[24] The distinctions among these categories are significant because Eighth Amendment scrutiny currently applies only to those actions that are in whole or in part punitive in nature.[25] The first category—contraband—includes objects that are subject to forfeiture because of their inherently illicit nature.[26] There is no right to possession of contraband; as such, the forfeiture of illegal items does not implicate notions of fairness or exces-

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[20] 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, 545 (2017); *see infra* notes 21–22 and accompanying text (differentiating the practices of criminal and civil forfeiture by explaining their respective procedural requirements and legal objectives).

[21] *See* CASSELLA, *supra* note 1, § 1-4, at 13–14 (stating that criminal forfeiture proceedings encompass those actions that are brought *in personam*—against a particular person—and thus focus on the guilt of the property owner).

[22] Pimentel, *supra* note 20, at 545. To successfully bring a civil forfeiture action, the government must have reason to believe that the property itself, as opposed to the offender, is guilty of being tied to criminal activity. Brent Skorup, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 427 (2012).

[23] Pimentel, *supra* note 20, at 545 (distinguishing criminal and civil forfeiture legal proceedings); *see also Jurisdiction*, BLACK'S LAW DICTIONARY, *supra* note 1 (defining *in rem* jurisdiction as a court's right to adjudicate an individual's entitlement to property, including the authority to confiscate and to retain said property). In the case of *in rem* forfeiture actions, it is the seized property that is regarded as being guilty, and thus the property owner's guilt bears no weight in the matter. Pimentel, *supra* note 20, at 545; *see, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996) (stating that the objective of civil forfeiture is deterrence, rather than punishment). Following a litigant's challenge to a civil forfeiture action, a prosecutor must then obtain judicial approval to seize the property in question. *See The Need to Reform Asset Forfeiture: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 4–5 (2015) (statement of the United States Department of Justice), https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/10/06/doj_submission_for_the_record_re_asset_forfeiture_reform_act_15apr152_2_508_compliant.pdf [https://perma.cc/49YT-ZASU] (outlining the judicial proceedings that the government must go through in order to legally seize an owner's assets). As a result, the subsequent litigation proceeds civilly and the government assumes the burden of proving that, by a preponderance of the evidence, the property was utilized to commit a crime or was acquired through criminal activity. *Id.* at 5.

[24] *See Bennis*, 516 U.S. at 459–61 (Stevens, J., dissenting).

[25] Austin v. United States, 509 U.S. 602, 609–10 (1993); *see also* Pimentel, *supra* note 20, at 545–47 (discussing in depth the variances among the different categories of forfeitable property, particularly with respect to the underlying legal reasoning and policy goals for each).

[26] *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (noting that possession of contraband alone, regardless of further action or motive, establishes criminal behavior). Such items may include, but are not limited to, illegal drugs and smuggled objects. *Bennis*, 516 U.S. at 459.

siveness.[27] The second category—proceeds of unlawful activity—includes stolen property and monies earned from unlawful transactions.[28] This type of forfeiture can target any assets of the wrongdoer, even those acquired legally, to satisfy the recovery of proceeds.[29] For this reason, the majority of circuits have held that the forfeiture of proceeds is not punitive and, therefore, not subject to Eighth Amendment scrutiny.[30] The final category of forfeiture—property used in the facilitation of a crime—is unique in that the government can take property that may otherwise be legal or legitimately acquired.[31] Although this type

[27] *See Bennis*, 516 U.S. at 459 (concluding that the government has an explicit interest in confiscating contraband, notwithstanding an owner's motives, given that mere possession of such items is illegal). Therefore, because the forfeiture of contraband lacks a punitive objective, it falls outside the purview of the Excessive Fines Clause. Pimentel, *supra* note 20, at 546.

[28] *Bennis*, 516 U.S. at 459 (citing United States v. 92 Buena Vista Ave., 507 U.S. 111, 121 n.16 (1993)). Although proceeds initially applied only to stolen property, Congress significantly expanded the category to cover monies earned from illicit transactions through the enactment of several federal statutes, such as the Racketeer Influence and Corrupt Organizations Act (RICO). *Id.*; *see, e.g.*, Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, 8 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2018)); *see also infra* note 43 and accompanying text (describing how the ratification of RICO extended the reach of the government's forfeiture power and bolstered prosecutorial tools for dismantling criminal organizations).

[29] Pimentel, *supra* note 20, at 547.

[30] *Id.* at 557. Most circuit courts of appeals have declined to apply the Excessive Fines Clause to proceeds forfeitures because they have either determined that proceeds forfeiture is remedial in nature or could never rise to the level of being "grossly disproportional" to the underlying crime. *Id.*; *see, e.g.*, United States v. Sum of $185,336.07 U.S. Currency Seized from Citizen's Bank Account L7N01967, 731 F.3d 189, 194 (2d Cir. 2013) (declining to hold that the Eighth Amendment applies to proceeds forfeitures given their non-punitive nature); United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) (determining that forfeiture of property obtained from the proceeds of criminal activity is not subject to Eighth Amendment scrutiny); United States v. 22 Santa Barbara Drive, 264 F.3d 860, 874–75 (9th Cir. 2001) (holding that unlawful proceeds have historically and correctly been viewed as non-punitive); United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1395–96 (10th Cir. 1997) (ruling that the forfeiture of proceeds can never be regarded as grossly excessive, and thus is not subject to the Eighth Amendment's restrictions); Smith v. United States, 76 F.3d 879, 883 (7th Cir. 1996) (holding that proceeds forfeitures can never be deemed punitive); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) (determining that the forfeiture of proceeds is remedial in nature and cannot be restricted by the Excessive Fines Clause, given that an owner must divulge himself of any proceeds obtained through illegal means). The Court of Appeals for the Fourth Circuit, however, determined that in some instances proceeds forfeitures may be deemed punitive. *See* United States v. Jalaram, Inc., 599 F.3d 347, 355 (4th Cir. 2010) (holding that in cases where an offender takes a small part in a conspiracy that produced significant proceeds, joint and several liability for such proceeds could lead to a forfeiture that is grossly disproportionate to the individual's contribution).

[31] *Bennis*, 516 U.S. at 460 (Stevens, J., dissenting) (citing *One 1958 Plymouth Sedan*, 380 U.S. at 699). For instance, in 1926 in *Van Oster v. Kansas*, the Supreme Court held that a car used in the commission of a crime constituted forfeitable property despite the lack of any evidence demonstrating that the criminal activity had taken place with the owner's knowledge. 272 U.S. 465, 466–67 (1926). As a counter measure to these types of injustices, the Civil Asset Forfeiture Reform Act of 2000 introduced an "innocent owner" defense. *See* Civil Asset Forfeiture Reform Act of 2000, P.L. 106-185, 114 Stat. 202 (2000) (establishing a safeguard for property owners that are unaware or have attempted to prevent illegal use of their property). Presently, numerous jurisdictions permit the use of an innocent owner defense when the property owner lacks any criminal guilt. *How Crime Pays*, *supra* note 18, at 2389. To obtain a favorable finding, however, property owners must affirmatively demonstrate

of forfeiture might result in innocent owners being divested of their lawfully-owned property, forfeitures of this nature have withstood various due process challenges.[32] In some cases, courts have deemed this category of forfeiture to be partially punitive and therefore within the purview of the Eighth Amendment.[33]

Section A of this Part discusses the origins of forfeiture and its contemporary development in the United States.[34] Section B then details the history and English roots of the Eighth Amendment's Excessive Fines Clause, its evolving application to forfeiture through Supreme Court jurisprudence, and the diverging opinions promulgated by lower courts concerning the Clause's applicability to forfeiture actions.[35] Finally, Section C outlines the factual and procedural history of *Timbs*, from its origins in the Grant County Superior Court to its disposition in the Supreme Court of the United States.[36]

### *A. The History of Civil Forfeiture*

Although forfeiture practices are rooted in ancient times, modern conceptions of civil forfeiture first arose in customs and admiralty law during the eighteenth century.[37] These early laws principally aimed to eradicate smug-

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their innocence. *See, e.g.*, 18 U.S.C. § 983(d) (2018) (stating that the onus falls on claimants to prove, by a preponderance of the evidence, that they did not engage in any criminal conduct associated with the forfeiture and took reasonable steps to stop any illegal use of the property). *But see* Taline Festekjian, *Civil Forfeiture and the Status of Innocent Owners After* Bennis v. Michigan, 37 B.C. L. REV. 713, 740 (1996) (asserting that the "innocent owner" standard should not be an affirmative charge because innocence of criminal guilt and unawareness of illegal misconduct are passive states). Thus, in practice, the defense is not regularly proffered by defendants, which results in most forfeitures, particularly those related to federal drug laws, going unchallenged. CASSELLA, *supra* note 1, § 1-4(a), at 10 & n.22; *see also* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2449 & n.11 (2016) (discussing the varied and contested reasonings espoused by scholars to explain the lack of objections to forfeitures, which range from the absence of meritorious defenses to the lack of protections given to property owners who bear the burden of proving their innocence).

[32] Pimentel, *supra* note 20, at 547. Procedural due process challenges seek to enforce the basic conditions of notice and a hearing, protected by the Fifth and Fourteenth Amendments' Due Process Clauses. *Due Process*, BLACK'S LAW DICTIONARY, *supra* note 1. Such procedural protections are particularly crucial when the government has divested an individual of an important life, liberty, or property right. *See* Block v. Hirsh, 256 U.S. 135, 159 (1921) (stating that "[t]he national government by the Fifth Amendment to the Constitution, and the states by the Fourteenth Amendment, are forbidden to deprive any person of 'life, liberty, or property, without due process of law'").

[33] Pimentel, *supra* note 20, at 547. Although the Supreme Court previously held that forfeitures may be restricted by the Eighth Amendment if they are in part punitive, it was not until the Court's 1993 decision in *United States v. Austin* that it applied this standard to civil *in rem* forfeitures. *See* 509 U.S. at 618 (stating that civil *in rem* forfeitures have traditionally been viewed as being at least partially punitive).

[34] *See infra* notes 37–47 and accompanying text.

[35] *See infra* notes 48–106 and accompanying text.

[36] *See infra* notes 107–126 and accompanying text.

[37] *Civil Asset Forfeiture: Purposes, Protections, and Prosecutors*, 67 U.S. ATT'Y BULL. 3, 7 (2019) [hereinafter *Civil Asset Forfeiture*]; *see also* Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79,

gling and piracy offenses.[38] The colonial government detained and tried naval captains and crews of ships for trafficking illicit goods, but without seizure the overseas owners of these vessels could evade justice and hire new crews for their ships.[39] New civil forfeiture procedures could immobilize owners in their smuggling efforts by empowering the government to take ships engaged in illegal activity without securing a conviction against the owner.[40] In 1789, Congress codified these maritime customs by passing numerous acts that regulated and prevented future smuggling violations by bringing ships and cargo within the purview of civil forfeiture.[41]

Following these congressional actions, for almost two centuries, federal and state authorities infrequently invoked civil forfeiture powers.[42] The early 1980s saw a dramatic surge in the practice of civil forfeiture as an enforcement weapon in President Ronald Reagan's "War on Drugs."[43] For instance, in 1978, Congress expanded the reach of the Comprehensive Drug Abuse Preven-

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99 (1996) (noting that Congress eventually broadened the scope of *in rem* forfeiture, beyond its maritime roots, to impose revenue provisions unconnected to nautical trade); Nelson, *supra* note 31, at 2457–67 (providing a detailed historical account of the genesis and development of civil asset forfeiture).

[38] *Civil Asset Forfeiture*, *supra* note 37, at 7.

[39] *Id.*

[40] *Id.* The enforcement of *in rem* forfeiture over maritime trade practices also prevented owners from continuing to derive revenue from their illegal enterprises. *Id.*

[41] Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 39, 47 (repealed 1790). Because of these congressional measures, vessels implicated in illegal activity could be subject to forfeiture regardless of whether the owner had been criminally charged or convicted. *Civil Asset Forfeiture*, *supra* note 37, at 7. Additionally, because the ship was considered a tool in the facilitation of the crime, the government could seize it to prevent any future illicit use of the ship. Act of July 31, 1789, ch. 5, §§ 12, 36.

[42] Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–95 (2014).

[43] *Id.* In 1970, President Richard Nixon set into motion the "War on Drugs" as a response to fears and panic arising out of the media's association between narcotics and violence. *See* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 246–47 (2015) (observing that in the early 1970s, a sizeable portion of the American population considered drug crime to be the most pressing issue for the country to resolve). Following Nixon's aggressive pursuit of narcotics offenses, President Ronald Reagan launched his own war on drugs in the 1980s. *Id.* at 247–48. By this point, national concern over drug abuse had only grown and public opinion supported more severe penalties for drug offenses. *Id.* at 248–49. Accordingly, Congress undertook sweeping legislative reforms to curtail the problem, including the enactment of harsher sentencing regulations. *Id.* at 246–47; Candace Caruthers, Comment, *When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses*, 62 HOWARD L.J. 277, 282 (2018). Congress also imbued existing asset forfeiture laws with increased depth and power, most notably through its implementation of RICO. Caruthers, *supra*, at 282–83. RICO mandated seizure of all proceeds stemming from criminal activity. *Id.* at 283. Legislators supported these robust asset forfeiture practices as essential to providing prosecutors with the requisite tools needed for taking on drug-related crimes. *Id.*; *see also* Richard Weber, *Introduction*, 55 U.S. ATT'Y BULL. 1 (2007), https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf [https://perma.cc/8FNF-YDZD] (asserting that prosecutors' ability to confiscate assets tied to criminal activity enables the government to take down dangerous criminals, particularly those in charge of large criminal organizations).

tion and Control Act of 1970 (CDAPCA) to include the civil forfeiture of commercial paper, including currency.[44] The next seismic shift in civil forfeiture occurred in 1984 when Congress again amended the CDAPCA.[45] These amendments permitted forfeited proceeds, which previously had been deposited into the United States Treasury, to be distributed exclusively to law enforcement departments.[46] With this change, state and local departments could derive a direct financial benefit from forfeited property.[47]

### *B. The Eighth Amendment's Excessive Fines Clause and Forfeiture Actions*

The founders created the Eighth Amendment, which protects individuals from excessive fines, to restrain the government's ability to inflict disproportionate punishments on its subjects.[48] Historically, courts and academics seem

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[44] Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(1), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6)). The Comprehensive Drug Abuse Prevention and Control Act of 1970 was initially devised to assist prosecutors in securing lengthy sentences for leaders of criminal drug organizations. Sharon C. Lynch, Comment, *Drug Kingpins and Their Helpers: Accomplice Liability Under 21 USC Section 848*, 58 U. CHI. L. REV. 391, 393 (1991).

[45] Luis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1119 (2017).

[46] Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 309, 98 Stat. 2040, 2051–52 (1984) (codified as amended at 21 U.S.C. § 881(e)); *see also* Caruthers, *supra* note 43, at 283 (observing that the evolution of asset forfeiture procedures in the 1980s ushered in a new era of financially motivated forfeiture actions by law enforcement agencies).

[47] Rulli, *supra* note 45, at 1120. Following this change, the highly lucrative practice of asset forfeiture proved to significantly supplement the accounts of law enforcement agencies. Skorup, *supra* note 22, at 434; *see* Rulli, *supra* note 45, at 1120 (documenting substantial gains in the Department of Justice's federal asset forfeiture account, which increased from $338 million in 1996 to $1.3 billion in 2008 to over $2.0 billion as of 2017). In light of such sizable financial gains, claims of abuse began to generate widespread media attention and public criticism. *See* Rulli, *supra* note 45, at 1120–21 (discussing the outpouring of negative media coverage surrounding asset forfeiture, including allegations of police corruption and lawsuits challenging the legality of certain forfeitures); *see also* Christopher Ingraham, *Law Enforcement Took More Stuff from People Than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/ [https://perma.cc/k5HF-X7EJ] (reporting that, in 2014, federal law enforcement agencies accumulated more than $5 billion in their asset forfeiture accounts whereas burglars robbed $3.5 billion). In spite of these criticisms, the Department of Justice remains steadfast in its position that asset seizure suppresses crime. Caruthers, *supra* note 43, at 283. The Department of Justice's website, moreover, maintains that the objective of the asset forfeiture system is to improve public safety and welfare. *Asset Forfeiture Program*, U.S. DEP'T OF JUST., https://www.justice.gov/afp [https://perma.cc/35GC-7243].

[48] U.S. CONST. amend. VIII; Pimentel, *supra* note 20, at 554. The Excessive Fines Clause refers to the portion of the Eighth Amendment that limits the sovereign's power to impose disproportionate fines. U.S. CONST. amend. VIII; *see supra* note 6 and accompanying text (describing each of the clauses within the Eighth Amendment, as well as the particularly ambiguous language of Excessive Fines Clause).

to have overlooked the Excessive Fines Clause.[49] The Clause, however, has been resurrected over the past several decades, notably emerging in 1998, in *United States v. Bajakajian*, in which the United States Supreme Court ruled that criminal asset forfeiture fell within the purview of the Excessive Fines Clause.[50] Despite holding that the Clause's protections apply to criminal forfeiture, the Court failed to provide any guidance regarding its application, leaving lower courts to formulate their own tests for measuring the "excessiveness" of a fine or forfeiture.[51] Subsection 1 of this Section explores the history of the Eighth Amendment's Excessive Fines Clause, tracing its origins and meaning back to the Magna Carta, and discusses the evolution of the Clause in both practice and significance in the United States.[52] Subsection 2 continues this analysis by reviewing seminal Supreme Court jurisprudence that prescribes the manner in which the Excessive Fines Clause restricts government forfeiture power.[53] Subsection 3 concludes that the Court's lack of guidance in applying

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[49] *See* David Lieber, *Eighth Amendment—The Excessive Fines Clause*, 84 J. CRIM. L. & CRIMINOLOGY 805, 808 (1994) (noting that both the Framers and the Supreme Court have long disregarded the Clause, in spite of its powerful restraint on sovereign authority); *see also* Colgan, *supra* note 6, at 295 & n.92, 296 (explaining that courts grappling with the meaning of the Excessive Fines Clause are hindered by the dearth of legislative history from which to gain insight into the Framers' intent).

[50] Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 833–34 (2013); *see Bajakajian*, 524 U.S. at 334 (holding that the Excessive Fines Clause analysis centers around the notion of proportionality, requiring that the amount of property forfeited correlate to the seriousness of the crime). In *Bajakajian*, the Court held that the seizure of cash following a criminal conviction for failing to disclose the conveyance of money overseas was punitive and thus subject to Excessive Fines Clause scrutiny. *See* 524 U.S. at 332–34 (ruling that the government's forfeiture of defendant Bajakajian's cash constituted a fine).

[51] McLean, *supra* note 50, at 834. The Supreme Court's *Bajakajian* opinion led to substantial doctrinal confusion among lower courts. Colgan, *supra* note 6, at 320 n.213, 321. Lower courts have construed the decision as denoting both that proportionality between the severity of the punishment and gravity of the harm caused is the sole consideration in evaluating whether a fine is excessive, and conversely that proportionality is an essential but not determinative condition. *Compare* United States v. Aguasvivas-Castillo, 668 F.3d 7, 17 (1st Cir. 2012) (determining that the gross disproportionality analysis requires contemplation of whether the offender constitutes an individual whom the statute was intended to reach), *and* United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004) (interpreting gross disproportionality to necessitate review of the character and extent of the criminal misconduct and whether the offense was connected to other illicit activities), *with* Von Hofe v. United States, 492 F.3d 175, 186 (2d Cir. 2007) (concluding that the United States Courts of Appeals for the First and Ninth Circuits' use of a hybrid of factors was an appropriate method for assessing a fine's excessiveness). Thus, some courts have interpreted *Bajakajian* as endorsing an Excessive Fines analysis that scrutinizes how a fine will impact a given defendant in conjunction with the disproportionality of the punishment. Colgan, *supra* note 6, at 321; *see, e.g.*, United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008) (holding that courts should evaluate whether a forfeiture would divest an offender of his or her livelihood, in addition to considering proportionality).

[52] *See infra* notes 55–69 and accompanying text.

[53] *See infra* notes 70–89 and accompanying text.

the Excessive Fines Clause has led lower courts to grapple with their own approaches to civil *in rem* forfeitures.[54]

### 1. Historical Roots & Use of the Eighth Amendment's Excessive Fines Clause

The text of the Eighth Amendment to the U.S. Constitution was modeled after a parallel provision in the Virginia Declaration of Rights of 1776 (Virginia Declaration), which itself parroted sentiments from the English Bill of Rights of 1689.[55] The English Bill of Rights of 1689 affirmed traditional freedoms established by judicial precedent, decrees, and the Magna Carta of 1215.[56] Significantly, the Magna Carta enforced restrictions upon the English government's power to levy fines for civil and criminal offenses on behalf of the Crown.[57] The first key restriction was a proportionality constraint, which stipulated that the pecuniary fine must pertain to the seriousness of the predicate crime.[58] The second restriction was a "livelihood" constraint, known as *salvo contenemento suo*.[59] The concept underlying *salvo contenemento suo* was that fines should never deny individuals of their livelihoods and must

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[54] *See infra* notes 90–106 and accompanying text.

[55] *See* ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, at 146 (1924) (stating that the Virginia Declaration of Rights of 1776 (Virginia Declaration) echoed English ideologies of a sovereign's power being derived from its people, and of citizens maintaining the intrinsic right to enact reforms when a government abuses its power); Virginia Declaration of Rights § 9 (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234–35 (1971) [hereinafter Virginia Declaration of Rights] (reproducing the entirety of the state of Virginia's original governing doctrine); *see also* JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 177–80 (2012) (describing the influence of the Virginia Declaration, which led other state legislatures to declare their sovereignty and adopt protections for their citizens' rights). Specifically, the Eighth Amendment to the U.S. Constitution mirrors section 9 of the Virginia Declaration, which stipulated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Virginia Declaration of Rights, *supra*, § 9, at 235; BESSLER, *supra*, at 177–80. Moreover, Section 9 of the Virginia Declaration encapsulated the English law tradition by internalizing the long-established principle that a fine should be proportionate to the severity of the offense and the wrongdoer's means. Jones v. Commonwealth, 5 Va. 555, 556–57, 1 Call 555, 556–57 (1799); *see also* NEVINS, *supra*, at 146 (stating that the Virginia Declaration reaffirmed values inherent to the Magna Carta, the Revolution of 1688, and the Petition of Rights).

[56] McLean, *supra* note 50, at 839.

[57] Rulli, *supra* note 45, at 1113; *see also* McLean, *supra* note 50, at 854 (discussing a portion of the Magna Carta that administered the regulation of amercements, which were an ancestral mode of fines).

[58] *See* Magna Carta, 9 Hen. III, ch. 14 (1255), 1 Stat. at Large 5 (1762 ed.); Rulli, *supra* note 45, at 1113 n.5 (translating Chapter Fourteen of the Magna Carta to proclaim that an individual may only be "amerced . . . in accordance with the measure of that same offense").

[59] *See* Magna Carta, 9 Hen. III, ch. 14, 1 Stat. at Large at 5. According to Blackstone, the core meaning of *salvo contenemento suo* is that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." 4 WILLIAM BLACKSTONE, COMMENTARIES *372.

leave them with adequate means to support themselves and their dependents.[60] Working together, these restrictions required that the sovereign impose pecuniary sanctions on a case-by-case basis, while also taking into consideration both the seriousness of the crime and the wrongdoer's financial circumstances.[61]

English fines became increasingly extreme and partisan during the 1680s.[62] Eventually, those who had been most severely penalized by these sanctions set out to establish restrictions on excessive fines through the English Bill of Rights of 1689.[63] Aware of England's history of financial abuses, the Framers were careful to ensure strong limitations on their new government's authority to impose fines.[64] As a result, even before the U.S. Constitution was ratified, eight out of nine states incorporated English laws banning excessive fines into their state constitutions and governing doctrines.[65]

In spite of the states' resounding opposition to disproportionate fines, the founders never established a fixed definition of "excessive fines" upon their adoption of the Eighth Amendment.[66] Consequently, scholars have looked to Blackstone's *Commentaries* to reveal the meaning behind "excessive fines" in the founding era.[67] In his writing, Blackstone proclaimed that fines were never to

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[60] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287, 293 (2d ed. 1914); *see* Alfred N. May, *An Index of Thirteenth-Century Peasant Impoverishment? Manor Court Fines*, 26 ECON. HIST. REV. 389, 398 (1973) (averring that historic documentation reveals that the practice of administering fines based on an offender's ability to pay was prevalent and customary throughout England during the twelfth century).

[61] *See* BLACKSTONE, *supra* note 59, at *372–73 (stating that both a wrongdoer's ability to pay and the severity of his offense should be considered when imposing amercements).

[62] *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267 (1989) (exploring England's storied history of oppressive monetary penalties, including the ruthless imposition of fines by the Stuart Kings as a tool for suppressing their political opponents).

[63] *Id.*; *see also* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1253–56 (1987) (outlining the events that led to the incorporation of a prohibition against excessive fines in the Declaration of Rights).

[64] *See Browning-Ferris*, 492 U.S. at 267 (stating that the founders took caution from England's history, namely the potential for governmental abuse, while drafting the U.S. Bill of Rights); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750 (1833) (maintaining that the colonies' adoption of the Eighth Amendment was a warning to all branches of the federal government against following the relentless model of the English tyrants).

[65] Rulli, *supra* note 45, at 1114. The following states included bans against excessive fines in their state charters: Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia. *Id.*

[66] *Id.* at 1115. According to historical accounts, there is no evidence that any member of the First Congress substantively addressed the meaning of the Excessive Fines Clause. 1 ANNALS OF CONG. 782–83 (Joseph Gales ed., 1789) (recording that only one member appeared to suggest that the meaning of excessive fines ought to be left for the U.S. Supreme Court to resolve). Furthermore, the legislative documentation available from this time fails to shed any light on the intended meaning of "excessive fines." Rulli, *supra* note 45, at 1116.

[67] *See* BLACKSTONE, *supra* note 59, at *372–73 (discussing the need to regulate a sovereign's power to impose disproportionate fines and the proper manner by which a fine should be assessed).

be in excess of an individual's unique economic circumstances.[68] Therefore, the history of the Eighth Amendment and its English origins illustrate the founders' intent to use the Eighth Amendment's Excessive Fines Clause as a check on the government's ability to punish its populace through the imposition of fines.[69]

### 2. Supreme Court Jurisprudence Applying the Excessive Fines Clause to Forfeiture Disputes

In the two centuries following the Framers' consideration of forfeiture, litigants brought legal challenges in an effort to restrain the federal government's seizure power, arguing that the Eighth Amendment's protection from excessive fines should apply to forfeitures.[70] In 1993, the Supreme Court granted certiorari to petitioner Richard Austin in *Austin v. United States*, to settle a split among the circuits as to whether civil *in rem* forfeitures could be unconstitutionally excessive.[71] Following a sting operation, Austin pled guilty to possession of two grams of cocaine with intent to distribute and was sentenced to seven years' imprisonment.[72] Soon after, the United States pursued an *in rem* action to seize Austin's mobile home and auto body shop.[73] Austin challenged the forfeiture on the grounds that the Eighth Amendment's Excessive Fines

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[68] *See id.* (professing that fines are disproportional when they exceed an offender's ability to pay). Blackstone compared the imposition of excessive fines to corporal punishment and incarceration, asserting that the former was more devastating to the individual because such penalty essentially amounted to "imprisonment for life." *Id.*

[69] Rulli, *supra* note 45, at 1116.

[70] *See infra* notes 71–89 and accompanying text (discussing the backgrounds and holdings of two Supreme Court cases which established controlling jurisprudence on the relationship between forfeitures and the Excessive Fines Clause).

[71] *Austin*, 509 U.S. at 606. Prior to the Supreme Court's 1993 decision in *Austin v. United States*, courts rarely held civil forfeitures to be excessive, prohibiting them only under the most problematic circumstances. Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1060–61 (2001). The hesitation to overrule forfeitures stemmed from the civil nature of *in rem* proceedings, as courts reasoned that the Eighth Amendment's restriction on excessive fines only affected criminal matters. Skorup, *supra* note 22, at 435; *see, e.g.*, United States v. On Leong Chinese Merchs. Ass'n Bldg., 918 F.2d 1289, 1296 (7th Cir. 1990) (stating that courts consistently have found that *in rem* actions are not subject to Eighth Amendment scrutiny because they are not punitive in nature). Furthermore, prior to *Austin*, the Second Circuit was the lone appellate court to employ the Excessive Fines Clause in a civil forfeiture matter. *See* United States v. 38 Whalers Cove Drive, 954 F.2d 29, 39 (2d Cir. 1992) (holding that the Eighth Amendment is applicable when an offender is liable for civil sanctions that are punitive); *see also* Sarah N. Welling & Medrith Lee Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After* Austin v. United States, 83 KY. L.J. 835, 841 (1994) (observing that the *Whalers Cove* ruling spurred a circuit split over whether the Excessive Fines Clause reaches beyond criminal proceedings).

[72] *Austin*, 509 U.S. at 604–05.

[73] *Id.* at 604. The United States brought suit pursuant to Title 21 Section 881, which permits the seizure of "[a]ll conveyances" and "[a]ll real property . . . which is used, or intended to be used . . . to facilitate the commission of, a violation . . . punishable by more than one year's imprisonment." 21 U.S.C. §§ 881(a)(4), (7) (2018); *Austin*, 509 U.S. at 602.

Clause covered civil *in rem* forfeiture actions.[74] Ultimately, the Supreme Court found in favor of petitioner Austin, holding that the seizure of Austin's property was punitive and therefore subject to an excessive fines analysis.[75] In its reasoning, the Court observed that nothing in the language or history of the Eighth Amendment restricts the application of the Excessive Fines Clause solely to criminal matters.[76] Further, the Court proclaimed that because the federal forfeiture statute in question included an "innocent owner" defense and other exceptions centered around the property owner's guilt, Congress had contemplated that the statute would serve a punitive purpose.[77] Notably, the Court declined to implement a constitutional "excessiveness" standard, instead choosing to leave the task of devising such a test to the lower courts.[78]

Five years after its *Austin* decision, the Supreme Court again examined the Excessive Fines Clause in *Bajakajian*.[79] In contrast to *Austin*, the *Bajakajian* forfeiture was criminal in nature, in that it occurred in connection with Bajakajian's unlawful activity.[80] While preparing to take an international flight with his family, Hosep Bajakajian had $357,144 of legitimately obtained cash in his luggage.[81] According to federal law, an individual carrying cash in ex-

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[74] *Austin*, 509 U.S. at 605 (citing U.S. CONST. amend. VIII).

[75] *Id.* at 621–22 (first citing United States v. Halper, 490 U.S. 435, 448 (1989); then citing *Browning-Ferris*, 492 U.S. at 265). The Supreme Court's holding in *Austin* overruled the Eighth Circuit's prior decision. *Id.* at 623. Notably, in its initial decision, the Eighth Circuit hesitantly ruled in the government's favor, stating that notions of fairness should compel a proportionality analysis when civil forfeitures result in severe punishment. United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992), *rev'd sub nom. Austin*, 509 U.S. 602.

[76] *Austin*, 509 U.S. at 608–09. The Supreme Court emphasized that the concept of punishment covered both civil and criminal matters. *Id.* at 610; *see also* Boyd v. United States, 116 U.S. 616, 634 (1886) (noting that proceedings arising out of an offender's forfeited property, although civil in practice, are nonetheless criminal in their character). Furthermore, in the context of excessive fines, the Court contended that the primary inquiry should be whether the forfeiture is a penalty, instead of whether it is merely civil or criminal. *Austin*, 509 U.S. at 610.

[77] *Austin*, 509 U.S. at 619–21; *see supra* note 31 and accompanying text (describing the innocent owner defense and its procedural requirements). Upon finding that the forfeiture statute at issue was not exclusively remedial, the Court determined that a seizure of assets under this provision served a punitive function, regardless of whether the offender had been convicted of a crime. *Austin*, 509 U.S. at 622.

[78] *Austin*, 509 U.S. at 622.

[79] *See Bajakajian*, 524 U.S. at 327 (noting that, prior to *Bajakajian*, the Court had only interpreted the Excessive Fines Clause on a few occasions, and had not yet applied it).

[80] *See id.* at 325–26, 333 (holding that the forfeiture of Hosep Bajakajian's currency was punitive because it followed the government's procurement of a criminal conviction against him).

[81] *Id.* at 324–25. Bajakajian, an Armenian immigrant, had acquired the $357,144 lawfully through his gas station business. Scott Bullock & Nick Sibilla, *The Supreme Court Resuscitates the Eighth Amendment*, THE ATLANTIC (Mar. 13, 2019), https://www.theatlantic.com/ideas/archive/2019/03/unanimous-supreme-court-decision-policing-profit/584506/ [https://perma.cc/4QX2-XAXH]. At the time of his arrest, Bajakajian was travelling from California to Cyprus to repay relatives who legally had loaned him money to begin his business. *Id.* Customs agents used dogs to detect over $230,000 cash in the family's checked baggage, and later uncovered an additional $127,000 in Bajakajian's carry-on luggage. *Id.*

cess of $10,000 outside the boundaries of the United States on a singular occasion must inform authorities of this fact.[82] Bajakajian's failure to report the large sum of money in his luggage led to his arrest for willful failure to comply with the law.[83] Consequently, the government confiscated the $357,144 and sought forfeiture of the entire sum.[84]

In challenging the forfeiture, Bajakajian asked the Supreme Court to determine whether seizure of the unreported $357,144 sum violated the Excessive Fines Clause.[85] The Court held that the forfeiture violated the Clause on the grounds that the government's seizure of Bajakajian's entire currency would be grossly disproportional to the severity of his crime.[86] *Bajakajian*, therefore, set a definitive standard for punitive forfeitures, holding them violative of the Excessive Fines Clause when they are "grossly disproportional to the gravity of a defendant's offense."[87] Notwithstanding this ostensible resolution, the *Austin* and *Bajakajian* opinions still fostered significant confusion among lower courts.[88] Although these rulings further developed the Supreme Court's Excessive Fines Clause jurisprudence, they failed to provide clear instructions to lower courts for applying the Clause to civil *in rem* forfeitures, and for this reason, lower court opinions often conflicted with one another.[89]

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[82] 31 U.S.C. § 5316(a) (2018).

[83] *Bajakajian*, 524 U.S. at 325.

[84] *Id.* The government sought to proceed against Bajakajian criminally, resulting in the forfeiture action being characterized as *in personam* rather than *in rem*. *Id.* at 333. As such, the seizure of Bajakajian's cash rested entirely upon his criminal conviction. *Id.* Therefore Bajakajian's guilty plea for the reporting offense set into motion the forfeiture of his $357,144. *Id.* at 325–26.

[85] *Id.* at 324.

[86] *Id.* at 339–40, 344. In its reasoning, the *Bajakajian* Court noted that the $357,144 forfeiture far exceeded the customary $5,000 fine suggested by the Sentencing Guidelines and previously employed by the lower court for similar offenses. *Id.* at 338, 340. Additionally, the Court remarked that seizure of such a large sum was unwarranted because Bajakajian's misconduct caused only minimal harm to the government. *Id.* at 339–40.

[87] *Id.* at 334. In articulating its "grossly disproportional" standard, the *Bajakajian* Court borrowed from the Eighth Amendment's Cruel and Unusual Punishments Clause. Pimentel, *supra* note 20, at 560.

[88] *See* Rulli, *supra* note 45, at 1132 (describing the divergence among lower courts with respect to their application of the Excessive Fines Clause, particularly when *in rem* forfeiture actions commence prior to an accusation or conviction of criminal misconduct); *infra* notes 90–106 and accompanying text (examining the division among lower courts in their approaches to forfeiture disputes, as a result of the inconsistencies between the Court's holdings in *Austin* and *Bajakajian*); *see also* Matthew C. Solomon, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 GEO. L.J. 849, 884–85 (1999) (criticizing *Bajakajian* for its failure to provide substantive guidance for the applicability and extent of the Excessive Fines Clause, thereby prompting more inquiries than it ultimately resolved).

[89] *Compare Bajakajian*, 524 U.S. at 340–41 (stating that *in rem* forfeitures were not intended to serve as punishment for engaging in criminal misconduct), *with Austin*, 509 U.S. at 618, 622 (holding that the Excessive Fines Clause applies to civil *in rem* forfeitures because they can and frequently do involve some punitive component). Although the *Bajakajian* Court deemed criminal forfeitures excessive when they are grossly disproportionate to the offense, it refused to weigh in on whether—or to what degree—an offender's ability to pay should factor into an excessive fines analysis. 524 U.S. at

### 3. Survey of Lower Court Approaches to Forfeiture Pre-*Timbs*

Since *Austin* and *Bajakajian*, lower courts have wrestled with the dearth of Supreme Court guidance as they endeavor to apply the Excessive Fines Clause to forfeiture actions.[90] The Court's open-ended precedent has led to significant doctrinal irregularity among lower courts, particularly with respect to whether an individual's financial standing should be considered when evaluating whether a particular forfeiture is excessive.[91] Several lower courts have construed *Bajakajian* as clearing a path for requiring consideration of an offender's ability to pay, either as a component of or in conjunction with a proportionality analysis.[92] Additionally, a handful of state courts have been willing to consider an offender's financial capacity to pay, interpreting Supreme Court precedent as instructing that they are bound to do so by the Eighth Amendment.[93] Notwithstanding these views, the majority of lower courts have interpreted *Bajakajian* and its progeny as supporting the notion that there should be no consideration of an offender's ability to pay.[94]

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334, 340 n.15; *see* Solomon, *supra* note 88, at 875–76 (asserting that *Bajakajian*'s "grossly disproportional" standard does not offer a clear framework to assist lower courts and future litigants in applying the Excessive Fines Clause to forfeitures).

[90] *See Fourteenth Amendment—Due Process Clause—Incorporation Doctrine*—Timbs v. Indiana, 133 HARV. L. REV. 342, 348–49 (2019) [hereinafter *Fourteenth Amendment*] (discussing the wide array of methods and outcomes that have emerged from lower courts as they continue to grapple with the Supreme Court's vague Excessive Fines Clause precedent).

[91] *Id.* at 348; *see infra* notes 92–106 and accompanying text.

[92] *See, e.g.*, United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016) (determining that the Supreme Court's decision in *Bajakajian* was not intended to impede courts from contemplating whether a forfeiture would divest a defendant of the capacity to support himself); *Levesque*, 546 F.3d at 83–84 (deciding that, in addition to a proportionality inquiry, courts should also assess whether seizure of a perpetrator's property would deprive a wrongdoer of his or her livelihood); United States v. 6380 Little Canyon Rd., 59 F.3d 974, 985 (9th Cir. 1995) (holding that courts should evaluate a forfeiture's financial impact on an individual offender, as well as the property's intangible significance, when assessing the proportionality of the seizure), *abrogation recognized by* United States v. 1,679 Firearms, 87,983 Rounds of Ammunition, 659 F. App'x 422 (9th Cir. 2016); *see also* United States v. King, 231 F. Supp. 3d 872, 902–05 (W.D. Okla. 2017) (holding that an excessiveness analysis should, upon resolving proportionality, evaluate whether the forfeiture at issue would be so devastating to an offender's financial standing as to unconstitutionally deprive him of his livelihood).

[93] *See, e.g.*, State v. Goodenow, 282 P.3d 8, 17 (Or. Ct. App. 2012) (determining that factors such as a defendant's fiscal responsibilities, the financial means accessible to a defendant, and the impact of a fine on the defendant's capacity to support himself, can cause an otherwise proportional fine to be excessive). *But see, e.g.*, State v. Webb, 856 N.W.2d 171, 175–76 (S.D. 2014) (declining to consider an offender's ability to pay as a relevant factor in measuring a fine's excessiveness).

[94] *See, e.g.*, Duckworth v. United States *ex rel.* Locke, 705 F. Supp. 2d 30, 48 (D.D.C. 2010) (holding that *Bajakajian* instructs that a defendant's financial capability is not a relevant factor in assessing proportionality under the Excessive Fines Clause), *aff'd*, 418 F. App'x 2 (D.C. Cir. 2011); *see also* United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (declining to consider the effect of an asset seizure on a particular offender in evaluating whether such forfeiture violates the Eighth Amendment); United States v. Dubose, 146 F.3d 1141, 1146 (9th Cir. 1998) (holding that an Eighth Amendment gross disproportionality test does not necessitate evaluating the difficulty that a given fine may cause a defendant); United States v. 427 & 429 Hall St., 853 F. Supp. 1389, 1399 n.22

Adding to the dispute concerning the proper application of the Excessive Fines Clause is the questioning by some courts of whether forfeitures should be subject to the Clause in the first instance.[95] The majority of lower courts are, in practice, unwilling to contemplate an individual's financial standing in forfeiture actions.[96] Scholars have surmised that this reluctance likely stems from the widely held belief that an individual whose property is subject to forfeiture is, by default, capable of paying.[97] For example, the Colorado Court of Appeals provides a general protection for persons subjected to financial penalties, instructing lower courts to take into account the offender's financial standing when levying fines.[98] The state appellate court, however, has created a carve-out from this protection for asset seizure.[99] The court concluded that consideration of a defendant's financial capability in such cases was unnecessary because the forfeited property adequately satisfied the penalty.[100]

On the other hand, some courts have reached the opposite conclusion, finding that mere possession of an asset does not signify that it is readily forfeitable.[101] Particularly in the context of homes and automobiles, courts have held that a "non-pecuniary subjective valuation" is necessary to assess proportionality, based upon the intangible, personal value that such assets can have in a person's life.[102] In applying this type of proportionality assessment, one court

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(M.D. Ala. 1994) (refusing to implement an excessive fines inquiry that would require subjective examination of the impact of a fine on a defendant's livelihood).

[95] *See Fourteenth Amendment*, *supra* note 90, at 349–50 (discussing how lower courts are split on whether forfeitures fall outside the purview of the Excessive Fines Clause, based on the concept that forfeitures serve as restitution); *infra* notes 96–106 and accompanying text.

[96] *Fourteenth Amendment*, *supra* note 90, at 349.

[97] McLean, *supra* note 50, at 896.

[98] People v. Pourat, 100 P.3d 503, 507 (Colo. App. 2004). The Colorado Court of Appeals held that the Supreme Court's ruling in *Bajakajian* did not conflict with the court's established position on considering a defendant's ability to pay fines. *Id.* The court's stance originated in *People v. Malone* in which the state appellate court determined that review of an offender's financial circumstances, in addition to the crime's gravity and the offender's background, should be considered when imposing fines. 923 P.2d 163, 166 (Colo. App. 1995).

[99] *Pourat*, 100 P.3d at 507. In *People v. Pourat*, the Colorado Court of Appeals distinguished the factual circumstances of *Bajakajian* from *Malone*. *Id.* Unlike *Malone*, which involved a fine arising out of the illicit possession of marijuana, *Bajakajian* centered around the seizure of existing monetary assets. *Id.*; *Malone*, 923 P.2d at 164. Therefore, given that the penalty in *Malone* involved the extraction of money not yet known to be available, the *Malone* court held that assessment of the defendant's ability to pay was necessary to devise a reasonable fine. *Malone*, 923 P.2d at 166.

[100] *Pourat*, 100 P.3d at 507.

[101] *Fourteenth Amendment*, *supra* note 90, at 349; *see* McLean, *supra* note 50, at 897 (noting that a handful of courts have indicated that forfeiture proceedings involving the seizure of an offender's home should be governed by an especially probing Eighth Amendment analysis).

[102] *See* Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 177, 189 (Pa. 2017) (holding that individual valuation is occasionally necessary given the capacity for forfeiture of a homestead or automobile to entirely deprive a defendant of his or her livelihood); *see, e.g.*, United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 938 (N.D. Ala. 1994) (determining that the forfeiture of a primary residence was excessive on the grounds that homesteads have traditionally received substantial protec-

observed that contemplation of an individual's livelihood is not only proper, but also aligned with the tenets of *Bajakajian*.[103] This perspective rebuffs the stance that an individual forfeiting assets is by definition capable of doing so, and implicitly invokes the historical notion that any seizure must allow the individual to preserve basic economic subsistence.[104] Nevertheless, support for safeguarding a wrongdoer's livelihood stands as the minority view among lower courts, with most courts endorsing the position that forfeitures are inherently distinct from fines regarding an offender's ability to pay.[105] It is this confusion among the lower courts, following the Supreme Court decisions in *Austin* and *Bajakajian*, that set the stage for *Timbs*—a case that could have provided necessary guidance on the application of the Excessive Fines Clause to civil forfeitures.[106]

### *C. An Introduction to* Timbs*: Opening the Door for Extension of the Excessive Fines Clause to the States*

In 2013, Tyson Timbs used life insurance proceeds paid out upon the death of his father to purchase a Land Rover automobile for $42,058.30.[107] Prior to his father's death, Timbs sought treatment for constant foot pain and obtained an opioid prescription.[108] Timbs became addicted to opioids, and once his prescription expired he began purchasing pills illegally.[109] Over time, Timbs developed an addiction to heroin.[110] To fund his addiction, Timbs would drive his Land Rover to purchase the illegal drug and eventually began using the vehicle itself to sell heroin.[111] On two occasions, Timbs sold heroin to undercover officers posing as buyers, travelling in his Land Rover to make the

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tion and seizure of such could have particularly adverse societal implications on the offender and his family).

[103] *1997 Chevrolet*, 160 A.3d at 189.

[104] *Fourteenth Amendment*, *supra* note 90, at 350.

[105] *See, e.g.*, United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) (holding that an offender's financial standing is relevant to the Excessive Fines Clause analysis in the context of fines, but not relevant when assessing a forfeiture's excessiveness); City & Cty. of San Francisco v. Sainez, 92 Cal. Rptr. 2d 418, 432 (Ct. App. 2000) (determining that forfeitures and fines are distinct from one another because proportionality is the central concern in forfeiture inquiries, given that defendants are always able to satisfy asset seizures, whereas a defendant's financial capability becomes the key factor in levying fines).

[106] *See The End of Civil Asset Forfeiture?*, *supra* note 7 (stating that the Supreme Court's review of *Timbs* demonstrated a hopeful opportunity for the Court to offer some clarity regarding civil forfeiture practices, and potentially eradicate the practice altogether).

[107] State v. Timbs, 62 N.E.3d 472, 473 (Ind. Ct. App. 2016) (*Timbs I*).

[108] Brief for Petitioners at 4, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

[109] *Id.*

[110] *Id.*

[111] *Timbs I*, 62 N.E.3d at 473.

transactions.[112] As Timbs was on his way to a third drug deal, authorities arrested him and seized his Land Rover.[113]

The State of Indiana charged Timbs—who subsequently pleaded guilty—to one count of dealing a controlled substance and one count of felony conspiracy to commit theft.[114] Timbs received a sentence of one year of home detention followed by five years of probation.[115] Additionally, the court required Timbs to pay several fees relating to his prosecution and conviction expenses.[116] Prior to the conclusion of his criminal case, the state filed a civil action for the forfeiture of Timbs's vehicle predicated on the state's evidence that Timbs used the Land Rover to traffic heroin.[117] The trial court ruled in favor of Timbs, finding that forfeiture of the Land Rover—worth nearly four times the amount of the ten thousand dollar maximum fine applicable to Timbs's crimes—was "grossly disproportional" to the nature of his offense and in violation of the Excessive Fines Clause.[118]

On appeal, the Court of Appeals of Indiana affirmed the lower court's dismissal of the forfeiture action.[119] Although acknowledging that the U.S. Supreme Court had not yet formally extended the Excessive Fines Clause to the states, the appellate court took judicial notice of an earlier state ruling in which a court held that Indiana's forfeiture statutes were subject to the Clause.[120] Echoing the sentiments of the trial court, the Court of Appeals of Indiana determined that forfeiture of Timbs's vehicle was "grossly disproportionate" to the severity of his wrongdoing.[121]

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[112] Brief for Petitioners, *supra* note 108, at 4. On both occasions, Timbs completed relatively small transactions, selling the officers approximately two grams of heroin each time. State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017) (*Timbs II*). The largest profit that Timbs obtained from these transactions was $225. *Id.*

[113] Brief for Petitioners, *supra* note 108, at 4–5.

[114] *Id.* at 5.

[115] *Id.* As part of his sentence, the court also required Timbs to enroll in a program for addiction treatment. Brianne J. Gorod & Brian R. Frazelle, Timbs v. Indiana*: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?*, 2019 CATO SUP. CT. REV. 215, 229.

[116] *Timbs II*, 84 N.E.3d at 1181.

[117] *Id.* at 1181, 1184–85. Indiana law authorizes the forfeiture of vehicles that have been used as tools in the facilitation of certain criminal activities, including the transportation of narcotic substances. IND. CODE § 34-24-1-1(a)(1)(A) (2018). Unlike Timbs's criminal prosecution, the civil forfeiture action was handled by private counsel working on a contingency-fee basis under the aegis of the state. Gorod & Frazelle, *supra* note 115, at 230. Indiana is unique in that it is the only state that permits prosecutors to enlist the assistance of private lawyers in civil forfeiture matters. Brief for Petitioners, *supra* note 108, at 32.

[118] *Timbs I*, 62 N.E.3d at 474. Following the Indiana Superior Court judge's finding, the state was directed to return Timbs's Land Rover. *Id*.

[119] *Id.* at 476–77.

[120] *Id.* at 475 n.4.

[121] *Id.* at 477. In accordance with the rationale employed by the superior court, the Court of Appeals of Indiana based its decision largely on the fact that the value of the Land Rover significantly exceeded the amount of the maximum statutory fine. *Id.* at 476. Moreover, the Court of Appeals ob-

The Supreme Court of Indiana, however, reversed the lower courts' rulings and held that the Excessive Fines Clause did not bind Indiana because the Supreme Court had not yet incorporated the Clause against the states.[122] The justices relied upon the absence of controlling precedent, as well as earlier Supreme Court dicta indicating a disinclination to enforce the Excessive Fines Clause against the states.[123] Further, the Indiana Supreme Court cited concerns for encroachment of its power by the federal government, ultimately deciding to refrain from adopting incorporation until such practice was mandated by the Supreme Court.[124] The court then awarded Timbs's Land Rover to Indiana and remanded the matter to the trial court.[125] Following the decision, Timbs petitioned for a writ of certiorari, requesting that the Supreme Court resolve the issue as to whether the Excessive Fines Clause was, in fact, "incorporated against the States under the Fourteenth Amendment."[126]

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served that Timbs had not used the proceeds from his drug transactions to purchase the Land Rover, that the state had already fined Timbs in the amount of $1,203, that the civil forfeiture complaint mentioned only a day's worth of illegal activities, and that Timbs had sold controlled substances on just two occasions. *Id.* at 476–77.

[122] *Timbs II*, 84 N.E.3d at 1181–82 (citing *Browning-Ferris*, 492 U.S. at 276 n.22, wherein the Supreme Court refused to resolve whether the Excessive Fines Clause was incorporated against the states). Notably, Timbs and the State of Indiana had settled that states were subject to the Excessive Fines Clause prior to coming before the Indiana Supreme Court. Gorod & Frazelle, *supra* note 115, at 231. The only remaining dispute between the parties was the excessiveness of the seizure of the Land Rover. *Id.*

[123] *Timbs II*, 84 N.E.3d at 1183–84. Although the Supreme Court already has incorporated a majority of the first eight amendments, it has refrained from incorporating the Third Amendment's safeguard from quartering soldiers, the grand-jury stipulation of the Fifth Amendment, the Seventh Amendment's entitlement to a civil jury trial, and the right to be free from excessive fines of the Eighth Amendment. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010). The dicta upon which the Indiana Supreme Court relied appeared in *McDonald v. City of Chicago*, a 2010 case that called upon the Supreme Court to determine whether the Second Amendment's right to keep and bear arms should be incorporated against the states. *Id.* at 767. In *McDonald*, the Court ultimately held that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment against the states. *Id.* at 791. Furthermore, the *McDonald* opinion deliberately acknowledged the fact that the Court had not yet resolved whether the Eighth Amendment's Excessive Fines Clause was enforceable against the states. *Id.* at 765 n.13.

[124] *Timbs II*, 84 N.E.3d at 1183–84. The Indiana Supreme Court justified these concerns by asserting that the state's independent legal system would be obstructed if the court assumed incorporation in the absence of an express directive. *Id.* at 1184. The court explained that the state had developed unique constitutional safeguards and excessive fines precedent, based upon the Indiana Constitution, which was distinct from that of the federal government. *Id.*

[125] *Id.* at 1185.

[126] Petition for a Writ of Certiorari at i, *Timbs*, 139 S. Ct. 682 (No. 17-1091). In an indication of the widespread bipartisan backing for Timbs's appeal, numerous amicus briefs supported his petition, including submissions from the Southern Poverty Law Center and the Cato Institute, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the United States Chamber of Commerce, and the Constitutional Accountability Center. *See* Timbs v. Indiana, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/timbs-v-indiana/ [https://perma.cc/52W7-JUKS] (providing a complete list of all brief amicus curiae filed in *Timbs* and access to the documents).

## II. THE IMPACT OF *TIMBS* ON CIVIL FORFEITURE

In 2019, in *Timbs v. Indiana*, the Supreme Court ultimately recognized the Excessive Fines Clause as incorporated against the states, thereby resolving the lingering issue of partial incorporation of the Eighth Amendment.[127] Aside from this significant pronouncement, the Court left important questions unresolved: whether civil forfeitures are tantamount to fines and, if so, whether consideration of an individual's ability to pay is relevant to determining the excessiveness of a forfeiture.[128] As a result, immediate reactions to the Supreme Court's holding in *Timbs* ranged from praise—hailing the decision as an end to unreasonable civil asset forfeiture—to general indifference, asserting that *Timbs* would have only minimal practical impact.[129] Section A of this Part examines the holding in *Timbs*, specifically focusing on the Court's decision to incorporate the Excessive Fines Clause of the Eighth Amendment against the states by way of the Fourteenth Amendment's Due Process Clause.[130] Section B explores the limitations of *Timbs*, specifically the Supreme Court's omission of a definitive test for measuring "excessiveness" in the context of civil *in rem* forfeiture, thereby forcing state courts to reconcile earlier Supreme Court decisions with their own distinct state precedents.[131] Additionally, the Section discusses the Court's failure to provide any further clarity with respect to the dis-

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[127] *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (holding that there was ample historical and rational support for determining that the Eighth Amendment's Excessive Fines Clause should be incorporated against the states).

[128] *See id.* at 690–91 (declining to overrule *Austin v. United States* and neglecting to outline an excessiveness test). The *Timbs* Court noted that the question of whether *in rem* forfeitures constituted fines, and thus fell within the purview of the Excessive Fines Clause, had not been properly raised. *Id.* at 689–90. As a result, the Court refused to rule on the matter. *Id.* at 690. Similarly, with respect to the concept of "excessiveness," the *Timbs* Court neglected to set forth a definitive test for measuring unconstitutional overreach by civil *in rem* forfeitures because the issue was not properly raised. *See id.* at 686–91.

[129] *Compare* Alan Pyke, *Supreme Court's New Ruling on Civil Asset Forfeiture Is Pretty Huge*, THINKPROGRESS.ORG (Feb. 20, 2019), https://thinkprogress.org/supreme-court-asset-forfeiture-police-timbs-v-indiana-a0a33df1f886/ [https://perma.cc/ZEP7-XG6H] (discussing the wide-ranging ramifications of *Timbs*, including the suppression of law enforcement's ability to abuse civil forfeiture and the beneficial effects on other monetary penalties imposed by state and local governing bodies), *and* Mark Joseph Stern, *The Supreme Court Just Struck a Huge, Unanimous Blow Against Policing for Profit*, SLATE (Feb. 20, 2019), https://slate.com/news-and-politics/2019/02/supreme-court-rules-against-civil-forfeitures-rbg-timbs.html [https://perma.cc/8GB5-M2ST] (characterizing the Supreme Court's decision in *Timbs* as a major victory for criminal justice reform in that it placed concrete restrictions on the ability of police to seize property and reflected the Supreme Court's unanimous position that such law enforcement measures have been overreaching), *with* Lisa Soronen, Timbs v. Indiana *Won't Have Much Impact*, PALM BEACH POST (May 1, 2019), https://www.palmbeachpost.com/opinion/20190501/soronen-timbs-v-indiana-wont-have-much-impact [https://perma.cc/9378-KMXC] (asserting that the practical effects of *Timbs* are likely to be minimal in scope, given that the Supreme Court did not provide any instruction on how to measure "excessiveness," nor resolve whether forfeitures constitute fines, thereby leaving lower courts to answer these questions on their own).

[130] *See infra* notes 134–149 and accompanying text.

[131] *See infra* notes 150–164 and accompanying text.

tinction between forfeitures and fines.[132] Section C reviews the wide-ranging reactions to *Timbs* from legal scholars, practitioners, and the public, as they forecast the ruling's potential impact or lack thereof.[133]

### *A. The Holding of* Timbs*: Incorporating the Eighth Amendment's Excessive Fines Clause Against the States*

Writing on behalf of a unanimous Court, Justice Ginsburg began her analysis by employing the incorporation test to determine whether the Eighth Amendment's Excessive Fines Clause should be incorporated against the states—either as a freedom central to concepts of "ordered liberty" or as a freedom historically engrained in American history.[134] Justice Ginsburg examined the history of the Excessive Fines Clause, tracing the Clause from its roots in England's Magna Carta to its adoption into the U.S. Bill of Rights.[135] Justice Ginsburg went on to observe that presently all states have a constitutional stipulation banning the levying of excessive fines, either outright or through the condition that such fines be in proportion to the crime.[136]

Having chronicled the evolution of the Excessive Fines Clause, Justice Ginsburg then underscored the Clause's significance within the United States' "scheme of ordered liberty," particularly as a means of thwarting governmental

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[132] *See infra* notes 165–172 and accompanying text.

[133] *See infra* notes 173–181 and accompanying text.

[134] *See Timbs*, 139 S. Ct. at 687 ("A Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))). Although Justice Thomas maintained that the Excessive Fines Clause should be incorporated under the Privileges or Immunities Clause, as opposed to the Due Process Clause, he nonetheless supported its incorporation. *Id.* at 691 (Thomas, J., concurring in the judgment).

[135] *See id.* at 687–88 (documenting the consistent presence of the Excessive Fines Clause as a restraint on sovereign power throughout English and American history). Justice Ginsburg noted that the Magna Carta instructed that economic punishments be proportioned to the harm, and not exceedingly substantial so as to deny an offender of his livelihood. *Id.* at 688; *see also* BLACKSTONE, *supra* note 59, at *372–73 (interpreting the Magna Carta to afford protections for individuals against fines that exceed their means). In examining the eventual implementation of the Excessive Fines Clause into the U.S. Bill of Rights, Justice Ginsburg observed that these English principles carried over into the Clause's construction. *Timbs*, 139 S. Ct. at 688. Additionally, the language of the Excessive Fines Clause echoed comparable colonial-era laws that sought to restrict fines based upon a wrongdoer's ability to pay and proportionality standards. *Id.*; *see, e.g.*, Pennsylvania Frame of Government (1682), Laws Agreed upon in England, Art. XVIII, *in* 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAW OF THE STATES, TERRITORIES, AND COLONIES 3059, 3061 (Francis Newton Thorpe ed., 1909) (requiring that all monetary sanctions be reasonable and preserve an individual's earnings, contenements, and merchandise).

[136] *Timbs*, 139 S. Ct. at 689. Justice Ginsburg emphasized the long-standing nature of this extensive consensus among the states by noting that, upon the Fourteenth Amendment's ratification, thirty-five of the thirty-seven state constitutions contained provisions that explicitly outlawed excessive fines. *Id.* at 688.

abuses.[137] Justice Ginsburg recounted numerous instances in which governing bodies utilized excessive fines to reprimand and control marginalized groups, including the subjugation of citizens who opposed the Stuarts' reign in England and liberated slaves in the South during the Reconstruction era.[138] Justice Ginsburg recognized, moreover, that fines are notably distinct from other types of punishment in that states and local governments use the revenue from fines as a source of funding.[139] Justice Ginsburg declared it paramount that fines are cautiously regulated to safeguard individuals from any improper law enforcement motivations.[140] Therefore, given the considerable amount of historical evidence demonstrating the enduring importance of restrictions on excessive fines, the *Timbs* Court held that the Excessive Fines Clause was applicable to the states by virtue of the Fourteenth Amendment's Due Process Clause.[141]

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[137] *Id.* at 688–89.

[138] *Id.* During the seventeenth century, rulers of the Stuart dynasty faced extensive criticism for their relentless imposition of hefty fines. LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 91 (1981); *see, e.g.*, The Grand Remonstrance (1641), *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at 210, 212 (Samuel Rawson Gardiner ed., 3d ed. 1906) (describing the frustrations of those under the Stuart regime, who were subject to severe monetary punishment and reprimanded for opposing the Stuart kings, often facing indefinite imprisonment). The Stuart kings utilized these fines to generate revenue, intimidate political enemies, and imprison those who could not afford to pay. SCHWOERER, *supra*, at 91. Similar abuses occurred after the conclusion of the Civil War, as states in the South instituted Black Codes to suppress liberated slaves and preserve their established social hierarchy. *Timbs*, 139 S. Ct. at 688. Through these laws, the southern states imposed fines for disobeying ambiguous prohibitions on "vagrancy," as well as other vaguely framed crimes. *Id.*; *see, e.g.*, Mississippi Vagrant Law, Laws of Mississippi § 2 (1865), *reprinted in* 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 283–85 (1950) [hereinafter Laws of Mississippi] (defining the crime of "vagrancy"). For those emancipated slaves who could not pay these monetary sanctions, the states would exact forced labor from them, thereby undercutting their constitutional rights. *See* Paul Finkelman, *John Bingham and the Background of the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681–85 (2003) (explaining how the southern states used Black Codes, excessive fines, and other statutory means to restore involuntary servitude); *see, e.g.*, Laws of Mississippi, *supra*, § 5, at 285 (detailing the punishment for violations of vagrancy laws to be in the form of fines and forfeiture collected by the state).

[139] *Timbs*, 139 S. Ct. at 689. The Court noted the inherently suspicious nature of fines, which can stray from the punitive objectives of retribution and prevention when states and local governments use them to produce revenue. *Id.* Additionally, fines and forfeiture are dissimilar from other methods of punishment, in that the latter commonly inflicts expenses borne by the states. *Id.*

[140] *Id.* (citing Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).

[141] *See Timbs*, 139 S. Ct. at 689 (holding that the Eighth Amendment's Excessive Fines Clause is an incorporated protection, given in part that states and governing bodies have a long-standing history of using excessive fines to undermine constitutional liberties). Although the Court unanimously agreed to incorporate the Excessive Fines Clause, Justice Gorsuch and Justice Thomas wrote concurring opinions questioning the majority's decision to incorporate the Clause by virtue of the Fourteenth Amendment's Due Process Clause. *See id.* at 691 (Gorsuch, J., concurring); *id.* at 691–98 (Thomas, J., concurring in judgment) (declining to support the majority's decision to extend the Excessive Fines Clause to the states by virtue of the Due Process Clause, reasoning that the Privileges or Immunities Clause provided a more suitable mechanism). In his brief concurrence, Justice Gorsuch advised that the Fourteenth Amendment's Privileges or Immunities Clause presented a more suitable means for incorporation. *Id.* at 691 (Gorsuch, J., concurring). In spite of taking this position, Justice Gorsuch

In reaching its decision, the *Timbs* Court dismissed two arguments raised by the State of Indiana.[142] First, Indiana asserted that civil *in rem* forfeitures did not fall under the purview of the Excessive Fines Clause because the Clause reaches only punishments that are punitive in nature.[143] The *Timbs* Court recognized that this argument implicitly challenged the Court's earlier 1993 ruling in *Austin v. United States*, which held that *in rem* forfeitures were subject to the Excessive Fines Clause when they encompassed some punitive purpose.[144] The Court, however, refused to reexamine its holding in *Austin* be-

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conceded that the inquiry as to which clause within the Fourteenth Amendment provided the most suitable means for incorporating Bill of Rights' protections was not an overriding concern, given that nothing in the *Timbs* matter hinged upon its resolution. *Id.* Justice Thomas built further upon this recommendation, averring that he would have incorporated the Excessive Fines Clause *only* through the Privileges or Immunities Clause. *Id.* (Thomas, J., concurring in judgment). In his concurrence, Justice Thomas reasoned that freedom from excessive fines constituted an inalienable right and therefore fell within the purview of the Privileges or Immunities Clause. *See id.* at 691–92 (stating that the entitlement to be uninhibited by excessive fines falls within the reach of the Fourteenth Amendment's Privileges or Immunities Clause because it is an indispensable substantive right, as opposed to a procedural one). Justice Thomas critiqued the Court for its historically narrow interpretation of the rights protected by the Privileges or Immunities Clause, consequently relegating the Clause as a provision of only minimal force. *Id.* at 692. In so doing, Justice Thomas echoed his claims in *McDonald v. Chicago*, in which he admonished the Court for relying primarily upon the Fourteenth Amendment's Due Process Clause as the main source of constitutional protection for individuals seeking to secure their substantive liberties from state infringement. 561 U.S. at 808–09 (Thomas, J., concurring in part and concurring in judgment). Furthermore, in his *Timbs* concurrence, Justice Thomas concluded that it was precisely because the right to be free from excessive governmental fines was so entrenched and essential—as agreed upon by the majority—that the Privileges or Immunities Clause provided a more appropriate vehicle for incorporating the Excessive Fines Clause. *See Timbs*, 139 S. Ct. at 696–98 (Thomas, J., concurring in judgment) (detailing the significance of the Excessive Fines Clause throughout early American history). In making his argument, Justice Thomas drew from many of the same historical events referenced by Justice Ginsburg to demonstrate the significance of the Excessive Fines Clause, while reaching a different conclusion with respect to the method of incorporation. *Compare id.* at 696 (arguing that protection from excessive fines constitutes an indispensable, vital right and therefore is properly incorporated through the Privileges and Immunities Clause), *with id.* at 687 (majority opinion) (determining that the Excessive Fines Clause is extended to the states by virtue of the Due Process Clause, thereby following earlier Due Process precedent holding that states cannot impinge upon the substantive liberties guaranteed in the Bill of Rights).

[142] *See Timbs*, 139 S. Ct. at 689–91 (determining that the issues raised by the State of Indiana were either mischaracterized or not properly before the Court).

[143] *See* Brief for Respondent at 41, 47–50, *Timbs*, 139 S. Ct. 682 (No. 17-1091). Indiana claimed that civil *in rem* forfeitures had not traditionally been bound by a proportionality restraint because they were not regarded as punitive. *Id.* at 17, 29–30, 37. To sustain these allegations, Indiana relied upon its assertion that *in personam* fines were distinct from *in rem* forfeitures in that the former *did* operate as a penalty. *See id.* at 37–38 (distinguishing *in personam* fines and *in rem* forfeitures).

[144] *Timbs*, 139 S. Ct. at 690; *see* Austin v. United States, 509 U.S. 602, 609–10, 620–22 (1993) (determining that civil *in rem* forfeitures are governed by the Excessive Fines Clause when they are in some manner partially punitive). The Court noted that although *Austin* occurred in a federal context, its holding remained applicable to the *Timbs* case. *See Timbs*, 139 S. Ct. at 689 (stating that the precedential force of *Austin* remained intact and binding upon the Court's holding in *Timbs*, despite the fact that *Timbs* arose from a civil *in rem* forfeiture by the state). The Court supported its affirmation of *Austin*, reasoning that when Bill of Rights provisions are incorporated against the states, they apply equally to the federal and state governments. *McDonald*, 561 U.S. at 766 n.14.

cause the State had failed to properly raise the issue.[145] As an alternative approach, the State contended that even if the Court deemed *in rem* forfeitures to be punitive and therefore governed by the Excessive Fines Clause, the precise right to be free from state *in rem* forfeitures failed the incorporation test because it was neither fundamental nor deeply engrained in American history.[146] The *Timbs* Court rejected this argument, finding the State's interpretation to be a flawed characterization of the incorporation test.[147] In reaching the threshold determination that the Excessive Fines Clause is incorporated against the states, the Court concluded that any particular function of the Clause, including civil *in rem* forfeitures, must receive constitutional protection.[148] The Supreme Court's decision overruled the Indiana Supreme Court's holding but failed to resolve the question of whether the State's forfeiture of Timbs's vehicle was, in fact, excessive.[149]

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[145] *Timbs*, 139 S. Ct. at 690.

[146] *Id.* at 689; *see* Brief for Respondent, *supra* note 143, at 5–6, 58 (stating that it took the Court nearly 124 years to apply the Excessive Fines Clause to *in rem* forfeitures).

[147] *Timbs*, 139 S. Ct. at 690. The Court clarified that the incorporation test plainly evaluates whether the general right in question is essential or historically rooted, and *not* whether every specific application of that right is similarly fundamental or traditionally engrained in society. *Id.*; *see, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017) (holding that the Free Speech Clause of the First Amendment was incorporated through the Fourteenth Amendment's Due Process Clause, without reviewing whether its particular application to social media websites was central or historically engrained).

[148] *Timbs*, 139 S. Ct. at 689–90.

[149] *Id.* at 687, 691. On remand, the Indiana Supreme Court held that the seizure of Timbs's vehicle constituted a fine, but again failed to reach an ultimate determination on whether the forfeiture of the Land Rover was excessive and thus in breach of the Eighth Amendment's Excessive Fines Clause. *See* State v. Timbs, 134 N.E.3d 12, 24, 39 (Ind. 2019) (remanding the issue of excessiveness to the trial court because the factual record before the Indiana Supreme Court did not reflect the breadth of information necessary to reach a conclusive holding). The court further remanded the matter to the trial court with instructions to apply its version of a refined proportionality test. *Id.* at 39. The Indiana Supreme Court noted that, in formulating its proportionality analysis, it relied upon the Supreme Court's earlier decisions in *Austin* and *United States v. Bajakajian*, as well as historical treatment of the Excessive Fines Clause and forfeitures. *Id.* at 23. Pointedly, the Indiana Supreme Court's proportionality test required the lower court to evaluate whether the severity of the seizure of Timbs's Land Rover was grossly disproportional to both the seriousness of Timbs's crime and his guilt for the vehicle's associated criminal use. *See id.* at 35–39 (outlining the relevant factors and proportionality analysis for determining when an instrumentality forfeiture is excessive); *see also* Kelsey Hackem, *Tyson Timbs' Asset Forfeiture Case in District Court Following Indiana Supreme Court Decision*, HEARTLAND INST. (Apr. 13, 2020), https://www.heartland.org/news-opinion/news/tyson-timbs-asset-forfeiture-case-in-district-court-following-indiana-supreme-court-decision [https://perma.cc/JCY2-C79F] (describing the Indiana Supreme Court's three-factor test as a "watershed moment" because it takes into consideration all the necessary circumstances surrounding a specific offense and a certain offender, including the offender's financial capability). On April 27, 2020, the Grant County Circuit Court ruled that the Land Rover seizure was "excessively punitive and unduly harsh" in that it stripped Timbs of his only asset, thereby amounting to a "life-altering sanction that made it difficult for him to maintain employment and seek treatment for his addiction." State of Indiana v. Timbs, 27D01-1308-MI-92, at *11–12 (Ind. Super. Ct. Apr. 27, 2020). Despite the decision's seemingly final nature, Indiana's Attorney General Curtis Hill moved to appeal, criticizing the court's judgment as "misguided." Nick

### *B. The Limitations of* Timbs

Despite the landmark nature of *Timbs*, in which the Court finally incorporated the Eighth Amendment's Excessive Fines Clause against the states, the decision failed to set forth a definitive test for evaluating a forfeiture's "excessiveness."[150] Notably, the *Timbs* Court also refrained from elaborating upon any of its prior Excessive Fines Clause jurisprudence.[151] As a result, the Court implicitly established a de facto open-ended, proportionality-centered analysis—without mandating consideration of ability to pay—as the proper method for assessing excessiveness.[152] This reading of *Timbs*, however, conflicts with the *Timbs* Court's extensive discussion of the Excessive Fines Clause's history, throughout which the Court wrote that an individual's ability to pay bears significant weight in evaluating the excessiveness of a forfeiture or fine.[153] The failure of the Court in *Timbs* to reconcile the two competing standards is significant because these divergent approaches can render conflicting findings on

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Sibilla, *After 7 Years, Indiana Returns Seized Land Rover in Landmark Supreme Court Case*, FORBES (May 31, 2020), https://www.forbes.com/sites/nicksibilla/2020/05/31/after-7-years-indiana-returns-seized-land-rover-in-landmark-supreme-court-case/#201a5c3452de [https://perma.cc/Q3HG-PAV9]. Nevertheless, while the litigation continues, the State of Indiana agreed to return Timbs's Land Rover to him—seven years after it was initially confiscated. *Id.*

[150] *Timbs*, 139 S. Ct. at 686–91 (holding that states would now be governed by the Excessive Fines Clause, by virtue of the Fourteenth Amendment's Due Process Clause, but neglecting to present a clear method for analyzing when a forfeiture or fine is excessive).

[151] *See id.* (declining to offer further guidance for when civil *in rem* forfeitures are excessive); *see, e.g.*, United States v. Bajakajian, 524 U.S. 321, 334, 336 (1998) (determining that excessiveness of an *in personam* fine should be measured based on a standard of gross disproportionality); *Austin*, 509 U.S. at 621–23, 623 n.15 (holding that *in rem* forfeitures that are at least partially punitive are subject to the Excessive Fines Clause, but relegating the task of developing an excessiveness analysis to the lower courts).

[152] *See Timbs*, 139 S. Ct. at 690 (upholding *Bajakajian*'s gross disproportionality test and neglecting to further delineate which factors are relevant to an excessiveness analysis). Scholars have surmised that the Court's preference for a gross disproportionality standard likely stems from its desire to maintain formal equality in sentencing practices. *See* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J.F. 430, 435 (2020), https://www.yalelawjournal.org/forum/financial-hardship-and-the-excessive-fines-clause [https://perma.cc/EZ9L-6TQY] (characterizing equality as the principle by which individuals that are similarly culpable for identical crimes receive the same penalty). Yet, *Timbs*'s apparent endorsement of a proportionality-centric test fundamentally neglects substantive considerations of equality, such as the ways in which the seizure of two automobiles will uniquely affect each owner and their dependents. *See id.* (asserting that some examination of subjective factors, such as the real-world impact of sanctions, is particularly critical in the context of fines).

[153] *See Timbs*, 139 S. Ct. at 687–89 (outlining the historical development of the Excessive Fines Clause, and establishing its roots in the Magna Carta, which mandated that monetary punishments be proportionate to the offense and not so substantial that they divest a wrongdoer of his livelihood); *see also Fourteenth Amendment*, *supra* note 90, at 347 (stating that the *Timbs* Court's in-depth discussion of the Excessive Fines Clause's history signifies the Court's awareness that an individual's financial capability is crucial to evaluating excessiveness).

a forfeiture's constitutionality, particularly at the state level.[154] Although courts historically have preferred the proportionality standard, the Court decided *Timbs* in the context of heightened debate over whether an individual's ability to pay should be considered in applying the Excessive Fines Clause to forfeiture matters.[155]

The Supreme Court's disinclination in *Timbs* to set forth a clear excessiveness test for civil forfeitures mirrors the hesitancy of its earlier Excessive Fines Clause precedent.[156] For instance, in *Austin*, the Court similarly refrained from delineating an excessiveness analysis and, instead, remanded the matter to the lower court with a generic instruction to apply the Excessive Fines Clause to the forfeiture in question.[157] In its decision, the *Austin* Court merely hinted at the possibility of requiring a proportionality analysis, in which the

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[154] *See Fourteenth Amendment*, *supra* note 90, at 347 (asserting that the discord between the strict proportionality analysis and the Eighth Amendment's contemplation of livelihood is evidenced by the variation among lower courts, as they grapple with devising a test to measure excessiveness).

[155] *See, e.g.*, Colgan & McLean, *supra* note 152, at 432 (proposing that the Supreme Court should establish a test for measuring the excessiveness of civil forfeitures that contemplates both the seized property's value and the seizure's impact on the particular individual's financial state); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 14, 47 (2018) (positing that an individual's ability to pay should be taken into consideration when imposing fines because doing so aligns with Eighth Amendment jurisprudence, and also because fines historically have a disparate impact on financially challenged persons); McLean, *supra* note 50, at 853–72, 885–900 (discussing the roots and historical use of the Excessive Fines Clause to demonstrate that the financial circumstances of a wrongdoer should be evaluated in order to mitigate the consequences of criminal justice debt); Pimentel, *supra* note 20, at 562–65 (asserting that the Excessive Fines Clause's history provides substantial support for assessing an individual's livelihood and, perhaps, ability to pay when evaluating the excessiveness of a fine).

[156] *See infra* notes 157–164 and accompanying text. Although there are indisputable benefits to affording states control over their judicial proceedings and local laws, conflicts of interest often arise in the context of civil forfeiture programs. *See* John Gordon et al., *Civil Forfeiture After* Timbs: *Mission Not Accomplished*, 88 HENNEPIN LAW. 22, 24 (2019) (stating that factors, such as the reduction in public funding for state judiciaries and the political reluctance to raise taxes, have led state and local authorities to rely upon fees, fines, and forfeitures in order to maintain general funds). As Justice Ginsburg noted in *Timbs*, unlike other areas of legislative control, state and local governments stand to benefit directly from fines and forfeiture proceeds and, in many cases, are heavily reliant upon them for revenue. *See Timbs*, 139 S. Ct. at 689 (noting that the revenue-generating nature of fines can detract from the state and local governments' goals of deterrence and retribution). Therefore, the Supreme Court's decision to assign lower courts the task of devising a fair and balanced method for applying the Excessive Fines Clause to civil forfeitures is disconcerting given the extent to which states stand to benefit. *See Fourteenth Amendment*, *supra* note 90, at 350 (discussing the significant stake that state and local governments, as well as police departments, have in civil forfeiture programs).

[157] *See Austin*, 509 U.S. at 622 (declining the petitioner's request to set forth specific Excessive Fines Clause criteria, based upon the Supreme Court's custom of giving lower courts the initial opportunity to deliberate on an inquiry's relevant factors).

lower court would evaluate the relationship between the punishment and the perpetrated crime.[158]

Four years after considering civil forfeiture in *Austin*, the Supreme Court set forth a test for measuring the excessiveness of a criminal forfeiture in *Bajakajian*.[159] The *Bajakajian* Court articulated a review for excessiveness that focused exclusively on whether the forfeiture at issue was grossly disproportional to the seriousness of the petitioner's offense.[160] Although the *Bajakajian* Court refused to take into account the offender's financial capability, the Court so refrained *only* because the respondent failed to timely bring the issue before the Court.[161] Additionally, *Bajakajian*'s dicta, in which the Court neglected to take a firm position on the role of ability to pay, further contributed to the uncertainty surrounding the Excessive Fines Clause analysis.[162] The ambiguity resulting from the Court's conflicting precedent underscores the potential importance of the reference to offender ability to pay in *Timbs*.[163] Therefore, although the *Timbs* Court failed to expound upon its earlier Excessive Fines Clause jurisprudence, it did leave open the possibility for financial capacity to be a determinative factor in future constitutional review of excessiveness.[164]

Fundamental to the unresolved question of what role an offender's financial capability should play in an Excessive Fines Clause analysis is the question of whether civil forfeitures constitute "punishments" and are, in turn, subject to Eighth Amendment scrutiny.[165] According to Supreme Court precedent,

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[158] *Id.* The Court also neglected to raise the offender's financial capacity as a potential factor for evaluating the fine's excessiveness. *See id.* at 604–22 (failing to mention the wrongdoer's livelihood or ability to pay as relevant points of consideration under the Excessive Fines Clause).

[159] *See Bajakajian*, 524 U.S. at 334 (holding that forfeitures infringe upon the Eighth Amendment when they are "grossly disproportional" to the seriousness of the underlying illicit activity). The *Bajakajian* opinion still stands as the only occasion on which the Supreme Court has utilized the Excessive Fines Clause to find a forfeiture unconstitutionally excessive. *See* Colgan, *supra* note 155, at 10.

[160] *Bajakajian*, 524 U.S. at 334.

[161] *Id.* at 340 n.15; *see also Timbs*, 139 S. Ct. at 688 (noting that the Court's ruling in *Bajakajian* refrains from taking a stance on whether an offender's financial standing is pertinent in assessing the excessiveness of a fine).

[162] *See Bajakajian*, 524 U.S. at 340 n.15 (tracing the origins of restrictions on excessive fines back to the foundational principles of the Magna Carta, which mandated that fines never divest offenders of their livelihoods).

[163] *See Timbs*, 139 S. Ct. at 688 (discussing the correlation between the Excessive Fines Clause and early English convictions requiring consideration of an individual's financial circumstances when imposing fines); *supra* note 135 and accompanying text (detailing the influence of the Magna Carta over the U.S. Bill of Rights, namely how historical protections against sanctions that divested individuals of their livelihoods framed the construction of the Excessive Fines Clause).

[164] *See Fourteenth Amendment*, *supra* note 90, at 348 (positing that the Supreme Court's brief discussion of a wrongdoer's financial standing in *Timbs* further complicates the application of the Excessive Fines Clause for lower courts in that it remains unclear what role, if any, the consideration of an individual's ability to pay should have in an excessiveness inquiry).

[165] *See* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1460 (2019) (discussing how a definitive resolution of whether civil *in rem* forfeitures are punitive in nature is crucial for securing individuals' constitutional protections against abusive asset seizures). If civil forfeitures

the Clause governs sanctions inflicted by the government "as punishment for some offense."[166] Consequently, if a government-imposed sanction is punitive, then it is subject to the Clause's mandate that the sanction be proportionate to the predicate crime—a standard previously established in *Bajakajian* in the context of criminal forfeitures.[167] In *Austin*, on the one hand, the Supreme Court observed that it had traditionally viewed statutory *in rem* forfeiture as punitive, thereby implicating the proportionality mandate of the Excessive Fines Clause.[168] On the other hand, in *Bajakajian*, the Court concluded that *in rem* forfeitures generally were *not* regarded as punitive and were thus beyond the reach of the Excessive Fines Clause.[169] By viewing the property alone as being guilty of the offense, the *Bajakajian* Court determined that the Clause was not applicable to *in rem* forfeitures because such forfeitures did not further punish the offender.[170] The *Timbs* Court neglected to offer any further clarity regarding this discrepancy between *Austin* and *Bajakajian* over the questionably punitive nature of *in rem* forfeitures.[171] Consequently, the *Timbs* decision perpetuates damaging inconsistencies in the Supreme Court's Excessive Fines Clause jurisprudence—whether and to what extent an individual's ability to pay should be considered and whether civil forfeitures are tantamount to fines—and, therefore, will likely lead to further variation among lower court decisions.[172]

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are characterized as distinct from fines, individuals stand to lose all constitutional safeguards against the government's authority to seize their property, including both proportionality limitations and any consideration of financial standing. *See id.* at 1461 (stating that the Constitution offers no protections against curbing aggressive forfeitures should *in rem* forfeitures be deemed to be non-punitive).

[166] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989); *see also Austin*, 509 U.S. at 609–10 (holding that the Excessive Fines Clause serves as a restraint on governmental power to collect payments, in the form of cash or property, as penalty for some crime).

[167] *See, e.g.*, *Bajakajian*, 524 U.S. at 334 (holding that the criminal forfeiture of monies seized as a result of failure to report such monies is subject to the constitutional protections of the Excessive Fines Clause). *But see, e.g.*, *Browning-Ferris*, 492 U.S. at 271 (determining that recovery of punitive damages does not fall under the purview of the Clause).

[168] *Austin*, 509 U.S. at 618.

[169] *Bajakajian*, 524 U.S. at 331; *see also* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1520–21 (2016) (noting that the *Bajakajian* Court made a deliberate distinction between forfeitures arising out of criminal actions from standard civil *in rem* forfeitures in reaching its decision).

[170] *Bajakajian*, 524 U.S. at 331.

[171] *See Timbs*, 139 S. Ct. at 688 (declining to overrule *Austin*'s holding that *in rem* forfeitures are subject to the Clause when they are punitive to some degree, and upholding the gross disproportionality review articulated in *Bajakajian*).

[172] *See, e.g.*, United States v. 1948 S. Martin Luther King Drive, 270 F.3d 1102, 1115 (7th Cir. 2001) (holding that the gross disproportionality standard of the Eighth Amendment does not apply to *in rem* forfeitures of property and automobiles used to facilitate drug crimes because such seizures are remedial, as opposed to punitive); United States v. Ahmad, 213 F.3d 805, 814 (4th Cir. 2000) (observing that *Bajakajian* instructs that assets used to commit a crime and later seized through *in rem* forfeiture should not be subjected to an Excessive Fines Clause analysis); United States v. Land, Winston Cty., 221 F.3d 1194, 1199 (11th Cir. 2000) (determining that *in rem* forfeitures are distinguishable

### *C. The Reactions to* Timbs*: Praise, Indifference & Criticism*

Following the Supreme Court's decision in *Timbs*, responses among scholars spanned from enthusiasm to cynicism.[173] For instance, leading counsels at the Constitutional Accountability Center hailed the *Timbs* ruling as a new catalyst in the crusade against oppressive financial sanctions.[174] These proponents averred that, by subjecting states to the constitutional protections of the Excessive Fines Clause, *Timbs* would stand as a powerful check on the inclination of state judges to favor law enforcement in the subjective evaluation of a fine's excessiveness.[175] Furthermore, proponents framed *Timbs* as a timely response to the increasingly exploitative nature of civil forfeiture, and to the growing cross-ideological criticism of asset seizure.[176]

Conversely, critics of the Court's ruling in *Timbs* surmised that the narrow decision would do little to nothing to quell misuse of civil forfeiture.[177] Some commentators posited that the Court's lack of guidance for employing the Excessive Fines Clause, coupled with strong financial motivations at the state level, would diminish any potential power of *Timbs*.[178] Furthermore, alt-

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from fines). *But see* United States v. 45 Claremont St., 395 F.3d 1, 6 (1st Cir. 2004) (holding that the underlying punitive character of civil forfeitures attained through 21 U.S.C. § 881(a)(7) allows for application of the Excessive Fines Clause's gross disproportionality analysis in order to resolve whether the forfeiture is excessive).

[173] *See infra* notes 174–181 and accompanying text.

[174] *See* Gorod & Frazelle, *supra* note 115, at 217 (asserting that the *Timbs* Court's decision to extend the Excessive Fines Clause to states will encourage more uniform and comprehensive guidelines for measuring excessiveness among lower courts, thereby increasing the likelihood of success for litigants in civil forfeiture challenges). In focusing on *Timbs*'s incorporation of the Excessive Fines Clause, proponents of the decision identified *Timbs* as the first of many cases that could produce an excessive-fines jurisprudence capable of curbing current injustices. *Id.*

[175] *Id.* at 240–41; *see also* Wayne A. Logan, Timbs v. Indiana*: Toward the Regulation of Mercenary Criminal Justice*, 32 FED. SENT'G REP. 3, 5 (2019) (positing that *Timbs* opens the door for future coordination between the Supreme Court, state courts, and lower federal courts to control mercenary criminal justices).

[176] *See* Gorod & Frazelle, *supra* note 115, at 248 (observing that although the *Timbs* ruling is long overdue, it signals a hopeful beginning for reestablishing fundamental principles of fairness and control in how the government deals with its citizens).

[177] *See infra* notes 178–181 and accompanying text.

[178] *Fourteenth Amendment*, *supra* note 90, at 351. *Timbs*'s silence with respect to applying the Excessive Fines Clause to civil forfeitures, as well as the Court's unwillingness to hold affirmatively that forfeitures are tantamount to fines, only exacerbates the doctrinal dissonance among lower courts following *Austin* and *Bajakajian*. *See id.* at 348–50 (stating that the *Timbs* Court's failure to provide further explication on these issues merely intensifies the existing inconsistences between *Austin* and *Bajakajian*); Rulli, *supra* note 45, at 1132 (discussing the split among lower courts in their methods for applying the Excessive Fines Clause to civil *in rem* forfeitures); *see also supra* notes 90–106 and accompanying text (exploring the discrepancies among lower courts' handling of forfeiture matters following the Court's conflicting holdings in *Austin* and *Bajakajian*). Furthermore, government incentives to pursue forfeiture actions can result in the circumvention of democratic restraints, in that state and local government may permit authorities to bypass state regulations. BRIAN D. KELLY, FIGHTING CRIME OR RAISING REVENUE?, INST. FOR JUST. 19 (2019), https://ij.org/report/fighting-crime-or-raising-revenue/ [https://perma.cc/SX7V-RG6J]. For example, in North Carolina, asset seizures must

hough the *Timbs* Court expressed hope that the Excessive Fines Clause would now operate as "a bulwark against the risk that the government will . . . take advantage of the revenue generating capacity of fines," scholars criticized the Court's timid opinion as incapable of providing the necessary foundation for protecting citizens from forfeiture abuse.[179] Still, others viewed *Timbs* as conclusive proof that it will require far greater action than a Supreme Court ruling to remedy the systemic issues inherent to civil forfeiture practices.[180] In light of the uncertain implications of *Timbs* on civil forfeiture practices and related judicial proceedings, litigants must continue to challenge unreasonable forfeitures in order to force the Court to clarify and build upon its deficient Excessive Fines Clause jurisprudence.[181]

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occur after criminal proceedings, and law enforcement agencies receive no monetary incentive for engaging in criminal forfeitures. *Id.* Despite this legislation, law enforcement authorities in North Carolina amass over $11 million annually by taking part in the federal government's equitable sharing program. *Id.* Moreover, states where local laws mirror federal forfeiture procedures still often favor equitable sharing as a more lucrative practice, thereby lessening the power of any state-enacted defenses to civil forfeiture. *See id.* (reporting findings from a 2018 study that revealed that state and local law enforcement agencies with the least economic incentives and strongest safeguards for property owners collected more than double the equitable sharing revenue per agency as compared to those in areas with the greatest incentives and weakest protections). Therefore, the *Timbs* opinion is unlikely to impact civil forfeiture practices in a significant manner, especially when considering its reserved position juxtaposed against the strong and established economic incentives afforded to state and local authorities. *See Fourteenth Amendment*, *supra* note 90, at 351 (criticizing those who viewed *Timbs* as an opportunity to eradicate civil forfeiture and asserting that such an outcome is rather improbable).

[179] *Compare Timbs*, 139 S. Ct. at 686 (describing how the Excessive Fines Clause offers individuals protection from exploitation by restricting the sovereign's authority to wield its punitive power), *and* Colgan, *supra* note 155, at 12–13 (asserting that the Supreme Court can affect structural change by further developing its Excessive Fines Clause precedent, thereby reining in the power of legislators to use monetary sanctions as means for generating revenue), *with Fourteenth Amendment*, *supra* note 90, at 351 (stating that the restrained and imprecise language of *Timbs* is unlikely to provide individuals with a formidable defense against exploitative forfeitures).

[180] *See* Nora V. Demleitner, *Will the Supreme Court Rein in Excessive Fines and Forfeitures?: Don't Rely on* Timbs v. Indiana, 32 FED. SENT'G REP. 8, 12–13 (2019) (cataloguing the numerous deficiencies of civil forfeiture, including lack of success as a crime-prevention tool, manipulation of law enforcement priorities, and targeting of less well-off individuals). As an alternative to judicial intervention, legislative reforms and regulatory guidelines have gained substantial traction as a promising means for curing the ills of civil forfeiture. *Id.* at 12. For instance, the American Bar Association (ABA) promulgated the *ABA Ten Guidelines on Court Fines and Fees*, which recommends reducing the size of financial penalties and lessening collateral ramifications. *Id.*; *see* PRESIDENTIAL TASK FORCE ON BUILDING PUB. TRUST IN THE AM. JUSTICE SYS., TEN GUIDELINES ON COURT FINES AND FEES, AM. BAR ASS'N (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [https://perma.cc/8GNG-98HS]. In the event of nonpayment, the Guidelines stipulate that "individuals should never face incarceration, be deprived of fundamental rights, or be punished disproportionately." Demleitner, *supra*, at 12. Significantly, the ABA's guidelines proffer that fees should never be collected in excess of an individual's financial capability. *Id.*

[181] *See* Colgan, *supra* note 155, at 11, 77 (averring that the Excessive Fines Clause has yet to be developed fully by lower courts and the Supreme Court, and thus remains an untapped and dynamic instrument for criminal justice reform).

## III. THE AFTERMATH OF *TIMBS*: LITIGATION AND LEGISLATION

After *Timbs v. Indiana*, the doctrinal discrepancy concerning ability to pay may have particularly poignant consequences, in that a proportionality-centric inquiry does not always safeguard individuals—particularly those to whom any financial loss is potentially ruinous—from forfeiture abuses at the state level.[182] As with the federal system, state and local governments rely significantly upon civil forfeitures as a source of revenue; reports have detailed the extent of such practices as a means for generating profit in police departments.[183] In addition, although a great deal of media interest is centered around federal *in rem* forfeiture, individual property is actually more vulnerable to law enforcement exploitation under state forfeiture regulations.[184] Therefore, although incorporation of the Eighth Amendment's Excessive Fines Clause may restrict the power of state authorities to perform severely unwarranted forfeitures, the *Timbs* ruling will likely not discourage the widespread forfeiture of lesser-valued property from those who are most financially vulnerable and

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[182] *Fourteenth Amendment*, *supra* note 90, at 350. Some scholars have argued that by purely focusing on proportionality—weighing the property forfeited against the severity of the predicate offense—the Court has failed to address the Excessive Fines doctrine's principles of equality, financial independence, dignity, prevention, and rehabilitation. Colgan & McClean, *supra* note 152, at 439–40. In order to satisfy these goals, Professor Beth A. Colgan and attorney-at-law Nicholas M. McLean suggest that when evaluating a forfeiture's excessiveness, courts should "consider whether and how the deprivation of the property may impede employment and educational access, obstruct the ability to meet basic human needs, interfere with family and social stability, and undermine other legal obligations." *Id.* at 440. By utilizing this comprehensive approach, in which consideration of an offender's ability to pay and the real-world consequences of forfeiture is central, Colgan and McClean argue that courts can more accurately assess excessiveness in individual cases. *Id.* at 447.

[183] *See, e.g.*, CARPENTER ET AL., *supra* note 3, at 43 (citing to data revealing that forty-three states funnel 45% of forfeiture proceeds, at a minimum, to their local police department funds); *How Crime Pays*, *supra* note 18, at 2391–92 (discussing the numerous ways in which law enforcement agencies derive financial benefits from forfeiture). Furthermore, statistics indicate that forfeiture practices continue to increase in frequency and scope, as law enforcement agencies at the state level operate under significant financial strain. McLean, *supra* note 50, at 887.

[184] Rulli, *supra* note 45, at 1123. For example, in Pennsylvania, lawmakers have adopted numerous civil forfeiture laws focused on controlled substances that mirror federal forfeiture statutes. *Id.* For instance, the Pennsylvania Controlled Substances Forfeiture Act requires the confiscation and forfeiture of controlled substances, of automobiles used to traffic controlled substances, and of cash and real property used or intended to be used to further a breach of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act. 42 PA. CONS. STAT. § 6801(a) (2006). Seized property is placed in the custody of either the district attorney or the Attorney General, and may be kept for official use or auctioned off, with all profits directed to local law enforcement agencies. *Id.* § 6801(e)–(h). At the local level, Philadelphia County has been vigorous in its pursuit of civil forfeiture actions against its own citizens. *See* Rulli, *supra* note 45, at 1123–24 (compiling data from Pennsylvania's Asset Forfeiture Reports from 2005 to 2014, reflecting that over the nine-year period, state and local authorities received a total net income of $47.7 million in seized property, comprised of $34.2 million in cash forfeitures, 1,938 automobile forfeitures, and 746 home forfeitures). Therefore, given the amount of funding that is at stake for law enforcement in states like Pennsylvania, there is significant potential for distortion of agency priorities and prosecutorial discretion. *Id.* at 1125.

least capable of challenging forfeiture actions because the opinion fails to require consideration of offender ability to pay.[185]

For example, one common source of asset forfeiture revenue is the confiscation of petty cash.[186] These monies are usually too minor in scale and value to satisfy a proportionality inquiry when balanced against the underlying purported crime.[187] But when considering the financial circumstances of those citizens most frequently subject to fines, these seizures of petty cash may inflict substantial financial hardship despite being a forfeiture of only minor assets.[188] At the opposite end of the spectrum, seizures of higher value items, such as houses, would likely be determined unconstitutionally excessive based upon a proportionality test.[189] Upholding forfeitures from those with the least

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[185] *How Crime Pays*, *supra* note 18, at 2403; *see* Timbs v. Indiana, 139 S. Ct. 682, 690 (2019) (upholding the gross disproportionality test put forth in *United States v. Bajakajian* and thereby neglecting to rule on whether a wrongdoer's financial capability should be considered in an Excessive Fines Clause analysis). Many courts operate under the theory that because property subject to forfeiture is physically within an individual's possession it is thus practically capable of being surrendered; this perspective may not reflect an accurate understanding of what is necessary to sustain one's livelihood. McLean, *supra* note 50, at 896. For example, asset seizures lead to the loss of family homes, means of transportation, or even an individual's life savings, and consequently affect not only the ability of offenders to survive, but also that of their dependents. Colgan, *supra* note 155, at 46 n.250.

[186] *See, e.g.*, Emily Early, *What the Supreme Court Ruling Could Mean for Civil Asset Forfeiture*, S. POVERTY L. CTR. (Apr. 16, 2019), https://www.splcenter.org/news/2019/04/16/what-supreme-court-ruling-could-mean-civil-asset-forfeiture [https://perma.cc/BWW5-GGKT] (noting that law enforcement regularly organizes checkpoints along major roadways in an effort to pull over motorists for minor violations that can then result in the seizure of their property, typically cash).

[187] *Fourteenth Amendment*, *supra* note 90, at 351. According to studies evaluating ten states' forfeiture statistics, the median value of seized property spanned from $451 to $2048. CARPENTER ET AL., *supra* note 3, at 12. In Philadelphia specifically, data over a two-year period revealed that half of the city's cash forfeiture actions involved seizures of less than $192. *Id.*

[188] *See* U.S. COMMISSION ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR 72 (2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf [https://perma.cc/8L3E-UN6L] (stating that some U.S. law enforcement agencies go as far as to specifically pursue low-income neighborhoods to generate revenue). For example, in Minnesota, reports indicate that cash forfeitures disproportionately affect poor, Black, and Hispanic families, who are "five times more likely to be unbanked" than white families. Gordon et al., *supra* note 156, at 24. Additionally, after forfeiting assets, poor, Black, and Hispanic families are more likely to have limited access to credit to assist them in withstanding the loss. *See id.* (noting that over 67% of Black and 63% of Hispanic families earning less than $15,000 annually possess no mainstream credit, in comparison to 48.2% of white families at the same income floor). The ancillary implications of authorities confiscating cash intended for paying bills or taking a family's only vehicle for commuting to work can rapidly escalate—unimpeded by the fact that the property owner is still presumed to be innocent. *Id.* In some cases, the effects of law enforcement prioritizing revenue collection have led to a further deterioration of community trust in law enforcement. *See id.* (stating that, in Ferguson, Missouri, the Department of Justice found that the demand to engage in revenue raising tactics and arrests detracted from community-policing efforts and impeded investigations into police misconduct). Furthermore, the financial imposition of punishments such as fines and forfeitures can forge "public safety-harming barriers to successful reintegration into the community for those involved with the criminal justice system." *Id.*

[189] *See* Rulli, *supra* note 45, at 1150–51 (asserting that application of a strict proportionality analysis for civil forfeitures of houses, in which the maximum statutory sanction is measured against the

assets to begin with runs counter to the social policy principles underlying the Excessive Fines Clause.[190] Furthermore, the phenomenon of persistent "criminal justice debt" demonstrates the extent to which poorer individuals' forfeitures are inequitably undervalued in the systematic imposition of fees and fines—and illuminates how the current constitutional scheme fails to protect the financial security of those without a safety net.[191] Thus, in addition to the uncertainty surrounding the state of civil *in rem* forfeitures following *Timbs*, the Court's ruling leaves unsettled economically prejudiced guidelines for state courts to grapple with in reviewing fines and fees.[192]

Following *Timbs*, courts are continuing to reconcile the Supreme Court's excessive fines jurisprudence with their own state court precedent, with a small minority viewing the caselaw as formidable evidence for deducing that a fine is unconstitutionally excessive when it exceeds an individual's financial capacity.[193] These occasional outcomes, however, are not enough to spur real, extensive systemic change amid unjust civil forfeiture practices.[194] Instead, the vast majority of lower courts will likely continue to omit an offender's ability to pay from their excessive fines analyses and thus fail to shield predominantly low-income and minority individuals from the devastating financial hardships of civil forfeiture.[195] Ultimately, the *Timbs* Court's failure to proffer a clear test for measuring excessiveness, coupled with the omittance of any guidance concern-

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home's fair market value, refutes any significant constitutional safeguard for owners of lesser valued houses).

[190] *See Fourteenth Amendment*, *supra* note 90, at 351 (noting that divestiture of an individual's home runs contra to the primary objective of the Excessive Fines Clause to maintain an individual's "contenement[]," as articulated by Blackstone).

[191] *See* Colgan, *supra* note 155, at 5–9 (describing how individuals sacrifice their homes, medical treatments, and food to incrementally pay back fines and other monetary sanctions or are even detained for their failure to pay). Scholars have further asserted that an Excessive Fines Clause review that focuses primarily on proportionality falls short of its punitive objectives, in that it does not effectively penalize those defendants that are well-off. *See id.* at 52 & n.275.

[192] *Fourteenth Amendment*, *supra* note 90, at 351.

[193] *See, e.g.*, Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC, 442 P.3d 94, 101 (Colo. 2019) (holding that an individual's financial capability is relevant to an Excessive Fines Clause analysis given *Timbs*'s reliance on historical authorities, including Blackstone and the Magna Carta).

[194] *See* Colgan & McLean, *supra* note 152, at 430 (documenting the sweeping abuses of civil forfeiture practices wielded by law enforcement agencies in an effort to demonstrate that the impact of *Timbs* will be only minor in scale).

[195] *See Fourteenth Amendment*, *supra* note 90, at 349 (stating that most courts refuse to take into consideration an offender's financial capacity when assessing the constitutionality of an *in rem* forfeiture); *supra* note 94 and accompanying text (referencing numerous cases in which lower courts interpreted Supreme Court jurisprudence as instructing that neither an individual's ability to pay, nor the particular financial hardship inflicted on the individual, are pertinent to evaluating whether a civil forfeiture is unconstitutionally excessive); *see also* Caruthers, *supra* note 43, at 291–92 (stating that because forfeiture practices disproportionately affect lower income communities and, by extension, minorities, "[B]lacks and other minority groups would benefit most from an excessive fines test that takes into account an individual's financial circumstances").

ing the debatably punitive nature of civil *in rem* forfeitures, will allow civil forfeiture abuses to continue as state litigants are kept in the dark about their constitutional rights over seized property.[196] Therefore, the duty falls upon litigants to utilize *Timbs* in an effective manner—as promoting consideration of ability to pay—to challenge state courts to adopt excessive fines analyses that contemplate the financial hardship imposed on offenders as a result of forfeiture.[197]

## Conclusion

Despite the significance of the Supreme Court's formal incorporation of the Eighth Amendment's Excessive Fines Clause in *Timbs v. Indiana*, the ruling created more questions than it resolved. By disrupting lower courts' existing approaches to civil *in rem* forfeiture matters, the Supreme Court imposed upon them the demanding burden of reconciling their own state's caselaw with federal precedent derived from challenges brought under the U.S. Constitution. The Court offered an ill-defined proportionality test to state courts for determining the excessiveness of fines and forfeitures, with little guidance on whether and to what extent an offender's ability to pay should be taken into consideration. Even more troubling—given that incorporation of the Excessive Fines Clause was arguably inevitable—the *Timbs* Court dodged the pressing issue of whether civil *in rem* forfeitures are punitive by nature and, thus, subject to the Excessive Fines Clause at all. The Court's silence will only intensify existing, widespread doctrinal inconsistency among state and lower federal courts. The onus therefore lies with litigants to bring precise and pointed challenges against civil forfeiture actions and urge courts to reconsider their respective Excessive Fines Clause analyses. Compelled by historical practices, courts should ultimately opt to factor an offender's ability to pay into the calculus of determining whether a forfeiture is excessive, finishing the job the Supreme Court started.

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[196] *See Fourteenth Amendment*, *supra* note 90, at 347 (asserting that the *Timbs* Court's extension of the Excessive Fines Clause to the states does not sufficiently safeguard state litigants from excessive fines because the persisting discord between ability to pay and proportionality is most evident in state-level asset seizures).

[197] *See id.*