October Term, 2018

In the
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,
v.
STATE OF INDIANA,
Respondent.

On Writ Of Certiorari To The
Indiana Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

This case centers around the application of the Excessive Fines Clause of the Eighth Amendment on civil asset forfeiture, and the Clause's incorporation through the Fourteenth Amendment. The protection against "excessive fines imposed" is yet to be incorporated against the states. Such a discrepancy has allowed certain courts in Montana, Mississippi, Michigan, and now Indiana to ignore the Clause despite the fact that two federal Circuit Appeals courts and at least fourteen state high courts have included it in through their state legislatures. These states' lack of acknowledgment has allowed for many States to seize the property of thousands of Americans, Tyson Timbs included, under civil asset forfeiture, a would-be violation of the Excessive Fines Clause of the Eighth Amendment. In this case, the state of Indiana confiscated his Land Rover, an asset worth $42,058.30, over four times the maximum fine he could have been penalized.

Assuming that the Eighth Amendment's Excessive Fines Clause will be incorporated to the States, should it be through the Due Process Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana.

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STATEMENT OF THE CASE

In January 2013, a man by the name of Tyson Timbs purchased a $42,058.30 Land Rover, which he used as a vehicle to transport heroin in Indiana. After two police-controlled drug purchases, the police arrested Mr. Timbs. Mr. Timbs pled guilty to two counts of felony drug offenses and was subsequently sentenced to home detention followed by probation. He was fined police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a $400 fee for a drug-and-alcohol assessment. The state of Indiana authorized an action of civil forfeiture to seize ownership of his Land Rover on the grounds that he used that vehicle to transport illegal drugs. An Indiana trial court and intermediate court denied the forfeiture of Timbs' vehicle because the action would be unconstitutional under the Excessive Fines Clause of the Eighth Amendment. The Indiana Supreme Court, however, reversed their decisions, reinstating the forfeiture under the argument that the Excessive Fines Clause does not apply to Indiana. After the Constitutional Accountability Center filed an amicus curiae brief to the U.S. Supreme Court requesting review in support of Timbs, the Court granted certiorari on June 18, 2018.

STATEMENT OF ARGUMENT

The Privileges or Immunities Clause of the Fourteenth Amendment is designed for the protection of citizens against actions of their state governments. In light of past jurisprudence, this clause has been set aside in favor of the Due Process Clause as a means of incorporating the first eight amendments of the Bill of Rights to the states. The intent of the Privileges or Immunities Clause must be taken into consideration, as well as the meaning of the phrase as a term of art. The "term of art" protects fundamental rights—both those that have been incorporated and those yet to be. The Court must, then, recognize that *Timbs v. Indiana* is a case of fundamental significance to citizens' rights on the basis of their privileges or immunities—especially considering significant concerns revolving around civil forfeiture. The incorporation of the Excessive Fines Clause of the Eighth Amendment must be through the Privileges or Immunities Clause: not only to prevent state governments from overreaching their powers over their citizens, but also for the protection of future citizens.

ARGUMENT

I. The Privileges or Immunities Clause Was Written to Apply the Bill of Rights Against the States.

A. The Evolving Definition of "Privileges" and "Immunities"

History further shows that in 1866, the words "privileges" and "immunities" were broadly understood to denote a set of core, inalienable rights and to refer to the rights given and protected by the Federal Constitution. This abundance of historical evidence—in the form of such newspaper articles, legal treatises, state, books, judicial opinions, foreign treaties and state constitutions—shows that constituents at the time understood the words of the Privileges or Immunities Clause to refer to the protection of substantive fundamental rights, including those enumerated in the Bill of Rights.

Tracing the meaning of the words "privileges" and "immunities" in dictionaries of the time reveals that they were often used in conjunction, and indeed evolved alongside the meanings of the words "rights," "freedoms," and "liberties." In Noah Webster's 1828 *An American Dictionary of the English Language*, the word "privilege" as "a right or immunity not enjoyed by others or by all" while identifying "franchise," "right," "liberty," and "immunity' as synonyms. It further defined "immunity" as "[f]reedom from an obligation[;] particular privilege." Meanwhile, the term "right" was defined as "[p]rivilege or immunity granted by authority."[1] In 1797, The Maryland General Court stated that "[p]rivilege and immunity are synonyms, or nearly so." See Campbell v. Morris H. & McH. 535, 553 (Md. 1797). Sir William Blackstone, in *The Commentaries on the Laws of England* even described the "rights and liberties" of Englishmen as "private immunities" and "civil privileges" and used it in conjunction with descriptions of the inalienable rights of individuals and positive-law rights of corporations.[2] The inclusion of this phrase in corporate charters thus also demonstrates how its nature fluctuates depending on the person, entity, and group it connoted to. As Justice Thomas notes in his concurrence in *McDonald v. Chicago* (2010), the last case to ponder the matter of incorporation through the Privileges or Immunities, *Magill v. Brown* (1833) used the term privileges or immunities to "relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places."[3] Therefore, the question presented is whether or not protection from excessive fines is considered an "inalienable" right. Historical record overwhelmingly demonstrates that the Eighth Amendment's prohibition on

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[1] N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865)

[2] William Blackstone, Commentaries on the Laws of England, 125-129

[3] Magill v. Brown, 16 F. Cas. 408, 428 (No. 8,952) (CC ED Pa. 1833)

excessive fines is an inalienable right and the right to be free from excessive fines sits comfortably under the umbrella of the original, public meaning of the Privileges or Immunities Clause. The fact that the Excessive Fines Clause was "taken verbatim from the English Bill of Rights of 1689" further demonstrates the long understanding of the prohibition against excessive fines as an inalienable right. See *United States* v. *Bajakajian,* 524 U.S. 321, 335 (1998). Indeed, at the time of the ratification of the Fourteenth Amendment, all but two states had included an Excessive Fines Clause in their constitutions.

B. English Roots

As colonists of England, American legal theory inherited a set of rights rooted in English common law. The fear of unrestrained royal power was especially apparent in documents such as the English Bill of Rights and the Magna Carta. Bernard Schwartz, in *The Ideological Origins of the American Revolution*, found that basic liberties of English citizens only became constitutionally enforceable when it was recognized in legal texts. These rights, as recognized in the English Bill of Rights (1689) would include parallels to the Bill of Rights such as the right to a jury trial, the right to bear arms, and the right to petition for redress of grievances. State and federal governments were understood to exist to protect and preserve the inalienable rights—the "privileges" or "immunities"—of their citizens.

Proclamations of colonists in the revolutionary era and treaties with foreign entities also reveal an understanding of "privileges or immunities" as included within an individual's rights of citizenship. In the Revolutionary Era, colonists used the words "privileges" and"immunities" to assert their inalienable rights as subjects of English law. In the Massachusetts Resolves of October 29, 1765, for example, colonists declared:

> "[N]o Man can justly take the Property of another without his Consent: And that upon this original Principle the Right of Representation… is evidently founded… That this inherent Right, together with all other, essential Rights, Liberties, Privileges and Immunities of the People of Great Britain, have been fully confirmed to them by the Magna Carta." [4]

The First Continental Congress even declared in 1774 that the King had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects … within the realm of England." Treaties such as the Treaty of Amity, Settlement, and Limits also demonstrates how the term "privileges and immunities" denoted the privileges common to all citizens of the United States. The Louisiana Cession Act of 1803 further reads that "[t]he inhabitants of the ceded

[4] The Massachusetts Resolves (Oct. 29, 1765), reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766, p. 56 (E. Morgan ed. 1959)

territory [shall enjoy] all the rights, advantages and immunities of citizens of the United States … [and] shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they process."[5]

When Puerto Rico was granted U.S. citizenship through the Jones-Shafroth Act and further welcomed to the fold in 1947 under the Truman Administration, its citizens were greeted with that same promise of "[t]he rights, privileges and immunities of citizens of the United States."[6] A Maryland law in 1639 notes the same meaning of the Clause, applying the term as natural and inalienable rights that subjects should enjoy.

John Bingham intended for the Privileges or Immunities Clause to protect the rights critical for American liberty, believing that these rights—as enumerated by the first eight amendments of the bill of rights—not only "secured the citizens against any deprivation of any essential rights of person" but also secured "all rights dear to the American citizen."[7] It is clear that the "purpose of the Privileges or Immunities Clause was to ensure, for the first time, that these rights were protected against state action." See Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, pp. 424-425 (2010).

II. The Privileges or Immunities Clause Includes and Protects Fundamental Rights

In drafting the Privileges or Immunities Clause of the 14th Amendment, John Bingham intended to protect the citizens of the United States' fundamental rights. He drew inspiration from precedent: legislative precedent in the Civil Rights Act of 1866 and judicial precedent in *Corfield v. Coryell*. The Civil Rights Act of 1866, borne of Reconstruction, provided "equality of citizens of the United States in the enjoyment of 'civil rights and immunities.'" This reaffirmed the meaning of privileges and immunities: federally protected rights. Justice Washington's opinion in *Corfield v. Coryell* lists the extensive rights under the Privileges and Immunities Clause of Article IV:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at

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[5] Treaty Between the United States of America and the French Republic, Art. III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86

[6] 48 U.S.C. § 737 - U.S. Code - Unannotated Title 48. Territories and Insular Possessions § 737. Privileges and immunities

[7] CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (1871).

> all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Under this precedent, privileges and immunities should not be constrained to trivialities. Bingham took these precedents into consideration and crafted the Privileges or Immunities clause in that fashion.

III. The Privileges and Immunities Clause Is A Superior Alternative to Incorporation of the Excessive Fines Provision to the States.

While the original intent of the Privileges or Immunities Clause was to function as the vehicle of incorporation of protections of citizens against their State governments enumerated in both Article IV and the first eight Amendments of the Bill of Rights, it has been cast aside by the landmark *Slaughter-House Cases*. Merely five years after the ratification of the Fourteenth Amendment, the first chance of expanding incorporation was sharply curtailed in the *Slaughter-House* majority opinion, penned by Justice Miller. In interpreting the Privileges or Immunities Clause in particular as a creator of new rights fundamentally separate from the language of Article IV and the rights enumerated in the first eight Amendments, it limited the Clause to an extremely limited subset of federal rights, such as "the right of free access to its seaports...to the subtreasuries, land offices, and courts of justice in the several States." Thus the Court denied that the Clause protected the butchers' "right to exercise their trade." See *Slaughter-House Cases*, 83 U.S. 16 Wall. 36 36 Page 83 U. S. 60 (1872). In doing so, it favored the limitation and curtailment rather than expansion of protections against actions of State governments. The decision was flawed from its inception, starting with the Court, as its members were less than partial to the expansion of civil rights and liberties in the Fourteenth Amendment. According to the American Constitution Society, the justices reduced civil rights legislation to "mere shadows" of intent, inflicting "incalculable damage" on the extent of the Fourteenth Amendment. Furthermore, even if the Framers of the Fourteenth Amendment intended the amendment solely as a means of protection for freedmen, the Court's decision to base their decision on such a narrow reading of the Clause stifled the future meaning and implication—that is, the protection of not only freedmen, but of all citizens.

In the words of Robert Bork in *The Tempting of America*, *Slaughter-House* obliterated the Privileges or Immunities Clause. After effectively ruling the what should have been the crown jewel of the Fourteenth Amendment, the Privileges or Immunities Clause, as a dead letter, the Court thus made the entire Amendment, to quote Justice Field's dissent, "a vain and idle enactment." Refer to *Slaughterhouse Cases*, 83 U.S. 36 Page 83 U. S. 96. (1873). The Court thus forced its own hand and had to subsequently use the Due Process Clause as a roundabout means of incorporation, leaving Privileges or Immunities barren of meaning. Today, virtually "no serious modern scholar" views *Slaughter-House* as a correct decision in its reading of the Fourteenth Amendment. See Robert H. Bork, *The Tempting of America* (2009).

It is unfortunate that the Court chose to incorporate through Due Process, as Due Process was never meant to be used as a means of incorporation—it was originally intended to be used as a procedural guarantee of justice. But because Due Process replaced the intended role of the Privileges or Immunities Clause, it provides "no protection at all against outrageous and obvious violations of simple justice" and instead offers "laboriously articulated protection against procedural errors."[8] The Court now encounters the dilemma of *defining* substantive rights using Due Process. Through the use of substantive due process, the Court has the power to decide which rights are "fundamental to our scheme of ordered liberty," according to *McDonald v. City of Chicago*[9]. The power of decision through Due Process, unlike the Privileges or Immunities Clause, is not grounded on a basis of previously enumerated rights, but is subject to the politics of the Court.

Since its 1873 ruling of *Slaughter-House*, the Supreme Court has furthered incorporation through the Due Process Clause. Such decisions include *Maxwell v. Dow*, 176, U.S. 581, 597 (1900), excluding the right to a grand jury from incorporation through Due Process, *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892), incorporating the protection against excessive punishment through Due Process, and finally in *re Kemmler*, 136 U.S. 436, 446 (1890), defining cruel and unusual punishment through Due Process. These holdings, including *Slaughter-House*, entrenched Due Process in the tradition of incorporation, but the Privileges and Immunities Clause can better serve as a superior basis for the incorporation of enumerated rights of individuals, as outlined by the first eight Amendments. The Eighth Amendment right of protection against "excessive fines" would be more than adequately covered by the Privileges and Immunities Clause.

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[8] William J. Stuntz, *The Collapse of American Criminal Justice* (2013).

[9] *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 767 (2010); id. at 778 ("It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")

One of the concerns about the Privileges or Immunities Clause is that, if it is used for incorporation, it could potentially pave the path towards excluding and degenerating the rights of non-citizens. However, incorporating through the Privileges or Immunities Clause will not weaken the Due Process Clause. Rather, it would expand the protections of inalienable rights that all those living under the 'flag' of the United States government. As the Journals of the Continental Congress (1774-1789) reveal, the colonists of the pre-Revolutionary era expected to be "entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England." *See* JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 60, at 68. In the aftermath of the American Revolution, state laws determined the conditions of citizenship and naturalization and their citizens expected the equal enjoyment of the rights endowed upon them by their state constitution. To remedy the potential need to establish visitation rights through treaties, Article IV of the Articles of Confederation declared that

> the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges or trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any States, to any other State, of which the owner is an inhabitant; provided also, that no imposition of duties, or restriction, shall be laid by any State on the property of the United States, or either of them.[10]

This was eventually streamlined into "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[11] As Kurt Lash notes in *The Origins of the Privileges or Immunities Clause*, there were five main approaches to Article IV in the antebellum era. First, the Clause could be considered to prohibit the federal government from discriminating on the basis of state citizenship. Second, it could be read as referring to a set of national rights that all states were bound to respect. The Clause could also be read to require states to grant visiting citizens of another state the same consideration of privileges and immunities that the state had conferred upon its own citizens. The last interpretation is perhaps the most influential of them all. In *Campbell v. Morris,* the court interpreted the clause as protecting rights conferred under state laws, ruled that these sets of rights must be extended to sojourning citizens of

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[10] *See* ARTICLES OF CONFEDERATION, art. IV, § 1 (1788).
[11] U.S. CONST., art. IV, § 2, cl. 1.

other states and limited the rights of Article IV to "personal rights."[12] Yet, some scholars have also suggested that Judge Chase in *Campbell* had interpreted Article IV to protect a set of substantive, fundamental personal rights—such as property rights—regardless of whether the rights had been protected under state law. *See, e.g.*, Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 845 (1997).

Although in there were two sets of "privileges and immunities" recognized in the Antebellum era—one conferred by state law and the other given by the constitution, the definition of citizenship is less straightforward. In an 1862 review of case law in relation to United States citizenship, United States Attorney General Edward Bates exclaimed:

> Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our laws and the records of our courts, for a clear and satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decisions in our courts, nor by the continued and consentaneus action of the different branches of our political government.[13]

He was finally able to conclude that a citizen of the United "means neither more nor less than a member of the nation."[14] Thus, taken in this context, privileges and immunities of citizens of the United States must involve the rights that are granted by the Constitution and the inalienable rights that citizens of the United States inherit.

John Bingham purposefully utilized the language of Article IV to declare the national privileges and immunities of citizens of the United States in order to accomplish his goal of protecting the Bill of Rights in the states.

IV. The Right to Be Free from Excessive Fines Remains Crucial

In Austin v. United States (1993), the Court ruled that forfeiture is a monetary punishment and as such, is protected under the umbrella of the Excessive Fines clause. *United States v. Halper* (1989) held that the remedial intent of forfeiture does not exclude it from the purview of Excessive Fines as long as it serves in part to punish.[15] A review of English and American law during and after the time of the ratification of the Eighth Amendment further illustrates that

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[12] *Campbell*, 3 H. & McH. at 553–54.
[13] 181. 10 Op. Att'y Gen. 382, 383 (1862).
[14] *Id.* at 7.
[15] United States v. Halper, 490 U. S. 435, 448.

forfeiture, including *in rem* forfeiture, was intended as punishment. The final verdict of guilt in particular, is decided by focusing on the owner's culpability—especially in cases relating to drug offenses. Justice Blackmun notes further in the majority opinion of *United States v. Halper* that despite the fact that *Helvering v. Mitchell* (1938) and *United States ex rel. Marcus v. Hess* (1943) established that proceedings and penalties were civil in nature, these cases did not consider whether these penalties may be so extreme to the point that it constitutes an excessive fine or severe punishment. Justice Blackmun also noted in the majority opinion of *Austin v. United States* that the Eighth Amendment is not limited to only criminal proceedings, and was instead, meant to limit the government's power and ability to punish. In *Peisch v. Ware*, 4 Cranch 346 (1808), the Court held that statutory *in rem* forfeiture is a form of punishment when they ruled that goods removed from custody without payment should not be forfeitable unless they were removed with consent. Chief Justice Marshall delivered the opinion this unanimous decision:

> The court is also of the opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property.[16]

Forfeiture in law thus has also been understood and justified on two theories—that the property is "guilty" of the offense and that the owner is accountable. Such assumptions rest on the notion that the owner is guilty of negligence. See *Harmony* v. *United States,* 2 How. 210 (1844); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); and *Calero-Toledo v. Pearson Yacht Leasing Co,* 416 U.S., at 683 (1974). Furthermore, not only is forfeiture a form of punishment and privy to the purview of the Excessive Fines, the Court has also previously held that the forfeiture of goods involved in customs violations is a "reasonable form of liquidated damages." See *One Lot Emerald Cut Stones* v. *United States,* 409 U.S. 232, 237 (1972). Yet, as Justice Blackmun notes in the majority opinion of *Austin v. United States* (1993), the Court has also previously ruled that the "forfeiture of property… [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law. See *United States* v. *Ward*, 448 U.S., at 254, (1980). Thus, *Austin* v. *United States* concluded that forfeiture ultimately constitutes "payment to a sovereign as punishment for some offense." See *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.,* 492 U.S., at

[16] Id., at 364.

265. Together, fines and forfeitures serve a remedial objective, and both can be abused the value of the property or of the payment becomes vastly disproportionate to the original severity of the crime or misdemeanor committed in the first place.

Although fines and forfeitures have historically fulfilled a role in punishment, however, states and local governments have been increasingly relying on them as a source of revenue. Such an approach has an exceedingly disparate effect those who can least afford to pay, and if it is not hampered through incorporation of the fines clause, state and local governments will only be further incentivized to take these punishments to excessive levels.

As a report in the Annual Review of Criminology and a paper in the University of Illinois Law Review established, fines—a pecuniary punishment imposed by court to punish an office—are the most common form of punishment utilized by local, state, and federal governments. See Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, Monetary Sanctions: Legal Financial Obligations in US Systems of Justice, 1 Ann. Rev. Criminology 471, 472 (2018); see also Wayne A. Logan & Ronald F. Wright, Mercenary Criminal Justice, 2014 U. Ill. L. Rev. 1175, 1186-96. Yet, one's inability to complete payment installments can set off a vicious cycle of accumulating fees, surcharges, and penalties that is only exacerbated if the individual is poor. Known as "poverty penalties," late fees, administrative fees, and interest fees pose significant barriers and consequences for those who are not able to pay. For Harriet Cleveland of Alabama, this tale rings especially true, as she was imprisoned in 2010 for failing to pay thousands of dollars in fees and fines that had originated from routine traffic violations. See more at Sarah Stillman, *Get Out of Jail, Inc.*, New Yorker 49 (June 23, 2014).

Without regular employment, she was forced to extreme means in order to complete her monthly payments including such acts as "renti[ing] an empty room in her home to an elderly stranger with dementia," "sift[ing] through neighbors' trash for soda cans to cash in at the scrap yard," and even stealing $50 from her son's backpack.[17] Despite the actions that she took, her debt soon increased to $4,713 in a period of just four years. When her case was turned over from the probation company back to the state, even more administrative fees and surcharges were added. Harriet Clevement is emblematic of a larger problem at hand, that fines, originally intended to punish misdemeanor and crime transformed into a means of revenue. As ArchCity Defenders, a non-profit legal aid organization in St. Louis, Missouri concluded that local governments in Ferguson were operating

[17] Stillman, supra note 7, at 49-50, 53-54.

> on the backs of their poorest and most politically vulnerable citizens… appear[ing] to targe[t] low-income and black communities with this practices. For example, fines were collected at rates more than fifteen times higher in one low-income, majority black community than in a more affluent neighboring municipality.

As low-income individuals are less likely to become influential politically, governments, often collaborating with politically-influential private entities, exacerbate the burden of such excessive fines. Furthermore, excessive fines can often lead to loss of access to government benefits such as food stamps, drivers' licenses, housing assistance, and supplemental security payments.[18] All these consequences may make it more difficult for people to gain or maintain employment—and thus, a means of paying the fines levied upon them. If the federal governments were to take such actions, the Excessive Fines Clause would prevent these cascading events from occurring. But as it is not incorporated, thus no federal constitutional protection is available.

The fact that civil asset forfeiture, the means of acquiring Mr. Timbs' Land Rover in this case, amounts to a lawsuit filed directly against a possession regardless of the owner's guilt poses problematic implications within the extent of the applications of the Excessive Fines Clause. As a piece of property does not share the same rights as an individual and is not guaranteed the right to an attorney, serious problems and obstacles to one's due-process rights have ensued. In the words of Louis Rulli, a clinical law professor at the University of Pennsylvania and a civil forfeiture export, "[t]he protections our Constitution usually affords are out the window" when it comes to civil forfeiture. The Court should expand the excessive fines language to include civil forfeiture and incorporate the Excessive Fines Clause through the Privileges or Immunities rather than the Due Process Clause. The nature of civil forfeiture as an excessive fine as well as accumulating penalties warrants the clarity that the Privileges or Immunities Clause provides. Indeed, incorporation through the Due Process Clause shifts erratically between four touchtones: "(a) enumerated rights against the federal government, i.e., 'incorporation' of the Bill of Rights, (b) rights prevalent in 1868, (c) natural rights or other morally genuine rights, and 9d) rights prevalent in contemporary practice and traditions." See more in Christopher Green, *Equal Citizenship, Civil Rights and the Constitution: The Original Sense of the Privileges or Immunities Clause*. Taylor & Francis, 2016. The Privileges or

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[18] Lawyers Comm. for Civil Rights of the San Francisco Bay Area, *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*, 9 (2016), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf

Immunities Clause however, provides a more straightforward and constitutionally appropriate means of incorporation.

The current framework for due process in civil forfeiture allows for pre-seizure hearings for deprivations of real property and post-seizure hearings for deprivations of vehicles and cash.[19] The Supreme Court, in *Fuentes* v. *Shevin* (1972),[20] has also recognized the right to a hearing at a "meaningful time" when there is a deprivation of property. However, this does not guarantee a hearing before the property is actually seized by the government.[21] The three factors considered and established in *Mathews* v. *Eldridge* (1976) has also been used to determine and compare the private and government interests in civil forfeiture cases. The three factors include: (1) private interest affected, (2) risk of erroneous deprivation, and (3) government interest.[22] The Civil Forfeiture Reform Act of 2000 has attempted to resolve some procedural difficulties in resolving civil forfeiture cases by granting courts broad authority to enter orders preserving a property's availability for trial. Yet, this still allows for a broad margin of error—especially as the government's pecuniary interest interest in civil forfeiture, often in the form of "equitable sharing" increases the incentives to seize property. In *Simms* v. *District of Columbia*, the court found that "there is an inherent risk of error when a seizure is based [on] a traffic stop: namely, its validity rests solely on the arresting officer's unreviewed probable cause determination."[23] Rather than "beyond a reasonable doubt," the burden of proof in civil forfeiture is merely a "preponderance of evidence." Such a standard makes it difficult to adequately enforce the prohibition against excessive fines as well as determine the "principle of proportionality" as described by *United States v. Bajakajian* (1998): "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." This low burden of proof, combining with the seizing agencies' financial incentives to seize property and the rampant disproportionality between the forfeiture and the underlying offense make it difficult for due process to adequately protect against excessive fines.

The lack of protection, enforcement, and limitations has caused stories such as James Morrow's to be prevalent. A twenty-seven-year-old man who worked slicing chicken strips at a Tyson plant in Pine Bluff, Arkansas, Mr. Morrow found

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[19] Ford, Timothy J. (2015). Due Process for Cash Civil Forfeitures in Structuring Cases. *Michigan Law Review,114*(3), 466-474. Retrieved from https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1234&context=mlr.

[20] *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972),

[21] *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-680 (1974)

[22] Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

[23] Simms v. District of Columbia, 872 F. Supp. 2d 90, 101-102 (D.D.C. 2012).

himself pulled over one day for "driving too close to the white line." Three-thousand-and-nine-hundred dollars were taken from him. Despite his protests that he was on his way to receive dental care at a Houston mall, the arresting officers maintained that his stories of travel were inconsistent and stated that they detected the "odor of burned marijuana" though none were discovered in the car. He spent a night in jail before he finally consented to sign away his property and was released with no car, no phone, and no money. See more at Sarah Stillman, *Taken*, New Yorker (Aug. 12, 2013). No doubt, forfeiture practices are financially lucrative. And much like fines, they are financially devastating, as they can work to deprive individuals of the monetary assets that they need for basic necessities.

The Founding Fathers recognized the need to protect against the governments' overstepping of bounds in the form of levying excessive taxes and exacting excessive monetary punishments. The forerunner of the Excessive Fines Clause dates back to the Virginian legislature's excessive fines clause, which in turn found inspiration from the English Bill of Rights, which found its roots in the Magna Carta.[24] Today, the practice of civil forfeiture and "poverty penalties" operate as excessive fines that disproportionately affect the very poor. Furthermore, since incentives proliferate at the state level, state legislatures are motivated to stymie the creation of laws that result in excessive fines and forfeitures. As state courts may not be particularly incentivized to police them—as they often fund the courts themselves[25]—cases such as Tyson Timbs', James Morrow's, and Harriet Cleveland's have been allowed to occur without intervention and protection. Therefore, the Excessive Fines Clause must be incorporated against the States, and the Privileges and Immunities Clause is the most appropriate avenue to do so.

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[24] Browning- Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266-68 (1989)

[25] Matt Ford, *The Problem with Funding Government Through Fines*, The Atlantic (Apr. 2, 2015), https://www. theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/.

CONCLUSION

An America in which the Due Process Clause allows for the state governments' violation of the privileges or immunities of citizens does not have a place in our future. The Supreme Court should reconsider its past decisions on incorporation through Due Process in this case because of the clause's inadequate protection of the rights of citizens. According to the United States Drug Enforcement Administration, $12 billion is made annually through civil forfeiture. While civil forfeiture is important in discouraging crime, it should be regulated under the wary eye of the federal government for the protection against excessive fines. Citizens should be shielded from the possibility of being taken advantage of by their local governments. Incorporating this protection would grant federal authority over judging on Excessive Fines, subjecting States to a set standard. This Court should reverse the judgment of the Indiana Supreme Court and incorporate the Eighth Amendment's Excessive Fines Clause through the Privileges or Immunities Clause of the Fourteenth Amendment.

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