

# **TABLE OF CONTENTS**

QUESTIONS PRESENTED - 2

TABLE OF AUTHORITIES - 3

STATEMENT OF ARGUMENT - 9

Argument I: The Land Rover is an excessive fine  
- 10

Argument II: The Freedom From Excessive Fines  
is an Essential Component of Liberty -12

Argument III: The Freedom from excessive fines is  
deeply rooted in our nation's history - 18

Argument IV: The Freedom From excessive fines  
can be incorporated with either the due process  
clause or the privileges and immunities clause - 23

CONCLUSIONS - 24

## **QUESTIONS PRESENTED**

Tyson Timbs purchased a Land Rover for \$42,000 dollars in the year 2013 using money from his father's life insurance policy. Mr. Timbs used this Land Rover to transport heroin within the state of Indiana and was arrested on two charges of felony dealing and conspiracy to commit theft. Timbs pleaded guilty to one charge of felony dealing and one charge of conspiracy to commit theft. The lower court judge sentenced him to 6 years, five of which would be suspended, which was the minimum sentencing time for the crime. Timbs also paid \$1,200 in fines. After this sentencing, the state sought the forfeiture of Mr Timbs' Land Rover; however, the trial court ruled that this would be an excessive fine prohibited by the Eighth Amendment. The state appealed and the appeals court did not reverse the trial court's ruling. When the state appealed again to the state supreme court, the supreme court said that states were not bound to the excessive fines clause as the supreme court has most recently stated that there no definitive answer as to whether the excessive fines clause has been incorporated yet.

Is the forfeiture of the Land Rover an excessive fine?

Is the Amendment 8 Clause 2 also known as the Excessive Fines Clause incorporated to the states through Amendment 14§1?

## TABLE OF AUTHORITIES

### Cases

<i>Adamson v. California</i> , 332 U.S. 46 (1947) .....	23
<i>Austin v. United States</i> , 509 U.S. 602 (1993).....	9, 10
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986).....	17
<i>Gitlow v. New York</i> , 268 U.S. 652 (1925).....	12
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010).....	13, 14, 15, 16, 24
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977).....	9, 17
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937).....	9, 12, 13
<i>Robinson v. California</i> , 370 U.S. 660 (1962).....	15, 16
<i>Slaughterhouse Cases</i> , 83 U.S. 36 (1872).....	12, 23
<i>STATE v. TIMBS</i> 84 N.E.3d 1179 (2017).....	11
<i>Spalding v. New York</i> , 45 U.S. 21 (1846).....	13
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998)..	9, 10, 11, 22, 24
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1875).....	23

*Washington v. Glucksberg*, 521 U.S. 702  
(1997).....17

**Constitutional Provisions**

United States Amendment VIII.....9, 10, 12, 13, 14, 15, 16, 17,  
18, 19, 21, 22, 23

United States Amendment XIV §1..... 9, 10, 12, 17, 21, 22, 23,  
24

**Statutes and Codes**

**Other Authorities**

A&E Television Networks. "Black Codes." History.com. Last  
modified August 21, 2018. Accessed February 23, 2019.  
<https://www.history.com/topics/black-history/black-codes>.....  
.....21

American Civil Liberties Union. "IN THE Supreme Court of the  
United States MICHAEL B. KINGSLEY, v STAN  
HENDRICKSON AND FRITZ DEGNER, ON WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT BRIEF FOR AMICI  
CURIAE AMERICAN CIVIL LIBERTIES UNION AND  
AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN  
SUPPORT OF PETITIONER." N.d. PDF.....15,16

- Bill of Rights Institute. "The Rights of the Colonists." Bill of Rights Institute. Accessed February 23, 2019.  
<https://billofrights.org/founding-documents/primary-source-documents/the-rights-of-the-colonists/>.....20
- Brutus. "Brutus II." Teaching American History. Accessed February 23, 2019.  
<http://teachingamericanhistory.org/library/document/brutus-ii/>.....  
 .....16
- Bullock, Scott, Marian R. Williams, Scott Burns, and Tim Lynch. "Policing for Profit: The Abuse of Civil Asset Forfeiture." Lecture, April 28, 2010.....15
- Calabresi, Steven G., Sarah E. Agudo, and Kathryn L. Dore. "State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition." *Southern California Law Review* 85 (2012): 1451-550. Accessed February 23, 2019.  
<https://heinonline.org/HOL/LandingPage?handle=hein.journals/sca185&div=48&id=&page=>.....17
- Colgan, Beth A. "The Excessive Fines Clause: Challenging the Modern Debtors' Prison." *UCLA Law Review* 65, no. 2 (2018): 5-76.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3148023](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148023).....  
 .....14

- The Colonial Williamsburg Foundation. "Virginia Declaration of Rights." The Colonial Williamsburg Foundation.  
<https://www.history.org/almanack/life/politics/varights.cfm>.....  
 .....20
- "Congressional Globe Debates and Proceedings, 1833-1873." In *Library of Congress*. Library of Congress.  
<http://memory.loc.gov/ammem/amlaw/lwecglink.html#anchor39...>  
 .....21
- Constitution.org. "Brutus." Constitution Society. Accessed February 23, 2019.  
<https://www.constitution.org/afp/brutus00.htm>.....16
- ConText. "An Annotation on Passage 45 of the Magna Carta." ConText by Montpelier. Accessed February 23, 2019.  
<https://context.montpelier.org/document/917/passage/45/annotation/1280>.....13
- Georgetown College. "EDMUND S. MORGAN'S ARGUMENT ON THE SEPARATION OF CHURCH AND STATE IN MASSACHUSETTS BAY." Georgetown College. Last modified February 9, 1999. Accessed February 23, 2019.  
<http://spider.georgetowncollege.edu/htallant/courses/his338/morgan.htm>. .... 20
- Haynes, Gerald D. "Debt Slavery." In *Encyclopaedia Britannica*. Encyclopaedia Britannica.  
<https://www.britannica.com/topic/debt-slavery>. .... 22

"Incorporation Doctrine." In *Wex Legal Dictionary*. Cornell Law School Legal Information Institute. Accessed February 23, 2019. [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine). .... 12

Jacob, Giles. *Every man his own lawyer: or, A summary of the laws of England, in a new and instructive method*. N.p., 1779. .... 19

James Madison, Federalist no. 51, in Yale Avalon Project ..... 14

Johnson, George W., ed. *The Fairfax correspondence. Memoirs of the reign of Charles the First*. London: R. Bentley, n.d. .... 19

Lloyd, Gordon. "Elliot's Debates: Volume 3." Teaching American History. Accessed February 23, 2019. <http://teachingamericanhistory.org/ratification/elliott/vol3/june17/>. ..... 21

McClean, Nicholas. "Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause." *Social Science Research Network*, February 4, 2016, 833-902. Accessed February 23, 2019. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2210674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210674). ..... 13

"Privileges and Immunities Clause." In *Cornell Law School Legal Information Institute*. Cornell Law School. [https://www.law.cornell.edu/wex/privileges\\_and\\_immunities\\_clause](https://www.law.cornell.edu/wex/privileges_and_immunities_clause). ..... 23

- Public Broadcasting Service. "Black Codes and Pig Laws." PBS. Accessed February 23, 2019.  
<http://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/>. . . . . 22
- Ries, Linda A. "Pennsylvania Charter of Privileges." In *Encyclopedia of Greater Philadelphia*. Encyclopedia of Greater Philadelphia.  
<https://philadelphiaencyclopedia.org/archive/pennsylvania-charter-of-privileges/>. . . . . 20
- Somin, Ilya. "Supreme Court Rules that Excessive Fines Clause Applies to States and Constrains Civil Asset Forfeiture." Reason.com. Last modified February 20, 2019. Accessed February 23, 2019.  
<https://reason.com/volokh/2019/02/20/supreme-court-rules-that-excessive-fines>. . . . . 21
- Stevenson, Bryan A. "THE EIGHTH AMENDMENT." Constitution Center. Accessed February 23, 2019.  
<https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii>. . . . . 15, 18, 19
- Stubbs, William. *The Constitutional History of England in Its Origin and Development*. N.p.: The Clarendon press, n.d. .... 18
- ThompsonReuters. "Indiana Drug Trafficking Laws." FindLaw. Accessed February 23, 2019.  
<https://statelaws.findlaw.com/indiana-law/indiana-drug-trafficking-laws.html>. . . . . 11



- United States Department of Justice Civil Rights Division.  
 "Investigation of the Ferguson Police Department." News release.  
 March 4, 2015. Accessed February 23, 2019.  
[https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). ... 14
- Vallance, Edward. "The Glorious Revolution." British  
 Broadcasting Corporation. Last modified February 17, 2011.  
 Accessed February 23, 2019.  
[http://www.bbc.co.uk/history/british/civil\\_war\\_revolution/glorious\\_revolution\\_01.shtml](http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml). ..... 19
- Walker, J. "The Censorship of the Press During the Reign of  
 Charles II." *History*, n.s., 35, no. 125 (October 1950): 219-38.  
 Accessed February 23, 2019.  
[https://www.jstor.org/stable/24402148?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/24402148?seq=1#page_scan_tab_contents). ..... 19
- Warren, Earl. *A Republic, If You Can Keep It*. N.p.: Times Books,  
 1972. .... 20

## **SUMMARY OF ARGUMENT**

In order to determine whether Timbs is protected from the forfeiture of his Land Rover, two conditions must be met. The first is that the forfeiture of the Land Rover qualifies as an excessive fine, and the second is that the Excessive Fines Clause applies to the states through the Fourteenth Amendment.

The Supreme Court has established a clear and precise definition for what constitutes an excessive fine. *United States v.*

*Bajakajian*, 524 U.S. 321 (1998). This definition also applies to in rem forfeitures as well as in personam forfeitures. *Austin v. United States*, 509 U.S. 602 (1993). The forfeiture ordered by the state of Indiana clearly fits the standards set by these two cases.

While the state of Indiana believes that it is not held accountable to the excessive fines clause of the eighth amendment, this clause does fit the requirements for incorporation using substantive due process. This is because the freedom from excessive fines is a right that is fundamental to our scheme of liberty, *Palko v. Connecticut*, 302 U.S. 319 (1937) and deeply rooted in our nation's history. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). This is because there is significant scholarship and Anglo-American legal tradition surrounding this right and there is history of both respect and disrespect of this essential freedom in our nation's history.

It is also possible to incorporate this amendment through the privileges and immunities clause of the fourteenth amendment §1. This is because the freedom from excessive fines is an immunity associated with citizenship of the United States. The method of incorporation would have no practical effect on the upshot of this case decision.

## **I: The Forfeiture of the Land Rover is an Excessive Fine**

This in rem forfeiture can qualify as an excessive fine. In the case *Austin v United States* justice Blackmun asserted in the decision that “that forfeiture under these provisions [in rem] constitutes ‘payment to a sovereign as punishment for some offense,’ and, as such, is subject to the limitations of the Eighth Amendment Excessive Fines Clause.” *Austin v. US* 509 U.S. 602

(1993). The *Austin* case mirrors *Timbs*' case in many ways. They both were subject to in rem forfeitures as a result of minor drug dealing incidents and both forfeitures were flagged as unconstitutionally excessive. Now, the *Austin* case has cleared the way for the in rem forfeiture of *Timbs*' car to be reviewed as an excessive fine.

The clearest definition for what constitutes an excessive fine was established in the case *Bajakajian v United States*. Justice Clarence Thomas claimed "the Court held that, to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: The property forfeited must be an 'instrumentality' of the crime committed, and the value of the property must be proportional to the culpability of the owner." *United States v. Bajakajian*, 524 U.S. 321 (1998). By instrumentality, the court meant that the property seized was essential to the completion of the crime. The Court also, in this case set a principle as to how fines could be declared unconstitutional. Thomas wrote in the decision "The first [standard], which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. 321 (1998) The legislature of Indiana did in this case set the standard for what would be an excessive fine. According to Indiana state law, the maximum fine in *Timbs*' felony dealing was \$10,000.<sup>1</sup> While the fine of \$1,200 meets this standard, the forfeiture of the Land Rover, which was valued at \$42,000 dollars

---

<sup>1</sup> ThompsonReuters, "Indiana Drug Trafficking Laws," FindLaw, accessed February 23, 2019, <https://statelaws.findlaw.com/indiana-law/indiana-drug-trafficking-laws.html>.

did not comply with the legislative guidelines. The second standard set by the *Bajakajian* case is “that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise” and as such “the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination ... must compare the amount of the forfeiture to the gravity of the defendant’s offense. If the amount of the forfeiture is grossly disproportionate to the gravity of the defendant’s offense, it is unconstitutional.” *United States v. Bajakajian*, 524 U.S. 321 (1998). Three lower courts have already reviewed the fine on this guideline and determined that the forfeiture of the Land Rover is grossly disproportionate to the gravity of the offense, a single felony dealing charge of dealing under \$400 worth of heroin. *State v. Timbs* 84 N.E.3d 1179 (2017).

## **II: The Freedom From Excessive Fines is an Essential Component of Liberty**

The question that must be answered next is whether or not the Excessive Fines Clause applies to the states through the Fourteenth Amendment. If this clause of the Eighth Amendment is incorporated to the states, it would mean that the forfeiture of Mr. Timbs levied by the state was not in line with the Constitution. The judicial theory of incorporation began in the 1920s, though it could have theoretically begun in 1868 with the ratification the Fourteenth Amendment.<sup>2</sup> The first truly significant instance in which the Supreme Court ruled in favor of incorporating the Bill of Rights to the states was *Gitlow v. New York* (1925). In this case, the Supreme Court found that the First Amendment guarantee to

---

<sup>2</sup> "Incorporation Doctrine," in *Wex Legal Dictionary* (Cornell Law School Legal Information Institute), [Page #], accessed February 23, 2019, [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine).

freedom of speech extended to the state and local governments. *Gitlow v. New York*, 268 U.S. 652 (1925). This was a contrast to the decision reached in the *Slaughterhouse Cases* (1873), in which the Supreme Court ruled against incorporating the Privileges and Immunities Clause of the Fifteenth Amendment to the states. *Slaughterhouse Cases*, 83 U.S. 36 (1872). *Gitlow v. New York* overturned the precedent of *not* applying the Bill of Rights to the states, beginning the process known today as incorporation. *Gitlow v. New York*, 268 U.S. 652 (1925).

The Court has, on several occasions set forth guiding principles for how a right can be incorporated. The first established in *Palko v. Connecticut*, states that rights “of the very essence of a scheme of ordered liberty” are applied to the states through the Due Process Clause of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937). This is certainly true for the Excessive Fines Clause as it has been embodied throughout history through the principle of *salvo contenimento*. This principle states that no fine should leave the perpetrator financially ruined.<sup>3</sup> This principle has existed since the advent of the freedom from excessive fines in the Magna Carta, upon which the English Bill of rights guarantee is based which was restated in the Virginia Declaration of rights that Madison used as the basis for the Eighth Amendment.<sup>4</sup> The presence of the fundamental principle of *salvo contenimento* is supported by the decision in *Spalding v. New York*

---

<sup>3</sup> Nicholas McClean, "Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause," *Social Science Research Network*, February 4, 2016, 835, accessed February 23, 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2210674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210674).

<sup>4</sup> 1. ConText, "An Annotation on Passage 45 of the Magna Carta," ConText by Montpelier, accessed February 23, 2019, <https://context.montpelier.org/document/917/passage/45/annotation/1280>

which declared a fine excessive as it would be impossible for the fine to be paid given the financial status of the accused. *Spalding v. New York*, 45 U.S. 21 (1846)

A corollary to the idea established in *Palko v Connecticut* is the idea established in *McDonald v Chicago* that the right must not only be historically fundamental but must remain fundamental today. *McDonald v. Chicago*, 561 U.S. 742 (2010). Today, the problem of excessive fines is as serious as it has ever been; unfortunately, it is also as corrupt as it has ever been. One example of this is that the state of Indiana, the state in which this case originated, give prosecutors a fraction of the money gained from forfeitures.<sup>5</sup> Additionally, in Indianapolis, the police offices set goals for that year's intake in money from civil forfeiture.<sup>6</sup> As James Madison wrote in *Federalist 51*, "If angels were to govern men, neither external nor internal controls on government would be necessary."<sup>7</sup> This idea is the very reason that the Bill of Rights exists; the government must not be given free rein to simply do as they please. Furthermore, Associate Justice Stephen Breyer wrote in his *McDonald v. Chicago* dissent that fines tend to target minority groups. *McDonald v. Chicago*, 561 U.S. 742 (2010) With the United States as diverse as it has ever been, this is a problem more now than ever.

---

<sup>5</sup> Beth A. Colgan, "The Excessive Fines Clause: Challenging the Modern Debtors' Prison," *UCLA Law Review* 65, no. 2 (2018): 22, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3148023](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148023).

<sup>6</sup> . United States Department of Justice Civil Rights Division, "Investigation of the Ferguson Police Department," news release, March 4, 2015, accessed February 23, 2019, [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>7</sup> James Madison, *Federalist* no. 51, in Yale Avalon Project [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp)

The above issues are not the only current problems of excessive fines in today's society. For instance, people can be and are jailed due to being in debt from an excessive fine. In Ferguson, Missouri, as an example, issuing arrest warrants for unpaid debts has been common practice.<sup>8</sup> In other places, there is an "auto-jail" policy for those that do not pay fines on time.<sup>9</sup> In addition, the idea of a fine in general is inherently beneficial to the government. When a citizen is fined, the money goes to the state or federal government, meaning there is an unquestionable incentive for those in power to try to get as much money possible in cases involving fines. Fortunately, Anglo-American societies have done an excellent job in general of outlawing excessive fines, although these rights are only consistently guarded. In fact, this guarantee goes back all the way to the Magna Carta.<sup>10</sup> Today, though, it seems as though excessive fines take place far too often. In 2012, twenty-six states and the District of Columbia combined to collect \$254 million.<sup>11</sup> This would be greatly reduced if the Excessive Fines Clause was incorporated.

---

<sup>8</sup> United States Department of Justice Civil Rights Division, "Investigation of the Ferguson."

<sup>9</sup> American Civil Liberties Union, "IN THE Supreme Court of the United States MICHAEL B. KINGSLEY, v STAN HENDRICKSON AND FRITZ DEGNER, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN SUPPORT OF PETITIONER," n.d., PDF.

<sup>10</sup> Bryan A. Stevenson, "THE EIGHTH AMENDMENT," Constitution Center, accessed February 23, 2019, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii>.

<sup>11</sup> Scott Bullock et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture" (lecture, April 28, 2010).

In terms of incorporation, *McDonald v. Chicago* also emphatically said that the rights listed in the Bill of Rights must be applied “with full force to both the Federal Government and the States.” *McDonald v. Chicago*, 561 U.S. 742 (2010). With the Bill of Rights slowly being incorporated to the states the fact that the majority opinion included this pro-total incorporation language hints that the precedent of the Supreme Court would support the incorporation of the Eighth Amendment right to be free of excessive fines.

Additionally, it should be noted that, of the three clauses that make up the Eighth Amendment, the only one that remains unincorporated is the Excessive Fines Clause. In *Robinson v. California* (1962), the Supreme Court ruled in favor of incorporating the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). In *McDonald v. Chicago*, the majority opinion listed the Eighth Amendment protection against excessive bail as an incorporated right, saying “the only rights not fully incorporated are (1) the Third Amendment’s protection against quartering of soldiers; (2) the Fifth Amendment’s grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment’s prohibition on excessive fines.” *McDonald v. Chicago*, 561 U.S. 742 (2010). Practically every right listed in the Bill of Rights has been incorporated, including two of the three listed in the Eighth Amendment, with the exception being the Excessive Fines Clause.

One of the most well-known voices advocating against the ratification of the United States Constitution went by the pseudonym “Brutus.” Differing in ideology from “Publius” of *The Federalist Papers*, Brutus was an Anti-Federalist, who advocated



for a more localized system of governance than the Federalists' plan to create a three-branched federal government.<sup>12</sup> Focused on the rights of the people, "Brutus II" argued that excessive fines needed to be outlawed in order to preserve the freedom of the people.<sup>13</sup> The bill of rights eventually granted his request. When the Bill of Rights was ratified, a majority of the existing states had a prohibition on excessive fines.<sup>14</sup> It was from these state bills of rights that the Founding Fathers gathered ideas for the Bill of Rights, and this is no exception. The purpose of the federal bill of rights was to restrict the federal government, that is, until the theory of incorporation through the Fourteenth Amendment came about. The state bills of rights were designed to restrict the state governments. Since bans on excessive fines were outlawed in most states at the time of the ratification of the federal bill of rights, it is not unreasonable to hypothesize that the Founding Fathers assumed that the state prohibitions on excessive fines would continue at the state level, whereas the prohibition of excessive fines in the Bill of Rights was intended to restrict federal power only. That being said, through the modern theory of incorporation, the rights listed in the federal bill of rights automatically apply to the states, regardless of whether or not those same rights are listed in the state bill of rights.

---

<sup>12</sup> Constitution.org, "Brutus," Constitution Society, accessed February 23, 2019, <https://www.constitution.org/afp/brutus00.htm>.

<sup>13</sup> Brutus, "Brutus II," Teaching American History, accessed February 23, 2019, <http://teachingamericanhistory.org/library/document/brutus-ii/>.

<sup>14</sup> Steven G. Calabresi, Sarah E. Agudo, and Kathryn L. Dore, "State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition," *Southern California Law Review* 85 (2012): accessed February 23, 2019, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/scal85&div=48&id=&page=>.

### **III: The Freedom from excessive fines is deeply rooted in our nation's history**

Another principle of Selective Incorporation was introduced in *Moore v City of East Cleveland*, and embraced in cases such as *Bowers v. Hardwick* and *Washington v Glucksberg*. This principle guarantees substantive due process to rights that are “Deeply Rooted in our nation’s history.” *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Washington v. Glucksberg*, 521 U.S. 702 (1997). The freedom from excessive fines clearly meets this requirement. The language of the Excessive Fines Clause is copied verbatim from the Virginia Declaration of Rights, which had borrowed the idea from the English Bill of Rights. The English Bill of Rights actually restated the right which was first introduced in the Magna Carta;<sup>15</sup> however, the history of English monarchs shows a clear disregard for the principle which necessitated its inclusion and strengthening in the English Bill of Rights.

The reason for including the freedom from excessive fine in the Magna Carta was to ensure that the only reason to administer justice was to ensure a safe and judicious society, not to collect revenue. This is an essential right. Administering justice for the purpose of collecting revenue violated the principles upon which American justice is founded upon. It was not only fear of excessive fines that prompted this right’s inclusion in the Magna Carta, it was experiences as well. One 19th century historian suggested that the only reason why justice was ever administered by Norman kings was for profits.<sup>16</sup> As a result, the Magna Carta sought to

---

<sup>15</sup> Stevenson, "THE EIGHTH," Constitution Center.

<sup>16</sup> William Stubbs, *The Constitutional History of England in Its Origin and Development* (n.p.: The Clarendon press, n.d.

protect the rights of the innocent and the accused by asserting “Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment.”<sup>17</sup>

Unfortunately, the Magna Carta did not protect the rights of Englishmen enough, as future kings would continue to abuse fines as a method of administering justice and collecting revenue. King Charles I used fines as a primary way of limiting the freedom of speech, raising revenue, and limiting parliamentary authority.<sup>18</sup> He would often fabricate offenses by granting permits to alter land but then exorbitantly fine the owner for building contrary to the code he had established. He also enacted fines based on other issues of land ownership.<sup>19</sup> Charles I’s sons also abused fines. King Charles II would use them to financially ruin his political opposition.<sup>20</sup> The offenses were worst in the final years before the Glorious Revolution when fines reached their peak.<sup>21</sup> Because of this, when James II abdicated and turned the throne to King William of Orange and Queen Mary, parliament included a protection against unfair fines in the English Bill of Rights that the new monarchs

---

<sup>17</sup> Giles Jacob, *Every man his own lawyer: or, A summary of the laws of England, in a new and instructive method* (n.p., 1779).

<sup>18</sup> George W. Johnson, ed., *The Fairfax correspondence. Memoirs of the reign of Charles the First* (London: R. Bentley, n.d.)

<sup>19</sup> Johnson, *The Fairfax*,

<sup>20</sup> J. Walker, "The Censorship of the Press During the Reign of Charles II," *History*, n.s., 35, no. 125 (October 1950): accessed February 23, 2019,

[https://www.jstor.org/stable/24402148?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/24402148?seq=1#page_scan_tab_contents).

<sup>21</sup> Edward Vallance, "The Glorious Revolution," British Broadcasting Corporation, last modified February 17, 2011, accessed February 23, 2019,

[http://www.bbc.co.uk/history/british/civil\\_war\\_revolution/glorious\\_revolution\\_01.shtml](http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml).

promised to follow. The exact wording of which was “[t]hat excessive Bail ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted.”<sup>22</sup>

American colonists had a particularly strong connection to the issue of excessive fines. Puritan politicians were often subjugated to disproportional fines for speaking out against the Church of England.<sup>23</sup> In addition, William Penn, the proprietor of Pennsylvania colony was also fined 40 marks for keeping his quaker hat on during a session of English Court.<sup>24</sup> This prompted Penn to include in the charter of his colony that fines would be in proportion to the gravity of the offense.<sup>25</sup> Since American colonists believed that they possessed all the rights of Englishmen,<sup>26</sup> more states began to protect against excessive fines in their charters and declarations of rights. Most notably Virginia included it in their

---

<sup>22</sup> Bryan A. Stevenson, "THE EIGHTH AMENDMENT," Constitution Center, accessed February 23, 2019, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii>.

<sup>23</sup> Georgetown College, "EDMUND S. MORGAN'S ARGUMENT ON THE SEPARATION OF CHURCH AND STATE IN MASSACHUSETTS BAY," Georgetown College, last modified February 9, 1999, accessed February 23, 2019, <http://spider.georgetowncollege.edu/htallant/courses/his338/morgan.htm>.

<sup>24</sup> Earl Warren, *A Republic, If You Can Keep It* (n.p.: Times Books, 1972), 113-115.

<sup>25</sup> Linda A. Ries, "Pennsylvania Charter of Privileges," in *Encyclopedia of Greater Philadelphia* (Encyclopedia of Greater Philadelphia), <https://philadelphiaencyclopedia.org/archive/pennsylvania-charter-of-privileges/>.

<sup>26</sup> Bill of Rights Institute, "The Rights of the Colonists," Bill of Rights Institute, accessed February 23, 2019, <https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-rights-of-the-colonists/>.

1776 Declaration of Rights.<sup>27</sup> When the Articles of Confederation were replaced with the constitution, there was controversy over a lack of a bill of rights. The lack of freedom from excessive fines was one of the most commonly cited grievances showing that it was perceived as essential and immutable. Not everyone agreed, however, that it was even essential to enumerate it. Notable Virginia politician Edmund Randolph even said “As to the exclusion of excessive bail and fines, and cruel and unusual punishments, this would follow of itself, without a bill of rights.”<sup>28</sup> Nonetheless it was included as a provision in the bill of rights.

Many states actually included provisions against excessive fines in their state constitutions. In fact, by the time the Fourteenth Amendment was ratified, thirty-five out of thirty-seven states protected against excessive fines.<sup>29</sup> This does not, however, mean that all states respected this right. In fact a primary motivation for the passage of the Fourteenth Amendment, whose original purpose according to its drafter congressman John Bingham was to make the bill of rights binding to the states.<sup>30</sup> The protection against excessive fines was particularly important to the total incorporation

---

<sup>27</sup> The Colonial Williamsburg Foundation, "Virginia Declaration of Rights," The Colonial Williamsburg Foundation, <https://www.history.org/almanack/life/politics/varights.cfm>.

<sup>28</sup> Gordon Lloyd, "Elliot's Debates: Volume 3," Teaching American History, accessed February 23, 2019, <http://teachingamericanhistory.org/ratification/elliott/vol3/june17/>.

<sup>29</sup> Ilya Somin, "Supreme Court Rules that Excessive Fines Clause Applies to States and Constrains Civil Asset Forfeiture," Reason.com, last modified February 20, 2019, accessed February 23, 2019, <https://reason.com/volokh/2019/02/20/supreme-court-rules-that-excessive-fines>.

<sup>30</sup> Congressional Globe Debates and Proceedings, 1833-1873," in *Library of Congress* (Library of Congress), <http://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor39>.

imagined by Bingham and his contemporaries as it related to the Black Codes of former confederate states which were designed to limit economic freedom and mobility of freedmen.<sup>31</sup> Perhaps no law accomplished this more than the system of vagrancy and labor contracts. This system forced free slaves into strict labor contracts. A person who was not on his way to work or at work in his labor contract would be fined for vagrancy.<sup>32</sup> These fines were nearly impossible to pay with the low salary of a labor contract, so when a debtor was unable to pay he or she would be sent to debt peonage, which was forced labor and has been called by some “slavery by another name.”<sup>33</sup> There were other laws limiting social mobility and enforcing the labor contract system, and most of them carried fines that would be considered disproportionate under the standards set by the *Bajakajian* case. Holding the states to the Excessive Fines Clause could have prevented this atrocity.

The chilling history of abuse of fining powers in pre-colonial English society highlights the dangers of a government that relies on fines as revenue as some states do today as described previously; the appalling chronicle of the black codes shows how the use of fines can be exploited for political purposes within our own states despite the national government restricting excessive fines at the national level. There is clearly history of both protection of the freedom from excessive fines and cautionary tales

---

<sup>31</sup> A&E Television Networks, "Black Codes," History.com, last modified August 21, 2018, accessed February 23, 2019, <https://www.history.com/topics/black-history/black-codes>.

<sup>32</sup> Public Broadcasting Service, "Black Codes and Pig Laws," PBS, accessed February 23, 2019, <http://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/>.

<sup>33</sup> Gerald D. Haynes, "Debt slavery," in *Encyclopaedia Britannica* (Encyclopaedia Britannica), <https://www.britannica.com/topic/debt-slavery>.

about a lack thereof throughout Anglo-American history and legal tradition.

**IV: The Freedom from excessive fines can be incorporated with either the Due Process Clause or the Privileges and Immunities Clause**

While the majority of this analysis focuses on incorporation through the Due Process Clause, as is the precedent, we suggest that incorporation through the Privileges and Immunities Clause is possible as well. The Privileges and Immunities Clause was the clause originally intended to apply the bill of rights to the states.<sup>34</sup> Many interpret the *Slaughter-House Cases* as a repudiation of that idea; however, this is not completely true. As justice Hugo Black cited in his dissent on *Adamson v. California*, no specific “privileges and immunities” were questioned during the case. He says “[T]he state law under consideration in the Slaughterhouse cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was ‘no direct constitutional provision against a monopoly.’ The argument did not invoke any specific provision of the Bill of Rights, but urged that the state monopoly statute violated ‘the natural right of a person’ to do business and engage in his trade or vocation.” *Adamson v. California*, 332 U.S. 46 (1947) This means that it is only specific amendments that have explicitly been barred from incorporation through the Privileges and Immunities Clause, such as the First and Second Amendments in *US v. Cruikshank* cannot be incorporated in this way without reversing a decision. *United States v. Cruikshank*, 92 U.S. 542 (1875). The Excessive

---

<sup>34</sup> "Privileges and Immunities Clause," in *Cornell Law School Legal Information Institute* (Cornell Law School), [https://www.law.cornell.edu/wex/privileges\\_and\\_immunities\\_clause](https://www.law.cornell.edu/wex/privileges_and_immunities_clause).

Fines Clause could be incorporated with the Privileges and Immunities Clause because no case has ever barred it from incorporation using this clause. Many reasons why the freedom from excessive fines is a privilege and immunity of citizenship of the United States are listed in the explanation for why the clause is essential to liberty and deeply rooted in our nation's' history. There is no practical difference between incorporation through the Due Process Clause and incorporation through the Privileges and Immunities Clause except perhaps that incorporation through the Privileges and Immunities Clause would not apply to non-citizens; however, this is uncertain as no definitive decision has been made on this hypothesis and since Tyson Timbs is a citizen it would make no difference in the ruling on the case. The court may choose to incorporate using the traditional due process method or using the privileges and immunities clause as proposed by Justice Thomas in his concurrence on *McDonald v Chicago* as they would have the same effect. *McDonald v. Chicago*, 561 U.S. 742 (2010).

## **CONCLUSION**

The case of Tyson Timbs allows the court to right a wrong and stop corruption as Timbs' fine clearly fits the standards for excessive fines set forth by the *Bajakajian* case and the freedom from excessive fines is clearly a fundamental and immutable right. *United States v. Bajakajian*, 524 U.S. 321 (1998). The history of abusive fines in English and American history highlights the dangers of a government that uses fines to limit rights and that rely on fines as a source of revenue. For these reasons, the states must be held accountable to these rights as well, especially since certain states are great abusers of fines and forfeitures. Both the Due Process Clause and the Privileges and Immunities Clause can serve



as the vehicle of incorporation and it would have no practical effect on the outcome of the case. Due process incorporation would rest on the idea that freedom from excessive fines is a fundamental right deeply rooted in our nation's history, while incorporation through the privileges and immunities clause is based on the idea that freedom from excessive fines is a right associated with citizenship of the United States. The freedom from excessive fines is an immutable right and it is the duty of the justice system to ensure that the American legal tradition reflects this fact.