Fourteenth Amendment — Due Process Clause — Incorporation Doctrine — Timbs v. Indiana

The Eighth Amendment[1] guarantees the right to be free from excessively harsh punishment at the hands of the government. Yet in spite of the amendment's deep roots in U.S. history and jurisprudence, a critical part of it had been left behind in the incorporation project: the Excessive Fines Clause.[2] Last Term, in *Timbs v. Indiana*,[3] the Supreme Court finally held that the clause was incorporated against the states,[4] and further, that it encompassed civil forfeitures in addition to criminal fines.[5] Notwithstanding this expansion of rights, *Timbs* may be more notable for the protection it did not guarantee. Historically, an individual's ability to pay a fine or forfeiture was an essential factor in determining the fine's excessiveness. Yet even after acknowledging this history, the Court in *Timbs* refrained from setting out a test that would consider a defendant's ability to pay. Instead, it implicitly left that choice to the lower courts. But federal and state courts have never agreed on whether and how to consider a fine's impact on a defendant's livelihood, and appear particularly reluctant to consider ability to pay in forfeiture cases. And all too often, forfeitures — especially state forfeitures — that are actually excessive are not recognized as such without analyzing an individual's ability to pay. Despite the long-awaited incorporation it achieved, *Timbs* may therefore leave some individuals effectively unprotected by the Excessive Fines Clause.

In 2013, Tyson Timbs purchased a Land Rover for $42,058.30, using life insurance proceeds he received upon the death of his father.[6] Timbs had previously become addicted to opioids after being prescribed them for "persistent" pain; when his prescription expired, he began buying opioids from dealers and eventually became addicted to heroin.[7] Timbs subsequently used the Land Rover to drive between Marion, Indiana, and Richmond, Indiana, to buy heroin.[8] When Timbs's funds ran out, a confidential informant directed him to undercover officers posing as heroin buyers.[9] Timbs sold heroin to the officers on two occasions, using

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[1] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[2] *Cf.* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (incorporating the Excessive Bail Clause); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating the Cruel and Unusual Punishment Clause).

[3] 139 S. Ct. 682 (2019).

[4] *Id.* at 689.

[5] *See id.* at 690–91.

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

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

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

[9] Brief for Petitioners, *supra* note 7, at 4.

the Land Rover to travel to one of those sales.[10] On his way to a third sale, Timbs was arrested and his vehicle was seized.[11]

Timbs was charged with "two counts of dealing in a controlled substance and one count of conspiracy to commit theft."[12] He pleaded guilty to one dealing count and the conspiracy count two years after his arrest and was sentenced to six years of home detention and probation.[13] While Timbs's case was pending, the State retained a private firm to file a civil action for the forfeiture of his vehicle.[14] After hearing argument on the forfeiture complaint, the trial court ruled for Timbs, finding that forfeiture of the Land Rover — the value of which was roughly four times that of the $10,000 maximum criminal fine available — was "grossly disproportional to the gravity of the Defendant's offense."[15] The State appealed the trial court's ruling.[16]

The Indiana Court of Appeals affirmed.[17] Writing for the panel, Judge Mathias[18] recognized that the Supreme Court had not held the Excessive Fines Clause applicable to the states; however, the Indiana Court of Appeals had previously held that the clause did apply to state forfeiture statutes, and Judge Mathias saw "no reason to disagree with . . . prior opinion."[19] In applying the clause, he similarly found that the forfeiture "was grossly disproportionate to the gravity of Timbs's offense,"[20] relying primarily on the relationship between the value of the vehicle and the maximum statutory fine amount.[21]

The Supreme Court of Indiana reversed on the grounds that the U.S. Supreme Court had not incorporated the Excessive Fines Clause against the states.[22] Justice Slaughter[23] treated the lack of controlling precedent

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[10] *Id.*

[11] *Id.* at 4–5.

[12] *Id.* at 5.

[13] *Id.*

[14] *Id.*; *see also* State v. Timbs, 62 N.E.3d 472, 474 (Ind. Ct. App. 2016). Indiana law provides for the forfeiture of vehicles used as instrumentalities of some crimes, including transportation of narcotic drugs. IND. CODE § 34-24-1-1(a)(1)(A) (2018). Indiana is also the only state that allows prosecutors to hire private attorneys to pursue civil forfeiture cases on a contingency-fee basis. Brief for Petitioners, *supra* note 7, at 32.

[15] *Timbs*, 62 N.E.3d at 474.

[16] *Id.*

[17] *Id.* at 477.

[18] Judge Mathias was joined by Judge Vaidik.

[19] *Timbs*, 62 N.E.3d at 475 n.4.

[20] *Id.* at 477.

[21] *Id.* at 476. The court also noted that the Land Rover was not purchased with proceeds from drug sales, financial burdens had already been imposed on Timbs, the complaint for forfeiture mentioned only one day's worth of criminal acts, and Timbs had sold heroin only twice. *Id.* at 476–77.

[22] State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017); *see also id.* at 1182 (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989), in which the Supreme Court declined to answer whether the Excessive Fines Clause was incorporated).

[23] Justice Slaughter was joined by Chief Justice Rush and Justices David, Massa, and Goff.

rather differently: he "decline[d] to find or assume incorporation until the Supreme Court decide[d] the issue authoritatively,"[24] invoking as justification federalism concerns[25] and prior Supreme Court dicta tending against incorporation.[26] After finding that Indiana had proven it was entitled to the Land Rover,[27] the court remanded with instructions to enter judgment for the State.[28] Timbs petitioned for a writ of certiorari on the question of whether the Excessive Fines Clause was incorporated against the states under the Fourteenth Amendment.[29]

The U.S. Supreme Court reversed and remanded, holding that the Excessive Fines Clause is applicable to the states under the Fourteenth Amendment's Due Process Clause.[30] Writing for a unanimous Court,[31] Justice Ginsburg began with the incorporation test, which asks whether the relevant Bill of Rights protection is "'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[32] Justice Ginsburg then examined the history of the Excessive Fines Clause, "which 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'"[33] She observed that the clause traced its origins to one of England's earliest legal institutions, Magna Carta, which "required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'"[34] The eventual "[a]doption of the Excessive Fines Clause" in the U.S. Bill of Rights reflected both English law and "colonial-era provisions" that limited fines according to principles of proportionality and an offender's ability to pay.[35] By the time of the Fourteenth Amendment's ratification — the temporal checkpoint in the incorporation inquiry — "the constitutions of 35 of the 37 States . . . expressly prohibited excessive fines."[36] Turning to the present, the Court observed that today, "all 50 States" have such constitutional protections.[37]

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[24] *Timbs*, 84 N.E.3d at 1183.

[25] *Id.* at 1183–84.

[26] *Id.* at 1183.

[27] *Id.* at 1184–85.

[28] *Id.* at 1185.

[29] Petition for a Writ of Certiorari at i, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

[30] *Timbs*, 139 S. Ct. at 687.

[31] Justice Thomas would have incorporated the right to be free from excessive fines under the Privileges or Immunities Clause. *See id.* at 691 (Thomas, J., concurring in the judgment).

[32] *Id.* at 687 (majority opinion) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[33] *Id.* (quoting United States v. Bajakajian, 524 U.S. 321, 327–28 (1998) (internal quotation marks omitted)).

[34] *Id.* at 688 (alteration in original) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 689.

Justice Ginsburg emphasized the Excessive Fines Clause's value to a scheme of ordered liberty by highlighting the governmental abuses that the clause historically sought to prevent.[38] Not only were excessive fines used to punish and control disfavored groups from Stuart-era England to the Reconstruction-era South,[39] but fines also had the potential to be employed "to retaliate against or chill the speech of political enemies," thus "undermin[ing] other constitutional liberties."[40] And because fines are unique among forms of punishment in that they "are a source of revenue" for the state, they must be regulated all the more carefully to protect against improper incentives.[41] Because of the extensive historical record showing the continued importance of a prohibition on excessive fines, the Court readily found that the right was incorporated against the states.[42]

The Court briefly addressed and disposed of the State's two arguments against Timbs.[43] First, Indiana argued that civil in rem forfeitures were historically not subject to a proportionality requirement[44] because they were not considered punitive;[45] therefore, they could not be subject to the Excessive Fines Clause, which encompasses only sanctions that are punitive in nature.[46] As the Court observed,[47] this argument implicitly called for overruling *Austin v. United States*,[48] which held that because in rem forfeitures "historically have been understood, at least in part, as punishment,"[49] such forfeitures were governed by the Excessive Fines Clause whenever they embodied some punitive intent.[50] Since the question of revisiting *Austin* was not properly before the Court, Justice Ginsburg declined to reconsider its precedent.[51]

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[38] *Id.* at 688–89.

[39] *See id.*

[40] *Id.* at 689.

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

[42] *Id.*

[43] The State also attempted to reframe the question as not whether the Excessive Fines Clause is incorporated, but whether the "Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition to Petition for a Writ of Certiorari at i, *Timbs*, 139 S. Ct. 682 (No. 17-1091). The Court replied that respondents' "right . . . to restate the questions presented . . . does not give them the power to expand [those] questions." *Timbs*, 139 S. Ct. at 690 (alteration in original) (internal quotation marks omitted) (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 279 n.10 (1993)).

[44] *See* Brief for Respondent at 17, 29–30, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

[45] *See id.* at 37. The State rested much of its argument on distinguishing between in personam fines, which it conceded functioned as punishment, and in rem forfeitures. *See id.* at 37–38.

[46] *See id.* at 41; *see also id.* at 47–50.

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

[48] 509 U.S. 602 (1993).

[49] *Id.* at 618.

[50] *See id.* at 609–10, 620–22. Punishment need not be the exclusive goal of a forfeiture for it to come under the clause. *See id.*

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

Indiana's "fallback"[52] argument relied on an attempted redefinition of the right at issue: the State contended that even if in rem forfeitures were punitive and therefore subject to the Excessive Fines Clause, protection against state in rem forfeitures *specifically* was a right "neither fundamental nor deeply rooted" and therefore failed the incorporation test.[53] The Court rejected this recharacterization, as it reflected a misunderstanding of the incorporation inquiry, which simply "ask[s] whether the right guaranteed — not each and every particular application of that right — is fundamental or deeply rooted."[54] Accordingly, once the Court determined that the Excessive Fines Clause was incorporated, any specific application, including to civil in rem forfeitures,[55] received the same protection. The Court did not decide whether the forfeiture of Timbs's vehicle was actually excessive, instead remanding for application of the clause.[56]

Justice Gorsuch wrote a one-paragraph concurrence.[57] He suggested that the Fourteenth Amendment's Privileges or Immunities Clause may be the more "appropriate vehicle for incorporation," but acknowledged that "nothing in this case turn[ed] on that question."[58]

Justice Thomas concurred in the judgment.[59] Going one step beyond Justice Gorsuch, Justice Thomas would have affirmatively incorporated "the right to be free from excessive fines" through the Privileges or Immunities Clause.[60] He argued that the prohibition on excessive fines was considered an "inalienable right[]"[61] that the Privileges or Immunities Clause was understood to protect at the time of its ratification. Similarly to Justice Ginsburg, Justice Thomas cited a historical record proving the importance of protection from excessive fines at common law,[62] a value that was carried through to the United States via individual state constitutions and the Federal Constitution.[63] Because "the prohibition on

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[52] *Id.*

[53] *Id.* at 689; *see* Brief for Respondent, *supra* note 44, at 5; *see also id.* at 58 (citing the fact that no court applied the Excessive Fines Clause to in rem forfeitures until 124 years after ratification of the Fourteenth Amendment).

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

[55] The Court pointed to its holding in *Austin* that civil forfeiture qualified as a fine under the Eighth Amendment. *See id.* at 689–90.

[56] *Id.* at 691.

[57] *Id.* at 691 (Gorsuch, J., concurring).

[58] *Id.*

[59] *Id.* (Thomas, J., concurring in the judgment).

[60] *Id.*

[61] *Id.* (quoting McDonald v. Chicago, 561 U.S. 742, 822 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

[62] *See id.* at 693–95.

[63] *Id.* at 695–97.

excessive fines was a well-established and fundamental right of citizenship,"[64] Justice Thomas found it more properly encompassed within the Privileges or Immunities Clause.

The pro-incorporation holding of *Timbs* was the correct (indeed, perhaps the inevitable[65]) outcome. However, in its commitment to stick narrowly to the question presented, the Court raised more issues than it resolved in its sparse opinion. Despite invoking the importance of ability to pay in the Excessive Fines Clause's history, the Court did not set out, or even recommend, a test that would require assessing a fine's impact on a defendant's livelihood. Instead, it left untouched its existing Excessive Fines Clause jurisprudence, which simply endorses an open-ended proportionality inquiry and leaves unsettled the role of ability to pay. But as the doctrinal inconsistency among lower courts regarding ability to pay shows, a proportionality-only test is often in tension with the Eighth Amendment's historic mandate to preserve livelihood. And because this dissonance between proportionality and ability to pay is most apparent in state-level forfeitures, *Timbs*'s incorporation may not adequately protect defendants in such cases from unconstitutional fines.

The Court's historical reasoning appeared to indicate that preserving livelihood was a core function of the Excessive Fines Clause and its predecessors. In Justice Ginsburg's narrative, a core requirement at common law was that a fine "not be so large as to deprive [an offender] of his livelihood."[66] She cited authorities from Blackstone to colonial-era laws echoing the requirement that fines preserve a man's "contenement[]."[67] The Court also discussed the injustices that resulted from ignoring ability to pay excessive fines: for instance, "[w]hen newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead."[68] While the Court primarily discussed the excessive uses of fines specifically, it cited *Austin* as acknowledgment that civil forfeitures fit into this framework to the extent they are "at least partially punitive."[69] This analysis resonated both with the arguments

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[64] *Id.* at 696; *see id.* at 696–98 (outlining the importance of the clause in early American history).

[65] In the words of Justice Gorsuch, "[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?" Transcript of Oral Argument at 32–33, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

[66] *Timbs*, 139 S. Ct. at 688 (alteration in original) (internal quotation marks omitted) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

[67] *Id.* (citing Pa. Frame of Gov't, Laws Agreed Upon in Eng., Art. XVIII (1682), *in* 5 FEDERAL AND STATE CONSTITUTIONS 3061 (F. Thorpe ed., 1909)). The historical "consensus" is that "to save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 855 (2013) (quoting WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 293 (2d ed. 1914)). "In no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." *Id.* (quoting MCKECHNIE, *supra*, at 287).

[68] *Timbs*, 139 S. Ct. at 689.

[69] *Id.*

Timbs made in briefing[70] and with the emerging discourse arguing that effect on livelihood should be considered in Excessive Fines Clause jurisprudence for both historical and normative reasons.[71]

Despite the history the Court laid out, its remand declined to assign any doctrinal weight to ability to pay in an excessiveness analysis. This silence is in keeping with the Court's trend. When remanding *Austin* for application of the Excessive Fines Clause to the civil forfeiture at issue, the Court similarly did not establish an excessiveness test, and instead simply alluded to a potential proportionality inquiry that considered the relationship between the "penalty" and "the offense committed."[72] At no point did the Court mention the defendant's financial standing. Further, in the very passage where it first invoked ability to pay in *Timbs*, the Court cited as a counterpoint *United States v. Bajakajian*,[73] the only Supreme Court case to apply the Excessive Fines Clause.[74] *Bajakajian* established a test that looks solely to whether a forfeiture "is grossly disproportional to the gravity of a defendant's offense."[75] Because the respondent did not raise the argument, the Court explicitly declined to consider effect on the defendant's livelihood.[76] Thus even as the Court again raised the potential significance of ability to pay in *Timbs*, it inserted ambiguity as to how that factor should, or should not, matter in future applications.

The Court's lack of explication since *Bajakajian* has created a wealth of doctrinal inconsistency as to what role, if any, a fine's impact on a person's livelihood should play under the Excessive Fines Clause. Some lower courts have read *Bajakajian* as opening the door to consideration of ability to pay, either as part of[77] or in addition to[78]

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[70] *See* Brief for Petitioners, *supra* note 7, at 11, 28 (discussing the language of the Magna Carta and the oppressive fines levied against newly freed slaves).

[71] *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 14, 47 (2018); McLean, *supra* note 67, at 853–72, 885–900; 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, 562–65 (2017).

[72] Austin v. United States, 509 U.S. 602, 622 (1993) (quoting United States v. 508 Depot St., 964 F.2d 814, 818 (8th Cir. 1992)).

[73] 524 U.S. 321 (1998); *see also Timbs*, 139 S. Ct. at 688 (describing *Bajakajian* as "taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine").

[74] *See* Colgan, *supra* note 71, at 10.

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

[76] *See id.* at 340 n.15.

[77] *See, e.g.*, United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016); *id.* at 111 ("It seems unlikely that the *Bajakajian* Court meant to preclude courts from considering whether a forfeiture would deprive an offender of his livelihood."); United States v. 6380 Little Canyon Rd., 59 F.3d 974, 985 (9th Cir. 1995) (holding that courts should consider both hardship to the defendant and the intangible value of the property, such as whether it is the family home, in determining proportionality of forfeiture).

[78] *See, e.g.*, United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008) ("Beyond the [proportionality analysis], a court should also consider whether forfeiture would deprive the defendant of his

a proportionality inquiry. A few state courts that considered themselves bound by the Excessive Fines Clause pre-*Timbs* have also shown amenability to considering a defendant's financial situation.[79] Indeed, *Timbs* has already begun to make its mark: the Colorado Supreme Court has found the historical analyses in *Bajakajian* and *Timbs* to yield "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."[80] However, other courts have drawn from *Bajakajian* the exact opposite conclusion, barring any discussion of a defendant's livelihood in an Eighth Amendment analysis.[81]

The conflict only deepens when courts grapple with the distinction between fines and forfeitures. Most courts are less inclined to consider a person's ability to pay a forfeiture, likely reflecting the instinct that "the owner of an asset subject to forfeiture proceedings is, by definition, 'able' to pay."[82] For example, while the Colorado Court of Appeals has held that "in imposing a fine, a trial court must consider a defendant's ability to pay," it has excluded forfeitures from this protection in the same breath, explaining that "there is no need . . . to consider the defendant's ability to pay because the assets seized are sufficient to satisfy the sanction."[83] However, at least one state court has held the opposite, finding that because "a home and a vehicle are often essential to one's life and livelihood," a "non-pecuniary subjective valuation" of such property is appropriate when determining the proportionality of a forfeiture.[84] As part of this valuation, the court reasoned that consideration

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or her livelihood." (citing *Bajakajian* in support)); *see also* United States v. King, 231 F. Supp. 3d 872, 902–05 (W.D. Okla. 2017) (deciding that an excessiveness inquiry would, after determining proportionality, "consider[] whether the forfeiture in question would be so ruinous to the defendant's future ability to provide a livelihood as to be unconstitutional for that reason," *id.* at 905).

[79] *See, e.g.*, State v. Goodenow, 282 P.3d 8, 17 (Or. Ct. App. 2012) ("Whether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant's ability to be self-sufficient." (citing *Bajakajian* in support)). *But see* State v. Webb, 856 N.W.2d 171, 175–76 (S.D. 2014) (rejecting the argument that ability to pay should be considered in an excessive fines analysis).

[80] Colo. Dep't of Labor & Emp't v. Dami Hosp., LLC, 2019 CO 47, ¶ 30.

[81] *See, e.g.*, Duckworth v. United States *ex rel.* Locke, 705 F. Supp. 2d 30, 48 (D.D.C. 2010) (concluding, after reviewing *Bajakajian*, that "ability to pay is not a component of the Eighth Amendment proportionality analysis"), *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) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); United States v. Dubose, 146 F.3d 1141, 1146 (9th Cir. 1998) (reaching "the conclusion that an Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender"); United States v. 427 & 429 Hall St., 853 F. Supp. 1389, 1399 n.22 (M.D. Ala. 1994) (rejecting proposed test for excessiveness that would include consideration of effect on livelihood because such a test would be "inherently subjective").

[82] McLean, *supra* note 67, at 896.

[83] People v. Pourat, 100 P.3d 503, 507 (Colo. App. 2004).

[84] Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 177, 189 (Pa. 2017).

of "whether the forfeiture would deprive the property owner of his or her livelihood" is not only appropriate, but "entirely . . . consistent with the teachings of *Bajakajian*."[85] This analysis offers a rebuttal to the logic that someone forfeiting property is by default able to pay it, and implicitly respects the historical prerogative that a forfeiture must "permit[] an individual to maintain some minimal level of economic subsistence."[86] But such an expansive interpretation of protecting livelihood remains the minority view: most lower courts echo the distinction between fines and forfeitures with respect to ability to pay.[87]

This doctrinal confusion over ability to pay may have particularly visible consequences after *Timbs* because a proportionality-only test does not adequately protect individuals from government abuse of the forfeiture power at the state level. As in the federal system, state and local governments are heavily dependent on civil forfeitures for revenue; the extent to which police departments profit in particular is well documented.[88] And although "much media attention is focused on federal civil forfeitures, the property of ordinary citizens is arguably more threatened by police practices under state civil forfeiture laws."[89] While incorporation of the Excessive Fines Clause will likely "reduc[e] law enforcement incentives to base seizure decisions on assets' value and liquidity,"[90] it may not as effectively deter the mass seizure of lower-value assets from those least able to pay[91] or least able to contest their forfeitures in court. For instance, a major source of forfeiture revenue

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[85] *Id.* at 189.

[86] McLean, *supra* note 67, at 896.

[87] *See, e.g.*, United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) ("[I]n the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause."); City & Cty. of San Francisco v. Sainez, 92 Cal. Rptr. 2d 418, 432 (Cal. Ct. App. 2000) ("Proportionality is likely to be the most important issue in a forfeiture case, since the claimant-defendant is able to pay by forfeiting the disputed asset. In imposing a fine, on the other hand, ability to pay becomes a critical factor." (quoting People *ex rel.* State Air Res. Bd. v. Wilmhurst, 81 Cal. Rptr. 2d 221, 230 (Cal. Ct. App. 1999))).

[88] *See, e.g.*, DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 43 (2d ed. 2015) ("Forty-three states direct at least 45 percent of forfeiture proceeds to law enforcement funds . . . ."); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2391–92 (2018) (describing how various police departments profit from forfeiture). Indeed, "[s]uch phenomena appear to have accelerated in recent years, amid the serious fiscal issues affecting many state and local governments." McLean, *supra* note 67, at 887.

[89] Louis 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, 1123 (2017).

[90] Note, *supra* note 88, at 2403.

[91] While (as many courts find) it is true that forfeiture of an asset is technically within a person's means this definition may not reflect the standard of maintaining livelihood, *see* McLean, *supra* note 67, at 896. For instance, "many forfeitures result in the loss of family homes, means of transportation, or even one's life savings." Colgan, *supra* note 71, at 46 n.250.

is the seizure of petty cash.[92] These assets are likely minor enough to satisfy a proportionality test when compared with the alleged offense.[93] But given the financial status of the individuals most often fined,[94] they are more likely to suffer financially from the seizure of even minor assets.[95] On the other end of the spectrum, forfeitures of higher value items, such as houses, likely also satisfy a proportionality test.[96] But those forfeitures too violate the historical spirit of the Excessive Fines Clause: surely a person's "contenement" encompasses their home. The experience of people paying criminal justice debt more broadly also evinces the degree to which preservation of livelihood is ignored in the fines and fees process.[97] Thus even beyond forfeiture, the Court risks leaving unresolved an economically unjust doctrine for future fines and fees jurisprudence in the states.

As *Timbs* was pending, commentators speculated whether the case signaled "the end of civil asset forfeiture."[98] This seems an unlikely end result. Indeed, the dearth of guidance in application of the Excessive Fines Clause and the powerful government incentives at the subfederal level may well weaken *Timbs*'s potential impact. The Court has "expressed a desire that the [Excessive Fines] Clause serve as a bulwark against the risk that the government will . . . take advantage of the revenue generating capacity of fines";[99] it remains to be seen whether *Timbs*, in its caution, will adequately protect against that risk.

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[92] *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/72L5-U63Q] ("[P]olice . . . can — and quite often do — set up highway checkpoints, pull over motorists for minor violations and seize their assets (usually cash) . . . .").

[93] Comparing data from ten states, the median value of forfeited property ranged from $451 to $2048. CARPENTER II ET AL., *supra* note 88, at 12. In Philadelphia over a two-year period, half of cash-only civil forfeiture cases involved an amount under $192. *Id.*

[94] *See* U.S. COMM'N 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/37XF-K5U6] ("[S]ome municipalities across the nation target low-income communities to raise revenue.").

[95] *See generally* AM. CIVIL LIBERTIES UNION OF CAL., CIVIL ASSET FORFEITURE: PROFITING FROM CALIFORNIA'S MOST VULNERABLE (2016).

[96] *See* Rulli, *supra* note 89, at 1150–51 (arguing that a rigid proportionality test in civil forfeitures of homes that compares maximum statutory penalty to fair market value "negates any meaningful constitutional protection," *id.* at 1150, for owners of low-value homes).

[97] *See* Colgan, *supra* note 71, at 5–9 (recounting how people forego food, shelter, and medicine to repay fines and fees a few dollars at a time, or are jailed for inability to pay them). Moreover, a proportionality-only framework may not actually punish wealthy offenders. *See id.* at 52 & n.275.

[98] Timbs v. Indiana*: The End of Civil Asset Forfeiture?*, HARV. C.R.-C.L. L. REV. (Oct. 4, 2018), https://harvardcrcl.org/timbs-v-indiana-the-end-of-civil-asset-forfeiture [https://perma.cc/37L4-QJ2R].

[99] Colgan, *supra* note 71, at 13; *see also Timbs*, 139 S. Ct. at 686 ("[T]he protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority.").