TIMBS V. INDIANA: THE CONSTITUTIONALITY OF CIVIL FORFEITURE WHEN USED BY STATES

KRIS FERNANDEZ*

INTRODUCTION

Civil forfeiture, the seizure of property associated with the commission of a crime, has long been used as a tool by Congress.[1] In theory, forfeiture should help deter crime and dismantle criminal organizations by attacking their financial assets. However, some criticize the seizure of valuable assets from those who have not committed serious crimes.[2] In *Timbs v. Indiana*, Petitioner Tyson Timbs asks the Supreme Court to incorporate the Excessive Fines Clause of the Eighth Amendment against the states, providing extra protection for individuals against fines and forfeiture that are "grossly disproportionate" to the harm caused.[3] The decision to incorporate the Excessive Fines Clause and the guidelines for applying that incorporation would have a substantial effect on governments, which often rely on the revenue gained from forfeiture.

This commentary argues that the Supreme Court of the United States should incorporate the Excessive Fines Clause based on historical support of an individual's right to be free from excessive fines. Further, the Supreme Court should reaffirm its guidelines as described in *Bajakajian*, which weigh the harm caused, the maximum fines that could be levied against the defendant, and whether or not the defendant is meant to be targeted by the statute.[4] These guidelines

*J.D. Candidate, Duke University School of Law, Class of 2020.

1. Austin v. United States, 509 U.S. 602, 613 (1993).
2. Brief of *Amicus Curiae* Foundation for Moral Law in Support of Petitioners at 15–16, Timbs v. Indiana, No. 17-1091 (Sept. 11, 2018).
3. Brief for Petitioners at 7, Timbs v. Indiana, No. 17-1091 (Sept. 4, 2018) [hereinafter Brief for Petitioner].
4. United States v. Bajakajian, 524 U.S. 321, 337–39 (1998).

sufficiently protect individual rights but do not encroach on the established societal expectation regarding property seizure. The Supreme Court should remand the case back to the Indiana Supreme Court with instructions to apply the Excessive Fines Clause in a way that best weighs the *Bajakajian* factors.

I. BACKGROUND

A. Factual Background

In January 2013, Petitioner used his father's life insurance proceeds to purchase a Land Rover for $42,058.38.[5] Petitioner regularly drove the Land Rover to transport heroin, and after several controlled purchases by the police, Petitioner was apprehended.[6] In June 2013, Respondent Indiana charged Petitioner with two counts of dealing in a controlled substance and one count of conspiracy to commit theft.[7] In 2015, Petitioner pleaded guilty to one count of dealing in a controlled substance and one count of conspiracy to commit theft, in order to get the remaining charge dismissed.[8] Petitioner was sentenced to six years, and he paid $1,203 in various fines.[9]

Within two months after the criminal charges were filed, Respondent also sought to acquire possession of Petitioner's Land Rover.[10] The trial court held that requiring him to forfeit property of such a high value is "grossly disproportional to the gravity of the . . . offense" and would therefore violate the excessive fines portion of the Eighth Amendment.[11] The Court of Appeals affirmed.[12] However, the Indiana Supreme Court reversed, noting that the particular clause had not yet been incorporated against the states by the United States Supreme Court.[13] The Indiana Supreme Court took a "cautious approach" and avoided the federal question altogether.[14] Because the incorporation question was not decided, Indiana relied on its own

5. State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1183–84.
14. *Id.*

constitution, which does not protect against excessive fines.[15] As a result, Respondent was entitled to take possession of the Land Rover.[16] The United States Supreme Court granted certiorari.[17]

B. Legal Background

1. History of Incorporation

The outcome in *Timbs* will rely on cases that establish the process for incorporating sections of the Bill of Rights against the states. The Bill of Rights imposes limitations and obligations on government action, but precedent dictates that the Court will decide on a case-by-case basis which clauses can be used to challenge state action.[18]

Until the Fourteenth Amendment was ratified, the Bill of Rights could be used only to challenge federal action.[19] In *Barron v. Baltimore*, a plaintiff brought a claim against the state of Maryland based on the Takings Clause of the Fifth Amendment.[20] The Court held, however, that the "amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."[21] The Framers of the Bill of Rights had intended state governments to be conducted in accordance with their own state constitutions, and the Bill of Rights did not indicate any intention to breach that separation.[22]

After the American Civil War, the United States dramatically shifted its stance on incorporating sections of the Bill of Rights against states.[23] In 1868, the Fourteenth Amendment was ratified in large part to protect the individual rights of recently freed Black Americans.[24] To bolster that goal, the amendment reads in relevant part:

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15. *Id.* at 1184–85.
16. *Id.* at 1185.
17. Timbs v. Indiana, 84 N.E.2d 1179 (Ind. 2017), *cert, granted*, 86 USLW 3625 (U.S. June 18, 2018) (No. 17-1091).
18. McDonald v. City of Chicago, 561 U.S. 742, 744 (2010).
19. Barron v. Balt., 32 U.S. 243, 250 (1833)
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* McDonald, 561 U.S. at 775 (citing Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389 (1982)).
24. *Id.*

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[25]

The Due Process Clause of the Fourteenth Amendment is substantially different from the provisions of the Fifth Amendment.[26] Specifically, it adds that a *state* cannot infringe on an individual's rights without due process, indicating that constitutional protections are not limited to challenges against federal action.[27]

In *Duncan v. Louisiana*, the Court laid out a process of "selective incorporation" for determining which rights are protected under the Fourteenth Amendment.[28] These rights have been demarcated in a variety of ways, but *Duncan* states that they are "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[29] The Court recognized that the Bill of Rights enumerates many of these fundamental principles, so courts ought to look at the early amendments as guidance for what might qualify.[30] The Court should look at each clause individually, determining if it is "essential to 'a fair and enlightened system of justice'" and is therefore protected under the Due Process Clause.[31]

The most recent incorporation case, *McDonald v. City of Chicago*, provides a full description of clauses on which the Court has ruled.[32] While the majority have been incorporated, some did not pass muster.[33] Until *Malloy v. Hogan*, the Court had incorporated "watered-down" versions of the Bill of Rights clauses, holding states to a lower standard than their federal counterparts.[34] However, the Court in *Malloy* was presented with the question of whether the Fifth

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25. U.S. CONST. amend. XIV, § 1.

26. U.S. CONST. amend. V § 1 ("No person shall be . . . deprived of life, liberty, or property, without due process of law")

27. U.S. CONST. amend. XIV, § 1.

28. *See* Duncan v. Louisiana, 391 U.S. 145, 161–162 (1968) (holding that the right to a trial by jury was incorporated against the states).

29. *Id.* at 178 (quoting Powell v. State of Alabama, 287 U.S. 45, 67 (1932)).

30. *See* McDonald v. City of Chicago, 561 U.S. 742, 763 (2010) (citing Gideon v. Wainwright, 372 U.S. 335, 341 (1963)) (". . . the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.").

31. *Id.* at 760.

32. *Id.* at 764–66 (citing a complete list of cases in which the Supreme Court has decided issues of selective incorporation).

33. *Id.*

34. Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

Amendment privilege against self-incrimination gave the same substantive rights against states as it did against the federal government.[35] The Court found it unreasonable that individuals would have different fundamental rights in front of state judges than they would before federal judges.[36] It held that the guaranteed rights are to be congruent.[37]

2. History of Eighth Amendment Jurisprudence

As applied to federal action, the Supreme Court has interpreted that the Eighth Amendment mandates that fines should be reasonably proportional to a defendant's conduct.[38] Further, in *Austin v. United States*, the Supreme Court held that forfeiture of property can be a violation of the Excessive Fines Clause.[39] The clause is triggered only when the defendant is "punished."[40] *Austin* held that forfeiture is sufficiently damaging to qualify as punishment when *any part* of the motivation behind the forfeiture is to deter or to punish.[41] The forfeiture must be entirely remedial for it to escape scrutiny under the Eighth Amendment.[42]

Assuming that a given fine or forfeiture is considered punishment, *United States v. Bajakajian* created a test for determining if the punishment is excessive such that it violates the Eighth Amendment.[43] In *Bajakajian*, the defendant was charged with failing to report that he was leaving the country with more than $10,000, a statutory requirement.[44] He pled guilty, but in the forfeiture bench trial, the district court ruled that he was to forfeit the $357,144 he had attempted to carry out of the country because that money was used in the commission of a federal crime.[45]

35. *Id.*
36. *Id.*
37. *Id.*
38. Austin v. United States, 509 U.S. 602, 604 (1993).
39. *Id.* at 622.
40. *See id.* at 610 (defining punishment as "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes").
41. *Id.* at 621.
42. *Id.*
43. United States v. Bajakajian, 524 U.S. 321, 337–39 (1998).
44. *Id.* at 325.
45. *Id.* at 325–26.

The Supreme Court held that this forfeiture violated the Excessive Fines Clause.[46] It weighed (1) whether the defendant fit into the "class of persons for whom the statute was principally designed," (2) the maximum penalties that could have been imposed under the Sentencing Guidelines, and (3) the harm caused by the defendant.[47] In its application of the facts at bar to this test, the Court found first that the law was designed to catch money launderers and tax evaders, not forgetful people like the defendant.[48] Second, the Court found that the maximum monetary penalty was 1/70th of the forfeiture.[49] Finally, the Court found that the only harm caused by the defendant was the failure to inform the government that $357,144 was leaving the country.[50] The Court held that the culpability and the harm were not enough to justify the full forfeiture and therefore the amount was "grossly disproportionate" to the wrong committed.[51]

II. HOLDING

The Supreme Court of Indiana rejected Petitioner's argument that the Excessive Fines Clause should be incorporated against the states.[52] It deferred to the opinion in *McDonald*, in which the United States Supreme Court chose not to identify the clause as previously incorporated.[53] The Supreme Court of Indiana chose a more cautious approach, inviting the United States Supreme Court to rule on the case while strictly applying Indiana law.[54] Because Indiana law has no constitutional protections against excessive fines that could be used in Petitioner's favor, the Court of Appeals' affirming judgment was reversed.[55]

46. *Id.* at 343.
47. *Id.* at 337–39.
48. *Id.* at 338.
49. *Id.*
50. *Id.* at 338–39.
51. *Id.*
52. State v. Timbs, 84 N.E.3d 1179, 1185 (Ind. 2017).
53. *Id.* at 1183.
54. *See id.* (holding that the Indiana Supreme Court will "await guidance" from the Supreme Court).
55. *Id.* at 1184–85.

III. ARGUMENTS

A. Petitioner's Argument

Petitioner argues that "almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen."[56] This caution forms the bedrock of Petitioner's claim.[57] Petitioner maintains that Anglo-American history is littered with evidence, up to the present, that people have the right to be free from fines grossly disproportionate to the gravity of their offenses.[58]

Petitioner argues that the Excessive Fines Clause stems from a long history of Anglo-American jurisprudence, making it "deeply rooted in this Nation's history and tradition" prior to the ratification of the Eighth Amendment.[59] The idea of a proportionality test for fines goes back as far as the Magna Carta, which states that a "Freeman 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 contenement."[60] Fearing abuses from future kings, four hundred years later, Parliament gave more specific direction regarding excessive fines.[61] Specifically, it sought to prevent kings from using unreasonable fines to increase revenue at the cost of citizens.[62] Against this backdrop, the English Bill of Rights provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted. . ."[63]

The general principle of the English Bill of Rights was carried forward to American jurisprudence.[64] The language of the Eighth Amendment was adopted directly from the Virginia Declaration of Rights, which was adopted directly from the English Bill of Rights.[65] Petitioner argues that the repeated prohibition on excessive fines

56. Brief for Petitioners, *supra* note 3 at 2.
57. *See id.* at 8. ("The power to fine is—and has always been—a formidable one. And unlike every other form of punishment, fines and forfeitures are a source of revenue for the government, making them uniquely prone to abuse. The accompanying risk to life, liberty, and property is very real.").
58. *Id.* at 10.
59. *Id.* at 8 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).
60. *Id.* at 11.
61. *Id.*
62. *Id.* at 12.
63. *Id.* at 16.
64. *Id.*
65. *Id.* at 17.

shows that the right is deeply rooted in Anglo-American jurisprudence.[66] Therefore, Petitioner argues that the Excessive Fines Clause was intended to be incorporated against the states.[67]

Further, Petitioner argues that the right to be free from excessive fines was a staple of American jurisprudence when the Fourteenth Amendment was ratified.[68] The Fourteenth Amendment was in large part a response to "Black Codes," which included efforts to subjugate newly freed slaves with economic burdens.[69] For example, without a special license, people who taught or preached to people of color were subject to heavy fines.[70] Instead of heavy fines, people could "opt" to labor on public roads or receive physical punishment.[71] Further, in Mississippi, Black Americans who were convicted of certain crimes but were unable to pay the fines were "leased" to any person who could pay the fine in their stead.[72] The debates over the Fourteenth Amendment made clear that many senators believed that these fines were grossly unfair.[73] One senator noted that a $1,000 fine for trespassing would functionally condemn a Black American to a lifetime of slavery.[74] The draconian fines instituted by many states were a particular target of the Framers of the Fourteenth Amendment, and Petitioner believes that this indicates an intent to incorporate the Excessive Fines Clause against the states.[75]

Petitioner maintains that other states joined with the federal government in prohibiting excessive fines under their own state constitutions.[76] When the Fourteenth Amendment was ratified, thirty-five of the thirty-seven state constitutions had adopted language directly from the Excessive Fines Clause.[77] The remaining two states adopted some form of the proportionality test, functionally prohibiting the same type of government behavior.[78] Petitioner argues that because this principle was universal across the states before the

66. *Id.* at 18.
67. *Id.*
68. *Id.* at 19.
69. *Id.* at 22.
70. *Id.* at 20.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 23.
75. *Id.* at 24.
76. *Id.* at 24–25.
77. *Id.* at 24.
78. *Id.*at 24–25.

Fourteenth Amendment was ratified, the Framers of the Fourteenth Amendment must have intended the Excessive Fines Clause to be incorporated against the states.[79]

Further, Petitioner argues that the right enshrined in the Excessive Fines Clause is just as imperative today as it was in the 1800s.[80] When the government has unlimited power to levy fines, it can create and has created systems of perpetual punishment for minor crimes.[81] Some states have "auto-jail" policies for people who are unable to pay their fines in a certain amount of time.[82] Jailtime can result in job loss, an increase of debt, and other long-term consequences for those who are only responsible for minor harm.[83] Forfeitures can have similar consequences.[84] For those who have taken out loans to purchase a car or a house, the forfeiture of that property could be financially devastating."[85] Petitioner argues that power over people's property could have "grave consequences" for personal liberty.[86]

Finally, Petitioner maintains that this power is "uniquely prone to abuse."[87] When property is forfeited to the government, the proceeds from that property generally go to the agency conducting the seizure.[88] Police departments, for example, depend on the revenue from the forfeitures, even setting goals for how much money departments should acquire from forfeiture.[89] Petitioner argues that individuals need to be protected from abuse in the event that the survival of government agencies wholly relies on seizing property.[90]

B. Respondent's Argument

Respondent argues that the question presented should be construed narrowly, and that the proportionality test of the Excessive Fines Clause should not apply to states exercising their power to seize property in *in rem* proceedings.[91] Respondent draws upon a wide

79. *Id.* at 25.
80. *Id.* at 26.
81. *Id.*
82. *Id.* at 27.
83. *Id.* at 26–27.
84. *Id.* at 26.
85. *Id.* at 25.
86. *Id.* at 27.
87. *Id.* at 28.
88. *Id.* at 31.
89. *Id.* at 33.
90. *Id.*
91. Brief for Respondent at 4–7, Timbs v. Indiana, No. 17-1091 (Oct. 4, 2018) [hereinafter

variety of historical evidence, concluding that a seizure of property does not constitute a "fine" as understood by the Eighth Amendment, and that forfeitures were never understood to be violations of fundamental American rights.[92]

Respondent rejects Petitioner's argument on the grounds that historical evidence against the use of *in personam* fines should not apply to questions regarding *in rem* forfeitures.[93] Respondent concedes that historical documents such as the Magna Carta provide ample evidence that disproportionate monetary *in personam* penalties could be opposed to fundamental Anglo-American rights.[94] Nevertheless, there is a lengthy history of harsh *in rem* forfeitures that have gone unchallenged.[95] English admiralty courts and the American colonies both utilized forfeitures to combat unlawful maritime practices, and the early United States continued this practice, under both the Articles of Confederation and the Constitution.[96]

The general acceptance of *in rem* forfeitures can be demonstrated by the most draconian seizures by the federal government.[97] For example, in *United States v. The Louisa Barbara*, the federal government enacted a strict weight-limit on maritime passengers.[98] The ship in question only exceeded the limit by a single passenger, but the court affirmed the federal government taking possession of the entire four hundred-ton vessel.[99] In similar cases, courts argued that they had "no power" to go against the will of the legislature regarding the seizure of property.[100] Respondent maintains that if such draconian outcomes like those in *The Louisa Barbara* went unchallenged under the Excessive Fines Clause, then surely the common understanding was that the clause did not apply to *in rem* forfeitures.[101]

Brief for Respondent].

92. *Id.* at 5.
93. *Id.* at 6–7.
94. *Id.* at 45–46.
95. *Id.* at 22.
96. *Id.* at 18–19.
97. *Id.* at 22.
98. *Id.* at 23 (citing United States v. The Louisa Barbara, 26 F. Cas. 1000, 1001 (E.D. Pa. 1833)).
99. *Id.*
100. *Id.* at 26 (citing United States v. Two Barrels of Whisky, 96 F. 479, 480 (4th Cir. 1899)).
101. *Id.*

Respondent also argues that the "innocent owner rule" demonstrates that the Eighth Amendment right in question does not apply to *in rem* forfeitures.[102] The innocent owner rule states that in *in rem* proceedings, the innocence of an owner cannot be used as a defense against the seizure of the property.[103] So if a man lends his vehicle to a friend in good faith, ignorant of her plot to use the vehicle to transport drugs, his ignorance cannot be used to prevent the government from seizing his vehicle.[104] The innocent owner rule, Respondent argues, demonstrates that the gravity of the owner's crime is irrelevant to the forfeiture of the property.[105] If the owner has done nothing wrong and his property can still be taken, then certainly it can be taken if he is actually responsible for a crime.[106] Respondent notes that as early as 1844, the Supreme Court of the United States affirmed the validity of the rule.[107] In *The Malik Adhel*,[108] Justice Marshall wrote that the necessity of the forfeiture is determined ". . . without any reference whatsoever to the character or conduct of the owner."[109] Respondent maintains that courts were well aware that the results of the innocent owner rule may seem unfair.[110] However, the Supreme Court declared it to be "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[111]

Respondent notes that the Excessive Fines Clause has historically been ignored in state *in rem* forfeiture cases, which demonstrates that the common understanding of the Fourteenth Amendment was that it did not apply to the seizure of property. Today, every state has incorporated some form of the Excessive Fines Clause into their state constitutions.[112] And yet it was not until *House and Lot v. State*[113] in 1920 that the Excessive Fines Clause's application to *in rem* forfeitures was even discussed.[114] In that case, the Alabama Supreme

102. *Id.* at 23–24.
103. *Id.*
104. *See id.* at 24 (quoting The Malek Adhel, 43 U.S. 210, 233 (1844)) (". . . the thing to which the forfeiture attaches [is determined] without any reference whatsoever to the character or conduct of the owner.").
105. *Id.* at 26.
106. *Id.*
107. *Id.* at 24.
108. 43 U.S. 210, 233 (1844).
109. Brief for Respondent, *supra* note 91 at 24.
110. *Id.*
111. *Id.*
112. *Id.* at 27.
113. 204 Ala. 108 (Ala. 1920).
114. Brief for Respondent, *supra* note 91 at 28–29.

Court rejected the use of the proportionality test for the validity of the forfeiture.[115] No state courts have disagreed with *House and Lot*'s analysis.[116]

Further, no federal court even considered the possibility of the Excessive Fines Clause applying to *in rem* cases until 1988.[117] While the Third, Fourth, and Ninth Circuits all rejected its application, the Second Circuit became the first to rule that *in rem* forfeitures were subject to the proportionality test in 1992.[118] Respondent argues that this lack of discussion for two hundred years demonstrates that the Excessive Fines Clause was never intended to be used as a defense to *in rem* forfeiture. Had the general populace understood the clause to apply to *in rem* forfeitures, the harshness of forfeiture would have incentivized some litigants to use the clause as a defense.[119] The absence of any discussion on this front shows that it was not meant to be applied to seizures of property.[120]

Respondent's analysis of the historical evidence seeks to show that the Excessive Fines Clause was not meant to be applied to *in rem* proceedings, and therefore it should not apply to Petitioner's Land Rover.[121] Therefore, Respondent ultimately argues that the Indiana Supreme Court's ruling should be upheld.

IV. ANALYSIS

This Part discusses two questions: whether the Excessive Fines Clause should be incorporated against the states, and what should qualify as an excessive fine. Ultimately, this Part contends that the clause should be incorporated, but that the Court should allow lower courts to have broad discretion in determining which fines are classified as excessive. This approach would be consistent with federal precedent regarding forfeiture.[122]

115. *Id.* at 28.
116. *Id.*
117. *Id.* at 29–30.
118. *Id.* at 30–31.
119. *Id.* at 27.
120. *Id.*
121. *Id.* at 58.
122. *See* United States v. Bajakajian, 524 U.S. 321, 337–39 (1998) (holding that a forfeiture of $357,144 is unconstitutional when the defendant was not one of the class of persons intended to be targeted by the statute, the maximum penalty for the statutory violation was $10,000, and the harm caused was not substantial).

A. The Excessive Fines Clause Should Be Incorporated Because Its Support from Historical Practice Comports with Previous Incorporations.

Petitioner's historical argument successfully demonstrates that Anglo-American tradition has valued protection from excessive fines across time and jurisdictions. The Supreme Court has recognized that demarcating fundamental rights often begins with historical practice.[123] Petitioner shows that the roots of the Excessive Fines Clause stem from documents which are representative of older Anglo-American tradition.[124] Furthermore, Petitioner establishes that the right to be free from excessive fines was intentionally enshrined through the Fourteenth Amendment.[125]

The Excessive Fines Clause has a place in tradition which looks very similar to that of previously-incorporated rights.[126] In the past, clauses from the Bill of Rights have been successfully incorporated, but the historical support for these clauses as fundamental rights rested on much more tenuous ground than the Excessive Fines Clause. For example, in *Louisiana ex rel. Francis v. Resweber*,[127] the Court held that the Cruel and Unusual Punishment Clause was a fundamental right to be incorporated against the states.[128] In its judgment, the Court stated: "Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment."[129] That selection is the beginning and end of the Court's discussion on the Cruel and Unusual Punishment Clause's place in Anglo-American tradition.[130] Similarly, the Excessive Fines Clause was taken directly from the English Bill of Rights.[131] Further, the Court has previously held that because the Cruel and Unusual Punishment Clause is placed in the same list as the Excessive Fines Clause, they should occupy equal

123. McDonald v. City of Chicago, 561 U.S. 742, 744 (2010).
124. Brief for Petitioners, *supra* note 3 at 11.
125. *Id.* at 11, 18, 19.
126. 561 U.S. at 765 n.13. *McDonald* held that 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."
127. 329 U.S. 459 (1947).
128. *Id.* at 463.
129. *Id.*
130. *Id*.
131. *See* Brief for Petitioners, *supra* note 3 at 10.

standing as fundamental rights.[132] Therefore, the Excessive Fines Clause more than passes the standard for incorporation.

Finally, it is worth noting that even the Respondent fails to argue that the Excessive Fines Clause should not be incorporated in some fashion. To be sure, Respondent vigorously defends a narrow construction, maintaining that an "excessive fine" does not apply to *in rem* forfeitures.[133] But the closest that Respondent comes to advocating for non-incorporation comes at the end of its brief, where it states that non-incorporation is the less attractive option compared to merely excluding *in rem* forfeitures from the clause.[134] Moreover, both parties seem content that the Court incorporates the Excessive Fines Clause for *in personam* fines.[135]

B. The Court Should Allow for Lower Courts to Have Broad Discretion in Interpreting the Excessive Fines Clause Because Its Historical Use and the Current Precedent Do Not Support an Overaggressive Application.

Assuming that the Excessive Fines Clause will be incorporated, the question remains as to what qualifies as an excessive fine. Respondent's historical evidence supports a more lenient interpretation, but the Petitioner advocates for a hard boundary based on historical evidence that protects a defendant's livelihood against fines for a minor violation.[136] The Eighth Amendment has already been applied at the federal level, and the results have not been overly restrictive of government action.[137] The Court should establish clear guidelines that protect individuals according to the description of the clause outlined in the Magna Carta, while still allowing for civil forfeitures. The constitutionality test in *United States v. Bajakajian* provides an effective measure and should be used as the test for constitutionality.[138] The test has been applied in lower court cases, and

132. *See* Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263 (1989) (holding that the Eighth Amendment as a whole limits government action, and therefore each clause in the amendment has equal reason to be incorporated against the states).

133. Brief for Respondent, *supra* note 91 at 4.

134. *Id.* at 44–45.

135. *Id.*; Brief for Petitioners, *supra* note 3 at 8.

136. Brief for Respondent, *supra* note 91 at *passim*; Brief for Petitioners, *supra* note 3 at 11.

137. *See* United States v. Jose, 499 F.3d 105, 112 (1st Cir. 2007) (holding that when (1) a defendant is one of the class of persons a law is intended to target, (2) the amount forfeited is more than four times the maximum monetary penalty for the statutory violation, and (3) Congress states that violating the statute causes severe harm, the forfeiture is constitutional).

138. United States v. Bajakajian, 524 U.S. 321, 337–39 (1998).

while the proportionality of the penalties do not stray far from the proportionality of historically-accepted *in rem* forfeitures, the decisions still ensure that individual rights are protected.[139]

Understanding the contours of a fundamental right should begin with historical practice.[140] In this respect, Respondent has shown a convincing pattern. Cases like *The Louisa Barbara* demonstrate that the American legal system has traditionally not been diametrically opposed to civil forfeitures.[141] Indeed, the defendant never even raised the Eighth Amendment question.[142] The innocent owner rule also works in Respondent's favor, showing that in the past the defendant's culpability has not affected the fairness of the forfeiture. Petitioner advocates for a rule that forbids fines that are not disproportionate to the defendant's wrongdoing, yet civil forfeiture is societally accepted even when the property owner has done no wrong.[143] Forfeitures of items of value, which may even seem unfair to the average person, likely do not infringe on the fundamental right.

However, Petitioner establishes a tradition that provides a strict boundary on how much property the state can seize.[144] The Magna Carta established that financial punishment must reserve to the defendant his livelihood, no matter how great the defendant's fault. As applied to cases like *Timbs*, individuals have a fundamental right to protection from the government taking their livelihood.[145] Possible circumstances that would trigger this protection could include the government seizing a car or a house when the defendant has just

139. *See* United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) (stating that a forfeiture which would deprive a defendant of her livelihood would violate the Excessive Fines Clause); *see also* von Hofe v. United States, 492 F.3d 175, 187–88 (2d Cir. 2007) (holding that the civil forfeiture of a farm valued at $124,000 was constitutional, when the defendant knew her son was growing marijuana on the property and the maximum statutory penalties including $1 million and twenty imprisonment); United States v. George, 779 F.3d 113, 124 (2d Cir. 2015) (holding that the forfeiture of an equitable interest in a home worth under $100,000 was constitutional, when the defendant knowingly hired an undocumented immigrant and the maximum statutory fine of $250,000); United States v. Castello, 611 F.3d 116, 124 (2d Cir. 2010) (holding that the forfeiture of over $12,000,000 plus the defendant's equity in his home was constitutional when the defendant failed to file Currency Transaction Reports as related to his check-cashing business, enabling clients to commit fraud).

140. McDonald v. City of Chicago, 561 U.S. 742, 744 (2010).

141. *See id.* at 23 (showing that draconian civil forfeitures by the federal government have historically not been challenged under the Excessive Fines Clause).

142. *Id*.

143. Brief for Petitioners, *supra* note 3 at 4; Brief for Respondent, *supra* note 91 at 24.

144. Brief for Petitioners, *supra* note 3 at 11.

145. *See id.* (". . . a 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 contenement.").

taken out a heavy loan on that property. The consequences of the debt, along with potentially needing to pay for new transportation or shelter, could endanger the defendant's livelihood.

Taking these dual historical considerations together, the Supreme Court has already established a set of guidelines that reconciles the two values.[146] The Court has held that Excessive Fines Clause analysis is to take into account (1) whether the defendant falls into the class of persons that the statute is designed to target; (2) the proportionality when comparing the statutory penalties and the forfeiture; and (3) the harm caused by the defendant.[147] In *Bajakajian*, the Court found that because the defendant did not fall into the class of targeted persons, because the forfeiture was seventy times greater than the other penalties, and because the harm was minimal, the forfeiture was unconstitutional.[148] This analysis takes into account the fairness of the penalty, which the Magna Carta requires. However, it still allows for steep penalties so long as other factors are satisfied, so the test does not run afoul of historical forfeitures like the ship in *Louisa-Barbara*.

Since the decision in *Bajakajian*, lower courts have not hesitated to find that large forfeitures are constitutional using the *Bajakajian* test.[149] After *Bajakajian*, the statutory penalties for failing to report the $10,000 had been amended, and the First Circuit Court of Appeals reached the opposite conclusion regarding the constitutionality of a similar forfeiture.[150] In *Jose*, the defendant was also found to have left the country without declaring $10,000.[151] However, the Patriot Act had bolstered the original statute.[152] The regulation now targeted anyone who had acquired money illegally, the maximum penalty was increased six-fold with added jail time, and Congress specified that the harm of not declaring money was severe.[153] Given these statutory changes, the court used the *Bajakajian* test to determine that the defendant in *Jose* was required to forfeit all $114,948 that he did not declare.[154] In contrast with *Bajakajian*, the forfeiture was proportionally much less in *Jose*.[155] Further, Congress

146. Bajakajian, 524 U.S. at 337–39 (1998).
147. *Id.*
148. *Id.*
149. *E.g.*, United States v. Jose, 499 F.3d 105, 112 (1st Cir. 2007).
150. *Id.*
151. *Id.* at 110.
152. *Id.*
153. *Id.* at 111–12.
154. *Id.* at 113–14.
155. *Id.* at 112.

had clarified in the amended statute that a violation of the statute actually caused substantial harm.[156] As shown in *Jose*, the federal test for excessive fines comports well with societal expectations regarding civil forfeiture as compared to the criminal responsibility of the defendant. Outcomes in other federal civil forfeiture cases have been similarly in line with historical practice.[157] The harsh outcomes of these cases may be unsettling, but the decisions are not out of step with outcomes in cases like *The Louisa Barbara*.

The guidelines in *Bajakajian* and *Jose* are sufficient to account for both the longstanding practice of civil forfeiture as presented by Respondent, and Petitioner's historical evidence that Anglo-American jurisprudence seeks to protect individuals from excessive fines. On Respondent's side, the guidelines could reasonably lead to the same outcomes in cases like *The Louisa Barbara*, even though those outcomes might be considered draconian. On Petitioner's side, the Excessive Fines Clause does apply to civil forfeitures and the protection is triggered in situations where the forfeiture is wildly disproportionate and the defendant has not caused substantial harm. Because Anglo-American jurisprudence has historically allowed civil forfeiture but has also somewhat limited the proportion of the forfeiture as compared to the harm caused, as seen in the Magna Carta and early federal cases, the historical evidence does not weigh decisively in favor of either Petitioner or Respondent.

156. *Id.*
157. *E.g.*, United States v. George, 779 F.3d 113, 124 (2d Cir. 2015).

V. CONCLUSION

In the end, historical practice and Anglo-American tradition are somewhat at odds. However, several conclusions can be clearly drawn. British legal tradition paved the way to a fundamental American understanding that individuals should have *some* level of protection from excessive financial punishments. This level of protection includes, at the very least, the right to maintain one's livelihood even after a financial punishment is assessed. However, historical practice also shows that heavy civil forfeitures were not understood to be challengeable under the Excessive Fines Clause in the time immediately following the Eighth Amendment's ratification. Finally, the guidelines in *Bajakajian* and *Jose* provide precedent for a balancing test which has the effect of weighing the historical considerations from both sides.

Given these conclusions, the Court should incorporate the Eighth Amendment because Anglo-American tradition demarcates a strict boundary for how much property can be seized through financial punishment. If the punishment threatens the defendant's livelihood, it is unconstitutional. If the punishment falls short of threatening the defendant's livelihood, the Court should instruct lower courts to follow its guidelines from *Bajakajian* and *Jose*. These guidelines will protect an established function of the government, while also ensuring that fines are not grossly disproportionate to the harm caused by the defendant.