

# Rumors Of Civil Forfeiture's Death Are Greatly Exaggerated

By **Alexander Klein** (February 24, 2019)

On Feb. 20, 2019, the U.S. Supreme Court issued a welcome decision that renders the excessive fines clause of the Eighth Amendment binding upon the states rather than just the federal government. This decision, *Tyson Timbs and a 2012 Land Rover LR2 v. State of Indiana*, ought to be celebrated by the civil forfeiture bar.



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Claimants in civil forfeiture can see law enforcement take their property without charging them with a crime, can be hauled into proceedings where their right to remain silent can be used against them, and can have accusations of criminal conduct sustained — and the takings of their property upheld — despite express reasonable doubt that they have done anything wrong. All based upon the fiction that civil forfeiture cases are against the property itself (“in rem”) rather than the person (“in personam”), civil forfeiture actions remain a controversial corner of the law enforcement world that since 2010 alone has harvested more than \$19 billion for governmental coffers.

Applying the excessive fines clause to state governments will not free these practices of controversy, but they will at least arm civil forfeiture claimants with a guarantee: If the assets in the government’s crosshairs are disproportionate in value to the cost or fines associated with the alleged wrongdoing, these claimants can raise a defense under the Eighth Amendment.

However, contrary to some early reporting about the case, *Timbs v. Indiana* should not be viewed as a sea change.

First, decided 9-0, its holding formalizes what most laymen already assume. Ask the average person on the street whether the First Amendment protects against the state government muzzling speech. Or ask whether the Fourth Amendment protects against state police rummaging through random homes. Very few people are likely to respond, “No, what offers these protections against state governments is technically not the Bill of Rights but actually the Fourteenth Amendment, through the doctrine of incorporation.”

But that technicality is the shadow from which *Timbs* emerges. The Bill of Rights protects against the federal government; then, generally, the Fourteenth Amendment applies (or “incorporates”) those rights against the states. The question in *Timbs* was simply whether the Eighth Amendment restriction against excessive fines followed that same pattern. Any other outcome — that states can impose excessive fines, for example — would have been jaw-dropping.

Second, separate from the Constitution, every state in the country already guarantee its citizens the right against excessive fines as a matter of state law. Take New York, for example. Article I, Section 5 of the New York State Constitution provides that “[e]xcessive bail shall not be required nor excessive fines imposed.” Therefore, for more than a decade and a half, New York’s highest court has explicitly recognized that civil forfeiture actions, depending upon their facts, can allow claimants to raise the defense of excessiveness. This new decision from the Supreme Court will not dramatically affect that calculus for New York claimants at all.

Third, Timbs echoes what the Supreme Court already stated at the turn of the century. In a case called *Cooper Industries Inc. v. Leatherman Tool Group Inc.*, the court, through Justice John Paul Stevens, expressed exactly what Timbs now sanctifies — that “the Fourteenth Amendment’s Due Process Clause [renders] ... the Eighth Amendment’s prohibition against excessive fines ... applicable to the States.” Some had viewed this language from *Cooper* as dicta, lacking precedential effect, so Timbs’ intervention is certainly welcome. But be clear: the intervention is to record an old tune rather than to write a new song.

Overall, applied in the context of civil forfeiture, Timbs is welcome. By anchoring states to federal law on excessiveness, Timbs sets a minimum standard that litigants like Indiana can no longer breach under the cloud of states’ rights. But the case should not be viewed as a landmark decision. The controversies surrounding civil forfeiture remain intact. Whether a party ultimately believes that civil forfeiture serves an important governmental function, or whether it offends one’s sense of justice, formally incorporating the excessive fines clause across the states will neither cure nor swell these broader concerns.

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