AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Foundations: Scope: Incorporation

**Timbs v. Indiana**, \_\_\_ U.S. \_\_\_ (2019)

*Tyson Timbs owned a Land Rover worth approximately $42,000. After he pled guilty to drug offenses and theft, Indiana initiated a civil suit that demanded the Land Rover be forfeited to the state on the ground that Timbs had used the vehicle to transport drugs. The trial judge rejected the lawsuit on the grounds that forfeiture would be an excessive fine under the Eighth and Fourteenth Amendments to the Constitution of the United States, because the largest fine that Timbs could be given for his crimes was $10,000. The Supreme Court of Indiana reversed this decision on the grounds that the due process clause of the Fourteenth Amendment did not incorporate the excessive fines clause of the Eighth Amendment. Timbs appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States unanimously reversed the Supreme Court of Indiana. Justice Ruth Bader Ginsburg’s majority opinion held that the right against excessive fines was incorporated by the due process clause of the Fourteenth Amendment because that liberty was “deeply rooted in this Nation’s history and tradition.” Compare Justice Ginsburg’s opinion in* Timbs *to the judicial opinions in* McDonald v. Chicago *(2010). To what extent do politics or law explain why the justices more easily incorporated the excessive fines clause than the right to bear arms? Justice Thomas insisted that incorporation take place under the privileges and immunities clause of the Fourteenth Amendment. Does his actual analysis differ from that of Justice Ginsburg? Is there any case where the privileges and immunities analysis is likely to differ from the due process analysis?*

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I0356260334f511e9ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0356260334f511e9ab20b3103407982a) delivered the opinion of the Court.

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. . . . Like the Eighth Amendment's proscriptions of “cruel and unusual punishment” and “[e]xcessive bail,” the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history and tradition.” *McDonald v. Chicago*  (2010). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan v. Mayor of Baltimore*  (1833). . . . With only “a handful” of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. A Bill of Rights protection is incorporated, we have explained, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation's history and tradition.” Incorporated Bill of Rights guarantees are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.

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The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that “[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 ....” As relevant here, Magna Carta required that economic sanctions “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood.” . . . When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that “excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” . . . An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines. . . .Today, acknowledgment of the right's fundamental nature remains widespread.. [A]ll 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies. . . Even absent a political motive, fines may be employed “in a measure out of accord with the penal goals of retribution and deterrence,” for “fines are a source of revenue,” while other forms of punishment “cost a State money.” In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation's history and tradition.”

. . . . [Indiana] argues that the Clause does not apply to its use of civil in rem forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted. . . . [T]o prevail, Indiana must persuade us . . . that . . . the Excessive Fines Clause is not incorporated because the Clause's application to civil in rem forfeitures is neither fundamental nor deeply rooted. . . . We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I0356260334f511e9ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0356260334f511e9ab20b3103407982a), concurring.

. . . . As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. . . . But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I0356260334f511e9ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0356260334f511e9ab20b3103407982a), concurring in the judgment.

. . . . Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with “process,” I would hold that the right to be free from excessive fines is one of the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment.

The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” “On its face, this appears to grant ... United States citizens a certain collection of rights—i.e., privileges or immunities—attributable to that status.” But as I have previously explained, this Court “marginaliz[ed]” the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause “quite narrowly.” Litigants seeking federal protection of substantive rights against the States thus needed “an alternative fount of such rights,” and this Court “found one in a \*692 most curious place,”—the Fourteenth Amendment's Due Process Clause, which prohibits “any State” from “depriv[ing] any person of life, liberty, or property, without due process of law.” Because this Clause speaks only to “process,” the Court has “long struggled to define” what substantive rights it protects. Because the oxymoronic “substantive” “due process” doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any “guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not. And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions. E.g. *Roe v. Wade* (1973); *Dred Scott v. Sandford* (1857).

The present case illustrates the incongruity of the Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to “ ‘proceed according to the “law of the land”—that is, according to written constitutional and statutory provisions,’ ” or that the State failed to provide “some baseline procedures.” His claim has nothing to do with any “process” “due” him. I therefore decline to apply the “legal fiction” of substantive due process.

When the Fourteenth Amendment was ratified, “the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms for ‘rights.’” Those “rights” were the “inalienable rights” of citizens that had been “long recognized,” and “the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights” against interference by the States.. . . The question here is whether the Eighth Amendment's prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

The Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689,” which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that “[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but according to the measure of the offence so shall he pay ....” Expanding this principle, Magna Carta required that “amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood.” . . . .

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“As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen,” including the prohibition on excessive fines. Thus, the text of the Eighth Amendment was “ ‘based directly on ... the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’ When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. . . . When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before “it was agreed to by a considerable majority.” And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was “adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts,” when “[e]normous fines and amercements were ... sometimes imposed.” Chancellor Kent likewise described the Eighth Amendment as part of the “right of personal security ... guarded by provisions which have been transcribed into the constitutions in this country from magna carta, and other fundamental acts of the English Parliament.” . . .

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions “expressly prohibited excessive fines.” . . . The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the “severe penalties” inflicted by the Black Codes and similar measures, suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

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The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States.