



BY ROBERT A. LEVY

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CHAIRMAN'S MESSAGE

Cato Wins at the Supreme Court

B+ is how I'd grade the Supreme Court's latest term. Cato filed amicus briefs in 16 cases. We were on the winning side in 12. That's quite impressive considering that cases reaching the court pose complex and contentious issues that typically divide lower courts as well as legal scholars.

Among our more important victories:

- Government cannot make value judgments regarding “scandalous” or “immoral” trademarks.
- State and local eminent domain actions can be challenged in federal court without first exhausting state court remedies.
- The Twenty-First Amendment, repealing Prohibition, does not allow states to discriminate against interstate commerce by enacting protectionist legislation.
- Courts will no longer rubber-stamp administrative agency interpretations of agency-crafted regulations.

Weighed against those successes were several losses:

- The Fourth Amendment permits a warrantless blood alcohol test of an unconscious driver.
- The constitutional ban on double jeopardy does not protect the accused from trial for the same crime by two separate sovereigns.
- Congress can reasonably delegate its authority to resolve practical legislative problems and make feasibility judgments under statutes that contain an intelligible principle to guide the delegation.

That brings us to *Timbs v. Indiana*—a triple victory that documents the court's concern over civil forfeiture abuse; the availability of a new tool, the constitutional ban on excessive fines, to rein in that abuse; and the application of the excessive fines clause in the Eighth Amendment to the states as well as the federal government.

Tyson Timbs pleaded guilty to dealing drugs in Indiana. When he was arrested, the police seized a Land Rover SUV, charging that it was used to transport heroin. Timbs had paid \$42,000 for the SUV—more than four times the \$10,000 maximum fine for his crime. Lower courts ruled that the forfeiture amounted to an excessive fine, but the Indiana Supreme Court held that the exces-

sive fines clause applied only to the federal government.

The root of civil forfeiture abuse can be traced to a 1996 Supreme Court case, *Bennis v. Michigan*. Tina Bennis co-owned a car with her husband, who took the car without her knowledge or consent and then had sex in the car with a prostitute. The police arrested the husband, the prostitute, and . . . the car, which allegedly “facilitated” the crime. Tina Bennis protested that she was an innocent co-owner, but the Supreme Court (5-4) upheld the forfeiture.

In 2000, Congress finally reacted—creating a federal innocent-owner exception. But many states still allow forfeiture of property that has minimal connection to an actual crime. Law enforcement officials thus have a perverse economic incentive. Civil forfeiture has become policing for profit—one of the more regrettable byproducts of our feckless war on drugs.

But now, after the *Timbs* case, which was litigated by our friends at the Institute for Justice, forfeitures can be contested not only as a violation of due process, or an uncompensated taking of property, but also as an imposition of excessive fines as barred by the Eighth Amendment. And that third line of attack can now be pursued in state as well as federal cases.

Until the Fourteenth Amendment was ratified, the Bill of Rights did not apply to the states. But then the due process clause of that amendment was used to “incorporate” the Bill of Rights against the states. That task wasn't completed all at once. It was accomplished provision by provision—free speech, religion, protection against unreasonable searches, etc. Remarkably, until the *Timbs* case, the court had not decided whether the excessive fines clause is incorporated. The criterion for incorporation is whether the right is deemed to be “fundamental.” That depends, in turn, on whether the right is vital to “our scheme of ordered liberty” or “deeply rooted in this Nation's history and tradition.” Virtually all of the Bill of Rights now qualify—including the First, Fourth, Fifth, and Sixth Amendments as well as the rest of the Eighth Amendment.

Justice Ruth Bader Ginsburg, writing for a unanimous court, made it official: The excessive fines clause is fundamental and, therefore, incorporated. ■

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