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Brett Kavanaugh could quickly have opportunity to expand 14th Amendment

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On Monday President Trump nominated Brett Kavanaugh to fill the Supreme Court vacancy created by Justice Anthony M. Kennedy's retirement. Monday also marks the 150th anniversary of the 14th Amendment, a post-Civil War amendment so important, it's often referred to as part of America's "Second Founding."

The amendment is the source of many of Justice Kennedy's most controversial decisions and votes, affecting issues from abortion and gun regulations to gay marriage and gerrymandering, and even the fate of the 2000 presidential election. The 14th Amendment's future is sure to feature prominently in Kavanaugh's confirmation hearing. If confirmed this fall, he will join the court in time to decide one of the biggest 14th Amendment cases in years, Timbs v. Indiana.

Mr. Timbs's case could have big implications for "civil forfeiture," a multi-billion-dollar controversial law enforcement tool frequently used to take private property from those never accused, much less convicted, of a crime. And it could affect the controversial practice of local governments like Ferguson, Missouri imposing crippling fines for minor code violations, like improper parking or uncut grass.

Civil forfeiture should be unconstitutional

My organization, the Institute for Justice, represents Tyson Timbs. Indiana took his \$40,000 car after he was convicted of selling \$225 worth of drugs. Timbs served his jail time and cleaned up his life after a prescription opioid addiction derailed it. He argues taking his car is unconstitutionally excessive.

The Bill of Rights' 8th Amendment bans the federal government from imposing "excessive fines." But the 8th Amendment doesn't apply to Indiana, or any other state. The Supreme Court said in 1833 that the Bill of Rights only protects against abuses by the federal government — not by states or local governments.

After the 13th Amendment banned slavery, former confederate states passed “black codes,” laws designed to recreate slavery in all but name by taking away the basic rights and freedoms of former slaves. These state governments also deprived abolitionists and pro-union white southerners of their rights. The country saw the wisdom in extending constitutional protections of our rights to all the states, and the 14th Amendment became part of our Constitution on July 9, 1868.

Extend the 14th Amendment once more

Over the last century, one case at a time, the Supreme Court has looked at different parts of the Bill of Rights separately to decide if the 14th Amendment extends those rights. Today, almost every protection in the Bill of Rights extends to the states. One significant holdout: the 8th Amendment’s protections against excessive fines. Timbs has asked the court to hold the text and history of the 14th Amendment support extending that protection to all 50 states, too.

While Congress was drafting the 14th Amendment, the former confederate states were routinely imposing excessive fines on freedmen and pro-union whites for minor violations. Texas, for example, imposed impossibly expensive fines for things like “leaving home without permission” and “impudence.” Today, states and municipalities like Pagedale, Missouri routinely impose outrageous fines and fees for minor property code violations, like mismatched curtains or walking on the wrong side of the sidewalk. For example, in Indio, California, 79-year-old Ramona Morales faced criminal charges and over \$6,000 in fines and court fees because her tenant illegally kept some chickens.

The last time the Supreme Court decided if part of the Bill of Rights applied to the states was in 2010. Justice Kennedy provided the pivotal fifth vote for the court to hold that under the 14th Amendment, states and local governments can’t take away the 2nd Amendment right to own a firearm.

Unlike the other controversial 14th Amendment issues that will no doubt dominate Brett Kavanaugh's confirmation hearing, Timbs need not split along ideological lines. Timbs is the exceedingly rare constitutional issue where groups as diverse as the Southern Poverty Law Center, a liberal civil rights group, the libertarian Cato Institute, and the U.S. Chamber of Commerce, the nation’s biggest business lobby, are all on the same side of a historic case. At a time when the country and court are split on so many issues, that’s an unusual alliance worth watching.