Should the Recent *Timbs* and *Dobbs* Decisions Revive Interest in the Excessive Fines Clause as the Constitutional Basis for Federal Regulation of Punitive Damages?

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ABSTRACT: In a series of cases in the early 1990s, the U.S. Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment implicitly enabled federal courts to review state punitive damages awards for unconstitutional arbitrariness and excessiveness. Before settling on the Due Process Clause as the basis of federal regulation of punitive damages, in a 1989 decision the Court considered and rejected the claim that the Excessive Fines Clause of the Eighth Amendment, as incorporated into the Fourteenth Amendment, could provide the constitutional foundation for federal regulation of state punitive damages awards. The reasoning in this earlier case, rejecting the application of the Excessive Fines Clause to punitive damages, was never very convincing, and its authority has been weakened substantially by later cases.

In 2022, in overruling Roe v. Wade *in* Jackson Women's Health Organization v. Dobbs, *the Supreme Court strongly rejected the claim that the Fourteenth Amendment Due Process Clause could ever be invoked to substantively validate the assertion of a constitutional right not expressly granted somewhere in the U.S. Constitution.*

This Essay first closely examines the reasoning of the Dobbs *decision and concludes that the language in the majority and concurring opinions limiting the scope of the Due Process Clause seriously threatens the constitutional underpinnings of current federal court regulation of state punitive damages awards. Positing that continued reliance on the Due Process Clause for constitutional authority to conduct this regulation may become untenable after the* Dobbs *decision, this Essay takes a hard second look at the Excessive Fines Clause as a possible alternative constitutional source for federal judicial power to regulate state punitive damages awards. In reconsidering possible*

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reliance on the Excessive Fines Clause for this purpose, this Essay considers the persuasiveness of a 1995 article proposing "a pragmatic approach" to interpretation of the Eighth Amendment as it applies to punitive damages, along with the relevance of two post-1989 cases enforcing the Excessive Fines Clause against in rem *forfeitures. The core of this Essay, however, primarily addresses the key question of whether civil punitive damages paid to a private party should qualify as a "fine" under the Excessive Fines Clause.*

This Essay also considers the advantages, after Dobbs*, of having express constitutional language, such as the Excessive Fines Clause, as the source of federal judicial authority to regulate state punitive damage awards. This Essay concludes that switching the constitutional basis to the Excessive Fines Clause would be a superior framework to continue federal court regulation of state punitive damages awards. Finally, this Essay argues that much of the past thirty years of punitive damages jurisprudence developed under the Due Process Clause could easily be absorbed and carried forward within the "disproportionality" analysis now routinely applied in Excessive Fines Clause cases.*

INTRODUCTION

When I first read Justice Alito's strong denunciation of the Fourteenth Amendment's Due Process Clause as a legitimate source for protecting unenumerated constitutional rights in his majority opinion in *Dobbs v. Jackson Women's Health Organization,* the 2022 Supreme Court case overturning *Roe v. Wade*, my immediate reaction was different than most interested readers. Having recently written two Articles about federal court regulation of state punitive damages awards, my initial reaction was two-fold. First, I thought "Wow, federalization of punitive damages law is in big trouble." Justice Alito's majority opinion in *Dobbs* echoes perfectly the dissents the late Justice Scalia repeatedly wrote claiming the federal courts lack constitutional authority to oversee state punitive damages awards.[1] Justice Thomas joined Justice Scalia's strong dissent in *BMW of North America, Inc. V. Gore*, and like Justice Scalia, Justice Thomas also dissented in every case in which the Court exercised regulatory control over state punitive damages awards.[2] This thought was reinforced on reading Justice Thomas's enthusiastic concurrence in which he urged the Court to identify all of its prior cases recognizing unstated constitutional rights on the basis of their being implied in the Due Process Clause and to reconsider them.[3] Secondly, I realized "[t]he search for a legitimate constitutional power for federal courts to strike down unreasonable or excessive state punitive damages awards will have to be restarted, and the Eighth Amendment Excessive Fines Clause is back in the running." This Essay will examine how the U.S. Supreme Court's decades-long campaign to federalize punitive damages law has arrived at this point, and explain why the Eighth Amendment's Excessive Fines Clause, as recently incorporated into the Fourteenth Amendment, should be the leading contender to become the

1. In his dissent in *Gore*, Scalia wrote "I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenti ng).

2. In *State Farm Mutual Automobile Insurance*, for example, Justice Thomas said in dissent: "I continue to believe that the Constitution does not constrain the size of punitive damages awards." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S 408, 429 (2003) (Thomas, J., dissenting) (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring)).

3. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

new source of constitutional power for federal courts to regulate state punitive damages awards.

The original Essay was in the *Iowa Law Review* publication processes when the U.S. Supreme Court handed down its sea-changing abortion rights decision: *Dobbs v. Jackson Women's Health Organization.*[4] In overruling *Roe v. Wade*[5] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[6] the Court found both the *Roe* and *Casey* decisions were wrongly decided because they lacked direct or indirect support in the express language of the U.S. Constitution.[7] *Dobbs* went on to hold that for a claim of an implied constitutional right to be sustained, it must be "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[8] The Court ruled that neither the *Roe* nor *Casey* decisions met these essential criteria and therefore had no basis in the Constitution.[9] This decision also held that both cases were so "egregiously wrong"[10] that they were not even entitled to customary *stare decisis.*[11]

The *Dobbs* opinion strongly asserted the Court's reluctance to recognize claims of constitutional rights that are not expressly granted in the text of the Constitution or its twenty-seven amendments.[12] The Court was particularly reluctant to incorporate such implied rights into the Fourteenth Amendment Due Process Clause, unless they met all of the aforementioned criteria.[13] In a concurring opinion in *Dobbs*, Justice Thomas lauded the Court for rejecting the claim that the Due Process Clause could stand as the source of numerous unstated substantive constitutional rights.[14] He went on to urge the Court to reconsider all its earlier cases where rulings were based on implied rights not expressly granted in the Constitution.[15]

Readers may doubt whether there is any relevant legal connection between a woman's asserted constitutional right to abortion and the asserted right of a malicious tortfeasor to be free from the risk of punitive damages that are not justified by the harm produced or are excessive in amount. But they would be wrong. Under the *Dobbs* rationale, the two assertions are closely related because both base their claims of implied constitutional rights on principles purported to inhere in the Due Process Clause.[16] Neither claimed

4. *Id.* at 2242 (majority opinion).
5. Roe v. Wade, 410 U.S. 113, 154 (1973).
6. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 803, 846 (1992).
7. *Dobbs*, 142 S. Ct. at 2242–43.
8. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).
9. *Id.* at 2246–59.
10. *Id.* at 2265–66.
11. *Id.* at 2261–77.
12. *Id.* at 2242.
13. *Id.* at 2242–43.
14. *Id.* at 2300–01 (Thomas, J., concurring).
15. *Id.* at 2301.
16. *Id.* at 2242 (majority opinion); Timbs v. Indiana, 139 S. Ct. 682, 686 (2022).

right is based on express constitutional language, and neither meets the *Dobbs* criteria of being "implicit in the concept of ordered liberty"[17] and "deeply rooted in this Nation's history and tradition,"[18] required to recognize an implied constitutional right and incorporation into the Fourteenth Amendment.[19] Thus, the current right of a malicious tortfeasor to have a state court's punitive damages award overturned by a federal court for arbitrariness and excessiveness looks like the type of unenumerated constitutional right Justice Thomas described in *Dobbs* and urged the Court to reexamine and overturn.[20]

Justice Thomas is the only current member of the Supreme Court bench who was sitting in the early 1990s when the Court decided the key cases requiring close federal review of state punitive damages awards.[21] Justice Thomas was an outspoken dissenter in these cases,[22] along with Justice Scalia.[23] When it was first created, federal judicial oversight of state punitive damages awards was justified by the Court as necessary to protect even a tortfeasor's "right" to fair notice of the possible risk and scale of punitive damages to which their reprehensible conduct might expose them.[24] This substantive "right" was found by the Court to implicitly inhere in the juridical concepts underlying the Fourteenth Amendment Due Process Clause.[25]

If Justice Thomas' recommendation in *Dobbs* is followed and the Court reconsiders all its decisions recognizing implied substantive constitutional rights where claims of unenumerated constitutional rights are based on principles asserted to lie within the Due Process Clause,[26] the justification for federal regulation of state punitive damages under the Fourteenth Amendment appears vulnerable to being overturned under the analysis adopted by the Court in the *Dobbs* decision.

This Essay reflects the implications of the *Dobbs* decision and the heightened sense of urgency this decision may have created for the Court to

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17. *Dobbs*, 142 S. Ct. at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

18. *Id.*

19. *Id.*

20. *Id.* at 2300–01 (Thomas, J., concurring).

21. For an account of these key cases, see N. William Hines, *Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?*, 62 CATH. U. L. REV. 371, 381–88 (2013).

22. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards." (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring))).

23. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award.").

24. *See id.* at 574 (majority opinion).

25. *Id.* at 562.

26. *See* text accompanying *supra* notes 14–15.

locate a sustainable constitutional foundation to continue federal regulation of state punitive damages awards.

This Essay will proceed in five Parts. Part I puts the constitutional issue in perspective by briefly tracing the winding eight-case constitutional path the Supreme Court followed before imposing federal limits on state court punitive damages awards. The first case in this eight-case series was *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, where the Court declined to apply the Eighth Amendment's Excessive Fines Clause[27] as the constitutional basis for imposing federal limits on state punitive damages awards.[28] The Court's majority and dissenting opinions in *Browning-Ferris* are examined in detail, giving special attention to the impressive pedigree of the Excessive Fines Clause in Anglo-American legal history.

Part II of this Essay discusses finding a *new* constitutional basis for federalizing limits on punitive damages awards that is not based on the Due Process Clause. The operative language in the 1993 *Austin v. United States* decision is reviewed to understand how far its application of the Excessive Fines Clause to restrain federal civil forfeitures departed from the authority of *Browning-Ferris*.[29] *Austin* arguably weakened *Browning-Ferris*'s authority by applying the Eighth Amendment to a punishment that was civil and not criminal.[30] Further, the possible implications of the 2019 *Timbs v. Indiana* decision for state punitive damages is explored.[31] In this context, this Essay considers the implications of Justice Gorsuch's suggestion that the incorporation of the Eighth Amendment into the Fourteenth Amendment would be better accomplished by placing it within the Privileges and Immunities Clause.[32]

Part III considers the possible impact of the recent *Dobbs*[33] decision for the continued enforceability of federal regulation of state punitive damages. This Essay closely analyzes the dramatic rejection in *Dobbs* of the proposition that the Due Process Clause can confer substantive individual constitutional rights by implication.[34] How this rejection of unenumerated "substantive due process rights" will affect continued federal regulation of state punitive damages awards is likely to be highly problematic and will perhaps create the need for an entirely different constitutional basis for this regulation—such as the Excessive Fines Clause.

Part IV considers today's arguments in favor of and against shifting from the Due Process Clause to the Excessive Fines Clause as the constitutional

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27. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

28. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

29. *See generally* Austin v. United States, 509 U.S. 602 (1993).

30. *Id.* at 604.

31. *See generally* Timbs v. Indiana, 138 S. Ct. 682 (2019).

32. *Id.* at 691 (Gorsuch, J., concurring).

33. *See generally Dobbs*, 142 S. Ct. 2228 (2022).

34. *Id.* at 2242.

foundation for imposing limits on state punitive damages awards. At this juncture, this Essay confronts the only remaining sticking point in avoiding the force of the *Browning-Ferris* decision—Justice Blackmun's majority opinion insisting that to fall within the prohibition of the Excessive Fines Clause, the "fine" at issue must be a penalty assessed directly by the government and collected for its exclusive benefit.[35]

Assuming a convincing case can be made for adopting the Excessive Fines Clause as the best source of constitutional power to limit state punitive damages awards, Part V of this Essay considers how much—or how little—the twenty-five years of punitive damages jurisprudence that has developed under the Due Process Clause framework should carry over to a new constitutional paradigm based on the Excessive Fines Clause.

This Essay concludes by speculating on whether such a change could actually take place, and how it might happen, acknowledging the dramatic change in the makeup of the Court since its 1989 *Browning-Ferris* decision and the impetus for a major change created by the *Dobbs* decision.

I. ORIGIN OF THE FEDERAL OVERSIGHT OF STATE PUNITIVE DAMAGES AWARDS

Starting in 1986, several Justices on the U.S. Supreme Court began an extensive search for a viable constitutional basis to justify imposing effective legal constraints on what they deemed the troubling number of large punitive damages judgments awarded by state courts around the country.[36] Justice O'Connor carried on a decade-long personal crusade to constitutionalize punitive damages.[37] Justice O'Connor claimed that unreasonably large punitive damages awards in state courts were "skyrocketing" out of control.[38] She argued that grossly excessive punitive damage awards posed an existential threat to the capacity of American businesses, large and small, to develop innovative products and create needed services.[39] In a series of concurring opinions and dissents, Justice O'Connor repeatedly urged the Court to find a source of judicial power within the Constitution "to rein in [outrageous] punitive damages awards."[40]

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35. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989).

36. The first mention by the Supreme Court of the possibility that there might be a federal constitutional constraint on the size of punitive damages awards is found in *Aetna Life Insurance Co. v. Lavoie*, where the defendant raised both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment as possible sources of such a constitutional limit. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 813, 828 (1986). The Court did not reach these claims but, writing for the majority, Chief Justice Burger referred to both claims raised as "important issues which, in an appropriate setting, must be resolved." *Id.* at 828–29; *see also* Hines, *supra* note 21, at 381–82 (noting the same).

37. Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1261 (2015).

38. *Id.* (quoting *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 282) (O'Connor, J., concurring in part and dissenting in part).

39. *Id.* at 1261 n.16.

40. *Id.* at 1261.

To make a long story short,[41] over a period of two decades, the Supreme Court granted certiorari to no less than eight cases in which it attempted to work out the implications of conducting a close federal review of state punitive damages awards under the Fourteenth Amendment.[42] Some of these cases focused on procedural issues raised by inadequacies in state courts' judicial proceedings that produced punitive damages awards.[43] These procedural cases—reviewed under the Fourteenth Amendment Due Process Clause[44]—dramatically upgraded the judicial practices in a number of states by which punitive damages were awarded and given appellate review.

However, five of the cases taken up by the Court during this period dealt with substantive claims that the challenged punitive damages awards were not merited by the facts, were not unjustifiably excessive in amount, or suffered both defects.[45] The first of these being the *Browning-Ferris* case—where the defendant claimed the punitive damages award violated the Eighth Amendment's Excessive Fines Clause.[46]

A. THE BROWNING-FERRIS *CASE*

Just two years before the Court adopted its substantive due process rationale for subjecting punitive damages to constitutional scrutiny, the Court took a close look at the Excessive Fines Clause of the Eighth Amendment as a possible constitutional basis for accomplishing this regulation.[47] In *Browning-Ferris*, the Court considered and rejected the opportunity to apply the more straight-forward Excessive Fines Clause to regulate the constitutionality of punitive damages awards.[48]

Browning-Ferris involved a combined federal antitrust claim and state business tort action filed by Kelco Disposal, a local Vermont waste disposal

41. For the long version of this story, see generally Hines & Hines, *supra* note 37.

42. This number is somewhat distorted because the case of *Philip Morris USA, Inc. v. Williams* reached the Supreme Court three times before certiorari was ultimately dismissed "as improvidently granted." Philip Morris USA, Inc. v. Williams, 556 U. S. 178, 179 (2009) (per curiam). *See generally* Philip Morris USA, Inc. v. Williams, 540 U.S. 801 (2003); Phillip Morris USA, Inc. v. Williams, 549 U.S. 346 (2007).

43. *See, e.g.,* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 16–18 (1991) (holding states must provide meaningful appellate review of all punitive damages awards). In *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S 424, 436 (2001), the *Haslip* ruling was expanded to require state courts to provide *de novo* review to punitive damages awards. Other cases were concerned with strictly limiting punitive damages to the harm caused to the plaintiff and excluding any reference to harm to third parties and harm originating outside the state. *See Williams*, 549 U.S. at 349 (harms to others); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–22 (2003) (harms to the public outside the state).

44. *See* Hines, *supra* note 21, at 382–84.

45. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 259 (1989); *Haslip*, 499 U.S. at 7–8; TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 446 (1993); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562–63 (1996); *Campbell*, 538 U.S. at 412–16.

46. *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 259.

47. *See id.*

48. *Id.* at 260.

company, against Browning-Ferris, a large national waste disposal company.[49] The antitrust complaint charged Browning-Ferris under Section 2 of the Sherman Act with predatory price reductions intended to put the local company out of business.[50] The business tort claim under Vermont law was based on an alleged interference with contracts between the Vermont firm and its customers.[51] The jury in a federal district court trial found for Kelco Disposal on both counts and awarded it $51,146 in compensatory damages on both the antitrust and state claims and $6 million in punitive damages.[52] The district court awarded $153,438 in treble damages on the antitrust claim, or alternatively, $6,066,082.74 in compensatory and punitive damages for the state claim.[53] On appeal, the Second Circuit affirmed the award in total—denying the applicability of the Excessive Fines Clause—and "noted that even if the [Eighth] Amendment" applied, the award was not excessive.[54] When the case reached the Supreme Court, Browning-Ferris argued that the Excessive Fines Clause should apply to the state civil litigation under the Fourteenth Amendment, and that the $6 million punitive damages award was unconstitutionally excessive.[55]

Justice Blackmun, writing for the 7–2 majority, upheld the punitive damages award and ruled that the Excessive Fines Clause did not apply to punitive damages awarded in civil suits where the state neither "prosecuted the action nor" was entitled to benefit from the damages.[56] He stated, "[r]ather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government."[57] He further observed that the Eighth Amendment was intended to apply only to criminal prosecutions, but stated that in the instant case it was unnecessary to limit its scope so narrowly.[58]

The majority decision was buttressed by an extended exploration of the history of the Eighth Amendment, dating back to the thirteenth century and the Magna Carta's limitation on amercements,[59] which were payments for various offenses against the Sovereign made to avoid a variety of possible sanctions.[60] After examining this history carefully, Justice Blackmun concluded that punitive damages were not "a modern-day analog of

49. *Id.* at 261.
50. *Id.* at 260–61.
51. *Id.* at 261.
52. *Id.* at 262.
53. *Id.*
54. *Id.*
55. *Id.* at 276.
56. *Id.* at 263–64.
57. *Id.* at 275.
58. *Id.* at 263–64. ("To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases.").
59. *Id.* at 268–73.
60. *Id.* at 269.

[thirteenth] century amercements."[61] The Court also pointed out that the language of the Eighth Amendment was taken almost verbatim from Section 10 of the 1689 English Bill of Rights.[62]

Justice Blackmun also noted that at the time the U.S. Bill of Rights was adopted, the constitutions of eight of the original states had the exact same prohibition against excessive fines as the English Bill of Rights, and none of them had ever applied their excessive fines language to punitive damages.[63] Finally, the Court observed that none of the reported discussions about the creation of the U.S. Bill of Rights—or its ratification by the states—supported the contention that unreasonably high punitive damages were intended to be within the purview of the Excessive Fines Clause.[64] Four years later, Justice Blackmun—again, writing for the majority—in *Austin v. United States* summarized his holding in *Browning-Ferris*:

> The Court concluded that both the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government* from abusing its power to punish . . . and therefore that the "Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[65]

Perhaps the weakest argument put forth by Justice Blackmun in his *Browning-Ferris* opinion was the counter-factual claim that punitive damages were already a well-established part of U.S. common law at the time the Eighth Amendment was adopted.[66] He made this assertion to distinguish judicial interpretation of the Excessive Fines Clause from the prevailing interpretation of the Cruel and Unusual Punishment Clause.[67] As to the latter clause, the Court held in prior decisions that its meaning might change over time as society's standards of decency evolved.[68]

In a lengthy dissent, Justice O'Connor urged the Court to treat the Excessive Fines Clause in the same way it treated the Cruel and Unusual Punishment Clause.[69] Justice Blackmun argued against affording a similar flexible interpretation to the Excessive Fines Clause, observing that unlike unforeseen future changes in societal understandings of basic decency,

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61. *Id.* at 268.

62. *Id.* at 266.

63. *Id.* at 264–65.

64. *Id.* at 266.

65. Austin v. United States, 509 U.S. 602, 607 (1993) (quoting *Browning-Ferris Indus. of Vt.*, 492 U.S. at 268).

66. *See Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 274.

67. *Id.*

68. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [the Cruel and Unusual Punishment Clause] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

69. *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part).

punitive damages were well known to the framers of the Eighth Amendment.[70] Justice Blackmun concluded that, if the framers of the Bill of Rights had intended punitive damages to be limited by the Excessive Fines Clause, they would have expressly said so.[71]

According to Professor McAllister, there were only two U.S. punitive damages decisions recorded before 1800, both of which used the term of the time, "exemplary damages."[72] Given the limited communications channels available at the time, it is very unlikely the framers of the U.S. Bill of Rights were aware of this small number of early punitive damages cases. While it is not certain why Justice Blackmun insisted that U.S. punitive damages law was well developed and widespread in the late eighteenth century, it is clear he was mistaken in this premise. Furthermore, the rare award of punitive damages in eighteenth century Anglo-American tort law practice bears little resemblance to today's frequent (and often large) punitive damages awards.[73]

Both the majority and dissenting opinions delved into the long English history of prohibiting excessive fines.[74] The two sides disagreed sharply, however, on what this history should mean for U.S. law; specifically, how narrowly or broadly the term "fines" should be construed in modern law.[75] Deciding not to apply the Excessive Fines Clause to punitive damages allowed the Court to avoid ruling on whether this part of the Eighth Amendment was impliedly incorporated into the Fourteenth Amendment and binding on the States. This incorporation issue was not resolved until the 2019 *Timbs* decision that favored incorporation.[76] It is noteworthy that in *Browning-Ferris* three justices separately made a point of cautioning that nothing in the opinion negated the possibility of finding a constitutional basis for regulating state punitive damages awards elsewhere in the Fourteenth Amendment.[77]

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70. *Id.* at 274 (majority opinion).

71. *Id.* at 274–75.

72. Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761, 769 n.54 (1995).

73. *See* ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES GUIDEBOOK: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 4–7 (2011). A 1955 California punitive damages award of $75,000 was one of the two highest awards ever recorded prior to 1960. Since then, punitive awards in seven and eight- figure amounts are common, and awards occasionally top $1 billion. *Id.* at 5–6, 13.

74. *See Browning-Ferris Indus. of Vt.*, 492 U.S. at 266–68; *id.* at 287–94 (O'Connor, J., concurring). An "amercement" was a payment made to avoid punishment for some offence done to the Sovereign. *Id.*

75. *Id.* at 265, 265 n.7 (majority opinion) (noting that at the time of ratification "'fine' was understood to mean a payment to a sovereign as punishment for some offense" and "[t]hen, as now, fines were assessed in criminal, rather than in private civil, actions"); *id.* at 296 (O'Connor, J., concurring) (maintaining that the term "fines" as used in the Eighth Amendment was not limited to criminal penalties, but also included various types of civil punishments).

76. *See* Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).

77. *Browning-Ferris Indus. of Vt.*, 492 U.S. at 276–77; *id.* at 280 (Brennan, J., concurring); *see also id.* at 285 (O'Connor, J., concurring).

II. FINDING A BASIS FOR FEDERALIZING LIMITS ON PUNITIVE DAMAGES AWARDS WITHIN THE DUE PROCESS CLAUSE

Just two years after *Browning-Ferris* rejected application of the Excessive Fines Clause to punitive damages, the Court appeared to settle on the Due Process Clause as the necessary constitutional "elsewhere." In *Pacific Mutual Life Insurance Co. v. Haslip*, a slim majority of the Court agreed with Justice O'Connor that the Court needed to do something about outrageous punitive damages awards.[78] After affirming the longstanding common law practice of empowering a properly instructed jury to determine the need for punitive damages—and assessing whether punitive damages were constitutional[79]—the Court opined that there should be a degree of federal power to control punitive damages awards when they "jar one's constitutional sensibilities."[80] After observing that arbitrary or unreasonably excessive punitive damages are unconstitutional, the Court identified the Fourteenth Amendment Due Process Clause as the most likely source of such a substantive regulatory power, without explaining exactly how it would come into play.[81] The Court in *Haslip* held that neither the state procedure used, nor the amount of the punitive damages awarded, violated the U.S. Constitution.[82]

Two years later in *TXO Production Corp. v. Alliance Resources Corp.*, the Court cited *Haslip* favorably, holding that the Due Process Clause exerted both procedural and substantive limits on state punitive damages awards.[83] But again, the Court found nothing unconstitutional about the result in the case,[84] much to Justice O'Connor's dismay.[85]

Finally, in *BMW of North America, Inc. v. Gore*,[86] five years after the idea of reining in excessive punitive damages awards as potentially unconstitutional under the Due Process Clause was first embraced broadly by the Court, a slim 5–4 majority of the justices found a punitive damages award by an Alabama jury to be unconstitutionally excessive.[87] The Court overturned a $2 million punitive damages award to the plaintiff.[88] In so doing, Justice Stevens offered the first full explanation for the Court's substantive interpretation of the Due Process Clause.[89] He stated that there was a "fair notice" principle inherent in the Due Process Clause that guaranteed even malicious tortfeasors the right to be informed in advance about the possible adverse legal consequences of

78. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).
79. *Id.* at 19.
80. *Id.* at 18.
81. *Id.*
82. *Id.* at 15–19.
83. TXO Prod. Corp. v. All. Res. Corp., 509 U. S. 443, 460–66 (1993).
84. *Id.*
85. *See id.* at 472–73 (O'Connor, J., dissenting).
86. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).
87. *See id.* at 574.
88. *Id.* at 567, 586.
89. *Id.* at 574–85.

the reprehensible tortious conduct they were about to undertake.[90] Dissenting justices[91] and constitutional scholars[92] alike severely criticized the Court for what they claimed was revitalizing a substantive due process framework thought to be abandoned in the 1930s,[93] but this controversial principle is clearly the legal foundation on which the key *Gore* and *Campbell* decisions were decided.[94]

In his *Gore* opinion, Justice Stevens also responded to Justice O'Connor's frequent call for the creation of a set of standards to guide lower courts in reviewing punitive damages awards.[95] Justice Stevens promulgated "three [constitutional] guideposts" to assist lower courts in reviewing punitive damages awards for arbitrariness and excessiveness.[96] The three guideposts announced were: (1) degree of reprehensibility;[97] (2) ratio of punitive damages to compensatory damages;[98] and (3) comparability to related civil sanctions.[99]

The correctness of the Court's new substantive due process rubric was reinforced seven years later when the Court set aside as unconstitutional a $145 million punitive damages award in *State Farm Mutual Insurance Co. v. Campbell*.[100] The constitutional guideposts announced in the *Gore* decision were reaffirmed and embellished in the *Campbell* majority opinion written by Justice Kennedy.[101]

Justice Kennedy spent ten pages in his opinion applying the three *Gore* guideposts to the facts of *Campbell*, and made a number of observations about them, most of which are dicta.[102] For example, he reinforced the suggestion made in the *Gore* opinion that guidepost one "degree of reprehensibility" was the most important guidepost,[103] and he carefully reviewed the five factors

90. *Id.* at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

91. *Id.* at 598–602 (Scalia, J., dissenting).

92. *See, e.g.*, Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 30–46 (2004) (sharing a critique premised on state sovereignty); Thomas H. Dupree, Jr., *Punitive Damages and the Constitution*, 70 LA. L. REV. 421, 426–34 (2010) (discussing the difficulty of applying the *Gore* guideposts and arguing for concrete standards).

93. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 133281 (3d ed. 1999).

94. *Gore*, 517 U.S. at 570.

95. *Id.* at 574–85.

96. *Id.*

97. *Id.* at 575–80.

98. *Id.* at 580–83.

99. *Id.* at 583–85.

100. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

101. *See id.* at 418–28.

102. *See id.*

103. *Id.* at 419 (citing *Gore*, 517 U.S. at 575) ("Perhaps the most important indicium of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

set out in *Gore* to help determine the degree of the defendant's reprehensibility: (1) physical versus economic harm; (2) reckless disregard of health or safety; (3) targeting the financially vulnerable; (4) repeated misconduct; and (5) intentionality.[104] He noted that the absence of all the factors renders a punitive damages award "suspect."[105] As to guidepost two, he commented that any punitive damages award over a single digit multiplier of the compensatory damages was presumptively excessive.[106] For guidepost three he opined that criminal penalties were not very useful when looking for comparable state-level punishments for the harmful conduct at issue.[107]

Critics of the guideposts claim that they are hardly the precise standards Justice O'Connor urged the Court to adopt in her concurring and dissenting opinions.[108] The Supreme Court, however, has not refined the guideposts since *Campbell*, but lower courts appear to be utilizing the guideposts effectively in the near hundreds of cases in which they have been applied over the past two decades.[109]

The only case involving an excessiveness claim to reach the Supreme Court since *Campbell* was *Exxon Shipping Co. v. Baker*.[110] This 2008 case raised an interesting question about possible excessiveness regarding the punitive damages awarded to Baker and fellow plaintiffs under federal admiralty law.[111] In his majority opinion in *Baker*, Justice Souter described approvingly the evolution of the Court's federalization of punitive damages law based on substantive application of the Due Process Clause,[112] but he ultimately chose not to apply it.[113] Instead, Justice Souter created a new federal law limitation on the size of punitive damages awards in admiralty cases.[114] The *Baker* decision promulgated a maximum ratio of one to one for punitive damages in relation to large compensatory damages in admiralty law cases.[115] In the course of his opinion, Justice Souter mused that the fear of runaway jury verdicts awarding unjustifiably large punitive damages that motivated the *Gore* and *Campbell* decisions was perhaps overstated.[116] He suggested that the Court's concern was not based on hard data, but on anecdotal evidence that

104. *Id.* at 419.

105. *Id.*

106. *See id.* at 426 ("In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.").

107. *Id.* at 428.

108. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc., 492 U.S. 257, 300–01 (1989) (O'Connor, J., concurring in part and dissenting in part); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 480–89 (1993) (O'Connor, J., dissenting).

109. *See* Hines & Hines, *supra* note 37, at 1273, 1276.

110. *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

111. *Id.* at 476.

112. *Id.* at 501–03, 515.

113. *Id.* at 514–15.

114. *Id.* at 513.

115. *Id.*

116. *Id.* at 498–503.

proved to be unreliable.[117] Having recounted the history of the Court's reliance on the Due Process Clause to support federal court regulation of state punitive damages, the Essay now moves to consider whether the Excessive Fines Clause could provide a superior constitutional foundation to justify exercise of this federal power.

A. AUSTIN V. UNITED STATES*: BEGINNING THE EROSION OF* BROWNING-FERRIS

Only four years after deciding *Browning-Ferris*, the Supreme Court had another occasion to consider the scope of the Eighth Amendment's Excessive Fines Clause in *Austin v. United States*, authored by Justice Blackmun.[118] The *Austin* case analyzed whether the Excessive Fines Clause applied to a federal civil *in rem* forfeiture action.[119] Austin had been convicted of possession of cocaine with intent to sell, and he was sentenced to seven years in prison.[120] After his trial, federal authorities initiated a civil *in rem* forfeiture action to revoke Austin's ownership of an automotive repair shop and his mobile home on the ground that both places had been used to commit the drug crime for which he was convicted.[121] Austin challenged the forfeiture under the Eighth Amendment Excessive Fines Clause, claiming that the amount of property taken in the forfeiture was grossly disproportional to the seriousness of the underlying crime.[122] Both the South Dakota District Court and the Eighth Circuit agreed with counsel for the federal government that the Eighth Amendment was not implicated.[123] The Supreme Court unanimously disagreed, and reversed the lower court's decision, holding that federal forfeiture actions were a form of government punishment covered by the Excessive Fines Clause.[124]

In the majority opinion, Justice Blackmun rejected the government's argument that the Excessive Fines Clause applied only to criminal prosecutions, disregarding his own earlier suggestion in *Browning-Ferris*.[125] The opinion carefully traced the history of forfeitures in England and in the United States, noting that of the three types of forfeitures available under English law, only the *in rem* forfeiture successfully migrated to the American

117. *Id.* at 500. Interestingly, Justice Souter's majority opinion acknowledged that recent studies suggested that the perceived crisis in escalating punitive damages awards the Court addressed through its Due Process jurisprudence was not as widespread or "out-of-control" as the Court's opinions at the time claimed. *Id.* at 497–500.

118. *See generally* Austin v. United States, 509 U.S. 602 (1993).

119. *Id.* at 606.

120. *Id.* at 604.

121. *Id.* at 604–05.

122. *Id.* at 605.

123. *Id.* at 605–06.

124. *Id.* at 622.

125. *Id.* at 607; Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263–64 (1989).

legal system.[126] Justice Blackmun pointed out that while the Fourth Amendment search and seizure rules and the Fifth Amendment ban on self-incrimination expressly apply to criminal prosecutions, the Eighth Amendment is different.[127] The Eighth Amendment specifically refers to criminal prosecutions only in the Excessive Bail Clause, but does not limit the Excessive Fines Clause or the Cruel and Unusual Punishment Clause.[128] From this, Justice Blackmun argued that the drafters of the Excessive Fines Clause did not intend to limit its application to criminal penalties.[129] He observed that "[t]he question is not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment."[130]

The Court posited that whenever the action in which the government was engaged was primarily a form of punishment, the Excessive Fines Clause applies.[131] The Court concluded that, although civil *in rem* forfeitures may include some elements of remedial purpose, they are primarily intended as punishment, regardless of the procedural form in which they are initiated.[132] Thus, the federal government's civil *in rem* forfeiture of Austin's automotive shop and mobile home were punishments subject to the Excessive Fines Clause.[133] The case was remanded to the lower courts to consider whether the forfeiture at issue constituted an excessive punishment.[134] The Court declined, however, to provide any guidance on when a punishment is constitutionally excessive, preferring to allow lower courts to develop their own jurisprudence on the concept of disproportionality.[135]

Justice Scalia concurred in the result but viewed the Court's suggestion that it was essential for the property owner to be guilty of a criminal offense as ill-advised.[136] He stated, "[p]unishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner."[137]

The *Austin* decision impliedly overruled two parts of the *Browning-Ferris* decision: First, it held that the Excessive Fines Clause applies to all types of government-imposed punishments.[138] Second, it held that such punishments can be civil as well as criminal.[139] It is hard to dispute that punitive damages

126. *Austin*, 509 U.S. at 611–13.
127. *Id.* at 607–08.
128. U.S. CONST. amend. VIII.
129. *Austin*, 509 U.S. at 607–09.
130. *Id.* at 610.
131. *Id.* at 618.
132. *Id.* at 622.
133. *Id.*
134. *Id.* at 622–23.
135. *Id.*
136. *Id.* at 625 (Scalia, J., concurring).
137. *Id.* at 624–25.
138. *Id.* at 622 (majority opinion).
139. *Id.*

as practiced in today's tort law are intended to be a civil punishment. The unresolved question after *Austin* became: can punitive damages be considered a government-imposed punishment when the civil action is initiated by a private party, who also receives the primary benefit of the pecuniary damages?

B. Professor McAllister's 1995 Article Urging a "Pragmatic Approach" to Invoking the Excessive Fines Clause to Limit Punitive Damages

Two years after the *Austin* decision, Professor Stephen R. McAllister published an Article closely examining the *Austin* ruling.[140] He suggests that in deciding *Austin* as the Court did—emphasizing a broad concept of punishment in interpreting the Eighth Amendment—the Court clearly had abandoned Justice Blackmun's assumption in *Browning-Ferris* that the Excessive Fines Clause applied exclusively to criminal proceedings.[141] Professor McAllister characterizes Justice Blackmun's ruling in *Browning-Ferris* as employing an unnecessarily "rigid, originalist methodology,"[142] and claims that Justice O'Connor's dissent offered a more accurate historical account of the origins of the Excessive Fines Clause.[143] Professor McAllister argues that the Court's retreat from *Browning-Ferris* in *Austin* should open the door to a more "pragmatic approach" to limiting punitive damages based on the Excessive Fines Clause.[144] He urges that the *Austin* decision, coupled with the Court's 1991 *Edmonson v. Leesville Concrete Co.* decision,[145] set the stage for the possible overruling of the *Browning-Ferris* decision.[146]

Professor McAllister readily acknowledges that the next step necessary to accomplish this pragmatic result is a challenging one.[147] It would require convincing the Court that punitive damages intended to punish a private litigant's malicious wrongdoing serves the same important governmental purpose as statutory civil or criminal penalties.[148] Further, he argues that the states not only had a large stake in carrying out this type of civil punishment to accomplish state objectives, but are also heavily engaged in supporting and controlling it.[149] If the Court could be persuaded to embrace this understanding of the states' role in sponsoring punitive damages as punishments, punitive damages awarded to private litigants logically would have to be treated constitutionally the same as similar criminal or civil penalties directly imposed on wrongdoers.[150]

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140. McAllister, *supra* note 72, at 762–63.
141. *Id.* at 763.
142. *Id.*
143. *Id.* at 770.
144. *Id.* at 762–63.
145. *See generally* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
146. McAllister, *supra* note 72, at 763.
147. *Id.*
148. *Id.*
149. *Id.* at 776–87.
150. *Id.* at 771.

In his Article, Professor McAllister marshalled the best arguments available in 1995 for persuading the Court to bridge this jurisprudential gap between constitutional treatment of direct government: enforced monetary penalties and punitive damages assessed in private litigation.[151] Based on the arguments he advanced, Professor McAllister asserts that after the *Austin* and *Edmonson* decisions, the Court is subject to a logical imperative to accept the strong pragmatic case for constitutionally limiting punitive damages under the Excessive Fines Clause.[152]

It is worth noting that Professor McAllister's 1995 Article was published at the time the Court was still developing its due process rationale for locating a satisfactory constitutional basis within the Fourteenth Amendment to undertake the project of regulating punitive damages. Only one year later, the Court overturned a state punitive damages award on the grounds that it violated the U.S Constitution,[153] thereby firmly settling on its substantive due process rationale for federal authority to regulate punitive damages. This is also when the Court instructed lower courts on how to implement this regulation by creating its three guideposts.[154] It is not clear how this timing affected the persuasiveness of Professor McAllister's pragmatic proposal, but it should have strengthened it. Nevertheless, the Supreme Court did not heed Professor McAllister's urging. Once the Court ruled in 1996 that it would limit excessive punitive damages substantively under a fundamental fairness concept imbedded in the Due Process Clause of the Fourteenth Amendment,[155] scholarly doubts about the continued vitality of the *Browning-Ferris* decision languished until the 2019 *Timbs* decision, and were perhaps brought to the forefront by the *Dobbs* decision.

C. TIMBS V. INDIANA*: FURTHER WEAKENING OF* BROWNING-FERRIS

After the *Austin* decision, it took the Supreme Court sixteen years to confirm what most constitutional scholars assumed was *Austin*'s clear implication—that the Eighth Amendment Excessive Fines Clause was incorporated in the Fourteenth Amendment and, therefore, applied to any state-imposed sanction punitive in nature.[156] In a unanimous decision in *Timbs*, the Court not only applied the *Austin* analysis regarding the application of the Excessive Fines Clause to civil *in rem* forfeitures conducted by the State of Indiana,[157] it also nailed down the incorporation point conclusively: "In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fine Clause is overwhelming."[158]

151. *Id.* at 776–79.
152. *Id.* at 779.
153. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996).
154. *Id.* at 574–85.
155. *Id.* at 574.
156. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).
157. *Id.* at 689–90.
158. *Id.* at 689.

Tyson Timbs was a low-level drug dealer convicted of possession of a small amount of heroin.[159] He was fined $1,203 and sentenced to one year of home detention and five years of probation.[160] The State of Indiana then sought to forfeit Timbs' Land Rover SUV worth $42,000, which he had recently purchased with the proceeds from his father's life insurance policy.[161] Timbs resisted the forfeiture, and the Indiana District Court and Court of Appeals ruled in his favor, citing the gross disproportionality of the forfeiture in relation to the seriousness of his crime.[162] The Indiana Supreme Court reversed, ruling that the Eighth Amendment Excessive Fines Clause did not apply to the states, and was therefore inapplicable to the *in rem* forfeiture in this case.[163] The U.S. Supreme Court granted certiorari and reversed the Indiana Supreme Court ruling, with Justice Ginsburg writing the opinion.[164]

In the course of rejecting the reasoning of the Indiana Court, the U.S. Supreme Court again traced the history of the Excessive Fines Clause in English and U.S. law all the way back to the Magna Carta.[165] The Court specifically reaffirmed its *Austin* holding that the Excessive Fines Clause applies to sufficiently punitive *in rem* forfeitures.[166] The Court also confirmed its view that the key question in determining issues of Fourteenth Amendment incorporation is whether the Bill of Rights safeguard in question is "fundamental to our scheme of ordered liberty," with "deep roots in our history and tradition."[167] Citing the *Austin* decision, the Court ruled that the Excessive Fines Clause of the Eighth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment.[168]

On the issue of whether the Excessive Fines Clause as incorporated reached state civil *in rem* forfeitures that are at least partially punitive, the Court refused Indiana's invitation to reconsider the *Austin* ruling.[169] It also dismissed the State's argument that, if the clause applied to *in rem* forfeitures, it could not be incorporated into the Fourteenth Amendment because such forfeitures were modern punishments that were therefore not "fundamental or deeply rooted" in Indiana law or tradition.[170] The Court explained its disagreement with Indiana's argument by noting that the "fundamental or deeply rooted" test applies to Bill of Rights provisions considered for incorporation in the Fourteenth Amendment—not to every instance of an

159. *Id.* at 686.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 686–87.
165. *Id.* at 687–89.
166. *Id.* at 690.
167. *Id.* at 687.
168. *Id.* at 689.
169. *Id.* at 690.
170. *Id.* at 690–91.

already incorporated constitutional right's application to a novel set of particularized facts.[171]

Because the Indiana Supreme Court had not addressed the question of whether the forfeiture of Timbs' SUV was disproportional to the seriousness of Timbs' crime, the case was remanded to the state court for further proceedings.[172] Considering the facts of the *Austin* case—where the Supreme Court found unconstitutional excessiveness with much less disproportionality—coupled with the finding of disproportionality by the lower Indiana courts in *Timbs*, it is unsurprising that ultimately Timbs did not lose his SUV.[173]

One curious aspect of the *Timbs* decision is an interesting suggestion made by Justice Gorsuch in his brief concurrence.[174] Justice Gorsuch agreed that "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."[175] However, Justice Gorsuch suggested that it might be preferable to incorporate the Excessive Fines Clause into the Fourteenth Amendment's Privileges and Immunities Clause instead of its Due Process Clause, into which most Bill of Rights protections were previously incorporated.[176] Justice Gorsuch did not elaborate on the reasons he thought the Privileges and Immunities Clause would offer a more appropriate home for incorporating the Excessive Fines Clause. However, he did refer to a similar suggestion by Justice Thomas in an earlier decision,[177] and cited two books and one law journal article on the Fourteenth Amendment in support of this suggestion.[178] In another concurrence in a 2023 takings case, *Tyler v. Hennepin County*,[179] Justice Gorsuch (joined by Justice Jackson) offered pointed comments on the possible application of the Excessive Fines Clause to a property tax foreclosure that forfeited the "surplusage" from the tax sale to the local government. He specifically criticized the lower federal court for ruling that a tax foreclosure cannot possibly qualify for treatment as an excessive fine because it is purely "remedial."[180] He also took issue with the lower court's ruling that a penalty must be intended as a punishment for the excessive fines clause to apply.[181] Justice Gorsuch opined that a penalty

171. *Id.*

172. *Id.* at 691.

173. The Indiana courts applied the Excessive Fines Clause and found the forfeiture of Timbs' SUV invalid by reason of disproportionality. Indiana v. Timbs, 169 N.E.3d 361, 371–77 (Ind. 2021).

174. *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See generally* Tyler v. Hennepin Cnty., 598 U.S. 631 (2023).

180. *Id.* at 648 (Gorsuch, J., concurring).

181. *Id.*

intended primarily to deter nonpayment of taxes would also qualify for application of the excessive fines prohibition.[182]

One possible favorable consequence of incorporating the Eighth Amendment into the Privileges and Immunities Clause of the Fourteenth Amendment is to facilitate the change in the constitutional underpinning for the federalization of punitive damages law proposed in this Essay. If Justice Gorsuch is correct in his claim "that the 'privileges or immunities of citizens of the United States' include, at minimum, the individual rights enumerated in the Bill of Rights,"[183] such placement of the right to be free from excessive fines fits neatly in this constitutional landscape. Not only does the Excessive Fines Clause provide a specific text for imposing constitutional limits on punitive damages, it also does not carry the same historical baggage as does finding substantive rights in the Due Process Clause.[184] If the Court were to adopt the Excessive Fines Clause as the superior constitutional basis for regulating punitive damages, making such a change might be justified by the newly recognized incorporation of the Eighth Amendment into the Privileges and Immunities Clause instead of the Due Process Clause.

The *Austin* and *Timbs* cases signal it is time to reexamine *Browning-Ferris*'s refusal to apply the Excessive Fines Clause to impose constitutional limits on punitive damages. Disregarding *Browning-Ferris* as binding precedent opens the door for the Supreme Court to make a transition from its often-criticized substantive due process rationale for regulating punitive damages to the less controversial source of constitutional power found in the Excessive Fines Clause.

III. HOW DOES THE *DOBBS* DECISION POTENTIALLY AFFECT THE CONTINUED VIABILITY OF FEDERAL COURT REGULATION OF STATE PUNITIVE DAMAGES?

Justice Alito's majority opinion in *Dobbs* deconstructs the *Roe* and *Casey* decisions so completely that it is easy to predict his conclusion that both cases were wrongly decided. *Roe*'s "trimester" system with its "fetus viability" test for determining abortion rights is said to completely lack any legitimate foundation in the constitutional text, case precedents, or legal history.[185] *Casey*'s "undue burden" test is similarly dismissed on the same grounds, with

182. *Id.* at 648–50.

183. *Timbs*, 586 U.S. at 691 (Gorsuch, J., concurring) (quoting McDonald v. City of Chicago, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring)).

184. TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring) ("I do not accept the proposition that [the Due Process Clause] is the secret repository of all sorts of other, unenumerated, substantive rights . . . ."); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards.") (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring); *id.* at 439 (Ginsburg, J., dissenting) ("I would not join the Court's swift conversion of [the three *Gore* guideposts] into instructions [to state courts] that begin to resemble marching orders.").

185. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249–59 (2022).

the added comment that it proved to be totally "unworkable" in practice.[186] The Court concluded that these cases were so "egregiously" wrongly decided that the custom of *stare decisis* could not protect it from overruling both *Roe* and *Casey*.[187]

In the course of his *Dobbs* majority opinion, Justice Alito reaffirmed what he describes as the Court's longstanding position that the Fourteenth Amendment Equal Protection Clause has no application to the abortion issue because natural physical differences between men and women are not a factor in litigation.[188] Justice Alito's opinion also dismisses the possible relevance of the Court's nine prior decisions based on a so-called "Right of Privacy" implied in the Fourteenth Amendment.[189] According to the *Dobbs* majority, these cases provide no precedent for *Roe* or *Casey* because "[n]one of those cases involve[] the destruction of what *Roe* called 'potential life.'"[190]

This Essay is not the place to critique the *Dobbs* decision, other than to note that the same criticism that Justice Alito's majority opinion levels at the *Roe* and *Casey* decisions—that they were exercises of "raw judicial power" that were more legislative than judicial in nature[191]—can also easily apply to the *Dobbs* decision, which overturned almost fifty years of what many of the majority justices themselves testified in their Senate confirmation hearings they regarded as well-settled law.[192]

What is important about *Dobbs* for purposes of this Essay is to unpack what the decision teaches us about how the Court will henceforth deal with constitutional rights that are not based on specific constitutional text, but are nevertheless claimed to be implied, and therefore proposed for incorporation into the Fourteenth Amendment. First, just as with abortion, nowhere in the Constitution's text is there a single mention of punitive damages. If, as it appears from its inception in a series of 1990s cases, the federal regulation of state punitive damages is based entirely on an implied "fair notice" principle imbedded in the Due Process Clause of the Fourteenth Amendment, the *Dobbs* decision strongly suggests that this was an illegitimate constitutional justification for creating the federal punitive damages jurisprudence the Court has followed for the past thirty years.[193]

According to *Dobbs*, claims of individual constitutional rights that are not based on express language in the Constitution can be recognized only if they are "fundamental to our scheme of ordered liberty" and are "deeply rooted

186. *Id.* at 2275.

187. *Id.* at 2261–77.

188. *Id.* at 2245–46.

189. *Id.* at 2267–68.

190. *Id.* at 2260.

191. *Id.* at 2265, 2270.

192. This was how *Roe* and *Casey* were described by three of the members of the majority during their Senate hearings on their appointments to the Court.

193. *See* Hines, *supra* note 21, at 384–85.

in this Nation's history and tradition."[194] Interestingly, the Court cited *McDonald v. Chicago*[195] (right to bear arms) and *Timbs*[196] (freedom from excessive fines) regarding this criteria. Both of these are cases where an expressly stated individual constitutional right granted in the Bill of Rights was successfully incorporated into the Fourteenth Amendment.[197] Neither case cited in the *Dobbs* opinion involved the recognition of a claim of an implied unenumerated constitutional right.[198] Nevertheless, the *Dobbs* opinion went on to apply this criteria to the claim of an implied individual right to abortion.[199] After an extensive survey of U.S. legal history, the Court found the claim of a right to abortion met neither criterion for incorporation into the Fourteenth Amendment, overturning *Roe* and *Casey*.[200]

The pivotal question posed for this Essay is: how will the *Dobbs* analysis operate if it is applied to finding a right to close federal judicial review of state punitive damages awards for their reasonableness and possible excessiveness? Although punitive damages awarded by state juries have been recognized by the Supreme Court as a permissible state tort remedy since the middle of the nineteenth century,[201] there is no history of federal intervention in the procedure or substance of such awards until the very late twentieth century.[202] Based on this background, arguing convincingly to the U.S. Supreme Court that federal regulation of state punitive damages awards is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition"[203] will be very difficult, probably a non-starter.

Federal regulation of state punitive damages also lacks any realistic connection to the implied "right of personal privacy" the Court has repeatedly invoked in matters directly affecting personal autonomy.[204] If a winning punitive damages plaintiff challenges the constitutionality of the current federal limits on state awards based on the *Dobbs* rubric, it is difficult to see how federal regulation of state punitive damages awards will be sustained under its current Due Process Clause justification. Thus, if the Court is as "business oriented" as some commentators claim, when the next punitive damages case reaches the Supreme Court, the Court may be very interested

194. *Dobbs*, 142 S. Ct. at 2246 (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).
195. *Id.* at 2246–47 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).
196. *Id.* at 2246 (quoting *Timbs*, 139 S. Ct. at 686).
197. *See McDonald*, 561 U.S. at 750; *Timbs*, 139 S. Ct. at 687.
198. *See generally supra* notes 195–96 and accompanying text.
199. *Dobbs*, 142 S. Ct. at 2245.
200. *Id.* at 2248–57.
201. *See* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).
202. Hines, *supra* note 21, at 380–81.
203. *Dobbs*, 142 S. Ct. at 2246.
204. *Id.* at 2267–68 (listing and carefully distinguishing these cases).

in finding an alternative constitutional foundation for continuing the past four decades of successful federal regulation.[205]

A. WHY WOULD THE EXCESSIVE FINES CLAUSE BE A PREFERABLE CONSTITUTIONAL BASIS FOR LIMITING PUNITIVE DAMAGES?

The simple answer to the question posed by this heading is that by basing constitutional regulation of punitive damages in the Excessive Fines Clause, there would now be a constitutional text providing the foundation for such regulation for the first time. The Excessive Fines Clause would have to be found to apply not only to state-imposed punishments, but also to state-authorized punishments—like punitive damages—that states support because they serve the purpose of punishing and deterring unwanted extreme tortious behavior. Granted, as suggested earlier, it will take a significantly expanded interpretation of the Excessive Fines Clause to accomplish this result, but such an interpretation is reasonable based on the Court's cases decided since *Browning-Ferris*. Justifying this somewhat broader interpretation of existing constitutional language today should be an easier and more transparent exercise than what the Court did in the 1990s by creating new constitutional jurisprudence based on the controversial revival of the concept of substantive due process.

It is difficult to see the downside of the Court agreeing to shift to the Excessive Fines Clause as the basis for limiting excessive punitive damages awards. Although the punitive damages jurisprudence developed under the Due Process Clause has seemingly worked, there has always been lingering doubt about the constitutional legitimacy of the substantive due process rationale underlying *Gore* and *Campbell*. By locating a "fair notice" principle imbedded in the Due Process Clause,[206] the Court chose to hang a rather weighty constitutional framework on a very weak hook.

By switching to the Eighth Amendment as the source of constitutional authority to regulate punitive damages, the Court would no longer face criticism that it is either resurrecting a discredited analytical framework or making up out of thin air the constitutional law being applied.[207] Thus, the Court would again honor the long-standing consensus that there is no substantive content within the Due Process Clause.[208] Justice Scalia once explained his disagreement with use of the Due Process Clause to regulate punitive damages in these terms:

> The plurality's continued assertion that federal judges have some, almost-never-usable, power to impose a standard of 'reasonable punitive damages' through the clumsy medium of the Due Process

205. *See generally* Hines & Hines, *supra* note 37 (describing and analyzing lower courts' implementation of the *Gore* & *Campbell* "Constitutional Guideposts" in detail).

206. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003).

207. *See Gore*, 517 U.S. at 598–607 (Scalia, J., dissenting).

208. *See* TRIBE, *supra* note 93, at 1332–81.

> Clause serves only to spawn wasteful litigation, and to reduce the incentives for the proper institutions of our society to undertake the task.[209]

The *Dobbs* decision suggests that the Court is prepared to heed its criticisms and, in the future, will uphold its long-standing position that there is no substantive content in the Due Process Clause. If the Court sticks with its *Dobbs* ruling and overrules *Gore* and *Campbell*, presumably the whole federal system for restraining excessiveness in punitive damages will collapse. Moving to the Excessive Fines Clause as the constitutional basis for reining in punitive damages avoids this risk. Employing the Excessive Fines Clause would—at the very least—be based on a specific provision in the Constitution limiting pecuniary punishments, and the charge of misuse of the Due Process Clause could no longer be made credibly.

IV. HOW TROUBLING ARE THE ARGUMENTS AGAINST SWITCHING TO THE EXCESSIVE FINES CLAUSE?

There are at least three arguments today against changing the constitutional basis for regulating punitive damages. First, the U.S. Supreme Court already rejected the proposition that the Excessive Fines Clause applies to punitive damages in *Browning-Ferris*.[210] As Professor McAllister points out, Justice Blackmun's atypical originalist analysis provided a very weak basis for the *Browning-Ferris* decision,[211] and the accuracy of his recounting of the history of the Excessive Fines Clause was disputed persuasively by the dissenters in the case.[212] Furthermore, Justice Blackmun's stated presumption that the Eighth Amendment is applicable only to criminal prosecutions was expressly rejected in the *Austin* decision.[213] It has been over thirty years since the Court issued its *Browning-Ferris* decision. The legal landscape has changed substantially over this time in ways that cast serious doubt on whether the case would be decided the same way today.

The second argument is that since 1996, U.S. courts have regulated punitive damages effectively under the Due Process Clause: So, why change from a legal regime that appears to be working? While it is true that studies show that the nation's courts are handling punitive damages claims generally in accordance with the Supreme Court's prescribed protocol and are producing reasonable results,[214] there is still a great deal of imprecision in the three guideposts the Court promulgated to assist lower courts in their review of punitive damages awards. Uncertainty among lower courts about how the guideposts apply to certain types of cases—and how to weigh the guideposts

209. *See* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 472 (1993) (Scalia, J., dissenting).

210. *See supra* Section I.A.

211. *See* McAllister, *supra* note 72, at 763.

212. *See* Browning-Ferris Indus. Of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 286–97 (1989) (O'Connor, J., concurring in part and dissenting in part).

213. *See* Austin v. United States, 509 U.S. 602, 604 (1993).

214. *See supra* note 109 and accompanying text.

among themselves—continues to hamper achieving nationwide consistency in the outcomes of similar punitive damages cases.

It has now been twenty years since the Supreme Court last addressed a claim that a punitive damages award in a conventional civil case was arbitrary or excessive. Even before Justice Souter's gratuitous comments in the *Baker* opinion about the Court's possible overreaction to a misperceived punitive damages crisis in *Gore* and *Campbell*,[215] the paucity of recent punitive damages cases in the Supreme Court was cause for some commentators to speculate that the Court had lost its enthusiasm for constraining arbitrary or excessively large punitive damages awards.[216]

However, the steady flow of punitive damages cases in lower courts around the country continues unabated, and there is every sign that state courts believe they are still under a mandate from the Supreme Court to focus close judicial review on the justifications for and the size of punitive damages awards coming before them.[217] The lack of firm directions from the Court on how lower courts should handle outlier cases[218] and cases with very low or very high compensatory damages has stymied a few courts,[219] but, overall, lower courts have been able to cope effectively with these uncertainties.[220] Further, it is unclear how much more detailed instructions the Court could offer without overstepping its supervisory role and appearing to micromanage lower courts' decision making.[221]

It is also worth noting that over the past decade, the membership of the Supreme Court bench has changed substantially. Of all the justices who participated in the creation of a federal role in monitoring state punitive damages awards, only Justice Thomas—who wrote strong dissents in the *Gore* and *Campbell* cases[222]—is still on the bench, and there are eight new Justices. Therefore, it is almost impossible to predict how *Browning-Ferris*, *Gore*, and *Campbell* would be decided today. Added to this uncertainty is the fact that some members of the current Supreme Court do not appear to feel as firmly bound by long-standing precedents as earlier Justices believed themselves to be.[223] Thus, the opportunity to reconsider whether the Eighth Amendment's

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215. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 498–503 (2008).

216. One scholar ventured the opinion that "it seems fair to say that the Court, given its current makeup, will no longer take punitive damages cases even if they do not comply with the *Gore* guideposts." *See* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 585 (2011) (footnote omitted).

217. *See* Hines, *supra* note 21, at 404–05.

218. *See* Hines & Hines, *supra* note 37, at 1313–14.

219. *Id.* at 1296–1302.

220. *See* Hines, *supra* note 21, at 404–05.

221. Justice Ginsburg in dissent objected to the Court issuing the states "marching orders." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 439 (2003) (Ginsburg, J., dissenting).

222. *See supra* note 22 and accompanying text.

223. *See, e.g.*, Franchise Tax Bd. Of Cal. V. Hyatt, 139 S. Ct. 1485, 1492 (2019) (overturning a long-standing precedent that allowed one state to sue another in the state sued, based on a claim arising in the state suing).

Excessive Fines Clause provides a superior constitutional basis for constraining punitive damages awards may be significantly better today than it was in 1989 when *Browning-Ferris* was decided.

The third argument against making this constitutional switch is that moving away from the Due Process Clause as the basis for regulating punitive damages will require a substantial expansion of the scope of the Excessive Fines Clause. It is argued that this expansion would switch from imposing a restraint on direct governmental punishment to regulating government-approved punishment in the private sector. While the first two arguments to switching to the Excessive Fines Clause as the constitutional basis do not appear to be game changers, this third concern is different. It requires the Court to take a major step beyond where it has already moved in the *Austin* and *Timbs* cases. Realistically, accomplishing this crucial move by adopting an even broader interpretation of the Excessive Fines Clause may prove to be an obstacle too weighty to overcome.

The immutable fact is that, unlike pecuniary punishments enforced and collected by the states, almost all punitive damages are awarded to private plaintiffs in private civil litigation—not prosecuted directly by the states or any other government entity. For the Court to extend the Excessive Fines Clause to punitive damages, it will be necessary for the Court to be convinced that punitive damages should qualify as a form of state-sanctioned punishment since it is imposed under state law, is agreed to further important state interests, and is so tightly entangled in the proper operation of state courts that it is more or less equivalent to direct punishment by the states. The Court will have to agree that these connections are so strong that not to treat punitive damages in the same way as all other forms of state-sanctioned punishments is without justification in law or common sense.

A. How to Overcome the Inconvenient Fact That Punitive Damages Are Received by a Private Party and Not the Government?

As Professor McAllister recognized over twenty-five years ago, the biggest impediment to employing the Excessive Fines Clause to restrict the size of punitive damages awards is overcoming Justice Blackmun's express holding in *Browning-Ferris*:

> We therefore hold, on the basis of the history and purpose of the Eighth Amendment, that its Excessive Clause does not apply to awards of punitive damages in cases between private parties.
>
> ….
>
> [The Eighth Amendment] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.[224]

224. Browning-Ferris Indus. Of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 260, 264 (1989).

In the conclusion to his *Browning-Ferris* opinion, Justice Blackmun went on to state, "[t]he fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take [to apply the Excessive Fines Clause]."[225]

Professor McAllister argues that to in order to clear the obstacle posed by Justice Blackmun, it would be necessary to convince the Court that the states are so deeply engaged in imposing this type of punishment through their support for and administration of punitive damages that it is entirely fair and appropriate to apply the Excessive Fines Clause to the results of their judicial processes.[226] He underlines this claim by pointing out that the Supreme Court itself has described punitive damages as "private fines levied by civil juries."[227]

To formulate the best argument for treating punitive damages as a form of state punishment subject to constitutional constraint under the Excessive Fines Clause, examination of the degree to which states currently are directly involved in administering punitive damages as a punishment for malicious wrongdoers within their jurisdictions is required. State punitive damages regimes have a long and respected history in U.S. law. In the 1850s, the Supreme Court affirmed that punitive damages were an integral part of U.S. tort law and had been recognized as such by U.S. courts for more than a century.[228] Justice Scalia pointed out in several concurrences that, historically, punitive damages jurisprudence was firmly ingrained in state tort law when the Fourteenth Amendment was adopted.[229] He argued that state substantive laws governing punitive damages were grandfathered in and not subject to regulation under the Fourteenth Amendment except perhaps to assure procedural fairness.[230] Although Justice Scalia's view on the immunity of punitive damages to substantive federal constraint was never accepted by the Court's majority, his argument underlines the fact that punitive damages have been a significant part of most states' tort law for over two hundred-fifty years. Punitive damages only became of concern to the Supreme Court in the late 1980s when state court awards were perceived to have increased markedly in frequency and size.

225. *Id.* at 275.

226. McAllister, *supra* note 72, at 776–86.

227. *Id.* at 768 (quoting Browning-Ferris Indus. Of Vt. v. Kelco Disposal, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part).

228. *See* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

229. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25–28 (1991) (Scalia, J., concurring) (arguing that punitive damages were a well-established part of U.S. tort law before the Fourteenth Amendment was adopted in 1868, and therefore they are immune from federal regulation under the Fourteenth Amendment.).

230. *Id.* at 26–27.

Punitive damages are available in almost all states[231] and are almost exclusively creatures of state law. The Supreme Court has repeatedly acknowledged in recent cases that states have a legitimate interest in authorizing and facilitating punitive damages to punish and deter wanton or malicious misconduct within their jurisdictions.[232] Furthermore, the Court has consistently ruled that the Fourteenth Amendment permits states to operate judicial systems that award punitive damages—either under specific statutes or as part of their common law heritage—so long as they operate within constitutional requirements of procedural fairness.[233]

State legislation determines whether punitive damages are even available for certain types of wrongs.[234] Specific legislation commonly controls crucial aspects of legal actions to recover punitive damages, including pleading requirements, various types of exceptions from punitive damages liability, pecuniary or percentile caps, and whether the plaintiff must share the recovery with the state or some non-profit organization designated by the state.[235] State law may be guided by federal procedural due process principles, but it nevertheless establishes the procedural rules private parties must follow in actions seeking (and defending against) punitive damages.[236]

Punitive damages are recoverable only through litigation in courts funded, organized, and managed by state government.[237] In those state courts, the applicable law and the judge and jury—which are legally essential for punitive damages claims to be litigated—are all provided by the state.[238] A winning plaintiff has recourse to the full panoply of the state's debt collection processes to convert a punitive damages award into cash, including judicial foreclosure of a judgement lien.[239] All of this involvement adds up to an overwhelming amount of state participation in private punitive damages actions and gives the state a major stake in their outcome. Is it enough to overcome Justice Blackmun's insistence that pecuniary punishments must be imposed and collected directly by the states for the Excessive Fines Clause to

231. Only four states (Michigan, Nebraska, New Hampshire, and Washington) do not allow punitive damages. HAMMESFAHR & NUGENT, *supra* note 73, at 267–68. Several other states allow punitive damages only when provided for by statute. *Id.* at 266–68.

232. *See, e.g.*, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (explaining that punitive damages serve multiple legitimate state purposes).

233. *See id.*

234. *See* McAllister, *supra* note 72, at 780–83.

235. *Id.* at 782–86.

236. Under Supreme Court decisions applying procedural due process to states' judicial practices for awarding and reviewing punitive damages, states are not only required to employ fair pleading and trial processes, but are also mandated to provide an effective process for judicial review of all punitive damages awards, and to do so *de novo*. *See* Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (adopting a *de novo* standard of review).

237. *See* DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 3.11(1) (2d ed. 1993).

238. *See id.*

239. *See id.*

apply to them? This Essay strenuously argues that a good case can now be made that it should.

Professor McAllister advances an interesting argument in which he analogizes finding heavy state participation in the awarding of punitive damages to finding "state action" necessary to bring a Section 1983 claim.[240] He argues that convincing the Court to treat punitive damages as a state-administered punishment equivalent to a fine is very much the same as convincing the Court that sufficient "state action" has occurred to justify invoking the Fourteenth Amendment.[241] He cites Supreme Court decisions *Batson v. Kentucky*[242] and *Edmonson v. Leesville Concrete Co.*[243] to bolster this analogy.[244] These two cases applied the Equal Protection Clause of the Fourteenth Amendment to forbid the use of preemptory challenges to strike jurors in criminal (*Batson*) and civil (*Edmonson*) cases, where the race of the potential juror was the reason for the challenge. Professor McAllister argues that in both decisions the key point was that states were so directly and deeply involved in administering the law at issue that they could not escape responsibility for the legal result.[245] Similarly, the complex judicial process by which punitive damages are awarded and assessed is so dependent on state participation that the Excessive Fines Clause should apply the Fourteenth Amendment to limit their impact as excessive punishments.[246]

Less well known is the somewhat more recent *Edmonson* case. In *Edmonson*, the Supreme Court found state action in routine civil litigation regarding a negligence claim where state procedural rules allowed each party three preemptory challenges to prospective jurors.[247] The plaintiff was African American, and the defendant exercised preemptory challenges to remove the only two African American members of the jury pool.[248] Though the decision to exercise the preemptory challenges in a racially discriminatory manner was made by the defendant's private attorney, the Court held that this was nevertheless state action that justified the Section 1983 claim of a denial of equal protection.[249] In its ruling, the Court reasoned that the injury to the plaintiff was rendered more severe because it took place in the courthouse, stating:

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine

240. *See* McAllister, *supra* note 72, at 776–78.
241. *Id.*
242. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).
243. *See generally* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
244. *See* McAllister, *supra* note 72, at 776–81.
245. *See id.* at 779.
246. *See id.* at 776–78.
247. *Edmonson*, 500 U.S. at 616–17.
248. *Id.*
249. *Id.* at 624–25.

> the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.[250]

Although finding state action in private civil litigation does pose somewhat different questions than attributing the awarding of punitive damages to the states' exclusive authority, the basic inquiry is much the same and, therefore, similar principles should apply.

Another aspect of state legal systems under which punitive damages are awarded that underscores the heavy involvement of the state is that the awards are almost always made by juries.[251] By choosing to rely on juries to determine whether punitive damages are justified on the facts of the case and, if so, to assess the appropriate amount of pecuniary punishment, states make a delegation decision that is crucial to the effective operation of punitive damages law. As the Court stated regarding the importance of the jury system in the *Edmonson* case, "[the jury] performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all the people.'"[252]

Similarly, another Supreme Court opinion underlined the importance of the jury by noting, "[i]ndeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[253]

The almost universal reliance of states on juries to determine both the defendant's liability for exemplary punishment and the size of the pecuniary damages award justified by the misconduct is another example of how deeply entangled the states are in the administration of punitive damages law.

Edmonson was a 6–3 decision by the Court, with Justices O'Connor, Rehnquist, and Scalia dissenting.[254] None of those three dissenters are still members of the Court, and the result in the case has not been overruled or even challenged in the nearly thirty years since it was decided. Professor McAllister's Article argues that, by analogy, the analysis in the *Edmonson* case is powerful authority for recognizing that the high degree of state government immersion in punitive damages verdicts should be recognized as decisive state action.[255] Coupled with the many other connections enumerated above, Professor McAllister claims the case for punitive damages being treated as a "fine" was stronger than the case for preemptory jury challenges being state action.[256] He claims the logic of the *Edmonson* case should make it almost

250. *Id.* at 628.

251. *See* McAllister, *supra* note 72, at 776–78.

252. *Edmonson*, 500 U.S. at 624 (alteration in original) (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

253. *See Powers*, 499 U.S. at 407.

254. *See Edmonson*, 500 U.S at 631–45.

255. McAllister, *supra* note 72, at 776–80.

256. *Id.* at 779.

imperative for the Court to abandon the *Browning-Ferris* ruling and interpret the Excessive Fines Clause as imposing a constitutional limit on the size of punitive damages awards by state courts.[257]

One obvious problem with this argument is that the Court is especially attentive to claims of racial bias, and *Batson* and *Edmonson* both involved overt racial discrimination—a fact pattern that is very different from what is typically at issue in punitive damages cases. Nevertheless, it is difficult to see why this line of argumentation based on the high degree of state entanglement in punitive damages is not more persuasive today than it was shortly after the *Austin* and *Edmonson* cases were decided.

At this time, a few states already either directly claim a share of punitive damages awards for their state treasury or legislatively direct a share be distributed to a specific public interest agency.[258] Thus, in these states, the proposition posited in *Browning-Ferris* that the state itself derives no monetary benefit from the punishment administered through its punitive damages law is simply not true,[259] nor was it true in 1989 when the case was decided. How should this fact affect the recognition of the Excessive Fines Clause as a source of federal regulatory authority over punitive damages?

One possible answer would be a two-tiered system of federal punitive damages law, whereby substantive due process continues to be the operative rubric in four-fifths of the states, but for the other one-fifth, the Excessive Fines Clause would become the constitutional basis for regulating punitive damages awards. This arrangement would not only be awkward to administer, but it seems wrong under basic federalism principles. This difference among the states where punitive damages are directed should not be used to justify treatment of one state's punitive damages regime differently than another. Rather, it should be treated as just one more piece of evidence demonstrating how essential state law and practices are to the totality of U.S. punitive damages law—a hegemony that arguably justifies applying the Excessive Fines Clause to all fifty states uniformly. Much of the Court's reasoning in *Browning-Ferris* has been discarded or relaxed.[260] For the Court to relent on its position that enforcing the requirement that the Excessive Fines Clause can apply only when the government itself imposes and collects the pecuniary punishment should not be all that institutionally difficult to disregard at this point in time.

V. IF THE CHANGE TO THE EXCESSIVE FINES CLAUSE IS ADOPTED, HOW MUCH CURRENT PUNITIVE DAMAGES JURISPRUDENCE SHOULD CARRY OVER?

If the U.S. Supreme Court could be persuaded that the Excessive Fines Clause, as incorporated into the Fourteenth Amendment, offers a superior

257. *Id.*

258. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 355–56 (3d ed. 2018).

259. *See* Browning-Ferris Indus. Of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 272–76 (1989).

260. *See supra* Section II.A & Section II.C.

basis for imposing constitutional limits on excessive state punitive damages awards, presumably nothing would change in the Court's procedural due process jurisprudence. The series of the Court's decisions in the 1990s and early 2000s establishing the constitutional judicial framework state courts must follow when awarding and reviewing punitive damages was decided under the procedural component of the Due Process Clause and were not particularly controversial. Decisions like *Honda Motor Co., Ltd. v. Oberg*, *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, and *Philip Morris USA Inc. v. Williams*, require that state courts must enforce procedural regularity in the trial of punitive damages cases,[261] must provide a clear procedural path for review of such decisions *de novo* by an appellant court,[262] and must assure that instructions to the jury confine the jury's attention to the harmful acts of the defendant within the state's jurisdiction.[263] All of these procedural requirements are salutary and should remain in place, even if the constitutional basis for imposing substantive limits on the reasonableness and size of punitive damages awards shifts from the Due Process Clause to the Excessive Fines Clause.

As to the remainder of constitutionalizing punitive damages law based on substantive fairness principles said to be imbedded in the Due Process Clause, common sense suggests that the Court's entire jurisprudence generated by the *Gore* and *Campbell* decisions should be carried forward in the implementation of the Excessive Fines Clause. Someone skeptical of this proposition may argue, "[n]ot so fast, isn't there a major difference between a constitutional regulatory regime based on a fundamental fairness principle and one based only on the excessiveness of the penalty?" Although there clearly is a rhetorical difference, when one considers the purposes of the two types of regulation, the similarities far outweigh the differences. How do courts go about determining disproportionality except by closely examining the seriousness of the defendant's wrongdoing and comparing it to the amount of the punishment exacted? That is exactly what courts do now under the *Gore/Campbell* guideposts.[264] They weigh the egregiousness of the defendant's wrongdoing and the harm inflicted on the victim—as measured by the compensatory damages awarded—against the size of the punitive damages awarded. For example, by definition, a punitive damages award that is not justified by the facts of the case is disproportionate. Administering the principle of disproportionality as it must play out in a court is almost indistinguishable from what is now routinely done in evaluating the constitutionality of a punitive damages award under the rubric of substantive due process.

Although repeatedly criticized by dissenters on the Court and numerous scholars, the jurisprudence emanating from the *Gore* and *Campbell* decisions

261. *See* Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 426–30 (1994).

262. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

263. *See* Philip Morris USA v. Williams, 549 U.S. 346, 352–57 (2007).

264. *See* text accompanying *supra* notes 95–99.

has clearly achieved the Court's purpose in imposing meaningful limits on the reasons for awarding punitive damages and on the size of the awards. It is difficult to see a good reason for abandoning these gains just because the constitutional basis for federal court regulation of punitive damages awards shifts to the Excessive Fines Clause of the Eighth Amendment.

Continuing to recognize and apply the *Gore/Campbell* guideposts would also solve one of the troubling problems identified by Professor McAllister—the absence of any objective criteria in the Eighth Amendment for determining when a punitive damages award is unconstitutionally excessive.[265] Professor McAllister proposes that the guiding principle for developing such objective criteria should be the concept of proportionality—which most states currently use in determining the legality of an *in rem* forfeiture.[266] Professor McAllister offers two ways to remedy this shortcoming. First, he suggests a simple ratio formula could be adopted based on historic multiples of exemplary damages to compensatory damages, like the double damages allowed in cases of legal waste of land or treble damages awarded for certain trademark and anti-trust violations.[267] Secondly, he proposes using *Solem v. Holm*—where the Court prescribed three proportionality factors to be applied in cases arising under the Eighth Amendment's Cruel and Unusual Punishment Clause[268]—as a model.[269] This was also Justice O'Connor's suggestion about where to find appropriate proportionality criteria in her dissent in the *Browning-Ferris* case.[270]

Of course, if as suggested above, the Court's current criteria for identifying unjustified or excessive punitive damages are imported into the Excessive Fines regime, it will not be necessary to create a new federal law of disproportionality. It would be equally unnecessary to create an organic ratio formula or to adapt to punitive damages awards the Court's *Solem v. Holm* criteria for determining when punishments are cruel and unusual. The standards set forth in the three *Gore/Campbell* guideposts[271] could easily be incorporated into the Eighth Amendment framework as the operative disproportionality criteria for determining unconstitutional excessiveness under the Eighth Amendment. This system for identifying unjustified or excessive punitive damages awards under the Due Process Clause has been in place for over thirty years and has been applied successfully in nearly one

265. *See* McAllister, *supra* note 72, at 790–91.

266. *Id.*

267. *Id.* at 791–92.

268. Solem v. Helm, 463 U.S. 277, 290–92 (1983).

269. *See* McAllister, *supra* note 72, 794–97.

270. Browning-Ferris Indus. Of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 300–01 (1989) (O'Connor, J., concurring in part and dissenting in part).

271. *See* text accompanying *supra* notes 95–99.

thousand lower court decisions.[272] Perhaps more importantly, contrary to Justice Scalia's lament in his *Gore* dissent that the guideposts set out in the case lead "nowhere,"[273] the guideposts have proved very useful to lower courts in identifying punitive damages awards that are not justified by the degree of reprehensibility of the defendant's conduct—the first guidepost.[274] Similarly, punitive damages awards should be set aside if they are excessive in relation to low ratios of punitive damages to compensatory damages established by the Court—the second guidepost.[275] To generalize on the experience under the *Gore/ Campbell* guideposts, a ratio that exceeds single digits is constitutionally suspect, and ratios in the range of four to one (or less) are presumptively reasonable.

However, a close review of recent punitive damages decisions suggests that seeking to compare a punitive damages award to the civil penalty that could be assessed for similar willful misconduct—the third guidepost[276]—has not proved to be a useful standard in most cases.[277] Consistent with the view stated in earlier articles on this topic, the third guidepost should not be carried forward in the excessiveness review under the Eighth Amendment, unless it is reformulated to focus on an investigation into the size of punitive damages awards made in similar cases, as many state courts do now.[278]

CONCLUSION: COULD THIS CHANGE ACTUALLY HAPPEN?

The recent *Dobbs* decision raised the stakes considerably. *Dobbs* could be a game changer because it strongly suggests the current constitutional basis for federal regulation is invalid because it is based on a creative substantive interpretation of the Due Process Clause and not an express grant of a constitutional right. Thus, if the Court deems the regulatory jurisprudence limiting punitive damages developed over the past thirty years worth salvaging, this revised Essay attempts to provide the Court with a viable alternative constitutional foundation for continuing federal regulation of unreasonable state punitive damages awards.

The *Austin* and *Timbs* decisions altered most of the holdings in *Browning-Ferris*. Contrary to *Browning-Ferris*, *Austin* ruled that the Excessive Fines Clause is not limited to criminal prosecutions; it governs all types of government-imposed punishments.[279] *Timbs* settled the incorporation issue by ruling the Excessive Fines Clause is incorporated into the Fourteenth

272. *See* Hines & Hines, *supra* note 37, at 1273, 1276 (The "nearly 1000" number is based on the 507 cases from 2003 to 2013 studied in this research, augmented by an average of five hundred cases per year since 2013).

273. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting).

274. *See* Hines & Hines, *supra* note 37, at 1277–83.

275. *Id.* at 1283–1304.

276. Hines, *supra* note 21, at 393.

277. Hines & Hines, *supra* note 37, at 1309–13.

278. *Id.* at 1310–13.

279. Austin v. United States, 509 U.S. 602, 610 (1993).

Amendment and, therefore, is binding on the states.[280] In both *Austin* and *Timbs*, the Excessive Fines Clause was specifically applied to the civil penalty of *in rem* forfeitures at the federal and state levels, necessitating some type of proportionality review that focuses on the extent of the punishment in relation to the seriousness of the underlying offense by the property owner.[281] This inquiry into proportionality is almost exactly what is currently done under the substantive due process rubric in reviewing punitive damages that are challenged as unreasonable or excessive. Thus, expanding the scope of the Excessive Fines Clause to encompass state-administered punishment in the form of punitive damages does not require an extraordinary exercise in analogical reasoning to make it operational.

It has been thirty years since *Browning-Ferris* was decided, and there is no question that its authority has been substantially weakened by later decisions. It has been sixteen years since the Supreme Court ruled on a claim of excessiveness in a state punitive damages award under the Due Process Clause. The membership of the Court has changed dramatically since *Browning-Ferris* was decided, with only Justice Thomas remaining on the bench from 1996 when the battle lines were firmly drawn over whether there was a fundamental fairness principle imbedded in the Due Process Clause that justified substantive constitutional limits on arbitrary or excessive punitive damages awards.

It is doubtful at this point that the Court would wish to turn back the clock and abandon its project to federalize punitive damages law. Some newer members of the Court are occasionally criticized for favoring corporate interests over the well-being of private citizens. Whether or not this is a fair criticism, continuing to impose constitutional limits on punitive damages clearly benefits corporate businesses, who are commonly overrepresented in the class of punitive damages. In fact, corporations were the defendants in all nine of the punitive damages cases to reach the Court in the recent era.[282]

If the Court overturns the current substantive due process basis for federal courts regulating state punitive damages, changing to a specific text in the Constitution—like that provided by the Excessive Fines Clause—may appeal to current members of the Court as a superior way to continue such regulation. Thus, the opportunity to reconsider whether the Excessive Fines Clause provides a more solid constitutional basis for constraining punitive damages awards is significantly better today than it was in 1989 when *Browning-Ferris* was decided, or in 1995 when Professor McAllister published his article arguing for such a change. The concurrence concerning the

280. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

281. *Id.* at 691; *Austin*, 509 U.S. at 618.

282. In order, the nine corporate defendants were Browning-Ferris Industries of Vermont, Inc. (1989), Pacific Mutual Life Insurance Co. (1991), TXO Production Corp. (1993), Honda Motor Company, Ltd. (1994), BMW of North America, Inc. (1996), State Farm Mutual Automobile Insurance Company (2003), Cooper Industries, Inc. (2001), Philip Morris USA, Inc. (2007), and Exxon Shipping Co. (2008).

Excessive Fines Clause in the recent *Tyler* case by Justices Gorsuch and Jackson suggests that at least two members of the Court are ready to seriously consider giving the clause a wider scope than it was given in *Browning-Ferris*.

Operating on a clean slate by locating incorporation of the Eighth Amendment into the Fourteenth Amendment as falling within the Privileges and Immunities Clause instead of the Due Process Clause, as Justice Gorsuch recommended,[283] might help ease the transition to relying on the Excessive Fines Clause to constrain punitive damages. In either case, the procedural due process jurisprudence relating to punitive damages should not be affected. It should be retained and continue to govern the procedural regularity of state punitive damages litigation. If a change to the Excessive Fines Clause is adopted, the substantial jurisprudence created over the past thirty years under the substantive due process rubric emphasizing acceptable ratios between punitive damages and compensatory damages should also be retained. It could easily transition into providing the framework for the disproportionality analysis now required under the Excessive Fines Clause.

If implemented by the Court, this shift to the Excessive Fines Clause not only eliminates the continuing skepticism about the legitimacy of relying on the chimera of substantive due process to support the current federal regulation of punitive damages, but it continues the current effective regulation unabated—but reinforced—through reliance on a different section of the Fourteenth Amendment.

283. *See* text accompanying *supra* notes 174–76.