

Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause

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Introduction

For much of this nation's history, the Excessive Fines Clause of the Eighth Amendment¹ received little attention from courts or scholars.² Over the past two decades, however, Excessive Fines Clause jurisprudence has experienced a significant revival. Most

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1. U.S. CONST. amend. VIII (“Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.”) (emphasis added).

2. The 1978 edition of Corwin's classic treatise, for example, states simply that “[t]he Supreme Court has had little to say with reference to excessive fines or bail.” EDWARD SAMUEL CORWIN, HAROLD WILLIAM CHASE & CRAIG R. DUCAT, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 432 (1978). In the words of one author, “the Excessive Fines Clause was virtually a dead letter.” Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 468 (2000); see also Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407 (1998) (suggesting that “the Excessive Fines Clause of the Eighth Amendment, has . . . gone virtually without judicial comment for most of the two hundred years since the adoption of the Bill of Rights”); Robert Brett Dunham, *The Cruel and Unusual Punishment and Excessive Fines Clauses*, 26 AM. CRIM. L. REV. 1617, 1617 (1989) (“The controversial and emotionally charged nature of the death penalty has focused eighth amendment debate on the ‘cruel and unusual punishments clause.’ In contrast, the ‘excessive fines’ clause has been moribund.”); Richard M. Re, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1041 (2010) (describing the Excessive Fines Clause as “often overlooked”); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 836 (1997) (“Given that much of the Bill of Rights is subject to immense judicial gloss through precedent, it is remarkable that the Excessive Fines Clause had for decades remained a virtually overlooked provision.”). As late as 1988, a leading periodical would describe the Excessive Fines Clause as merely “a blank slate” and “an obscure phrase in the Eighth Amendment.” *Lawsuits: Punish and Suffer*, *ECONOMIST*, Dec. 17, 1988, at 31, 36.

notably, in the 1998 case of *United States v. Bajakajian*,³ the Supreme Court for the first time held that a forfeiture constituted a constitutionally “excessive” fine.⁴

In the years since *Bajakajian*, lower courts have (in the absence of further guidance from the Supreme Court) grappled with a variety of issues associated with Excessive Fines Clause doctrine. Against this backdrop has emerged a little-noticed but important circuit split regarding the appropriate test for determining the constitutional “excessiveness” of a fine or forfeiture. Most courts have read the Supreme Court’s opinion in *Bajakajian* as requiring a tightly cabined analysis: as long as a penalty is not grossly disproportionate in relation to its associated offense, it is not barred by the Eighth Amendment.⁵ These courts have generally not regarded a

3. *United States v. Bajakajian*, 524 U.S. 321 (1998).

4. Although the *Bajakajian* case is today the leading case on the Excessive Fines Clause, the 1990s renaissance in the Supreme Court’s Excessive Fines Clause jurisprudence began several years earlier. In the 1993 case of *Austin v. United States*, 509 U.S. 602 (1993), the Supreme Court affirmed that the Excessive Fines Clause applies in the context of *in rem* civil forfeitures; however, the court “decline[d] th[e] invitation” to delineate the appropriate test for determining constitutional excessiveness at that time. *Id.* at 604, 622–23; *see generally* *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting) (suggesting the Excessive Fines Clause was “rescued from obscurity” in *Austin*). It is noteworthy, however, that the significant revival in Excessive Fines Clause jurisprudence in the courts over the past two decades has been unmatched by a commensurate increase in the level of scholarly attention. One author’s suggestion that it is “almost as if the everyday nature of the fine . . . has discouraged the interests of academics” is, perhaps, instructive. S. Shaw, *Monetary Penalties and Imprisonment: The Realistic Alternatives*, in *PAYING FOR CRIME* 29 (P. Carleen & D. Cook eds., 1989); *cf.* Pat O’Malley, *Theorizing Fines*, 11 *PUNISHMENT & SOC’Y* 67, 68 (2009) (“[T]he fine is virtually ignored theoretically, as though too obvious or too trivial to require such analysis.”).

5. Courts have recognized that the proportionality analysis associated with the Excessive Fines Clause is necessarily fact-intensive and not amenable to inflexible, bright-line rules. *See, e.g.*, *United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994) (noting that the proportionality inquiry “requires a fact-specific evaluation”). Nevertheless, in developing tests for “gross disproportionality,” most state courts and federal circuit courts have hewn fairly close to the factors set out by the Court in *Bajakajian*, described by one court as the following: “[1] the essence of the crime of the defendant and its relation to other criminal activity, [2] whether the defendant fit[s] into the class of persons for whom the statute was principally designed, [3] the maximum sentence and fine that could have been imposed, and [4] the nature of the harm caused by the defendant’s conduct.” *United States v. Castello*, 611 F.3d 116, 120 (2d Cir. 2010) (quoting *United States v. Varrone*, 554 F.3d 327, 331 (2d Cir. 2009)); *see also, e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (“We have . . . looked to factors similar to those used by the Court in *Bajakajian* in our Excessive Fines Clause cases.”).

defendant's inability to pay a fine as a relevant consideration in the context of the Eighth Amendment.⁶

The First Circuit,⁷ however, has required courts to consider an additional factor as well—would the contemplated fine or forfeiture be so severe as to destroy a defendant's livelihood? This addition of a second stage to the constitutional excessiveness inquiry represents a notable departure from the approach taken by the majority of modern courts. Nevertheless, it is an approach that is significantly more faithful to the history and purpose of the Excessive Fines Clause. In contrast, the majority view—that *Bajakajian* requires courts to disregard a defendant's ability to pay a fine for the purposes of the Excessive Fines Clause analysis—arguably misreads *Bajakajian* and, I suggest, renders a construction of the Excessive Fines Clause that is both inequitable and ahistorical.

The First Circuit's emerging Excessive Fines Clause jurisprudence goes some way toward resurrecting a foundational, but today, largely forgotten principle of English law known as *salvo contenmento suo* (translated as “saving his contenment,” or livelihood). Enshrined in the Magna Carta, this principle had become firmly established as a fundamental principle at common law by the seventeenth and eighteenth centuries. The principle required, among other things, that a defendant not be fined an amount that exceeded his ability to pay. The historical evidence suggests that the English Bill of Rights' outlawing of “excessive fines” was intended—at least in part—to reaffirm this principle. In this Article, I trace the development of the principle of *salvo contenmento*, focusing in particular on the role this background norm played in informing early understandings of prohibitions against excessive fines in England, in the American colonial period, at the time of the Founding, and in the early Republic.⁸

6. See, e.g., *United States v. Smith*, 656 F.3d 821, 828–29 (8th Cir. 2011); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (“[E]xcessiveness is determined in relation to the characteristics of the offense, *not in relation to the characteristics of the offender.*”) (emphasis added) (footnote omitted).

7. This line of cases begins with *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007), and was developed further in *United States v. Levesque*, 546 F.3d 78, 83–85 (1st Cir. 2008).

8. This work can thus be seen, at least in part, as an “extended historical concurrence,” Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 868 (2006), to this emerging strand of First Circuit doctrine; my aim is to defend the basic intuition behind this line of cases, while simultaneously sketching the possible contours of such a doctrine.

As a historical matter, the Excessive Fines Clause of the Eighth Amendment can appropriately be understood as encoding two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the offender's economic status and circumstances. We might call this second principle the Eighth Amendment's "economic survival" (or perhaps "livelihood-protection") norm. And yet—in sharp contrast to the large academic literature that has developed on the issue of proportionality⁹—scholarly exploration of this further core meaning of the Eighth Amendment remains notable largely for its absence. While the Supreme Court has occasionally alluded to the notion that the original English excessive fines clause might have contemplated

9. For a small slice of recent scholarly discussions of the concept of proportionality in the punitive or Eighth Amendment context, see JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* (2012); E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* (2009); William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69 (2011); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71 (2010); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1996); James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247 (2004); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995); Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. (forthcoming 2013); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527 (2008); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883 (2002); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998); Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of A Unifying Principle"?*, 73 U. PITT. L. REV. 107 (2011); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011); William W. Taylor, III, *The Problem of Proportionality in RICO Forfeitures*, 65 NOTRE DAME L. REV. 885 (1990); Stacy J. Pollock, Note, *Proportionality in Civil Forfeiture: Toward A Remedial Solution*, 62 GEO. WASH. L. REV. 456 (1994); Douglas S. Reinhart, Note, *Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235 (1994).

ability to pay as a core referent of “excessiveness,”¹⁰ no scholarly work has sought to apply these historical insights to the emergent Excessive Fines Clause jurisprudence that has developed in the lower courts in the wake of the Supreme Court’s 1990s rehabilitation of the Clause.¹¹ This is a surprising and unfortunate gap in the literature because a modern Excessive Fines Clause jurisprudence that reflected the history and original meaning of the Clause would be more equitable, more sensitive to the plight of the indigent, and more conducive to the rehabilitative goals of the criminal law.

I seek to address this gap in the literature by articulating and systematically developing an account of the Eighth Amendment’s economic survival norm. I proceed in seven parts. In Part I, I provide a brief overview of the Excessive Fines Clause and the modern case law interpreting the Clause. I focus primarily on the Supreme Court’s leading Excessive Fines Clause case, *United States v. Bajakajian*, and the jurisprudence that has developed in the lower courts in the wake of that case. In Part II, I introduce the traditional English legal principle of *salvo contentamento* and examine the role this principle played in informing the meaning of the excessive fines

10. See, e.g., *S. Union Co. v. United States*, 132 S. Ct. 2344, 2362 (2012) (Breyer, J., dissenting); *Bajakajian*, 524 U.S. at 354–55 (Kennedy, J., dissenting); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989). This history is also discussed in LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689 91 (1981) and in 4 WILLIAM BLACKSTONE, *COMMENTARIES* *372–73 (Univ. of Chi. Press ed. 1979).

11. To the extent that modern scholarly works have considered the possibility that an offender’s individual economic circumstances might be relevant for the purposes of the Excessive Fines Clause inquiry at all, these discussions have been relatively summary treatments that have been proffered in the context of discussions focused on applications other than criminal fines and forfeitures. See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 122–23 (2004) (discussing this history in the context of a discussion largely focused on the Cruel and Unusual Punishments Clause); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 155–56 (1986) (presenting this history in the context of a discussion of potential constitution limitations on civil punitive damages); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1274 (1987) (same). The question addressed by two of the above articles—whether the Excessive Fines Clause applies to punitive damages in private civil litigation—was resolved in 1989, when the Supreme Court held in *Browning-Ferris*, 492 U.S. at 257, that it did not. For an important further discussion of the Excessive Fines Clause in the context of a critique of the Court’s Cruel and Unusual Punishments Clause jurisprudence, see Michael J. Zydney Mannheimer, *Harmelin’s Faulty Originalism* 16–17, <http://ssrn.com/abstract=2127660> (unpublished manuscript, 2012). Mannheimer criticizes Justice Scalia’s suggestion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), that the inclusion of the word “excessive” in the Excessive Fines Clause, coupled with that word’s exclusion from the Cruel and Unusual Punishments Clause, should be read as a rejection of a proportionality principle in the case of the latter clause. See *id.* at 978 n.9 (Scalia, J., concurring in the judgment).

protections of the 1689 English Bill of Rights. In Part III, I consider American colonial understandings of the concept of *salvo tenemento* as fundamental law and undertake a brief survey of post-Founding understandings of the meaning of the phrase “excessive fines.” In Part IV, I consider the public meaning of the Excessive Fines Clause at the time of the Fourteenth Amendment’s ratification in order to explore how we might conceptualize the meaning of this provision as applied against the states. In Part V, I examine the modern case for fully reintegrating the economic survival norm of *salvo tenemento* into Eighth Amendment jurisprudence. In Part VI, I examine certain doctrinal implications of my thesis. Part VII concludes.

I. The Excessive Fines Clause

The Eighth Amendment’s command that “excessive fines” not be “imposed”¹² is far from self-defining.¹³ Although the terms “fine” and “excessive” both had established meanings in the Founding era,¹⁴

12. U.S. CONST. amend. VIII.

13. See BESSLER, *supra* note 9, at 193–94 (noting that “on its face, the text says neither how large fines or bail amounts can be before they become ‘excessive’”); Chemerinsky, *supra* note 9, at 1063 (stating that “a prohibition of ‘excessive fines’ inherently requires some way of deciding what is too much” but “the textual argument does not provide much of an answer”); see generally Trop v. Dulles, 356 U.S. 86, 100 (1958) (noting that “the words of the [Eighth] Amendment are not precise”) (footnote omitted); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 871 (1960) (characterizing the Eighth Amendment as one of the Constitution’s “less precise provisions”).

14. The landmark 1828 edition of Webster’s dictionary defines “fine” as “[a] sum of money paid to the king or state by way of penalty for an offense; a mulct; a pecuniary punishment.” 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated); see also, e.g., 1 T. SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 3 (1780) (defining “fine” as “[a] mulct, a pecuniary punishment; penalty; forfeit, money paid for any exemption or liberty”). Webster’s dictionary provides two different definitions for the word “excessive.” The first defines it as “[b]eyond any given degree, measure or limit, or beyond the common measure or proportion; as the excessive bulk of a man; excessive labor; excessive wages.” WEBSTER, *supra*. The second definition is “[b]eyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility; as excessive indulgence of any kind.” *Id.* In *Bajakajian*, the Supreme Court simply stated that Webster’s 1828 dictionary defines “excessive” as “beyond the common measure or proportion.” 524 U.S. at 335. The Court’s decision to ignore the second definition provided, and instead to quote only half of the first definition, is a somewhat surprising one—particularly because the example Webster provides in support of the *second* (much broader) definition of “excessive” is the following: “Excessive bail shall not be required.” WEBSTER, *supra*; see generally Stinneford, *supra* note 9, at 914–26 (undertaking a close textual reading of the Eighth Amendment).

the text of the Clause would nevertheless seem to leave many questions unanswered. For example, the Clause itself lacks a referent: a fine must not be “excessive,” but “excessive” in relation to what, exactly?¹⁵ The direct legislative history of the Eighth Amendment is also far from dispositive as to the meaning of the text. The adoption of the Eighth Amendment generated scant debate in the First Congress and the state ratifying conventions;¹⁶ then, as now, what debate there was tended to focus on the Cruel and Unusual Punishments Clause, rather than the Excessive Fines or Excessive Bail Clauses.¹⁷ However, in contrast to the admittedly limited guidance offered by the plain meaning of the text of the Excessive Fines Clause, the broader historical context of the provision is both extensive and instructive.

The language of the Eighth Amendment was based on an analogous provision in the Virginia Declaration of Rights of 1776,¹⁸ which in turn echoed a provision of the English Bill of Rights of 1689.¹⁹ This document was itself declaratory of traditional rights embodied in case law and in a number of statutes and other documents, including the Magna Carta of 1215.²⁰ The content of

15. This issue is discussed in Claus, *supra* note 11.

16. See *Weems v. United States*, 217 U.S. 349, 368 (1910) (noting that the Eighth Amendment “received very little debate in Congress”); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 840–42 (1969) (discussing the debates on the Eighth Amendment in the state ratifying conventions).

17. See, e.g., 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789).

18. See Va. Declaration of Rights § 9 (1776), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234–235 (1971). On the influence of the Virginia Declaration of Rights, see, e.g., BESSLER, *supra* note 9, at 177–93; JEFF BROADWATER, GEORGE MASON, FORGOTTEN FOUNDER (2006); and ROBERT ALLEN RUTLAND, GEORGE MASON: RELUCTANT STATESMAN 65–67 (1989).

19. See ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789 146 (1924).

20. Magna Charta, 9 Hen. III, ch. 14 (1225), 1 STAT. AT LARGE 6–7 (1762 ed.); see also NEVINS, *supra* note 19, at 146 (“In the main, [the Virginia Declaration of Rights] was a restatement of English principles—the principles of Magna Charta, the Petition of Rights, the Commonwealth Parliament, and the Revolution of 1688.”). In light of its venerable history and the lack of controversy engendered by its adoption, one commentator has suggested the Eighth Amendment (and analogous provisions in contemporary state constitutions) might be understood as “constitutional ‘boilerplate.’” Granucci, *supra* note 16, at 840; (footnote omitted); see also Claus, *supra* note 11, at 129–30 (“For many in the founding generation, [the language of the Eighth Amendment] had become the verbiage of civility, and they were intent on employing it for whatever it was worth. Like the Latin Mass, it was valued by those for whom it was cultural heritage, whether understood or not.”).

these traditional rights is particularly important in light of the common Founding-era claim that “Americans had all the rights of English subjects.”²¹ Thus, for example, Joseph Story suggests the Eighth Amendment is best read in light of its purpose: Namely, that “[i]t was . . . adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts”—a time when, among other things, “[e]normous fines and amercements were . . . sometimes imposed.”²² In short, at the time of the Founding the phrase “excessive fines” was—like the phrase “cruel and unusual punishments”—understood to be linked in important ways to the meaning of analogous legal protections in English history.²³ As a result, historical analysis has often featured

21. *Solem v. Helm*, 463 U.S. 277, 286 (1983). As George Mason, drafter of the Virginia Bill of Rights, noted in 1766, “We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . We have received [these rights] from our Ancestors, and, with God’s Leave, we will transmit them, unimpaired to our Posterity.” Letter to the Committee of Merchants in London (June 6, 1766), *reprinted in* 1 THE PAPERS OF GEORGE MASON 71 (Rutland ed. 1970), *quoted in* *Solem*, 463 U.S. at 285 n.10. *See also infra* note 127 and accompanying text.

22. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896, at 750–51 (1833).

23. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1221–22 & n.127 (1992) (suggesting that documents such as the English Bill of Rights of 1689 and the Magna Carta were “the fountainhead of the common law, and the widely understood source of many particular rights that later appeared in the federal Bill, sometimes in identical language,” and noting that “[t]he language of the Eighth Amendment substitutes ‘shall not be’ for ‘ought not to be,’ but is otherwise identical” to the English Bill of Rights). And, as another scholar suggests, “The founding generation’s failure to have more public conversations about what the Eighth Amendment meant suggests that many of its members were uncritically claiming a liberty of their heritage, and expected it to mean what it had always meant.” Claus, *supra* note 11, at 134. The phrase “excessive fines” can thus appropriately be regarded as a preexisting legal term of art. On the role of terms of art in constitutional interpretation generally, *see* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 491–98 (2007); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003); Lawrence B. Solum, *Semantic Originalism* 54–56 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), *available at* <http://ssrn.com/abstract=1120244>. *Cf.* *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”); *Dist. of Columbia v. Heller*, 554 U.S. 570, 597 (2008); *see generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791 (1999) (“Legal words and phrases can sometimes be used as terms of art, with nuances of meaning not well captured by standard dictionaries reflecting lay usage. Often we seek

prominently in the Supreme Court's Eighth Amendment jurisprudence.²⁴

the meaning of a word cluster—a phrase—rather than of a single word . . .”). For early examples of this form of constitutional interpretation, see *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“The [C]onstitution gives to the president, in general terms, ‘the power to grant reprieves and pardons for offences against the United States.’ As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.”); see also *Ex parte Wilson*, 114 U.S. 417, 422 (1885) (“The scope and effect of this, as of many other provisions of the Constitution, are best ascertained by bearing in mind what the law was before.”); see generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 n.1 (6th ed. 2009) (noting that the Supreme Court “has frequently stated that legal concepts informed the understanding of technical legal terms used in drafting the Constitution”).

24. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998); *Austin v. United States*, 509 U.S. 602 (1993); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Solem*, 463 U.S. at 277; *Furman v. Georgia*, 408 U.S. 238, 240–57 (1972) (Douglas, J., concurring); see also Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761, 768 (1995) (noting that Justice Blackmun’s “majority opinion [in *Browning-Ferris*] adopted a strict originalist approach”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1117 & n.32 (1990) (citing *Browning-Ferris* in support of the proposition that “even those Justices and commentators who believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration”); Richards, *supra* note 2, at 834–40 (presenting an illuminating case study of the Court’s employment of historical analysis in the opinions of Justices Blackmun, Scalia, and Kennedy in *Austin*, and concluding that “[t]he [*Austin*] Court seemed clear in its belief that an original understanding of the Eighth Amendment was not only discoverable, but also should be applied and entitled to great weight, only to be abandoned in the event of significant countervailing policy considerations”); see generally John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1696 & n.131 (2004) (citing, inter alia, *Browning-Ferris*, 492 U.S. at 275–76, and suggesting that “the Court’s articulated frame of reference, at least for matters of first impression, virtually always builds upon some notion of fidelity to historical or original understanding of the adopted text”). While my goal in this piece is emphatically not to litigate the virtues of originalism as an interpretative method vis-à-vis other approaches, I do accept the Supreme Court’s repeated statements that historical context is at least of relevance to the interpretive enterprise. Moreover, once one elects to rely on the historical meanings associated with this provision (as the Supreme Court repeatedly has), then it surely becomes important to explore in detail the actual contours of historical understandings regarding the Excessive Fines Clause, and to examine the potential implications of a constitutional jurisprudence that faithfully reflected these understandings. Cf. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1743–44 (2008) (characterizing as uncontroversial the notion “that the original meaning of the text is relevant to constitutional interpretation, whatever one’s position in the larger originalism/nonoriginalism debate” and suggesting “that it is therefore worthwhile to seek to determine the original meaning of constitutional text where that meaning has previously been ignored or underdeveloped”).

A. *United States v. Bajakajian*

In June 1994, Hosep Bajakajian and his family attempted to depart the United States with \$357,144 in U.S. currency.²⁵ Federal customs law mandated that any amount over \$10,000 be reported to customs inspectors.²⁶ Consequently, pursuant to federal statute,²⁷ the funds were subject to forfeiture proceedings in U.S. district court. The Supreme Court—in an opinion authored by Justice Thomas and joined by Justices Stevens, Souter, Ginsburg, and Breyer—concluded that forfeiture of the entire amount would violate the Excessive Fines Clause. The Court focused much of its discussion on a historical analysis of Eighth Amendment. On the basis of this analysis, the Court then concluded that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”²⁸ Recognizing that none of the historical sources examined “suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive,”²⁹ the Court then turned to its prior “gross disproportionality” case law, developed in the Cruel and Unusual Punishments Clause context.³⁰ Under this framework, a sentence is unconstitutional if it is “grossly disproportionate” to the offense.³¹ Applying this framework, the Court then compared the severity of the offense (“depriv[ing the United States] of the information that \$357,144 had left the country”³²) with the penalty (the forfeiture of the \$357,144) and concluded that the forfeiture in question was “grossly disproportional to the gravity of [the] offense.”³³

25. *Bajakajian*, 524 U.S. at 324–25.

26. 31 U.S.C. § 5316(a) (2006).

27. 18 U.S.C. § 982(a)(1) (2006).

28. *Bajakajian*, 524 U.S. at 334. The Court here echoed Justice Scalia’s concurrence in *Austin v. United States*, 509 U.S. 602 (1993). In that opinion, Justice Scalia had suggested that “[i]n the case of a monetary fine, the Eighth Amendment’s origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King’s opponents, demonstrate that the touchstone is value of the fine in relation to the offense.” *Id.* at 627 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted).

29. *Bajakajian*, 524 U.S. at 336.

30. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983).

31. *Id.* at 288.

32. *Bajakajian*, 524 U.S. at 339.

33. *Id.* at 339–40.

B. Post-*Bajakajian* Excessive Fines Clause Doctrine in the Lower Courts

In the years since it was decided, *Bajakajian* has been widely cited in the lower courts.³⁴ Nevertheless, modern Excessive Fines Clause jurisprudence remains in many respects inchoate³⁵ and—in the absence of further guidance from the Supreme Court—a number of areas of doctrinal uncertainty have emerged.³⁶

First, there are a number of open questions relating to the domain of the Excessive Fines Clause. For example, there is disagreement among the circuit courts of appeal on the issue of whether the Clause applies to the forfeiture of proceeds from unlawful activities (or, more precisely, there is disagreement on whether such forfeitures are capable of functioning in a punitive capacity, or are instead inherently remedial).³⁷ Various courts have

34. A Westlaw search reveals that *Bajakajian* has been cited in 459 lower federal court opinions, in 223 state court opinions, and in over 1,700 appellate court documents.

35. See generally Lee, *supra* note 9, at 692 n.72 (noting that “a distinct excessive fines jurisprudence has yet to develop”).

36. One commentator, for example, suggests that “*Bajakajian*’s narrow holding and fact-specific rationale add little to our understanding of the constitutional limitations the Excessive Fines Clause imposes on the government” and that the decision “provides only limited guidance to future parties and the lower courts about the scope and applicability of the Excessive Fines Clause.” Matthew C. Solomon, Note, *The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court’s Civil Double Jeopardy Excursion*, 87 GEO. L.J. 849, 876, 884 (1999); see also Barclay Thomas Johnson, Note, *Restoring Civility—the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1062–64 (2002) (suggesting that the scope of the *Bajakajian* holding is limited).

37. Compare *United States v. Jalaram, Inc.*, 599 F.3d 347, 354 (4th Cir. 2010) (determining “that the Excessive Fines Clause applies to the forfeiture of proceeds”), and *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007) (concluding that the forfeiture of proceeds from unlawful activities was subject to Eighth Amendment proportionality analysis), and *United States v. Corrado*, 227 F.3d 543, 558 (6th Cir. 2000) (same) with *United States v. Betancourt*, 422 F.3d 240, 250 (5th Cir. 2005) (holding that the Eighth Amendment does not apply to drug proceeds forfeiture) and *United States v. Tilley*, 18 F.3d 295, 299 (5th Cir. 1994) (“The forfeiture of proceeds of illegal drug sales serves . . . wholly remedial purposes . . .”); see also Amanda Seals Bersinger, Note, *Grossly Disproportional to Whose Offense? Why the (Mis)application of Constitutional Jurisprudence on Proceeds Forfeiture Matters*, 45 GA. L. REV. 841 (2011) (discussing this circuit split); but see Neal Kumar Katyal, *Architecture As Crime Control*, 111 YALE L.J. 1039, 1121 n.307 (2002) (suggesting that the Constitution imposes no limits on the “forfeiture of proceeds of a crime . . . because such proceeds are not ‘fines’ but rather ‘fruits’”). Courts and commentators have also noted the lack of guidance on whether the standard articulated in *Bajakajian* (an *in personam* forfeiture) applies to *in rem* forfeiture actions. See, e.g., *United States v. 45 Claremont Street*, 395 F.3d 1, 6 (1st Cir. 2004) (“The Supreme Court has not directly addressed whether the ‘grossly disproportional’ standard applies to *in rem* civil forfeiture actions.”); Marc S. Roy, *United States Federal Forfeiture*

expressed uncertainty as to whether the Excessive Fines Clause applies to corporations.³⁸ Although the Supreme Court has explicitly concluded that the Excessive Fines Clause is inapplicable to punitive damage awards in private litigation,³⁹ there is significant uncertainty among the lower courts on the issue of whether the Clause may be invoked in the context of *qui tam* actions.⁴⁰ Doctrinal confusion has

Law: Current Status and Implications of Expansion, 69 MISS. L.J. 373, 417 (1999) (“The *in rem/in personam* method of classification of forfeitures has, and continues to, foster confusion in the law.”); *but see, e.g.,* Von Hofe v. United States, 492 F.3d 175, 184 (2d Cir. 2007) (suggesting that the *Bajakajian* Court “seemed to declare in sweeping language that punitive forfeitures—regardless of whether they proceed *in rem* or *in personam*—are excessive if they are ‘grossly disproportional to the gravity of a defendant’s offense’”) (quotation omitted). For discussions of the Supreme Court’s lack of guidance on constitutional forfeiture analysis generally, *see* Johnson, *supra* note 36, at 1064 (noting “the lack of clarity” in the Court’s Excessive Fines Clause jurisprudence and suggesting “the lower courts are split on what test is applicable when a challenge is raised to a forfeiture under the Eighth Amendment.”).

38. *See, e.g.,* *Browning-Ferris*, 492 U.S. at 276 n.22 (stating that “we [shall not] decide whether the Eighth Amendment protects corporations as well as individuals”); *United States v. Chaplin’s, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011) (“The Supreme Court has never held that this amendment applies to corporations.”); *United States v. Pilgrim Market Corp.*, 944 F.2d 14, 22 (1st Cir. 1991) (characterizing the notion that the Excessive Fines Clause applies to corporations as “a very tenuous assumption”); *see generally* Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313 (1996) (noting the lack of doctrinal clarity on this issue and suggesting a number of factors that militate in favor of extending the protections of the Eighth Amendment to corporations).

39. *See* *Browning-Ferris*, 492 U.S. at 257.

40. *See Id.* at 276 n.21 (expressly declining to decide the issue of whether the Excessive Fines Clause applies to *qui tam* actions); *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (“It is far from clear that the Excessive Fines Clause applies to civil actions under the False Claims Act.”); *Hays v. Hoffman*, 2001 WL 1141827 (D. Minn. Aug. 22, 2001) *rev’d in part on other grounds*, 325 F.3d 982 (8th Cir. 2003) (“Whether the Excessive Fines Clause actually applies to any fine imposed under these circumstances, is murky at best.”); CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 7:20 (2012) (“It is unclear how the Court would ultimately resolve the question of whether forfeitures in a civil False Claims Act case constitute punishment for purposes of the Excessive Fines Clause.”); *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (“We conclude the civil sanctions provided by the False Claims Act are subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment.”); *see generally* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 372 n.157 (1989) (suggesting that *Browning-Ferris*’s “reasoning makes clear that the applicability of various constitutional rules designed to protect defendants from prosecutorial overreaching may turn on the public nature of the prosecuting authority rather than on the nature of the sovereign’s interest in the litigation” and that “the same distinction between the United States as a juridical entity and the government as an institutional entity applies to particular procedural rules governing adjudication of *qui tam* actions as well”); Suzanne E. Durrell, *The Excessive Fines Clause of the Eighth Amendment and the Civil False Claims Act: To United States v. Bajakajian and Beyond*, 27 FALSE CL. ACT & QUI TAM Q. REV. 9 (2002)

been exacerbated by a lack of clarity even on the basic question of whether the Excessive Fines Clause has been incorporated against the states.⁴¹

Apart from issues relating to the scope of the Clause's protection, there is also at least some doctrinal uncertainty associated with each of the following three issues: (1) how to conceptualize a penalty's harshness for constitutional purposes,⁴² (2) how to determine the severity of a given offense for the purposes of the disproportionality analysis,⁴³ and (3) how to determine the point at which the relationship between a given penalty and a given offense becomes unconstitutionally disproportionate.⁴⁴ In other words, each circuit has had to develop its own version of the *Bajakajian/Solem* multi-factor "gross disproportionality" test, with the "gross

(discussing the potential applicability of the Excessive Fines Clause to *qui tam* actions); Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 967 (2002) (suggesting that "the conclusion appears inescapable that the FCA's civil damages and penalties formula constitutes 'punishment' for Eighth Amendment purposes").

41. See discussion *infra* notes 154–168 and accompanying text.

42. For example, see cases cited *infra* note 226.

43. Courts have diverged, for example, on the issue of what role the Federal Sentencing Guidelines should play in determining the severity of the offense. Some lower courts have followed the approach taken by the Court in *Bajakajian*, looking to the relevant Guidelines range as an indicium of the offense's severity. See, e.g., *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1198 (9th Cir. 1999); *United States v. Beras*, 183 F.3d 22, 27 n.5 (1st Cir. 1999); *Von Hofe*, 492 F.3d at 187. Other courts, in contrast, have focused their analysis on the relationship between the penalty imposed and the statutory maximum. See, e.g., *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010); *United States v. Rico-Hernandez*, 350 F. App'x 653, 655 (3d Cir. 2009); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309 (11th Cir. 1999) (concluding that "if the value of forfeited property is within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional") (footnote omitted). Indeed, one court of appeals has, somewhat remarkably, concluded that there is "no constitutional violation when the forfeiture does not exceed the maximum fine allowed by statute," seemingly suggesting that a penalty within the statutory maximum is subject to an irrebuttable presumption of constitutionality. *United States v. Hill*, 167 F.3d 1055, 1072–73 (6th Cir. 1999) (en banc). Such an approach would appear to be flatly inconsistent with the Supreme Court's suggestion that "no penalty is *per se* constitutional." *Solem v. Helm*, 463 U.S. 277, 290 (1983). For a discussion of the Court's use of the sentencing guidelines in *Bajakajian* as a severity heuristic, see Johnson, *supra* note 2, at 515; see generally Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 698–99 (2012) (noting the split among those courts that have held within-maximum monetary penalties *per se* constitutional and those that have not, and suggesting that the former approach "seemingly confine[s] the analysis in *Bajakajian* to asset forfeiture").

44. One might think of these as the "numerator problem," "denominator problem," and "ratio problem," respectively.

disproportionality” determination often characterized as an inherently fact-intensive inquiry.⁴⁵

One area of near-consensus among the lower federal courts has, however, emerged: the large majority of lower courts have appeared to read *Bajakajian* as foreclosing an inquiry into the personal financial or economic characteristics of a defendant for the purposes of an Excessive Fines Clause analysis. For example, the Eleventh Circuit, citing *Bajakajian*, has concluded that “excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender,”⁴⁶ and, in another case, has stated that “we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.”⁴⁷ Similarly, the Ninth Circuit has suggested that “an Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender.”⁴⁸ The Eighth Circuit appears to have reached a similar conclusion.⁴⁹ Other circuits—while not explicitly holding that personal financial hardship and a defendant’s characteristics are irrelevant to the excessiveness determination—have simply not taken such factors into account in the course of their analysis.⁵⁰ However, a close reading of

45. See *Von Hofe*, 492 F.3d at 186 (“Determining the excessiveness of a civil in rem forfeiture is necessarily fact-intensive . . .”); see also *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995) (stating that “courts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause”); cf. *Amos v. Gunn*, 84 Fla. 285, 364 (1922) (“There being no definitely fixed rules or standards for determining what are and what are not excessive fines, each case, whether a statute prescribing fines or a judgment imposing a fine under a statute, must be adjudged on its merits . . .”). Although the precise list of factors employed thus varies by circuit, a consensus has developed that the inquiry demands, at a minimum, a consideration of the factors considered by the *Bajakajian* court: namely, “(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant’s conduct.” *United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011) (citations omitted). Nevertheless, as the Court in *Solem* emphasized, “no one factor will be dispositive in a given case” and “no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.” 463 U.S. at 291 n.16.

46. *817 N.E. 29th Drive*, 175 F.3d at 1311.

47. *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (citation omitted).

48. *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998).

49. *United States v. Smith*, 656 F.3d 821, 828–29 (8th Cir. 2011).

50. See, e.g., *United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011); *United States v. Zakharia*, 418 F. App’x 414, 422 (6th Cir. 2011); *United States v. Sabhnani*, 599

Bajakajian—and of the text, history, and purpose of the Excessive Fines Clause itself—suggests this consensus may well be mistaken.

C. The Case Against the Majority Approach

There are three potential problems with this majority approach. First, it is simply not correct to regard *Bajakajian*'s holding as compelling a lower court to disregard a defendant's personal circumstances when undertaking an Excessive Fines Clause analysis. Second, the majority approach is arguably inconsistent with the analytical frameworks the Supreme Court has adopted in other Eighth Amendment contexts. Third, attempts to justify the majority approach on historical grounds have relied upon an incomplete and selective reading of the historical record.

First, it is simply not the case that, as some lower courts have suggested, *Bajakajian*'s holding requires that a defendant's means be disregarded when undertaking an Excessive Fines Clause analysis. Because the Supreme Court in *Bajakajian* found that the forfeiture was "grossly disproportional to the gravity of his offense,"⁵¹ the Court did not reach issues associated with the defendant's wealth, income, or livelihood. Indeed, Justice Thomas's opinion expressly reserved judgment on issues relating to the interface between the Excessive Fines Clause and considerations of "livelihood" or ability to pay, stating that "[r]espondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect."⁵² Several commentators and courts have recognized this: as one author observed following the *Bajakajian* Court's decision, "The Court . . . left unresolved whether courts' assessments of the severity of punishment should vary depending on individual defendants' ability to pay."⁵³ Thus, in light of the Court's explicit reservation of

F.3d 215, 262 (2d Cir. 2010); *Newell Recycling Co., Inc. v. U.S. EPA*, 231 F.3d 204, 210 (5th Cir. 2000).

51. *Bajakajian*, 524 U.S. at 339.

52. *Id.* at 340.

53. Comment, *Excessive Fines Clause*, 112 HARV. L. REV. 152, 158 (1998); see also *id.* ("Justice Thomas merely mentioned that *Bajakajian* 'does not argue that his wealth or income are relevant to the proportionality determination' and left the issue undecided."); Durrell, *supra* note 40, at 9 n.1 (noting that "[t]he [*Bajakajian*] Court did not decide whether a defendant's wealth or income . . . were relevant factors"). Several courts have also explicitly recognized the limited nature of the Court's holding. See, e.g., *United States v. Bader*, 07-CR-00338-MSK, 2010 WL 2681707, at *1 n.2 (D. Colo. July 1, 2010) (concluding that, in light of *Bajakajian*'s narrow holding, it is "not clear to what extent"

judgment on the issue of livelihood and ability to pay, the Court's statement that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is . . . [that the] amount of the forfeiture must bear some relationship to the gravity of the offense" is properly read as a statement simply to the effect that proportionality was the "touchstone" of the constitutional analysis in *Bajakajian*—that is, in a case in which *non*-proportionality aspects of the Excessive Fines Clause were not at bar.⁵⁴ Properly understood, therefore, *Bajakajian*'s holding does not require that proportionality between penalty and offense represent the entirety of the Excessive Fines Clause analysis in all cases.⁵⁵

Second, a conclusion that a defendant's personal characteristics are not to be considered for Excessive Fines Clause purposes is also somewhat in tension with other aspects of the Supreme Court's Eighth Amendment jurisprudence. For example, in the context of determining the excessiveness *vel non* of a judicially imposed fine for contempt, the Court has indicated that "a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment . . . , consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."⁵⁶ Similarly, in the context of the Court's

the issue of "the effect that . . . a forfeiture will have on [an individual]" "is a factor that is appropriately considered"); *One 1995 Toyota Pick-Up Truck v. Dist. of Columbia*, 718 A.2d 558, 565 n.15 (D.C. 1998) (concluding that the *Bajakajian* court "appears to have left open the prospect that other factors may be included in the proportionality analysis, such as the wealth of the owner of the property and the effect of the forfeiture on his or her livelihood").

54. *Bajakajian*, 524 U.S. at 334. In other words, in *Bajakajian* the Court established gross disproportionality to offense merely as *one* avenue through which the unconstitutional "excessiveness" of a penalty might be established. A court that simply concludes, on the basis of the conditional premise "gross disproportionality to offense entails unconstitutionality," that a lack of gross disproportionality conclusively refutes a claim of unconstitutionality—would risk appearing to commit the logical fallacy of the denial of the antecedent. *See, e.g.*, ELIE MAYNARD ADAMS, *THE FUNDAMENTALS OF GENERAL LOGIC* 164 (1954) ("[D]enying the antecedent is an invalid form of the simple conditional argument.").

55. In fact, courts have recognized that non-proportionality factors—such as ability to pay—are likely to be of greater relevance in cases of fines, as opposed to forfeitures. *See, e.g.*, *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) (suggesting that "[p]roportionality is likely to be the most important issue in a forfeiture case, since the claimant-defendant is able to pay by forfeiting the disputed asset" but that "[i]n imposing a fine . . . ability to pay becomes a critical factor"). It is thus unsurprising that *Bajakajian*—a forfeiture case—did not address the non-proportionality aspects of Excessive Fines Clause jurisprudence.

56. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947); *see also* Cordray, *supra* note 2, at 459 (discussing this case); Craig W. Palm, *RICO Forfeiture and*

Excessive Bail Clause jurisprudence, it has been established that “the financial ability of the defendant” is a relevant consideration.⁵⁷ It is also surely worthy of note that the Court has characterized its Eighth Amendment jurisprudence as “flow[ing] from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.”⁵⁸ The current failure of the majority of lower courts to incorporate any consideration of the effect of a fine or forfeiture on an individual

the Eighth Amendment: When Is Everything Too Much?, 53 U. PITT. L. REV. 1, 82 (1991) (highlighting *Mine Workers* as illustrative of potentially relevant factors under an Excessive Fines Clause analysis); King, *supra* note 9, at 196 (situating *Mine Workers* within the Court’s Eighth Amendment jurisprudence and noting that “[i]n 1947, the Court sliced a \$3.5 million criminal contempt fine to \$700,000 after finding the original sanction excessive given the defendant’s financial resources”).

57. *Stack v. Boyle*, 342 U.S. 1, 5 & n.3 (1951); see Comment, *supra* note 53, at 162; see generally Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 997 (1965). Under Excessive Bail Clause doctrine, the relevant “excessiveness” referent is whether the bail amount exceeds “an amount reasonably calculated to fulfill th[e] purpose” of bail—namely, “assurance of the presence of an accused.” *Boyle*, 342 U.S. at 5. Of course, it is true that “bail is not excessive merely because the defendant is unable to pay it.” *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966).

58. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012). It is certainly true that in *Miller* (a Cruel and Unusual Punishment Clause case), the relevant individual circumstance—age—implicates culpability in ways that a defendant’s personal economic circumstances arguably do not. Juvenile status is perhaps appropriately regarded as *sui generis*, and I certainly do not suggest that *Miller* speaks directly to the Excessive Fines Clause issue. Nevertheless, the broader point—that tailoring a punishment to a defendant’s individual circumstances is a “basic precept of justice”—remains instructive. I note that a number of theorists have suggested the socioeconomic status of an offender should inform our assessment of that offender’s culpability. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459 (1994); Barbara Hudson, *Punishing the Poor: Dilemmas of Justice and Difference*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW (William C. Heffernan & John Kleinig eds., 2000). However, my account of the Eighth Amendment’s economic survival norm does not rely on positing the existence of relationship between economic status and moral culpability.

Another aspect of the Court’s Cruel and Unusual Punishments jurisprudence is also arguably informative. The Court’s doctrine governing incarceration conditions is grounded on the understanding that “when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment.” *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989). If such a quasi-fiduciary governmental obligation to provide for “basic human needs” inheres in the Eighth Amendment for cases of incarceration, it might be suggested that a similar obligation ought to be implicated when the state affirmatively takes steps to dramatically inhibit an individual’s ability to provide for him or herself through the imposition of crushing economic penalties.

defendant renders doctrine in these circuits arguably somewhat in tension with the logic of these aspects of Supreme Court case law.

Finally, it is incongruous (and historiographically suspect) for courts adopting the majority view to cite the lengthy history of excessive fines protections in Anglo-American law for the proposition that the Excessive Fines Clause incorporates a proportionality principle, while simultaneously ignoring the fact that these same historical sources overwhelmingly suggest that a central purpose of historical excessive fines provisions was to protect against fines that were excessive in relation to a defendant's estate (and thus destructive of a defendant's capacity for economic self-sufficiency).⁵⁹ I examine this history in Parts II and III, *infra*.

D. Livelihood and the Excessive Fines Clause in the First Circuit

In contrast to the majority approach to Excessive Fines Clause jurisprudence stands the approach adopted by the First Circuit.⁶⁰ The

59. For example, in *United States v. One Parcel Prop. Located at 427 & 429 Hall St., Montgomery, Montgomery Cnty., Ala.*, 74 F.3d 1165 (11th Cir. 1996), the Eleventh Circuit concluded that for the purposes of the Excessive Fines Clause, "appropriate inquiry with respect to the Excessive Fines Clause is, and is only, a proportionality test." *Id.* at 1170. In support of this proposition, the court cited the first half of Chapter Fourteen of the Magna Carta ("A freeman shall not be amerced for a small fault but after the manner of the fault; and for a great crime according to the heinousness of it . . ."), but neglected the quote the second half of the relevant provision ("saving to him his contenment; and a Merchant likewise, saving to him his merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage"). The *429 Hall St.* court did not venture an explanation as to why the first half of this sentence was dispositive as to the meaning of the Excessive Fines Clause, while the second half was irrelevant.

60. Although my focus in this section is on the First Circuit's emergent doctrinal framework, I note parenthetically that there is also some authority under Eighth Circuit case law for the proposition that the Excessive Fines Clause prohibits the imposition of fines that exceed a defendant's ability to pay. However, the leading Eighth Circuit case simply asserts the proposition as a matter of *ipse dixit* and provides no other support for the inclusion of ability to pay as a relevant constitutional factor (whether based on text, history, precedent, or otherwise). See *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) ("Proportionality is likely to be the most important issue in a forfeiture case, since the claimant-defendant is able to pay by forfeiting the disputed asset. In imposing a fine, on the other hand, ability to pay becomes a critical factor. But the [Federal Sentencing] Guidelines mandate that this factor be considered . . . and if the sentencing court complies with these provisions, any constitutional ability-to-pay limitation will necessarily be met."); see also *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) ("[I]n the case of fines . . . the defendant's ability to pay is a factor under the Excessive Fines Clause."); *Hays v. Hoffman*, 97-CV-1656(JMR/FLN), 2001 WL 1141827, at *3 n.6 (D. Minn. Aug. 22, 2001) *rev'd in part on other grounds*, 325 F.3d 982 (8th Cir. 2003) ("A defendant's ability to pay a fine is a factor under the Excessive Fines Clause."). That said, I would suggest that this line of cases (while perhaps undertheorized) nevertheless gives voice to the powerful intuition that the basic notion of "excessiveness" is capacious enough to

First Circuit began to develop an alternative doctrinal framework for Excessive Fines Clause claims in a 2007 case, *United States v. Jose*.⁶¹ In that case, defendant Otilio Jose appealed from a forfeiture order entered by the U.S. District Court for Puerto Rico.⁶² Jose argued that the forfeiture of \$114,948 in unreported U.S. currency by U.S. customs officials constituted a constitutionally excessive fine. The First Circuit highlighted the historical link the *Bajakajian* court drew between the Excessive Fines Clause and the Magna Carta, and then, citing the text of Chapter 14 of the Magna Carta,⁶³ concluded that “[g]iven the history behind the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive Jose of his livelihood.”⁶⁴

encompass the consideration of a defendant’s individual economic circumstances. *See generally* Murphy, *supra* note 43, at 700 (noting that “[t]he [federal] appellate courts are divided as to whether the defendant’s ability to pay is a factor under the Excessive Fines Clause”). In addition, courts in six states have suggested that the ability to pay might, at least in certain circumstances, be a relevant consideration in determining whether a fine is constitutionally disproportionate. These determinations have been made on the basis of the federal Excessive Fines Clause, analogous state constitutional provisions, or both. In Colorado, *see People v. Pourat*, 100 P.3d 503, 507 (Colo. Ct. App. 2004); and *People v. Malone*, 923 P.2d 163, 166 (Colo. Ct. App. 1995). For further discussion, *see* SULLIVAN & FRASE, *supra* note 9, at 152, which briefly discusses *Malone* and suggests “[t]he ability-to-pay factor identifies either a new form of excessiveness or one indirectly related to ends or means proportionality.” This Article proposes that the former suggestion—that this line of cases represents a new (or, at least, largely unexplored) form of excessiveness—is essentially correct. In California, *see People v. Roscoe*, 169 Cal. App. 4th 829, 840, 87 Cal. Rptr. 3d 187, 196 (2008); *Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728, 124 P.3d 408, 421 (2005); *San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1321–22, 92 Cal. Rptr. 2d 418, 432 (2000). In Pennsylvania, *see Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997). In Arizona, *see, e.g., State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 201 (Ct. App. 2010). In New York, *see People v. Ingham*, 453 N.Y.S.2d 325, 328 (City Ct. 1982); and *County of Nassau v. Moloney*, N.Y.L.J., Oct. 2, 2002, at 228, col. 2 (Nass. Co. Sup. Ct). Finally, for a discussion of recent Oregon jurisprudence that builds on the First Circuit’s *Jose/Levesque* line of cases, *see infra* note 74.

61. *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007).

62. The forfeiture order was entered subject to the bulk cash smuggling provisions of the USA PATRIOT Act, Pub.L. No. 107–56, § 371, 115 Stat. 272, 336–38 (codified as amended at 31 U.S.C. § 5332).

63. Magna Charta, 9 Hen. III, ch. 14 (1225), 1 STAT. AT LARGE 6–7 (1762 ed.) (“A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other’s villain than ours shall be likewise amerced, saving his wainage.”).

64. *Jose*, 499 F.3d at 113. The *Jose* court ultimately concluded that “[i]t cannot reasonably be argued that forfeiture of the \$114,948 would deprive defendant of his livelihood because “according to Jose’s own words, the money wasn’t his to start with . . . [s]o whether the government forfeits it or not, it is really of no consequence to him because it wasn’t his to be forfeited.” *Id.* (citations and quotations omitted).

The First Circuit further developed this analytical framework in the 2008 case of *United States v. Levesque*.⁶⁵ In *Levesque*, the court considered an Excessive Fines Clause challenge to a district court's imposition of a money judgment totaling over \$3 million on an alleged drug "mule."⁶⁶ Although the *Levesque* court acknowledged that the district court had correctly applied the circuit's standard test for gross disproportionality in fines and forfeitures (a test based on the factors articulated in *Bajakajian*⁶⁷), the court reaffirmed that this "is not the end of the inquiry under the Excessive Fines Clause."⁶⁸ Noting that the Supreme Court in *Bajakajian* appeared to "treat[] as distinct [from the "gross excessiveness" inquiry] the question of whether a forfeiture would deprive a defendant of his livelihood,"⁶⁹ the *Levesque* court then undertook a brief review of the history of the Excessive Fines Clause (and analogous excessive fines protections in English law),⁷⁰ concluding that "the notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment."⁷¹

Although the *Levesque* court stated that "a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional," the court nevertheless concluded that "it is not inconceivable that a forfeiture could be so onerous as to deprive a defendant of his or her future ability to earn a living, thus implicating the historical concerns underlying the Excessive Fines Clause."⁷² Consequently, the First Circuit vacated the district court's forfeiture order and remanded the case for a consideration of whether the proposed forfeiture would have been barred under this test.

The court noted in *Levesque* that a number of aspects of the First Circuit's evolving Excessive Fines Clause "livelihood" jurisprudence

65. *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008). Both *Jose* and *Levesque* were authored by Judge Sandra Lynch.

66. *Levesque*, 546 F.3d at 79–80.

67. *See* *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005). As an aside, note that the subsequent development of the *Jose/Levesque* line of cases must be regarded as superseding *Heldeman*'s suggestion that "[a] forfeiture will violate the Eighth Amendment's prohibition *only* if it is 'grossly disproportional to the gravity of the defendant's offense.'" *Id.* (citing *Bajakajian*, 524 U.S. at 336–37) (emphasis added).

68. *Levesque*, 546 F.3d at 83.

69. *Id.*

70. *Id.* at 83–84.

71. *Id.*

72. *Id.* at 85.

remain inchoate.⁷³ Nevertheless, by incorporating a consideration of the defendant's livelihood into the excessiveness calculus, the First Circuit has taken a significant step towards a more historically grounded Excessive Fines Clause jurisprudence.⁷⁴ Below, I provide a review of this history—focusing in particular on the traditional English common law principle of *salvo contenemento*—so as to contextualize and defend the First Circuit's emergent doctrinal framework.

II. The Principle of *Salvo Contenemento*

In this Part, I briefly review the history of the legal concept of *salvo contenemento* in English law. The phrase itself is most prominently associated with the Magna Carta of 1215, although aspects of this principle appear to predate that document.⁷⁵

73. *Id.*

74. In July 2012, the Court of Appeals of Oregon, relying on both *Levesque* and *Bajakajian*, took a further step toward developing this emerging strand of Excessive Fines Clause jurisprudence. In *State v. Goodenow*, 251 Or.App. 139 (2012), the defendant challenged a forfeiture of \$960,843 in lottery winnings received from lottery tickets that had been bought with an illegally acquired credit card. Although the Oregon court ultimately concluded the forfeiture of these winnings did not constitute an excessive fine, the test articulated in *Goodenow* is instructive. The *Goodenow* court concluded, in light of “the history of the Excessive Fines Clause and its purpose of protecting defendants’ livelihoods and self-sufficiency,” it was appropriate to consider both “the amount of [a] forfeiture and the effect of the forfeiture on the defendant.” *Id.* at 153 (emphasis added). The court thus suggested that “[w]hether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant’s ability to be self-sufficient.” *Id.*

75. A pre-Magna Carta writ known as *de moderata misericordia* (under which unjustly large fines could be reduced) is attested by the twelfth century; Glanvill’s treatise (dating to circa 1188) states that “[a]mercement by the lord king . . . means that he is to be amerced by the oath of lawful men of the neighborhood, but so as not to lose any property necessary to maintain his position.” THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 114 (G.D.G. Hall ed., 1965) (emphasis added). Perhaps the most extensive discussion of the writ of *moderata misericordia* is found in ANTHONY FITZHERBERT, LA NOVELLE NATURA BREVIVM 167–71 (1534). Scholars have also noted parallels between these provisions and the *ius commune*. See, e.g., R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 326–29 (1999) (citing C.9 q.3 c.1; C.14 q. 6 c. 1; C.15 q. 3 c. 4; and C.24 q. 1 c. 21) (discussing parallels between Magna Carta’s amercements provisions and certain aspects of the *Decretum Gratiani*, and noting by way of comparison that “the seed, animals, and tillage necessary for the livelihood of rustici were given special protection against incursion under the *ius commune*”). Coke suggests that somewhat analogous livelihood-protection provisions that protected implements of husbandry from being seized in cases of distresses, as codified in the *Statute of Marlborough*, 52 Hen. III (1267), find their origin in pre-Roman British law. See EDWARD COKE, THE SECOND PART OF THE INSTITUTES

A. Magna Carta

Chapter 14 of the Magna Carta governs the assessment of amercements, an early form of fines.⁷⁶ Translated from the original Latin, the document reads as follows:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, *yet saving always his “contenement”* [*salvo contenemento suo*]; and a merchant in the same way, *saving his “merchandise”*; and a villein shall be amerced in the same way, *saving his “waynage”*—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.⁷⁷

In an often-quoted passage, a leading nineteenth century legal historian suggests that “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements.”⁷⁸ The exact meaning of the word “contenement” has

OF THE LAWS OF ENGLAND 132 (London, E & R Brooke 1797) (1628); *but see, e.g.*, 2 JOHN EDWARD LLOYD, A HISTORY OF WALES FROM THE EARLIEST TIMES TO THE EDWARDIAN CONQUEST 527 (3d ed. 1939) (suggesting that the history upon which Coke’s account relies may in fact have been apocryphal). For an interesting discussion of the plow sanctuary in medieval English history generally, see James H. Morey, *Plows, Laws, and Sanctuary in Medieval England and in the Wakefield Mactacio Abel*, 95 *STUD. PHILOLOGY* 41 (1998).

76. Originally, the terms “fines” and “amercements” referred to different forms of payments. See JOHN FOX, *CONTEMPT OF COURT* 118–201 (1927) (providing an extensive discussion on the differences between these two forms of monetary penalties, and on the history of both fines and amercements). However, by the eighteenth century, the terms were often used interchangeably and Magna Carta’s traditional framework came to be seen as governing the calculation of fines as well. See, e.g., 4 BLACKSTONE, *supra* note 10, at *372–73 (describing Magna Carta’s amercements provisions as governing “the reasonableness of fines in criminal cases”).

77. Magna Charta, 9 Hen. III, ch. 14 (1225), 1 *STAT. AT LARGE* 6–7 (1762 ed.) (emphasis added). Similar provisions governing the amercement of nobles and religious officials can be found in Chapter 15 and 16, respectively. For clarity and consistency, I refer to the numbering of chapters adopted in the statutory form of the Magna Carta (as enacted in 1225), not the numbering that existed in the original document signed at Runnymede in 1215.

78. F. W. MAITLAND, *PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER* xxxiv (1884).

at times been a matter of some controversy,⁷⁹ and the word has been variously defined as “freehold,” “tenement,” or “countenance.”⁸⁰ Nevertheless, a consensus has developed as to the core meaning of the provision. As the historian William McKechnie puts it, “to save a man’s ‘contenement’ was to leave him sufficient for the sustenance of himself and those dependent on him.”⁸¹ The purpose of this provision was thus to ensure that “[i]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him. Even if all other effects had to be sold off to pay the amount assessed, he was to retain his ‘contenement.’”⁸² The effect of Magna Carta’s parallel protections for “merchants” and “villeins”⁸³ was similar: By protecting their “merchandize” and “waynage,”⁸⁴ respectively, a

79. See, e.g., ALEXANDER HILL EVERETT, ORIGIN AND CHARACTER OF THE OLD PARTIES, JULY 1834 (“It is difficult to give the precise meaning of this word.”); see also Henry Sherman Boutell, *Seventh Centenary of Magna Carta*, 3 GEO. L. J. 49, 50 (1915) (noting that “[e]ssays are still being written on the true meaning of *contenementum* and *uainagium*”). For discussions of various controversies that have emerged regarding the meaning of the word, see A.F. Pollard, ‘*Contenementum*’ in *Magna Carta*, 27 ENG. HIST. REV. 117 (1913); James Tait, *Studies in Magna Carta: Waynagium and Contenementum*, 27 ENG. HIST. REV. 720 (1912).

80. A leading eighteenth century law dictionary defines “contenement” as “that which is needed for the Support and Maintenance of Men, according to their several Qualities, Conditions, or States of Life.” GILES JACOB & JOHN HOLT, A NEW LAW-DICTIONARY (8th ed. 1762) (unpaginated); accord WHARTON’S LAW LEXICON (1847) (defining “contenement” as “a man’s countenance or credit, which he has together with, and by reason of, his freehold; or, that which is necessary for the support and maintenance of men, agreeably to their several qualities of life”); HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE 16 (W.N. ed., 5th ed., Boston, J. Franklin 1721) (describing “the contenement of the Criminal” as “that which is necessary for his Support, according to his Condition or State of Life; so that tho he might be amerced, yet something must be left for his Support”); F.O., THE LAW-FRENCH DICTIONARY (1701) (defining “contenement” as meaning “the Freehold Land which lieth to a man’s Tenement, or Dwelling-house that is in his own Occupation”). McKechnie suggests that “[t]he word comes from the French ‘contenir,’ and has many shades of meaning, as capacity, maintenance, appearance, social condition or grade.” WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 293 (2d ed. 1914).

81. MCKECHNIE, *supra* note 80, at 293.

82. *Id.* at 287.

83. The villain was a type of feudal serf. For extensive discussions regarding medieval villainage, see generally PAUL R. HYAMS, KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES (1980); PAUL VINOGRADOFF, VILLAINAGE IN ENGLAND: ESSAYS IN ENGLISH MEDIAEVAL HISTORY (1892).

84. Coke suggests “waynage” meant “the contenement of a villain,” namely “the furniture of his cart or wain.” COKE, *supra* note 75, at 28. Although Coke’s definition has been widely repeated, see, e.g., Massey, *supra* note 11, at 1276, leading historians have sharply criticized Coke’s attempt to tie the word to the Saxon word “wagna,” or cart,

minimum core level of economic viability was protected notwithstanding the imposition of monetary penalties.

The Magna Carta's principles governing the calculation of amercements were restated a number of times in subsequent legislation,⁸⁵ and a number of twelfth century examples illustrate the manner in which these principles operated in practice. The fine rolls of King Henry III record an order to the Sheriff of Hampshire which refers to a penalty assessed "according to the manner of that trespass and the quantity of their goods, saving their contenment."⁸⁶ Another such order, to the Sheriff of Somerset, describes a monetary penalty set "according to the degree of the offence and the quantity of his goods, saving his livelihood."⁸⁷ Based on extensive research into the Winchester Pipe Rolls (a set of fine rolls that date to circa 1208-1300), one historian concludes that "it is clear that the practice of regularly assessing fines according to ability to pay was widespread throughout this period."⁸⁸

Notably, observance of the principle of *salvo contemento* did not require that only those fines that could be paid immediately could be assessed. Writing in 1711, the legal scholar Thomas Madox

instead suggesting the word is more appropriately understood as "a Latinized form of the French word 'gagnage,'" likely used to mean "tillage" or "crops." MCKECHNIE, *supra* note 80, at 291-92; *see also* Tait, *supra* note 79, at 721-22. Regardless of which etymology is correct, the overall livelihood-protection thrust of the provision remains apparent.

85. The Magna Carta itself was reaffirmed on a number of occasions. After its initial agreement in 1215, it was passed into law in 1225, *see* 9 Hen. III, ch. 14 (1225), 1 STAT. AT LARGE 6-7 (1762 ed.), and was subsequently reconfirmed on over forty different occasions during the thirteenth, fourteenth, and fifteenth centuries. *See* FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629* 10 (1948). Provisions regarding the calculation of amercements, mirroring Magna Carta's, were also included in the *Statute of Westminster*, 3 Edw. 1, ch. 6 (1275), which required "that no City, Borough, nor Town, nor any Man be amerced, without reasonable Cause, and according to the Quantity of his Trespass; that is to say, every Free-man saving his Freehold, a Merchant saving his Merchandise, a Villain saving his Waynage, and that by his or their Peers."

86. *For John le Fraunceys and his associates, Fine Roll C 60/57, 44 Henry III (1259)*, HENRY III FINE ROLLS PROJECT, http://www.finerollshenry3.org.uk/content/calendar/roll_057.html (last visited Apr. 20, 2013).

87. *For Gervase de Halton, Fine Roll C 60/58, 45 Henry III (1261)*, HENRY III FINE ROLLS PROJECT, http://www.finerollshenry3.org.uk/content/calendar/roll_058.html (last visited Apr. 20, 2013). For other examples of thirteenth century amercement practices, *see* FAITH THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA* 46-48 (1925); and Granucci, *supra* note 16, at 846.

88. Alfred N. May, *An Index of Thirteenth-Century Peasant Impoverishment? Manor Court Fines*, 26 ECON. HIST. REV. 389, 398 (1973). May goes so far as to propose (as the title of his piece suggests) that fine amounts might properly serve as a proxy for poverty levels. *Id.*

records that in the late thirteenth century, courts were enabling men to “[s]av[e] their Contenment”—that is, “[s]aving the maintenance of himself, his Wife and Children”—by permitting the payment of amercement debts in “reasonable installments.”⁸⁹

B. English Bill of Rights

To understand the meaning of the punishment provisions of the English Bill of Rights of 1689,⁹⁰ it is necessary to understand the circumstances surrounding the adoption of these provisions. By the mid-seventeenth century, English courts had come to disregard many of the traditional practices associated with the imposition of monetary penalties. One writer in 1637, for example, contrasted the contemporary practices of the Star Chamber with earlier practices under John Whitgift, who had served as Archbishop of Canterbury between 1583 and 1604, noting that “Arch-Bishop Whitgift did constantly in this Court maintain the Liberty of the Free-Charter, that none ought to be fined but *salvo Contenimento*: he seldom gave any Sentence, but therein did mitigate in something the Acrimony of those that spake before him.”⁹¹ By 1641, in contrast, one advocate would exclaim:

[T]hough Magna Charta be so sacred for antiquity;
though its confirmation be strengthened by oath, . . .
and assigns every subject his birthright, it only survives

89. See THOMAS MADDOX, *THE HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND* 678 (1711). On the early fining practices in the English courts generally, see also ARCHER MORESBY WHITE, *OUTLINES OF LEGAL HISTORY* (1895):

The practice in the superior courts was to inquire what a man could pay the king yearly, saving his maintenance, and that of his wife and children. . . . Then, instead of an excessive fine which he could never have paid, and according to the maxim *qui non habet in crumena luat in corpora* [lit. “who has nothing in purse, let him suffer in body”], he would be imprisoned until he did pay, which meant perpetual imprisonment. Then, instead of a fine, a limited imprisonment was inflicted.

Id. at 205. (The translation added to the above passage is the author’s own.)

90. 1 Wm. & Mary, 2d Sess., ch. 2, 3 STAT. AT LARGE 440, 441 (1689) (“[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”).

91. *A Discourse Concerning the High-Court of Star-Chamber* (1637), reprinted in *THE STAR CHAMBER* 4, 10 (John Southerden Burn ed. 1870).

in the Rolls, but is miserably rent and torn in the Practice. These words, “*salvo contenenemento*,” live in the Rolls, but they are dead in the Star-chamber.⁹²

Although the Star Chamber was abolished by statute in 1641,⁹³ judicial abuses in the assessment of fines continued. Indeed, by the mid-1680s, “the use of fines ‘became even more excessive and partisan,’ and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.”⁹⁴

Against this backdrop, the highly publicized trial and punishment of the Anglican cleric Titus Oates has been widely recognized as a valuable source of information regarding contemporary understandings of the protections against “excessive fines” and “cruell and unusuall Punishments” in the English Bill of Rights.⁹⁵ In the late 1670s, Oates had spread false reports of a Jesuit conspiracy against King Charles II; in response, a number of leading Catholic figures had been executed.⁹⁶ Subsequently charged with perjury, Oates’s trial at the King’s Bench had been presided over by the

92. *Impeachment of Sir Richard Bolton et al.*, 4 STATE TRIALS 53 (1641).

93. *An Act for Regulating the Privy Council and for Taking Away the Court Commonly Called the Star Chamber*, 16 Car. 1, c. 10 (July 5, 1641) (Eng.); see 1 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 514–16 (3d. ed.) (1922).

94. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (quoting SCHWOERER, *supra* note 10, at 91; citing *Trial of Thomas Pilkington, and others, for a Riot*, 9 STATE TRIALS 187 (1683); *Trial of Sir Samuel Barnardiston*, 9 STATE TRIALS 1333 (1684)). Other courts of this era appeared still to recognize Magna Carta’s limitations on criminal fines. See, e.g., *Townsend v. Hughes* (1677), 86 Eng. Rep. 994 (C.P.) 994 (“In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenenemento suo*; and no fine is to be imposed greater than he is able to pay.”).

95. See, e.g., Granucci, *supra* note 16, at 856 (concluding that “[f]or positive evidence of what the framers of the Declaration of Rights intended to prohibit, we must look to Titus Oates and the infamous ‘Popish Plot’ of 1678-79”); see generally *id.* at 856–60 (discussing the Oates case). Although some writers have suggested it was Judge Jeffreys’s so-called “Bloody Assize” that inspired the English provision, see, e.g., IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 155 (1965), most modern sources agree it is the trial of Titus Oates and similar abuses in the Court of King’s Bench that served as the immediate catalyst.

96. For extensive background on Titus Oates and the “Popish Plot,” see PETER HINDS, “THE HORRID POPISH PLOT”: ROGER L’ESTRANGE AND THE CIRCULATION OF POLITICAL DISCOURSE IN LATE SEVENTEENTH-CENTURY LONDON (2010); JOHN PHILIPPS KENYON, THE POPISH PLOT (1972).

notorious Judge Jeffreys.⁹⁷ Sentenced in 1685 to “(1) a fine of 2,000 marks, (2) life imprisonment, (3) whippings, (4) pilloring four times a year and (5) to be defrocked,”⁹⁸ Oates in 1688 petitioned Parliament in an attempt to have his sentence overturned. Oates’s appeal was rejected by the House of Lords, but several members dissented on the grounds that the sentence handed down was “contrary to the declaration . . . that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.”⁹⁹ The House of Commons then appeared to adopt the views of the dissenting lords,¹⁰⁰ with one member claiming that the sentence was “cruel and illegal.”¹⁰¹ Modern scholars¹⁰² and courts¹⁰³ have recognized that understanding the nature of the dispute over the penalty and sentence in Oates’s case—a major dispute over the legality of a particularly high-profile punishment—is relevant to understanding the scope of the rights protections codified in the English Bill of Rights. It is thus instructive that, in his appeal to the House of Lords to overturn his sentence, Oates characterized his fine as excessive not solely in relation to his culpability, but also in

97. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87 (1998) (“[I]n the late eighteenth century, every schoolboy in America knew that the English Bill of Rights’ 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys.”). Although Jeffreys’s abuses were myriad, and certainly not limited to the imposition of “excessive fines,” various sources emphasize in particular his refusal to observe the principle of *salvo contentemento*. One writer has described, as an occasion on which Judge Jeffreys “pervert[ed] the law,” Jeffreys’s conclusion that “the clause in Magna Charta, ‘*Liber homo non amercietur pro magno delicto nisi salvo contentemento suo*,’ does not apply to fines imposed by the King’s Judges.” 4 JOHN CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND* 412 (1847) (footnote omitted); see also, e.g., The Tryal of John Hambden, Esq., 9 STATE TRIALS 1054, 1124 (1684) (describing Justice Jeffreys’s statement, when confronted with a defendant’s claim that “Magna Carta says, there should be a Salvo Contentemento in all fines,” that “[Magna Carta] was never meant of Fines for great Offenses” and Jeffreys’s subsequent decision to sentence the defendant without regard to ability to pay).

98. Granucci, *supra* note 16, at 858.

99. 10 STATE TRIALS 1325 (T. Howell ed. 1811).

100. See Granucci, *supra* note 16, at 858.

101. *Id.* at 859. As noted in *A Complete Collection of State Trials and for High Treason and Other Crimes and Misdemeanors*, “On the 2d of July, A bill was brought into the House of Commons to reverse the two judgments against Oates, it was passed and carried up to the Lords on the 6th.” 10 STATE TRIALS 1079, 1329. Oates was released in August 1689. See JANE LANE, *TITUS OATES* 328–29 (1949).

102. See, e.g., Granucci, *supra* note 16.

103. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991).

relation to its failure to respect Magna Carta's economic-survival principles:

4. Exception. Fined 1,000 marks in each judgment, and committed in execution for the fines aforesaid; which fines are excessive, twice as much as the Defendant was worth, and therefore against Magna Charta, by which all fines ought to be with a *salvo contenimento*.¹⁰⁴

Further illustration of this point may be found in a case in the House of Lords—known as the *Earl of Devonshire's Case*¹⁰⁵—which follows Parliament's adoption of the English Bill of Rights by just three months. Because of the proximity of this case to the passage of the Bill of Rights, later commentators have regarded the House of Lords' opinion in this matter as valuable in shedding light on the meaning of the punishment clauses of the 1689 Bill of Rights; indeed, the Supreme Court has cited this case for the proposition that the English Bill of Rights incorporates a proportionality principle.¹⁰⁶

104. *Dominus Rex v. Oates*, reprinted in 1 THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1689-1690 81 (1889). For additional evidence suggesting that English excessive fines protections contemplated ability to pay as an "excessiveness" referent, see Claus, *supra* note 11, at 123. It appears likely that the English prohibition may also have contemplated a broader criterion for "excessiveness," encompassing not just "excessiveness" relative to ability to pay (or, for that matter, "excessiveness" in its standard proportionality sense) but "excessiveness" relative to established precedent. See *id.*; Stinneford, *supra* note 9. As Stinneford describes, *id.* at 936–37, the arguments before Parliament in *The Earl of Devonshire's Case*, (1687) 11 STATE TRIALS 1353, provide support for just such an understanding of "excessiveness." In that case, it was proposed that, in determining excessiveness, "[t]here are two things which have heretofore been looked upon as very good guides, 1st, what has formerly been expressly done in the like case; 2dly, for want of such particular direction, then to consider that which comes the nearest to it, and so proportionably to add or abate, as the manner and circumstance of the case do require." *Id.* at 1362. Because the English precedent for calculating monetary penalties was based in part on Magna Carta's dual principles of proportionality and livelihood protection, both of these principles would have been encompassed by a precedent-based conceptualization of excessiveness.

105. 11 STATE TRIALS 1353.

106. See *Solem v. Helm*, 463 U.S. 277, 285 (1983) (quoting language from this case); see also *United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (same); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 291 (1989) (O'Connor, J., concurring in part and dissenting in part) (same); *Weems v. United States*, 217 U.S. 349, 376 (1910) (same). This basic intuition—that the word "excessive" in the Excessive Fines Clause must denote an explicit proportionality principle—has been repeated by a number of commentators. See, e.g., Cordray, *supra* note 2, at 458 n.244 ("[T]he proportionality guarantee is more explicit in the Excessive Fines Clause than in the Cruel and Unusual Punishments Clause."); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 113–14 (1993)

While the 1689 excessive fines clause surely incorporates such a principle—designed, as it was, to reassert Magna Carta’s traditional dual principles of proportionality and *salvo contentemento*¹⁰⁷—it is somewhat questionable that this case actually stands for the proposition (proportionality tout court) for which the Court has cited it. In the *Earl of Devonshire’s Case*, the House of Lords was of the opinion that a “fine of thirty thousand pounds, imposed by the court of King’s Bench . . . , was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land.”¹⁰⁸ In that case, however, the argument made by the Earl of Devonshire to the House of Lords suggests that a core aspect of his complaint was that the fine was excessive in relation to his personal means to pay the fine. In making the case for the “excessiveness of the fine,” the historical experience with the Star Chamber and the circumstances of its abolition were emphasized:

The Court of Starchamber was taken away, because of the unmeasurable Fines which it impos’d, which alone was a plain and direct prohibition for any other court to do the like, for otherwise the Mischief remain’d

. . . .

[T]hose great Fines, imposed in that Court, were inconsistent with the Law of England, which is a Law of Mercy, and concludes every Fine which is left at discretion, with Salvo Contentimento.¹⁰⁹

Then, regarding the rationale for this rule, it is remarked:

(“The Eighth Amendment includes an explicit proportionality requirement in its prohibition of excessive fines.”) (footnote omitted); Rachel A. Van Cleave, “*Death Is Different, Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages-Shifting Constitutional Paradigms for Assessing Proportionality*,” 12 S. CAL. INTERDISC. L.J. 217, 274 (2003) (“[T]he Excessive Fines Clause is arguably explicit in its inclusion of proportionality review”); Warren, *supra* note 38, at 1331 (“The Court has read ‘cruel and unusual punishments’ as implicitly requiring what the Excessive Fines Clause requires explicitly: proportionate or non-excessive punishment.”).

107. See, e.g., LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 231–38 (1999) (discussing the traditional proportionality principle in English law).

108. *Earl of Devonshire’s Case*, 11 STATE TRIALS 1367 (1689).

109. *Id.* at 1362.

[I]f the judges may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay into court, then it will depend upon the judges pleasure, whether he shall ever has his liberty; because the fine may be such as he shall never be able to pay; and thus every man's liberty is wrested out of the dispose of the law, and is stuck under the girdle of the judges.¹¹⁰

A number of other examples also exist in which “excessiveness” is conceptualized as incorporating reference to an offender’s ability to pay. For example, in reversing a fine entered against Samuel Barnardiston, the House of Lords declared that a “Fine of Ten Thousand Pounds is exorbitant and excessive, and not warranted by legal Precedent in former Ages; for all Fines ought to be with a *Salvo Contenemento*, and not to the Parties Ruin.”¹¹¹ In light of this history, it is unsurprising that, by the early eighteenth century, the principle of *salvo contenemento* was being described as grounded on both the Magna Carta and the Bill of Rights.¹¹²

Blackstone, in the fourth volume of his *Commentaries* (published in 1769), provides an extensive discussion regarding the “reasonableness of fines.” He begins by noting that in the context of “discretionary fines and discretionary length of imprisonment,” the “duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances.”¹¹³ Blackstone further notes that “[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Carta concerning amercements for misbehavior.”¹¹⁴ Indeed, he suggests that “the bill of rights was only declaratory of the old constitutional law.”¹¹⁵ Then, after quoting Chapter 14 of the Magna Carta in full, he provides the following gloss on the principle of *salvo contenemento*:

110. *Id.* at 1363.

111. 14 JOURNAL OF THE HOUSE OF LORDS: 1685-1691 210 (1767-1830), available at <http://www.british-history.ac.uk/report.aspx?compid=13061>.

112. See, e.g., *R. v. Bennett*, 93 Eng. Rep. 412, 413 (1712) (K.B.) (“The fine here will be salvo contenemento, according to Magna Charta, and the Bill of Rights.”).

113. 4 BLACKSTONE, *supra* note 10, at *371.

114. *Id.* at *372.

115. *Id.*

A rule that obtained even in Henry the Second's time, and means only that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the landholder his contenment, or land: to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry.

....

[I]t is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.¹¹⁶

Similarly, Matthew Bacon writes that “amercements are to be with a salvo contenmento, and were always holden too grievous and excessive, if they deprived the offender of the means of his livelihood.”¹¹⁷ Other eighteenth century sources similarly affirm the centrality of the principle of *salvo contenmento* to the proper calculation of monetary penalties.¹¹⁸ Writing in 1771, William Eden outlined this principle in his influential treatise, *Principles of Penal Law*.¹¹⁹ After noting that “the bill of rights was only declaratory of the old constitutional privileges,” he writes that “[i]t is the usage of the courts, superinduced on the clause of Magna Charta relative to civil amercements, never to extend the fine of any criminal so far, as

116. *Id.* at *372-73.

117. 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 186 (1798).

118. 2 NEW ABRIDGMENT OF LAW, BY A GENTLEMAN OF THE MIDDLE TEMPLE 517 (1736); 5 *id.* at 247 (“[I]n a criminal Case a Man is by Magna Charta to be fined with a Salvo Contenmento suo, and consequently no greater Fine is to be imposed than he is able to pay . . .”); *see also, e.g.*, *Edwards v. Hughs*, 25 Eng. Rep. 146, 147–48 (1726) (noting that “before th[e] Charter of Liberties [i.e., Magna Carta] the Lords used to set such excessive and grievous Amerciaments on their Tenants, that under Pretence of such amerciaments, they used to seize the whole Profit of the Tenement which they had granted” and that, under the Magna Carta, amerciaments “must not destroy the Livelihood of the Offender”).

119. WILLIAM EDEN, BARON AUCKLAND, PRINCIPLES OF PENAL LAW 64 (2d ed.1771). As the Supreme Court has noted (in the context of relying on Auckland’s work to elucidate the meaning of the Fifth Amendment), this widely-read treatise “passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence.” *Ex parte Wilson*, 114 U.S. 417, 422 (1885).

to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support.” Instead, “[i]f the produce of his property, under those humane restrictions, be thought inadequate to the degree of the offense, some corporal punishment is inflicted, or stated imprisonment.”¹²⁰ Consequently, he suggests, “the wisdom of our Law, having thus amply secured the property, and personal freedom of the subject, hath rarely thought it advisable to affix certain sums to specified crimes.”¹²¹ As late as 1844, a leading jurist would suggest that “Magna Charta provides that no fine shall be imposed beyond what the party is able to pay.”¹²²

As the discussion presented in Blackstone’s *Commentaries* suggests, the dual principles of proportionality and *salvo contentamento* reinforced each other. Because a collateral consequence of imposing a fine that could not be paid was indefinite imprisonment (irrespective of the characteristics of the offense in question), such a punishment would make a mockery of notions of proportional punishment. This point was recognized by the eighteenth century jurist Sollom Emlyn, who observed:

If no Measures were to be observed in [regulating the imposition of] discretionary Punishments, a Man who is guilty of a Misdemeanor might be in a worse Condition than if he had committed a capital Crime; he might be exposed to an indefinite and perpetual Imprisonment, a punishment not at all favour’d by law, as being worse than Death itself: nor does an extravagant Fine, which is beyond the Power of the Offender ever to pay or raise, differ much from it; for if his Imprisonment depend upon a Condition, which

120. EDEN, *supra* note 119, at 64-65.

121. *Id.* at 65.

122. O’Connell v. Reg., 11 Cl. & Fin. 59, 406 (1844) (Campell, L.) (U.K. H.L.). Even today, a somewhat analogous requirement is codified in the U.K.’s *Criminal Justice Act of 2003*, 2003 c. 44, section 164 of which requires that “[b]efore fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.” *Id.* The Act further provides (1) that “[t]he amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence” and (2) that “[i]n fixing the amount of any fine to be imposed on an offender . . . , a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender” *Id.*

will never be in his power to perform, it is the same as if it were absolute and unconditional¹²³

Thus, while “every case must depend upon its own particular circumstances,” “some Fines and some Punishments are so monstrously extravagant, that no body can doubt their being so.”¹²⁴

Reflecting these principles, there is evidence that criminal fining practices in English courts following the adoption of the 1689 Bill of Rights did indeed take poverty into account when setting the level of criminal fines: One leading study of fining practices in and around London at the turn of the seventeenth century concludes that “following the conventional practice of adjusting fines to the defendant’s ability to pay, the justices were willing to reduce fines for poor defendants”¹²⁵ and that “the defendant’s ability to pay played a role in determining the size of the fine: 61% of gentlemen, compared to only 44% of all other men, were fined more than 3s. 4d.”¹²⁶

III. *Salvo Contentamento* and the Meaning of Excessive Fines Protections in Early American History

A. Colonial Era

Early colonists in America claimed “the same fundamental rights as other Englishmen.”¹²⁷ Among these rights were the Magna Carta’s

123. 1 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II xii (S. Emlyn ed., 3d ed. 1742) (footnotes omitted).

124. *Id.* (citing, as examples of excessive fines, *John Hampden’s Case*, 9 STATE TRIALS 1054, 1126 (1684); and *Trial of Sir Samuel Barnardiston*, 9 STATE TRIALS 1333 (1684)). Emlyn also emphasized the importance of proportionality, noting that “A Judge therefore ought to be strictly careful that he conform to the rules of law not only as to the nature of the Punishment, but likewise as to the degrees thereof.” *Id.*

125. ROBERT B. SHOEMAKER, PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, C. 1660-1725 155–61 (1991).

126. *Id.*

127. *McDonald v. Chicago*, 130 S. Ct. 3020, 3064 (2010) (Thomas, J., concurring); *see also id.* at 3065 n.3 (Thomas, J., concurring) (quoting Md. Act for the Liberties of the People (1639), *reprinted in* 1 SCHWARTZ, *supra* note 18, at 68; citing Charter of Va. (1606), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3783, 3788 (F. Thorpe ed. 1909); Charter of New England (1620), *reprinted in* 3 *id.*, at 1827, 1839; Charter of Mass. Bay (1629), *reprinted in id.* at 1846, 1856–57; Grant of the Province of Me. (1639), *reprinted in id.*, at 1625, 1635; Charter of Carolina (1663), *reprinted in* 5 *id.*, at 2743, 2747; Charter of R.I. and Providence Plantations (1663), *reprinted in* 6 *id.*, at 3211, 3220; Charter of Ga. (1732), *reprinted in* 2 *id.*, at 765, 773)) (concluding that “[a]s English subjects, the colonists considered themselves to be vested

prohibitions on excessive amercements, including both its proportionality principle and the limiting principle of *salvo contentemento*. In fact, in the years prior to Parliament's adoption of the English Bill of Rights in 1689, allusions to the concept of *salvo contentemento* are attested in a number of documents relating to colonial era understandings of the scope of fundamental rights. For example, William Penn's Frame of the Colony of Pennsylvania of 1682 provided "[t]hat all fines shall be moderate, and saving men's contentements, merchandize, or wainage."¹²⁸ The New York Charter of Liberties and Privileges of 1683 mirrored Chapter 14 of the Magna Carta even more closely, providing "[t]hat a freeman shall not be amerced for a small fault but after the manner of his fault and for a great fault after the greatness thereof, saving to him his freehold and a husbandman saving to him his wainage, and a merchant saving to him his merchandise."¹²⁹ In Maryland's Protestant Revolution of 1689, when disaffected colonists led by John Coode rebelled against the colonial government, one stated justification for their actions was the "[t]he Imposseinge Excessive fines Contrary to magna Charta without any respect had to the *salvo Contentemento suo sibi* therein Injoynd."¹³⁰ A generation later, in 1721, Jeremiah Dummer's seminal work *A Defence of the New-England Charters* similarly

with the same fundamental rights as other Englishmen" and citing a number of colonial laws claiming traditional English rights and liberties); *see also* *Solem v. Helm*, 463 U.S. 277, 286 (1983) (citing 1 J. CONTINENTAL CONGRESS 83 (Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) (declaring that "we claim all the benefits secured to the subject by the English constitution"); 1 AMERICAN ARCHIVES 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774) ("[H]is Majesty's subjects in America . . . are entitled to the same rights, privileges, and immunities with their fellow-subjects in Great Britain . . ."); *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) ("[N]ot only is the original meaning of the [English] 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular "rights of English subjects" it was designed to vindicate.").

128. Pennsylvania Frame of Government § XVIII, *reprinted in* 1 THE ROOTS OF THE BILL OF RIGHTS 141 (B. Schwartz ed. 1971). This principle was reaffirmed in 1700, when the Pennsylvania legislature required "[t]hat all fines shall be moderate, saving men's contentements, merchandise and wainage, which is to say, their furniture of their calling and means of livelihood." An Act To Prevent Immoderate Fines, *reprinted in* 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 44 (1896).

129. Charter of Liberties and Privileges, Oct. 30, 1683, *reprinted in* 1 AMERICA'S FOUNDING CHARTERS 177, 178 (Jon L. Wakelyn ed. 2006).

130. *See* "Mariland's Grevances Wiy The Have Taken Op Arms" (Beverly McAnear ed.), *reprinted in* 8 J. S. HIST. 392, 401 (1942). For an extensive history of this rebellion, *see* LOIS GREEN CARR & DAVID WILLIAM JORDAN, MARYLAND'S REVOLUTION OF GOVERNMENT 1689-1692 (1974); *see also* FRANCIS EDGAR SPARKS, CAUSES OF THE MARYLAND REVOLUTION OF 1689 (1896).

demonstrated a keen familiarity with the dual proportionality and economic-survival protections of the Magna Carta. Dummer, a Massachusetts native serving as agent for the New England colonies in London, proclaimed that “[t]he Subjects Abroad claim the Privilege of Magna Charta, which says that no Man shall be fin’d above the Nature of his Offense and, whatever his Miscarriage be, a Salvo Contenemento suo is to be observ’d by the Judge.”¹³¹ And indeed, there is some evidence that colonial courts did, in practice, tend to take into account the individual characteristics of defendants when determining the level of fines.¹³²

131. JEREMIAH DUMMER, A DEFENCE OF THE NEW-ENGLAND CHARTERS 16–17 (1721). On Dummer and his important role in early American political thought, see CRAIG YIRUSH, *SETTLERS, LIBERTY, AND EMPIRE: THE ROOTS OF EARLY AMERICAN POLITICAL THEORY, 1675-1775* 83–112 (2011).

While seventeenth and early eighteenth century colonists may have been clear on their entitlement to the rights of English subjects (including explicit claims to the Magna Carta’s principle of *salvo contenemento*), officials back in Great Britain were—perhaps unsurprisingly—less certain on this point. The archives of the British colonial office record a letter dated February 27, 1707, in which the Council of Trade and Plantations requests an opinion of the Attorney General on the matter of whether the authorities of the Massachusetts Bay Colony possessed the power to impose fines for misdemeanors and, “[s]upposing that a power is granted them by the Charter, whether [it is] unlimited and arbitrary without a *salvo contenemento*, or whether the fine to be imposed is to be moderated and restrained to the condition, circumstances and abilities of the persons offending.” Letter of Attorney General to the Council of Trade and Plantations, Feb. 27, 1707, *reprinted in* CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1706-1708 § 787, at 386 (Cecil Headlam ed. 1916). Despite the concern expressed in the letter that if the fine is “more than he is worth . . . if he should be detained in prison till he has paid his fine, he must lose his liberty during life,” *id.*, the colonial archives record a reply made on March 28 of that year, in which the Attorney General concluded that the courts of the Massachusetts colony “might legally impose a fine on a man without a *salvo contenemento*, otherwise a poor man is not to be fined at all.” Letter of Attorney General to the Council of Trade and Plantations, Mar. 28, 1707, *reprinted in id.* § 832, at 410.

132. See, e.g., Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982) (“[W]ithin the discretion of the judge, . . . the precise amount of the fine was established by him and tailored individually to the particular case. The range was apparently without limit *except insofar as it was within the expectation on the part of the court that it would be paid.*”) (emphasis added); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 640–41 (2004) (“As in England, the two main forms of noncapital punishment were whippings and fines, and, in both cases, the judge could set the amount or even elect between the two, depending upon the nature of the defendant and the crime.”); Chilton L. Powell, *Marriage in Early New England*, 1 NEW ENGLAND Q. 333 n.23 (1928) (noting that in the context of colonial era fines for fornication, “fines ranging from £2 to £10 were levied, the amount apparently depending upon the culprits ability to pay rather than upon the circumstances of the case”); *but see* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 21 (1985) (suggesting that “during the eighteenth century, fines that amounted to total

Colonial-era understandings regarding the nature of these limitations on the scope of judicial discretion to fine defendants would likely have been influenced by the writings of Edward Coke and William Blackstone—two English writers who had a profound effect on the development of early American legal and political thought.¹³³ Blackstone's *Commentaries*, as noted above, explicitly ties the issue of what constitutes an "excessive fine" to Magna Carta's regulation of amercements under the twin principles of proportionality and *salvo contentemento*.¹³⁴

Also perhaps influential may have been the work of the Italian jurist Cesare Beccaria, whose 1764 treatise *On Crimes and Punishments* highlights both the importance of proportionality in systems of criminal justice, and the risks of excessive reliance on monetary sanctions;¹³⁵ as Beccaria notes, "fines only increase the number of criminals above the original number of crimes, and take bread from the innocent when taking it from the villains."¹³⁶

forfeiture was exacted of felons in all the American colonies, despite articles against excessive fines in Magna Carta, in the statute of 1 Westminster, c. 30, and in the 1689 English Bill of Rights").

133. For Coke's treatment of the principle of *salvo contentemento*, see COKE, *supra* note 75, at 27–29; for Blackstone's, see 4 BLACKSTONE, *supra* note 10, at *372–73. On Coke's influence on American legal development, see H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (1965); Charles F. Mullett, *Coke and the American Revolution*, 38 *ECONOMICA* 457 (1932). On Blackstone's influence, see WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* (2008); CHARLES F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760–1776* (1966); DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* (1941); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 *N.Y.U. L. REV.* 731 (1976).

134. See *supra* notes 113–116 and accompanying text.

135. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davies trans., 1995). On the influence of Beccaria's work, see Bessler, *supra* note 9, at 47–65 (discussing and citing sources). See also, e.g., John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 *AM. CRIM. L. REV.* 1913, 1934 n.156 (2013) ("In a 1786 letter written in Philadelphia by James Madison's friend, William Bradford, Jr., to Luigi Castiglioni, an Italian botanist who visited America in the 1780s, Bradford wrote this of Beccaria's treatise: 'One must attribute mainly to this excellent book the honor of this revolution in our penal code. The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens.'") (quoting LUIGI CASTIGLIONI'S *VIAGGIO: TRAVELS IN THE UNITED STATES OF NORTH AMERICA, 1785–87* 313–14 (Antonio Pace ed. & trans. 1983)).

136. BECCARIA, *supra* note 135, at 53.

More broadly, it is perhaps instructive that at least one prominent member of the Founding generation understood private property as falling into two basic types: that which was necessary for economic survival (and thus protected as a matter of natural right) and that which was not. As Benjamin Franklin wrote in 1783:

All the Property that is necessary to a Man, for the Conservation of the Individual and the Propagation of the Species, is his natural Right, which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who, by their Laws, have created it, and who may therefore by other Laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition.¹³⁷

Finally, the case of Virginia is particularly informative. Because Virginia's 1776 Declaration of Rights¹³⁸ served as the immediate template for the Eighth Amendment,¹³⁹ exploring the fining practices of the Virginia courts enables us to explore contemporary understandings as to the meaning of that provision. At the time of the First Congress, the imposition of fines in Virginia was governed by a 1786 statute.¹⁴⁰ This law—described by the Chief Justice of the Virginia Supreme Court in a 1799 opinion as having been “founded upon the spirit” of the state's constitutional excessive fines protection¹⁴¹—required, in relevant part, that “in every . . .

137. Letter from Benjamin Franklin to Robert Morris (Dec. 25, 1783), in BENJAMIN FRANKLIN: WRITINGS 1079, 1082 (Library of America 1987); see generally Jerry L. Anderson, *Takings and Expectations: Toward a “Broader Vision” of Property Rights*, 37 U. KAN. L. REV. 529, 533 (1989) (“For Franklin and other republicans, protecting a certain amount of private property was necessary to provide for basic human needs and to encourage socially useful production.”); Gerald Stourzh, *Reason and Power in Benjamin Franklin's Political Thought*, 47 AM. POL. SCI. REV. 1092 (1953). One might think of Franklin's proposed typology of property interests as something of a forerunner of Radin's conception of “fungible” and “personal” as two property archetypes—albeit one with a far more cramped understanding of “personhood” (i.e., only property necessary for a person's basic survival). See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

138. Va. Declaration of Rights § 9 (1776), reprinted in 1 SCHWARTZ, *supra* note 18, at 235 (1971).

139. See *supra* note 19 and accompanying text.

140. *An Act for Preventing Vexations and Malicious Prosecutions, and Moderating Amercements*, reprinted in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, 41, 41–42 (1786).

141. *Jones v. Com.*, 5 Va. (1 Call) 555, 556–57 (1799) (Roane, J.).

information or indictment, the amercement . . . ought to be according to the degree of the fault, *and saving to the offender his contenment.*”¹⁴² In other words, to realize the “spirit” of the Virginia Bill of Rights’ prohibition against “excessive fines,” the legislature provided that fines must be set with reference both to the “degree of the fault” and to the “estate of the offender.”¹⁴³

B. Early Republic

Essentially no Supreme Court Excessive Fines Clause case law exists prior to the modern era. Nevertheless, there is some evidence attesting to the conceptualization of the Excessive Fines Clause as prohibiting fines that grossly exceeded a defendant’s ability to pay. For example, in the 1846 case of *Spalding v. New York*,¹⁴⁴ one litigant—a bankrupt facing a large criminal fine—argued that “the imposition of this fine . . . was excessive, and was a cruel punishment for the offence, for it imposed an impossibility” and “[t]he law never imposes a fine, where it presumes the party can have nothing to pay.”¹⁴⁵ Likewise, in *Ex Parte Watkins*,¹⁴⁶ an opinion for the Court by Justice Story in 1833 noted the argument made by one petitioner “[t]hat the fines imposed upon him are excessive, and contrary to the eighth amendment of the constitution; which declares, that excessive fines shall not be enforced.”¹⁴⁷ In both cases, however, the matter was

142. *Supra* note 140 (emphasis added).

143. *Jones*, 5 Va. (1 Call) at 556–57 (discussing “the clause of the bill of rights prohibiting excessive fines and the act of 1786 founded on the spirit of it and providing, that the fine should be according to the degree of the fault and the estate of the offender”). Judge Roane’s glossing of the statutory provision “saving to the offender his contenment” as requiring that a fine “be according to . . . the estate of the offender” is instructive as to contemporary understandings of the meaning of the word “contenment,” as is his apparent use of the terms “fine” and “amercements” interchangeably.

Judge Roane goes on to note that the imposition of the contemplated fine would be “so unjust and contrary to the spirit of the constitution, that even if it were established by adjudged cases to be the law, nay even if an act of Assembly should pass authorizing it, in express terms, I should most probably be of opinion that the one should be exploded and the other declared unconstitutional and not law.” *Id.* at 557 (Roane, J.); *see generally* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 494–95 (2005) (discussing Virginia’s well-established pre-*Marbury* tradition of judicial review).

144. 45 U.S. 21 (1846).

145. *Spalding*, 45 U.S. at 30, *quoted in* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 581 n.76 (2010).

146. 32 U.S. 568 (1833).

147. *Id.* at 573.

disposed of on other grounds, and the courts did not reach the constitutional issue.¹⁴⁸

Moreover, while the evidence from the federal courts in the Early Republic may be limited, a number of early opinions in the state courts attest to judicial understandings of excessive fines protections as incorporating a consideration of an individual's ability to pay. For example, in *Commonwealth v. Morrison*,¹⁴⁹ an 1819 case in the Kentucky Court of Appeals, the court was called upon to articulate the test for determining the constitutional "excessiveness" of fines under the state constitution. After noting that "no definite criterion is furnished by the constitution or bill of rights by which to ascertain what fine would or would not be excessive," the court concluded "[t]he fine imposed should bear a just proportion to the offense committed" *as well as to* "the situation, circumstances and character of the offender."¹⁵⁰ The North Carolina Supreme Court, in

148. Writing for the Court in *Ex Parte Watkins*, Justice Story concluded that no appellate jurisdiction existed through which the Supreme Court might modify the lower court's sentence, *id.* at 574, and, in dicta, further suggested "there is nothing on the record in this case, which establishes that at the time of passing judgment the present fines were, in fact, or were shown to the circuit court to be, excessive." *Id.*

It is unclear whether Justice Story's statement should be taken as expressing skepticism of the very notion of an inability to pay-based Excessive Fines Clause challenge, or whether the statement should be taken as merely suggesting that *Watkins* had not successfully demonstrated the excessiveness of the fine in relation to his own circumstances in the case at bar. If, however, Justice Story had regarded the Excessive Fines Clause inquiry as consisting solely of a comparison between penalty and offense, it is unclear why "the time of passing judgment," *id.*, would have been a relevant factor to consider in the excessiveness calculus at all. In contrast, if Justice Story's opinion instead contemplated a notion of excessiveness as encompassing fines that were beyond an individual's ability to pay, the use of such a baseline would have made perfect sense.

Following the Supreme Court's decision in *Ex Parte Watkins*, a similar Excessive Fines Clause argument was made again by *Watkins* in the Circuit Court for the District of Columbia. See *United States v. Watkins*, 4 D.C. (4 Cranch) 490 (1833). There, Chief Judge Cranch noted counsel's argument "[t]hat the fines were excessive, and amount to a sentence of perpetual imprisonment." *Id.* at 492. Again, however, the court resolved the case on other grounds and did not reach the issue. *Id.* at 498.

149. 9 Ky. (2 A.K. Marsh.) 75, 99 (1819).

150. *Id.* Similarly, in determining whether "excessive damages" had been assessed in the tort context, the Court of Appeals of Kentucky, in *Applegate v. Ruble*, 9 Ky. (2 A.K. Marsh) 128, 130 (1819), adopted as an appropriate "excessiveness" reference the size of the defendant's estate: when the defendant moved to set aside a verdict on the grounds of "[e]xcessiveness of damages," the court concluded "*one-tenth of defendant's estate* are not damages so excessive as to warrant a new trial on that account alone." *Id.* at 129, 130 (emphasis added); accord *Potter v. Lansing*, 1 Johns. 215 (N.Y. Sup. Ct. 1806) (suggesting damages were not "excessive" because the jury "were the proper judges of [the defendant's] circumstances, and if they thought him able to pay, the sum they have given is not extravagant") (emphasis added). Although these examples are from the private law

the 1838 case of *State v. Manuel*,¹⁵¹ similarly concluded that “[w]hether a fine be reasonable or excessive, ought to depend on the nature of the offence, *and the ability of the offender*.”¹⁵² Reflecting such understandings, early treatises emphasized the importance of tethering the level of fines to the individual ability for payment. For example, Benjamin Lynde Oliver’s 1832 work *The Rights of an American Citizen* states that in light of the Excessive Fines Clause, “it is forbidden to impose unreasonable fines, on account of the difficulty the person fined would have of paying them, the default of which would be punished by imprisonment only.”¹⁵³

IV. The Excessive Fines Clause and the Fourteenth Amendment

The history presented in the prior sections provides insight regarding the meaning of the Excessive Fines Clause, at least as it was understood to apply against the federal government in 1791. But what of the Clause as applied against the states?

A. Current Incorporation Status

As one recent district court opinion notes, “[t]here is a surprising amount of confusion as to whether the Excessive Fines Clause has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment.”¹⁵⁴ The Supreme Court’s pronouncements on this issue have been, to put it mildly, in tension with one other. In *McDonald v. City of Chicago*,¹⁵⁵ the Court

context, they nevertheless provide an illustration of contemporary understandings of meaning of the term “excessiveness” as applied in the judicial context.

151. 20 N.C. (3 & 4 Dev. & Bat.) 20 (1838).

152. *Id.* at 35 (emphasis added). Highlighting the multifaceted nature of the “excessiveness” inquiry, other state cases in the early nineteenth century appear to characterize “excessiveness” along the dimension of proportionality between fine and offense. *See, e.g.*, *Stephoe v. Auditor*, 24 Va. (3. Rand.) 221, 233–34 (1825) (characterizing a fine as “*excessive*, as bearing no proportion whatever to the nature of the offence”) (emphasis in original); *Bullock v. Goodall*, 7 Va. (3 Call) 44, 49–50 (1801) (“No man can doubt, but that a fine of 264*l.* 8*s.* 9*d.* imposed on an officer who has committed no fault, for the benefit of a creditor who has sustained no injury, is superlatively excessive, unconstitutional, oppressive, and against conscience.”).

153. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 185 (1832).

154. *Reyes v. N. Texas Tollway Auth.*, 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011); *see also, e.g.*, Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 899 n.69 (2011) (“It is disputed whether the Excessive Fines Clause of the Eighth Amendment has been incorporated.”).

155. 130 S. Ct. 3020 (2010).

suggested that “[w]e never have decided whether the Third Amendment or the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”¹⁵⁶ In a 2001 case, in contrast, the Court stated that the Due Process Clause “makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”¹⁵⁷ And at various other points, the Court has similarly appeared to suggest that the entire Eighth Amendment is incorporated.¹⁵⁸ The Court expressly refrained from deciding the incorporation issue in the 1989 case of *Browning-Ferris Industries of Vermont v. Kelco Disposal*,¹⁵⁹ over the protests of Justice O’Connor. In her opinion, Justice O’Connor suggested that she saw, in light of the Court’s clear incorporation of the Cruel and Unusual Punishments Clause¹⁶⁰ and its assumed incorporation of the Excessive Bail Clause,¹⁶¹ “no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States.”¹⁶²

Against this backdrop, as one authority notes, “[t]he lower court responses to these differing signals from the Supreme Court has been mixed.”¹⁶³ Although case law in certain lower courts—including the

156. *Id.* at 3035, n.13.

157. *Cooper Indus., Inc. v. Leatherman Tool Grp, Inc.*, 532 U.S. 424, 433–34 (2001). One lower court, however, has suggested that this statement may be “more wishful thinking than a statement of the law.” *Reyes*, 830 F. Supp. 2d at 207.

158. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (“The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that ‘[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’”); *Baze v. Rees*, 553 U.S. 35, 47 (2008); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“The Eighth Amendment provides ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ The provision is applicable to the States through the Fourteenth Amendment.”). One author has gone so far as to criticize such characterizations as “judicial sloppiness rather than an accurate statement of the law” in light of statements to the contrary in *Browning-Ferris and McDonald*. Samuel Wiseman, *McDonald’s Other Right*, 97 VA. L. REV. IN BRIEF 23, 24 n.4 (2011).

159. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (stating that “we shall not decide whether the Eighth Amendment’s prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals”).

160. *Id.* at 284 (O’Connor, J., concurring in part and dissenting in part) (citing *Robinson v. California*, 370 U.S. 660, 666–67 (1962)).

161. *Id.* (citing *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971)).

162. *Id.*

163. WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE, at § 2.6(b) (3d ed., 2012); *see QWest Corp. v. Minn. Pub. Utilities Comm’n*, 427 F.3d 1061, 1069–70 (8th Cir. 2005)

Fifth and Eighth Circuits¹⁶⁴—has been viewed as having held that the Excessive Fines Clause is incorporated outright, other courts have simply assumed without deciding that the Clause is incorporated,¹⁶⁵ while still others have expressly held that the Excessive Fines Clause is not incorporated.¹⁶⁶

Scholarly opinion is also somewhat split. One leading treatise has concluded that “the Court never has ruled as to whether the prohibition of excessive fines in the Eighth Amendment is incorporated.”¹⁶⁷ Another suggests that although “[t]he Court has not determined whether the ‘excessive fine’ provision of the Eighth Amendment is applicable to the states,” “the provision seems logically intertwined with the other provisions of that Amendment,” and thus “it may already have been impliedly made applicable to the states.”¹⁶⁸

(applying the Excessive Fines Clause against state government); *Ex parte Dorough*, 773 So. 2d 1001, 1004 (Ala. 2000) (same); *In the Matter of Property Seized From Terrel*, 639 N.W.2d 18, 20–22 (Iowa 2002) (same); *State v. A House and 1.37 Acres of Real Prop.*, 886 P.2d 534, 539–40 (Utah 1994) (same); *Enquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 1005–07 (9th Cir. 2007) (assuming *arguendo* the incorporation of the Excessive Fines Clause); *City of Milwaukee v. Arrieh*, 211 Wis. 2d 764, 771–76 (Wis. Ct. App. 1997) (same); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099–100 (Colo. App. 1996) (same); *State v. Meister*, 866 S.W.2d 485, 488–491 (Mo. App. W.D. (1993) (same); *Taylor v. Cisneros*, 913 F. Supp. 314, 323 (D.N.J. (1995) (same).

164. *See, e.g.,* *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 572 (5th Cir. 2002) (“The imposition of punitive damages under state law is constrained by the Eighth and Fourteenth Amendments, the first proscribing excessive fines and cruel and unusual punishment, the second making grossly excessive punishments unlawful under its Due Process Clause.”); *Qwest*, 427 F.3d at 1069 (“The Eighth Amendment’s prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment.”).

165. *See, e.g.,* *Wright v. Riveland*, 219 F.3d 905, 914–19 (9th Cir. 2000) (assuming without deciding that the Excessive Fines Clause applied against a Washington State government entity); *State v. Goodenow*, 251 Or. App. 139, 147 n.7 (Or. Ct. App. 2012) (“[W]e assume, without deciding, that the Excessive Fines Clause of the Eighth Amendment applies to the states through the Fourteenth Amendment.”); *see also, e.g.,* *State v. Clark*, 124 Wash. 2d 90, 102 (Wash. 1994) (“Because neither party raises it, we do not reach the issue whether the federal excessive fines clause applies to state action Even if we were to assume the federal excessive fines clause does apply to state action, the Clarks’ challenge would fail because they have not established that either of the forfeitures is ‘excessive’ under the federal constitution.”).

166. *See, e.g.,* *Reyes*, 830 F. Supp. 2d at 208 (“[T]his court concludes that the Excessive Fines Clause is not incorporated against the states”).

167. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 505 (3rd ed. 2006).

168. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 14.2(a) (5th ed. 2011). For still more debate on this topic see, for example, Eugene Volokh, *Is the Excessive Fines Clause Incorporated*

B. The Excessive Fines Clause and the Reconstruction Era

In light of the uncertainty discussed in the prior section, there are two important issues to consider. First, the gateway question: Assuming arguendo that the federal Excessive Fines Clause has not to date been incorporated against the states, should it be? And second, if we accept that the Excessive Fines Clause should be incorporated, how should the Clause—as applied against the states—be interpreted? I consider these two questions in turn.

1. Incorporation

As noted above, it remains somewhat unclear whether the Supreme Court has in fact incorporated the Excessive Fines Clause to date.¹⁶⁹ Given the traditional understanding of protection from “excessive fines” as inherent in English fundamental law, and in light of the fact that protections against excessive fines are among the most ancient rights of the Anglo-American legal tradition, it can scarcely be argued that such rights are not “‘deeply rooted in this Nation’s history and tradition.’”¹⁷⁰ Moreover, as a textual matter, as Justice O’Connor implied in her *Browning-Ferris* dissent,¹⁷¹ it would seem highly incongruous to conclude that the Eighth Amendment’s Excessive Fines Clause was not incorporated, while its parallel provisions governing cruel and unusual punishments and excessive bail were.¹⁷²

Against the States?, THE VOLOKH CONSPIRACY, (Aug. 30, 2010, 7:40 PM), <http://www.volokh.com/2010/08/30/is-the-excessive-fines-clause-incorporated-against-the-states>.

169. See *supra* notes 154 through 168 and accompanying text.

170. *McDonald*, 130 S. Ct. at 3036 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Cf. Amar, *supra* note 23, at 1248 (“Clearly an institution as venerable and widespread as the grand jury, with roots in the mythic ‘ancient constitution’ of England and in force in 1866 in all but a handful of states, could be plausibly claimed to be implicit in ordered liberty.”).

171. *Browning-Ferris*, 492 U.S. at 284 (O’Connor, J., concurring in part and dissenting in part).

172. See Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 198 (2012) (“If it is accepted that the excessive bail and the cruel and unusual prohibitions were incorporated properly against the states, however, there is no textual reason that the excessive fines prohibition also should not have been incorporated against the states. Indeed the English Bill of Rights included the same language regarding excessive bail, excessive fines, and cruel and unusual punishment that the Framers adopted in the Eighth Amendment, and at the time of the Constitution’s framing, similar provisions appeared in some of the states’ constitutions.”) (footnotes omitted).

Understanding the prohibition against excessive fines as a fundamental right,¹⁷³ properly incorporated against the states, finds further support in the inclusion of analogous provisions in the large majority of state constitutions. By 1791, excessive fines prohibitions could be found in the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia.¹⁷⁴ An analogous provision was also included in the Northwest Ordinance of 1787, which established that “[a]ll fines shall be moderate.”¹⁷⁵ By the end of 1868, explicit prohibitions on “excessive fines” existed in thirty-five of thirty-seven state

Of course, a similar logic might also militate in favor of the incorporation of the Grand Jury Clause of the Fifth Amendment, as Amar and others have recognized. See AMAR, *supra* note 97, at 197-202, 307 (characterizing the “failure to incorporate the right to . . . the grand jury” as “hard to justify”); *but see* AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 166 n.* (2012) (suggesting that the fact that Grand Jury Clause “has not been mirrored by most state constitutions” and that “it has the weakest foundations in actual modern practice at the state level” may militate against incorporation); *see generally* Hurtado v. California, 110 U.S. 516, 532-34 (1884) (declining to incorporate the grand jury right).

173. Or, alternatively, a “privilege or immunity” within the meaning of Section 1 of the Fourteenth Amendment. *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 146-48 (1997); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18-25 (1980); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last?”*, 1972 WASH. U. L.Q. 405 (1972); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998); *but see, e.g.*, *McDonald*, 130 S. Ct. at 3030-31 (noting that “[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause” and “therefore declin[ing] to disturb the *Slaughter-House* holding” to that effect). Engagement with the broader controversy over Due Process incorporation versus Privileges or Immunities Clause incorporation is beyond the scope of this Article. The case for the incorporation of the Excessive Fines Clause is, however, a very strong one irrespective of which framework is applied.

174. *See* DEL. Decl. of Rts. of 1776, § 16, *reprinted in* 1 SCHWARTZ, *supra* note 18, at 278; GA. CONST. of 1777, art. LIX, *reprinted in* 1 *id.* at 300; MD. Decl. of Rts. of 1776, § XXII, *reprinted in* 1 *id.* at 282; MASS. Decl. of Rts. of 1780, § XXVI, *reprinted in* 1 *id.* at 343; N.H. Bill of Rts. of 1783 § XXXIII, *reprinted in* 1 *id.* at 379; N.C. Decl. of Rts. of 1776, § X, *reprinted in* 1 *id.* at 287; PA. Decl. of Rts. of 1776, § 29, *reprinted in* 1 *id.* at 272; VA. Decl. of Rts. of 1776, § 9, *reprinted in* 1 *id.* at 235.

175. Northwest Ordinance of 1787 § 3, *reprinted in* 1 United States Code, at LV-LVI (2006); *see also* Matthew J. Hegreiness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1881 (2011) (suggesting the inclusion of this provision in the Northwest Ordinance militates in favor of the incorporation of the Excessive Fines Clause) (citations omitted).

constitutions;¹⁷⁶ today, “excessive fines” provisions are in forty-seven such documents.¹⁷⁷

176. See ALA. CONST. of 1867 art. I, § 17, *reprinted in* 1 THORPE, *supra* note 127, at 134; ARK. CONST. of 1868 art. I, § 7, *reprinted in* 1 *id.* at 307; CAL. CONST. of 1849 art. I, § 6, *reprinted in* 1 *id.* at 391; CONN. CONST. of 1818 art. I, § 13, *reprinted in* 1 *id.* at 538; DEL. CONST. of 1831 art. I, § 11, *reprinted in* 1 *id.* at 583; FLA. CONST. of 1868 (Feb. 25, 1868) art. I § 7, *reprinted in* 2 *id.* at 705; GA. CONST. of 1868 (Mar. 11, 1868) art I § 16, *reprinted in* 2 *id.* at 823; IND. CONST. of 1851 art. I, § 16, *reprinted in* 2 *id.* at 1075; IOWA CONST. of 1857 art. I, § 17, *reprinted in* 2 *id.* at 1137; KAN. CONST. Bill of Rts. § 9, *reprinted in* 2 *id.* at 1242; KY. CONST. of 1850 art. XIII, § 17, *reprinted in* 3 *id.* at 1313; LA. CONST. of 1868 tit. I, § 8, *reprinted in* 3 *id.* at 1449; ME. CONST. of 1819 art. I, § 9, *reprinted in* 3 *id.* at 1648; MD. CONST. Decl. of Rts. art. 25, *reprinted in* 3 *id.* at 1781; MASS. CONST. pt. 1, art. XXVI, *reprinted in* 3 *id.* at 1892; MICH. CONST. of 1850 art. VI, § 31, *reprinted in* 4 *id.* at 1956; MINN. CONST. art. I, § 5, *reprinted in* 4 *id.* at 1992; MISS. CONST. of 1868 art. I, § 8, *reprinted in* 4 *id.* at 2069; MO. CONST. of 1865 art. I, § 21, *reprinted in* 4 *id.* at 2191; NEB. CONST. of 1866 art. I, § 6, *reprinted in* 4 *id.* at 2349; NEV. CONST. art. I, § 6, *reprinted in* 4 *id.* at 2403; N.H. CONST. of 1784 pt. 1, art. XXXIII, *reprinted in* 4 *id.* at 2457; N.J. CONST. of 1844 art. I, ¶ 15, *reprinted in* 5 *id.* at 2600; N.Y. CONST. of 1846 art. I, § 5, *reprinted in* 5 *id.* at 2654; N.C. CONST. of 1868 art. I, § 14, *reprinted in* 5 *id.* at 2800, 2801; OHIO CONST. of 1851 art. I, § 9, *reprinted in* 5 *id.*, at 2913, 2914; OR. CONST. art. I, § 16, *reprinted in* 5 *id.* at 2999; PA. CONST. of 1838 art. I, § 13, *reprinted in* 5 *id.* at 3114; R.I. CONST. of 1842 art. I, § 8, *reprinted in* 6 *id.* at 3223; S.C. CONST. of 1868 art. I, § 38, *reprinted in* 6 *id.* at 3284; TENN. CONST. of 1834 art. I, § 16, *reprinted in* 6 *id.* at 3427; TEX. CONST. of 1868 art. I, § 11, *reprinted in* 6 *id.* at 3592; VA. CONST. of 1864 art. I, *reprinted in* 7 *id.* at 3854 (incorporating by reference the 1776 Bill of Rights); W. VA. CONST. of 1861 art. II, § 2, *reprinted in* 7 *id.* at 4014; WIS. CONST. art. I, § 6, *reprinted in* 7 *id.* at 4077; *cf.* ILL. CONST. of 1848, art. XIII § 14, *reprinted in* 2 *id.* at 1008 (“All penalties shall be proportioned to the nature of the offense; the true design of all punishment being to reform, not to exterminate, mankind.”); VT. CONST. of 1793 ch. II, § 32, *reprinted in* 6 *id.* at 3769–70 (“[A]ll fines shall be proportioned to the offences.”). As Calabresi and Agudo note:

Ninety-two percent of Americans in 1868—a huge supermajority—lived in states with constitutions that banned excessive fines. A ban on excessive fines was found in 100% of the Southern state constitutions, in 92% of the Midwestern-Western state constitutions, and in 90% of the Northeastern state constitutions. Eighty-nine percent of the pre-1855 constitutions and 100% of the post-1855 constitutions banned excessive fines.

Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 82 (2008).

By way of comparison, Justice Alito’s 2010 opinion for the Court in *McDonald*, held that the Second Amendment right to keep and bear arms was incorporated against the states in part because “[i]n 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms” and that “[a] clear majority of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.” 130 S. Ct. at 3042 (footnoted omitted) (citing Calabresi & Agudo, *supra*, at 50).

177. For current state constitution provisions prohibiting “excessive fines,” see ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST.

Many commentators have suggested that if the Court squarely confronted the issue of incorporation, it would be inclined to incorporate the Clause against the states.¹⁷⁸ Certainly, the case for incorporation appears to be a strong one.¹⁷⁹

art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. BILL OF RTS. § 9; KY. CONST. § 17; ME. CONST. art. I, § 9; MD. CONST. DECL. OF RTS. art. 25; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. 33; N.J. CONST. art. I, ¶ 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14. The Illinois and Vermont constitutions impose explicit proportionality requirements on “all penalties” and fines. See ILL. CONST. art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”); VT. CONST. ch. II, § 39 (“[A]ll fines shall be proportioned to the offences.”). The Louisiana constitution prohibits “excessive . . . punishment.” LA. CONST. art. I, § 20.

178. See, e.g., Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1524 (2000) (“With regard to excessive bail and excessive fines under the Eighth Amendment, it seems hard to believe that the Court would not incorporate those rights if ever confronted with the issue, especially given that the remaining Eighth Amendment guarantee, against cruel and unusual punishments, has long been incorporated.”) (citations omitted); Massey, *supra* note 11, at 1272 (“[I]t seems a small enough, and a logical enough, extension [of the Supreme Court’s existing Eighth Amendment doctrine] to incorporate the excessive fines clause into the due process clause of the fourteenth amendment.”).

Even before the adoption of the Fourteenth Amendment, at least one author had argued explicitly in favor of applying the strictures of the Eighth Amendment’s ban on “excessive fines” to the states. In an 1825 treatise, William Rawle claimed that:

[T]hat the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favour, and the assistance of counsel for his defence, and the 8th article [of the Bill of Rights], that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, are founded on the plainest principles of justice, and alike obligatory on the legislatures and judiciary tribunals of the states and of the United States.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (1825); see also AMAR, *supra* note 97, at 145–46, 355 n.47 (characterizing Rawle’s work as “widely read” and highlighting Rawle as one of “a considerable number of considerable lawyers” adopting a pro-incorporation view of at least certain aspects of the Bill of Rights prior to the adoption of the Fourteenth Amendment); but see *Pervear v. Massachusetts*, 72 U.S. 475, 479–80 (1866) (concluding that the Excessive Fines Clause

2. Interpretation

Assuming *arguendo* the incorporation of the Excessive Fines Clause against the states, how should we interpret the Clause? In

“does not apply to State but to National legislation”); 3 STORY, *supra* note 22, at §1897 (“It has been held in the state courts, (and the point does not seem ever to have arisen in the courts of the United States) that [the Eighth Amendment] does not apply to punishments inflicted in a state court for a crime against such state; but that the prohibition is addressed solely to the national government, and operates, as a restriction upon its powers.”).

179. *But see Reyes*, 830 F. Supp. 2d at 208. In *Reyes*, the court apparently regarded the absence of explicit decisional law incorporating the Excessive Fines Clause as dispositive of the issue, rather than engaging with the question whether the Clause should, as a matter of first impression, be incorporated (based perhaps on the assumption that incorporation is or should be the sole province of the Supreme Court).

The author is aware of very few scholarly arguments to the effect that the Excessive Fines Clause specifically should not be incorporated against the states. Perhaps the closest such argument is that proffered by Laurence Tribe in a 1999 article in the *Harvard Law Review*. In that piece, Tribe suggests that “perhaps the most convincing candidate for a core idea around which the privileges or immunities of United States citizenship should be elaborated would be the basic right that genuine citizenship presupposes—the right to individual self-government, as embodied in, but not exhausted by, some (but not all) parts of the Bill of Rights.” Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future-or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 182–83 (1999). He then suggests that:

The one right in the Bill of Rights that the Supreme Court has incorporated against the states but that seems unlikely to be included either as a privilege of national citizenship (if such privileges are limited to rights relating to self-government) or as an aspect of procedural due process is the right not to be subjected to excessive fines. Although that exception might be taken as an argument against limiting the privileges or immunities of national citizenship to self-government-related rights, or against scuttling substantive due process once the privileges or immunities doctrine has been fully implanted, it seems unwise and indeed illegitimate to make the architecture of constitutional doctrine turn on one’s reaction to the inclusion or exclusion of one or even several specific, but not genuinely foundational, rights in the resulting array.

Id. at 196 n.360 (citations omitted). Although Tribe’s analysis proceeds from an apparent assumption that the Excessive Fines Clause has been explicitly incorporated by the Supreme Court through the Due Process Clause (an assumption that, in light of subsequent pronouncements from the Supreme Court, seems open to question), his point regarding individual self-government as the core meaning of privileges and immunities is an important one. If we accept the standard modern, narrow reading of the Excessive Fines Clause as a source of a proportionality principle tout court, it might well be difficult to square such a provision with an individual self-government-centered view of a citizen’s privileges and immunities. If, however, one accepts the broader (and, I suggest, historically accurate) reading of the Excessive Fines Clause as the source of an additional norm—one focused on fundamental economic survival notwithstanding punishment—then the relevance of the Clause to individual self-government becomes far more apparent.

answering this question, I begin from the premise that the project of conceptualizing the meaning of the Eighth Amendment as incorporated against the states can be informed by examining the circumstances surrounding the enactment of the Fourteenth Amendment in addition to the Founding-era history of the Eighth Amendment.¹⁸⁰ Thus, just as one might explore “how the very meaning of freedom of speech, press, petition, and assembly was subtly redefined in the process of being incorporated,”¹⁸¹ so one might question whether the meaning of the Excessive Fines Clause might have shifted between the Eighth Amendment’s ratification in 1791 and the ratification of the Fourteenth Amendment in 1868.¹⁸² Akhil

180. This point has admittedly not found uniform acceptance, even among originalist authors and jurists. As Jamal Greene notes in a recent essay:

Judges, scholars, and ordinary citizens writing or speaking in the originalist tradition consistently ignore the original understanding of the Fourteenth Amendment even when that understanding should, on originalist principles, control the outcome of a case. An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue. . . .

With limited exceptions, originalists do not engage in these inquiries, tending instead to focus intently on the writings and utterances of the eighteenth-century constitutional drafters.

Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012); see also *id.* at 978–79 (citing *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment) (presenting an example of originalist interpretation of the Fourteenth Amendment’s application of the Eighth Amendment’s Cruel and Unusual Punishments Clause against a state government that addressed neither the text nor history of the Fourteenth Amendment and instead focused its analysis solely on the text and history of the Eighth Amendment)).

181. AMAR, *supra* note 97, at 236.

182. A somewhat analogous critique has been offered by Kurt Lash:

[J]udicial enforcement of incorporated (or claimed incorporated) rights focused heavily on the meaning of the texts when first added to the constitution in 1791, while judicial enforcement of non-textual substantive due process rights broke away from any historical analysis whatsoever beyond an occasional nod to developments at common law up to the modern era. Almost completely missing from both tracks of analysis is a focus on the meaning of rights . . . at the time of the adoption of the Fourteenth Amendment.

....

Amar suggests, for example, that incorporating the Cruel and Unusual Punishments Clause under the Fourteenth Amendment fundamentally transformed its meaning:

Here, as elsewhere, the meaning of the Bill of Rights shifted when its words and principles were refracted through the prism of the later Fourteenth Amendment. Section 1 of that amendment . . . took special aim at the abusive practices of state governments of the Deep South, a region that had lagged behind national norms of liberty and equality. Even if a state legislature consistently authorized a given punishment, that consistency hardly made the practice “usual” when judged by the national baseline envisioned by the Fourteenth Amendment. Thus, a clause that originated in 1689 England as a limit on (crown) judges vis-à-vis (parliamentary) legislators morphed in 1868 into a clause empowering (federal) judges vis-à-vis (state) legislators—and also vis-à-vis federal legislators if Congress ever tried to enact harsh punishments contrary to the broad consensus.¹⁸³

[L]ittle if any effort is made to identify legal principles at play in 1868 which informed, and constrained, the understanding of privileges or immunities of citizens of the United States.

Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 455 (2009). For a discussion of further examples of similar critiques or analysis, see Greene, *supra* note 180, at 979 n.6 (citing sources).

183. AMAR, *supra* note 172, at 134. For another take on this issue, see Michael J. Zydner Mannheim, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 72 (2012) (“[B]ecause the Court’s Cruel and Unusual Punishments Clause jurisprudence stems solely from controversies dealing with state sentences, what we think of as ‘Eighth Amendment’ cases are actually Fourteenth Amendment cases” and undertaking “to rediscover the appropriate standards governing the ‘pure’ Eighth Amendment, unmediated by the Fourteenth and applicable only to the federal government.”).

Somewhat relatedly, Lawrence Lessig has highlighted the Cruel and Unusual Punishments Clause as an example in which taking into account a text’s changed context is necessary in order to achieve “fidelity in translation.” As he notes:

Such a proscription must embrace something about the presuppositions of a culture—namely what that culture views as cruel and unusual. At one time, flogging was not viewed as cruel; for us, now, flogging is “cruel and unusual.” If we were to proscribe “cruel and unusual punishments” now we clearly would be proscribing flogging. If the reader ignores this change in presuppositions, then her

Such a dramatic transformation in meaning may well be appropriate in light of the Cruel and Unusual Punishments Clause's textual commitment to the concept of the "usualness" of a particular punishment—a concept that, notwithstanding its initial linkage to what had been "usual" practice according to common law precedents¹⁸⁴ or a linkage to "usual" in the sense of longstanding tradition¹⁸⁵—has long taken on an inherently comparativist, outward-looking meaning.¹⁸⁶

reading will change the meaning of the text. An application of the Eighth Amendment that permitted flogging would be an application that permitted, rather than proscribed, cruel and unusual punishments. Or again, reading the amendment in the same way in this different context would be to read into the text a different meaning.

Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1188 (1993). By the same token, one might simply approach the question whether a given fine is excessive by referring to shared popular intuitions regarding what it means for a penalty to be "excessive," rather than by reference to the historical meaning of the phrase "excessive fines." If one accepts the broad definition of "excessive" proffered in Webster's 1828 dictionary—"[b]eyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility," WEBSTER, *supra* note 14—then a flexible, evolving conception of "excessiveness," which incorporates changing societal presuppositions and context, might be appropriate even in a self-consciously originalist Eighth Amendment jurisprudence.

The issue of whether to interpret the word "excessive" (1) by reference to evolving societal presuppositions and background norms regarding the concept of excessiveness in the punishments context, or (2) by reference to the meaning of historical prohibitions of "excessive fines," could perhaps be seen as an instantiation of Balkin's "original meaning"/"original expected application" dichotomy (or, alternatively, of Dworkin's distinction between "semantic originalism" and "expectations originalism"). See JACK M. BALKIN, *LIVING ORIGINALISM* 6–7 (2012); Ronald Dworkin, Comment, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 116 (Amy Gutman ed., 1997). I would, however, resist the notion that looking to the history of English and colonial protections against excessive fines necessarily constitutes an inquiry merely into the Excessive Fines Clause's expected *application*, because the phrase "excessive fines," as it appears in the Eighth Amendment, is itself properly seen as a preexisting legal term of art. See BALKIN, *supra*, at 45 ("[W]e want to know if the language uses generally recognized terms of art, and what those terms of art meant at the time."); see also discussion and sources cited *supra* note 23. Thus, when we turn to English precedents and commentary regarding the Magna Carta and the 1689 Bill of Rights in order to give analytic context to the concept of the "excessiveness" of a fine, we are exploring not just the manner in which the Founding generation would have expected the Excessive Fines Clause to be applied, but the meaning of the phrase itself.

184. *Harmelin*, 501 U.S. at 974 (citations omitted) ("A requirement that punishment not be 'unusuall'—that is, not contrary to 'usage' (Lat. 'usus') or 'precedent'—was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition.").

185. Stinneford, *supra* note 24, at 1767–68 ("The word also had a more specific meaning, however, as a legal term of art: 'contrary to long usage' or 'immemorial usage.'")

In contrast, the historical evidence suggests the phrase “excessive fines” continued to be understood—even in the post-Civil War era—as a unique legal term of art tied to the meaning of older English provisions barring “excessive fines.” For example, Cooley’s 1868 *Constitutional Limitations*¹⁸⁷—perhaps the most influential American constitutional law treatise of the nineteenth century¹⁸⁸—unequivocally concludes that the constitutional prohibition against “excessive fines” requires that “[a] fine should have some reference to the party’s ability to pay it.”¹⁸⁹ As support, Cooley cites the amercement provisions of the Magna Carta (requiring the observance of both proportionality and the principle of *salvo contentemento*) and notes that “[t]he merciful spirit of these provisions addresses itself to the criminal courts of the American States through the [excessive fines] provisions of their constitutions.”¹⁹⁰

Lawmakers during the 1860s similarly appear to have recognized the historical linkage between the traditional amercement practices outlined in the Magna Carta and the meaning of the constitutional

A review of seventeenth- and eighteenth-century legal and political history shows that this last meaning is the only one that may plausibly be attributed to the term ‘unusual’ in the Eighth Amendment’s Cruel and Unusual Punishments Clause.”); *see also id.* at 1764 (“Where the law requires judges to follow longstanding precedent in imposing a sentence, then a given sentence can be illegal by virtue of being unusual. But where the law does not require judges to follow longstanding precedent—for example, where a court follows a new statute that calls for the imposition of a less severe punishment for a given crime than was imposed at common law—the sentence can be unusual without being illegal.”).

186. For discussions of the Court’s glosses on the meaning of the word “unusual,” *see* Ryan, *supra* note 145; Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465 (2008); and Stinneford, *supra* note 24.

187. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION* (1868).

188. *See* EDWIN S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 116–18 (1948) (describing Cooley’s treatise as “the most influential . . . ever published on American constitutional law”); *McDonald*, 130 S. Ct. at 3068 (Scalia, J., concurring) (describing Cooley’s treatise as “influential”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 778 (1994) (describing the treatise as “monumental”); *see generally* CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 27–32 (1973) (discussing Cooley’s treatise).

189. COOLEY, *supra* note 187, at 328.

190. *Id.* at 329; *see also* *House & Lot v. State*, 85 So. 382 (Ala. 1920) (“By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, saving to him his contentement. And Judge Cooley says that the merciful spirit of these provisions addresses itself to the criminal courts of the American States through provisions of their Constitutions.”).

phrase “excessive fines.” An 1864 speech by the Pennsylvania Republican Senator Edgar Cowan—delivered on the floor of the Senate just two years before the introduction of the Fourteenth Amendment in Congress¹⁹¹—is illustrative. After noting that “[a]n ‘excessive fine’ is a technical term as well known to the law as that of larceny or any other legal term susceptible of exact definition,” Cowan defined the phrase “excessive fines” with reference to the amercement limitations of the Magna Carta, suggesting that a constitutional fine must “save[] to the freeholder his tenement, to the merchant his merchandise, to the villein his wainage” and that such a fine must “be determined from the condition of the man how much he could pay without touching the sustenance of his wife and children.”¹⁹²

Additionally, in the years following reconstruction, state courts would continue to cite to Blackstone’s definition of “excessive fines” in interpreting the meaning of excessive fines clauses in state constitutions. For example, in 1887, the Florida Supreme Court, citing Blackstone, noted that:

The duration and quantity of each [fine] must, says Blackstone, frequently vary from the aggravation, or otherwise, of the offense, *the quality and condition of the parties*, and from innumerable other circumstances, and the quantum, in particular, of pecuniary fines neither can nor ought to be ascertained by an invariable; and he says the statute law has not often, and the common law never, ascertained the quantity of fines.¹⁹³

191. See CONG. GLOBE, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan).

192. *Id.*

If anything, the case for reading an individual-focused economic-survival norm into the Excessive Fines Clause might seem to be strengthened by the historical context of the Reconstruction Amendments. *Cf.* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 40 (1990) (“When the Reconstruction Amendments are viewed as a whole, a radically different vision of society emerges. Precisely because the Fifteenth Amendment gave former slaves the right to vote, and the Fourteenth Amendment made them citizens by dint of their birth, we should interpret the Thirteenth Amendment to guarantee each American a certain minimum stake in society. Otherwise, We the People of the United States really failed to set the slaves free—free from economic dependence.”) (footnotes omitted).

193. *Frese v. State*, 2 So. 1, 2 (Fla. 1887) (emphasis added).

As late as 1902, a member of the Supreme Court of Appeals of Virginia would recall that “[t]he rule, as old as the written law, is that a fine must have reference to the estate of the defendant,” citing Blackstone’s maxim that “[w]hat is ruin to one man’s fortune, may be a matter of indifference to another’s.”¹⁹⁴ Indeed, courts expressed similar sentiments well into the twentieth century.¹⁹⁵

V. The Modern Case for Reincorporating “Economic Survival” into Excessive Fines Clause Jurisprudence

Blackstone’s suggestion that an “excessive fine” would “amount[] to imprisonment for life”¹⁹⁶ might seem anachronistic or quaint today; we generally think of debtors’ prisons as belonging to another age entirely.¹⁹⁷ However, similar concerns—including the

194. *Doyle v. Commonwealth*, 40 S.E. 925, 930 (Va. 1902) (Cardwell, J., dissenting). Other courts, perhaps unconsciously, have also echoed Blackstone’s maxim. *See, e.g., People ex rel. Waller v. 1992 Oldsmobile Station Wagon*, VIN IG3BP8376NW300058, 638 N.E.2d 373, 377 (Ill. App Ct. 1994) (“[T]he value of a car may be a pittance to a rich man and a fortune to a poor man.”).

195. *See, e.g., State v. Staub*, 162 So. 766, 768 (La. 1935) (“What constitutes an excessive fine for the violation of a penal statute depends in part . . . upon the ability of the defendant to pay. A fine which in one case would be only slight punishment, because easily paid, might in another case be excessive, because its payment would be ruinous to the convict.”); *In re Hershey Farms*, 24 N.Y.S.2d 163, 166 (N.Y. Gen. Sess. 1941) (quoting 15 Am. Jur., Criminal Law, § 551) (“A fine is excessive if it seriously impairs his ability to gain a livelihood.”); *Cohen v. State*, 195 A. 532, 539 (Md. Ct. App. 1937) (“[W]hen a fine is imposed, it should be done with due regard to the ability of the defendant to pay . . .”); *cf. State v. Ross*, 104 P. 596, 474 (Or. 1909) (overruled by *State v. Hanna*, 356 P.2d 1046 (Or. 1960)) (“[I]mprisonment [] for life, for the nonpayment of [a] fine, . . . is a cruel and unusual punishment.”). Not all state courts, however, agreed on this point. *See, e.g., Poindexter v. State*, 193 S.W. 126, 128 (Tenn. 1917) (“A fine is proportioned to the gravity of the offense punished, and the financial ability of a defendant to pay is not ordinarily considered.”); *Conley v. State*, 11 S.E. 659 (Ga. 1890); *State v. Little*, 42 Iowa 51, 56 (1875) (“It seems to us that this is one of the cases which call for severe punishment. In view of the fact that the extent of the punishment in such cases is fixed by law at one thousand dollars, we think a fine of half that sum is far from being excessive in this case.”).

196. 4 BLACKSTONE, *supra* note 10, at *371; *see discussion supra* note 116 and accompanying text.

197. *See* Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 24 (1926-1927) (“Imprisonment for debt is usually thought of as a barbarous custom . . . which was totally done away with long ago.”); *see also* Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today’s Society*, 51 S.C. L. REV. 589, 610 (2000) (describing debtors’ prisons as “Dickensian”); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1974) (discussing the history and abolition of the practice of imprisonment for debt); *but see, e.g., Recent Legislation, Alabama Raises the Rates at Which Individuals in Jail for Nonpayment of Fines Earn Out Their Debts*, 116 HARV. L.

imposition of monetary sanctions significantly exceeding a defendant's ability to pay and fundamentally impairing the prospects for the defendant's rehabilitation and reintegration as a productive member of society—remain highly relevant today.

A 2010 study, *Criminal Justice Debt: A Barrier to Reentry*, powerfully makes this case.¹⁹⁸ In that study, the authors conclude that “[d]espite the fact that most criminal defendants are indigent, none of the fifteen examined states pay adequate attention to whether individuals have the resources to pay criminal justice debt, either when courts determine how much debt to impose or during the debt collection process.”¹⁹⁹ Consequently, “[t]he result is a system effectively designed to turn individuals with criminal convictions into permanent debtors.”²⁰⁰ This can seriously impact the capacity of defendants to reintegrate as productive members of society: for defendants, “unpaid criminal justice debt . . . can impact everything from their employment and housing opportunities, to their financial stability, to their right to vote.”²⁰¹ As another commentator notes,

REV. 735, 735 (2002) (“Incarceration for ‘public,’ not ‘private,’ debts is typically not considered ‘imprisonment for debt’ within the meaning of state constitutional prohibitions . . .”).

198. ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* (2010). In the wake of this report, the role of criminal justice debt—or, as it is sometimes termed, “legal financial obligations” (LFOs)—has come under greater scrutiny. See, e.g., Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State’s Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 551 (2012) (“[M]any [have] criticize[d] criminal monetary penalties as creating de facto debtors’ prisons.”).

199. BANNON ET AL., *supra* note 198, at 13.

200. *Id.*; see AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), <http://www.aclu.org/prisoners-rights-racial-justice/aclu-and-brennan-center-reports-expose-resurgence-debtors-prisons>; Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, at A1, available at <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html>; Editorial, *Return of Debtors’ Prisons*, N.Y. TIMES, July 13, 2012, at A16, available at <http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html>.

201. BANNON ET AL., *supra* note 198, at 13. A number of courts have also recognized the rehabilitation-related issues that the imposition of an excessive fine can raise. See, e.g., *State v. Meador*, 01C01-9011CR00291, 1992 WL 85795 (Tenn. Crim. App. Apr. 29, 1992) (concluding that “[a]n oppressive fine can disrupt future rehabilitation and prevent a defendant from becoming a productive member of society”); see also Alec Samuels, *The Fine*, 41 J. CRIM. L. 192, 193–94 (1977) (summarizing the contemporary approach of English courts to setting fines and concluding that “[e]arning capacity, status and age are properly to be taken into account” as factors militating in favor of a reduced fine because “[a]n excessive fine may be counterproductive, leading to default, distress, desperation, possibly further offences”) (citing *R. v. Loblely*, (1974) 59 Cr. App. R. 63; *R. v. Thompson*, [1974] Crim. L.R. 720).

“[s]ince the 1990s, state and local governments across the nation increasingly have turned to fees imposed on criminal defendants to keep their justice systems afloat in economically tough times” and “[t]hreats of more jail time for nonpayment . . . constantly loom.”²⁰² Such phenomena appear to have accelerated in recent years, amid the serious fiscal issues affecting many state and local governments.²⁰³ As a result, it has been suggested that “heavy-handed tactics used to collect from ex-offenders signal a return, in effect, to debtors’ prisons.”²⁰⁴ As one commentator has recently noted:

Criminal justice debt drags people further away from reintegration with civil society. A person’s life can spiral out of control when interest accrues, late fees are incurred, a driver’s license is revoked, and persons are ineligible for public assistance, which means that unpaid criminal justice debt snowballs. You cannot get blood from a stone, but if you try, you can break the stone.

Optimal punishment is swift and sure, but it has a defined endpoint. As with bankruptcy, punishment must end, leaving both hope and opportunity. It is doubtful that incarceration for criminal justice debt or its threat could increase deterrence enough to be

202. John Gibeaut, *Get Out of Jail—But Not Free: Courts Scramble To Fill Their Coffers by Sticking Ex-Cons with Fees*, ABA J., July 2012, at 50, 52.

203. Ann K. Wagner, *The Conflict over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors’ Prison*, 2010 U. CHI. LEGAL F. 383, 388 (2010) (“The budget crises faced by many state and local governments have already led to other aggressive strategies to collect debts from probationers, prompting highly critical coverage in the press . . .”) (citing sources); see also, e.g., Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 404 (2012) (“[O]nce a person is caught in the vortex of criminalization, debt arises from the criminal justice system itself through the imposition of court costs, fees, and restitution. Thus, the emerging practice of incarcerating civil debtors, no matter how short a time, foreshadows trouble for those living on the economic margins, in numbers that have increased significantly during an era of economic recession.”); Jason Zweig, *Are Debtors’ Prisons Coming Back?*, WALL ST. J. TOTAL RETURN BLOG, Aug. 28, 2012, <http://blogs.wsj.com/totalreturn/2012/08/28/are-debtors-prisons-coming-back> (citing sources).

204. *Id.*; see also Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 967 (2012) (“[S]tates have begun to impose additional fees, fines, and special assessments (as states seek to augment limited budgets) that have resulted in a resurgence of ‘debtors’ prisons,’ populated by individuals held in contempt for failure to comply with court payment orders.”).

worth the extra costs of imprisonment to the state. Releasing people with little hope or opportunity for reintegration with civil society, however, is good neither for the releasees nor for society.²⁰⁵

Similarly, the authors of a recent empirical study on the impact of criminal justice debt conclude that “[b]y reducing income; limiting access to housing, credit, transportation, and employment; and increasing the chances of ongoing criminal justice involvement, monetary sanctions significantly expand the duration and intensity of penalties associated with a criminal conviction.”²⁰⁶ Criminal justice debt can also inhibit felons’ ability to regain political rights, with such obligations “routinely hinder[ing] the formal resumption of voting

205. Alexander Tabarrok, *Fugitives, Outlaws, and the Lessons of Safe Surrender*, 11 CRIMINOLOGY & PUB. POL’Y 461, 466 (2012); see also Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of A Conviction After Padilla v. Kentucky and State v. Sandoval*, 9 SEATTLE J. FOR SOC. JUST. 855, 874 (2011) (“Even for those men and women with unpaid LFOs who do not end up back behind bars, their substantial legal debts pose a significant, and at times insurmountable, barrier as they attempt to reenter society. They see their incomes reduced, their credit ratings worsen, their prospects for housing and employment dim, and their chances of ending up back in jail or prison increase.”); Ronald F. Wright & Wayne A. Logan, *Mercenary Criminal Justice* (unpublished manuscript, 2013) (highlighting the troubling effects of LFOs and suggesting reforms).

206. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1792 (2010). Similarly, an in-depth study of criminal defendants in Washington State concluded:

[Legal Financial Obligations (LFOs)] added to the difficulties [of reintegration into society following conviction] by reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing. LFOs also hindered people’s efforts to improve their education and occupational situations, and created incentives to avoid work, to return to crime, and/or to hide from the authorities. Perhaps most strikingly, the inability to make regular payments toward their legal debt led many of those interviewed to have warrants issued for their arrest, and be arrested and jailed either as a penalty for non-payment or as a means of reducing their debt. Notably, researchers have found that each of these consequences—reduced earnings and employment, difficulties finding stable housing, and short-term jail stays—are associated with recidivism.

KATHERINE BECKETT, ALEXES HARRIS & HEATHER EVANS, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* (Olympia: Wash. State Minority & Justice Comm’n, 2008).

rights after criminalization, even after state disenfranchisement schemes no longer serve that function.”²⁰⁷

In short, “a growing body of evidence now suggests that criminal justice debt leads to serious unintended consequences—consequences that harm the individual, the community, and the criminal justice system itself.”²⁰⁸ The pernicious effects of criminal justice debt are particularly significant given the nondischargability of obligations under the Bankruptcy Code “to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.”²⁰⁹ In apparent recognition of the significant harms that inadequately tailored criminal fines can impose on offenders, the ABA’s *Standards for Criminal Justice* provide that “[a]n offender’s ability to pay should be a factor in determining the amount of the sanction” and that “[s]entencing courts, in imposing a fine on an

207. Cammett, *supra* note 203, at 354. Cammett suggests that “the requirement that ex-felons pay all LFOs or other debt before they are allowed to restore voting rights is simply not rationally related to a legitimate state interest and also runs counter to significant policy prerogatives that should be further illuminated within the policy discourse surrounding prisoners and reentry.” *Id.* at 401; *but see id.* at 390–91 (acknowledging that “all of the appellate courts that have considered the issue have concluded that payment of LFOs before the restoration of voting rights is constitutional, regardless of a person’s ability to pay”) (footnote omitted). On felon disenfranchisement generally, *see* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012).

208. Alexandra Shookhoff, Robert Constantino & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FEDERAL SENTENCING REPORTER 62, 63 (2011); *see also* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Money Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 509-10 (2011) (“The widespread assessment of substantial and nongraduated fees and fines is incompatible with policy efforts to enhance reintegration, lacks a convincing penological rationale, and raises numerous concerns about justice and fairness. Moreover, reliance on this revenue stream to fund key government operations is inefficient and creates undesirable conflicts of interest for judges and other criminal justice actors.”).

209. 11 U.S.C. § 523 (2006); *see generally* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 715 n.371 (2006) (“Criminal fines are typically not treated as ordinary contractual debts to society. State and federal laws frequently provide that exemptions from collection shall not apply to fines or taxes.”) (citing sources); Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 203 (2010) (“Most debts arising from the commission of a crime are not dischargeable. Depending on the bankruptcy chapter, such debts may include criminal restitution, taxes on illegal activity, civil damages for personal injury from drunk driving, willful and malicious injury to others, larceny, court fees, and many other civil and criminal fines, penalties, and forfeitures.”) (footnote omitted).

individual, should consider the offender's obligations, particularly family obligations."²¹⁰ Likewise, a number of criminal law theorists have also argued in favor of taking ability to pay into account when calculating fines.²¹¹

Financial penalties²¹² that push an individual beyond a certain fundamental level of economic survival and self-sufficiency are unnecessarily harsh and utterly counterproductive. Of course, "the Constitution does not provide judicial remedies for every social and economic ill,"²¹³ and whether such penalties are good policy is a

210. ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 18-3.16 at 113 (3d ed. 1994), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blkold.html.

211. See, e.g., 2 JEREMY BENTHAM, THEORY OF LEGISLATION 133 (Richard Hildreth trans., Boston, Weeks, Jordon, & Co. 1840) (1802) ("Pecuniary punishments should always be regulated by the fortune of the offender."). In the modern era, so-called "day fines"—fines which are linked (1) to the severity of the offense and (2) to the daily income of the offender—have been widely advocated, and adopted in certain jurisdictions. See Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 54 (1990); see also Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 304 (1983); Sally T. Hillsman & Judith A. Greene, *Tailoring Criminal Fines to the Financial Means of the Offender*, 72 JUDICATURE 38 (1988); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION 141 (1990) ("[I]t is axiomatic that a just fine must be calculated in relation to the offender's means, earning capacity, and financial obligations to dependents."). The primary concern of such schemes is to more carefully calibrate the deterrent and punitive effect of fines. It is important to recognize, however, that such schemes are distinct in an important way from the "economic survival norm" I discuss in this work. I do not suggest fines must be proportional to an offender's ability to pay (i.e., that there must be a direct relationship between the fine and the defendant's means). See, e.g., Frank Jordans, *Speeding Fines Being Linked to Income in Europe*, ASSOCIATED PRESS, Jan. 11, 2010 (discussing a Swiss court's imposition of a USD \$290,000 fine for speeding in light of the offender's wealth). In contrast, I suggest simply the Excessive Fines Clause imposes a limiting principle such that the power to impose otherwise-proportionate fines and forfeitures be subject to an "ability to pay" or "livelihood-protection" determination—in effect, imposing a constitutional "ceiling" on the level of monetary penalties for a given defendant in light of that defendant's wealth and earnings capacity. Thus, even if one were to accept (contra current doctrine) the notion of "symmetric proportionality" in Eighth Amendment jurisprudence, see Parr, *supra* note 9, the Excessive Fines Clause under this framework would still not require that fines exhibit a direct relationship to offenders' means.

212. For the sake of simplicity, I limit my discussion here to criminal fines and forfeitures, and do not consider the separate issue of fees that are assessed on defendants or inmates. Some courts have suggested the scope of the Excessive Fines Clause might not encompass such fees. See, e.g., *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000) (suggesting certain categories of fees imposed on prisoners might not "fit th[e] mold" of "fines" as that term is used in the Excessive Fines Clause).

213. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); cf. *United States v. Alvarez*, 132 S. Ct. 2537, 2565, 183 L. Ed. 2d 574 (2012) (Scalia, J., dissenting) ("Not every foolish law is unconstitutional."); *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting) ("The criterion of constitutionality is not whether we

distinct question from whether they are unconstitutional. But the text, history, and purpose of the Excessive Fines Clause suggest that those monetary penalties that are set at such a level that they cannot possibly be repaid (and which consequently inhibit reintegration into society) are appropriately encompassed by the Eighth Amendment's prohibition on the imposition of "excessive fines."

It is true that the Supreme Court's Equal Protection Clause jurisprudence does bar the *incarceration* of a defendant solely because of inability to pay²¹⁴—at least in theory.²¹⁵ However, the explicit recognition of a constitutional barrier even to the *imposition* of a fine that exceeds a level that a defendant might ever reasonably

believe the law to be for the public good."); *Legal Tender Cases*, 79 U.S. 457, 552, 20 L. Ed. 287 (1870) ("Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust."); *see generally* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., rev. ed. 1937) (statement of James Wilson) ("Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.").

214. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983) ("[I]f [a] probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available."); *see also* *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

215. *But see* BANNON ET AL., *supra* note 198 (alleging "state courts across the country routinely ignore th[e] command [of the Supreme Court's Equal Protection jurisprudence] and send people to jail without the required hearing to determine whether a defendant is indigent"); *Beckett & Harris*, *supra* note 208, at 529 (concluding that, despite *Bearden*, "the incarceration of debtors without consideration of their ability to pay continues to occur with some regularity in states and localities across the country"); *Wright & Logan*, *supra* note 205, at 45 (noting "the increasing practical irrelevance of *Bearden v. Georgia*" and suggesting that "[t]oday, the case is often construed narrowly or disregarded altogether") (citing sources); *see also, e.g.*, Editorial, *Debtors' prison—Again*, TAMPA BAY TIMES, Apr. 14, 2009, <http://www.tampabay.com/opinion/editorials/article991963.ece> ("[S]everal courts in Florida have resurrected the de facto debtor's prison—having thousands of Floridians jailed for failing to pay assessed court fees and fines. . . . In the United States, it is unconstitutional to incarcerate someone solely for failing to pay a debt. Florida officials get around this by claiming the defendants are going to jail not for their debts but for violating a court order. That is what you would call a self-serving technicality."); Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 472 (2011) ("The criminal justice system has . . . become self-propelling, increasingly imposing huge fines and fees on criminal defendants to fund its operations. . . . This trend has a tremendous impact on the poor, and anecdotal evidence suggests that defendants' families often bear these costs. Failure—or inability—to pay such fees can result in re-incarceration."); *WA Jails People for Court Debt; Experts Critical*, SEATTLE TIMES (May 24, 2009), http://seattletimes.nwsourc.com/html/localnews/2009257861_apwacourtfines.html.

be expected to pay would both be consistent with the text and history of the Eighth Amendment, and would serve as a valuable measure of further protection for criminal defendants.²¹⁶ Even if we were to assume (contrary to much evidence) that current Equal Protection doctrine is successful in keeping individuals from being imprisoned solely due to inability to pay a penalty, being subjected to unpayable criminal justice debt can still result in a number of devastating collateral consequences short of imprisonment.

Moreover, understanding certain aspects of indigency-related doctrine as grounded in the Eighth Amendment, rather than the Equal Protection Clause, arguably provides a firmer textual basis on which to develop and strengthen such rights.²¹⁷ Certainly,

216. See Ann K. Wagner, *The Conflict over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 385 (2010) (criticizing *Bearden* for not “requir[ing] an estimate of ability to pay at initial sentencing” despite the fact that “one might think that at least some repayment problems are avoided when sentencing judges make an effort to do so”).

A greater focus on offenders’ ability to pay during the calculation of penalties might also benefit the enforcement agencies themselves; for example, it might help (at least at the margins) to mitigate the current embarrassing “collection gap” between assessed penalties and collected penalties. See Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 483 (2011) (noting that the “DOJ has collected as little as 4% of outstanding criminal debt in recent years” and that “[e]ven when agency personnel are acting diligently and competently, offenders may lack means to pay the fine”) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 10 (2001); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE’S COLLECTION PROCESSES 3, 27 (2004)).

217. Cf. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (“[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”).

The notion that certain aspects of indigency-protection doctrine currently based on the Equal Protection Clause could be augmented by rights sounding in Eighth Amendment jurisprudence is not an entirely new idea. See, e.g., Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281, 1283 (1971) (lamenting the fact that “[e]ven though the United States Constitution prohibits ‘cruel and unusual punishment’ and ‘excessive fines,’ those terms have not been given enough substantive content to provide a constitutional basis for an attack on an authorized sentence as being inappropriate”) (footnote omitted). In fact, a little-noticed indigency-protection Excessive Fines Clause jurisprudence had arguably begun to develop in the years prior to the emergence of the Supreme Court’s Equal Protection indigency jurisprudence. See *People v. Saffore*, 18 N.Y.2d 101, 104 (N.Y. Ct. App. 1966) (“The phrase ‘excessive fine’, if it is to mean anything, must apply to any fine which notably exceeds in amount that which is reasonable, usual, proper or just. A fine of \$500 for a common misdemeanor, levied on a man who has no money at all, is necessarily excessive when it means in reality that he must be jailed for a period far longer than the

rediscovering the indigency-protection promise of the Eighth Amendment would unquestionably be of value to litigants in the event that the Supreme Court elects to weaken current Equal Protection-grounded doctrine relating to indigency status.²¹⁸

VI. Doctrinal Implications

Throughout this Article, I have sought to examine the case for understanding “economic survival” as a core Eighth Amendment norm. A brief discussion of some of the potential doctrinal implications of this thesis follows. One hesitates to propose a single, integrated test for determining whether a forfeiture or fine is unconstitutionally excessive from the perspective of “economic survival”: such a determination is inherently fact-intensive and context-dependent, and requires a court to undertake a difficult balancing of competing interests.²¹⁹ But many courts today do not

normal period for the crime, since it deprives the defendant of all ability to earn a livelihood for 500 days and since it has the necessary effect of keeping him in the penitentiary far longer than would ordinarily be the case.”); *People v. McMillan*, 279 N.Y.S.2d 941, 943 (Orange County Ct. 1967); *State v. Allen*, 104 N.J. Super. 187, 201–02, 249 A.2d 70, 77–78 (App. Div. 1969); *Ex parte Carr*, 1961 OK CR 89, 365 P.2d 392, 393 (noting in dicta that “to confine an indigent person in the county jail until he pays a \$5,000 fine at \$1 per day would be cruel and excessive”); *cf. Moore v. United States*, 150 F.2d 323, 325 (10th Cir. 1945) (suggesting in dicta that “a fine which is beyond the ability of one to pay or which takes a substantial portion of one’s assets would be excessive and arbitrary”).

218. See Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851 (2008). As Siegel notes, despite the Supreme Court’s failure to treat poverty as a suspect classification under the Equal Protection Clause, a number of “interstitial constitutional protection[s] for the poor” have remained part of the Court’s jurisprudence. *Id.* at 857; see generally ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997) (discussing the welfare rights movement); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1282–84 (1993). Siegel suggests that, although the Rehnquist court refrained from revisiting a number of these early, Equal Protection Clause-grounded precedents, “there are some serious reasons to think that the Roberts Court will not do the same.” Siegel, *supra*, at 863. Justice Thomas, for example, has characterized the equal protection theory of *Griffin v. Illinois*, 351 U.S. 12 (1956)—which undergirds this entire line of cases—as one “which was dubious *ab initio* and which has been undermined since.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 133 (1996) (Thomas, J., dissenting).

219. At the outset, let me emphasize that my discussion here is focused on the doctrinal implications for the realm of criminal fines and forfeitures jurisprudence. Consequently, I do not address the potential implications of a recognition of an explicit “economic survival” norm to, for example, the criminal restitution context, except to note that the recognition of such a norm for fines and forfeitures jurisprudence does not necessarily imply that such a norm also be applied in the context of restitution. There is some uncertainty among courts and commentators on the question of whether restitution is imposed in furtherance of punitive or compensatory goals. See, e.g., Andrew Kull,

attempt to balance these interests at all, at least on a constitutional level, and instead adhere dogmatically to the notion that the Excessive Fines Clause speaks *only* to a conceptualization of “excessiveness” along the dimension of proportionality between offense and penalty amount. Such a narrow conceptualization of the Excessive Fines Clause analysis is not compelled by the Court’s holding in *Bajakajian*, is inconsistent with the long history of excessive fines protections in the Anglo-American legal tradition, and results in a cramped constitutional inquiry in which a real risk of injustice inheres. The Supreme Court is surely correct in characterizing the provision of some measure of proportionality between penalty and offense as a core constitutional concern in the Excessive Fines Clause context—but in light of the text, history, and purpose of the Clause, it should not be understood to represent the entirety of the inquiry.

It is important to recognize that a constitutional jurisprudence faithful to the economic-survival aspects of the Eighth Amendment’s original meaning would not simply absolve a criminal defendant of any need to pay a fine if he or she did not have the necessary funds on hand: as noted above,²²⁰ even by the thirteenth century, courts had recognized that criminal defendants could be required to pay criminal penalties in installment so as to satisfy punitive, deterrent, and retributivist goals while simultaneously protecting defendants. Thus, an appropriate constitutional test, in light of the history of the Excessive Fines Clause, might well resemble the current Federal Sentencing Guidelines provision that a fine not be assessed “where the defendant establishes that he is unable to pay *and* is not likely to

Restitution’s Outlaws, 78 CHI.-KENT L. REV. 17, 17 n.1 (2003) (noting that “the question whether [criminal] restitution is punitive is actively litigated”); Heidi M. Grogan, Comment, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1079 (2005) (discussing the split on this issue and citing sources); see generally Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984) (discussing the various goals of restitution); Note, *Restitution and the Criminal Law*, 39 COLUM. L. REV. 1185 (1939). As a result, there is some lack of clarity on the issue of whether the Excessive Fines Clause applies to restitution orders imposed in the criminal sentencing context. See, e.g., *United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011) (“We have never held that the Excessive Fines Clause of the Eighth Amendment applies to restitution.”); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (suggesting that financial hardship is irrelevant in the restitution context). Likewise, my discussion does not focus on the potential implications of the recognition of an Eighth Amendment-grounded “economic survival” norm on other areas of criminal procedure, or indeed on other areas of constitutional law more generally.

220. See *supra* note 89 and accompanying text.

become able to pay any fine” and “[i]n determining the amount of the fine, the court shall consider,” among other things, “any evidence presented as to the defendant’s ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources” and “the burden that the fine places on the defendant and his dependents relative to alternative punishments.”²²¹ Indeed, these provisions of the Sentencing Guidelines should be regarded as implementing an important constitutional norm.²²² Moreover, the development of a jurisprudence that effectively constitutionalized these protections could be important for several reasons. First, it would transform these protections against oppressive criminal fines from post-*Booker* advisory guidelines into binding constitutional law.²²³ At a minimum, in light of these

221. U.S.S.G. § 5E1.2(a) (emphasis added).

Of course, it is true that determining “ability to pay” can in many circumstances be a challenging process. As a recent study notes:

[N]othing is simple in assessing an individual’s ability to pay. Relying on legislative, judicial, or administrative efforts to determine an individual’s financial status or capacity is fraught with complications. To gain an accurate picture of the income position of an individual, whose work record is irregular at best, is constantly changing, and has financial obligations that might extend across multiple institutional arenas (child support, restitution, court, and state obligations in addition to informal or formal loans taken from family and friends) only can be beset by inaccuracies.

Mary Fainsod Katzenstein & Mitali Nagrech, *A New Punishment Regime*, 10 CRIMINOLOGY. & PUB. POL’Y 555 (2011) (quotation omitted).

222. Such a view would be consistent with the Eighth Circuit’s conclusion that “if [a] sentencing court complies with [the relevant Sentencing Guidelines provisions], any constitutional ability-to-pay limitation will necessarily be met.” *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996). For further discussion of this strand of Eighth Circuit doctrine, see *supra* note 60.

Recognition of the constitutional grounding of this provision of the Sentencing Guidelines might well encourage courts not to adopt a highly restrictive interpretation of this rule, such as that suggested by the Seventh Circuit in *United States v. Gomez*, 24 F.3d 924 (7th Cir. 1994). See *id.* at 926–27 (“[T]he judge *must* impose a fine, unless the defendant demonstrates that he cannot pay anything, either at sentencing or in the foreseeable future. Defendants bear a heavy burden, because almost everyone has or will acquire some assets.”) (citations omitted).

223. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court rendered the Federal Sentencing Guidelines advisory rather than mandatory. The possibility Congress might make the Guidelines mandatory for criminal fines, if not for other punishments, was essentially foreclosed by the Supreme Court in *Southern Union Company v. United States*, 132 S. Ct. 2344 (2012), which held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applied to the determination of criminal fines.

constitutional issues, imposing a fine that exceeds any capacity for repayment should, in the language of post-*Booker* sentencing review, be regarded as per se substantively unreasonable.²²⁴ Second, it could provide a powerful corrective to the current practice in many states of imposing large penalties on criminal defendants with little or no regard to those defendants' ability to pay.²²⁵

Arguably, a historically grounded Excessive Fines Clause jurisprudence would require not just that a fine be set such that it could reasonably be expected to be paid, but require that it be paid while permitting an individual to maintain some minimal level of economic subsistence. This distinction becomes particularly relevant in the context of constitutional forfeiture jurisprudence: simply relying on a measure of "ability to pay" to proxy livelihood-protection or economic-survival interests is unlikely to be particularly helpful in the forfeiture context, as the owner of an asset subject to forfeiture proceedings is, by definition, "able" to pay. But the history of the Excessive Fines Clause suggests a modestly more demanding standard may be appropriate: protecting and preserving offenders' ability to contribute usefully to their communities, notwithstanding the imposition of a monetary penalty, was a core purpose of this constitutional provision. In an era of aggressive use of forfeiture statutes, reincorporating such considerations into Excessive Fines Clause jurisprudence could result in a constitutional law of forfeitures that is both more faithful to our constitutional history, and more sensitive to the plight of owners of property subject to forfeiture proceedings. The First Circuit's emerging constitutional forfeiture jurisprudence, which recognizes the economic survival dimension of the Excessive Fines Clause inquiry, represents an important step in this direction.

224. *Accord* United States v. Kakoullis, 150 F. App'x 80, 82 (2d Cir. 2005) ("Imposing a fine that the defendant is unable to pay is an abuse of discretion.") (citing United States v. Salameh, 261 F.3d 271, 276 (2d Cir. 2001)). On post-*Booker* "reasonableness review" of federal sentences generally, see Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1 (2008); and Anne Louise Marshall, Note, *How Do Federal Courts of Appeals Apply Booker Reasonableness Review After Gall?*, 45 AM. CRIM. L. REV. 1419 (2008).

225. See BANNON ET AL, *supra* note 198; Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html>; see also *Return of Debtors' Prisons*, N.Y. TIMES, July 13, 2012, <http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html>.

This point assumes the eventual incorporation of the Excessive Fines Clause. See *supra* notes 154 through 168 and accompanying text.

In a similar vein, a number of courts have suggested that when the government seeks to seize a defendant's home in a forfeiture action, such forfeitures should be subject to a particularly searching Eighth Amendment review.²²⁶ The history of the Excessive Fines

226. For one notable example, see *United States v. 461 Shelby County Rd.*, 361, 857 F. Supp. 935, 938 (N.D. Ala. 1994). The *Shelby* court justified its decision on the grounds that homesteads were "historically given a high degree of protection" (although the court did not develop this point further) and in light of concerns over the particularly negative societal impact associated with a forfeiture of the primary residence of a criminal defendant and his family. Other courts have reached similar conclusions. See *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1995); *United States v. 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994); *United States v. One Parcel of Real Prop. with Buildings, Appurtenances & Improvements k/a 45 Claremont St., Located in City of Cent. Falls, R.I.*, 395 F.3d 1, 6 (1st Cir. 2004); *United States v. Dodge Caravan Grand SE/Sport Van, VIN No. 1B4GP44G2YB7884560*, 387 F.3d 758, 763 (8th Cir. 2004); *Nez Perce County Prosecuting Attorney v. Reese*, 136 P.3d 364, 370 (Idaho Ct. App. 2006); *United States v. Real Prop. in Name SOF Dexter F. Leslie & Odetta O. Leslie*, 203 F.3d 833 (9th Cir. 1999) (noting that "no member of his family resides in" the home as a relevant factor in concluding that forfeiture is not unconstitutionally excessive); *State v. Real Prop. at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254, 1258 (directing courts to consider "intangible, subjective value of the property" in the excessiveness calculus); *United States v. One 1992 Isuzu Trooper VIN No. JACDH58W3N79112571*, 51 F. Supp. 2d 1268, 1274 (M.D. Ala. 1999) (including both the "nature and value of the property forfeited" as relevant considerations); *cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("The constitutional limitations we enforce in this case apply to real property in general, not simply to residences. That said, the case before us well illustrates an essential principle: Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it."); *People v. One 2000 GMC VIN 3GNFK16T2YG169852*, 876, 829 N.E.2d 437, 440 (2005) ("Forfeiture of personal property is less harsh than forfeiture of real estate."); *People ex rel. Waller v. 1996 Saturn, VIN 1G82H5282TZ113572*, 699 N.E.2d 223, 228 (1998) ("A higher value is placed on real property, particularly a home, than on personal property."); *see also King, supra* note 9, at 196 (discussing and critiquing this doctrine). Certain foreign jurisdictions have also demonstrated concern for the sanctity of the home when reviewing forfeiture actions. For example, the South African Constitutional Court has concluded that "[f]or the purposes of forfeiture, it makes a difference whether the property instrumental in crime is for example an uninhabited factory building, or a home." *Van der Burg and Another v National Director of Public Prosecutions and Another*, [2012] ZACC 12, para. 58 (S. Afr.). On a procedural level, similar concern regarding the potential severe hardship imposed by forfeiture of the home is manifested by the federal civil forfeiture statute's provision for the "immediate release of seized property" during the pendency of a forfeiture proceeding if "the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as . . . leaving an individual homeless." 18 U.S.C. § 983(f)(1)(C) (2006). The cases cited above might be said to provide an intriguing example of judicial concern for tailoring penalties to "the subjective experience of punishment." Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 226 (2009) (making the case for offenders' subjective experience of punishment as a relevant consideration, and noting that "there seems to be little retributive justification for our general practice in the United States of imposing punitive fines that are independent of offenders' experiences of those fines"). It is true that mandating such

Clause—including the Magna Carta’s protection of individuals’ homesteads and core personal possessions²²⁷—can be read to support such a doctrinal framework, as can the privileged place of the home in other constitutional contexts.²²⁸ Likewise, it is noteworthy that some

an inquiry risks drawing courts into the difficult process of ascertaining idiosyncratic or subjective value; this would particularly true if homes were protected not simply by a categorical rule subjecting all home forfeitures to heightened scrutiny, but by a rule that protected owner-occupied dwellings only insofar as the home in question had heightened subjective value to the defendant and his or her family. *See* *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Counties, Pa.*, 441 U.S. 506, 511 (1979) (noting the “serious practical difficulties in assessing the worth an individual places on particular property at a given time”); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211, 1233 n.67 (1991) (discussing the “difficulties in accurately measuring idiosyncratic valuations” and in “ascertaining and fairly compensating idiosyncratic and subjective valuations of property” and citing sources). Nevertheless, the failure of (for example) the law of eminent domain to account for surplus subjective value has been criticized by commentators, and one might well question the notion that the measurement problems associated with determining subjective value are truly insuperable. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 *STAN. L. REV.* 871, 886 (2007) (noting that “many takings of property are of nonfungible assets that hold value to the owner in excess of the property’s market value and of its nearest market substitutes” and suggesting reforms); *see generally* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. CHI. L. REV.* 681, 735–37, 745–46 (1973) (discussing the problem of uncompensated subjective losses); Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 82–85 (1986) (same).

227. In fact, parallels have occasionally been drawn between the livelihood-protection provisions of the Magna Carta and state homestead laws. *See, e.g.*, *Frese v. State*, 2 *So. 1* (Fla. 1887); Louie W. Strum, *Magna Carta, its History and Influence*, 31 *COM. L. LEAGUE J.* 513, 516 (1926); D.D. Wallace, *The South Carolina Constitutional Convention of 1895*, 4 *SEWANEE R.* 348, 358 (1896); *but see* Joseph W. McKnight, *Mexican Roots of the Homestead Law*, in *ESTUDIOS JURÍDICOS EN HOMENAJE AL MAESTRO GUILLERMO FLORIS MARGADANT* 291, 292 (1988) (tracing the history of Texas’s influential Homestead Act of 1839 to the thirteenth-century Castilian legal code of the *Siete Partidas*).

228. *See, e.g.*, *United States v. Craighead*, 539 F.3d 1073, 1077 (9th Cir. 2008) (stating that “[t]he home occupies a special place in the pantheon of constitutional rights”); AMAR, *supra* note 97, at 62, 267 (noting that both “the Third and Fourth Amendments . . . explicitly protect ‘houses’—above and beyond all other buildings—from needless and dangerous intrusions by government officials” and that “the Third Amendment . . . bridges together a home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain”); *see also* *Payton v. New York*, 445 U.S. 573, 601 (1980) (noting “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic”) (footnote omitted); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (emphasizing the privacy of the home in the context of First Amendment obscenity doctrine); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (linking Second Amendment protections to the defense of the home); *cf.* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993) (noting, in the context of an application of the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), that the “right to maintain control over [the] home, and to be free from governmental interference, is a private interest of historic and continuing importance”); Thomas G. Sprankling, Note,

courts have focused in particular on the impact that the forfeiture of an offender's home can have on that individual's children.²²⁹ In addition to reflecting both the historical concerns underlying the Excessive Fines Clause and fundamental values militating against the punishment of innocents, a constitutional forfeiture jurisprudence that would disfavor (all else being equal) those forfeitures that impose particularly severe harms on an offender's children might find support by reading the Excessive Fines Clause in conjunction with the Corruption of Blood and Forfeiture Clauses of Article III.²³⁰

Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses, 112 COLUM. L. REV. 112 (2012) (proposing reading the Takings Clause in conjunction with the Third Amendment in order to justify heightened scrutiny of the seizure of homes); *see generally* AMAR, *supra* note 172, at 124–32 (suggesting that the Supreme Court has “developed a case law of both enumerated rights and unenumerated rights that recognizes the special significance of houses and what happens inside them”); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006) (cataloging the ways in which homes “are treated more favorably by the law than other types of property”); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786 (2006) (same); Radin, *supra* note 137, at 986 (conceptualizing property rights as existing along a spectrum ranging from “personal” to “fungible,” locating the home at the “personal” end of this continuum, and suggesting that “fungible property rights” might “be overridden in some cases in which . . . personal property rights . . . cannot be”).

229. *See, e.g.*, *United States v. 45 Claremont St.*, 395 F.3d 1, 6 (1st Cir. 2004); *United States v. Bieri*, 68 F.3d 232, 237 (8th Cir. 1995); *United States v. 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994); *United States v. Robinson*, 721 F. Supp. 1541, 1544 (D.R.I. 1989); *accord* U.S.S.G. § 5E1.2(d)(3) (including as a relevant sentencing factor “the burden that the fine places on the defendant *and his dependents*”) (emphasis added).

230. *See* U.S. CONST. art. III, § 3 (“[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”); *see also* Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 728 (1992) (presenting “the Corruption of Blood Clause and the Bill of Attainder Clause” as “two provisions that establish the Framers’ hostility to harming children for parental conduct”); *cf.* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 61 (2000) (discussing the potential broader applicability of the “nonattainder principle” in the context of race); *but see* *United States v. Grande*, 620 F.2d 1026, 1038–39 (4th Cir. 1980) (concluding that although Article III’s substantive limitations on punishment for treason should be read to apply to other felonies in light of “the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for . . . lesser crimes,” only the “total disinheritance of one’s heirs . . . and forfeiture of *all* of one’s property” would contravene these provisions).

In light of the potential relevance of these norms, it is perhaps unfortunate Article III’s provisions relating to the doctrine of forfeiture of estate have been so absent from modern forfeiture scholarship and jurisprudence. *See* Larson, *supra* note 8, at 865 (“The Treason Clause is one of the great forgotten clauses of the Constitution, and many well-trained lawyers might be surprised to learn that it even exists.”); *but see* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 22 (2012) (calling attention to the fact that a provision of the Patriot Act appears essentially to resurrect the concept of forfeiture of estate and questioning the constitutionality of that

An additional doctrinal implication of a return to the original meaning of the Excessive Fines Clause is procedural in nature. Once we understand the centrality of an offender's personal circumstances to the "excessiveness" calculus, certain types of mandatory schemes of fines and forfeitures could become open to serious constitutional question. Such systems risk the foreclosure of any individualized inquiry into personal circumstances, tying punishment instead solely to offense, rather than to offender.²³¹

provision) (citing 18 U.S.C. § 981(a)(1)(G)(i) (2006)); *see also* Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA Patriot Act of 2001*, 34 LAW & POLY INT'L BUS. 7, 7–8 (2002) (noting that, in light of section 806 of the Patriot Act, "once the Government establishes that a person, entity, or organization is engaged in terrorism against the United States, . . . the Government can seize and ultimately mandate forfeiture of *all assets*, foreign or domestic, of the terrorist entity, whether those assets are connected to terrorism or not").

As an aside, I note that the provisions of Article III relating to the punishment of treason have been subject to conflicting nomenclature. *Compare* *United States v. Kim*, 808 F. Supp. 2d 44, 48–49 (D.D.C. 2011) (referring to the entirety of Article III Section 3 as the "Treason Clause") *and* *Larson*, *supra* note 8, at 865 (same), *with* *United States v. Martino*, 681 F.2d 952, 964 (Former 5th Cir. 1982) (Politz, J., dissenting) (referring to the "forfeiture clause"); Brief for Respondent at 36 n.19, *Alexander v. United States*, 509 U.S. 544 (1993) (No. 91-1526), 1992 WL 511952 (U.S.) (same) *and* David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1194 (2006) (same) *and* Amar, *supra*, at 134 (referring to the "Corruption of Blood Clause" as a distinct unit). I have adopted the latter approach—disaggregating corruption of blood and forfeiture—both because the Corruption of Blood Clause and the Forfeiture Clause are distinct grammatical clauses and because the two prohibited punishments are, strictly speaking, distinct.

231. *Cf.* *Com. v. Carela-Tolentino*, 48 A.3d 1221, 1222–29 (Pa. 2012) (Castille, C.J., dissenting) (suggesting a "one-size-fits-all mandatory approach" to criminal financial penalties "violates constitutional prohibitions against excessive fines," in contrast to the "more nuanced approach" set out by the Supreme Court in *Bajakajian*).

It is true that in the context of noncapital, non-juvenile Cruel and Unusual Punishments Clause jurisprudence, courts have generally been unreceptive to attacks on mandatory sentencing. *See* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly A Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1084 (2001) ("Relying on *Harmelin*, the circuit courts have uniformly rejected Eighth Amendment challenges to long federal drug sentences.") (footnote omitted); Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 8 (2008) ("Invalidating a [mandatory minimum] statute based on the Eighth Amendment . . . will likely be reversed on appeal."); *see generally* *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding sentence of mandatory life without parole for drug possession); *but cf.* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 119 (1993) ("A central component of the Supreme Court's Eighth Amendment jurisprudence in capital cases is the defendant's right to an individualized determination of the appropriateness of the death penalty.") (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 302–03 (1976) (plurality opinion)); *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (concluding that mandatory life sentences for juveniles "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties"

VII. Conclusion: On Protecting the Poor Through the Eighth Amendment

The Magna Carta's specific protections of offenders' "contentments" and "wainage" were developed in the context of the feudal political economy of the high middle ages; this language was archaic even by the seventeenth century. Nevertheless, the basic principles for which those provisions came to stand—that a fair and just monetary penalty requires not just some form of proportionality between penalty and offense, but also the protection of a minimum core level of economic viability for persons against whom penalties are assessed, determined with some reference to the individual's personal economic circumstances—were unquestionably recognized as fundamental rights at common law by the seventeenth and eighteenth centuries. These principles, which are closely tied to historical understandings of the meaning of the phrase "excessive fines," remain highly relevant today. This Article has thus sought to sketch one aspect of a constitutional vision that is faithful to text and history and yet also profoundly concerned with the economic needs of the most vulnerable members of society. Such issues of economic survival and livelihood protection are core aspects of our constitutional heritage, although they are often overlooked today.²³²

and "therefore hold[ing] that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'"). However, it is important to recognize that the question whether mandatory monetary penalties offend the autonomous Excessive Fines Clause is entirely distinct from the question whether mandatory prison sentences violate the Cruel and Unusual Punishments Clause.

232. See, e.g., William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in *THE CONSTITUTION IN 2020* (Jack Balkin & Reva Siegel eds., 2009) ("Work and livelihoods; poverty and dependency; economic security and insecurity: For most of our history their constitutional importance was self-evident. The framers of 1789 had no doubt that personal liberty and political equality demanded a measure of economic independence and material security."); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987). I emphasize that throughout this piece my discussion has remained firmly anchored within the sphere what Michelman termed "possessive," rather than "distributive," rights—that is, "negative claims against interference with holdings, not positive claims to endowments or shares." *Id.* at 1319. My account is thus consistent with the traditional conceptualization of the Constitution as "a charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.). Cf. *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 196 (1989) (noting that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid"); see also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (discussing and critiquing the "conventional wisdom" on this point). However, it is noteworthy that the constitutional "economic

* * *

survival” norm I identify—while grounded in the possessive (i.e., negative-rights) tradition—is nevertheless not fundamentally antiredistributive. In eschewing a focus on positive rights, my discussion stands in contradistinction to a number of other explorations of what Charles Black famously called the “constitutional justice of livelihood.” Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103 (1986). For canonical articulations of variants of this thesis, see Amar, *supra* note 192; Black, *supra*; Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); and Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659.