FINES, FORFEITURES, AND FEDERALISM

*Jessica L. Asbridge**

Fines are ubiquitous in modern society, and they are imposed for both serious crimes and minor civil wrongs. The U.S. Supreme Court recently recognized that the Constitution's Excessive Fines Clause applies to the states, but that decision raises previously unexplored questions as to how to enforce the Clause's protections in the states. A key question is what role, if any, federalism should play in crafting doctrinal rules that apply the Clause's protections to state and local fines and related property forfeitures. This Article is the first to accord in-depth treatment to that important question.

The extent to which federalism principles should apply does not have an immediate and obvious answer. On the one hand, federalism plays a significant role in the Court's jurisprudence on the Cruel and Unusual Punishment Clause. The Court therefore generally takes a highly deferential approach in reviewing sentences of imprisonment. Lower courts have applied that same deferential review in the context of the Excessive Fines Clause. On the other hand, fines and forfeitures are unlike other forms of punishment—such as prison—because they are often used as a revenue source for state and local governments, creating a conflict of interest for state and local decision-making bodies.

To address this conundrum, this Article makes the novel argument that the Court should look to the exactions doctrine under the Takings Clause, which often implicates similar concerns of government self-interest and overreaching. Exactions and excessive fines are

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conceptually similar, but scholars thus far have overlooked the close relationship between them. The exactions doctrine gives minimal weight to federalism concerns, and it applies a heightened-scrutiny standard that is well suited to the excessive fines context. Indeed, differences between federal practice and state and local practices as to fines suggest that state and local discretionary fines should be subject to closer constitutional scrutiny than federal fines. As a recent example illustrates, such heightened scrutiny would ensure that the Excessive Fines Clause is not merely a parchment barrier, while still accounting for variations between states and localities in terms of their communities' values and needs.

INTRODUCTION

The U.S. Supreme Court recently held that the Excessive Fines Clause of the Eighth Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment and, thus, applies to state action.[1] The expanded applicability of the Excessive Fines Clause may ultimately mean very little, as lower courts generally are highly deferential in their constitutional review of fines and forfeitures.[2] Indeed, many courts apply a presumption of constitutionality to a fine or forfeiture below the statutory maximum, rendering illusory the Clause's protections[3]—even, for example, when someone stands to lose their house for failure to mow their lawn.[4]

This deferential review is consistent with principles of federalism, which generally provide that the federal branches of government, including the judiciary, must respect state and local decision-making.[5] The current Court has fully embraced federalism in many recent decisions, leading one commentator to refer to the Court as "the most 'federalism'-friendly court in at least a century."[6] However, neither the

[1] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (holding that the Excessive Fines Clause applied to the states).

[2] See infra Subsection I.A.2.

[3] See, e.g., Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *3 (11th Cir. July 14, 2022); City of Seattle v. Long, 493 P.3d 94, 115 (Wash. 2021); United States v. Suarez, 966 F.3d 376, 387 (5th Cir. 2020); Commonwealth v. Ishankulov, 275 A.3d 498, 505 (Pa. Super. Ct. 2022); Morrow v. City of San Diego, No. 11-cv-01497, 2011 WL 4945015, at *5 (S.D. Cal. Oct. 18, 2011).

[4] See infra Section I.A (discussing *Ficken*).

[5] See infra Sections I.B, II.A.

[6] Sanford V. Levinson, Is the Supreme Court Moving Us Backward, or Back Toward Federalism?, Dall. Morning News (July 29, 2022, 7:00 AM), https://www.dallasnews.com/opinion/commentary/2022/07/31/is-the-supreme-court-moving-us-backward-or-back-toward-federalism/ [https://perma.cc/NNW4-FCZ6]; see also Timothy M. Harris, Backwards Federalism: The Withering Importance of State Property Law in Modern Takings Jurisprudence, 75 Rutgers U. L. Rev. 571, 572–73, 601–06 (2023) (citing *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), as recent decisions demonstrating that the Court, overall, is elevating federalism concerns over issues such as abortion rights and climate change).

Court nor scholars have yet directly addressed the weight federalism concerns carry in the excessive fines context because of the recentness of the Court's incorporation of the Excessive Fines Clause. I seek to explore that key issue herein.

Ultimately, I conclude that federalism should play a minimal role as to the Excessive Fines Clause and, relatedly, that heightened scrutiny should instead apply to the review of discretionary state and local fines. This conclusion, however, is in tension with the Court's current doctrine. Thus far, the Court has relied upon cases involving the Cruel and Unusual Punishment Clause for guidance in shaping the contours of excessive fines doctrine.[7] It has done so with little reasoning.[8] Federalism principles play a central role in the Court's cruel and unusual punishment cases, such that the Court takes a highly deferential approach to its review of sentences of imprisonment.[9] Lower courts have adopted that same deferential approach in the excessive fines context.[10]

This Article argues that the exactions doctrine within the Takings Clause is a better analogue—at least as to state and local fines. Both the Takings Clause and the Excessive Fines Clause limit government acquisitions of property: takings must be for public use and just compensation must be paid,[11] and punitive fines and forfeitures must not be excessive.[12] State and local governments often rely upon fines and forfeitures as sources of revenue, raising concerns similar to those underlying exactions—that the government is acting out of self-interest, overreaching, and singling out the few to shoulder what should be public burdens.[13] These concerns are generally not present as to sentences of imprisonment, which cost the government money.

[7] See United States v. Bajakajian, 524 U.S. 321, 336–37 (1998).

[8] See id. The Eighth Amendment provides in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[9] See infra Section II.A.

[10] See infra Section II.B.

[11] U.S. Const. amend. V.

[12] See Austin v. United States, 509 U.S. 602, 610 (1993); U.S. Const. amend. VIII.

[13] See infra Sections II.B, III.A. I use the term "self-interest" throughout to refer to government action for the purpose of acquiring funds and other resources to fund the workings of government itself or to use for a public project. Cf. United States v. Winstar Corp., 518 U.S. 839, 896 (1996) ("[W]hen we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."). I distinguish this from government action that resolves disputes between private parties or that costs the government money. Although the funds or other property acquired will ultimately serve the public interest when used for public

To date, scholars have largely overlooked this close relationship between takings and excessive fines. This Article explores the connection and shows how takings jurisprudence—primarily the exactions doctrine—may prove especially useful for the Court as it continues to flesh out the doctrinal details of the Excessive Fines Clause.

In the takings context, the Supreme Court has held that heightened scrutiny applies to exactions, which occur when the government requests private property in exchange for lifting land-use restrictions.[14] Specifically, the Court requires the government to show both (1) a nexus between the exaction and the proposed development and (2) that the exaction is roughly proportionate to the impact of the proposed development.[15] The Court has explained that its exactions doctrine is a special application of its "unconstitutional conditions doctrine" and has justified the heightened scrutiny with concerns about government self-interest and overreaching.[16] The Court has rejected federalism-based arguments that a more deferential standard should apply to review of state and local exactions.[17]

Although I do not rely on the unconstitutional conditions doctrine, I argue that heightened scrutiny should apply to discretionary fines due to similar concerns, and despite the federalism principles at play.[18] State and local fines often directly fund those governments, bringing in millions in revenue.[19] By contrast, federal criminal fines are generally not used as a

services or projects, the risk of government overreach is heightened when it seeks to expand its resources. See infra Subsection III.C.1.

[14] See Lee Anne Fennell, Escape Room: Implicit Takings After *Cedar Point Nursery*, 17 Duke J. Const. L. & Pub. Pol'y 1, 49–50 (2022) (noting that exactions receive "high scrutiny" and are reviewed under standards "far beyond the usual standard for social and economic legislation").

[15] See Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599, 612 (2013).

[16] See infra Paragraph III.B.2.i; Subsection III.C.1.

[17] See infra Subsection III.B.2.

[18] Outside of the excessive fines context, scholars have argued that the Court should adopt an inquiry similar to the exactions inquiry to determine whether the public use requirement of the Takings Clause is satisfied with respect to a particular exercise of the power of eminent domain. See Brief for David L. Callies et al. as Amici Curiae Supporting Petitioners at 22–25, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

[19] See, e.g., Ben Wieder, Shirsho Dasgupta & Sheridan Wall, Families Lose Homes After Florida Cities Turbocharge Code Enforcement Foreclosures, Mia. Herald (Sept. 2, 2024, 12:43 PM), https://www.miamiherald.com/news/business/real-estate-news/article273093600.html [https://perma.cc/FSZ9-K98C].

source of revenue.[20] Further, state and local fines are imposed by judges who often have wide discretion as to the fine amounts and generally are not required by statute to ensure that the fine is proportional to the severity of the offense and the offender's ability to pay. Federal statutes, however, require federal courts to consider the circumstances of the offense and the offender's financial circumstances. Concerns of government overreach and singling out are thus particularly acute in the context of state and local discretionary fines, suggesting that they should perhaps be subject to *more* scrutiny than in the federal context—not more deference on federalism grounds.[21]

In analyzing mandatory fines, which are similar in nature to legislative exactions and involve heightened federalism concerns, I rely upon the Supreme Court's 2024 decision in *Sheetz v. County of El Dorado*, holding that legislative exactions are not categorically excluded from heightened review.[22] I ultimately suggest that certain mandatory fines may violate the Excessive Fines Clause to the extent they wholly fail to account for the individualized circumstances of the offense and the offender.

The heightened scrutiny proposed in this Article would be a substantial step toward eliminating the significant governmental abuses that currently occur with respect to discretionary and certain mandatory fines and forfeitures. Fines and forfeitures have a disproportionate impact on impoverished and disadvantaged groups.[23] They can result in debtors losing their ability to pay for basic necessities, including rent or housing payments, which also may impact debtors' families.[24] Fines often result

[20] Federal criminal fines generally do not pose issues of self-interest, as most criminal fines are paid into the Crime Victim Fund. See 34 U.S.C. § 20101(b)(1). Federal forfeitures, however, do implicate issues of government self-interest, as they often function as revenue sources for both the federal government and, through equitable sharing programs, for state and local governments. See Lisa Knepper, Jennifer McDonald, Kathy Sanchez & Elyse Smith Pohl, Inst. for Just., Policing for Profit: The Abuse of Civil Asset Forfeiture 15–17 (3d ed. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf [https://perma.cc/JQ2H-YWS8].

[21] See infra Section IV.A.

[22] 144 S. Ct. 893, 902 (2024).

[23] For example, a 2023 investigation by the Miami Herald shows that Black-owned heirs' property was recently the target of "ramped-up foreclosures over unpaid code fines in numerous cities across [Florida]." Amelia Winger, Heirs to Black-Owned Homes Face Ramped-Up Foreclosures. Here's Who's Pushing Back, Mia. Herald (Sept. 2, 2024, 7:50 AM), https://www.miamiherald.com/news/business/real-estate-news/article276644691.html [https://perma.cc/ZF46-GFK7].

[24] Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2, 67 (2018) [hereinafter Colgan, Debtors' Prison].

in property liens, which if foreclosed upon (a common practice in some states) can result in the loss of the debtor's home.[25] State and local governments can also use fines and foreclosures on the related liens as a way to acquire property without formally condemning blighted property and paying the just compensation required under the Takings Clause.[26]

This Article proceeds as follows: Part I examines key questions about the application of the Excessive Fines Clause that remain after *Timbs v. Indiana*, which held that the provision applies to the states. It also discusses the role federalism plays both in court opinions and the scholarship addressing the formulation of doctrine to enforce the Bill of Rights. Part II of the Article analyzes the role federalism has played in the Supreme Court's cruel and unusual punishment cases and how those cases have influenced the Court with respect to its formulation of doctrine to implement the meaning of the Excessive Fines Clause. Part III then turns to the Court's takings jurisprudence and explores (1) the similarities between takings and excessive fines, (2) the heightened scrutiny that applies in the exactions context, and (3) the federalism arguments against such scrutiny. Part IV argues that the Court should apply its heightened scrutiny to the review of discretionary fines so as to ensure that excessive fines provisions do not remain toothless. This Part further argues that federalism generally has only a minimal role to play in this context. Federalism plays a larger role as to mandatory fines, but as I suggest, certain mandatory fines may themselves be inconsistent with the Excessive Fines Clause. A short Conclusion follows.

[25] See Wieder et al., supra note 19; Jayati Ramakrishnan, Analysis Finds Property Owners in Portland's Most Diverse, Gentrifying Areas Hardest Hit by Code Violation Fines, The Oregonian (Nov. 3, 2021, 6:00 AM), https://www.oregonlive.com/portland/2021/11/analysis-finds-property-owners-in-portlands-most-diverse-gentrifying-areas-hardest-hit-by-code-violation-fines.html [https://perma.cc/9GDQ-7P6D]; Jaelynn Grisso, Code Violations Can Be Double-Edged Sword for Low-Income Residents, Matter News (June 4, 2021), https://matternews.org/community/code-violations-can-be-double-edged-sword-for-low-income-residents/ [https://perma.cc/V87S-PD4X]; Eileen Zaffiro-Kean, Daytona Properties with Unpaid Fines Could Face Foreclosure, Daytona Beach News-J. (May 14, 2017, 3:13 PM), https://www.news-journalonline.com/story/business/real-estate/2017/05/14/daytona-properties-with-unpaid-fines-could-face-foreclosure/21045567007/ [https://perma.cc/VS7N-BUGH]. In some states this practice is very common. In the past eight years, one attorney has filed foreclosure lawsuits against more than 800 properties in nine Florida cities. Ben Wieder, Lawyer Once Helped Debt-Ridden Owners Hang on to Homes. Now He Helps Cities Take Them Away, Mia. Herald (Jan. 26, 2025, 6:35 AM), https://www.miamiherald.com/news/business/real-estate-news/article273093630.html [https://perma.cc/7GP2-M8QP].

[26] See infra Section IV.A.

I. BACKGROUND ON THE EXCESSIVE FINES CLAUSE AND FEDERALISM'S ROLE AS TO INCORPORATED PROVISIONS

Multiple questions regarding the scope and application of the Excessive Fines Clause remain unanswered following the Court's decision in *Timbs*, holding that the Clause is incorporated against the states through the Fourteenth Amendment. These questions include whether the Clause applies to civil fines and the level of scrutiny that applies to fines as opposed to forfeitures. Many of these questions implicate federalism concerns and values, including the broader question of the role federalism should play as to individual rights generally.

A. Open Questions After Timbs v. Indiana

In *Timbs v. Indiana*, the Court held that the Excessive Fines Clause was incorporated and applied against the states.[27] The case involved the forfeiture of a Land Rover SUV valued at $42,000 in connection with Tyson Timbs's conviction for a drug-trafficking offense that involved a statutory maximum fine of $10,000.[28] Despite the vehicle's value exceeding the statutory maximum, the state kept the entire vehicle.[29] The Court did not, however, address whether the forfeiture was, itself, excessive, and instead remanded the case to the lower court to resolve the excessiveness question in the first instance.[30]

Timbs underscores the Court's interest in reinvigorating the Excessive Fines Clause and its importance today.[31] As the Ninth Circuit recognized following the decision, the "right to be free from excessive governmental fines is not a relic relegated to the period of parchments and parliaments, but rather it remains a crucial bulwark against government abuse."[32] However, difficult questions regarding the Excessive Fines Clause remain—many of which the Court can no longer easily avoid addressing now that the Clause applies to the states. *Ficken v. City of Dunedin*,

[27] 139 S. Ct. 682, 687 (2019).
[28] Id. at 686.
[29] Id.
[30] See id. at 686, 691.
[31] Wesley Hottot, What Is an Excessive Fine? Seven Questions to Ask After *Timbs*, 72 Ala. L. Rev. 581, 586–87 (2021).
[32] Pimentel v. City of Los Angeles, 974 F.3d 917, 925 (9th Cir. 2020).

involving $28,500 in fines and interest for uncut grass, illustrates two of the key issues remaining after *Timbs*.[33]

As background, in 2015, the city of Dunedin, Florida, found James Ficken in violation of a city ordinance prohibiting grass exceeding ten inches and warned that a repeat violation could result in fines of up to $500 per day.[34] Three years later, on July 5, 2018, an inspector again found that Ficken had failed to mow his lawn and provided notice of the repeat violation.[35] A city administrative board imposed a $500-per-day fine for the period between July 5 and August 20, 2018, for a failure to comply with the ordinance, such that the board imposed a total of $28,500 in fines plus interest.[36] Because Ficken was unable to pay the fine, the board began proceedings to foreclose on his home so that the city could use the proceeds to satisfy the debt.[37] Thus, Ficken faced the prospect of losing his home over the failure to mow his lawn.

Ficken challenged the total fine in federal district court on the grounds that it violated the Excessive Fines Clause.[38] A federal district court rejected his challenge, and the Eleventh Circuit affirmed.[39] Ficken's excessive fines challenge raised the following questions: (1) Does the Excessive Fines Clause apply to civil fines unconnected to criminal proceedings? (2) What level of scrutiny should a court apply to a fine that falls below a statutory maximum? The Supreme Court has not yet clearly answered these questions, which are increasingly important following *Timbs*, as the City of Dunedin is far from alone with respect to its fining practices.

[33] Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *1 (11th Cir. July 14, 2022).

[34] Id.

[35] Id.

[36] Id.

[37] Id. at *2.

[38] Id. at *3.

[39] Id. at *4. Ficken ultimately was able to have his fees reduced, such that he avoided foreclosure. Daryl James & Ari Bargil, Florida Man's Tall Grass Saga Comes to an End, Reason (May 1, 2024, 2:00 PM), https://reason.com/2024/05/01/florida-mans-tall-grass-saga-comes-to-an-end/ [https://perma.cc/L3U7-KSLN]. The city then, however, sought to collect the city's attorney fees related to his challenge to his fine. Id. In April 2024, Ficken settled his case with the city. Id.

1. Applicability of the Excessive Fines Clause to Civil Fines

Courts are split as to whether the Excessive Fines Clause extends to civil fines and forfeitures unconnected to a criminal proceeding.[40] The Court has declined to resolve this question, recently denying the petition for a writ of certiorari filed in *Toth v. United States* raising this issue.[41] Justice Gorsuch dissented, writing that the Excessive Fines Clause extends to civil fines and forfeitures provided that they are partly punitive.[42]

Scholars have persuasively argued that historical evidence demonstrates that the Excessive Fines Clause extends to civil sanctions even if unconnected to criminal proceedings. Beth Colgan has argued that, based on early American colonial practices, the Court should extend the Clause's protections to fines imposed for civil offenses.[43] The key to whether a penalty constituted a "fine" within the scope of the Excessive Fines Clause was whether the underlying offense involved a harm that was viewed as public in nature.[44] Similarly, the late Calvin Massey argued extensively that, based on the relationship between the Clause and parallel language found in the English Bill of Rights, as well as the English history of that prohibition, civil punitive damages fall within the scope of the Clause.[45] The Supreme Court has rejected extending the Clause to civil punitive damages, but only because they are not paid to the sovereign.[46] The Court left open the possibility that such civil damages, if paid to the government, would fall within the scope of the Clause.[47]

Although the question of whether the Excessive Fines Clause extends to civil fines remains unsettled in the courts, I assume that civil fines fall within the Clause's scope.[48] I also do not seek herein to answer the separate but somewhat related question of when a jury trial is required for

[40] See Toth v. United States, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from the denial of certiorari).

[41] Id. at 552 (denying petition).

[42] Id. at 553 (Gorsuch, J., dissenting from the denial of certiorari).

[43] Beth A. Colgan, Reviving the Excessive Fines Clause, 102 Calif. L. Rev. 277, 295–300, 340–41 (2014) [hereinafter Colgan, Reviving Excessive Fines].

[44] Id. at 340–41.

[45] Calvin R. Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233, 1234, 1240–56 (1987).

[46] Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989).

[47] See id. at 275 n.21.

[48] Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *3 (11th Cir. July 14, 2022) (assuming the Clause's protections extend to civil land-use fines).

the imposition of civil fines. In *SEC v. Jarkesy*, the Supreme Court held that a defendant is entitled to a jury trial when a federal agency seeks civil penalties for securities fraud.[49] The scope of *Jarkesy* is far from clear, however. It may just be limited to securities fraud due to the relationship of that offense to common law fraud.[50] Additionally, the decision rested in part on separation of powers grounds, which the Court has affirmed do not extend to the states.[51]

2. Level of Scrutiny Applicable to Fines

In *United States v. Bajakajian*, the Court held that the test for determining if a forfeiture is excessive is whether the forfeiture is "grossly disproportional to the gravity of the . . . offense," a highly deferential test.[52] The Court, however, has not yet specifically addressed whether that same gross disproportionality test also applies to the imposition of fines, which often involves the exercise of discretion by the judge or board imposing the fine.

The need for the Court to directly address the level of scrutiny applicable to fines (as opposed to forfeitures) was not particularly pressing prior to incorporation of the Clause into the Fourteenth Amendment because federal statutes and the U.S. Sentencing Guidelines significantly restrained federal judges' sentencing discretion. Specifically, federal statutes require a judge to "impose a sentence sufficient, but not greater than necessary" to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[53] These statutes also require a judge to consider, among other factors, "the defendant's income, earning capacity, and financial

[49] 144 S. Ct. 2117, 2129–30 (2024).

[50] See Christopher J. Walker, What SEC v. Jarkesy Means for the Future of Agency Adjudication, Yale J. on Regul.: Notice & Comment (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication/ [https://perma.cc/8WLQ-3G26].

[51] Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51, 53–54 (1998) (acknowledging that the Court has stated that the separation of powers doctrine does not apply to the states but suggesting that the U.S. Constitution may implicitly assume state governments will be structured similarly to the federal government).

[52] 524 U.S. 321, 336–37 (1998).

[53] 18 U.S.C. § 3553(a); see also id. § 3572(a) (requiring courts to consider several factors in addition to the § 3553(a) factors to impose a sentence of a fine).

resources" and "the burden that the fine will impose on the defendant" or any financial dependents.[54]

Further, the U.S. Sentencing Guidelines, which are not mandatory but provide guidance to district courts in imposing fines, set ranges of recommended fines based on the severity of a given crime.[55] The Guidelines are prepared by the Sentencing Commission and are the "product of extensive research, thought, input from commentators, and experience."[56] "They are designed to proportion punishments to crimes with even greater precision than criminal legislation."[57] Challenges to fines have largely rested on a failure to properly consider the statutory factors (which, in large part, enshrine the protections of the Excessive Fines Clause), as opposed to involving direct challenges to the fine under the Excessive Fines Clause.

No uniform statutory framework applies to state and local fines, however. Since *Timbs*, fined parties have raised challenges in the lower courts with increasing frequency. In resolving these challenges, courts have generally relied upon the gross disproportionality test set forth in *United States v. Bajakajian*.[58] Indeed, multiple courts, including the Eleventh Circuit in *Ficken*, have determined that a fine that falls within a statutory range enjoys a strong presumption of constitutionality, which the offender must seek to overcome by showing the fine is nevertheless grossly disproportionate to the offense.[59] The impact of this test, however, is to make any constitutional challenge to a fine almost impossible, as fines are always at or below the statutory maximum (or else they would violate the statute),[60] and it is unclear what evidence would be sufficient

[54] Id. § 3572(a)(1)–(2).

[55] U.S. Sent'g Guidelines Manual § 5E1.2(c)(3) (U.S. Sent'g Comm'n 2021).

[56] United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1310 (11th Cir. 1999).

[57] See id.

[58] See, e.g., Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *1–3 (11th Cir. July 14, 2022) (challenging fines for uncut grass); Pimentel v. City of Los Angeles, 974 F.3d 917, 922 (9th Cir. 2020) (challenging a city parking fine); Robson 200, LLC v. City of Lakeland, 593 F. Supp. 3d 1110, 1115, 1120 (M.D. Fla. 2022) (challenging fine for failure to repair fence); Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1314, 1320, 1328–29 (11th Cir. 2021) (challenging False Claims Act fines); Torres v. City of New York, 590 F. Supp. 3d 610, 614, 627 (S.D.N.Y. 2022) (challenging parking ticket fines).

[59] See, e.g., *Ficken*, 2022 WL 2734429, at *3; City of Seattle v. Long, 493 P.3d 94, 115 (Wash. 2021); United States v. Suarez, 966 F.3d 376, 387 (5th Cir. 2020); Commonwealth v. Ishankulov, 275 A.3d 498, 505 (Pa. Super. Ct. 2022); Morrow v. City of San Diego, No. 11-cv-01497, 2011 WL 4945015, at *5 (S.D. Cal. Oct. 18, 2011).

[60] By contrast, the test does serve to limit forfeitures, as the value of the property forfeited may exceed the statutory maximum set for the fine.

to overcome the strong presumption of constitutionality. Indeed, some judges have criticized such deference, with one judge observing that it "[s]eems a bit like letting the driver set the speed limit."[61]

Thus, although *Timbs* has applied the Excessive Fines Clause to the states, important questions linger as to the Clause's scope and application. These questions implicate federalism concerns, as state and local governments impose the majority of fines.

B. The Role of Federalism in Interpreting Individual Rights

Federalism is a structural constitutional principle embodied in the general structure of the Constitution and the Tenth Amendment.[62] Federalism involves the division of power between the federal government and the states, and it involves questions as to when state autonomy should limit federal power.[63] The Court's decisions are inconsistent as to whether federalism principles are relevant when interpreting an incorporated provision of the Bill of Rights. Multiple scholars, however, have argued the Court should account for federalism in interpreting the Bill of Rights.

Prior to ratification of the Fourteenth Amendment, federal courts generally did not apply the Bill of Rights as a limit on states' autonomy, and thus, the interplay between federalism and individual rights was not a concern of the federal courts outside of the diversity context.[64] Yet, following ratification of the Fourteenth Amendment, federal courts—somewhat slowly—began to apply the Bill of Rights as a limit on state action.[65]

The Court embraced different views as to incorporation throughout the early twentieth century. One view was the fundamental fairness approach,

[61] *Yates*, 21 F.4th at 1318 (Newsom, J., concurring) (noting that the Eleventh Circuit takes a "hyper-deferential posture toward Congress's judgments about excessiveness").

[62] See Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 13–14 (1985).

[63] Erwin Chemerinsky, Rehabilitating Federalism, 92 Mich. L. Rev. 1333, 1337 (1994).

[64] See Jason Mazzone, The Bill of Rights in the Early State Courts, 92 Minn. L. Rev. 1, 2, 16–17 (2007) (arguing that *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833)—which is commonly viewed as establishing that the Bill of Rights did not apply to state governments at all—is better viewed as: (1) establishing only that federal courts would not apply the Bill of Rights to the states, and (2) leaving open the question of whether state courts should apply the Bill of Rights to limit state action); id. at 56–60 (noting that, in diversity cases, early federal courts applied general constitutional law, which was distinct from interpretation of the U.S. Constitution).

[65] Id. at 69.

which provided that certain provisions of the Bill of Rights applied to the states, not because they were enumerated in the Bill of Rights but rather because they "ha[d] been found to be implicit in the concept of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[66]

The protections the Bill of Rights provided against state action under the fundamental fairness approach differed from the protections applicable to federal government action to account for federalism concerns.[67] Indeed, Justice John Marshall Harlan II—one of the key proponents of the fundamental fairness approach—stated in a public address delivered in August 1964 that "our federalism not only tolerates, but encourages, differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness."[68]

In the 1960s, a majority of the Court began to consistently embrace the selective incorporation theory, which provides that a provision of the Bill of Rights is incorporated when it is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."[69] Importantly, once a provision was incorporated, all of the doctrinal details developed in the context of the federal government were to apply equally to the states (unlike under the fundamental fairness approach).[70]

This congruence principle was motivated by concern relating to the criminal context, where federal defendants were faring significantly

[66] Palko v. Connecticut, 302 U.S. 319, 325–26 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969). *Snyder v. Massachusetts*, a case pre-dating *Palko*, used a slightly different test that provided that a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 291 U.S. 97, 105 (1934). This test seems consistent with the Court's approach in *Palko*. The Court's current selective incorporation cases, however, including *Timbs v. Indiana*, provide that a Bill of Rights protection is incorporated if it is "deeply rooted in this Nation's history and tradition," which echoes the "so rooted" language used in *Snyder*. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[67] See Gideon v. Wainwright, 372 U.S. 335, 346–47 (1963) (Douglas, J., concurring).

[68] See John M. Harlan, The Bill of Rights and the Constitution: An Excerpt from an Address, 64 Colum. L. Rev. 1175, 1176 (1964).

[69] *Timbs*, 139 S. Ct. at 687 (quoting *McDonald*, 561 U.S. at 767).

[70] See Mark D. Rosen, The Surprisingly Strong Case for Tailoring Constitutional Principles, 153 U. Pa. L. Rev. 1513, 1556 (2005) [hereinafter Rosen, Tailoring] (observing that states had little guidance under the fundamental fairness approach to determine what was required of them).

better than state defendants with respect to constitutional claims.[71] Thus, the congruence principle is thought to reject "the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[72]

The Court continues to this day to declare that federalism plays no role in the decision as to whether to fully incorporate a provision of the Bill of Rights.[73] As the Court stated in *Timbs*, "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[74] Relatedly, in *McDonald v. City of Chicago*, the Court stated that "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."[75]

The Court's current approach to selective incorporation thus seems to leave little room for federalism arguments to shape constitutional doctrine. Yet, in numerous cases involving individual rights, federalism still plays a central role, such that the fundamental fairness approach may not be entirely dead. This is particularly notable in the cruel and unusual punishment and certain takings contexts discussed in Parts II and III, *infra*. In these cases, the Court frequently observes that respecting state and local laws through deferential review will advance democratic participation, and thus, the Court "aligns the values of federalism with the values of democracy."[76] The Court has also recognized other instrumental justifications for limiting federal interference into states' domains, including responsiveness to the diverse needs and values of different populations, experimentation and innovation across jurisdictions, and competition between states as they compete for a mobile citizenry.[77]

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[71] Id. at 1534, 1559 n.160. For example, in *Adamson v. California*, the Court held that the Fifth Amendment right against self-incrimination did not apply to the states. 332 U.S. 46, 50 (1947), *overruled by* Griffin v. California, 380 U.S. 609, 615 (1965).

[72] See, e.g., Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (quoting Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960)).

[73] See Rosen, Tailoring, supra note 70, at 1545.

[74] *Timbs*, 139 S. Ct. at 687.

[75] 561 U.S. 742, 784–85 (2010).

[76] Brenner M. Fissell, Federalism and Constitutional Criminal Law, 46 Hofstra L. Rev. 489, 493 (2017).

[77] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). The Court also seems to defer to states and local governments simply to respect the sovereignty of the states—a non-instrumental justification. Preserving the "integrity, dignity, and residual sovereignty of the States" is "an

Because of the difficulties in reconciling federalism with the congruence principle (requiring consistency in constitutional doctrine despite differences between federal and state governments), Mark Rosen has persuasively argued that the tailoring of constitutional provisions so that they apply differently to different levels of government is consistent with selective incorporation.[78] Rosen argues that the reasons for applying a one-size-fits-all approach are, overall, relatively weak;[79] that the Court, at times, has tailored constitutional provisions based on institutional context;[80] and that institutional differences between different levels of government may require differences in doctrine.[81] Other scholars have since relied upon Rosen's seminal work in developing when tailoring is appropriate as to particular constitutional rights, including: (1) the right to free speech,[82] (2) the right to the free exercise of religion,[83] and (3) the right to bear arms.[84]

The scholarship on federalism is particularly robust with respect to the Cruel and Unusual Punishment Clause and the Takings Clause, as they both touch upon areas traditionally within the primary purview of the

end in itself, to ensure that States function as political entities in their own right." Bond v. United States, 564 U.S. 211, 221 (2011).

[78] See Rosen, Tailoring, supra note 70, at 1516, 1536–37 (proposing that constitutional principles should apply differently to different levels of government and explaining that tailoring rejects an identical application of the Bill of Rights to all levels of government); see also Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 Tex. L. Rev. 1129, 1132–33 (1999) (arguing that a self-governance activity is a legitimate basis for "geographical nonuniformity of constitutional requirements and proscriptions").

[79] Rosen, Tailoring, supra note 70, at 1541, 1543–45.

[80] Id. at 1549–50.

[81] Id. at 1570–71.

[82] See, e.g., Frederick Schauer, Towards an Institutional First Amendment, 89 Minn. L. Rev. 1256, 1260 (2005) (arguing for the consideration of institutional context in First Amendment jurisprudence). But see Scott A. Moss, Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine, 54 UCLA L. Rev. 1635, 1639 (2007) (cautioning against over-tailoring in the First Amendment context outside of "certain unique institutions").

[83] See Richard C. Schragger, The Role of the Local in the Doctrine and Discourse of Religious Liberty, 117 Harv. L. Rev. 1810, 1813 (2004) (arguing for the consideration of institutional context in jurisprudence addressing the Religion Clauses).

[84] See Joseph Blocher, Firearm Localism, 123 Yale L.J. 82, 105–07, 125 (2013) (arguing that the Court should tailor its interpretation of the Second Amendment to account for geographic and cultural differences between rural and urban communities).

states: criminal law[85] and property law.[86] Indeed, the takings literature has been said to "fairly drip[] with federalism,"[87] and institutionalist arguments abound.[88] Takings scholars frequently argue that the Court should account for differences between local, state, and federal government bodies in shaping its decision rules.[89]

Missing from the scholarship thus far, however, is a comprehensive account of the role federalism should play with respect to the Court's shaping of constitutional decision rules implementing the meaning of the Excessive Fines Clause.[90] I seek to develop an account of the role federalism should play in the excessive fines context here and, in doing so, build on the federalism scholarship relating to both (1) cruel and unusual punishment cases and (2) takings cases.

II. THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[91] The Court has generally adopted a deferential stance with

[85] I distinguish here criminal law from criminal procedure. Although the Court has generally taken a hands-off approach with respect to criminal law (in the sense of defining offenses and punishment for those offenses), it has taken a more active role with respect to criminal procedure. Cf. Wayne A. Logan, Fourth Amendment Localism, 93 Ind. L.J. 369, 374, 376 (2018) (exploring whether the Court should tailor in the Fourth Amendment context to account for local preferences and concluding that the Fourth Amendment is "not a good candidate" as the "cluster of rights it protects differs in kind from other Bill of Rights provisions").

[86] See Carol M. Rose, What Federalism Tells Us About Takings Jurisprudence, 54 UCLA L. Rev. 1681, 1683 (2007).

[87] Id.

[88] See, e.g., Gerald S. Dickinson, Federalism, Convergence, and Divergence in Constitutional Property, 73 U. Mia. L. Rev. 139, 141, 147–48 (2018) (observing that state courts often interpret their state constitutional takings provisions in lockstep with the Supreme Court, but that the post-*Kelo v. City of New London*, 545 U.S. 469 (2005), reforms were the exception and were likely justified based on political economy concerns); Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 Wm. & Mary L. Rev. 301, 302–03 (1993) (observing the tension between "Our Federalism" and the Court's expansion of categorical exceptions to the Court's regulatory takings doctrine).

[89] See, e.g., Rose, supra note 86, at 1693, 1699–1701 (proposing that the Court consider intergovernmental distinctions in the takings context).

[90] See, e.g., Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 9, 12 (2004) (distinguishing between constitutional operative propositions—those doctrines that "represent the judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision"—and constitutional decision rules—"doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied").

[91] U.S. Const. amend. VIII.

respect to its Cruel and Unusual Punishment Clause jurisprudence, often in the name of federalism.[92] The Court has taken that same deferential approach with respect to reviewing claims arising under the Excessive Fines Clause—even prior to incorporation of the Clause.[93] Such an approach, however, may not be warranted in light of the significant government self-interest at play in the fines and forfeiture context.

A. The Gross Disproportionality Test

The Court has observed that the words of the Cruel and Unusual Punishment Clause "are not precise, and . . . their scope is not static," such that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[94] As to sentences of imprisonment for adults, the Court has effectively delegated enforcement of the Clause to the states by presuming the constitutionality of challenged sentences.[95] This is largely to account for federalism values—primarily respect for democratically enacted laws.[96]

In reviewing sentences of imprisonment, the Court utilizes a two-part test, first set forth in Justice Kennedy's concurrence in *Harmelin v. Michigan*, that "is easy to state, difficult to apply, and virtually impossible to satisfy."[97] Step one requires the Court to determine whether "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[98] If a showing of gross disproportionality can be made, the Court proceeds to step two, which requires consideration of two factors: (1) how the sentence compares to sentences imposed in the same jurisdiction for other offenses (an intra-jurisdictional analysis), and (2) how the sentence compares to those

[92] See infra Section II.A.

[93] See supra Subsection I.A.2; see also supra Section I.B.

[94] Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

[95] See John F. Stinneford, The Illusory Eighth Amendment, 63 Am. U. L. Rev. 437, 484 (2013) (explaining that the Court operates under "a strong categorical presumption that legislatively authorized sentences of imprisonment are constitutional"). The Court, however, has taken a different approach as to the death penalty for non-homicide offenses, juveniles, and the intellectually disabled, as well as life sentences without parole for juveniles. Id. at 484–85.

[96] See Michael J. Zydney Mannheimer, Cruel and Unusual Federal Punishments, 98 Iowa L. Rev. 69, 82, 87–88 (2012) (characterizing the Court's Eighth Amendment jurisprudence on sentencing as deferential to the legislature primarily due to federalism concerns).

[97] Id. at 82.

[98] Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

imposed in other jurisdictions for the same offense (an inter-jurisdictional analysis).[99]

Although the test consists of two parts, "the first step provides for almost complete deference to legislative judgments about the severity of the crime."[100] Application of the gross disproportionality test thus only rarely results in a violation of the Cruel and Unusual Punishment Clause.[101] Accordingly, despite the constitutional promise that the government will not inflict cruel and unusual punishments on individuals, "the Court has essentially decided that no noncapital sentence will ever be deemed unconstitutional."[102]

The Court justifies its deferential approach to reviewing sentences of imprisonment in large part due to its concern about respecting federalism and the multiple values it furthers. Indeed, in *Harmelin*, Justice Kennedy recognized that "divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure."[103]

First, and most significantly, the Court's cruel and unusual punishment cases demonstrate the Court's respect for democratic participation at the state level. State and local governments present increased opportunities for democratic participation.[104] Respect for federalism advances democratic participation, as it limits interference by the federal judiciary

[99] Id. at 1004–05. Although the test was originally set forth in Justice Kennedy's concurrence, the Court subsequently recognized Justice Kennedy's opinion as the controlling opinion. See Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 693 (2005) (noting that Justice Kennedy's *Harmelin* concurrence "eventually came to assume the status of law").

[100] Mannheimer, supra note 96, at 82.

[101] See id. at 85 (explaining that "federal defendants have rarely made successful Eighth Amendment challenges to federal carceral sentences").

[102] Bidish J. Sarma & Sophie Cull, The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses, 66 Case W. Rsrv. L. Rev. 525, 554 (2015). But see Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that a mandatory-sentencing scheme requiring that "all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes" violates the Eighth Amendment).

[103] *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment).

[104] See Nestor M. Davidson & Timothy M. Mulvaney, Takings Localism, 121 Colum. L. Rev. 215, 231, 266 (2021) (describing the ways in which democratic participation can be stronger at the local level than the state level, and that states govern in many ways through local government).

with respect to decisions made through state and local democratic processes.[105]

In *Rummel v. Estelle* (which influenced Justice Kennedy's subsequent opinion in *Harmelin*[106]), the Court upheld a mandatory sentence of life imprisonment with the possibility of parole for recidivism following petitioner's third felony conviction.[107] In doing so, the Court explained that the lines to be drawn between different types of offenses are "'subjective,' and therefore properly within the province of legislatures, not courts."[108] Uncertainty generally existed as to the best sentences required, such that any "trend" toward lighter sentences "must find its source and its sustaining force in the legislatures, not in the federal courts."[109] Thus, each state was "entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors."[110]

The Court's concerns relating to judicial review of democratically enacted legislation can be traced to Justice Holmes's dissent in *Lochner v. New York*, which involved the Court striking down a piece of state wage-and-hour legislation as violative of substantive due process.[111] Justice Holmes argued that the majority had found the law unconstitutional because of the Justices' disagreement with the law on policy grounds. Justice Holmes wrote: "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."[112] The Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[113]

Justice Stewart, concurring in *Rummel*, echoed Justice Holmes's *Lochner* dissent to justify why he joined the Court's judgment in *Rummel*:

[105] Fissell, supra note 76, at 528.

[106] See *Harmelin*, 501 U.S. at 998–1001 (Kennedy, J., concurring in part and concurring in the judgment) (applying principles from *Rummel* in considering whether to apply proportionality review).

[107] Rummel v. Estelle, 445 U.S. 263, 264–65 (1980).

[108] Id. at 275–76.

[109] Id. at 283–84.

[110] Id.

[111] 198 U.S. 45, 52–53 (1905).

[112] Id. at 75 (Holmes, J., dissenting).

[113] Id. at 75–76.

> If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.[114]

In his 1962 book *The Least Dangerous Branch*, Alexander Bickel labeled the concerns underlying Justice Holmes's dissent the "[c]ounter-[m]ajoritarian [d]ifficulty."[115] According to Bickel, when the Supreme Court invalidates action enacted through majoritarian, democratic processes, the Court "exercises control, not in behalf of the prevailing majority, but against it."[116] Judicial review "is a deviant institution in the American democracy,"[117] and thus, Bickel's theory of judicial intervention requires deference to legislative judgments even where important constitutional rights are involved.[118]

Relatedly, Justice Frankfurter, who advocated strenuously for the fundamental fairness approach to incorporation, likewise counseled that courts ought to avoid "political thicket[s]."[119] According to Justice Frankfurter, many provisions in the U.S. Constitution were not enforceable by the courts.[120] Rather, "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the

[114] *Rummel*, 445 U.S. at 285 (quoting Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring)).

[115] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."); see also Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 201–02 (2002) (reviewing Bickel's work).

[116] Bickel, supra note 115, at 16–17.

[117] Id. at 18.

[118] See Daniel J. Solove, The Darkest Domain: Deference, Judicial Review, and the Bill of Rights, 84 Iowa L. Rev. 941, 960–61 (1999) (describing that even where important constitutional rights are implicated, courts are deferential to legislative decision-makers).

[119] Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

[120] Id.

vigilance of the people in exercising their political rights."[121] Overall, the Court's cruel and unusual punishment jurisprudence leaves the limits on imprisonment to the political process.

The Court's cruel and unusual punishment cases also demonstrate the Court's respect for a state's "right to do things differently."[122] The *Rummel* Court observed that Arizona punished a theft of any "'neat or horned animal,' regardless of its value" whereas California considered the theft of "'avocados, olives, citrus or deciduous fruits, nuts and artichokes' particularly reprehensible."[123] If a punishment is required to be proportional to the severity of the offense, but the severity of the offense varies from state to state in light of the geographic and societal needs and values of that community, it becomes exceedingly difficult to set nationwide constitutional standards. Thus, as the *Rummel* Court noted, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."[124]

Allowing a diversity of policies recognizes that "individuals often have different preferences; the best way to please more of the people more of the time is to offer a choice of regulatory regimes."[125] In other words, federalism allows for states and localities to "create the type of social and political climate [citizens] prefer."[126]

Federalism also plays a role with respect to promoting policy experimentation between the states. Federalism, as Justice Brandeis notably observed, allows "a single courageous State [to] . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[127] Experimentation federalism recognizes that state and local government officials have more subject-matter expertise with respect to matters within their jurisdiction.[128]

Often key to federalism arguments is the idea that regulatory diversity will itself result in states adopting beneficial policies, as states will

[121] Id.

[122] Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 53 (2004).

[123] Rummel v. Estelle, 445 U.S. 263, 282 (1980) (first quoting Ariz. Rev. Stat. Ann. § 13-663(A) (1977) (repealed 1978); and then quoting Cal. Penal Code § 487(1) (West 1970)).

[124] Id.

[125] Young, supra note 122, at 54.

[126] Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 8 (1988).

[127] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[128] See Fissell, supra note 76, at 514–15.

compete for mobile citizens (who are both taxpayers and investors).[129] Citizens who object to a state or local law can, at least in theory, move to a jurisdiction more aligned with their policy preferences. This risk of exit, in turn, forces governments to adjust their policies to account for their citizenry's preferences (much like a company adjusting its product for consumers' tastes in order to compete in the marketplace).[130] The Court, however, has generally not relied upon mobility arguments in the criminal law setting.[131] Further, mobility arguments may be largely theoretical in nature, as studies suggest that changes in policies do not always impact mobility.[132]

Although some scholars have argued that the Court properly deferred to states with respect to sentences of imprisonment on federalism grounds,[133] others have criticized the Court. Critics argue the Court's decisions "reflect[] a repudiation of its responsibility to determine how the Eighth Amendment should be interpreted outside of the death penalty."[134] The Court thus far, however, has been immune to this criticism.

B. The Inappropriate Extension of the Gross Disproportionality Test to Excessive Fines

Prior to *Timbs*'s recognition that the Excessive Fines Clause is incorporated into the Fourteenth Amendment, the Court held in *United*

[129] Patrick M. Garry, A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights, 36 Seton Hall L. Rev. 851, 859–61 (2006).

[130] See Fissell, supra note 76, at 529–30; Ilya Somin, How Judicial Review Can Help Empower People to Vote with Their Feet, 29 Geo. Mason L. Rev. 509, 516–17 (2022) ("[I]nterjurisdictional diversity combined with freedom of movement can do much to enhance political freedom and increase opportunity.").

[131] Fissell, supra note 76, at 559 (observing that the Court has generally not invoked mobility federalism in its criminal law cases perhaps because "the core premise of this theory—the free ability of citizens to move across state lines—is a fiction that seems intolerable to indulge in when it is used to justify geographically disparate regimes of criminal punishment").

[132] See, e.g., Richard Florida, Do Taxes Really Cause the Rich to Move?, Bloomberg (June 29, 2016, 10:44 AM), https://www.bloomberg.com/news/articles/2016-06-29/when-do-taxes-cause-millionaires-to-move [https://perma.cc/S23N-45AV].

[133] See, e.g., Michael P. O'Shea, Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences, 72 Tenn. L. Rev. 1041, 1094 (2005) (arguing that application of heightened scrutiny to sentences of imprisonment "would impose real costs to federalism; it would result in a meaningful loss of flexibility and independence among the criminal justice systems of the States").

[134] E.g., Tonja Jacobi & Ross Berlin, Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence, 51 U.C. Davis L. Rev. 2033, 2087 (2018).

States v. Bajakajian that the test for determining whether a mandatory forfeiture is excessive is the grossly disproportionate test developed in its cruel and unusual punishment cases.[135] The Court's reasoning on this point was cursory[136] and failed to account for the fact that fines and forfeitures often pose a risk of government self-interest.[137]

In adopting the gross disproportionality standard, the Court relied on two considerations. First, the Court observed how "judgments about the appropriate punishment for an offense belong in the first instance to the legislature" and included in a parenthetical a quote from *Solem v. Helm*, a cruel and unusual punishment case, providing that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[138] Second, the Court observed that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[139]

The use of the gross disproportionality standard in the excessive fines context has been sharply criticized by scholars.[140] Indeed, in *Bajakajian*, the Court did not make any attempt to distinguish the two provisions despite both textual ("cruel and unusual" versus "excessive") and historical differences.[141]

Although *Bajakajian* involved a mandatory forfeiture, lower courts have since applied the gross disproportionality standard to fines—those both mandatory and discretionary in nature.[142] And, in light of the language in *Bajakajian* about the legislature being entitled to deference, some courts have found that fines that fall below statutory maximums are

[135] 524 U.S. 321, 334, 336–37 (1998).

[136] Id.

[137] Cf. Cain v. White, 937 F.3d 446, 454 (5th Cir. 2019) (holding that the fines and fees practices of judges in the Orleans Parish Criminal District constituted a conflict of interest in violation of due process).

[138] *Bajakajian*, 524 U.S. at 336 (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)).

[139] Id.

[140] See, e.g., Colgan, Reviving Excessive Fines, supra note 43, at 319–20 (criticizing the Court's failure to consider differences between the Cruel and Unusual Punishment Clause and the Excessive Fines Clause in adopting the gross disproportionality standard to determine whether a forfeiture is excessive).

[141] *Bajakajian*, 524 U.S. at 336–37.

[142] See, e.g., Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *1–3 (11th Cir. July 14, 2022); Pimentel v. City of Los Angeles, 974 F.3d 917, 922 (9th Cir. 2020); Robson 200, LLC v. City of Lakeland, 593 F. Supp. 3d 1110, 1115, 1120 (M.D. Fla. 2022); Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1328–29 (11th Cir. 2021); Torres v. City of New York, 590 F. Supp. 3d 610, 614, 627 (S.D.N.Y. 2022).

presumed constitutional, effectively rendering them immune from constitutional scrutiny.[143] The judiciary has thus effectively abdicated its role in enforcing the Excessive Fines Clause.[144] Indeed, during oral argument in *Timbs*, Justice Kagan observed: "[W]e've made it awfully, awfully hard to assert a disproportionality claim with respect even to imprisonment. And if it's at least equally hard to assert a disproportionality claim with respect to fines, we could incorporate this tomorrow and it would have no effect on anybody."[145]

Since *Bajakajian*, scholars have argued that courts should consider an offender's ability to pay in imposing fines or ordering property forfeited.[146] Courts are mixed in their receptiveness to this argument, but even if accepted, it ignores that decision-makers often have significant discretion as to the amount to impose and may have a conflict of interest related to fines directly benefiting the government entity for which the decision-maker works.[147]

As Beth Colgan has observed, "[t]he story of the Excessive Fines Clause is set against a centuries-long history of lawmakers designing systems that allow the government to extract revenue through the use of disproportionate economic sanctions rather than taxation."[148] Thus, key to ensuring the Excessive Fines Clause's protections are meaningful is addressing the reality that government decision-makers often have significant discretion in imposing fines and that such fines often benefit the government directly, increasing the risk that government will overreach and impose a fine far greater than necessary to punish.

The risk of government self-interest and related overreach is heightened with respect to state and local governments, which often rely

[143] See, e.g., *Ficken*, 2022 WL 2734429, at *3; City of Seattle v. Long, 493 P.3d 94, 115 (Wash. 2021); United States v. Suarez, 966 F.3d 376, 387 (5th Cir. 2020); Commonwealth v. Ishankulov, 275 A.3d 498, 505 (Pa. Super. Ct. 2022); Morrow v. City of San Diego, No. 11-cv-01497, 2011 WL 4945015, at *5 (S.D. Cal. Oct. 18, 2011).

[144] Brandon Buskey, A Proposal to Stop Tinkering with the Machinery of Debt, 129 Yale L.J.F. 415, 419 (2020).

[145] Transcript of Oral Argument at 24, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[146] See Buskey, supra note 144, at 418.

[147] Id. at 421–23 (detailing why inability-to-pay determinations, by themselves, may be insufficient to enforce the protections provided by the Excessive Fines Clause).

[148] Beth Colgan, The Burdens of the Excessive Fines Clause, 63 Wm. & Mary L. Rev. 407, 424 (2021) [hereinafter Colgan, Burdens].

upon fines and fees to fund portions of their budgets.[149] As the ACLU argued in *Timbs*, "[p]erhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue."[150] By contrast, federal criminal fines generally do not pose issues of self-interest, as almost all criminal fines are paid into the Crime Victim Fund.[151]

Although the percentage of state and local budgets consisting of fines and fees is generally in the low single digits, exceptions exist.[152] One study showed that six cities during multiple years had *over half* of their general revenue coming from fines, fees, and forfeitures.[153] These cities are all located near major highways and, in 2017, spent at least a third of their budget on law-enforcement activities.[154]

Moreover, in some state and local jurisdictions, fines, fees, and forfeitures directly fund the law-enforcement or court program collecting them, as opposed to being allocated to a general fund.[155] Specifically, in thirty-two states, a police department that seizes cash or property relating to a crime can keep eighty to one hundred percent of the forfeiture proceeds.[156] And, in at least forty-three states, speeding ticket revenue is allocated to courts or law enforcement in whole or in part.[157] These practices can undermine confidence in the criminal justice system, as communities can view them as exploitative.[158]

[149] See Tax Policy Briefing Book: State and Local Tax Policies, How Do State and Local Revenues from Fines, Fees, and Forfeitures Work?, Urb. Inst. & Brookings Inst.: Tax Pol'y Ctr. [hereinafter State and Local Tax Policies], https://taxpolicycenter.org/briefing-book/how-do-state-and-local-revenues-fines-fees-and-forfeitures-work [https://perma.cc/D7DH-77UU] (last updated Jan. 2024).

[150] Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 7, *Timbs*, 139 S. Ct. 682 (No. 17-1091); see also Harry M. Hipler, Conflicting Parameters of Code Enforcement Fines and Liens Pursuant to Chapter 162 of the Florida Statutes, *Timbs*, and the Eighth Amendment: How Much Is Too Much?, 52 Stetson L. Rev. 669, 718 (2023) ("Budget pressures are part of what drives state and local governments to rely on monetary sanctions.").

[151] 34 U.S.C. § 20101(b).

[152] State and Local Tax Policies, supra note 149.

[153] E.g., id.

[154] Id.

[155] Id.

[156] Id.

[157] Id.

[158] Id.

And, it is not just criminal and traffic fines that shore up cities' budgets. Hundreds of cities also receive revenue from land-use violations, which can include fines for cracked driveways, uncut grass, and debris in yards.[159] The City of Dunedin, Florida, is a representative example of the practice of imposing high land-use fines to fund government.[160] In addition to *Ficken*, cases included $92,600 in fines for overgrown vegetation and a stagnant swimming pool; $31,000 in fines for failing to obtain a permit before fixing roof damage; and $43,000 in fines in relation to an inoperative car, dried leaves in the yard, and overgrown plants.[161] Fines were a significant revenue source for the city, as during a period of five and a half years, the city collected approximately $3.6 million in fines.[162]

The land-use ordinances at issue generally do not involve health and safety but rather implicate aesthetic concerns. Because these fines accumulate based on the days the violation was ongoing, they can quickly increase to thousands (if not hundreds of thousands) of dollars in total fines. If the offender is unable to pay, cities often attach liens to the offenders' homes and ultimately foreclose on the liens, as in *Ficken*. Thus, property owners are not just becoming impoverished by such fines—they are literally losing their homes.

Justice Scalia suggested that closer scrutiny of fines than imprisonment may be justified because fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money."[163] Indeed, "some early state constitutions prohibited excessive fines without limiting other forms of punishment."[164] Thus, fines and forfeitures differ from sentences of imprisonment with respect to the risk

[159] Nick Sibilla, Nearly 600 Towns Get 10% of Their Budgets (or More) from Court Fines, Forbes (Aug. 29, 2019, 12:45 PM), https://www.forbes.com/sites/nicksibilla/2019/08/29/nearly-600-towns-get-10-of-their-budgets-or-more-from-court-fines/?sh=7da91ed04c99 [https://perma.cc/UC4V-A8HR].

[160] Kristine Phillips, A Florida Woman Was Fined $100,000 for a Dirty Pool and Overgrown Grass. When Do Fines Become Excessive?, USA Today (Dec. 16, 2019, 9:37 PM), https://www.usatoday.com/in-depth/news/politics/2019/07/19/florida-city-hits-homeowners-massive-penalties-supreme-court-excessive-fines/1691703001/ [https://perma.cc/4RAS-8Y28].

[161] Id.

[162] Id.

[163] Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

[164] State v. Timbs, 134 N.E.3d 12, 38 (Ind. 2019).

of government overreaching, raising the issue whether heightened scrutiny may be justified for fines and forfeitures on this basis.

That government regulators are prone to overreach is consistent with public choice theory, which provides that regulators largely act out of self-interest, as opposed to in the public interest, similar to individuals acting in the private sector.[165] Even politically accountable actors may seek to increase their chances for reelection by seeking to extract a wider array of benefits for voters by seeking greater fines.[166] Thus, under public choice theory, "the notion of the common good is at best a utopian illusion, at worst a pretext for self-serving deals."[167] In light of the differences between fines and forfeitures on the one hand and imprisonment on the other, the cruel and unusual punishment cases may be of limited value with respect to further development of the Excessive Fines Clause.

III. THE TAKINGS CLAUSE

Although the Court's excessive fines jurisprudence has thus far looked primarily to the Cruel and Unusual Punishment Clause for guidance, I argue that the Takings Clause's exactions doctrine is a better analogue. While generally overlooked, the Takings Clause and the Excessive Fines Clause are closely related.[168] The Court's takings jurisprudence—like its cruel and unusual punishment jurisprudence—is generally highly deferential. Yet, in limited circumstances, the Court has deviated, applying heightened scrutiny and other categorical exceptions to certain types of government action often implicating an increased risk of government overreach similar in nature to that implicated by fines.[169] The

[165] Gregory S. Alexander, Takings, Narratives, and Power, 88 Colum. L. Rev. 1752, 1771 (1988).

[166] Daniel P. Selmi, Takings and Extortion, 68 Fla. L. Rev. 323, 338–39 (2016).

[167] Alexander, supra note 165, at 1771; see Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 874 (1987) (discussing the ways public choice theory differs from the public interest model).

[168] Scholarship discussing the relationship between the Excessive Fines Clause and Takings Clause is almost nonexistent. But see J. Kelly Strader, Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation, 23 Pepp. L. Rev. 449, 450 (1996) (comparing the Supreme Court's Excessive Fines Clause and Takings Clause doctrines and explaining that "[t]he Court has yet to address the Takings Clause in the context of seizures and forfeitures").

[169] E.g., Tyler v. Hennepin County, 143 S. Ct. 1369, 1375–76 (2023) (finding a county's retention of surplus in excess of tax debt following forfeiture sale constituted a taking); Horne v. U.S. Dep't of Agric., 576 U.S. 351, 358, 365–66 (2015) (finding that the Takings Clause

theory and jurisprudence behind the Takings Clause thus may prove useful to courts, advocates, and scholars who seek to explore the meaning of the Excessive Fines Clause and the decision rules that should be adopted to implement its protections in the wake of *Timbs*.

A. The Relationship Between Takings and Excessive Fines

The Excessive Fines Clause's relationship to the Takings Clause is not as obvious as its relationship to the Cruel and Unusual Punishment Clause, but takings and excessive fines are closely connected. Both involve limits on government obtaining property from owners and, to a degree, government self-interest and the risk of overreaching. Further, although the Court has not yet addressed the interplay between the two provisions, they frequently arise together in litigation. Overall, a better "fit" may exist between takings and excessive fines than between excessive fines and cruel and unusual punishment.

Before comparing the two provisions, it is useful to provide some background on the Takings Clause, which provides: "[N]or shall private property be taken for public use, without just compensation."[170] It is generally settled that the provision requires just compensation for formal exercises of eminent domain—that is, when government condemns private property for the purpose of assuming title to it for some "public use."[171] When it applies to government action outside of the formal exercise of eminent domain is somewhat less clear and subject to a framework riddled with exceptions and differing levels of scrutiny.[172] I refer to all takings that are not by way of formal exercises of the eminent domain power as "implicit" takings.[173]

Where a government regulation or action does not transfer title but rather impacts the owner's bundle of rights, the Court does not find a taking outright, but rather seeks to determine whether the action or

applies to personal property and that the government could not condition selling raisins on sellers' relinquishing a portion of their crop to the government).

[170] U.S. Const. amend. V.

[171] See Jed Rubenfeld, Usings, 102 Yale L.J. 1077, 1081 (1993). Just compensation is typically determined by the fair market value of the property, although some have questioned that conception. See, e.g., Emilio R. Longoria, Properly Construing the Just Compensation Clause, 64 B.C. L. Rev. 1377, 1401–02 (2023).

[172] See Fennell, supra note 14, at 5 ("The field of implicit takings has long been described as muddled.").

[173] See James E. Krier & Stewart E. Sterk, An Empirical Study of Implicit Takings, 58 Wm. & Mary L. Rev. 35, 40–41 (2016).

regulation goes "too far," such that it becomes a taking.[174] To determine whether something has gone "too far" is the focus of the Court's *Penn Central Transportation Co. v. New York City* regulatory takings test.[175] Exceptions to this test exist, including physical invasions of property.[176] Although land-use restrictions by themselves rarely satisfy the *Penn Central* test, the Court's exactions doctrine provides for heightened scrutiny of government demands for private property in exchange for lifting a restriction on property (e.g., in exchange for issuing a permit for a developer to build on a parcel, the city demands an easement over the parcel or a sum of money in lieu of an easement).[177]

The Takings Clause and the Excessive Fines Clause are historically related. In June 1789, James Madison proposed to Congress the addition to the Constitution of both the Takings Clause and the Excessive Fines Clause.[178] Although the clauses are now found in separate amendments, Madison's original proposal placed the Excessive Fines Clause almost immediately after the Takings Clause—with only a provision regarding bail separating the two.[179]

I do not seek to fully explore here the originalist arguments and implications for looking to the Takings Clause as an analogue for the Excessive Fines Clause. The Court has, however, garnered significant attention for its reliance on history and tradition in its recent cases. In *New York State Rifle & Pistol Ass'n v. Bruen*, for example, the Court placed the burden on the government to show that a challenged gun control regulation "is consistent with this Nation's historical tradition of firearm regulation."[180] In *Tyler v. Hennepin County*, a takings case, the Court engaged in a similar inquiry when it reviewed history and precedent to determine whether the county had violated the Takings Clause by retaining the surplus proceeds following a tax forfeiture sale.[181] If an

[174] Id. at 38.

[175] Id. at 44; see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[176] See Fennell, supra note 14, at 13–14.

[177] Id. at 26–27.

[178] 1 Annals of Cong. 433–34 (1789) (Joseph Gales ed., 1834).

[179] Id. at 434.

[180] 142 S. Ct. 2111, 2126 (2022).

[181] 143 S. Ct. 1369, 1376–78 (2023). The Court did not, however, expressly place the burden on the government. Id. I have argued elsewhere that property tax delinquency absent fraud or willful misconduct may be such that any punitive fine or forfeiture is constitutionally barred. See Jessica L. Asbridge, Tax Forfeitures and the Excessive Fines Muddle, 118 Nw. U. L. Rev. Online 170, 181 (2023).

approach similar to *Bruen* and *Tyler* were taken, the government may only be able to fine for certain types of offenses—those where history and tradition would support imposition of a fine. This would differ from the Court's interpretation of the Cruel and Unusual Punishment Clause, which focuses on evolving standards of decency.

The Excessive Fines Clause and Takings Clause are also textually and substantively related. Neither clause absolutely prohibits takings or fines and forfeitures, but rather the Clauses set limits on their use. Takings are permitted provided just compensation is paid. Under the Takings Clause, regulations infringing upon property are permitted without payment of just compensation provided they do not go "too far."[182] Similarly, fines and forfeitures are permitted as a form of punishment provided that they are not excessive. But difficult questions are embedded in these simple limits: When does a regulation of property go "too far"? When is a fine "excessive"? The Court has consistently shied away from engaging in difficult line-drawing tasks in part due to respect for federalism.

The Takings Clause and the Excessive Fines Clause can be implicated in the same case. For example, the petitioner in *Tyler* argued that the retention of the surplus proceeds violated the Takings Clause and the Excessive Fines Clause.[183] The *Tyler* Court ultimately found only a taking and avoided addressing whether the Excessive Fines Clause was also implicated.

Further development of the relationship between the Takings Clause and the Excessive Fines Clause is needed. Indeed, as I have previously argued, the tax forfeiture at issue in *Tyler* may be better viewed as an excessive fine, as opposed to a taking.[184] If a fine or forfeiture is punitive in nature, treating the penalty as a taking by requiring just compensation would seemingly undermine any legislative intent to punish. Perhaps a court could determine which portion of a penalty constituted punishment and which portion constituted a taking for public use (because the penalty was imposed for revenue purposes, as opposed to punishment). Ultimately, it may very well be that certain fines and forfeitures implicate

[182] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[183] *Tyler*, 143 S. Ct. at 1374. For another example of a case implicating both the Takings Clause and the Excessive Fines Clause, see Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1135 (9th Cir. 2014), *rev'd*, 576 U.S. 351, 370 (2015).

[184] See Asbridge, supra note 181, at 173–75 (arguing the Court should have analyzed the forfeiture at issue in *Tyler* under the Excessive Fines Clause, as requiring just compensation for a punitive forfeiture undermines any legislative intent to punish).

both the Takings Clause and the Excessive Fines Clause. If so, it may be that the closer scrutiny of such penalties that I argue for in Part IV, *infra*, is justified in part due to multiple constitutional rights being implicated.[185]

Takings, like excessive fines, also involve a significant "federalist dimension" due to the central role state law plays in determining the constitutionality of a government action that is unique as compared to other constitutional amendments, which generally do not require an inquiry into state law outside of the challenged provision.[186] On the takings side, regulations of property vary widely to address different communities' needs and values. Not only are there state law variations as to regulation, but also there are variations as to what constitutes private property in the first place. In other words, the Takings Clause requires just compensation for takings of "private property," but what constitutes "private property" is determined by sources that include state law, such that takings protection could potentially vary from state to state based on differences between property law systems.[187] Similarly, laws providing for fines and forfeitures also vary widely from jurisdiction to jurisdiction. Further, the underlying offenses themselves vary from state to state. Thus, the Court might be faced with reviewing a punishment for a particular state offense, but other states may not even criminalize or otherwise punish someone who commits that conduct. These variations are what also makes crafting doctrine so difficult in the context of enforcing the Takings and Excessive Fines Clauses.

Due to the difficulties of setting nationwide standards implementing the Takings Clause's protections, the Court has generally taken an approach of deference in its takings cases out of respect for federalism. Where deferential review applies, the challenged action is generally upheld. But the Court does not always defer, such as where concerns of government self-interest and the related risk of overreaching are at play. Importantly, however, when heightened scrutiny applies, the risk of

[185] The Court has, at times, combined two independent rights in a way that "yields a more restrictive set of limits on government action than what would exist in the combination's absence." Michael Coenen, Combining Constitutional Clauses, 164 U. Pa. L. Rev. 1067, 1078 (2016).

[186] Stewart E. Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L.J. 203, 218–20 (2004).

[187] Id. at 222; *Tyler*, 143 S. Ct. at 1375 (observing that state law is "one important source," but not the only source, such that the Court also looks to traditional property law principles, historical practice, and the Court's precedents in determining what constitutes private property under the Takings Clause).

government overreach thus far has been accompanied by a risk of singling out individuals for unfavorable treatment. Indeed, the Takings Clause, today, is understood as prohibiting forcing "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[188] Likewise, fines often single out individuals to shoulder the burden of funding law enforcement and government more generally (what should be public burdens), and the Excessive Fines Clause may similarly provide limits to such singling out.[189]

B. Takings Jurisprudence and Differing Levels of Scrutiny

In the takings context, the Court generally accords significant deference to government with respect to its decision-making. One exception to this deferential approach, however, is the Court's exactions doctrine. This Section sets forth the Court's takings doctrine that generally affords significant deference to government and contrasts it with the Court's exactions doctrine.

1. Deferential Scrutiny

The Court has indicated that it generally will not closely scrutinize the ends or the means with respect to challenges to either: (1) whether a public use exists for a formal exercise of eminent domain or (2) regulations impacting property rights. Instead, the Court gives weight to the values of federalism—most frequently equating them to the values of democratic participation.

As to formal exercises of the eminent domain power, the Court set forth its deferential standard of review most recently in *Kelo v. City of New London*.[190] As the Court explained in *Kelo*, the Court has "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[191] The Court thus emphasizes the "great respect" that it affords state legislatures and state courts in discerning local public needs.[192] The

[188] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[189] See Developments in the Law—Policing and Profit, 128 Harv. L. Rev. 1723, 1733 (2015) ("[D]ecisions about which laws to enforce and how people should be punished are driven by profit. Instead of distributing the cost of policing throughout society, police are allowed to single out who will shoulder this burden.").

[190] 545 U.S. 469, 483 (2005).

[191] Id.

[192] Id. at 482.

Court observed that the "needs of society have varied between different parts of the Nation" and relied on prior precedent that the Court recognized "embodied a strong theme of federalism."[193] As a practical result, "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts."[194]

Similarly, the Court will not scrutinize the ends or the means of regulation with respect to implicit takings. Although prior cases had suggested that a regulation infringing on property must "substantially advance a legitimate state interest," the Court unanimously rejected that test in *Lingle v. Chevron U.S.A. Inc.*[195] The Court found that such a test would "present serious practical difficulties" and would "demand heightened means-ends review of virtually any regulation of private property."[196] Such scrutiny of "a vast array of state and federal regulations" was "a task for which courts are not well suited," as it would result in courts often "substitut[ing] their predictive judgments for those of elected legislatures and expert agencies."[197]

As to implicit takings, the Court's three-factor *Penn Central* test applies unless there is a categorical exception in play. Application of the *Penn Central* test to state action, however, generally has the "inevitable" result that the regulation is sustained.[198]

In addition to the Takings Clause, the Court also reviews land-use regulations under substantive due process. Such regulations, however, are subject to a highly deferential standard and are not unconstitutional unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[199] The Supreme Court has observed that "state courts undoubtedly have more

[193] Id. at 482–83.

[194] Goldstein v. Pataki, 516 F.3d 50, 57 (2d Cir. 2008); see Jessica L. Asbridge, Private Delegations and Eminent Domain, 101 Or. L. Rev. 359, 406 (2023); see also Emilio R. Longoria, Hoardings, 69 Vill. L. Rev. 477, 492, 516 (2024) (exploring "hoardings," which are "instances of unnecessary or excessive takings by government entities or their proxies that are tolerated under existing law," and arguing for closer scrutiny of such hoardings).

[195] 544 U.S. 528, 540, 544 (2005).

[196] Id. at 544.

[197] Id.

[198] Sterk, supra note 186, at 251; see Krier & Sterk, supra note 173, at 89 ("Fewer than 10 percent of regulatory takings claims are successful . . . ."). In *Lucas v. South Carolina Coastal Council* the Court recognized, however, that a regulation constitutes a categorical taking when it "denies all economically beneficial or productive use of land." 505 U.S. 1003, 1015 (1992).

[199] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[200] Lower federal courts have similarly recognized that state courts are better equipped to handle land-use issues, and federal courts should thus respect principles of federalism and generally avoid state-federal conflict.[201] Indeed, some federal courts apply a highly deferential "shocks the conscience" standard to local administrative acts.[202]

2. Heightened Scrutiny

Although the Court has taken a highly deferential approach overall with respect to claims arising under the Takings Clause, the Court has, at times, deviated from that approach notwithstanding federalism principles being implicated.[203] I focus here primarily on the Court's exactions doctrine, but note that the Court's decision in *Tyler v. Hennepin County* serves as another recent example.[204]

i. The Exactions Doctrine

The Court's exactions doctrine applies when government seeks to obtain private property in exchange for lifting a land-use restriction or

[200] San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 347 (2005).

[201] Laura D. Beaton & Matthew D. Zinn, *Knick v. Township of Scott*: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation, 47 Fordham Urb. L.J. 623, 635–36, 636 n.85 (2020) (citing multiple federal circuit courts that have found that they should avoid state-federal conflict with respect to land-use issues out of respect for federalism).

[202] See, e.g., United Artists Theatre Cir., Inc. v. Township of Warrington, 316 F.3d 392, 399 (3d Cir. 2003) (Alito, J.) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

[203] Despite the Supreme Court's typical deferential approach with respect to land-use decisions by state and local governments, the Court has applied heightened scrutiny to exactions. Shelley Ross Saxer, When Local Government Misbehaves, 2016 Utah L. Rev. 105, 106.

[204] In *Tyler*, the petitioner challenged state law as effectuating an unconstitutional taking because it provided that her interest in her home was forfeited when she failed to pay her property taxes despite the value of her home exceeding the tax debt. 143 S. Ct. 1369, 1373 (2023). The government argued that federalism principles favored upholding the state law. Brief for Respondents at 40, *Tyler*, 143 S. Ct. 1369 (No. 22-166). The Court rejected that argument, finding that state law was not the only source for defining "private property" for the purposes of the Takings Clause, because otherwise a state could sidestep traditional property interests it wanted to appropriate. *Tyler*, 143 S. Ct. at 1375. The Court thus refused to defer to state law and instead looked to history and tradition to ultimately conclude that the retention of the surplus constituted a taking. Id. at 1375–76.

granting a permit.[205] Although land-use regulations are generally presumed constitutional, exactions receive "[h]igh [s]crutiny," as they are reviewed under standards "far beyond the usual standard for social and economic legislation."[206]

The exactions doctrine is "a special application" of the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[207] The unconstitutional conditions doctrine arises from "a general wariness" about the government using "its discretion to grant or deny benefits" as leverage to obtain the waiver of constitutional rights.[208] By requiring close scrutiny of exactions, the Court is protecting the right to just compensation for property the government takes when owners apply for land-use permits.[209]

The Court's exactions doctrine was first announced in *Nollan v. California Coastal Commission*[210] and refined in *Dolan v. City of Tigard*.[211] Under the doctrine, the government can "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."[212]

The Court's nexus and rough proportionality test ensures that the government does not overreach and try to obtain easements or other private property under the guise of mitigation.[213] In the land-use context,

[205] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604–05 (2013).

[206] Fennell, supra note 14, at 49. Notably, this heightened scrutiny differs from "the areas of substantive due process, equal protection, and eminent domain, [where] courts approach their inquiries with a great deal of deference and with the burden of proof squarely on the shoulders of the party challenging the government's bona fides." Lee Anne Fennell & Eduardo M. Peñalver, Exactions Creep, 2013 Sup. Ct. Rev. 287, 316. By contrast, "[i]n the exactions context . . . the presumption is reversed," and the burden is placed on the government. Id.

[207] *Koontz*, 570 U.S. at 604 (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005)).

[208] Michael B. Kent, Jr., Viewing the Supreme Court's Exactions Cases Through the Prism of Anti-Evasion, 87 U. Colo. L. Rev. 827, 846 (2016) [hereinafter Kent, Anti-Evasion].

[209] *Koontz*, 570 U.S. at 604–06.

[210] 483 U.S. 825, 837–41 (1987).

[211] 512 U.S. 374, 377, 386–91 (1994).

[212] *Koontz*, 570 U.S. at 605–06 (first quoting *Nollan*, 483 U.S. at 837; and then quoting *Dolan*, 512 U.S. at 391).

[213] Kent, Anti-Evasion, supra note 208, at 834, 849–50, 853–55, 869 (classifying the exactions doctrine as an "anti-evasion doctrine," which, according to Kent, the Court uses "when it perceives there to be a lack or failure of political safeguards that otherwise might prevent governmental overreaching"). But see Lee Anne Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 Iowa L. Rev. 1, 28 (2000) (arguing that, "[w]hile

government is entitled to mitigate the impacts of a proposed development by demanding property from the developer to offset those impacts, but government is not entitled to "use its substantial power and discretion in land-use permitting to pursue governmental ends" that fail to satisfy the *Nollan-Dolan* standard.[214]

The rough proportionality prong of the test is highly searching, as it requires the government body to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[215] The rough proportionality test places the burden of proof on the government, "inverting the traditional presumption of constitutionality of properly enacted regulations."[216]

The Court initially limited its exactions doctrine only to "dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings."[217] In *Koontz v. St. Johns River Water Management District*, however, the Court expanded its exactions doctrine to extend to where government conditions a permit on the payment of money in lieu of deeding government physical property.[218]

The Court suggested in its 2005 decision *Lingle v. Chevron U.S.A. Inc.* that its exactions doctrine is limited only to "adjudicative land-use exactions"—those that are decided on a case-by-case basis as opposed to being set in advance by a generalized legislative scheme.[219] Despite the *Lingle* limitation being only dicta, a number of lower courts adopted the adjudicative-legislative distinction.[220]

nexus and proportionality do too much by blocking advantageous bargains, they also do too little by failing to provide meaningful protection against government overreaching").

[214] Kent, Anti-Evasion, supra note 208, at 866 (quoting *Koontz*, 570 U.S. at 614); id. at 864.

[215] *Dolan*, 512 U.S. at 391.

[216] Fennell & Peñalver, supra note 206, at 294.

[217] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

[218] 570 U.S. 595, 618–19 (2013); Timothy M. Mulvaney, The State of Exactions, 61 Wm. & Mary L. Rev. 169, 179 (2019).

[219] 544 U.S. at 546.

[220] Fennell & Peñalver, supra note 206, at 340. Distinguishing between adjudicative and legislative actions with respect to the formulation of doctrinal rules is not unique to exactions, but rather occurs in a number of other areas of the law. Most fundamentally, procedural due process protections generally apply only to executive ad hoc decision-making, not legislative decision-making. Timothy M. Mulvaney, Legislative Exactions and Progressive Property, 40 Harv. Env't L. Rev. 137, 142–43 & n.17 (2016). For a discussion of how courts distinguish between adjudicative and legislative exactions and the difficulties involved, see Saxer, supra note 203, at 116.

The Court, however, recently held in *Sheetz v. County of El Dorado* that legislative exactions are not categorically exempt from the exactions doctrine.[221] The Court did not resolve the issue of "whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development," nor did it address whether the exactions doctrine extends to permits conditioned on demands for money when no alternative request for physical land is made.[222]

If the exactions doctrine does extend to demands for money—at least those that are directly linked to an identifiable property interest—an argument may exist that land-use fines, like at issue in *Ficken*, are exactions, such that they are subject to heightened review under the Takings Clause itself (no analogizing required). At first glance, land-use fines seem indistinguishable from other types of land-use fees, as they also are conditional in nature: the homeowner is relieved of the land-use restriction so long as she is willing to pay the fine. I assume, however, as previously noted, that land-use fines, unlike exactions, are in fact at least partly punitive, such that the Excessive Fines Clause is implicated.[223] The similarities between land-use fines and exactions, however, provide further grounds for the Court's takings doctrine to inform its excessive fines doctrine.

ii. Exactions and Federalism Concerns

Members of the Court and scholars have both argued the exactions doctrine is inconsistent with federalism principles. In *Koontz*, Justice Kagan—joined by Justices Ginsburg, Breyer, and Sotomayor—forcefully dissented due to the federalism concerns raised by applying heightened

[221] 144 S. Ct. 893, 900–02 (2024).

[222] Id. at 902. Debate abounds as to whether the holding of *Koontz* extends to monetary obligations directly linked to private property ownership or extends only to those monetary obligations designed to "replace a physical exaction." See Saxer, supra note 203, at 111, 122, 127. Although this issue still remains unresolved after *Sheetz*, petitioner's counsel argued that demands for money that were directly linked to identifiable property interests fell within the scope of the exactions doctrine. Transcript of Oral Argument at 6, *Sheetz*, 144 S. Ct. 893 (No. 22-1074). However, Chief Justice Roberts and others suggested during oral argument that a taking may not occur where the exaction at issue involved only money, as opposed to money in lieu of an easement or other identifiable property interest. Id. at 7–9. This question's resolution is outside the scope of this Article.

[223] See Margaret Meriwether Cordray, Contempt Sanctions and the Excessive Fines Clause, 76 N.C. L. Rev. 407, 455–57 (1998) (arguing contempt sanctions are punitive such that the Excessive Fines Clause applies).

scrutiny to monetary exactions in the land-use context. Justice Kagan asserted that the majority's decision turned "a broad array of local land-use regulations into federal constitutional questions" and placed "courts smack in the middle of the most everyday local government activity."[224]

John Echeverria has similarly criticized *Koontz*, arguing that it is inconsistent with federalism values. According to Echeverria, "[a]ll of the values associated with federalism in the land use context are threatened by intrusive national legal rules constraining local policy options."[225] He observes how citizens can effectively engage in the democratic process to influence land-use decisions that directly impact their day-to-day lives and how, at the local level, more opportunities exist for citizens to voice their opinions.[226] Deference to state and local authorities "permits the development of different approaches to land use regulation and management that are responsive to the diverse values of different communities."[227]

Rick Hills has described the exactions doctrine as a "quixotic expedition to control land-use decisions far too numerous and fact-specific to be amendable to federal judicial policing."[228] "The problem is that many national rights involve a stew of messy inquiries that can loosely be lumped under the heading of 'policy-making.'"[229] This suggests that policing exactions is better left to states, which are better able to adopt different decentralized solutions that reflect differences in regional and political culture.[230]

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[224] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 635–36 (2013) (Kagan, J., dissenting).

[225] John D. Echeverria, The Costs of *Koontz*, 39 Vt. L. Rev. 573, 598 (2015).

[226] Id. at 597.

[227] Id.

[228] Rick Hills, Koontz's Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?, PrawfsBlawg (June 25, 2013, 3:41 PM), https://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html [https://perma.cc/TMP3-KXF9].

[229] Rick Hills, Bill Fischel on Koontz: Why Federalism Should Limit Enforcement of Takings Doctrine, PrawfsBlawg (Aug. 16, 2013, 12:50 PM), https://prawfsblawg.blogs.com/prawfsblawg/2013/08/bill-fischel-on-koontz-why-federalism-should-limit-enforcement-of-takings-doctrine.html [https://perma.cc/K632-L2TH].

[230] See id. ("The important point is that we should not let the glittering, abstract, and absolutist rhetoric of federal rights fool us into thinking that the underlying doctrines being enforced are the sorts of rules that normally should or will be implemented by federal judges. As a normative and predictive matter, federal takings doctrine always will be a minor sideshow in subnational landuse law—and a good thing, too."). Others have similarly recognized the tension between federalism and the Court's land-use decisions. See Matthew J. Cholewa &

These varied federalism arguments lose some of their force as applied to adjudicatory exactions. Adjudicatory decisions "represent not the considered judgment of those who live within the community, acting through their elected representatives, but rather the raw exercise of bureaucratic discretion."[231] The impact on democratic participation—a key federalism value—is lessened, as the close scrutiny of adjudicatory exactions is not of democratically enacted laws that represent the values and preferences of the community. Thus, in a sense, court review of adjudicatory exactions does not implicate Bickel's core concern of the Court acting as a counter-majoritarian institution and the related concerns of the *Lochner* era.

This is not to say that federalism concerns are altogether absent in the adjudicatory exactions context. Although not specific to exactions, federalism scholars, led by Heather Gerken, have recently argued for deference on federalism grounds to even local adjudicatory decision-making. Specifically, Gerken argues that democratic participation is wider than that reflected by majoritarian voting at the local, state, and federal levels and should extend to participation through local institutions consisting of non-elected members, including administrative boards and juries.[232] David Barron has similarly argued for federal courts to defer to local conduct even when adjudicatory in nature.[233]

Federalism "all-the-way-down" has some support in the Court's own opinions, as the Court has previously deferred to local school boards, which Barron has described as "deliberative, participatory entities, concerned with public interests distinct from the aggregated private preferences of the majority."[234] Indeed, the Court itself has observed that "local autonomy has long been thought essential both to the maintenance

Helen L. Edmonds, Federalism and Land Use After *Dolan*: Has the Supreme Court Taken Takings from the States?, 28 Urb. Law. 401, 402–03 (1996) (arguing that the Court's close scrutiny of land-use regulations in its exaction cases changes the relationship between the states and the federal government); Melvyn R. Durchslag, Forgotten Federalism: The Takings Clause and Local Land Use Decisions, 59 Md. L. Rev. 464, 473 (2000) ("[M]y argument is that more than other rights protecting provisions, when the Takings Clause is applied to local land use regulation, it must be tempered with a concern for federalism.").

[231] Adam J. MacLeod, Identifying Values in Land Use Regulation, 101 Ky. L.J. 55, 71 (2012–2013).

[232] Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 8, 21–22 (2010).

[233] David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 530, 557–59 (1999).

[234] Id. at 559.

of community concern and support for public schools and to quality of the educational process."[235] Further, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[236] As Barron explains, "[T]he local sphere is worthy of deference less because an abstract respect for majoritarian will demands it, or a respect for private suburban interests compels it, than because public educational excellence depends, at least in part, upon local community control."[237] Thus, federalism interests are at play at least to some degree with respect to both adjudicatory and legislative exactions.

C. The Justifications for Applying Heightened Scrutiny to Exactions

Despite the federalism arguments for not intruding upon state and local land-use decision-making, the Court's doctrine is now clear that heightened scrutiny applies to adjudicatory exactions and at least some legislative exactions.[238] The justifications for applying heightened scrutiny generally are more forceful as to adjudicatory exactions, but some categories of legislative exactions also warrant heightened review.

1. Adjudicatory Exactions

The application of heightened scrutiny to adjudicatory exactions is justified—despite federalism principles—due to concerns about: (1) government overreach, (2) the lack of political safeguards, and (3) singling out individual property owners to bear what should be public burdens. These concerns are also present with respect to discretionary fines, suggesting heightened scrutiny also should apply in that context as discussed in Part IV.

First, the Court extends heightened scrutiny to adjudicatory exactions due to its concern that local government will overreach out of self-interest when demanding exactions. In *Nollan*, the California Coastal Commission conditioned a permit to build a larger residence on beachfront property on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean

[235] Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).
[236] Id. at 742 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).
[237] Barron, supra note 233, at 559.
[238] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 618–19 (2013).

high-tide line.[239] The Court found no nexus existed between the government's purpose of visual access to the ocean from the roadway to the ability to traverse to and along the shorefront.[240] According to the Court, this lack of a nexus turned the permit condition into "an out-and-out plan of extortion."[241]

The Court's exactions doctrine thus relies on the "notion of ever-present bad faith on the [land-use] officials' part, which leads to the Court's consequent distrust of local government actions."[242] The Court believes that "government has an incentive to overreach in placing conditions on the approval [of a permit]," which increases the risk of government abuse as to exactions.[243] This concern about government overreach is consistent with public choice theory.[244] The Court has also indicated in other settings that where self-interest is at play, deference is inappropriate.[245]

The Court's approach as to exactions is a significant shift from its prior deferential approach to state and local government action in the land-use field more generally.[246] The Court views its role as one "defend[ing] landowners from constant overreaching by local officials" and has "insert[ed] itself as a monitor into the bargaining process between landowners and local governments."[247] And, the Court applies heightened scrutiny regardless of local officials' actual motives, finding that the risk of government abuse alone is sufficient to give rise to heightened scrutiny.[248] This seems in line with a more procedural approach, where states should generally be owed deference on matters of property except

[239] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).
[240] Id. at 837–39.
[241] Id. at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14 (N.H. 1981)).
[242] Selmi, supra note 166, at 337.
[243] Id. at 338.
[244] See supra Section II.B.
[245] See U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977) (explaining that complete deference to government is not appropriate in case involving a Contract Clause claim where "the State's self-interest is at stake" because a "governmental entity can always find a use for extra money"); United States v. Winstar Corp., 518 U.S. 839, 896 (1996) (plurality opinion) ("[S]tatutes tainted by a governmental object of self-relief" are those where the "Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."); id. at 898 ("The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence . . . .").
[246] Selmi, supra note 166, at 351, 368.
[247] Id. at 338.
[248] Id. at 350–51.

if "there is some reason to suspect that state actors have manipulated or unfairly interpreted existing rules."[249]

Because the exactions doctrine examines the fit between ends and means and is focused on "ferreting out bad government behavior," as opposed to measuring whether a regulation "is otherwise legitimate but burdensome enough to require compensation," some have argued that the exactions inquiry should be instead analyzed under the Due Process Clause.[250] Yet, even if viewed through a due process lens, the level of scrutiny provided for by the exactions inquiry would be "highly unusual," as it is "more searching than the usual 'rational basis' review" that would otherwise apply to such government actions.[251]

Viewing the Takings Clause as a check against government self-interest and the risk of overreach is not new. Joseph Sax, in his 1964 article *Takings and the Police Power*, argued that the key function of the Takings Clause was to provide a "bulwark against arbitrary, unfair, or tyrannical government."[252] According to Sax, compensation was due for losses caused by the government acting in its enterprise capacity by seeking to enhance its resources, as opposed to losses that were "incurred as a consequence of government acting merely in its arbitral capacity," that is, government seeking to mediate disputes between private interests.[253]

When government was acting in its enterprise capacity, it was acting "as a judge in its own case"—as a self-interested regulator.[254] In short, any "restraint and detached reflection which one expects from a legislature presiding over a contest between two private interests, and the consideration required before established interests are put aside, may well

[249] Maureen E. Brady, The Illusory Promise of General Property Law, 123 Yale L.J.F. 1010, 1032 (2023).

[250] Fennell & Peñalver, supra note 206, at 292–94, 320, 353–54.

[251] Id. at 293–94.

[252] See Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 64 (1964) [hereinafter Sax, Takings and the Police Power]. Sax later modified his theory, see Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 150 n.5 (1971), "but it remain[s] an influential way to think about the Takings Clause." Nestor M. Davidson, The Problem of Equality in Takings, 102 Nw. U. L. Rev. 1, 19 (2008); see also Carlos A. Ball, The Curious Intersection of Nuisance and Takings Law, 86 B.U. L. Rev. 819, 843 (2006) ("Sax himself later disowned the idea that the government always effects a taking when it acts in its enterprise capacity, presumably because the proposal called for an understanding of the Takings Clause that was more protective of private property interests than (the later) Sax thought prudent or necessary.").

[253] Sax, Takings and the Police Power, supra note 252, at 62–63.

[254] Id. at 65.

be feared to be wanting when government is called upon to implement its own projects."[255] He notes that a lack of restraint "may be greater when a self-interest is involved."[256] Another way of putting it: "It is the difference between legislators debating a typical controversial issue on which there are conflicting views and their deciding to enact a law that will double their own salaries."[257] Sax's theory seemingly applies directly to exactions, which involve government acting in both enterprise and arbitral capacities.[258]

Concern about government officials acting in their own self-interest also played a prominent role in James Madison's Federalist No. 10.[259] Madison, the author of the Takings Clause, recognized that representatives may legislate in ways that advance their own interests, as opposed to the public good, especially when it came to property.[260] Although Madison recognized the importance of local governments being primarily responsible for local decision-making, he also recognized that local governments could be particularly susceptible to acting on behalf of interests other than the common good and were prone to oppressing minorities.[261] Oppressive local decision-making could nevertheless be checked by federalism, as the larger could serve as a check on the smaller.[262]

Second, heightened scrutiny is also justified as to adjudicatory exactions due to the lack of political safeguards. The lack of political safeguards arises because adjudicatory exactions are demanded in the context of ad hoc proceedings by administrative bodies, as opposed to being enacted by legislative bodies.[263] "In a well-functioning democratic system, extensive political checks attend legislative enactments, and these

[255] Id.

[256] Id.

[257] Id.

[258] See Stewart E. Sterk, *Nollan*, Henry George, and Exactions, 88 Colum. L. Rev. 1731, 1738 (1988).

[259] See The Federalist No. 10, at 78–80 (James Madison) (Clinton Rossiter ed., 1961).

[260] See id. at 79–80; see also William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 783–84, 805–06 (1995) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1057 & n.23 (1992) (Blackmun, J., dissenting)).

[261] The Federalist No. 10, supra note 259, at 79–81, 83.

[262] See id. at 82–84.

[263] See Kent, Anti-Evasion, supra note 208, at 856–57 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)) (arguing the majority's decision in *Koontz* was likely motivated by its concern over a lack of political safeguards that would have otherwise prevented overreaching).

arguably make it less necessary (and indeed, inappropriate) to add intrusive judicial checks."[264] As the Supreme Court of California observed in *San Remo Hotel L.P. v. City & County of San Francisco*:

> [A] city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition in the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.[265]

Further, adjudicatory decisions are often made by executive branch personnel, rather than legislative officials who are directly elected and "are generally more accountable [to citizens] than [executive officials] who are appointed."[266]

Relatedly, because adjudicatory exactions are imposed on a case-by-case basis, they are individualized in nature, as opposed to applying generally to a specific class.[267] As Justice Robert H. Jackson observed in the equal protection context: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[268]

Finally, adjudicatory exactions pose the risk that property owners subject to exaction demands will be singled out to carry what should be

[264] Fennell & Peñalver, supra note 206, at 341.

[265] 41 P.3d 87, 105 (Cal. 2002); see Fennell & Peñalver, supra note 206, at 341 (discussing *San Remo Hotel*); Saxer, supra note 203, at 113–14 (arguing the Court's heightened scrutiny is justified to monitor adjudicative decisions, which "may go astray from the rule of law because they are adjudicated or negotiated through individualized, case-by-case decision-making").

[266] Bernard W. Bell, *Marbury v. Madison* and the Madisonian Vision, 72 Geo. Wash. L. Rev. 197, 229–32 (2003).

[267] See Fennell & Peñalver, supra note 206, at 324–25, 340; see also Saxer, supra note 203, at 132–33 (examining differences in state jurisprudence between uniform and individual zoning cases).

[268] Ry. Express Agency v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.").

public burdens borne by the public as a whole.[269] Indeed, Justice Scalia previously distinguished taxes from takings on the basis that takings result in singling out individuals to bear what should be public burdens.[270] According to Justice Scalia, the costs of regulatory burdens that fall on only a small number of persons are not always accounted for in the democratic political process, and the Takings Clause provides protection in such cases.[271] This is also consistent with a risk-regulation theory of constitutional doctrinal formulation where judicial review should be more searching if the political safeguards for enforcement of a particular constitutional principle are lacking.[272]

The concerns about government overreach, the lack of political safeguards, and singling out as to adjudicatory exactions justify heightened scrutiny even if federalism values would generally necessitate a position of deference. Indeed, despite highlighting the strengths of local governments, Gerken and Barron do not seem to argue for deference to adjudicative action where it infringes upon positive constitutional rights, as opposed to where it expands such rights. For example, Barron stresses that his arguments are not "a defense of a locality's right to engage in . . . constitutional nullification."[273] He further recognizes that "the recognition of local constitutionalism would not confer independent interpretive authority over the Federal Constitution on local governments" and that local government actions "would still have to accord with those constitutional norms that *are* judicially enforceable."[274] Somewhat relatedly, Gerken notes in passing that "it is perfectly acceptable for the national majority to play the Supremacy Clause card whenever it sees fit."[275] Thus, scrutinizing local government action implicating constitutional norms "is not inconsistent with a sincere belief in the positive potential of local governments."[276]

[269] See Eduardo Moisés Peñalver, Regulatory Taxings, 104 Colum. L. Rev. 2182, 2228 (2004) (noting that "ad hoc" exactions (i.e., adjudicatory) have a "greater potential for singling out individual property owners for unusually harsh treatment").

[270] Pennell v. City of San Jose, 485 U.S. 1, 21–22 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[271] Id. at 21–23.

[272] See Brannon P. Denning & Michael B. Kent, Jr., Judicial Doctrine as Risk Regulation, 82 Tenn. L. Rev. 405, 438–39 (2015).

[273] Barron, supra note 233, at 602–03.

[274] Id. at 601.

[275] Gerken, supra note 232, at 51.

[276] Justin Weinstein-Tull, Abdication and Federalism, 117 Colum. L. Rev. 839, 890 (2017).

2. Legislative Exactions

In *Sheetz*, the Court determined that legislative exactions are not categorically excluded from heightened scrutiny but declined to address whether more generalized permit conditions had to be tailored with the same degree of specificity as those conditions that target individual developments.[277] The arguments presented in *Sheetz* are useful in framing the issues that arise as to mandatory fines, as they are similar to legislative exactions.

Legislative exactions, like adjudicatory exactions, pose the risk of government overreach. Yet, federalism concerns play a more heightened role, as legislative exactions were subject to the political process and, thus, are more reflective of the values of the local community. Additionally, the concerns about singling out that arise as to adjudicatory exactions are not as significant as to legislative exactions generalized in nature. Even at the local level, exit and voice serve to limit government unfairness.[278] This is not to say that political process defects and the resulting singling out cannot occur with respect to legislative exactions—just that the risk is lessened.[279] Thus, overall, the federalism-based arguments for applying heightened scrutiny to adjudicatory exactions are stronger than those that apply to generalized legislative exactions.[280]

A different concern, however, arises as to at least some categories of legislative exactions: that the exaction is not tailored to the particular

[277] Sheetz v. County of El Dorado, 144 S. Ct. 893, 901–02 (2024).

[278] See Rose, supra note 86, at 1687–88 (noting that multiple scholars have argued that local governments are more prone to singling out individuals to carry what should be public burdens and unfairness, but suggesting that these arguments are largely overstated due to "exit" and "voice" constraints, which allow those who disagree with decision-making to exit a jurisdiction or to voice such disagreement at public meetings). But see Ilya Somin, Federalism and Property Rights, 2011 U. Chi. Legal F. 53, 58–61 (arguing that voice and exit constraints are overstated as to immobile property).

[279] Certain zoning decisions may appear legislative in nature, but in reality only impact a few. See Inna Reznik, Note, The Distinction Between Legislative and Adjudicative Decisions in *Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 260–61 (2000).

[280] Cf. Saxer, supra note 203, at 112–13 (arguing that heightened scrutiny should not be extended into the realm of legislatively enacted impact fees); Michael B. Kent, Jr., Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings, 51 Wm. & Mary L. Rev. 1833, 1864 (2010) [hereinafter Kent, Impact Fees] (observing that the "small and insular nature" of small government raises a "real danger" that the political process will fail to protect against excessive exactions regardless of whether legislative or adjudicative in character).

project at all because no individualized determination occurred.[281] During the *Sheetz* oral argument, the government conceded that at least some legislative exactions qualify for heightened scrutiny,[282] such that the Court's ultimate decision in *Sheetz* was unsurprising. The difficult question, however, is which legislative exactions qualify for this closer scrutiny—a question which the *Sheetz* Court declined to address.[283] This question is largely outside the scope of this Article.

The Justices did raise the possibility during oral argument that, where the legislature had divided property owners into narrow classes and set different fees for each class, judicial review would be of those general classifications, as opposed to a parcel-by-parcel, individualized review.[284] Further, Justice Barrett questioned whether, in such a case where the exactions were broken into specific categories and applied generally across such categories, a lower standard of review (e.g., rational basis review) could apply.[285] This approach still raises difficult line-drawing questions, however, as it is unclear when the categories would be properly drawn to perhaps trigger some form of lesser scrutiny.[286]

Overall, the treatment throughout the *Sheetz* oral argument was that legislative exactions may not be as problematic as adjudicatory exactions—at least where the regulatory framework was broken down into narrow categories as opposed to overly blunt and generalized exactions. The ultimate resolution of these issues remaining open after *Sheetz* thus has implications for mandatory fines, which are similar in nature to legislative exactions.

IV. APPLYING HEIGHTENED SCRUTINY UNDER THE EXCESSIVE FINES CLAUSE AND FEDERALISM'S MINIMAL ROLE

Looking to the exactions doctrine, I argue that the Court should apply heightened scrutiny when reviewing discretionary fines at the state and local level. Although respect for federalism has often led the Court to take a deferential approach to reviewing state and local action, the role

[281] Transcript of Oral Argument, supra note 222, at 4 (arguing that a generalized exaction "only amplifies the risk that the government hasn't tailored its exaction to a project's impacts").

[282] Id. at 51.

[283] *Sheetz*, 144 S. Ct. at 902.

[284] Transcript of Oral Argument, supra note 222, at 23–27, 38.

[285] Id. at 40–41.

[286] Id. at 40–41, 76–78.

federalism should play in the Court's excessive fines jurisprudence is relatively minimal. If anything, heightened scrutiny is more justified in the state and local government setting. Application of heightened scrutiny to fines would render many penalties unconstitutionally excessive and would be a meaningful change from the deferential approach currently applied.

The arguments for applying such heightened scrutiny to mandatory fines, however, are somewhat more complex. Federalism concerns are heightened there, and such fines are both generalized in nature and accompanied by political safeguards. Nevertheless, I suggest that certain mandatory fines may themselves be inconsistent with the Excessive Fines Clause. Finally, I propose that the current framework applicable to forfeitures should be revisited, in light of the arguments made as to discretionary and mandatory fines.

A. The Justifications for Applying Heightened Scrutiny to Discretionary Fines

Discretionary fines are common punishments with respect to both civil and criminal law. Like adjudicatory exactions, state and local discretionary fines raise concerns related to government self-interest, the risk of government overreaching, the lack of political safeguards, and singling out individuals to bear public burdens. These concerns, however, are significantly reduced at the federal level, such that heightened scrutiny may only be required as to state and local fines. Scholars have previously argued that federal courts should account for institutional differences between federal, state, and local governments in formulating doctrine.[287] Because of the broader institutional issues that arise generally at the state and local level, I ultimately conclude that heightened review should apply to state and local fines, as opposed to more deference on federalism grounds.[288]

[287] See Rose, supra note 86, at 1684, 1693 (suggesting that courts should place the focus of takings jurisprudence on differences between rulemaking bodies at the federal, state, and local level); Rosen, Tailoring, supra note 70, at 1556 (discussing the pros and cons of a "One-Size-Fits-All" approach).

[288] Justin Weinstein-Tull has explored whether deference to local courts furthers federalism values generally. He argues that "state courts do not promote the values of federalism as much as we thought and that the costs of relying on state courts are far higher than we thought." Justin Weinstein-Tull, The Structures of Local Courts, 106 Va. L. Rev. 1031, 1090 (2020) [hereinafter Weinstein-Tull, Local Courts]. He observes that "the problems that arise in local courts are widespread, varied, persistent, and deeply troubling." Id. at 1055.

The imposition of both civil and criminal fines often involves significant discretion by the decision-maker within a statutory framework—only rarely is a fine fixed for a certain offense.[289] The fine at issue in *Ficken v. City of Dunedin*, for example, involved significant discretion by the land-use board in the City of Dunedin.[290] In setting the fine, the board was to consider the following factors: (1) "[t]he gravity of the violation"; (2) "[a]ny actions taken by the violator to correct the violation"; and (3) "[a]ny previous violations committed by the violator."[291] After considering those factors, the board had discretion as to: (1) whether *any* fine would be imposed; (2) if so, the amount of the fine subject to the $500 statutory maximum; and (3) whether the fine would accrue each day.[292]

The City of Dunedin is not alone with respect to its fining practices—cities, towns, and counties across the United States confer similar discretion on administrative boards with respect to the setting of fines.[293]

[289] 36A Corpus Juris Secundum Fines § 11, Westlaw (database updated May 2024). Although often a statutory scheme provides adjudicators and courts with significant discretion, mandatory minimum and maximum penalties limit that discretion. Alec Schierenbeck, The Constitutionality of Income-Based Fines, 85 U. Chi. L. Rev. 1869, 1873 (2018).

[290] No. 21-11773, 2022 WL 2734429, at *3 (11th Cir. July 14, 2022); see Fla. Stat. § 162.09 (2018).

[291] Fla. Stat. § 162.09(2)(b) (2018).

[292] See id. § 162.09(1) (providing that an enforcement board "may order the violator to pay a fine"); id. § 162.09(2)(c) (providing that "[a]n enforcement board may reduce a fine imposed pursuant to this section").

[293] See, e.g., Town of Pawlet v. Banyai, 274 A.3d 23, 29 (Vt. 2022) (upholding $46,600 in fines for zoning violations relating to the construction of a firearms training facility and observing that the environmental division has broad discretion in setting a fine); Lent v. Cal. Coastal Comm'n, 62 Cal. App. 5th 812, 825, 856 (2021) (upholding California Coastal Commission's imposition of a $4,150,000 penalty due to landowners' refusal to remove a gate blocking public access to an easement owned by the Coastal Conservancy to provide public access to the coast); Duisberg v. City of Austin, No. 07-20-00171-CV, 2020 WL 6122951, at *2 (Tex. App. Oct. 16, 2020) (noting that the city had discretion to determine the amount of civil penalty assessed up to $1,000 per day); Moustakis v. City of Fort Lauderdale, No. 08-cv-60124, 2008 WL 2222101, at *2 (S.D. Fla. May 27, 2008) (rejecting an excessive fines challenge to $700,000 in fines—based on a $150 per diem fine that had accrued for fourteen years on a home worth $200,000—because a per diem fine was within the statutory range). A number of news stories also address such fines. See, e.g., Sona Waraich, Property Owners Sue Humboldt County for Improper Cannabis Fines, Enforcement, Times Standard (Oct. 5, 2022, 12:59 PM), https://www.times-standard.com/2022/10/05/property-owners-sue-humboldt-county-for-improper-cannabis-fines-enforcement/ [https://perma.cc/V6UA-X3W9] (discussing homeowners' challenge to $1,080,000 in fines for failure to tear down a barn used to grow cannabis prior to the homeowners' purchase of the property); Bob Segall, Indianapolis Family Faces Hundreds of Thousands of Dollars in Fines and Legal Bills Over Backyard Patio Dispute, 13 WTHR (May 12, 2023, 7:01 PM), https://www.wthr.com/article/news/investigati

State and local judges also often have significant discretion in imposing civil and criminal fines.[294]

The history of the Excessive Fines Clause suggests a special concern with discretionary fines, as government officials could impose them on their enemies to ruin them, and even to incarcerate them if they were unable to pay.[295] Fines also may prove more ruinous than forfeitures.[296] With respect to forfeitures, governments seize the property at issue, but they do not impose any new financial obligations on the offender, as fines do.[297] Abusive fining practices have devasting real-world consequences, often "forcing people to forgo necessities for themselves and their families, such as food, utilities, and housing payments."[298]

ons/13-investigates/indianapolis-family-faces-hundreds-of-thousands-of-dollars-in-fines-and-legal-bills-over-backyard-patio-dispute-code-permit-indianapolis-indiana/531-dd5568d9-d708-4949-a063-08d249867ac4 [https://perma.cc/WL74-LXUW] (discussing homeowners' challenge to fines for renovating an existing backyard patio without first obtaining the required permits); Brenda Schory, Campton Hills Says It Could Impose $22M Fine on Brian Larsen, Known for Christmas Light Show, Over 10 Alleged Zoning Violations, Kane Cnty. Chron. (Apr. 25, 2023, 5:34 AM), https://www.shawlocal.com/kane-county-chronicle/news/2023/04/25/campton-hills-says-it-could-impose-22m-fine-on-brian-larsen-known-for-christmas-light-show-over-10-alleged-zoning-violations/ [https://perma.cc/S5LE-W7YA] (discussing a city's warning of a fine as high as $22,225,000 for alleged zoning violations based on a resident's Christmas lights show).

[294] See, e.g., City of Philadelphia v. Okamoto, No. 51 C.D. 2019, 2020 WL 2048023, at *1, *5 (Pa. Commw. Ct. Apr. 29, 2020) (upholding a trial court's imposition of a total fine of $37,200 for violations relating to cleaning the premises of construction debris and issues with applying for building, electrical, and plumbing permits and noting that the trial court had discretion to impose a fine within the range of $150 and $2,000 per day); State v. Enderson, 804 A.2d 448, 454 (N.H. 2002) (observing that "[t]rial judges are vested with broad discretionary powers with regard to sentencing" and upholding imposition of $160,000 in fines for multiple counts of gambling, despite the defendant's arguments that the fine was disproportionate to his offense and beyond his capacity to pay (quoting State v. Stearns, 547 A.2d 672, 682 (N.H. 1988))); Johnson v. State, No. C9-02-703, 2002 WL 31111782, at *2 (Minn. Ct. App. Sept. 24, 2002) (noting that fines and restitution were left to the district court's discretion); State v. Kelley, No. 14-0186, 2014 WL 6977265, at *3 (Iowa Ct. App. Dec. 10, 2014) (addressing claim that court abused its discretion in requiring payment of $30,685 in costs, fines, surcharges, and restitution).

[295] United States v. Bajakajian, 524 U.S. 321, 354–55 (1998) (Kennedy, J., dissenting) (explaining that "[o]ne of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison").

[296] Buskey, supra note 144, at 428 (explaining that forfeitures, unlike fines, "do not impose a new financial obligation that the government may enforce prospectively by incarceration").

[297] Id.

[298] Id. at 416.

Discretionary fines also raise many of the same concerns as adjudicatory exactions—at least as to state and local fines.[299] First, fines, like exactions, often implicate government self-interest and the risk of overreaching. As detailed in Section II.B, government is often self-interested and prone to overreach, as such fines fund court and enforcement programs directly or contribute to the state or local general budget. State and local fines thus pose the risk that offenders will be fined beyond that needed to punish for the purposes of raising revenue.

As Justin Weinstein-Tull observes, "[l]ocal courts are keenly aware that their continued existence depends upon their funding source (or sources)."[300] Because many local courts are not funded by their states, they must raise money through the imposition of fines and fees on litigants.[301] Such "[a] single-minded focus on revenue generation can result in local-court systems that, through excessive monetary penalties, fail to administer justice fairly."[302] Such revenue pressures are simply not present with respect to federal criminal fines, which are generally paid into the Crime Victim Fund.[303]

Second, because discretionary fines are decided on a case-by-case basis outside of the legislative process, they largely lack political safeguards and the federalism benefits that flow from democratically enacted laws. Fines are generally imposed by state and local courts—either general-jurisdiction trial level courts or limited-jurisdiction courts, such as municipal and justice courts—or by administrative boards. These state and local courts and boards do provide opportunities for citizen involvement in government, but overturning them generally does not directly implicate the counter-majoritarian difficulty.

Deference to state and local courts when reviewing discretionary fines also often does not further other values of federalism because of the nature

[299] Christina Martin, who argued *Tyler v. Hennepin County* before the Supreme Court, has observed that the Court's exactions doctrine is calculated "[t]o protect applicants from excessive demands" and that the government violates the doctrine when it makes "excessive demands for property from permit applicants." Christina M. Martin, *Nollan* and *Dolan* and *Koontz*—Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More, 51 Willamette L. Rev. 39, 40 (2014). It makes little sense to apply one test for excessiveness in the takings context and a more deferential test for excessiveness in the excessive fines context, especially where the concerns underlying the exactions doctrine are the same as those implicated by fines.

[300] Weinstein-Tull, Local Courts, supra note 288, at 1060.

[301] Id. at 1051.

[302] Id.

[303] 34 U.S.C. § 20101(b).

of the adjudicatory bodies imposing such fines. Although theoretically state and local court and board decisions may further experimentation,[304] those benefits are speculative because the ultimate outcome of such decisions "are largely invisible to us," as "local-court [and board] opinions are unpublished."[305] Relatedly, it is difficult to determine whether such decisions advance local preferences, as opposed to the individual decision-maker's preferences, because decisions are often obscured from view.[306]

Moreover, these adjudicatory bodies also often lack expertise. Some states allow lay judges, those who do not have formal legal training, to serve as local-court judges.[307] At least twenty-six states allow lay judges in local limited-jurisdiction courts.[308] The U.S. Supreme Court has upheld this practice, but some evidence suggests, perhaps not surprisingly, that lay judges are "prone to ignoring the law."[309] Those appointed to land-use boards similarly may lack legal experience and may even be unaware of constitutional protections like the Excessive Fines Clause. Applying a presumption of constitutionality makes little sense when there is no indication that such bodies attempted to comply with the Excessive Fines Clause when imposing a fine.

Finally, discretionary fines pose an increased risk of singling out individuals to shoulder what should be public burdens. This occurs because state statutes often confer significant discretion on local judges and boards as to the amount to be imposed, and they provide little guidance as to the factors to be considered.[310] By contrast, federal judges imposing criminal fines are restrained by federal statutes and have the benefit of the U.S. Sentencing Commission's expertise, as ranges of fines are calculated pursuant to the Sentencing Guidelines.[311] The wide discretion often accorded local judges can implicate implicit biases, leading to significant procedural failure and abuse.[312]

[304] Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 634 (1981).

[305] Weinstein-Tull, Local Courts, supra note 288, at 1093.

[306] See id. at 1094–95.

[307] Id. at 1053.

[308] Id.

[309] Id. at 1054 (quoting Colin A. Fieman & Carol A. Elewski, Do Nonlawyer Justices Dispense Justice?, 69 N.Y. St. B.J., Jan. 1997, at 20, 20 n.2).

[310] See supra notes 293–94.

[311] See supra Subsection I.A.2.

[312] Weinstein-Tull, Local Courts, supra note 288, at 1105.

Indeed, exploitative fines to raise revenue have fallen "largely on the backs of minority and low-income communities least equipped to resist."[313] Ferguson, Missouri, is a prime example of a city with discriminatory and oppressive punishment practices, as it raised revenue through fines imposed for minor offenses, including "wearing saggy pants," "failing to sign up for a designated trash collection service," and, yes, uncut grass.[314]

The use of fines as a tool of oppression traces back to the Black Codes in the post-war South.[315] By imposing unpayable fines, state and local government officials were able to effectively re-enslave Black populations by convicting freedmen of vagrancy and then auctioning them off as contract laborers to white employers who then paid the fines.[316] Thus, it "quickly became clear to Congress that Southern states could not be trusted to respect the fundamental rights of their own citizens."[317] As one U.S. senator observed, "[t]hey deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."[318] To protect fundamental rights in the South, Congress crafted the Fourteenth Amendment. It ensured that states could not encroach upon those fundamental liberties set forth in the Bill of Rights.[319] Now that the Court has recognized that the Excessive Fines Clause is incorporated against the states, deferring to states on federalism grounds in the face of such self-interest and oppression would make a mockery of the protections the Clause provides.[320]

[313] Brianne J. Gorod & Brian R. Frazelle, *Timbs v. Indiana*: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?, 2018–2019 Cato Sup. Ct. Rev. 215, 217 (2019). In many cases, fines and forfeitures may even constitute "stategraft," involving illegal coercive resource extraction by state actors that exploits vulnerable populations. Bernadette Atuahene, A Theory of Stategraft, 98 N.Y.U. L. Rev. 1, 46 (2023).

[314] Gorod & Frazelle, supra note 313, at 242.

[315] Id. at 222.

[316] Id.

[317] Id. at 223.

[318] Id. (quoting Cong. Globe, 39th Cong., 1st Sess. 474 (1865) (statement of Sen. Trumbull)).

[319] Id. at 225.

[320] Leaving it to the states to enforce the Excessive Fines Clause is simply insufficient. Even prior to the incorporation of the Excessive Fines Clause, many states interpreted their own state constitutional excessive fines provisions to be identical to the Eighth Amendment. Id. at 239. This demonstrates state courts' reluctance to expand the protections past those set by the U.S. Supreme Court.

Differences between state and local governments, on the one hand, and the federal government, on the other, justify higher scrutiny for state and local fines than federal fines. Because of the Court's continued adherence to the congruence principle, however, if heightened scrutiny were to apply to state and local government, the Court would likely apply that same scrutiny to the federal government as well (although challenges may not arise as frequently).[321]

Heightened scrutiny in the context of fines imposed for land-use violations would also serve an important prophylactic role in ensuring that state and local governments comply with the Takings Clause in cases of blight. Specifically, since *Berman v. Parker*, the Supreme Court has found that condemnation of blighted property satisfies the "public use" requirement of the Takings Clause.[322] However, such condemnations can occur only if government pays just compensation to the landowners. Fine abuse in the land-use context can result in government avoiding payment of just compensation by imposing daily fines for various code violations, imposing a lien on the property for the total value of the fine, and foreclosing when a landowner fails to pay. The blight abuses that have occurred with respect to poor minority neighborhoods have been written about in detail.[323] Largely ignored, however, is how land-use fines contribute to the loss of property ownership in blighted areas and allow cities and towns to avoid the payment of just compensation for the property. Applying heightened scrutiny to land-use violations would ensure that fines (and the liens arising from them) do not become a way to circumvent the protections of the Takings Clause.

Thus far, I have focused on the parallels between exactions and fines. One difference between exactions and fines, however, is that exactions often impact property developers, whereas fines most often impact

[321] See supra Section I.B.

[322] 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . [T]here is nothing in the Fifth Amendment that stands in the way.").

[323] See, e.g., Ilya Somin, Controlling the Grasping Hand: Economic Development Takings After *Kelo*, 15 Sup. Ct. Econ. Rev. 183, 270 (2007) ("In reality, such condemnations often deliberately target poor and minority property owners for the purpose of benefiting politically powerful development interests and middle class homeowners who are expected to move in after the redevelopment process is completed.").

impoverished and disadvantaged individuals.[324] Continuing to accord heightened scrutiny only to exactions and not fines where the same concerns are at stake suggests that the Court is focused on wealth protection rather than the neutral application of constitutional principles.[325]

In arguing for heightened scrutiny as to fines, I am not suggesting that the Court's deferential review of sentences of imprisonment is sound. Rather, I argue only that different considerations inform the analysis regarding the level of scrutiny that should apply to review of fines versus sentences of imprisonment, such that the Takings Clause is a better analogue to the Excessive Fines Clause than the Cruel and Unusual Punishment Clause.[326] While outside the scope of this project, further exploration is necessary as to why less deferential review occurs in some contexts as to rights involving property than rights involving liberty.

Finally, the question remains—why look to exactions doctrine, as opposed to treating fines more like taxes? Taxes too involve the possibility of overreaching and government self-interest. Yet states have practically limitless power to tax, and courts are highly deferential as to a wide variety of taxes.[327]

Although I am not seeking to fully explore this issue, part of the explanation may be that the Takings Clause and the Excessive Fines Clause are both express provisions, whereas no similar constitutional limits apply to taxes. Further, the tax setting generally does not implicate the concerns applicable to discretionary fines and adjudicatory exactions related to the lack of political safeguards and singling out individuals to bear public burdens.

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[324] See infra Section IV.A; Timothy M. Mulvaney, Progressive Property Moving Forward, 5 Calif. L. Rev. Cir. 349, 366–69 (2014) (arguing for the consideration of identity—meaning the social, economic, and political needs of groups—in resource conflicts).

[325] Mulvaney, supra note 324, at 369 (questioning the Supreme Court's finding of unconstitutional coercion in the exactions context, which often involves developers and other owners of real estate, versus its finding of no unconstitutional coercion when a state agency conditioned receipt of aid to families with children on consenting to home visits by a welfare worker).

[326] Examples of profiting off of incarcerated individuals exist, however, including charging excessive fees for prison phone use, as well as imprisonment involving forced labor. Atuahene, supra note 313, at 44–46. In these respects, the arguments set forth herein for applying higher scrutiny to fines are directly applicable.

[327] See Peñalver, supra note 269, at 2198 (explaining that, "[s]ince the earliest days of the republic, the Court has consistently affirmed the virtually plenary power of the state to tax its citizens").

The singling-out principle as a way to distinguish certain takings, including adjudicatory exactions, and fines from taxes seems promising.[328] Under public choice theory, the issue with singling out individuals to bear public burdens by way of adjudicatory exactions or discretionary fines is that they are generally unable to politically organize to challenge such government action (and even if they were able to do so, the transaction costs would be too great).[329] Moreover, the taxpaying public will likely "not only tolerate such redistribution of public burdens [by way of exactions] but will desire and celebrate it."[330] By contrast, taxes either impact a significant number of citizens or otherwise impact organized interest groups that can protect themselves through the political process.[331]

B. The Doctrinal and Pragmatic Implications of Applying Heightened Scrutiny to Discretionary Fines

Applying heightened scrutiny to discretionary fines would have a limited impact on the Court's current precedent, as it has not yet specifically addressed the test applicable to fines, as opposed to forfeitures. However, it would have a significant impact with respect to how the lower courts currently review excessiveness challenges to discretionary fines. Indeed, under this approach, the fine imposed in *Ficken* for uncut grass, discussed in Part I, would be excessive.

Such scrutiny would not require overruling *Bajakajian*, as that case involved a mandatory forfeiture and did not directly address excessiveness in the context of fines. Fines—especially civil fines, which may accrue by the day—differ from forfeitures in multiple ways.[332] As one Eleventh Circuit judge observed, "[f]orfeitures in the context of

[328] Id. at 2219; see Kent, Impact Fees, supra note 280, at 1856 & n.109, 1873 (noting that monetary exactions, unlike taxes, generally impose burdens on one segment of society and are generally not imposed uniformly).

[329] Saul Levmore, Just Compensation and Just Politics, 22 Conn. L. Rev. 285, 306–07 (1990).

[330] Kent, Anti-Evasion, supra note 208, at 857, 871.

[331] Levmore, supra note 329, at 308. Special assessments, like taxes, are also subject to review that is more deferential than that accorded exactions. Christopher Serkin, Exacting Assessments: *Sheetz* and the Problem of Stategraft, 2024 Wis. L. Rev. 641, 650–52. Serkin has argued that courts should scrutinize more closely those assessments that are used inconsistently such that they create a risk of shifting extra costs to certain neighborhoods—in other words, those assessments that single out the few to shoulder public burdens. Id. at 660.

[332] See infra Section IV.C.

criminal proceedings, as in *Bajakajian*, are vastly different from civil fines . . . and to apply the same test to both would be to start our Excessive Fines Clause jurisprudence as it applies to civil fines on the wrong foot from the beginning."[333]

Courts applying heightened scrutiny to a discretionary fine would look at (1) whether the penalty is roughly proportionate to the offense at issue and (2) the offender's circumstances, as opposed to just applying the grossly disproportionate test. No presumption of constitutionality would apply to fines where the fine falls below the maximum set by the legislature.[334] Once a challenge to a fine was raised, the burden would be on the government to show that the penalty was roughly proportionate, as opposed to the offender having the burden of showing that the fine was grossly disproportionate.

In terms of the factors that should be considered in applying the rough proportionality test, I argue for a largely open-ended and fact-specific inquiry. This perhaps opens the door to criticism leveled at the gross disproportionality test—that it has failed to give "clear or meaningful guidance" about when a penalty is excessive.[335] Yet, as Wesley Hottot argues, the excessiveness standard "can be traced through centuries of Anglo-American law," but the standard has never "been reduced to strict factors, rigid formulae, or balancing tests."[336] The excessiveness inquiry requires courts "to focus on all the circumstances of a particular offense and a particular offender," including the punishments available, those already imposed, and the effect additional economic penalties will have on the offender and the community.[337] An open-ended test coupled with heightened scrutiny may ensure the Excessive Fines Clause serves as a meaningful protection, as opposed to proving purely hollow.

Importantly, the Court should still include within the inquiry evidence of community norms when considering the severity of the offense, such

[333] Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1326 (11th Cir. 2021).

[334] The elimination of the presumption of constitutionality by itself is likely to have a significant impact on the size of fines. As Adam MacLeod has observed, "[t]hough these presumptions are rebuttable, the legal presumption with which a court begins often disposes the issue." MacLeod, supra note 231, at 59. "Any ambiguity or uncertainty about who ought to prevail will be resolved in favor of the party that enjoys the presumption; thus the other party faces the significant challenge of convincing the court that its proposal is justified." Id.

[335] Gorod & Frazelle, supra note 313, at 242 (quoting David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 542 (2017)).

[336] Hottot, supra note 31, at 583.

[337] Id.

that diverse geographic and social values and needs can be considered. The Court also could account for any factors the legislature indicated should be considered in determining the severity of the offense, as well as the statutory maximum, such that what constitutes an excessive fine may still vary somewhat by jurisdiction. Thus, unlike the Court's current cruel and unusual punishment doctrine, the proposed approach would not compare the fine to those imposed in other jurisdictions because it would not have the goal of uniformity as to fines between jurisdictions.[338] Rather, the proposed approach seeks closer review by appellate bodies of discretionary fines in light of the local conditions in which they were imposed—similar to the Court's exactions doctrine, which also does not require any cross-jurisdictional analysis.

The Court has suggested that the financial impact of a fine may be relevant to assessing whether the penalty is excessive.[339] Lower courts, however, remain split on whether an offender's ability to pay a fine is a factor to be considered in assessing whether a fine is grossly disproportionate.[340] Ability to pay should be considered, as multiple scholars have persuasively argued for its inclusion in any review for

[338] Some scholars have argued for constitutional uniformity in the Fourth Amendment context, achieved by courts developing a national law of property and torts to assess if a person has suffered an unlawful search and seizure. See, e.g., Danielle D'Onfro & Daniel Epps, The Fourth Amendment and General Law, 132 Yale L.J. 910, 917 (2023); Richard M. Re, The Positive Law Floor, 129 Harv. L. Rev. F. 313, 334 (2016). Maureen Brady, however, has argued against such uniformity and reliance on general law (as opposed to positive law) and has drawn support for her arguments by examining similar arguments that arise in the takings context. She argues against uniformity in property law for purposes of takings analysis because property law has long been viewed as local, and a general law standard of property law would stifle experimentation between the states. Brady, supra note 249, at 1050, 1053. Yet, as Brady observes, deference to local practice need not mean "blind acceptance." Id. at 1024. Likewise, here, the majority of civil and criminal fines are largely local in nature, and jurisdictions vary with respect to local conditions and preferences, such that certain offenses may call for harsher punishment than others. Consideration of such local conditions and the range set by the legislature should thus be a part of the analysis, but that does not mean that a reviewing court must blindly defer to the lower body that imposed the fine.

[339] See Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019) (emphasizing the principle rooted in Magna Carta that economic sanctions should "not be so large as to deprive [a person] of his livelihood" (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989))).

[340] Compare Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019) (considering the ability to pay in the excessiveness analysis), with State v. Izzolena, 609 N.W.2d 541, 551 (Iowa 2000) ("The manner in which the amount of a particular fine impacts a particular offender is not the focus of the test.").

excessiveness.[341] Takings jurisprudence could again provide a useful framework for considering when the financial impact of a fine on an offender renders a fine excessive without regard to other factors. When an offender lacks the ability to pay a fine, such a fine could be treated as categorically excessive, similar to takings doctrine providing that a regulation that eliminates all beneficial use of property constitutes a categorical taking.[342] In other cases, where the evidence suggests the offender could technically pay, the burden on the offender should be considered, and the burden could reach a point sufficient to render the fine excessive based on burden alone, similar to a regulatory takings claim that requires a taking to be found when a regulation goes "too far."[343]

Application of the heightened scrutiny proposed here can be illustrated with *Ficken*, in which the homeowner was fined $28,500 for uncut grass.[344] That fine was imposed by an adjudicatory board that had significant discretion and was self-interested (in the sense the city would receive the fine directly as revenue).[345] Application of heightened scrutiny demonstrates that the fine was excessive, for several reasons.

First, the city failed to show any actual harm was caused by the violation—just a risk of harm related to attracting snakes and vermin and potential lowering of property values of nearby homes.[346] Indeed, some evidence shows that failing to cut grass is beneficial for the environment, with the "No Mow May" grassroots movement urging landowners to avoid cutting lawns to allow grass and wildflowers that provide habitats and food for early-season pollinators to flourish.[347]

[341] See, e.g., Beth A. Colgan & Nicholas M. McLean, Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After *Timbs*, 129 Yale L.J.F. 430, 432–33 (2020); Colgan, Reviving Excessive Fines, supra note 43, at 319–36; Colgan, Debtors' Prison, supra note 24, at 46–76.

[342] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (setting forth the categorical rule that compensation is required when a regulation restricts all beneficial use of land).

[343] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071–72 (2021) (observing that when a regulation goes "too far" it will constitute a taking and that the *Penn Central* balancing test determines when a regulation constitutes a taking (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).

[344] Ficken v. City of Dunedin, No. 21-11773, 2022 WL 2734429, at *1 (11th Cir. July 14, 2022).

[345] See id.

[346] Id. at *4.

[347] See, e.g., Nidhi Sharma, 'No Mow May' Encourages Homeowners to Help Bees by Letting Their Lawns Grow, NBC News (May 11, 2023, 2:43 PM), https://www.nbcnews.com/science/science-news/no-mow-may-encourages-homeowners-help-bees-letting-lawns-grow-rcna84001 [https://perma.cc/PUT4-22JL]. However, some have called "No Mow May" a

Second, the city imposed the maximum fine the statute permitted for a repeat offense (as Ficken's was)—$500 for each day for uncut grass—despite the Florida statute giving the city broad discretion as to where to set the fine, with no mandatory minimum fine.[348] That maximum $500 fine applied to *all* municipal code violations, not just a failure to cut one's grass.[349] These code violations vary in severity and include more dangerous or damaging offenses like discharging weapons on city property and window peeping.[350] Thus, although a maximum $500 fine might be appropriate for one of those offenses, a failure to mow one's lawn would seemingly not justify the same amount.

Third, the amount of the fine actually imposed was disproportionate to the conduct of failing to cut grass. Although the daily fine ($500) may not seem unreasonable, considering only the daily amount ignores the magnitude of the actual fine, which reflects the total for the number of days involved. That latter amount—here, $28,500—was the fine assessed and the amount of the lien that attached to the property.[351] The opinion did not reveal that the city board gave any consideration to reduce that aggregate amount despite discretion provided in the statute.[352] This example helps show that even where each individual offense bears only a small punishment, when they are brought together and one punishment for the whole is inflicted, the resulting fine may be excessive.[353] Thus, any fines should be reviewed in the aggregate—not on a day-by-day basis.

"terrible" idea. Critics claim that avoiding mowing in May will lead animals to create temporary habitats for their nests in the grass, which will be destroyed when people mow their grass come June. Therefore, an "all-or-nothing" approach is better. Jessica Damiano, No Mow May? Good Intentions, Bad Approach, Critics Say, AP News (May 7, 2023, 12:13 PM), https://apnews.com/article/gardening-no-mow-may-lawns-6aa1669b9e9bb5b5d8ea671c44d186f2 [https://perma.cc/67V3-X6D7].

[348] See *Ficken*, 2022 WL 2734429, at *1, *4; Fla. Stat. § 162.09(1)–(2) (2018).

[349] See *Ficken*, 2022 WL 2734429, at *1; Fla. Stat. § 162.09(1)–(2) (2018).

[350] Dunedin, Fla., Code of Ordinances, ch. 50 (2014), https://library.municode.com/fl/dunedin/codes/code_of_ordinances?nodeId=SPAGEOR_CH50MIOF [https://perma.cc/69F5-S3KZ].

[351] See Hipler, supra note 150, at 695–96 (explaining that a per diem fine ultimately merges into one aggregate fine and lien once the violation has been remedied).

[352] See Fla. Stat. § 162.09(1)–(2) (2018).

[353] Cf. O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) ("The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.").

Finally, and most importantly, Ficken could not pay the fine, which resulted in the initiation of foreclosure proceedings as to the lien on his home.[354] Despite the value placed on homeownership, reflected in homestead exemptions and the like,[355] the board did not seem to consider Ficken's capacity to pay.[356] As one scholar has observed, fines for code violations can "become crushing debts against real property owners whether the fines and liens apply to homestead or non-homestead real property, making it difficult and virtually impossible for many real property owners to afford fines absent a reduction of the fines" by either the adjudicative body or, ultimately, a court.[357]

In arguing for heightened scrutiny as to fines, I am not arguing for the application of the unconstitutional conditions doctrine upon which the Court has stated the exactions doctrine is based.[358] The concern at issue as to fines is not about government leverage to obtain the waiver of a constitutional right. Rather, the question is simply whether the right to be free of excessive fines was directly violated. To determine if a fine was excessive—more than needed to punish—the Court should adopt a test similar to that used in the exactions context. In the fines context, the rough proportionality test would ensure that the government is not seeking to extract money under the guise of punishment—similar to the Court's concern with respect to exactions about imposing conditions on land just to obtain property without paying just compensation.

Applying such heightened scrutiny to state and local fines may raise pragmatic concerns similar to those raised in Justice Kagan's dissent in *Koontz v. St. Johns River Water Management District*.[359] State and local fines are extremely common. In 2015, 86.2 million cases were filed in local courts—46.4 million were traffic cases and 18.1 million were

[354] *Ficken*, 2022 WL 2734429, at *2.

[355] D. Benjamin Barros, Home as a Legal Concept, 46 Santa Clara L. Rev. 255, 276 (2006) ("Homestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control are just some of the instances where debtor-creditor laws and landlord-tenant laws give more protection to the possessory interest in the home than the law ordinarily gives to the possession of other types of property."); Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 958–59 (1982) (theorizing that homes are constitutive of personhood).

[356] *Ficken*, 2022 WL 2734429, at *1–2.

[357] Hipler, supra note 150, at 690.

[358] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604–05 (2013).

[359] Id. at 626–27 (Kagan, J., dissenting) (explaining that the majority's approach "threatens significant practical harm" and diminishes "the flexibility of state and local governments to take the most routine actions to enhance their communities").

criminal cases (many of which involved fines).[360] Federal courts seem ill-equipped in terms of resources to handle any influx of excessive fines claims that would follow from requiring heightened scrutiny of fines.[361] Further, such heightened review seems to thrust federal courts into the position they have repeatedly stressed they do not want: that of a national zoning board (albeit examining the punishment imposed for violations of the ordinances on the back end, rather than scrutinizing the imposition of land-use ordinances on the front end).[362]

Federal courts, however, will not hear the majority of excessive fines claims (although they will hear some, as *Ficken* illustrates). Rather, state courts will be primarily responsible for such claims. Abstention doctrines, including both *Younger* abstention[363] and the *Rooker-Feldman* doctrine[364]—which limit the state court cases that federal courts can hear—will generally limit federal court review of fines. This is consistent with federal courts' practice of abstaining in land-use cases, motivated by "concerns for federalism as well as judicial administration, the federal courts since the mid-twentieth century have directed a good many land use cases involving both legal and equitable relief to state courts under abstention and related doctrines."[365] Relatedly, although takings cases can

[360] Weinstein-Tull, Local Courts, supra note 288, at 1042–43, 1051; Wilson Ctr. for Sci. & Just. and Fines & Fees Just. Ctr., Debt Sentence: How Fines and Fees Hurt Working Families 11 (May 2023), https://wcsj.law.duke.edu/wp-content/uploads/2023/05/Debt_Sentence_FFJC-Wilson-Center-May-2023.pdf [https://perma.cc/BZ3K-CKLN].

[361] Federal courts hear far fewer cases—in 2015, only 343,176 cases were filed in federal court. Weinstein-Tull, Local Courts, supra note 288, at 1043.

[362] See, e.g., Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465–66 (7th Cir. 1988) (observing that substantive due process does not extend to erroneous zoning decisions but noting the difficulties in recognizing when it does impose limits on government zoning decisions).

[363] Ingram v. County of Wayne, No. 20-cv-10288, 2021 WL 4479398, at *4–6 (E.D. Mich. Sept. 30, 2021) (discussing *Younger* abstention, which forbids federal courts "from staying, enjoining, or deciding a matter pending in state court proceedings except under special circumstances," and concluding that *Younger* abstention was inapplicable in the context of a challenge to a forfeiture where the forfeiture proceedings had completed (citing Younger v. Harris, 401 U.S. 37, 41 (1971))), *aff'd*, 81 F.4th 603, 606 (6th Cir. 2023), *abrogated by* Culley v. Marshall, 144 S. Ct. 1142, 1153 (2024).

[364] Kelly v. Town of Southold, No. 21-cv-03215, 2023 WL 6050494, at *6–7 (E.D.N.Y. June 7, 2023) (first citing Rooker v. Fidelity Tr. Co., 263 U.S. 413, 415–16 (1923); and then citing D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 463, 476 (1983)) (dismissing plaintiff's excessive fines claim due to application of the *Rooker-Feldman* doctrine, which provides that cases filed in federal court that function as de facto appeals of state court judgments are jurisdictionally barred).

[365] See Ann Woolhandler & Julia D. Mahoney, Federal Courts and Takings Litigation, 97 Notre Dame L. Rev. 679, 710–11 (2022).

now be filed directly in federal court without first pursuing state compensation in state court,[366] scholars have argued that state court resolution of exactions cases is more appropriate due to the "routine nature" of such claims.[367]

Application of the heightened standard would often be applied by the state court reviewing the fine. Not all fines would be challenged, as appeal rates still remain relatively low in the state courts.[368] Yet, state appeals play a critical role with respect to shaping legal norms and ensuring respect by lower courts for the protections provided by the Excessive Fines Clause.[369] Although local courts and boards may have a direct interest in the fine amount (because it funds their program or will be distributed to their locality's general fund), state appellate courts lack such a direct interest in the amount.[370] In about half of the states, they also are more immune from political pressures, as they are appointed by the governor, rather than through direct election.[371]

Although state courts should primarily be responsible for review of excessive fines claims, the U.S. Supreme Court still plays a critical role in crafting the doctrine the state courts will apply. As of yet, lower courts have uniformly taken a deferential approach to the review of fines, relying on the Court's opinion in *Bajakajian v. United States*.[372] If the Clause is to have any teeth at all, the Court must provide some guidance as to the meaning of the Clause with respect to fines specifically.

Ultimately, however, full enforcement of the Excessive Fines Clause will only occur with the help of state and local legislative bodies—the Court alone cannot fully ensure the protections of the Excessive Fines Clause are realized. Some change has already begun to happen, with state

[366] Id. at 680.

[367] See id. at 710.

[368] See Weinstein-Tull, Local Courts, supra note 288, at 1072–75.

[369] Id. at 1072 (noting that appeals generally allow the "'upper-level courts to correct[] legal and factual errors' of the local courts below, 'encourag[e] the development and refinement of legal principles; increase[e] uniformity and standardization in the application of legal rules; and promot[e] respect for the rule of law'" (quoting Cassandra Burke Robertson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1225 (2013))).

[370] Id. at 1060–61.

[371] Diane M. Johnsen, Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection, 53 San Diego L. Rev. 829, 832 (2016) (noting that in twenty-six states the governor appoints appellate judges; the legislatures in two states select appellate judges; and in the remainder of the states, voters elect appellate judges).

[372] See supra notes 58–61 and accompanying text.

legislatures beginning to cap how much revenue can come from fines and fees.[373] The Court can accelerate that change and promote the importance of the Clause by recognizing that a fine is not immune from constitutional scrutiny merely because it falls below a statutory maximum.[374]

C. The Tension Between Mandatory Penalties and the Excessive Fines Clause

Federalism plays a stronger role in the mandatory fines context (just as it does with legislative exactions), which could weaken the argument for application of heightened scrutiny. Nevertheless, mandatory fines, at least in their current form, may be inconsistent with the Excessive Fines Clause, which seemingly requires that all fines be individualized to account for the circumstances of the offense and the offender. Similar issues arise with respect to forfeitures, which also often fail to account for individualized circumstances.

Mandatory fixed fines directly implicate the federalism principles underlying the Court's cruel and unusual punishment jurisprudence (primarily respect for democratically enacted laws), as well as scholarly criticism of the Court's exactions doctrine to the extent it extends to legislative action.[375] Mandatory fines, like legislative exactions, are generalized in nature (in that they involve a set amount that applies to anyone who commits a given offense).[376] Mandatory fines also are often set by statutes enacted by legislative bodies and are thus generally accompanied by political safeguards that mitigate to a degree the risk of

[373] Notably, Alabama recently capped the amount of a city's operation budget that can come from traffic ticket fines and penalties to ten percent and also required municipalities to report to the state the amount collected from fines and fees and how this money is spent. Heather Gann & Mary Sell, Municipal Court Fine Reporting, Fee Revenue Cap Bills Pass Legislature, Ala. Daily News (Apr. 12, 2022), https://aldailynews.com/municipal-court-fine-reporting-fee-revenue-cap-bills-pass-legislature/ [https://perma.cc/9XTM-LPLC]. This is a small step, but it is in the right direction.

[374] Kenneth Ward, Alexander Bickel's Theory of Judicial Review Reconsidered, 28 Ariz. St. L.J. 893, 912–13 (1996) (noting that *Brown v. Board of Education*, 347 U.S. 483 (1954), "galvanized and legitimized the civil rights protests of the 1950's and the 1960's" and that, through *Brown*, "the Court was also able to activate democratic processes that expanded society's moral consensus because it demanded that political institutions represent the interests of the subordinated minority").

[375] See supra Section II.A; Subsection III.B.2.

[376] Examples of statutes setting mandatory fines abound. See, e.g., Commonwealth v. Ishankulov, 275 A.3d 498, 500, 506–07 (Pa. Super. Ct. 2022) (rejecting excessive fines challenge to a mandatory fine of $10,200 for violating the state's Restrictions of Use of Highways and Bridges statute).

arbitrariness often posed by discretionary fines (which are imposed on a case-by-case basis similar to adjudicatory exactions).[377]

Yet, political safeguards can certainly fail in the fines context—especially for disadvantaged groups who may lack the economic capacity to exit a jurisdiction or a voice in legislative processes.[378] In the takings context, Carol Rose has argued that the level of scrutiny should vary based on whether property owners have sufficient opportunities for exit and voice, such that unfairness is adequately constrained.[379] A process-based approach to mandatory fines that examines whether the subjects of the fines were adequately represented in the political process when determining the level of scrutiny is one possible doctrinal solution.[380]

Yet, even where no process defects exist, generalized legislative fines may impose an even greater risk of disproportionality between the fine and individual circumstances than discretionary fines. If heightened scrutiny were only to apply to discretionary fines, this could result in government entities avoiding challenges to fines by relying more frequently on mandatory fines that wholly fail to account for the individual circumstances of the offense and the offender.[381]

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[377] See supra Subsection III.C.1 (discussing political safeguards). Political safeguards, however, may be weakened when the mandatory fines are set by administrative agencies. See, e.g., Prince v. City of New York, 966 N.Y.S.2d 16, 22 (N.Y. App. Div. 2013) (discussing a $2,000 mandatory administrative fine for unauthorized removal of residential recyclable material using a motor vehicle).

[378] See Fissell, supra note 76, at 528–29, 548, 555, 560 (discussing how disadvantaged groups may be unable to "vot[e] with [their] feet" by leaving an objectionable jurisdiction and how community views may reflect privileged over disadvantaged voices).

[379] Rose, supra note 86, at 1687–88.

[380] Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1073 (1980) (explaining process-based theories as premised on the concept that "governmental action that burdens groups effectively excluded from the political process is constitutionally suspect"). Constitutional theory has long looked to footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), for the idea that constitutional law should seek to protect groups that are unprotected by the political process. Fissell, supra note 76, at 557–58; see also Sanford Levinson, McCulloch II: The Oft-Ignored Twin and Inherent Limits on "Sovereign" Power, 19 Geo. J.L. & Pub. Pol'y 1, 15 (2021) (noting that state and local entities are prone to unfairness with respect to taxes that target those who live outside of the jurisdiction, such as the hotel tax). The Court, however, has long resisted such an approach. See Aaron Tang, Rethinking Political Power in Judicial Review, 106 Calif. L. Rev. 1755, 1759 (2018).

[381] Timothy Mulvaney made a similar argument in the context of exactions, noting that "limiting heightened scrutiny to administrative exactions could prompt government entities to avoid takings litigation by increasing reliance on the relative safe haven of legislative exactions, even where conditions on the ground seemingly warrant an administrative response." Timothy M. Mulvaney, Legislative Exactions and Progressive Property, 40 Harv.

As Chief Justice Castille of the Supreme Court of Pennsylvania wrote in a dissent, "mandatory [penalties] are automatic, indiscriminate, and blunt provisions that deny trial courts the ability to calibrate punishment to correspond to a defendant's actual criminal conduct and circumstances."[382] He further highlighted the observation of a former federal prosecutor during the 1980s crack epidemic that "these types of sentencing provisions transform judges into 'mere automatons' permitted only to mechanically impose standardized and arbitrary sentences."[383] Beth Colgan, who highlighted Justice Castille's dissent as "noteworthy," observed that "[e]conomic sanctions are insidious in part because they often are assessed with little to no attention paid to the defendant's circumstances, including the extraordinarily severe consequences that often result for individuals, their families, and society at large."[384]

Because of these concerns, it may be that certain mandatory fines themselves are fundamentally inconsistent with the Excessive Fines Clause. In other words, at least as to certain offenses, the Clause may demand that fines be individualized in nature.[385] Nicholas McLean suggested just that following his in-depth and thoughtful study of the original meaning of the Excessive Fines Clause.[386] McLean wrote, "Once

Env't L. Rev. 137, 156 (2016); see also Kent, Anti-Evasion, supra note 208, at 866–67 (noting that exempting monetary exactions from *Nollan*/*Dolan* scrutiny would have encouraged the government to demand money rather than land simply to escape heightened scrutiny).

[382] Commonwealth v. Carela-Tolentino, 48 A.3d 1221, 1227 (Pa. 2012) (Castille, C.J., dissenting).

[383] Id. (quoting David M. Zlotnick, The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion, 57 SMU L. Rev. 211, 212–15 (2004)).

[384] Colgan, Reviving Excessive Fines, supra note 43, at 280–81.

[385] And although many federal and state courts have found that ability to pay is a factor to be assessed when determining excessiveness, some statutes prohibit consideration of ability to pay. Schierenbeck, supra note 289, at 1873–74. But see Melissa Ballengee, *Bajakajian*: New Hope for Escaping Excessive Fines Under the Civil False Claims Act, 27 J.L. Med. & Ethics 366, 371–72 (1999) (noting that *Bajakajian* still provides "courts with enormous discretion to weigh the seriousness of the offense against the size of the fine," and "[t]his discretion releases courts from the mandatory per offense fine").

[386] Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 900 (2013). William Berry has recently argued for individualized sentencing under the Cruel and Unusual Punishment Clause. His arguments suggest that the Court may need to revisit the constitutionality of mandatory penalties under the Eighth Amendment more generally. See William W. Berry III, Unusual Deference, 70 Fla. L. Rev. 315, 331–32 (2018); William W. Berry III, Individualized Sentencing, 76 Wash. & Lee L. Rev. 13, 65–66 (2019). In light of the Court's holdings in its individualized sentencing cases, this Article argues for an expansion of these principles to all felony cases. Specifically, the seriousness of the deprivations warrants individualized consideration.

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."[387]

If that understanding of the Clause is correct, then courts should accord no special deference in reviewing mandatory fines that fail to account for individualized circumstances. Deference to majoritarian legislative action in such circumstances ignores that the Constitution itself is anti-majoritarian.[388] It demands protection of certain rights—even when those rights are being infringed by a law adopted through the proper processes with no political process defects present.[389] Thus, a judge's role is to protect individual rights from majoritarian influences.[390] That is not the judge being counter-majoritarian; that is the judge enforcing the Constitution.[391]

Requiring individualized, discretionary punishment in each case would avoid the pitfalls associated with generalized provisions that fail to account for an offender's individualized circumstances. Yet, as discussed at length, individualized punishment still poses risks of arbitrariness (due to the risk of overreaching, the lack of political safeguards, and singling out). Thus, if all punishment were required to be discretionary (i.e., individualized), this would seemingly require close scrutiny of *all* fines—an unworkable proposition.

There may, however, be a middle ground. Specifically, it may be possible to create a legislative scheme setting forth a statutory fine schedule that divides offenses into various classes and provides for different fines based on income, such that penalties are individualized to an extent. The scheme would generally not provide for individual decision-makers to vary from this scheme except where factors not accounted for by the scheme existed. The risk of overreach would be significantly lowered from the risk currently posed by regimes such as that at issue in *Ficken*.

This would be a difficult task, but it is not necessarily an impossible one. Indeed, federal statutes coupled with the U.S. Sentencing Guidelines

[387] McLean, supra note 386, at 900.

[388] Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 74–75 (1989).

[389] Id. at 75–76.

[390] Id.

[391] Id. at 76–77.

already have largely accomplished such a framework.[392] What is needed is for a similar scheme to apply at the state and local level and reach civil as well as criminal offenses. Perhaps this could be accomplished through the creation of model legislation with states able to modify provisions as needed based on their voters' own unique needs and values. Notably, the Court has already begun considering the scrutiny that would apply to such a scheme in the legislative exactions context, as such a framework was discussed during oral argument in *Sheetz v. County of El Dorado*.[393] The suggestion arose that, provided the categories were narrowly drawn, individualized scrutiny of each exaction may not be required.[394] Thus, such a framework may be the solution to the constitutional issues posed by fines, as well as exactions. Outside of such a framework, however, close scrutiny would be required.

To be sure, difficult line-drawing problems would exist with respect to dividing such classes.[395] Further, creating such a scheme would take time, political will, and resources often not available to state legislators.[396] This is likely the reason legislatures so often simply provide for a wide range without delineating between gradients of the offense level—so that lower-level decision-makers can exercise discretion to ensure the penalty fits the offense.[397] I do not seek to address all of the nuances of such a proposal here—only to suggest that there may be a way to craft a framework that removes some of the concerns inherent to the fines schemes that currently exist at the state and local level.

Thus far, the discussion has focused on fines, as *Bajakajian* addressed excessiveness in the forfeiture context. Yet, the *Bajakajian* standard for forfeitures may also require revisiting. Forfeitures also often serve as a source of government revenue and thus implicate concerns of overreach

[392] See 18 U.S.C. §§ 3551–3557, 3571; see also U.S. Sent'g Guidelines Manual, ch. 1, pt. A.2 (U.S. Sent'g Comm'n 2023) (explaining the role of the Sentencing Guidelines).

[393] Transcript of Oral Argument at 23–27, 38, Sheetz v. County of El Dorado, 144 S. Ct. 893 (2024) (No. 22-1074).

[394] See supra Subsection III.C.2.

[395] See id.

[396] Charles W. Tyler & Heather K. Gerken, The Myth of Laboratories of Democracy, 122 Colum. L. Rev. 2187, 2199–2201 (2022) (setting forth the challenges facing state legislatures in enacting new legislation).

[397] Heather K. Gerken, Lecture: Exit, Voice, and Disloyalty, 62 Duke L.J. 1349, 1363 (2013) ("Central decisionmakers must give some discretion to lower-level decisionmakers to interpret and implement the majority's decrees.").

and arbitrariness.[398] Although states have enacted statutory reforms related to forfeiture abuse, these efforts have largely fallen short due to the "powerful financial incentives for law enforcement to continue to employ the practice."[399]

Although the forfeiture in *Bajakajian* was mandatory upon conviction,[400] forfeitures differ from fines, as the dollar amount is dependent on the value of the property seized, as opposed to any range set by statute.[401] This means that the legislature, in enacting a forfeiture provision, did not exercise its judgment as to whether the value of the property was proportional to the offense. Courts thus far, however, have typically compared the value of the property forfeited to the maximum fine that can be imposed for the underlying offense—such that forfeitures involving property exceeding the statutory maximum fine are often found unconstitutional.[402] Thus, challenges to forfeitures to date have been more successful than with respect to challenges to fines. If state and local governments modified statutory schemes to account more closely for differences between offenses and financial circumstances, this would, indirectly, impact the excessiveness inquiry as to forfeitures. Because the statutory maximums would more closely approximate the circumstances of the offense and the offender, more forfeitures would likely be found excessive.

Currently, law enforcement and prosecutors exercise significant discretion both in deciding which property to seize and even whether to commence forfeiture proceedings.[403] This discretion is particularly

[398] Gorod & Frazelle, supra note 313, at 216–17 ("Particularly at the state and local level, forfeiture has become a cash cow, a tool used to fill the gaps of declining law-enforcement budgets without formally raising taxes.").

[399] David Pimentel, Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?, 25 Geo. Mason L. Rev. 173, 175 (2017).

[400] See United States v. Bajakajian, 524 U.S. 321, 325, 328 (1998).

[401] Colgan, Burdens, supra note 148, at 416–17.

[402] See, e.g., *Bajakajian*, 524 U.S. at 338–39 & n.14 (noting that the maximum fine that could be imposed under the Sentencing Guidelines was $5,000 and "the other penalties that the Legislature has authorized are certainly relevant evidence"); State v. Timbs, 169 N.E.2d 361, 376 (Ind. 2021) (finding a vehicle forfeiture to be unconstitutional because, among other factors, the value of the property to be forfeited "was three-and-a-half times the maximum fine for the underlying offense"); State v. Boyd, 618 N.W.2d 251, 256 (Wis. Ct. App. 2000) (applying *Bajakajian*'s proportionality test to find that a full forfeiture of a $28,000 truck would be excessive where the maximum fine was $10,000).

[403] Susan R. Klein, Civil In Rem Forfeiture and Double Jeopardy, 82 Iowa L. Rev. 183, 189 (1996) (implicitly finding that prosecutors have discretion of whether to bring criminal forfeiture charges, civil forfeiture claims, or no forfeiture proceedings at all).

unrestrained with respect to civil-instrumentality forfeitures, which often do not require proof of conviction of an offense for the property to be forfeited, but rather only proof by a preponderance of the evidence that the property is linked to criminal activity.[404] Thus, further study is necessary as to whether the gross disproportionality standard applicable under *Bajakajian* is appropriate given the wide range of discretion and government self-interest often implicated by forfeitures. In short, the discussion regarding federalism, fines, and forfeitures is only just beginning, as the Court begins to grapple with the critical questions that have arisen in the wake of *Timbs v. Indiana*.

CONCLUSION

When the Court defers to state or local governments to account for federalism principles, it is the equivalent of the Court delegating enforcement of constitutional provisions to them. This approach should not apply when the Court is enforcing the Excessive Fines Clause against the states—at least under the current frameworks in place. State and local fines directly implicate government self-interest, creating a heightened risk of government overreaching and of singling out individuals to bear what should be public burdens. The Court has already applied heightened scrutiny in the land-use context with respect to certain categories of exactions, despite federalism concerns. It is time for the Court to do the same in the fines and forfeitures context, so that the Excessive Fines Clause serves as more than a mere parchment barrier.

[404] David Pimentel, Forfeitures Revisited: Bringing Principle to Practice in Federal Court, 13 Nev. L.J. 1, 3, 16 (2012).