ARTICLES

A Pragmatic Approach to the Eighth Amendment and Punitive Damages

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I. INTRODUCTION

In conjunction with a public perception of a “crisis” in the civil justice system and the resulting call for “tort reform,” during the past decade lawyers in many civil suits between private parties have raised federal constitutional challenges to the imposition of punitive damages.1 The call for tort reform received a renewed impetus during and following the most recent congressional elections, with the Republican Party taking control of both houses of Congress and promising, as part of its “Contract with America,” to reform the civil justice system in

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1. Although the existence and scope of a “crisis” may well be debatable, there can be little doubt that massive punitive awards, particularly in products liability cases, are more common now than they once were. See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2724 (1993) (upholding a punitive award of $10 million in a case in which the actual harm was approximately $19,000); Dunn v. Hovic, 1 F.3d 1371, 1391 (3d Cir.) (en banc) (remitting a $2 million punitive award (which the District Court already had remitted from $25 million) to $1 million in a fear-of-cancer case involving exposure to asbestos products), modified in part, 13 F.3d 58 (3d Cir.), cert. denied, 114 S. Ct. 650 (1993); Capstick v. Allstate Ins. Co., 998 F.2d 810, 823 (10th Cir. 1993) (upholding a $2 million punitive award in a case involving an insurance coverage dispute over an automobile worth $1500); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. Ct. App. 1987) (remitting a punitive award of $3 billion to $1 billion), cert. dismissed, 485 U.S. 994 (1988); Moseley v. General Motors Corp., No. 90V6276 (Fulton County, Ga. 1993) ($101 million punitive damages jury verdict in products liability case), reversed, 447 S.E.2d 302 (Ga. 1994); Pickering v. Owens-Corning Fiberglas Corp., 638 N.E.2d 1127, 1143 (Ill. App. Ct.) (affirming punitive awards totaling $7.5 million to three plaintiffs in asbestos cases), appeal denied, 645 N.E.2d 1367 (Ill. 1994), petition for cert. filed, 63 U.S.L.W. 3672 (U.S. Mar. 6, 1995); Kochan v. Owens-Corning Fiberglas Corp., 610 N.E.2d 683 (Ill. App. Ct.) (affirming punitive awards totaling $5 million made to five plaintiffs in asbestos cases), appeal denied, 622 N.E.2d 1208 (Ill. 1993), cert. denied, 114 S. Ct. 1219 (1994); see also Mike Hudson, Alabama: Tort Capital or Whipping Boy?, 81 A.B.A. J., June 1995, at 18-19 (pointing out that the top five jury verdicts awarding punitive damages in Alabama in 1994 totaled $151.25 million, and that trial courts affirmed $52 million of those verdicts); Reversals: Verdicts Reversed by Judges, Nat’l L.J., Feb. 6, 1995, at C14 (discussing multimillion dollar verdicts, including punitive damage verdicts, that were eliminated or reduced by courts during 1994).
general and punitive damages in particular. Whether any significant federal legislative changes will occur remains to be seen and, in any event, is not the focus of this Article.

Rather, this Article considers the question whether the Constitution should be construed to impose any significant limitations on the imposition of punitive damages. In recent years, the Supreme Court of the United States has considered several constitutional challenges to punitive damage awards, primarily under the rubric of the Due Process Clause of the Fourteenth Amendment. The clear result of those decisions, however, is that due process imposes no meaningful substantive or procedural limitations on punitive damage awards. This Article accepts those decisions and does not reexamine or question them.

2. See, e.g., Stephen Labaton, GOP Preparing Bill To Overhaul Negligence Law, N.Y. TIMES, Feb. 19, 1995, § 1, at 1 (discussing two civil justice reform bills that have been introduced in the House of Representatives, one of which would require that entitlement to punitive damages be proven by clear and convincing evidence and which would limit punitive awards to $250,000 or three times the compensatory damages, whichever is greater); Peter Pasell, McGovern v. Nader, by Mail, on Changing Civil Justice System, N.Y. TIMES, Dec. 16, 1994, at D21.


4. See, e.g., TXO Prod. Corp., 113 S. Ct. 2711 (1993) (upholding a punitive award of $10 million when the compensatory damages were determined to be approximately $19,000); Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1849 n.197 (1992) ("[T]he scrutiny the Court gave the award in [Pacific Mut. Life Ins. Co. v. Haslip] was so generous that few punitive damages awards are likely to be struck down in the future."); But cf. Honda Motor Co., 114 S. Ct. 2331 (1994) (finding a procedural due process violation when an Oregon statute—the only one of its kind—prohibited trial and appellate courts from altering a punitive award unless there was "no evidence" to support the award).

Instead, the author argues for a pragmatic⁶ inquiry into the question whether the Supreme Court should read the Constitution as imposing any federal restraints on the imposition of punitive damages in civil suits between private parties based on state law. The author suggests that the logical and sensible constitutional provision for imposing federal limitations on punitive damage awards is the Excessive Fines Clause of the Eighth Amendment.⁷ The difficulty with this position is that the Supreme Court rejected an attempt to apply that constitutional prohibition to punitive damage awards in Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.⁸ Relying on a rigid, originalist methodology, the Court in Browning-Ferris concluded that a punitive award in a private civil case does not constitute a "fine" within the meaning of the Excessive Fines Clause, primarily because the state neither prosecutes the case nor shares in the punitive award.⁹ The Court further rejected the argument that the state's provision of a forum for imposing such awards alone sufficed to invoke constitutional protection.¹⁰

It is the thesis of this Article that a principled, pragmatic approach to the question whether the Eighth Amendment applies to punitive damages awards in civil cases between private parties strongly suggests that Browning-Ferris is wrong. The thesis relies heavily on subsequent Supreme Court decisions—in particular, Austin v. United States,¹¹ and Edmonson v. Leesville Concrete Co.¹²—that seriously undermine the result and the rationales in Browning-Ferris. The Article largely does not, however, depend upon nor reexamine the historical arguments made by commentators prior to the Court's decision in Browning-Ferris and rejected by the Court in that case.¹³ Rather, the author proposes a

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⁷. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). At least one state supreme court has held that an analogous provision in the state constitution applies to punitive damage awards made in civil cases between private parties. See Colonial Pipeline Co. v. Brown, 365 S.E.2d 827, 831 (Ga.), appeal dismissed sub nom. Colonial Pipeline Co. v. Wright Contracting Co., 488 U.S. 805 (1988).
⁹. Id. at 264-76.
¹⁰. Id. at 275.
pragmatic interpretation of the Eighth Amendment in light of developments occurring subsequent to *Browning-Ferris* itself.

Apart from the effect of the Supreme Court's own subsequent decisions on the rationales the Court adopted in declining to apply the Excessive Fines Clause to punitive awards in *Browning-Ferris*, there are at least three potential pragmatic justifications for reexamining the holding in that case. First, the circumstances in which punitive awards are permitted and made have changed significantly since the eighteenth century. What was once a civil punishment only for intentional wrongdoing has been expanded to punish conduct that is neither intentional nor necessarily criminal. Second, it is certainly possible, although not perhaps yet proven, that the availability of essentially boundless awards of punitive damages results in less than optimal settlements and creates disincentives for either plaintiffs or defendants to settle cases in which such damages are a possibility. Third, especially in mass tort situations, such as the asbestos or DES cases, there is a real possibility that the payment of massive and unlimited punitive damage awards will bankrupt defendants and, ultimately, deny even compensatory damages to the plaintiffs who pursue their claims later rather than sooner.

Part II of the Article examines and critiques the interpretational methodology and the rationales the Supreme Court relied on in *Browning-Ferris* in support of the outcome in that case. Parts III.A and B discuss subsequent developments that undermine the rationales, the methodology and, ultimately, the result of *Browning-Ferris*. Part III.C considers several other potential objections to the application of the Eighth Amendment's prohibition on excessive fines to punitive damage awards. The author concludes that application of the Excessive Fines Clause to punitive damage awards is warranted—or at least the

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15. The common law of Kansas, for example, as is true of many jurisdictions, developed to permit the imposition of punitive damages for "reckless" conduct. See, e.g., Allman v. Bird, 186 Kan. 802, 353 P.2d 216 (1960). Indeed, some courts have recognized that punitive damages are permissible, or may be permissible, in actions based on a theory of strict liability which does not even require proof of negligence on the part of the defendant. See, e.g., Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 647-59 (Md. 1992); Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986).

16. Companies representing more than half of the historical liability in asbestos litigation already have succumbed to bankruptcy. See Suzanne L. Oliver & Leslie Spencer, "Who Will the Monster Devour Next?", FORBES, Feb. 18, 1991, at 75.
question merits reexamination—and could result in a more rational system for reviewing such awards.

II. THE SUPREME COURT’S CURRENT JURISPRUDENCE

A. Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.

1. The Majority

The Court in Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc. confronted a dispute between two rival, waste disposal companies. The plaintiff company filed suit in federal court, asserting claims for violation of the federal antitrust laws and a state law tort claim for interference with contractual relations. Following a trial, the jury awarded the plaintiff a little more than $50,000 in compensatory damages and $6 million in punitive damages. The Court of Appeals affirmed the award, and the Supreme Court granted certiorari to consider whether the Eighth Amendment’s Excessive Fines Clause applies to awards of punitive damages made in civil proceedings between private parties.

A seven-member majority of the Court, speaking through Justice Blackmun, held that it did not. Justice Blackmun first hinted, but did not hold, that the Eighth Amendment might apply only to criminal cases. He then announced that the Court would apply an originalist approach in answering the question whether the Eighth Amendment limits punitive damage awards between private parties, declaring that the Court relies on a “historical emphasis” in deciding “when” the Eighth Amendment applies, but not necessarily so when deciding the “scope” of the Amendment once the Court has determined that it applies.

After noting that the first “Congress did not discuss what was meant by the term ‘fines,’ or whether the prohibition had any application in the civil context,” in proposing the Eighth Amendment, Justice Blackmun proceeded to review historical sources concerning the

18. Id. at 261.
19. Id. at 261-62.
21. See Browning-Ferris, 492 U.S. at 262.
22. Id. at 262-63.
23. Id. at 264 n.4.
24. Id. at 264-65.
meaning of the concept of "fine." Among other things, he concluded that "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense," that in the late eighteenth century "fine" was not understood to include "private civil damages of any kind," that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages," and that the English courts never understood the pre-Magna Carta doctrine of "amercements" to be relevant to "private damages" of any kind.

Finally, Justice Blackmun considered whether, despite contrary original intent, the Eighth Amendment ought to apply to punitive damage awards in civil cases. The purported basis for this inquiry was Weems v. United States, which first recognized that the scope of the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments might change with society's evolving standards of decency. In conducting this inquiry, Justice Blackmun opined that "[t]his aspect of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days." But he asserted that "the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment" and "the doctrine was expressly recognized in cases as early as 1763." He also declared that "[t]he fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take." The Court expressly reserved judgment, however, on the questions whether a qui tam action, in which a private party brings suit in the name of the sovereign and shares in any award of damages, would implicate the Eighth Amendment and whether the Excessive Fines Clause applies to the states at all by virtue

25. See id. at 265-73.
26. Id. at 265.
27. Id. at 265 n.7.
28. Id. at 266.
29. Id. at 272-73.
30. Id. at 268-73. For more detailed discussions of the concept of amercements, see Boston, supra note 13, at 714-28; Jeffries, supra note 13, at 154-58; Massey, supra note 13, at 1259-69.
32. 217 U.S. 349 (1910).
34. Id. at 274 (citing Huckle v. Money, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763)).
35. Id. at 275.
36. Id. at 275 n.21.
of incorporation through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{37}

2. The Dissent

Justice O'Connor, joined by Justice Stevens, dissented from the Court's holding.\textsuperscript{38} Justice O'Connor addressed two preliminary questions: first, whether the Excessive Fines Clause applies to the states; and second, whether it applies to corporations as well as individuals.\textsuperscript{39} Her answer to the first question was that, although the Court never has held expressly that the Eighth Amendment applies to the States, it has applied the Cruel and Unusual Punishments Clause in cases involving states on several occasions, "most notably in the capital sentencing context,"\textsuperscript{40} and she saw "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation."\textsuperscript{41} With respect to the second question, she asserted that the Court had declined to recognize constitutional rights for corporations only when the right at issue was personal in nature, such as the privilege against self-incrimination or a right to privacy,\textsuperscript{42} and concluded that, because "[t]he payment of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity,"\textsuperscript{43} it should be protected "by the Excessive Fines Clause."\textsuperscript{44}

Justice O'Connor then engaged in her own review of the historical evidence regarding the Framers' understanding and intent with respect to the Excessive Fines Clause, prefacing her discussion with the observation that "[h]istory aside, this Court's cases leave no doubt that punitive damages serve the same purposes—punishment and deterrence—as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent."\textsuperscript{45} In rebuttal to Justice Blackmun, she argued that

\textsuperscript{37} \textit{Id. at 276 n.22.}
\textsuperscript{38} \textit{Id. at 282 (O'Connor, J., concurring in part, dissenting in part).} Justice Brennan, joined by Justice Marshall, concurred in the Court's opinion, but wrote separately to emphasize that the Court's opinion left for another day the question whether the Due Process Clause of the Fourteenth Amendment might constrain the imposition of punitive damages in civil cases between private parties. \textit{See id. at 280 (Brennan, J., concurring).}
\textsuperscript{39} \textit{Id. at 283 (O'Connor, J., concurring in part, dissenting in part).}
\textsuperscript{40} \textit{Id. at 284 (O'Connor, J., concurring in part, dissenting in part).}
\textsuperscript{41} \textit{Id. (O'Connor, J., concurring in part, dissenting in part); see infra part III.C.1.}
\textsuperscript{43} \textit{Id. at 285 (O'Connor, J., concurring in part, dissenting in part).}
\textsuperscript{44} \textit{Id. (O'Connor, J., concurring in part, dissenting in part); see infra part III.C.1}
\textsuperscript{45} \textit{Id. at 287 (O'Connor, J., concurring in part, dissenting in part).}
the concept of "punitive damages" was in its infancy in the late eighteenth century and thus historical sources distinguishing between "damages" (by which they meant solely compensatory damages) and "fines" simply do not answer the question whether the Eighth Amendment applies to modern punitive damage awards.\(^{46}\)

Moreover, Justice O'Connor looked to the modern understanding of the concept of a "fine." In so doing, she pointed to numerous Supreme Court decisions referring to punitive damages as "private fines levied by civil juries" and recognizing their penal nature.\(^{47}\) In conclusion, she asserted that "[a] governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law."\(^{48}\) Indeed, she argued that from the standpoint of the defendant forced to pay an excessive monetary sanction, "it hardly matters" whether the government or a private party is the recipient of the award.\(^{49}\)

**B. Critique of Browning-Ferris**

Two major rationales can be derived from the majority's opinion in support of the result in *Browning-Ferris*. In identifying and analyzing those rationales, it is important to remember that, for the most part, the majority opinion adopted a strict originalist approach to the interpretive question confronting the Court. Thus, this Article critiques both the rationales the Court adopted and the methodology it employed in *Browning-Ferris*.

The first rationale is that there is neither a textual suggestion nor a history of congressional or ratification intent that the Excessive Fines Clause applies to punitive damage awards in civil cases between private parties.\(^ {50}\) The Court strongly hints that the Clause may not apply at all in civil—as opposed to criminal—cases,\(^ {51}\) and that view may well have set the tone for the remainder of the opinion. But this is an extremely weak rationale, and one that works only under an originalist approach to constitutional interpretation.\(^ {52}\)

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46. *Id.* at 292-93 (O'Connor, J., concurring in part, dissenting in part).
47. *Id.* at 297 (O'Connor, J., concurring in part, dissenting in part) (quoting *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), and citing numerous other cases).
48. *Id.* at 298 (O'Connor, J., concurring in part, dissenting in part).
49. *Id.* at 299 (O'Connor, J., concurring in part, dissenting in part).
50. See *id.* at 264-65.
51. *Id.* at 262.
52. More importantly, it is one that the Supreme Court itself subsequently has rejected. See *Austin v. United States*, 113 S. Ct. 2801 (1993) (holding that the Eighth Amendment Excessive Fines Clause applies to civil forfeiture proceedings initiated by the government), discussed *infra* at part III.A.
The text of the Constitution frequently says nothing directly about particular practices or issues that may arise decades, or even centuries, after a constitutional provision was ratified. Nonetheless, the Supreme Court has interpreted any number of such situations to fall within the scope of various textual provisions. Indeed, with respect to the Eighth Amendment itself, the Court has interpreted the Cruel and Unusual Punishments Clause to impose numerous constitutional limitations on the trial and sentencing process in capital cases, even though there is little support in the text of the Clause for those rules, and certainly the Clause makes no direct reference to capital punishment.\textsuperscript{53}

Moreover, although the English courts may have recognized punitive damages in the late eighteenth century, the Court offers absolutely no historical evidence that American courts also recognized the doctrine nor, more importantly, that punitive awards were made with the frequency, of the size, or for the purposes with which they are awarded today. In fact, the historical evidence in America appears to undermine the Court’s assertion. The earliest reported American case that apparently expressly recognizes the concept of punitive damages dates back only to 1784, less than a decade prior to the proposal and adoption of the Eighth Amendment.\textsuperscript{54}

Not surprisingly, therefore, as both the majority and the dissent in \textit{Browning-Ferris} recognize,\textsuperscript{55} the historical record is silent on the issue of whether the first Congress which proposed the amendment or those who ratified it intended the excessive fines provision to apply to punitive damage awards. From a textual standpoint, the use of a general term such as “fine” certainly does not indicate any clear intent to preclude the application of the Clause to punitive damage awards, which the Court frequently has referred to as private fines.\textsuperscript{56} Only by adopting a rigid, originalist approach to defining the term is the Court so easily able to conclude that the Eighth Amendment does not apply to punitive damage awards in civil cases between private parties.


\textsuperscript{54} See Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784) (upholding a verdict of 400 pounds against a defendant who had placed a substance in the plaintiff’s drink that caused the plaintiff to be ill for several months; the court observed that the plaintiff was entitled to “exemplary damages”); see also Coryell v. Colbaugh, 1 N.J.L. 77 (1791) (upholding an award against the defendant for seduction that resulted in a breach of a promise to marry on the ground that damages were appropriate for “example’s sake, to prevent such offenses in the future”).

\textsuperscript{55} See \textit{Browning-Ferris}, 492 U.S. at 264-65; id. at 294 (O’Connor, J., concurring in part, dissenting in part).

\textsuperscript{56} See supra note 50-53 and accompanying text.
The Court's second rationale, that "fine" as the Eighth Amendment uses the term refers only to situations in which the sovereign directly participates in the case or receives part of the award, is similarly unconvincing. As Justice O'Connor recognizes, any distinction the English courts drew in the late eighteenth century between the concepts of "damages" and "fines" appears to have been at most a distinction between compensatory damages and punishment.\(^{57}\) Interestingly, the majority cites not a single American case for the proposition that the Framers recognized such a distinction.\(^{58}\) Indeed, all of the cases and sources the Court cites in support of the distinction between "fines" and "damages" define what would today be labeled compensatory damages.\(^{59}\) And even assuming that Congress and American courts in the late eighteenth century understood and recognized the concept of punitive damages, which they probably did, certainly they could not have contemplated the size and frequency of such awards nor the circumstances in which they are awarded today.\(^{60}\)

Perhaps more importantly, the Court's second rationale accords almost no weight to its own decisions describing and recognizing the nature of punitive damages and the purposes they serve.\(^{61}\) Indeed, the Court acts as though states have no interest whatsoever in punitive damage awards in civil cases between private parties. Apart from historical arguments that undercut that assumption, it is clear that states have a direct and substantial interest in such awards. The Court itself, fifteen years prior to Browning-Ferris, declared that punitive damages "are private fines levied by civil juries."\(^{62}\) The states' interest and involvement in imposing punitive damages is further demonstrated both by statutes that regulate the imposition and awarding of punitive damages and statutes that give the State a share of such awards.\(^{63}\) Furthermore, the Court's own decisions since Browning-Ferris have expanded greatly the notion of the level of state involvement sufficient to invoke constitutional protections.\(^{64}\)

The foregoing analysis brings one ultimately to the question why the Supreme Court—through Justice Blackmun, no less—applied such a

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58. See id. at 274 & n.20 (citing only English cases).
59. See id. at 265 n.7.
60. See, e.g., id. at 282 (O'Connor, J., concurring in part, dissenting in part); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25-26 (Scalia, J., concurring).
61. See infra part III.A.
63. See infra part III.B.
64. See Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), discussed infra at part III.B.
rigid, originalist approach to the Eighth Amendment question presented in *Browning-Ferris*. At least two explanations come to mind. The first, and perhaps more benevolent, is that a majority of the Court doubted that the Eighth Amendment should ever apply outside of the criminal context. This explanation is suggested by certain statements in the majority opinion and certainly is consistent with the Court's traditional interpretation of the Eighth Amendment's Excessive Fines Clause.65

The second explanation is that perhaps the Court had little sympathy for corporate defendants engaged in civil litigation arising from a business dispute. Certainly, in the capital punishment context, Justice Blackmun is much more solicitous of defendants' interests in interpreting the scope of the Eighth Amendment.66 The suspicion that the Court is unsympathetic to corporate defendants engaged in private, civil litigation may well be confirmed by the Court's marked reluctance to impose any meaningful constitutional constraints on punitive damage awards as a matter of due process.67

In any event, private cases involving punitive damages are an appropriate situation in which to apply a pragmatic approach to interpreting the Eighth Amendment for several reasons. First, the text of the Eighth Amendment, which plainly and simply refers to "fines," does not on its face foreclose applying the Amendment to punitive damage awards in civil cases between private parties. Second, as the opinions in *Browning-Ferris*—as well as the scholarly commentary—demonstrate, there is no direct evidence of congressional intent with respect to the scope of the Eighth Amendment's Excessive Fines Clause, and evidence regarding the historical background is ambiguous at best. This is a situation that highlights the limitations of an originalist approach to constitutional interpretation. Third, the Supreme Court's own opinions and precedent neither require nor even necessarily suggest the originalist approach to the question that the Court adopted in *Browning-Ferris*. Fourth, there appears to be little, if any, dispute that the nature and scope of punitive awards in civil cases between private parties have changed dramatically since the late 1700s. Finally, and perhaps most importantly in terms of persuading the Court to reexamine the issue, the Court itself in decisions issued since *Browning-

65. Subsequent to *Browning-Ferris*, however, the Supreme Court expressly rejected such a limitation on the scope of the Excessive Fines Clause. See Austin v. United States, 113 S. Ct. 2801 (1993), discussed infra part III.A.

66. See, e.g., Callins v. Collins, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of a stay) (arguing that the Supreme Court should give up its attempts to form a constitutional death penalty jurisprudence and that he henceforth would not vote to affirm any capital sentences).

67. See cases cited supra notes 3-4.
Ferris has seriously undermined both the interpretative approach and the rationales it adopted in that case.

III. SUBSEQUENT DEVELOPMENTS THAT UNDERMINE BROWNING-FERRIS

A. Does the Eighth Amendment’s Excessive Fines Clause Apply to Civil Cases?

1. Austin v. United States

In Austin v. United States, the Supreme Court held that the Eighth Amendment’s Excessive Fines Clause applies to civil forfeiture actions initiated by the United States. In so doing, the Court rejected the government’s initial contention that the Excessive Fines Clause applies only to criminal proceedings, a proposition that the Court tacitly endorsed in Browning-Ferris. The Court observed that “[s]ome provisions of the Bill of Rights are expressly limited to criminal cases,” but that “[t]he text of the Eighth Amendment includes no similar limitation.” Moreover, opined the Court, “[t]here were no proposals [in the First Congress] to limit that Amendment to criminal proceedings.” The Court emphasized that “[t]he purpose of the Eighth Amendment . . . was to limit the government’s power to punish.” Relying on its own precedent, the Court maintained that “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.” Thus, the Court concluded, “the question is not, as the United States would have it, whether forfeiture [under the relevant statutes] is civil or criminal, but rather whether it is punishment.”

In answering that question, the Court opined

In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the

68. 113 S. Ct. 2801 (1993).
69. Id. at 2803. The Court distinguished Browning-Ferris on the ground that in that case the government neither prosecuted the action nor had a right to share in the damages, in contrast to Austin in which it was the government that sought forfeiture of assets. Id. at 2804.
70. Id.
71. Id. at 2804-05.
72. Id. at 2805 (quoting Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 292 (1989) (O’Connor, J., concurring in part, dissenting in part)).
73. Id.
74. Id. (quoting United States v. Halper, 490 U.S. 435, 447-48 (1989)).
75. Id. at 2806.
limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. . . . We turn, then, to consider whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under [the relevant statutes] should be so understood today. 76

After an extensive review of the historical treatment of forfeiture and a review of modern decisions, the Court concluded that civil forfeiture proceedings satisfied both aspects of the inquiry: they were considered punitive at the time the Eighth Amendment was ratified and they are considered punitive today. 77 The Court declined, however, to adopt a test for determining when a civil forfeiture is constitutionally excessive, instead remanding that question to the lower courts. 78

Because the government initiated the forfeiture proceeding, the key question in Austin was whether the forfeiture itself could be deemed "punishment." Contrary to its tacit assumption in Browning-Ferris and consistent with contemporary double jeopardy precedent on which it relied in part, 79 the Supreme Court rejected the notion that the "civil" and "criminal" labels alone are determinative of the constitutional question. Observing that the text of the Eighth Amendment neither requires nor even suggests such a distinction, the Court adopted a pragmatic approach to the problem.

Instead of applying a rigid, originalist approach to the question whether the Excessive Fines Clause applies to civil forfeiture proceedings initiated by the government, the Court focused on the purpose of the Eighth Amendment, concluding that it was designed to limit governmental power to "punish," as that concept is broadly and generally understood. In assessing whether civil forfeiture proceedings are "punishment," the Court examined the actual nature and effects of such proceedings, both from a historical and a contemporary perspective. Such flexibility and pragmatism is markedly absent from the Court's opinion in Browning-Ferris and perhaps represents a significant shift in the methodology the Court is willing to employ in interpreting the scope of the Eighth Amendment's Excessive Fines Clause.

76. Id.
77. Id. at 2806-12.
78. Id. at 2812.
79. In United States v. Halper, 490 U.S. 435 (1989), the Supreme Court rejected reliance on "civil" and "criminal" labels in the double jeopardy context, holding that double jeopardy barred the government from seeking to extract punitive civil penalties from a person previously convicted and sentenced for the same conduct. The Court recently extended that holding in the double jeopardy context in a case decided after Austin, holding that double jeopardy also bars the collection of a punitive civil tax and tax penalties from a person previously convicted and sentenced for the same conduct. See Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994).
Certainly, putting aside for the moment the question whether the Clause applies to proceedings to which the government is not a party or in which the government has no direct financial stake, punitive damages constitute "punishment" under the Austin standard and, indeed, under any rational understanding of their history, nature and purposes.

2. Applying the Austin Test to Punitive Damages

The Austin test for determining what constitutes "punishment" within the reach of the Excessive Fines Clause requires two inquiries: first, whether the challenged practice considered "punishment" at the time the Eighth Amendment was ratified; and second, whether it is considered punishment today. In answering those questions, the Court made clear in Austin that it need only be shown that the practice serves in part a punitive function; it need not be the sole purpose. Applying the Austin test to punitive damages, it is clear that—again, assuming for the moment the requisite level of governmental involvement—it punitive damages constitute "punishment" within the scope of the Eighth Amendment.

The Supreme Court's own opinions confirm this conclusion beyond any doubt, were there any real argument on the point. In Day v. Woodworth, for example, decided in 1852, the Court observed that

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.83

Thus, the Supreme Court itself long ago recognized that the concept of punitive damages was an accepted part of American law by the late

80. Part III.B. of this Article addresses that question which constitutes the other half of the analysis necessary to demonstrate that the Court incorrectly interpreted the scope of the Excessive Fines Clause in Browning-Ferris.
81. See supra note 80 and accompanying text.
82. 54 U.S. (13 How.) 363 (1851).
83. Id. at 371 (emphasis added). There is a serious question whether the practice of awarding punitive damages was so uniformly accepted for as long as the Court suggests in Day, see Boston, supra note 14, at § 1:8 n.57, but, in any event, the concept of punitive damages, and the notion that they served, at least in part, punitive and deterrent purposes, probably was recognized in the late eighteenth century. Id. §§ 1:7-8.
eighteenth century. Indeed, the majority opinion in Browning-Ferris expressly reached the same conclusion as Day v. Woodworth in rejecting the argument that it should interpret the Eighth Amendment flexibly in light of modern developments.\(^8\) Although there may be some dispute regarding the original nature and purposes of such damages at the time the Eighth Amendment was ratified,\(^5\) it is clear that to the extent such damages were recognized at all, they were viewed as serving punitive and deterrent purposes,\(^6\) and that is enough to satisfy the first requirement of the Austin test.

Similarly, there can be no serious contention that punitive damages as they exist today do not serve, at least in part, a punishment function. Once again, the Supreme Court's own decisions confirm that conclusion beyond doubt. Recently, in Molzof v. United States,\(^7\) the Court considered the question whether tort damages sought in a suit against the United States under the Federal Tort Claims Act (FTCA) were "punitive damages"—which the statute prohibits—simply because in the circumstances they would not serve to compensate the plaintiff. In deciding what Congress intended by the phrase "punitive damages" the Court looked to the common law understanding of that concept and concluded that the phrase "is a legal term of art that has a widely accepted common-law meaning."\(^8\) That meaning, observed the Court, was that such damages were "awarded to punish defendants for torts committed with fraud, actual malice, violence, or oppression,"\(^9\) with the focus "on the nature of the defendant's conduct."\(^\) Ultimately, the

\(^8\) See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 274 (1989) ("The practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment."). As noted previously, this proposition is debatable, with the earliest reported American case expressly recognizing the concept of punitive damages apparently dating back only to 1784. See Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784) (upholding a verdict of 400 pounds against a defendant who had placed a substance in the plaintiff's drink that caused him to be ill for several months; the court observed that the plaintiff was entitled to "exemplary damages"); see also Coryell v. Colbaugh, 1 N.J.L. 77 (1791) (upholding an award against the defendant for seduction that resulted in a breach of a promise to marry on the ground that damages were appropriate for "example's sake, to prevent such offenses in the future"). Although the English cases provide some support for recognition of the concept, even they apparently do not date back further than 1763. See, e.g., Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763) (upholding award of 300 pounds to a plaintiff who at most suffered 20 pounds in actual damages). See generally BOSTON, supra note 14, at §§ 1:5-6.

\(^8\) Id.

\(^9\) Id.

\(^1\) Id. at 306.

\(^2\) Id. at 307.

\(^3\) Id.
Court concluded that the damages at issue were not “punitive damages” barred by the FTCA in part because “their purpose is not to punish.”\textsuperscript{91}

Thus, after \textit{Austin}, the only remaining, significant constitutional hurdle to applying the Excessive Fines Clause of the Eighth Amendment to punitive damages in civil actions between private parties is the notion that the government lacks a sufficient stake in the proceedings to invoke constitutional protections. As discussed in the next section, that rationale too has been undermined since the Supreme Court’s decision in \textit{Browning-Ferris}.

\textbf{B. Is the State Sufficiently Involved in the Imposition of Punitive Damages to Invoke Constitutional Protection?}

1. \textit{Edmonson v. Leesville Concrete Co.}

The other major development since \textit{Browning-Ferris} that could affect the Court’s decision in that case is the Court’s expansion of the “state action” concept in Fourteenth Amendment litigation. In \textit{Batson v. Kentucky},\textsuperscript{92} the Court held that it was a violation of equal protection for prosecutors in criminal cases to utilize peremptory challenges to strike potential jurors on account of their race. The Court then extended the \textit{Batson} rule to all civil cases—including those in which the government was not a party in any way—in \textit{Edmonson v. Leesville Concrete Co.},\textsuperscript{93} a case decided two years after the Court’s decision in \textit{Browning-Ferris}.

In order to reach the conclusion that the racially discriminatory use of peremptory strikes by purely private parties in a civil case violated the Fourteenth Amendment’s Equal Protection Clause, the Court had to conclude that the conduct at issue constituted “state action.”\textsuperscript{94} The Court initially applied the analysis set forth in \textit{Lugar v. Edmondson Oil Co.},\textsuperscript{95} and inquired “first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority” and then second “whether the private party . . . charged

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.} at 312; \textit{see also} Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (“[U]nder the law of most States, punitive damages are imposed for purposes of retribution and deterrence.”).
  \item \textsuperscript{92} 476 U.S. 79 (1986).
  \item \textsuperscript{93} 500 U.S. 614 (1991).
  \item \textsuperscript{94} The Court subsequently has extended \textit{Batson} to prohibit the racially discriminatory use of peremptory strikes by criminal defendants, Georgia v. McCollum, 112 S. Ct. 2348 (1992), and to prohibit the use of peremptory strikes to discriminate on the basis of gender, J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).
  \item \textsuperscript{95} \textit{Edmondson}, 500 U.S. at 619-20.
  \item \textsuperscript{96} 457 U.S. 922 (1982).
\end{itemize}
could be described in all fairness as a state actor." The Court found that the first inquiry was easily satisfied in *Edmonson* because peremptory challenges are authorized by state law and have "no significance outside a court of law." The Court also emphasized that peremptory challenges are both authorized and regulated by statute in most states and, thus, clearly find their source in state authority.

With respect to the second inquiry, the Court opined that its cases identify three primary factors to consider in determining whether a particular action is governmental in character: (1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury is aggravated in a unique way by the incidents of governmental authority. In considering the first factor, the Court observed that "private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action," but asserted that state action does exist when private parties make use of such procedures with the "overt, significant participation of the government . . . ." The Court found such assistance present in *Edmonson* because the government summons jurors, establishes their qualifications, compensates them and, ultimately, the court removes them when a peremptory challenge is made. Thus, the Court concluded, peremptory strikes could not occur without "the direct and indispensable participation of the judge, who beyond all question is a state actor . . . ."

In considering the second factor, the Court observed that peremptory challenges are used to select "an entity that is a quintessential governmental body . . . . The jury exercises the power of the court and of the government that confers the court's jurisdiction." The Court went on to describe, in a revealing passage, some of the ways in which juries perform governmental functions:

In some civil cases, as we noted earlier this Term, the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. See *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). . . . And in all jurisdictions a true verdict will be incorporated in a judgment enforceable by the court. These are traditional

98. *Id.*
99. *Id.* at 620-21.
100. *Id.* at 621-22.
101. *Id.* at 622.
102. *Id.*
103. *Id.* at 623-24.
104. *Id.* at 624.
105. *Id.* (emphasis added).
functions of government, not of a select, private group beyond the reach of the Constitution.\textsuperscript{106}

Thus, the Court concluded, even though the use of peremptory challenges is a delegation of authority to private parties, that "fact does not change the governmental character of the power exercised."\textsuperscript{107}

Lastly, the Court easily concluded that the injury caused by the racially discriminatory use of peremptory strikes is uniquely aggravated by the incidents of governmental authority. In reaching that conclusion, the Court emphasized the importance of the fact that the harm occurred in a court:

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with utmost care to ensure that justice is done.\textsuperscript{108}

In \textit{Browning-Ferris}, the Court offhandedly rejected the argument that "[t]he fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests"\textsuperscript{109} demonstrated a sufficient level of governmental participation to invoke constitutional protection, the very notion that \textit{Edmonson} wholeheartedly embraces, albeit in a somewhat different context. Contrary to the rigid, originalist approach of \textit{Browning-Ferris}, \textit{Edmonson} not only recognizes but expressly declares that the imposition of punitive damages in civil cases is a \textit{governmental function}.\textsuperscript{110} Indeed, the Court in \textit{Edmonson} declares that both (1) the jury's decision to impose such damages and its determination of the amount, as well as (2) the court's incorporation of such a verdict in a judgment enforceable by the court, are quintessential governmental functions.\textsuperscript{111}

\textit{Edmonson} correctly rejects the \textit{Browning-Ferris} view that direct state participation is necessary to invoke constitutional protections against state conduct. If anything, the case for regarding awards of punitive damages as state action is stronger than the case for regarding peremptory challenges as such. Punitive awards are made by juries which are

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 625 (emphasis added).
\item \textsuperscript{107} \textit{Id.} at 626.
\item \textsuperscript{108} \textit{Id.} at 628.
\item \textsuperscript{109} 492 U.S 257, 275 (1989).
\item \textsuperscript{110} \textit{Edmonson}, 500 U.S. at 624.
\item \textsuperscript{111} \textit{Id.}
\end{itemize}
government actors, even if ad hoc. Peremptory strikes in civil cases between private parties are made by private, nongovernmental lawyers.

The only way to avoid the impact of Edmonson on Browning-Ferris is to argue that there is a meaningful distinction between “state action” for Fourteenth Amendment purposes and the level of government involvement necessary to make something a “fine” within the scope of the Eighth Amendment. Under a pragmatic approach to interpreting the Constitution, however, such a distinction will not withstand scrutiny.

In either situation, the fundamental question is whether the government is sufficiently involved, or its interests are sufficiently at stake, so that it is both fair and appropriate to invoke a constitutional limitation on the scope of governmental authority. The answer in both situations, given Edmonson, appears to admit of very little doubt. Clearly, as the Court recognizes in Edmonson, punitive damages serve the “government’s interest in punishing and deterring willful misconduct.”112 Just as the State may not avoid the reach of the Fourteenth Amendment by delegating its responsibilities to private actors,113 so it should not be permitted to avoid the Eighth Amendment by the simple expedient of bestowing the ability to collect punitive awards on private citizens.114

Moreover, like the racial discrimination condemned in Edmonson, punitive damages can be imposed only by virtue of the State’s authority. Typically, a jury—a governmental entity—determines when to impose such damages and, if so, in what amount. The court then incorporates the jury’s verdict into an enforceable judgment. And, if the defendant refuses to pay, the plaintiff may invoke the authority of the court and obtain the direct assistance of state executive officials in seizing and selling assets of the defendant in order to satisfy the defendant’s obligations. In Browning-Ferris, however, the Court apparently deemed even such direct governmental participation in collecting an award of punitive damages for the benefit of a private plaintiff insufficient to invoke the protection of the Excessive Fines Clause.

So long as Edmonson remains valid, there really is no excuse for the Court’s refusal in Browning-Ferris to apply the Excessive Fines Clause of the Eighth Amendment to punitive damage awards in civil cases between private parties.

112. Id. at 625.
114. See Mann, supra note 4, at 1868 (arguing that encouraging private plaintiffs to seek punitive damages is desirable because it “removes the burden of prosecution from the government, thereby allowing the private sector to fund law enforcement”).
2. State Authorized/Adopted Procedures and Substantive Limitations on Punitive Damages

The conclusion that the states are sufficiently involved in the imposition and collection of punitive damage awards to invoke the protection of the Excessive Fines Clause is further buttressed by the number of state statutes that now regulate punitive damage awards. These statutes take many forms, with some adopting procedural requirements that significantly alter the common law system for imposing punitive damages,¹¹⁵ some imposing caps on the amounts that may be awarded,¹¹⁶ and several even requiring that a portion of any punitive award be paid directly to the state treasury or a state-sponsored fund.¹¹⁷ These statutes only serve to emphasize beyond question the

¹¹⁵. See, e.g., CONN. GEN. STAT. ANN. § 52-240b (West 1991) (providing that the court shall determine the amount of a punitive award); KAN. STAT. ANN. §§ 60-3702, -3703 (1994) (imposing special pleading requirements and providing that only the court may determine the amount of a punitive award); NEV. REV. STAT. § 42.005.3 (1991) (if the trier of fact determines a punitive award is warranted, the amount must be determined in a separate proceeding); see also Differences of Opinion, A.B.A. J., Apr. 1995, at 74, 75 (graphic indicating that approximately 19 states require proof by clear and convincing evidence).

¹¹⁶. See, e.g., ALA. CODE § 6-11-21 (1993) (punitive awards generally may not exceed $250,000); COLO. REV. STAT. § 13-21-102(1)(a), (3) (1987) (jury shall not make a punitive award that exceeds the amount of compensatory damages and the court, although it may increase punitive awards in some circumstances, may not award a sum in excess of three times the actual damages); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (no punitive award in a products liability case may exceed twice the damages awarded to the plaintiff); FLA. STAT. ANN. § 768.73(1)(a), (b) (West Supp. 1995) (any punitive award more than three times the amount of compensatory damages is presumptively excessive); GA. CODE ANN. § 51-12-5.1(g) (Supp. 1994) ($250,000 cap, except in cases involving intentional misconduct or products liability); KAN. STAT. ANN. § 60-3702(e) (1994) (no award shall exceed the lesser of either the highest annual gross income of the defendant during the five-year period immediately preceding the conduct or $5 million); NEV. REV. STAT. §42.005.1 (1991) (punitive awards limited to three times the amount of the compensatory damages if compensatory damages exceed $100,000, otherwise punitive are capped at $300,000); VA. CODE ANN. § 8.01-38.1 (Michie 1992) ($350,000 cap); see also JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.15 (Supp. 1991) (noting that 12 states cap punitive awards); Differences of Opinion, supra note 115, at 75 (graphic indicating that 10 states cap punitive awards).

¹¹⁷. See, e.g., COLO. REV. STAT. § 13-21-102(4) (1987) (one-third of punitive award must be paid into state general fund); FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1995) (35% of a punitive award must be paid either to the Public Medical Assistance Trust Fund or the General Revenue Fund, depending upon the nature of the case); GA. CODE ANN. § 51-12-5.1(e)(2) (West Supp. 1994) (75% of any punitive award made in a products liability case must be paid into the state treasury); ILL. ANN. STAT. ch. 735, para. 5/2-1207 (Smith-Hurd 1992) (trial court in its discretion may apportion punitive award between plaintiff, plaintiff's attorney and state Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1(2)(b) (West 1987) (a substantial share of each punitive award must be paid into the Iowa Civil Reparations Trust Fund for use in funding indigent civil litigation or insurance assistance programs); KAN. STAT. ANN. § 60-3402(e) (1994) (50% of any punitive award in a medical malpractice case must be paid to the state treasurer); MO.
strength of the states' interests in punitive awards. Moreover, under Edmonson, they clearly constitute state "involvement" in the process of imposing punitive damages. A few examples amply illustrate these propositions.

In Kansas, for example, no claim for punitive damages may be included in the original complaint. Rather, a plaintiff desiring to seek such relief must move the court for permission to amend the complaint to include a punitive damage claim. The defendant is entitled to oppose such a motion and the court may grant permission to amend the complaint only if it concludes that "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim . . . ."

If the court permits such an amendment and the case proceeds to trial, the trier of fact determines only whether an award of punitive damages is warranted. In order to demonstrate an entitlement to punitive damages, the plaintiff must prove, "by clear and convincing evidence . . . that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice." If the trier of fact finds that punitive damages are appropriate in the circumstances, then the court determines the amount of the award in a separate proceeding. In determining the appropriate amount, the court may consider seven statutory factors. The Kansas statutes perhaps impose procedures

REV. STAT. § 537.675.2 (Supp. 1992) (50% of punitive award must be paid to the Tort Victims Compensation Fund); OR. REV. STAT. § 18.540(3) (1988) (50% of punitive award must be paid to the Criminal Injuries Compensation Fund); UTAH CODE ANN. § 78-18-1(3) (1992) (50% of the amount of any punitive award in excess of $20,000 must be paid to the state treasurer for deposit into the General Fund); see also Differences of Opinion, supra note 115, at 75 (graphic indicating that 7 states collect a portion of any punitive awards).

118. See KAN. STAT. ANN. § 60-3703 (1994).
119. Id.
120. Id.
121. See id. § 60-3702(a) (1994).
122. Id. § 60-3702(c).
123. Id. § 60-3702(a).
124. Id. § 60-3702(b). The factors include the following:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
(2) the degree of the defendant's awareness of that likelihood;
(3) the profitability of the defendant's misconduct;
(4) the duration of the misconduct and any intentional concealment of it;
(5) the attitude and conduct of the defendant upon discovery of the misconduct;
(6) the financial condition of the defendant; and
(7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of criminal penalties to which the defendant has been or may be subjected.
more extensive than those imposed by statute in many states, but they
demonstrate both the strength of the State's interest in punitive damages
and the level of its involvement in the actual imposition of such awards.

Some states, including Kansas, have gone even further in legislatively
demonstrating their interest and involvement in the imposition and
collection of punitive damage awards. These states require that a
percentage of any punitive award made in their courts be paid either to
the state treasury or to a state-sponsored fund.\footnote{125} These statutes in the
strongest fashion demonstrate the State's interest in, and the state
purposes that are served by, permitting awards of punitive damages.
Indeed, even under the originalist approach of \textit{Browning-Ferris} itself,
punitive damages in these states should be considered "fines" within the
scope of the Eighth Amendment because the State has a "share in the
recovery."\footnote{126} At the very least, they raise one of the questions the Court
reserved in \textit{Browning-Ferris}, whether \textit{qui tam} actions in which private
parties bring suit on behalf of the government and in which punitive
damages are awarded would be subject to the Excessive Fines Clause.\footnote{127}

For example, the State of Georgia, by statute, requires that seventy-
five percent of any punitive award made in a products liability case be
paid into the state treasury.\footnote{128} The statute further provides that
\begin{quote}
[u]pon issuance of judgment in such a case, the state shall have all rights due
due to a judgment creditor until such judgment is satisfied and shall stand on equal
footing with the plaintiff of the original case in securing a recovery after
payment to the plaintiff of damages awarded other than as punitive dam-
ages.\footnote{129}
\end{quote}

The Georgia Supreme Court has summarily and without discussion
upheld the statute against an Eighth Amendment challenge.\footnote{130}

A federal district court in Georgia, however, declared the statute
unconstitutional on Eighth Amendment grounds. In \textit{McBride v. General
Motors Corp.}, the plaintiffs in a products liability action challenged
the constitutionality of the Georgia statute on several grounds, including
that the provision requiring that seventy-five percent of any punitive
award be paid into the state treasury violated the Excessive Fines

\footnote{125. See statutes cited supra note 117.}
\footnote{126. See \textit{Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.}, 492 U.S. 257, 272 (1989).}
\footnote{127. See id. at 275-76 n.21; see also James D. Ghiardi, \textit{Punitive Damages: State Extraction
Practice Is Subject to Eighth Amendment Limitations}, 26 \textit{TORT & INS. L.J.} 119 (1990); Paul F.
Kirgis, Comment, \textit{The Constitutionality of State Allocation of Punitive Damage Awards}, 50 WASH.
& LEE L. REV. 843 (1993); Recent Case, 106 HARV. L. REV. 1691 (1993).}
\footnote{128. See \textit{GA. CODE ANN.} § 51-12-5.1(2) (Supp. 1994).}
\footnote{129. Id.}
\footnote{130. See \textit{Mack Trucks, Inc. v. Conkle}, 436 S.E.2d 635, 640 (Ga. 1993).}
\footnote{131. 737 F. Supp. 1563 (M.D. Ga. 1990).}
Clause because it made the state a party to the action. The District Court’s analysis consisted of a lengthy quote from *Browning-Ferris*, followed by the observation that the Georgia statute gives the State “a right to receive a share of the damages awarded . . .” Thus, the court concluded, without further explanation, that because the statute “converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State,” it is “contrary to the constitutional prohibition[] as to excessive fines . . .”

The *McBride* decision is remarkable for the court’s misapprehension of the Excessive Fines Clause. *McBride* correctly concludes that the State’s direct participation in sharing in the collection of punitive awards invokes the protections of the Excessive Fines Clause. The court is completely off-base, however, when it then concludes that the statute is *per se* unconstitutional. The Excessive Fines Clause does not prohibit “all fines” but rather only *excessive* fines. The conclusion that the Clause applies only means that a court then has to examine the circumstances and the amount awarded in each case to determine whether, in that particular instance, the punitive award is unconstitutionally excessive. The Georgia statute, on its face, cannot violate the Excessive Fines Clause. The State’s interest in punitive damage awards made in civil cases between private parties only invokes the Clause; it tells a court nothing about whether a particular award is in fact *excessive*. Similar to Georgia, Iowa has a statute that entitles the State to a substantial share of most punitive damage awards made in the Iowa courts. The statute provides for disbursement of a portion of such awards to the plaintiff and payment of the remainder into the Iowa Civil Reparations Trust Fund which is under the control of state executive officials. The money is to be used for the “purposes of indigent civil litigation programs or insurance assistance programs.”

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132. See id. at 1577-78.
133. Id. at 1578.
134. Id.
135. Id.
136. Another aspect of the Excessive Fines Clause issue raised by statutes like Georgia’s is whether, in determining excessive, a court should consider only the portion of the punitive award that is paid to the State. In other words, if it is only the State’s direct interest that invokes the constraints of the Excessive Fines Clause, then perhaps excessive for federal constitutional purposes depends only on the portion of a punitive award the State receives, not the entire amount. To date, no court appears to have considered this aspect of the Excessive Fines Clause issue.
137. See IOWA CODE ANN. § 668A.1(2)(b) (West 1987).
138. Id.
139. Id.
In *Burke v. Deere & Co.*, the defendant relied upon *McBride* to argue that the Iowa statute violates the Excessive Fines Clause because a substantial portion of any punitive award made under Iowa law will be paid to the civil reparations fund. The District Court observed that under the Georgia statute the money was paid into the general state treasury and thus, unlike that statute, the Iowa statute "does not provide the State of Iowa with any interest in the punitive damage award." After making that remarkably disingenuous declaration, the Court's remaining analysis consisted of a single sentence: "A clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts." In support of that conclusion, the court cited only *Browning-Ferris* "generally," and did not identify any portion of the majority's opinion in that case that justified the District Court's distinction.

Likewise, in *Spaur v. Owens-Corning Fiberglas Corp.*, the Iowa Supreme Court rejected the argument that the Iowa statute triggered the protection of the Excessive Fines Clause in civil cases between private parties. In so doing, the court relied upon a mechanical reading of *Browning-Ferris* and seemed to ignore (or be unaware of) the Supreme Court's recent holding in *Austin v. United States* that the Excessive Fines Clause applies in at least some civil cases. The Iowa Supreme Court declared that, notwithstanding the Iowa statute, the Excessive Fines Clause is inapplicable because the State neither prosecuted the action against the corporate defendant nor was attempting to extract penalties for the purpose of raising revenue. Incredibly, like the District Court in *Burke*, the court found "a clear distinction between the Fund and the general state treasury. The damage awards are not commingled with state revenues . . . ." The court did acknowledge that the civil reparations fund served "a public purpose." Nonetheless, without citing or mentioning *Austin*, the Iowa Supreme Court declared that "[w]e do not find that the limited nature of the State's interest in a share of any punitive damage award transforms subsection 668A.1(2)(b) into either a criminal or quasi-criminal statute."
The holdings in *Burke* and *Spaur* seem clearly wrong—or at the very least poorly supported—for at least two reasons. First, if all the State has to do to insulate itself from the limitations of the Excessive Fines Clause is have punitive awards paid into a special fund—which nonetheless is used for indisputably public purposes—rather than the general state treasury, there apparently is no level of state involvement sufficient to invoke the Clause, short of the state actually prosecuting the case itself. Second, to the extent in *Spaur* the Iowa Supreme Court seemed to believe that the Excessive Fines Clause applies only to criminal penalties, it was clearly wrong. *Austin*, decided more than six months before the court’s decision in *Spaur* and which the Iowa Supreme Court does not even cite, held that, at least in some circumstances, the Excessive Fines Clause may and will apply to civil proceedings that serve the punitive purposes of the State.\textsuperscript{150}

It may be a more difficult question, however, whether a state might avoid the reach of the Excessive Fines Clause by simply “taxing” punitive damage awards.\textsuperscript{151} The Supreme Court traditionally has accorded the States great leeway in denominating the collection of funds a “tax” rather than punishment, although the Court’s most recent decision on that issue suggests that the Court may look behind the State’s label and ascertain the true nature of the State’s interest and conduct.\textsuperscript{152} In addition, state constitutional provisions requiring “uniform” taxation may significantly limit states’ ability to tax punitive damage awards.\textsuperscript{153} Finally, the time at which the State’s interest in such awards attaches may affect the State’s ability to characterize its share as a form of “tax.” If the State’s interest attaches only after the plaintiff has obtained a judgment for punitive damages, then arguably the State’s share of the award is more like a tax than a civil penalty.\textsuperscript{154}

Several other states besides Iowa and Georgia have enacted similar statutes. For example, the Kansas statute provides that fifty percent of any punitive award in a medical malpractice case “shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the health care stabilization fund . . . .”\textsuperscript{155} Illinois has a statute that permits the trial court “in its discretion” to “apportion the punitive award among the plaintiff, the plaintiff’s attorney and the State of

\textsuperscript{150} See supra part III.A.

\textsuperscript{151} See Kirgis, supra note 127, at 845 & n.18; Recent Case, supra note 127, at 1696.

\textsuperscript{152} See Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (holding that the Double Jeopardy Clause bars collection of a punitive civil “tax” and tax penalties from a person previously convicted and sentenced criminally for the same conduct).

\textsuperscript{153} See Kirgis, supra note 127, at 845 n.18.

\textsuperscript{154} See id. at 845-46.

\textsuperscript{155} KAN. STAT. ANN. § 60-3402(e) (1994).
Illinois Department of Rehabilitation Services." 156 Utah has a statute which provides that fifty percent "of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund." 157 There apparently have been no Excessive Fines Clause challenges to these statutes that have reached the state appellate courts.

The Florida statute provides that in any civil case in which punitive damages are awarded, thirty-five percent of such an award shall be paid either to the State's Public Medical Assistance Trust Fund (if the action was based on personal injury or wrongful death) or to the General Revenue Fund (in all other cases). 158 The Florida Supreme Court has upheld the statute against numerous constitutional challenges, 159 but apparently has not considered whether it implicates the Excessive Fines Clause of the Eighth Amendment. Finally, Colorado enacted a statute which required that any plaintiff receiving a punitive award pay one-third of such "damages collected . . . into the state general fund." 160 The Colorado Supreme Court declared the statute unconstitutional in Kirk v. Denver Publishing Co., 161 but in so doing found a violation of the Takings Clause and did not consider the Excessive Fines Clause.

C. Other Objections to the Application of the Excessive Fines Clause to Punitive Damages

Apart from the issues addressed in the majority opinion in Browning-Ferris, there are several other potential objections to the application of the Eighth Amendment's Excessive Fines Clause to punitive damages awarded in civil proceedings between private parties. This section considers several possible objections, including that the Eighth Amendment does not apply to the States, that it does not protect corporations as opposed to natural persons, and that applying the Clause would necessitate applying other criminal procedure protections in civil punitive damages cases. None of these objections are, for the reasons set forth below, substantial hurdles to application of the Excessive Fines Clause to punitive damages. A final objection, that the Excessive Fines Clause contains no objective standards for determining when a punitive award is excessive, is a more substantial concern and is addressed in the

156. ILL. ANN. STAT. ch. 735, para 5/2-1207 (Smith-Hurd 1992).
159. See Gordon v. State, 608 So. 2d 800 (Fla. 1992) (per curiam) (rejecting Takings Clause and other constitutional challenges to statute).
most detail below. Ultimately, however, even with respect to this concern, there at least two alternatives that would provide courts with significant guidance in deciding excessiveness questions and which are well-grounded either in existing Eighth Amendment jurisprudence or the common law.

1. The Excessive Fines Clause is Not Applicable to the States Nor Does It Protect Corporations

In Browning-Ferris, the majority expressly reserved the questions "whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment" and "whether the Eighth Amendment protects corporations as well as individuals." Justices O'Connor and Stevens, in dissent, addressed both questions. They easily, and correctly, concluded first that there is no good reason why some parts of the Eighth Amendment—such as the Cruel and Unusual Punishments Clause—should be incorporated by virtue of the Fourteenth Amendment’s Due Process Clause—as it is—and not others such as the Excessive Fines Clause. Justice O'Connor recognized that, in 1892, the Court held that the Eighth Amendment does not apply to the States, but that, during the thirty years prior to Browning-Ferris, the Court regularly and consistently had applied the Cruel and Unusual Punishments Clause to the States, “most notably in the capital sentencing context.” After observing that the Court also “has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States,” she quite sensibly declared “I see no reason to distinguish one Clause of the Eighth Amendment from

163. See id. at 283-84 (O'Connor, J., concurring in part, dissenting in part); see also Massey, supra note 13, at 1271-72 (arguing that, given the Court's application of the Cruel and Unusual Punishments Clause to the States, "it seems a small enough, and a logical enough, extension to incorporate the excessive fines clause into the due process clause of the fourteenth amendment"); Jeffries, supra note 13, at 148 ("[T]here is no apparent reason to doubt that the prohibition against excessive fines applies to the states" because the Court has so held with respect to the Cruel and Unusual Punishments Clause, has assumed the same with respect to the Bail Clause, and the Excessive Fines Clause "is logically intertwined with the other two provisions."). Cf. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 130-32 (2d ed. 1829) ("Excessive fines constitute one mode of inflicting cruel punishments."), reprinted in 5 THE FOUNDERS' CONSTITUTION 387 (Philip B. Kurland & Ralph Lerner eds., 1987).
165. See Browning-Ferris, 492 U.S. at 284 (O'Connor, J., concurring in part, dissenting in part).
166. Id. (O'Connor, J., concurring in part, dissenting in part).
another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States."167

Similarly, Justice O'Connor in Browning-Ferris had little trouble concluding that the Excessive Fines Clause should protect corporations as well as natural persons. In reaching that conclusion, she argued that the Court has refused to grant constitutional criminal procedure protections to corporations only when the nature of the right is not one that can be held by an entity but rather is a personal right, for example, the Fifth Amendment privilege against self-incrimination.168 Justice O'Connor recognized that the Court has not applied all constitutional protections to corporations, but she pointed to cases in which the Court permitted corporations to invoke First Amendment free speech rights, the right not to have property taken without just compensation, the Fourth Amendment right against unreasonable searches and seizures, double jeopardy protection and general due process rights.169 She argued that the payment of monetary sanctions is something a corporation may do as an entity and, indeed, she cited early twentieth century cases in which the Court relied on the Fourteenth Amendment's Due Process Clause to scrutinize fines levied on corporations.170 Thus, Justice O'Connor concluded, if the Due Process Clause protects corporations from overbearing and oppressive monetary sanctions, the Excessive Fines Clause also protects them from such penalties.171

It is difficult to argue with Justice O'Connor's reasoning on either point, but especially with respect to the conclusion that the Eighth Amendment's Excessive Fines Clause applies to the States. Clearly, in the capital punishment cases, the Court has, for over twenty years, applied the requirements of the Cruel and Unusual Punishments Clause to the States.172 There simply appears to be no basis in the text nor the history of the Eighth Amendment, the Court's own decisions, nor in common sense for distinguishing between the Cruel and Unusual Punishments Clause and the Excessive Fines Clause for purposes of the incorporation doctrine.

The second question, whether the Excessive Fines Clause applies to corporations in addition to natural persons, is perhaps a little less clear,

167. Id. (O'Connor, J., concurring in part, dissenting in part).
168. Id. (O'Connor, J., concurring in part, dissenting in part).
169. Id. at 284-85 (O'Connor, J., concurring in part, dissenting in part) (citing cases).
170. Id. at 285 (O'Connor, J., concurring in part, dissenting in part) (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111-12 (1909) and St. Louis I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).
171. Id. (O'Connor, J., concurring in part, dissenting in part).
given the Court’s decisions in this area. Nonetheless, even were the Court to conclude that the constitutional prohibition on excessive fines does not protect corporations, that result would not mean that the Excessive Fines Clause never applies to civil suits between private parties in which punitive damages are awarded. Rather, it would mean only that cases involving corporate defendants would be outside the reach of the Eighth Amendment. Although that result might eliminate a significant portion—if not the majority—of punitive damages cases from the Amendment’s scope, it would not eliminate the effect of the Excessive Fines Clause altogether. It still would remain applicable to protect individual defendants. Thus, although Justice O’Connor is almost certainly correct that the Excessive Fines Clause should protect corporations as well as natural persons, even a contrary conclusion would not eliminate the Eighth Amendment from consideration in all civil cases between private parties in which punitive damages are awarded.

2. Applying the Excessive Fines Clause to Punitive Damages Would Necessitate Applying Other Constitutional Criminal Procedure Protections to Civil Proceedings Involving Punitive Damages Claims, e.g., Proof of Defendant’s Wrongful Conduct Beyond a Reasonable Doubt

It might be suggested that, if the courts were to apply the Excessive Fines Clause to punitive damages because they are punitive and quasi-criminal in nature, then they also would be obligated to import into civil proceedings involving punitive damages other constitutional criminal procedure protections such as the requirement of proof beyond a reasonable doubt. In *Austin v. United States*, however, makes clear that there is no such problem. In *Austin*, the Court observed that “[s]ome provisions of the Bill of Rights are expressly limited to criminal cases” but “[t]he text of the Eighth Amendment includes no similar limitation.” In a detailed footnote, the Court explained that its decisions generally had adhered to the “distinction between provisions that are limited to criminal proceedings and provisions that are not,” noting that it had applied the Fourth Amendment (which is not so limited) in civil forfeiture proceedings but not the Confrontation Clause of the Sixth Amendment, nor the due process requirement of

175. *Id.* at 2804.
176. *Id.* at 2804-05.
177. *Id.* at 2804-05 n.4.
proof of guilt beyond a reasonable doubt, nor generally the Fifth Amendment privilege against self-incrimination, all of which are viewed as primarily, if not solely, for the protection of the rights of criminal defendants.\textsuperscript{178} The only caveat the Court offered was that, in extraordinary circumstances, a civil proceeding could be so punitive in nature that it would be treated as a criminal proceeding, in which case all of the foregoing protections necessarily would apply.\textsuperscript{179}

Thus, under the Supreme Court's most recent pronouncement regarding the Excessive Fines Clause, it is clear that applying the Clause to civil proceedings generally does not require importing other constitutional criminal procedure protections into such proceedings. Nor do the Court's recent double jeopardy cases involving civil proceedings\textsuperscript{180} suggest a contrary conclusion. Those cases are distinguishable because they involved civil penalties or taxes sought after the defendant had been prosecuted criminally. In the vast majority of cases in which punitive damages are awarded, the defendant has not been—and will not be—prosecuted criminally for the conduct at issue. Thus, even if application of the Excessive Fines Clause to punitive damage awards in civil proceedings between private parties suggests application of double jeopardy principles to those same proceedings, as a practical matter the issue is unlikely to arise with any frequency.\textsuperscript{181}

3. The Excessive Fines Clause Provides No Objective Criteria for Determining When a Punitive Damages Award is Excessive

a. Proportionality as the Guiding Principle

The Eighth Amendment prohibits "excessive" fines, but nowhere amplifies the meaning of the term "excessive." Similarly, there appears to be nothing in the history surrounding the drafting and ratification of the Amendment to suggest that the drafters had any specific intent with respect to the notion of what constituted an "excessive" fine.\textsuperscript{182} Thus,

\begin{itemize}
\item \textsuperscript{178} See id. (citing cases).
\item \textsuperscript{179} See id. (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).
\item \textsuperscript{181} States in which the state shares in any punitive award may, however, encounter double jeopardy problems. In such states, even with no criminal proceeding, each civil suit against a particular defendant for a single course of conduct which results in an award of punitive damages would constitute "punishment" by the state. In that situation, punitive awards made in multiple civil suits based on a single course of conduct, such as in the products liability context, might violate double jeopardy.
\item \textsuperscript{182} See, e.g., House of Representatives, Amendments to the Constitution 17 Aug. 1789 (statement of Mr. Livermore: "What is understood by excessive fines? It lies with the court to determine."), reprinted in 5 THE FOUNDERS' CONSTITUTION 377 (Philip B. Kurland & Ralph
\end{itemize}
like the Due Process Clause of the Fourteenth Amendment, the Excessive Fines Clause by its own terms imposes only a general limitation on the government. Unlike the Due Process Clause, however, which provided only the most tenuous basis at best for regulating the size of punitive damage awards in civil cases, the Excessive Fines Clause does focus on a specific concept, "excessiveness," that may be given more concrete meaning without relying solely on the discretion of judges to devise and implement appropriate standards.

In particular, all three clauses of the Eighth Amendment—the Bail Clause, the Excessive Fines Clause and the Cruel and Unusual Punishments Clause—focus on what generally may be referred to as the concept of proportionality. Bail must be proportional to the offense. The same is true of fines. And punishment may not be cruel and unusual in relation to the nature and magnitude of the offense. Thus, the starting point for determining what is "excessive" under the Eighth Amendment necessarily ought to be the concept of proportionality.183

In particular, both the understanding of that concept at the time the Amendment was drafted and ratified,184 as well as contemporary understanding of that notion, may assist courts in fashioning a coherent constitutional doctrine of "excessiveness" that has a firm basis in Anglo-American jurisprudence.

b. A Ratio Rule

The first alternative that suggests itself under a proportionality inquiry is a ratio rule, i.e., a rule that a penalty which exceeds the amount of harm caused by the misconduct by more than a specified multiple is presumptively excessive. Multiples of compensatory damages as a measure of the appropriate level of punishment for misconduct were utilized as early as 4000 years ago185 and were utilized in England for

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183. See Bittle, supra note 13, at 1448 ("[T]he fundamental principle underlying the eighth amendment is proportionality."). See generally Solem v. Helm, 463 U.S. 277 (1983).

184. See, e.g., Montesquieu, 6 Spirit of Laws Ch. 16 (1748) ("It is an essential point, that there should be a certain proportion in punishments.") (emphasis added), reprinted in 5 The Founder's Constitution 369, 370 (Philip B. Kurland & Ralph Lerner eds., 1987); Penn. Const. of 1776, Sec. 29 ("[A]ll fines shall be moderate."); Sec. 38 ("The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.") (emphasis added), reprinted in 5 The Founder's Constitution 373 (Philip B. Kurland & Ralph Lerner eds., 1987); A Bill for Proportioning Crimes and Punishments (1778), reprinted in 5 The Founder's Constitution 374-76 (Philip B. Kurland & Ralph Lerner eds., 1987).

185. See Boston, supra note 14, at § 1:2 (citing examples from Babylonian and Roman law); see also Exodus 22:1 (man who steals and kills or sells an ox or sheep must restore to the owner five oxen or four sheep); id. at 22:9 (double damages for trespass to goods). See generally
centuries. Indeed, according to one commentator, approximately sixty-five statutes authorizing double, treble or quadruple damages were enacted in England from 1275 to 1753. The notion of multiplying compensatory damages as punishment for misconduct has a long pedigree in Anglo-American law.

Those same notions remain valid in many contexts today. Several federal statutes authorize multiple damages as a sufficient means of protecting the government's interest in punishing and deterring through civil suits certain categories of misconduct. Some state statutes currently limit punitive damages in particular in just this fashion. And, currently, as part of the Republican Party's "Contract with America," there are efforts underway in Congress to limit punitive awards in all cases to treble the amount of the plaintiff's actual damages.

A ratio rule that limits punitive damages to a specified multiple of the actual damages—or in some cases, if no harm occurred, the potential
harm as viewed objectively at the time of the misconduct—makes good sense if the point is to punish and deter the defendant’s conduct because of the actual or potential consequences. Moreover, conduct that is inherently bad generally will be punishable under the criminal law. Tort law need not necessarily provide a civil punishment for every act of criminal misconduct.\textsuperscript{192}

A ratio rule also focuses on the defendant’s conduct alone, rather than on factors such as the wealth of the defendant. Wealth, especially the lack thereof, may be relevant in absolving defendants of potential punitive liability, for example, in deciding \textit{not} to impose such an award on an indigent defendant. But the systems that currently exist in many states, systems that increase the magnitude of the punitive award if the defendant is wealthy, are antithetical to the fundamental notion of proportionality.\textsuperscript{193} It may be that if the only penalty available were a monetary fine, then a wealthy and an indigent murderer who committed identical crimes in identical circumstances should suffer different sentences simply because one had money and the other did not. Otherwise, the defendant with money who could afford to pay for the offense would have less incentive than the indigent person to avoid engaging in the conduct.\textsuperscript{194}

Again, however, the truly egregious misconduct that may give rise to punitive damages liability often will also subject the wrongdoer to criminal liability. It is not necessary for tort law to provide punishment for every offense. Additionally, in the context of products liability suits in particular, in which a defendant may be faced with multiple suits for a single course of conduct, the compensatory liability and litigation costs alone will act as a substantial punishment and deterrent.\textsuperscript{195} In general, people and corporations should be punished “only for what they do, not for who they are.”\textsuperscript{196}

\begin{footnotes}
\item[192] It is true that in some cases of egregious and reprehensible misconduct, there may be little or no actual damages. Indeed, that may be the very situation in which punishment in some form, including possibly punitive damages, is most legitimate. See \textsc{William M. Landes \& Richard A. Posner, The Economic Structure of Tort Law} 160-63, 184-85 (1987). Society’s interest in deterring such conduct, however, often, if not virtually always, can be served by resort to the criminal law. Many intentional torts—such as battery, assault, and false imprisonment—also constitute criminal offenses which can be punished by the criminal law.
\item[193] See \textit{Boston, supra} note 13, at 742.
\item[195] Judge Friendly recognized this proposition almost 30 years ago in \textit{Roginsky v. Richardson-Merrell, Inc.}, 378 F.2d 832, 841 (2d Cir. 1967), in the context of considering whether punitive damages were necessary to punish the manufacturer of a drug product that may have harmed hundreds or thousands of potential plaintiffs.
\item[196] See \textit{Boston, supra} note 13, at 742.
\end{footnotes}
A ratio rule, thus, is attractive as a measure of "excessiveness" under the Excessive Fines Clause for a number of reasons. First, the notion that a multiple of the actual harm caused is sufficient to serve the State’s interest in punishment and deterrence is older than English and American law and long has been recognized in Anglo-American law. Second, that notion is still recognized as valid today in the form of various statutory schemes. Third, a ratio rule is faithful to the proportionality concept that is central to all three of the Eighth Amendment’s provisions. A ratio rule focuses on the actual or potential harm that did or could have resulted from the defendant’s misconduct. The defendant’s status is irrelevant. Finally, a ratio rule would be relatively easy to apply once the courts have established the relevant multiple that limits, or at least creates a presumptive limit, on the size of any punitive award.

c. Solem v. Helm Proportionality Analysis

An alternative to using a ratio rule to define excessiveness would be for courts to adopt some form of the proportionality analysis the Supreme Court endorsed in Solem v. Helm198 for use in cases arising under the Eighth Amendment’s Cruel and Unusual Punishments Clause. That is, in fact, how Justice O’Connor recommended analyzing the issue in Browning-Ferris.199 Some commentators also have suggested such an approach.200

The Solem approach requires that courts considering whether a punishment is cruel and unusual in a particular case examine the following factors: (1) the gravity or seriousness of the offense and the harshness of the penalty; (2) the penalties imposed by the same jurisdiction on other criminals for similar conduct; and (3) the penalties imposed for commission of the same crime in other jurisdictions.201 Justice O’Connor, in her Browning-Ferris dissent, proposed that the Solem analysis be adapted as follows for use in determining whether a particular award of punitive damages is excessive:

First, the reviewing court must accord ‘substantial deference’ to legislative judgments concerning the appropriate sanctions for the conduct at issue.

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197. At the very least, courts could adopt a rule that ratios in excess of a specified multiple create a presumption of excessiveness with the result that plaintiffs then would have the burden to justify an award that exceeded the ratio. See Bittle, supra note 34, at 1466 (discussing similar proposal made in 1986 by the American Bar Association Litigation Section’s Special Committee on Punitive Damages).
200. See, e.g., Bittle, supra note 13, at 1452-55; Boston, supra note 13, at 732-42.
201. See Solem, 463 U.S. at 290-92.
Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.202

Justice O'Connor further suggested that "[i]n identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions"203 and, she suggested that in considering criminal penalties, "the court should consider not only the possible monetary sanctions, but also any possible prison term."204

The first Solem consideration—the gravity of the conduct and the harshness of the punishment (Justice O'Connor's second consideration)—may initially be assessed by comparing the actual or potential harm caused by the defendant's conduct to the punitive damages awarded. "[T]he punitive award is the proxy for the harshness of the penalty and the compensatory award is the proxy for the gravity of the offense."205 In cases in which there is little or no actual harm but the conduct nonetheless merits the imposition of punitive damages, the potential harm should serve as the measure of the gravity of the offense. This is essentially the rationale the Supreme Court adopted in upholding against a due process challenge a $10 million punitive award in a case in which there was only $19,000 in actual damages.206

The second inquiry under Solem is to consider the punishments that the same jurisdiction authorizes for different types of conduct. The point of this inquiry is to evaluate the legislative scheme for punishments generally in the relevant jurisdiction. Ultimately, a court must attempt to fit the conduct at issue within that scheme and consider whether the punitive award results in harsher punishment than the legislature has authorized for similar conduct or likely would authorize for the conduct in question.

There are at least three difficulties with this inquiry. First, not all conduct that gives rise to liability for punitive damages finds a close counterpart in the criminal law. Examples where this is likely to be true include products liability, medical malpractice and defamation, none of which generally involve conduct that is punished criminally. Thus, there may be no criminal counterpart for the conduct at issue.

203. Id. (O'Connor, J., concurring in part, dissenting in part).
204. Id. (O'Connor, J., concurring in part, dissenting in part).
205. Boston, supra note 13, at 736.
Second, an important part of most criminal punishment schemes is the potential for terms of imprisonment. Comparing legislatively authorized criminal fines to punitive damage awards is simple but placing a value on the potential for imprisonment is another matter. Furthermore, many criminal statutes provide for a wide range of possible terms of imprisonment, for example a sentence of fifteen years to life for murder. Thus, it may not be possible, even if the value of imprisonment can be quantified, to determine with any certainty anything other than the absolute lower bound of the criminal punishment authorized for similar conduct. That information alone may not be very helpful in determining whether a particular punitive award is excessive.

Third, this inquiry may create serious disputes over characterization. In an asbestos products liability case, for example, a plaintiff might argue that knowingly placing a deadly product on the market without appropriate warnings constitutes the equivalent of some form of murder. Alternatively, a defendant might argue that its conduct is nothing more than mere negligence, which generally is not punished criminally or that, at most, its conduct amounts to some form of reckless conduct that might justifiably be compared to involuntary manslaughter in its least culpable form. Another factor complicating the process of characterization is that a state may have both general prohibitions that apply to the conduct at issue as well as more specific statutes that might apply. For example, again using the asbestos products liability example, it may be unclear whether the defendant’s conduct should be evaluated by comparison to general forms of criminal conduct—such as murder—or to more subject-specific criminal and civil penalties such as those present in environmental statutes that prohibit releasing toxic or harmful wastes. Similarly, it may be difficult to decide in a bad faith case against an insurer who declined to pay a claim of the insured whether the insurer’s conduct, if deemed tortious, should be punished by reference to the State’s general prohibitions on fraudulent conduct or rather by focusing on specific provisions in the State’s insurance code that might apply to the conduct.

All of the foregoing are real and important concerns in applying the second factor of the Solem analysis. A ratio rule, as described in the previous section, avoids most, if not all, of these difficulties. But, in any event, the existence of civil and criminal penalties authorized by the legislature of the relevant jurisdiction may provide at least a tangible starting point for consideration of the potential excessiveness of a punitive award.

The final Solem inquiry is an examination of the punishments that other jurisdictions impose for the same or similar conduct. Application of this factor is very similar to the application of the second factor with
respect to legislatively authorized punishments available in other jurisdictions and, thus, will require consideration of the same issues identified above. Part of this comparison, however, may be particularly informative when considering statutes of those States that place caps on some or all punitive awards.\(^{207}\)

Another aspect of the third *Solem* inquiry will be the comparison of the punitive damage award to such awards made in cases arising in other jurisdictions and that involve the same or similar conduct. This is likely to be a relatively unscientific process, but perhaps no more so than the comparison of the punitive award to legislatively authorized punishments. To ensure that this comparison does not result in circular evaluation, however, courts would have to be careful about comparing punitive awards imposed in other cases and, as a prerequisite, perhaps establish some baseline against which to measure the acceptability of such decisions. In other words, if one or more states upheld punitive awards virtually without limit prior to the institution of a *Solem* analysis, comparing subsequent punitive awards to those decisions will be of little value in determining what is excessive.

One of the primary difficulties in applying the second and third inquiries identified in *Solem* is that, in some cases at least, there may be no relevant statutory criminal punishments or civil penalties against which to measure the potential excessiveness of a punitive award. In those circumstances, the first *Solem* inquiry—weighing the gravity of the defendant’s conduct against the harshness of the penalty—will become the determinative consideration. This inquiry, however, if assessed by comparing the actual or potential harm (as the proxy for gravity of the offense) to the punitive damage award (as the measure of the penalty), may boil down to a form of the ratio rule proposed in the previous section. Thus, if the *Solem* inquiry ultimately results in the adoption of ratio rules, because the second and third inquiries are difficult to undertake, perhaps the better approach is simply to adopt a ratio rule at the outset. That result appears justified by history, by contemporary practice, by the Eighth Amendment’s concern with proportionality and by the Court’s own precedent implementing the Eighth Amendment’s protections.

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207. The Supreme Court relied to some extent on this type of comparison in Oberg v. Honda Motor Co., 114 S. Ct. 2331 (1994), in holding that Oregon’s statutory prohibition on judicial modification of punitive awards unless a reviewing court could declare that “no” evidence supported the jury’s verdict violated due process because no other state imposed such strict limitations on judicial review of punitive awards.
IV. CONCLUSION

The Supreme Court erred in Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., when it held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties. The Court's conclusion that such punitive awards do not constitute a "fine" within the meaning of the amendment has been eroded significantly by the Court's own subsequent decisions applying the Excessive Fines Clause to civil proceedings involving the government and finding Fourteenth Amendment "state action" in a civil case between purely private parties. In light of these decisions, and the proliferation of state statutes that govern (1) the procedures for imposing punitive damages, (2) the size of such awards, and (3) the State's right to share in punitive awards, it is difficult to continue to maintain that punitive awards are insufficiently governmental in character to justify application of the Eighth Amendment.

Application of the Eighth Amendment's excessiveness limitation may be accomplished in at least two ways. First, the Supreme Court could adopt a ratio rule that would focus on the relationship between actual or potential damages and any punitive award. A ratio rule finds strong support in both historical and modern practices regarding the doubling or trebling of damages as an adequate level of punishment for various forms of misconduct. Once the Court established the appropriate ratio, such a rule would be relatively straightforward to apply, even if the ratio served only as a presumptive limit on the size of any punitive award.

The second alternative would be to adopt a modified form of the Solem v. Helm proportionality analysis. Under that approach, which two Justices of the Supreme Court already have advocated in this context, courts would have to consider the various civil and criminal penalties that exist for the same or analogous misconduct as that at issue, both for the jurisdiction in which the cases arose and for other jurisdictions. This approach has the disadvantage of requiring much more judicial effort to determine the appropriate limit for punitive awards but it does have a basis in the Court's existing Eighth Amendment jurisprudence and at least offers the possibility for imposing punitive damages in a manner that is consistent with legislatively authorized punishments for similar conduct. In any event, application

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of the Eighth Amendment's prohibition against excessive fines to private civil cases involving punitive damages could bring some semblance of rationality to at least one aspect of a civil justice system that many find difficult to understand.