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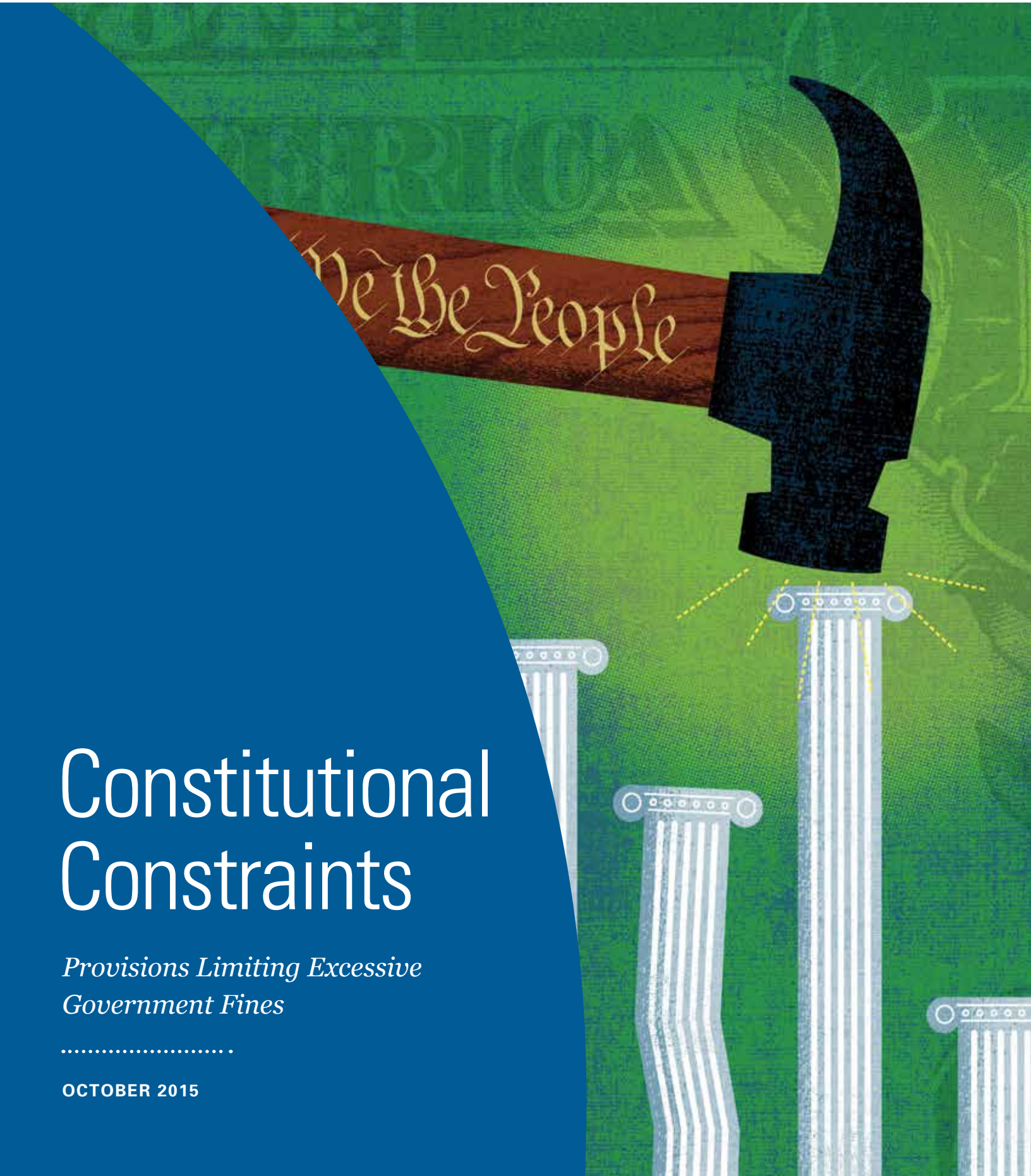

Constitutional Constraints

Provisions Limiting Excessive Government Fines

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Table of Contents

Prepared for the U.S. Chamber Institute for Legal Reform by

Paul D. Clement, Bancroft PLLC

Executive Summary

In the past decade, government officials at both the federal and state levels have increasingly turned to the imposition of massive fines against companies and individuals as a means of punishing perceived misconduct. Of course, fines have existed as long as there have been governments to impose them. And in the United States, both the federal government and the states have long employed criminal and civil fines as a means of deterring conduct and exacting retribution.

The fines that federal and state governments in the United States have been imposing in recent years, however, differ from the fines imposed in the past in both degree and kind. They differ in degree because of their sheer immensity—sometimes reaching into the billions of dollars against a single entity. And they differ in kind because they seldom follow a finding of wrongdoing. Instead, fines are increasingly imposed as components of coercive settlements with the government, preceding even formal allegations of misconduct. Moreover, entities are frequently subject to multiple fines by different government actors for the same conduct; the fines are based on novel interpretations of broadly worded statutes that no reasonable party could anticipate; and the fines often inure not to the general benefit of the government, but to the direct benefit of the particular government entities that impose them—creating incentives for government actors to deploy this strategy again and again.

Fortunately, the targets of this troubling new approach to government fines have a formidable ally: the Constitution. Our nation's founding document was forged in response to the same government abuses seen in today's imposition of government

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fines: arbitrary state action, lack of notice and process, concentration of government power, multiple punishments, and fundamental unfairness. The Constitution contains a number of provisions designed to limit the government's ability to impose criminal and civil fines. Chief among these constraints are the Excessive Fines Clause and the Due Process Clause, which speak directly to the problems raised by massive fines and their misuse. Other constitutional principles found in the Double Jeopardy Clause and the Takings Clause reinforce these restraints, which are buttressed by Supreme Court case law limiting punitive damages and expressing concerns about excessive criminalization and unsound prosecutorial discretion. These constitutional constraints not only provide targets of the new wave of government fines with a means to push back against overzealous government actors; they also give assurance to legislators wishing to curb these abusive government tactics, that their efforts are well-grounded in long-standing constitutional principles.

The two principal constitutional constraints on massive government fines are the Excessive Fines Clause and the Due Process Clause. Ignored for much of American history, the Excessive Fines Clause has recently reemerged as an important check on oppressive government penalties. Rooted in concerns over abusive government enforcement, the Excessive Fines Clause applies to any penalty that constitutes punishment, including penalties imposed in civil proceedings. It bars fines that are grossly disproportional to the offense and limits the government's ability to use its prosecutorial power for improper ends. As an independent constitutional restraint on state action, it also gives rise to an important interpretive principle requiring statutes to be construed in order to avoid problems under the Excessive Fines Clause.

The Due Process Clause is a second key constraint on excessive fines, and it is relevant to the government's new approach to fines in multiple ways. First, due process limits the extent to which government actors may be unduly incentivized to punish—a restraint that applies to the practice by many government agencies of imposing fines to fund substantial portions of their own operations. Second, due process limits the government's ability to seek multiple compensation for the same injury. Third, due process supports an ability to test the government's fines before an independent decision maker, despite the government's current efforts to use the

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threat of massive fines to avoid judicial review. Fourth, due process demands clear notice of the consequences that attach to conduct. Parties must be able to anticipate whether certain conduct is proscribed and the penalties for violating the law. These principles run counter to state action that bases liability on novel constructions of vaguely written statutes, followed by unpredictable, sweeping penalties based on that liability.

Other constitutional principles reinforce the foregoing limitations. The Double Jeopardy Clause bolsters the Due Process Clause's constraint against multiple punishments as well as the Excessive Fines Clause's restraint on massive government penalties. The Takings Clause forbids the government from forcing some people to bear burdens alone that should be borne by the public as a whole, and it prevents the government from forcing a private party to transfer property to another private party—both practices implicated by the government's new approach to financial penalties. The Supreme Court's punitive damages jurisprudence has placed substantive and procedural limitations on private jury awards that inform the textual prohibition on excessive fines that inure to the benefit of the government. And the Supreme Court has also recently expressed concerns over two problems that permeate the government's recent enforcement efforts: overcriminalization and questionable exercises of prosecutorial discretion.

Overview of the Problem

Government fines are nothing new. The Code of Hammurabi permitted "the elders" to "impose a fine of grain or money" on wrongdoers. And in the United States, federal and state governments have long imposed fines as part of their efforts to combat misconduct.

Traditionally, however, fines in the United States have largely been the proverbial tail of the dog: either they have constituted a relatively small penalty; or they have been imposed in connection with imprisonment, thus garnering little attention compared with the accompanying deprivation of liberty. Until recently, therefore, fines have largely been a relatively inconsequential tool in the government's enforcement arsenal.

Today, however, truly massive government fines are becoming routine.[1] Indeed, each week seems to herald the announcement of yet another record government fine against a company or individual. The new approach to fines does differ from the historic approach in both degree and kind. It differs in degree due to the sheer size of today's fines. The numbers would be mind-boggling were they not so commonplace. In May 2015, five major banks agreed to pay criminal fines exceeding $2.5 billion for conspiring to manipulate currency prices.[2] In November 2013, Johnson & Johnson agreed to pay more than $2.2 billion to the federal government to resolve various multiple criminal and civil actions leveled against it concerning the prescription medication Risperdal.[3] That same month, JPMorgan Chase agreed to pay $13 billion to numerous federal and state entities, including the Department of Justice, the Federal Housing Finance Agency, the National Credit Union Administration, and state attorneys general, in connection with its sale of residential mortgage-backed securities.[4] In December 2012, HSBC agreed to pay $1.9 billion to avoid possible criminal charges related to money laundering.[5] In September 2009, Pfizer was fined $2.3 billion and pleaded guilty to misbranding a pharmaceutical product.[6]

The new fines differ in kind from past fines in a number of significant respects.

FIRST

Fines are almost always the product of a settlement with the government, rather than a punishment imposed by an impartial adjudicator following a finding of criminal or civil liability. Governments are aware that the filing of a criminal indictment against a company can cause its share price to plummet, permanently damage its reputation, and place its licenses, contracts, and existing customers at risk. The consequences of civil charges, especially if they can result in disbarment from an

important government program, are almost as harmful. As a result, governments know that they need only to informally accuse a company of wrongdoing or commence an investigation in order to bring the company to the bargaining table and extract harsh penalties that the company often has little choice but to accept—even if it believes it would be exonerated in court of the misconduct of which it is accused. On occasion, agreements between the government and a business resulting in a fine include an admission of criminal or civil liability, but far more frequently, they do not. Thus, unlike traditional fines, the new model divorces the payment of a fine from a formal finding of wrongdoing by an impartial decision maker. Equally significant, because governments need not prove their case in court, they are far more likely to base accusations of wrongdoing—and extract fines based on those accusations—on novel interpretations of vague laws. As a result, no reasonable business can anticipate either the basis of its supposed liability or the size or kind of penalty the government might impose.

SECOND

No longer is a fine the product of a single government actor's investigation; indeed, often, there is no longer just a single fine. Today, companies are targeted by multiple government actors, each with its own investigation and enforcement powers. These entities include the federal Department of Justice, scores of federal agencies, state agencies, and state attorneys general (who are frequently assisted by the plaintiffs' bar, which often brings its own cases representing private individuals). Not only does this "swarm litigation" force a company to defend itself on multiple fronts, thereby increasing the pressure to agree to a substantial penalty despite a meritorious defense, it also exposes the company to multiple fines by multiple government actors for what is essentially the same alleged misconduct. Recently, for example, the South Carolina Supreme Court upheld a $124 million damages award in a case brought by the South Carolina Attorney General against Johnson & Johnson for the same purported misconduct regarding Risperdal that was the subject of the company's $2.2 billion settlement with the federal government. The case was not based on any unique connection to South Carolina or any conduct addressed exclusively to South Carolina.[7] If the other 49 states followed South Carolina's lead, it would amount to over $6 billion in civil fines on top of the federal government's $2.2 billion settlement.

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Governments are also increasingly requiring targets not just to pay criminal or civil fines, but also to submit to other obligations such as recoupment, payments to unrelated third parties, and other civil remedies. JPMorgan Chase's $13 billion settlement, for example, included an agreement by JPMorgan to spend $4 billion to provide consumer relief, including reduction of mortgage principal, loan modification, and refinancing for homeowners to avoid foreclosure. As another example, in 2012, the Department of Justice required the Gibson Guitar Corporation not only to pay a $300,000 fine to settle an alleged violation of a restriction on wood imports, but also to make a $50,000 payment to the National Fish and Wildlife Foundation, which had no direct relationship to the purported offense.[8] Governments are thus using novel methods to supplement traditional fines and, in so doing, blurring the lines among the various remedies at its disposal.

THIRD

Fines have historically been deposited into the general treasury of the government imposing them, where like all general revenues they are subject to traditional constitutional, statutory, and political constraints on spending for the good of the public at large. Today, however, fines are increasingly paid to the specific federal or state actor that imposes them, which then has full rein to spend the money on its own needs or desires free from traditional checks and balances or any real oversight. The Consumer Financial Protection Bureau (CFPB), for example, has a "Civil Penalty Fund" into which the proceeds of settlements are placed. The CFPB—which operates outside the congressional appropriations process—then uses those proceeds in part to fund its own operations. Similarly, the Department of Justice and Department of Health and Human Services maintain a "Health Case Fraud and Abuse Control Account" that holds the proceeds of all fines, settlements, and civil penalties imposed in healthcare fraud enforcement actions. The departments have recently used this fund not simply to return proceeds to the general treasury, but also to create and sustain new task forces designed to amplify their enforcement efforts. The result of this "self-funding" of law enforcement gives multiple government actors a strong incentive to focus on maximizing revenue by targeting deep-pocketed companies and individuals, despite questionable legal bases for establishing their alleged wrongdoing.

Furthermore, the recent approach to fines is not limited to companies; governments have employed the same tactics against individuals in corporate leadership. For example, in 2009, the Securities and

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Exchange Commission (SEC) agreed to dismiss civil charges against Maurice "Hank" Greenberg, former chairman and chief executive officer of American International Group, in exchange for a civil penalty of $7.5 million and disgorgement of another $7.5 million.[9] One year later, the SEC settled civil charges against former Countrywide Financial CEO Angelo Mozilo in exchange for a $22.5 million civil penalty and $45 million in disgorgement.[10] A year after that, Marc Hermelin, former CEO of drug manufacturer KV Pharmaceutical, pleaded guilty to misbranding in exchange for one month of imprisonment, a $1 million fine, and $900,000 in forfeiture.[11] In sum, billions of dollars are flowing from the private sector to the government—to say nothing of the hundreds of millions of dollars spent navigating and resolving redundant enforcement efforts—without any finding of wrongdoing by an impartial adjudicator or any judicial determination that the punishment fits the conduct.

The Excessive Fines Clause

The Excessive Fines Clause is perhaps the leading constitutional constraint on the new approach to government fines. The Excessive Fines Clause is a component of the Eighth Amendment to the Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[12] Reflecting the status of fines as the less dangerous means of government enforcement throughout most of American history, the Excessive Fines Clause was long ignored in American jurisprudence. Recent decisions by the Supreme Court interpreting and applying the Clause, however, have reestablished it as an important check on abusive government power.

The Historical Roots of the Excessive Fines Clause

The Excessive Fines Clause is rooted in concerns over abuse of the government's prosecutorial power. Its history stretches back to 13th-century England and the use of "amercements." The medieval analog to today's fines, amercements were an "all-purpose royal penalty" demanding payments to the Crown, imposed on individuals who were "in the King's mercy" for committing some offense.[13] Over the years, amercements became increasingly frequent and were occasionally abused; the King used them as a source of royal revenue and as a weapon for oppressing enemies of the Crown.[14]

In 1215, the English barons sought to check this "arbitrary royal power" in the Magna Carta.[15] The Magna Carta placed limits on the "tyrannical extortions, under the name of amercements, with which King John had oppressed his people."[16] It required that: (1) one be amerced only for some genuine harm to the Crown; (2) the amount be proportional to the wrong; (3) the amercement not deprive one of his livelihood; and (4) the amount be fixed by one's peers, sworn to amerce only in a proportionate amount.[17]

The problem of outsized, arbitrary fines did not go away, however. By the time of the Stuart monarchs, fines had become "even more excessive and partisan."[18] The King's judges had imposed heavy fines on

the King's enemies, some of whom were forced to remain in prison because they could not pay the huge monetary penalties assessed.[19] The result was a provision in the English Bill of Rights of 1689 that placed even more pointed constraints on the Crown's ability to impose fines: Section 10 provided that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[20]

The American framers adopted this language in the Virginia Declaration of Rights and then in the Eighth Amendment, which was based directly on the Virginia Declaration.[21] Perhaps because its historical pedigree was well-known to the framers, the Eighth Amendment as a whole received little attention during the drafting and ratification of the Constitution, and the Excessive Fines Clause even less so.[22] Nonetheless, the Eighth Amendment "clearly was adopted with the particular intent of placing limits on the powers of the new Government"—specifically, "the potential for governmental abuse of its 'prosecutorial' power."[23] And the Excessive Fines Clause in particular was designed to "limit … the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."[24] It was "intended to limit … fines directly imposed by, and payable to, the government."[25]

The Modern Revival of the Excessive Fines Clause

The Excessive Fines Clause received relatively little attention from courts and scholars for most of American history. The *Browning-Ferris* case marked the Supreme Court's first serious examination of the history and purpose of the Clause. *Browning-Ferris* held that the Clause does not apply to damages awarded by a jury in a private civil trial.[26] As a result, the Court did not further explain when, precisely, the Clause is applicable or how to evaluate whether a fine is excessive.

The Court fleshed out the contours of the Clause's applicability in *Austin v. United States*.[27] In *Austin*, the federal government initiated *in rem* civil forfeiture proceedings against a mobile home and auto body shop after their owner pleaded guilty in state court to one count of possessing cocaine with intent to distribute. The case was prosecuted under a federal statute

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providing for the forfeiture of vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes. The government contended that the Excessive Fines Clause applies only if the challenged state action could be characterized as criminal punishment, whether by reference to criminal punishment at the time of the Constitution's Framing or based on a multi-factor test urged by the government.[28]

The Court rejected this argument and held that the appropriate question is not whether state action is criminal or civil, but rather "whether it is punishment."[29] In so holding, the Court reiterated *Browning-Ferris*'s observation that the purpose of the Eighth Amendment was "to limit the government's power to punish."[30] In particular, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'"[31] The Court observed that a civil punishment "may advance punitive as well as remedial goals," and state action need only serve "in part" to punish in order for the Excessive Fines Clause to be applicable.[32] Concluding that civil forfeiture under the federal statute at issue constituted "payment to a sovereign as punishment for some offense," the Court held that it was "subject to the limitations of the Eighth Amendment's Excessive Fines Clause."[33] It then remanded the case for a determination of whether the forfeiture was constitutionally excessive.[34]

Five years later, in *United States v. Bajakajian*,[35] the Court continued its examination of the Clause's key terms by addressing the meaning of "excessive." In *Bajakajian*, the defendant attempted to leave the country with $357,144 in legally obtained currency and pled guilty to failing to report that he was transporting more than $10,000 out of the United States, as required by federal law. Among other charges, the federal government sought criminal forfeiture of the entire $357,144. The Court renewed its previous observations that state action is a "fine" for Eighth Amendment purposes "if it constitutes punishment even in part" and regardless of whether it is styled *in rem* or *in personam*.[36] And it held that in the case before it, full forfeiture was so "grossly disproportional to the gravity of [the] offense" that it was unconstitutional.[37]

In so holding, the *Bajakajian* Court explained that "excessive" means "surpassing the usual, the proper, or a normal measure of proportion."[38] Acknowledging that neither the text nor the history of the Excessive Fines Clause suggests how disproportional a fine must be in order to be deemed constitutionally excessive, the Court looked to two other considerations in formulating its standard: First, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature" and second, "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." These principles counseled in favor of a "gross disproportionality" standard.[39] "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense," the Court stated, "it is unconstitutional."[40]

The Court then held that the forfeiture in the case before it satisfied that standard by looking to a number of factors that indicated gross disproportionality between full forfeiture and the gravity of the defendant's offense. The offense—a reporting offense—was relatively benign.

The defendant's violation was unrelated to any other criminal activities; the money comprised proceeds of legal activity and was to be used to repay a lawful debt. The defendant did not fit into the class of persons for whom the statute was principally designed—money launderers, drug traffickers, and tax evaders. The maximum term of imprisonment he could have received was six months, and the maximum fine was $5,000. And the harm caused by his offense was minimal; it affected only one party (the government) and in a relatively minor way, with no loss to the public fisc.[41]

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Since *Bajakajian*, the Court has not addressed whether a particular sanction depriving a party of property—a civil penalty, civil forfeiture, or otherwise—is excessive under the Excessive Fines Clause. The lower courts have generally hewn to some combination of the factors cited by *Bajakajian* in determining whether a fine is grossly disproportional to the offense and thus unconstitutional. In *United States v. Costello*,[42] for example, the Second Circuit explained: "Four factors, distilled from *Bajakajian*, guide our analysis: [1] the essence of the crime of the defendant and its relation to other criminal activity, [2] whether the defendant fit[s] into the class of persons for whom the statute was principally designed, [3] the maximum sentence and fine that could have been imposed, and [4] the nature of the harm caused by the defendant's conduct."[43]

The Excessive Fines Clause and the New Wave of Government Fines

Browning-Ferris, *Austin*, and *Bajakajian* all have implications for the new wave of government fines imposed on companies and individuals.

FIRST

Under these decisions, it is clear that the Excessive Fines Clause would apply to these fines if they were imposed without a target's consent. To be sure, the government frequently seeks recoupment, disgorgement, or other relief that could fairly be characterized as purely remedial. But these measures almost always accompany the imposition of fines whose purpose—whether labeled criminal or civil—is manifestly punitive in part. Under the foregoing decisions, that is sufficient to bring the fine within the purview of the Excessive Fines Clause.

SECOND

These decisions describe how the Excessive Fines Clause and its historic predecessors were animated by concerns over abusive and arbitrary government conduct—policies just as applicable to today's government overreaching. The Clause is "intended to prevent the government from abusing its power to punish."[44] Its primary focus is the "potential for governmental abuse of its 'prosecutorial' power."[45] It thus "limit[s]

the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."[46] These pronouncements have considerable force in the context of governments' recent approaches to fines.

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Furthermore, while the Court's cases have explained that a fine can be considered to be unconstitutional by being sufficiently excessive in size as compared with the underlying offense, they also indicate that the *purpose*, and not simply the *size*, of a fine matters as well—a fine used "for improper ends" may be constitutionally suspect. This has significant implications on governments' practice of effectively extorting enormous fines from deep-pocketed companies and individuals for the purposes of raising revenue and funding specific operations rather than combatting wrongdoing.

THIRD

Of course, the decisions also establish outer limits on the size of government fines. The multi-factor test adopted by the lower courts is necessarily "imprecise,"[47] but its overall emphasis on the relationship between the fine imposed and the gravity of the offense bears on the new approach to government fines. To begin with, it presupposes that the government must make some effort to establish what offense, exactly, the target engaged in, and how it did so—contrary to the recent practice of alleging vague violations of broadly drawn statutes under novel legal theories. The test also assumes that the government can adequately elaborate the harm caused by the defendant's conduct, since that too enters into the excessiveness inquiry. Finally, the test suggests that a government's announcement of historic fines—a common public-relations practice upon imposing a fine—can be used against it. After all, if a fine levied against a target is truly "historic," then unless the alleged offense is equally "historic," the fine may well "surpass … the usual, the proper, or a normal measure of proportion," rendering it "excessive."[48]

The Canon of Constitutional Avoidance

The revival of the Excessive Fines Clause as a meaningful constitutional prohibition on state action also implicates broader interpretive principles bearing on the imposition of government fines, in particular the canon of constitutional avoidance. Under the avoidance canon, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[49] This canon counsels in favor of treating statutory authority in a way that minimizes rather than maximizes the number of violations from a course of conduct and so avoids problems under the Excessive Fines Clause.[50] It also augurs in favor of rules that limit the government's discretion to subdivide conduct in a way that artificially multiplies the numbers

of violations and artificially magnifies a prosecutor's discretion to inflate the applicable penalties.

The regulated community deserves to know what conduct constitutes a fine, rather than remaining at the mercy of a government prosecutor who can decide what constitutes a false claim or an unfair practice. Although prosecutors and agencies generally have broad discretion in their enforcement decisions, that discretion is "subject to constitutional constraints."[51] Accordingly, the canon of constitutional avoidance contemplates some cabining of prosecutorial discretion for enforcement decisions that implicate the Excessive Fines Clause.

The Rule of Lenity

Finally, the reemergence of the Excessive Fines Clause recalls concerns similar to those raised by the rule of lenity. The rule of lenity dictates that ambiguities in criminal statutes be resolved in favor of defendants.[52] Premised on the principle that "legislatures and not courts should define criminal activity," it requires the legislature to issue a clear mandate if it seeks to impose criminal liability.[53] Just as with ambiguous criminal statutes, the Excessive Fines Clause—at least as it relates to criminal fines—militates against imposing disproportionately large fines when Congress has not clearly defined the scope and reach of a punitive statute. Yet that is precisely the approach government actors have taken in the new wave of government fines, capitalizing on vague and ambiguous statutes to coerce extraordinary payments from their targets.

The Excessive Fines Clause and rule of lenity are also analogous in another respect: both check the executive branch by cabining prosecutorial discretion. The rule of lenity requires that courts decline to extend the law to cover unexpected and uncertain factual scenarios, even if the prosecutor has chosen to charge the crime. The Excessive Fines Clause can and should function similarly in the face of overzealous or politically motivated prosecutors and agencies seeking monetary penalties.

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The Due Process Clause

Another key constitutional constraint on the new wave of government fines is the Due Process Clause, which is found in two separate constitutional provisions. The Fifth Amendment to the Constitution states in relevant part that "[n]o person shall…be deprived of life, liberty, or property, without due process of law."[54] The Fourteenth Amendment to the Constitution states in relevant part that "[n]o state shall…deprive any person of life, liberty, or property, without due process of law."[55] Multiple strains of precedent addressing and applying the Due Process Clause bear upon the government's pursuit of excessive fines.

Due Process Limits the Government's Ability to Feather Its Own Nest

The Supreme Court has long frowned on practices under which judges and prosecutors have personalized incentives to punish, especially financial incentives. The seminal case on this subject is *Tumey v. Ohio*,[56] which contains parallels to today's practice of government fines.

In *Tumey*, state and municipal statutes gave the mayor of an Ohio village authority to hear and decide criminal cases involving violations of prohibition laws, and also to impose fines upon the guilty. The village's treasury would receive half of any fine, with the other half going to the state treasury. In addition, half of the village's share of fines (i.e., one-quarter of the total) was directed to a special fund used solely for enforcing the prohibition laws. Deputy marshals, detectives, and prosecutors were compensated from the fund, each receiving percentages of a collected fine. Finally, on top of his regular salary, the mayor was compensated for his costs to hear each case; but no costs could be recovered unless a defendant was convicted. Thus, apart from the fund created by the fines from convicted defendants, the mayor, marshals, detectives, and prosecutors could not be paid for their services.[57] Evidence also showed that the mayor believed the "liquor court" necessary to shore up the village's finances, and that the collected fines had gone toward general village upkeep.[58]

The Court held that "a system by which an inferior judge is paid for his service

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only when he convicts the defendant" violates due process unless the payments are *de minimis*, which did not describe the circumstances before it.[59] The Court also held that due process was violated because of the structure and incentives of the liquor court system. The system gave "inducement[s]" to the village to maintain the court, and offered the village "a means of substantially adding to its income … to relieve it from further taxation."[60] Thus the mayor, who represented the village and was responsible for its financial condition, had an additional improper incentive to convict defendants.[61] Combining the executive and judicial power in the mayor did not itself raise due process concerns; what was problematic was that the liquor court system involved "such addition[s] to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact."[62]

Nearly 50 years later, the Court reaffirmed *Tumey* in *Ward v. Village of Monroeville*.[63] Like *Tumey*, *Ward* also involved a court presided over by a village mayor. Unlike *Tumey*, the mayor's compensation was not dependent on convictions; however, "[a] major part of village income" was "derived from the fines, forfeitures, costs, and fees imposed by him."[64] The Court observed that "the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'"[65] And it concluded that the "possible temptation" existed where the mayor's executive responsibilities for village finances could make him more likely to render convictions and impose monetary penalties against defendants.[66]

Tumey and *Ward* are of a piece with other Supreme Court decisions holding that the Due Process Clause limits the authority of decision makers with either real or perceived improper motivations. In *Aetna Life Insurance Co. v. Lavoie*,[67] for example, the Court held that due process was violated when a judge heard a bad-faith claim against an insurance company while simultaneously serving as the lead plaintiff in a class-action suit against insurance companies based on bad-faith conduct.[68] In *Gibson v. Berryhill*,[69] the Court held that an administrative board composed of optometrists had a pecuniary interest of "sufficient substance" that it could not preside over a hearing against competing optometrists.[70]

To be sure, the Court has held that "prosecutors may not necessarily be held to as stringent a standard of disinterest as judges."[71] Thus in *Marshall v. Jerrico, Inc.*,[72] the Court declined to find a due process violation where fines imposed by the federal Employment Standards Administration (ESA) for violations of federal labor laws were returned to ESA

to reimburse its costs of determining violations and assessing penalties. It rejected the argument that this system created "an impermissible risk and appearance of bias by encouraging [ESA] to make unduly numerous and large assessments of civil penalties."[73] The Court observed that ESA officials were not comparable to the decision makers in *Tumey* and *Ward* because they acted in a prosecutorial capacity, and the constitutional concerns over incentivizing judges to secure penalties do not apply with the same force when prosecutors are similarly incentivized.[74]

At the same time, however, the *Marshall* Court acknowledged that there are "constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions."[75] For example, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."[76] The Court also suggested that a government agency's or official's judgment could be impermissibly "distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[77] Under the facts before the Court, though, the "biasing influence" was "too remote and insubstantial" to violate due process constraints.[78] That was because, in ESA's case, its collected fines amounted to less than 1% of its annual budget; the fines were minuscule compared with ESA's annual congressional appropriation; and ESA routinely did not spend its full appropriation, returning unspent appropriations to the Treasury in amounts far exceeding the total sum of collected fines.[79] Thus, the Court concluded, "the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties."[80]

Tumey, *Ward*, and *Marshall* bear upon the new approach to government fines, given the recent propensity for government agencies to use massive fines to fund substantial portions of their own operations. Both *Tumey* and *Ward* are premised on the critical fact that the fines imposed were a significant portion of the jurisdiction's revenue. Indeed, in *Tumey*, the fines paid the salaries of the individuals tasked with prosecuting and determining violations leading to the fines. And while *Marshall* distinguished the judicial role from the prosecutorial role, *Tumey* and *Ward* retain force within the context of the new wave of government fines, given the coercive aspect of government conduct that effectively renders prosecutors and other government officials both prosecutor and judge.

Equally important, *Marshall* conceded that the Due Process Clause could place "constitutional constraints" on prosecutors and government administrators performing prosecutorial functions.[81] And the circumstances surrounding today's fines

> *"A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."*

are markedly different from the facts that led *Marshall* to deem the impermissible biasing influence in that case "too remote and insubstantial."[82] In an era of tight budgets and constant appropriations battles, government agencies at both the federal and state levels now often use fines to fund their own operations. Indeed, some federal agencies, such as the CFPB, operate entirely outside the appropriations process. It is unlikely that the fines collected by the multiplicity of federal and state agencies comprise less than 1% of their respective budgets, as in *Marshall*. In 2012 alone, for example, the Environmental Protection Agency took in approximately $250 million in civil and criminal penalties.[83] Therefore, contrary to the facts in *Marshall*, it can no longer be said that many government agencies are "in no sense financially dependent on the maintenance of a high level of penalties." More than ever, then, the Due Process Clause can play a critical role in checking abusive government fines imposed not simply for the general benefit of the public treasury but also for the particular benefit of the agency imposing them.[84]

"In an era of tight budgets and constant appropriations battles, government agencies at both the federal and state levels now often use fines to fund their own operations. Indeed, some federal agencies, such as the CFPB, operate entirely outside the appropriations process."

Due Process Limits the Government's Ability to Seek Multiple Compensation for the Same Injury

Another feature of the new wave of government fines—seeking multiple compensation for the same alleged violation—also implicates due process limits. The Supreme Court has long been reluctant to expose parties to multiple liability for the same act. In the antitrust context, for example, the Court has established rules precisely designed to eliminate the risk of "unwarranted multiple liability for the defendant" and "duplicative recoveries" against that defendant.[85] The Court has applied this reasoning in multiple other contexts as well. In a Racketeer Influenced and Corrupt Organizations (RICO) fraud suit, for example, the Court has invoked the "risk of multiple recoveries."[86] It has similarly noted the need to "avoid duplication of damages" when claims "are submitted to different triers of fact."[87] And in the punitive damages context, the Court has warned against "the possibility of multiple punitive damages awards for the same conduct."[88]

The Due Process Clause subjects federal and state governments to these same constraints on obtaining multiple recoveries from a single target for the same conduct.[89] There is a "fundamental unfairness which is at war with due process" in requiring a company or individual to pay twice—or more—to the government for the same alleged harm.[90] Yet today, targets are subject to remedies by multiple government actors at both the federal and state levels, all for what is essentially the same alleged conduct. For example, the $13 billion payment by JPMorgan Chase is divided into

separate payments to numerous federal and state entities, including: $2 billion to the U.S. Department of Justice; $1.4 billion to the National Credit Union Administration; $515.4 million to the Federal Deposit Insurance Corporation; $298.9 million to the State of California; $19.7 million to the State of Delaware; $100 million to the State of Illinois; $34.4 million to the Commonwealth of Massachusetts; and $613 million to the State of New York. All of the claims settled by these payments, however, were directed toward essentially the same conduct: the packaging, marketing, sale, and issuance of residential mortgage-backed securities before 2009. If governments seek multiple recoveries, the Due Process Clause requires, at a minimum, that each government identify the discrete conduct directed at it and the particular harm it suffered as a result. Similarly, to the extent any penalties imposed are compensatory in nature, the Due Process Clause limits a government's ability to seek recoupment for the same conduct.

Due Process Supports Ability to Test Government Fines

Another critical feature of the Due Process Clause is that it favors an avenue to judicial review of state action. Federal courts have long held, for example, that preventing judicial review of constitutional claims would raise "serious due process concerns."[91] "[A] due process right to have the scope of constitutional rights determined by an independent judicial body" has been "long recognized."[92] Accordingly, consistent with canons of constitutional avoidance,[93] the Supreme Court has repeatedly construed that statutes barring judicial review nevertheless permit constitutional challenges to be heard by courts.[94] Even closer to the excessive fines context, the Court has also held that the Due Process Clause requires judicial review of the amount of punitive damages awarded by a jury.[95]

These principles support the proposition that a company or individual should be able to challenge fines as unconstitutional under the Excessive Fines Clause and other constitutional constraints, notwithstanding the government's desire to preclude judicial review by essentially forcing companies to agree to massive fines behind closed doors. Governments should not be able to invoke enormous penalties as a deterrent for companies to seek a judicial determination of their alleged liability. The Excessive Bail Clause of the Eighth Amendment provides that "[e]xcessive bail shall not be required."[96] In those cases where Congress has made bail available, this clause prevents bail from being set at a figure "higher than an amount reasonably calculated to fulfill" the purposes of bail—namely, ensuring the presence of an accused at trial and safeguarding the public.[97] In this way, the clause

> *"There is a 'fundamental unfairness which is at war with due process' in requiring a company or individual to pay twice—or more—to the government for the same alleged harm."*

safeguards the "traditional right to freedom before conviction" and the "infliction of punishment prior to conviction,"[98] and requires the government to test its theories of liability in front of a judge and jury before depriving someone of liberty.

The same principles apply to the new wave of excessive fines. Defendants facing the prospect of huge government fines should have the opportunity to test the government's theories before independent decision makers. Due process provides that avenue by requiring judicial review of staggeringly high fines designed in part to evade third-party scrutiny. As the Supreme Court has observed, "a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent" may present a "constitutionally intolerable choice."[99] Companies likewise should not be put to the "intolerable choice" of, on the one hand, agreeing to pay massive fines unchallengeable in court or, on the other hand, risking the ruinous consequences of an indictment or other charges if it refuses to agree to the government's demands.

Due Process Demands Clear Notice of the Consequences that Attach to Conduct

The Due Process Clause also demands that parties have reasonable notice of the consequences of their conduct. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[100] This requirement of "clarity in regulation" is "essential to the protections provided by the Due Process Clause" and mandates "the invalidation of laws that are impermissibly vague."[101] "A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[102]

On a related note, due process also bars the "novel construction of a criminal statute to conduct" that the statute had not "fairly disclosed to be within its scope."[103] And as the Court recently reaffirmed in *Elonis v. United States*,[104] a criminal conviction requires proof of *mens rea*, even if a criminal statute lacks a *mens rea* element. That rule of construction "reflects the basic principle that 'wrongdoing must be conscious to the criminal.'"[105] Moreover, the *mens rea* for criminal liability must be greater than negligence, because that standard is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing."[106]

These principles bear directly upon the government's recent approach to fines. In imposing fines, the government has increasingly relied on novel and expansive

constructions of broadly drafted statutes. State governments rely on similarly broad laws in their respective jurisdictions, including ambiguous "unfair practices" or "public nuisance" laws. Seldom do any of these laws provide targets with "fair notice" that their alleged conduct was proscribed or give rise to an "awareness of some wrongdoing." Nor could any of those targets have reasonably anticipated the potential penalties they might face for their purported misconduct—especially the multiple remedies that are now routinely extracted from them.

The government has frequently come up short in defending aggressive prosecutorial theories before a neutral decision maker.[107] By flouting "ordinary notions of fair play" and "the first essential of due process,"[108] the government's reliance on vague statutes to arbitrarily impose enormous financial liability should meet the same fate. Thus while the Court has long recognized that government sanctions that are "wholly disproportioned to the offense and obviously unreasonable" are substantively improper under the Due Process Clause,[109] imposing massive liability on parties who could not even anticipate that liability also clearly raises serious procedural problems.

Finally, just as the Excessive Fines Clause supports an interpretive principle limiting the government's ability to impose massive fines, so too does the Due Process Clause. Statutory and regulatory authority must be construed to avoid creating constitutional problems that may arise under the Due Process Clause from the new wave of government fines. These include concerns that government administrators are impermissibly seeking to increase their agency's own revenues at the expense of impartiality; the government is requiring a target to make multiple payments for the same conduct; the government is attempting to discourage independent review of its penalties; and the government is relying on novel constructions of vague statutes to impose liability and fines no party could have reasonably anticipated. Application of this interpretive principle ensures that the Due Process Clause fully serves its purpose as a bulwark of fundamental fairness.

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Other Constitutional Principles

Aside from the Excessive Fines Clause and the Due Process Clause, other constitutional principles reinforce the concerns over massive government fines and their misuse. Two specific provisions, the Double Jeopardy Clause and the Takings Clause, shape limitations on the government's ability to deprive persons of their property. And the Supreme Court's jurisprudence on punitive damages, overcriminalization, and prosecutorial abuse further inform the constitutional constraints on the new wave of government fines.

The Double Jeopardy Clause

Found in the Fifth Amendment to the Constitution, the Double Jeopardy Clause provides that no person "shall … be subject for the same offense to be twice put in jeopardy of life or limb."[110] This clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."[111] In *United States v. Halper*, the Supreme Court focused on the last of these categories and held that a civil sanction can constitute "punishment" for purposes of the Double Jeopardy Clause. A civil sanction is "punishment" under the Double Jeopardy Clause, the Court explained, if it "may not fairly be characterized as remedial" because it "bears no rational relation to the goal of compensating the Government for its loss," and instead only "serves the goals of punishment."[112]

In subsequent cases, however, the Court moved away from and finally abandoned this test. In *Department of Revenue of Montana v. Kurth Ranch*,[113] a closely divided Court held that the Double Jeopardy Clause was violated by a tax on possession of illegal drugs assessed after a criminal conviction for that same conduct.[114] In dissent, Justice Scalia observed that the Excessive Fines Clause—which had been "rescued from obscurity" in *Austin* only after the Court decided *Halper*—not only "place[s] substantive limits upon" punishment but supported and explained the decision in *Halper*.[115] In Justice Scalia's view, "[m]ultiple punishment is of course restricted," but by the Eighth Amendment, including the Excessive Fines Clause.[116] Next, in *United States v. Ursery*,[117] the Court held that an *in rem* civil forfeiture is not "punishment" for double jeopardy purposes. It acknowledged that *Austin* had deemed the same sanction "punishment" under the Excessive Fines Clause but explained that this clause is not

> *[T]he Double Jeopardy Clause is no longer the proper vehicle for challenging duplicative noncriminal fines. Nevertheless, it sanctions the proposition that levying multiple fines for the same conduct is a constitutional 'ill' that the Excessive Fines Clause is especially suited to address. Additionally, it reinforces the role of the Due Process Clause in constraining irrational and arbitrary government sanctions.*

"parallel, or even related to, the Double Jeopardy Clause."[118]

Finally, in *United States v. Hudson*,[119] the Court abrogated *Halper*, stating that it "deviated from our traditional double jeopardy doctrine" and its test had proven "unworkable."[120] The Court held that double jeopardy "protects only against the imposition of multiple *criminal* punishments for the same offense."[121] Thus, the inquiry is not whether a particular sanction is "punishment," but whether the legislature intended to establish *criminal* punishment, determined by reference to a multi-factor test.[122] Significantly, the Court noted that "some of the ills at which *Halper* was directed are addressed by other constitutional provisions."[123] Specifically, the Court explained, "[t]he Eighth Amendment protects against excessive civil fines," and the Due Process Clause protects "individuals from sanctions which are downright irrational."[124]

Hudson establishes that the Double Jeopardy Clause is no longer the proper vehicle for challenging duplicative noncriminal fines. Nevertheless, it sanctions the proposition that levying multiple fines for the same conduct is a constitutional "ill" that the Excessive Fines Clause is especially suited to address. Additionally, it reinforces the role of the Due Process Clause in constraining irrational and arbitrary government sanctions. Under *Hudson*, moreover, the Double Jeopardy Clause can still play a role with respect to multiple government fines if the fines are, in actuality, criminal penalties. The Court reiterated that even if the legislature has deemed a particular punishment civil, courts may inquire "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty," using the multi-factor test set forth in *Kennedy v. Mendoza-Martinez*.[125] *Hudson*'s preservation of this more limited role for the Double Jeopardy Clause in buttressing the Excessive Fines Clause underscores that multiple constitutional provisions cast doubt on the infliction of multiple punishments for the same conduct, which has become the norm in recent years.

The Takings Clause

The Takings Clause is also found in the Fifth Amendment to the Constitution. It provides that "private property" shall not "be taken for public use, without just compensation."[126] The Court has extended this prohibition to actions by states that improperly take private property.[127] The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[128] The notion that the few may not be forced to pay for burdens properly shared by all is "fundamental" to the Takings Clause.[129] This "axiomatic" proposition[130] bolsters the concerns raised by the new wave of government fines.

Frequently, the fines now imposed are not deposited in the general treasury for the use of the public at large (according to determinations by their elected representatives), but are instead kept by the specific government actor that imposed the fine, often to fund its own operations (including additional investigations) in lieu of legislative appropriations funded by general tax revenues. Increasingly, therefore, "some people"—deep-pocketed companies and individuals—are bearing the costs of funding governmental services that should be "borne by the public."

These concerns are magnified by the government's recent practice of requiring targets to make payments not only to the government but also to nongovernmental third parties. In *Kelo v. City of New London*,[131] the Supreme Court sanctioned the use of eminent domain to transfer property from one private party to another in the name of economic development ostensibly benefiting the general public. But it made clear that the government cannot simply take property from one private party for the sole purpose of transferring it to another private party, even if it pays just compensation.[132] That principle applies with considerable force to the government's compelled transfer of property from targeted companies to private third parties under the guise of a fine or other sanction—without, of course, any just compensation to boot. There is manifestly no "public use" occasioned by that state action, raising grave Takings Clause concerns.

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Punitive Damages Jurisprudence

Supreme Court decisions limiting massive punitive damages awards by juries also bear upon the new wave of government fines. The Court has held that due process forbids "grossly excessive" punitive damages and requires certain procedures in connection with imposing punitive damages.[133] Absent these safeguards, punitive damages "may deprive a defendant of 'fair notice of the severity of the penalty that a State may impose.'"[134] And they "may threaten 'arbitrary punishments,' i.e., punishments that reflect not an 'application of law' but 'a decision-maker's caprice.'"[135]

Accordingly, the Court has indicated that "few" punitive damages awards should exceed compensatory damages by more than a single-digit ratio.[136] The Court has also held that punitive damages cannot punish a party "for injury that it inflicts upon nonparties."[137] Otherwise, the "fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified."[138] Finally, the Court has indicated that the potential for abuse inherent in punitive damages demands appellate review.[139]

While the Excessive Fines Clause speaks more directly to the problem of massive fines that inure to the government, the foregoing principles adopted in the Court's punitive damages cases inform the analysis as well. The same concerns giving rise to constitutional constraints on imposition of punitive damages—massive liability, unbridled discretion, lack of notice, arbitrariness, and uncertainty—apply with equal force to many government fines, especially when they are imposed by prosecutors behind closed doors, rather than by neutral decision makers. The punitive damages cases themselves recognize that while governments possess "broad discretion" in "the imposition of criminal penalties and punitive damages," the Constitution "imposes substantive limits on that discretion."[140]

While the Court has indicated that criminal penalties provide greater notice than punitive damages, some of the premises that support that view are not true when it comes to the current wave of government fines. For example, the Court has observed that parties subject to punitive damages "have not been accorded the protections applicable in a criminal proceeding," thereby magnifying the "concerns over

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the imprecise manner" in which they are administered.[141] But most companies subject to massive fines likewise "have not been accorded the protections applicable in a criminal proceeding." To the contrary, prosecutors have used the threat of those criminal proceedings to ensure that the appropriateness of the fines is never judicially reviewed. In a similar way, many statutes specify a dollar amount per violation without providing meaningful notice of what constitutes a violation. Such statutes replicate the same notice problems that bedevil defendants in punitive damages cases.

Overcriminalization and Unsound Prosecutorial Discretion

Finally, a number of the Court's recent decisions have identified two themes that bolster concerns about the current approach to government fines: overcriminalization and prosecutorial overreach. These issues were on display most recently in *Yates v. United States*,[142] which addressed a provision of the Sarbanes-Oxley Act making criminal the destruction or concealing of any "tangible object" with the intent of impeding a federal investigation.[143] The federal government prosecuted a commercial fisherman under this provision after he tampered with a batch of illegally caught fish before returning to shore. The Court concluded that the term "tangible object" as used in Sarbanes-Oxley did not include fish, and overturned the conviction.[144] While the justices divided sharply over the interpretation of the statute, they were unified in their criticism of the prosecutors.

In a spirited dissent, Justice Kagan, joined by three other justices, argued that the Court's decision was driven not by traditional tools of statutory interpretation—under which "tangible object" includes fish—but by a latent concern over "overcriminalization and excessive punishment in the U.S. Code."[145] Justice Kagan pointed to the plurality's stated disquiet with a construction of the statute "that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil."[146]

"[A] number of the Court's recent decisions have identified two themes that bolster concerns about the current approach to government fines: overcriminalization and prosecutorial overreach."

> *"The government's current approach to fines is premised on overzealous enforcement of broadly worded statutes, excessive punishments unmoored from actual wrongdoing, and extraction of sanctions by means of attrition rather than merit."*

She agreed that the provision at issue "is a bad law" that "give[s] prosecutors too much leverage and sentencers too much discretion," and she added that it was "not an outlier, but an emblem of a deeper pathology in the federal criminal code."[147] But she believed that "whatever the wisdom or folly of §1519, this Court does not get to rewrite the law."[148]

Yates follows other recent decisions in which the Court has expressed doubts over questionable enforcement actions brought under broadly worded statutes. In *Bond v. United States*,[149] the Court unanimously overturned the conviction of a woman charged with violating the Chemical Weapons Convention Implementation Act after she spread small amounts of a minor toxin on the car door handle and mail of her husband's paramour. The Court deemed the government's decision to prosecute the incident under that statute "surprising" and expressed disapproval of the federal government's "zeal to prosecute" the defendant.[150]

In *United States v. Stevens*,[151] the Court struck down, on overbreadth grounds, a federal statute banning the creation, sale, or possession of depictions of animal cruelty, holding that it encompassed too much speech protected by the First Amendment.[152] In seeking to uphold the law, the federal government, "invoking its prosecutorial discretion," argued that it would prosecute only depictions of "'extreme' cruelty."[153] The Court rejected this contention, stating that the First Amendment "protects against the Government; it does not leave us at the mercy of *noblesse oblige*."[154] Indeed, the Court added, "[t]his prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint."[155] In *Sorich v. United States*,[156] Justice Scalia argued for review of the federal "honest services" statute because it "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[157] Not long afterward, the Court addressed the statute and significantly narrowed its reach, limiting it to bribes and kickbacks.[158]

The new wave of government fines clearly implicates the twin concerns of excessive criminalization and questionable exercises of prosecutorial discretion that the Court has noted. The government's current approach to fines is premised on overzealous enforcement of broadly worded statutes, excessive punishments unmoored from actual wrongdoing, and extraction of sanctions by means of attrition rather than merit. These efforts conjure the precise ills of arbitrary and abusive enforcement against which then-Attorney General, later Justice, Jackson warned in a speech to United States Attorneys:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.[159]

These principles not only cast a harsh light on the government's current practices; they militate toward a construction of statutes that limit the potential for arbitrary enforcement by providing clear notice of penalties.

Conclusion

The new approach to government fines reflects abuses that the Framers would quickly recognize: arbitrary enforcement, absence of fair notice, efforts to shield government action from judicial review, excessive punishment, and fundamental unfairness. Fortunately, the Constitution that they formulated responds to these practices with constraints that limit government overreach, including with respect to massive fines.

The Excessive Fines Clause and the Due Process Clause speak most directly to restraining the new wave of government fines. The Double Jeopardy Clause and the Takings Clause reinforce these constraints, which are further informed by Supreme Court decisions establishing limitations on punitive damages and expressing concerns about overcriminalization and questionable exercises of prosecutorial discretion.

Parties targeted by the multiplicity of government actors threatening liability and penalties should invoke these constitutional principles and precedents early, often, and forcefully. At a minimum, doing so will shape the metes and bounds of negotiations with government actors by placing them on notice that their efforts will not go unchallenged and are subject to well-established limitations. It will also tee up compelling issues that parties may wish to raise in court should the means for doing so arise; indeed, even the threat of seeking judicial or political relief based on invocation of these principles may favorably shape discussions with government actors. Finally, companies and individuals should invoke these principles when seeking to persuade legislators to enact limitations on the government's abusive practices. Assuring legislators that statutory efforts to restrain the new wave of government fines are consistent with foundational tenets of constitutional law, reinforced by decisions of the Supreme Court, may bolster efforts to obtain much-needed reforms.

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Endnotes

1 The information in this section is largely drawn from two publications by the U.S. Chamber Institute for Litigation Reform: *Unprincipled Prosecution: Abuse of Power and Profiteering in the New "Litigation Swarm"* (Oct. 2014) and *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* (Mar. 2015).

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7 *See South Carolina ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, ___ So. 2d ___, 2015 WL 4112411 (S.C. 2015).

8 *See* Paul J. Larkin, "Funding Favored Sons and Daughters: Nonprosecution Agreements and 'Extraordinary Restitution,'" 47 Loy. L. Rev. 1, 6-7 (2013).

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10 Press Release, U.S. Securities & Exchange Commission, *Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against a Public Company's Senior Executive* (Oct. 15, 2010), *available at* https://www.sec.gov/news/press/2010/2010-197.htm.

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12 U.S. Const. amend. VIII.

13 *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 269 (1989).

14 *Id.* at 270-71.

15 *Id.*

16 *Id.* at 272 (quotation marks omitted).

17 *Id.* at 271.

18 *Id.* at 267.

19 *Id.*

20 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689).

21 *See Browning-Ferris*, 492 U.S. at 266.

22 *Id.* at 264.

23 *Id.* at 266.

24 *Id.* at 267.

25 *Id.*; *see also id.* at 275 (observing that "the Eighth Amendment places limits on the steps a government may take against an individual," including "imposing excessive monetary sanctions").

26 *Id.* at 259-60.

27 *Austin v. United States*, 509 U.S. 602 (1993).

28 *Id.* at 605-07.

29 *Id.* at 610.

30 *Id.* at 609 (citing 492 U.S. at 266-67).

31 *Id.* at 609-10 (quoting 492 U.S. at 265).

32 *Id.* at 610; *see also id.* at 618 n.12 ("[T]he question is whether [state action] serves *in part* to punish, and one need not exclude the possibility that [it] serves other purposes to reach that conclusion.").

33 *Id.* at 622 (quoting *Browning-Ferris*, 492 U.S. at 265).

34 On the same day it decided *Austin*, and relying on *Austin* and *Browning-Ferris*, the Court held in *Alexander v. United States*, 509 U.S. 544 (1993), that the Excessive Fines Clause applies to *in personam* criminal forfeitures, likewise remanding for an excessiveness inquiry. *Id.* at 558-59.

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

36 *Id.* at 329 n.4, 331 n.6.

37 *Id.* at 339-40.

38 *Id.* at 335.

39 *Id.* at 336.

40 *Id.* at 337.

41 *Id.* at 337-39.

42 *United States v. Costello*, 611 F.3d 116 (2d Cir. 2010).

43 *Id.* at 120 (quoting *United States v. Varrone*, 554 F.3d 327, 331 (2d Cir. 2009)); *see also, e.g.*, *United States v. Jalaram, Inc.*, 599 F.3d 347, 356 (4th Cir. 2010); *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007); *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) ("We have ... looked to factors similar to those used by the Court in *Bajakajian* in our Excessive Fines Clause cases.").

44 *Austin*, 509 U.S. at 607.

45 *Browning-Ferris*, 492 U.S. at 266.

46 *Id.* at 267.

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

48 *Id.* at 335.

49 *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *see also Hooper v. California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); *cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

50 *See, e.g.*, *United States v. Krizek*, 111 F.3d 934, 940 (D.C. Cir. 1997).

51 *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

52 *See, e.g.*, *Liparota v. United States*, 471 U.S. 419, 425 (1985) (applying the rule to avoid "criminaliz[ing] a broad range of apparently innocent conduct").

53 *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995).

54 U.S. Const. amend. V.

55 *Id.* amend. XIV, §1.

56 *Tumey v. Ohio*, 273 U.S. 510 (1927).

57 *Id.* at 517-20.

58 *Id.* at 521.

59 *Id.* at 531-32.

60 *Id.* at 532-33.

61 *Id.* at 533.

62 *Id.* at 534.

63 *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

64 *Id.* at 58.

65 *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532).

66 *Id.*

67 *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

68 *Id.* at 822-25.

69 *Gibson v. Berryhill*, 411 U.S. 564 (1973).

70 *Id.* at 579.

71 *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987).

72 *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

73 *Id.* at 241.

74 *Id.* at 247-49.

75 *Id.* at 243.

76 *Id.* at 249-50.

77 *Id.* at 250.

78 *Id.* at 244.

79 *Id.* at 245-46, 250-51.

80 *Id.* at 251.

81 *Id.* at 243.

82 *Id.*

83 EPA, *Enforcement Annual Results for Fiscal Year 2012*, *available at* http://www2.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2012.

84 Executive agencies that raise and spend substantial portions of their own budgets—essentially undertaking their own taxing and spending functions—are also arguably violating separation-of-powers principles, since the Constitution vests Congress alone with the power to collect and expend public funds. *See* U.S. Chamber Institute for Legal Reform, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* 5 (Mar. 2015).

85 *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977); *see also Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972) (refusing to "open the door to duplicative recoveries" by permitting the state to sue in sovereign capacity given citizens' ability to sue for the same alleged misconduct). The Court has applied this reasoning in multiple other contexts as well.

86 *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269, 273 (1992) (invoking the "risk of multiple recoveries" in RICO fraud suit).

87 *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 n.6 (1963) (holding that where recovery of maintenance and cure claim and Jones Act claim "are submitted to different triers of fact, questions of res judicata and collateral estoppel necessarily arise, particularly in connection with efforts to avoid duplication of damages"); *see also Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 646 (1958) (permitting respondent to bring union-interference action in state court instead of before National Labor Relations Board, but acknowledging that "[o]f course, [respondent] could not collect duplicate compensation for lost pay from the state courts and the Board").

88 *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (warning against "the possibility of multiple punitive damages awards for the same conduct").

89 *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 77 (1961) (recognizing that forcing a company "to pay a single debt more than once" raises due process concerns).

90 *Akins v. Texas*, 325 U.S. 398, 402 (1945).

91 *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987).

92 Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 25 (1980); *see, e.g.*, *Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 765 (D.C. Cir. 1997) ("[A] statute that totally precluded judicial review for constitutional claims would clearly raise serious due process concerns.").

93 *See, e.g.*, *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

94 *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that a "serious constitutional question … would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680-81 (1986); *Johnson v. Robison*, 415 U.S. 361, 366-68, 373-74 (1974).

95 *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 418 (1994).

96 U.S. Const. amend. VIII provides an instructive analog.

97 *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *see also United States v. Salerno*, 481 U.S. 739, 752-54 (1987); *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952).

98 *Stack*, 342 U.S. at 4.

99 *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994); *see also Ex Parte Young*, 209 U.S. 123, 148 (1908).

100 *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids." (brackets and quotation marks omitted)).

101 *Fox*, 132 S. Ct. at 2307.

102 *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (statute violates due process if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes" or "so standardless that it invites arbitrary enforcement").

103 *United States v. Lanier*, 520 U.S. 259, 266 (1997).

104 *Elonis v. United States*, 135 S. Ct. 2001 (2015).

105 *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)).

106 *Id.* at 2011 (quoting *Staples v. United States*, 511 U.S. 600, 606-07 (1994)).

107 *See, e.g.*, *Elonis*, 135 S. Ct. at 2008 (rejecting statutory construction eliminating intent requirement); *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015) (rejecting broad reading of Sarbanes-Oxley Act); *United States v. Sekhar*, 133 S. Ct. 2720, 2727 (2013) (rejecting broad reading of Hobbs Act); *Fox*, 132 S. Ct. at 2317-18 (rejecting liability for indecency given lack of "fair notice of what was forbidden"); *United States v. Newman*, 773 F.3d 438, 443 (2d Cir. 2014) (rejecting broad insider-trading theories).

108 *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391).

109 *St. Louis, I.M. & S Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

110 U.S. Const. amend. V.

111 *United States v. Halper*, 490 U.S. 435, 440 (1989).

112 *Id.* at 448-49.

113 *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994).

114 *Id.* at 784.

115 *Id.* at 803 & n.2 (Scalia, J., dissenting).

116 *Id.* at 805.

117 *United States v. Ursery*, 518 U.S. 267 (1996).

118 *Id.* at 286.

119 *United States v. Hudson*, 522 U.S. 93 (1997).

120 *Id.* at 101-02.

121 *Id.* at 99.

122 *Id.* at 99-100.

123 *Id.* at 102-03.

124 *Id.* at 103; *see also id.* at 116 (Breyer, J., concurring in the judgment) ("[T]he Court in *Halper* might have reached the same result through application of the constitutional prohibition of 'excessive fines.'").

125 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *see also* 522 U.S. at 99 (brackets, citation, and internal quotation marks omitted).

126 U.S. Const. amend. V.

127 *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

128 *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)); *see also Monongahela Nav. Co.*

v. United States, 148 U.S. 312, 325 (1893) (Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government").

129 *Id.*

130 *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

131 *Kelo v. City of New London*, 545 U.S. 469 (2005).

132 *Id.* at 477.

133 *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

134 *Philip Morris*, 549 U.S. at 352 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574).

135 *Id.* (quoting *State Farm*, 538 U.S. at 416, 418).

136 *State Farm*, 538 U.S. at 425.

137 *Philip Morris*, 549 U.S. at 354.

138 *Id.*

139 *See Oberg*, 512 U.S. at 418.

140 *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001); *see also St. Louis, I.M. & S. Ry. Co.*, 251 U.S. at 66-67 (even though government has "a wide latitude of discretion" in prescribing penalties for violations of laws, due process is violated if "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable").

141 *State Farm*, 538 U.S. at 417.

142 *Yates v. United States*, 135 S. Ct. 1074 (2015).

143 *See* 18 U.S.C. §1519.

144 135 S. Ct. at 1088-89 (plurality); *id.* at 1089 (Alito, J., concurring in the judgment).

145 *Id.* at 1100 (Kagan, J., dissenting).

146 135 S. Ct. at 1088 (plurality).

147 *Id.* at 1101 (Kagan, J., dissenting).

148 *Id.*

149 *Bond v. United States*, 134 S. Ct. 2077 (2014).

150 *Id.* at 2085, 2093.

151 *United States v. Stevens*, 559 U.S. 460 (2010).

152 *Id.* at 482.

153 *Id.* at 480.

154 *Id.*

155 *Id.* The overbreadth doctrine constitutes another avenue for resisting excessive government fines. A statute "may be invalidated as overbroad if a substantial number of its applications are unconstitutional" under the First Amendment, "judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. Thus if the statute under which a fine is imposed substantially encompasses activities protected by the First Amendment, it may be subject to a facial attack as unconstitutionally overbroad.

156 *Sorich v. United States*, 129 S. Ct. 1308 (2009).

157 *Id.* at 1310 (Scalia, J., dissenting from denial of certiorari).

158 *See Skilling v. United States*, 561 U.S. 358, 368 (2010).

159 R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940; *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.").

Notes

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U.S. CHAMBER
Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com