OUR ANEMIC EXCESSIVE FINES CLAUSE: ARE STATE COURTS FOLLOWING THE FEDERAL LEAD?

Michael O'Hear[*]

In 2019, in Timbs v. Indiana, *the United States Supreme Court held for the first time that the Eighth Amendment Excessive Fines Clause is incorporated into the Fourteenth Amendment and thus limits the fines that can be imposed by state and local authorities. In its opinion, the Court suggested that the Clause might be used to rein in the controversial and growing reliance of American governments on economic penalties—a practice that is said to warp law-enforcement priorities and shift public expenses from ordinary taxpaying sources to the socioeconomically disadvantaged. However,* Timbs *was decided against a backdrop of well-established, contrary jurisprudential patterns in the lower federal courts. The federal case law has consistently adopted narrowing interpretations of the Excessive Fines Clause, which have left the Clause largely ineffectual as a matter of federal practice.* Timbs *seemed to invite state courts to engage differently with the Clause. Have they?*

*This Article provides the first systematic survey of the post-*Timbs *state case law on the Excessive Fines Clause. On the whole, state courts are following the federal lead, although the case law in a handful of states holds out the possibility of a more robust understanding of the Clause. In particular, if the emerging case law in Washington proves influential with other states, there remains some possibility that the promise of* Timbs *will be realized.*

* Professor, Marquette Law School. B.A., J.D. Yale University. This work was generously supported by a research grant from Marquette Law School. Thanks also go to Abby Nilsson and Haley Haddad for excellent research assistance, and to Chad Oldfather for helpful counsel.

TABLE OF CONTENTS

INTRODUCTION

It is common knowledge that American incarceration rates exploded over the past generation.[1] Less well known, but likely affecting a far larger number of people, is the explosion of *economic*

1. *See* MICHAEL O'HEAR, THE FAILED PROMISE OF SENTENCING REFORM xiii–xv (2017).

penalties over the same time period.[2] The economic consequences of criminal liability now often include some combination of fines, restitution to victims, forfeiture of property, and fees paid to the court and other agencies.[3] Such penalties have attracted growing criticism in recent years.[4] Imposed disproportionately on individuals who are poor, economic penalties can become a form of long-term debt that exacerbates socioeconomic disadvantage and interferes with a convicted person's rehabilitation and reintegration into society.[5] Moreover, critics argue, the pursuit of remuneration through economic penalties can warp the policies and practices of law-

---

2. *See, e.g.*, Daniel S. Harawa, *How Much Is Too Much?: A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 68 (2020) ("[F]ines are the most common form of punishment."); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1178 (2014) (noting proliferation of legal financial obligations since the 1980s).

3. Michael O'Hear, *Can the Excessive Fines Clause Mitigate the LFO Crisis? An Assessment of the Caselaw*, 108 MINN. L. REV. 1171, 1175 (2024). By "fees," I mean any of the many different types of impositions by which policymakers attempt to shift financial responsibility for various government functions to individuals who have been charged with or convicted of crimes—impositions that may go by such names as "'assessments,' 'surcharges,' and 'costs.'" *Id.* at 1182–83. Note that the economic penalties of concern include *civil* forfeiture, which is typically based on some underlying criminal activity, *id.* at 1187–88, and *civil* fines, which are typically imposed for lower-level violations of the law, such as parking or moving traffic violations, *id.* at 1185.

4. *See id.* at 1191–95 (summarizing criticism).

5. *See, e.g.*, ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 5 (2010), https://perma.cc/MX62-99Q9; Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 518 (2011); ARAVIND BODDUPALLI & LIVIA MUCCIOLO, URB. INST., FOLLOWING THE MONEY ON FINES AND FEES: THE MISALIGNED FISCAL INCENTIVES IN SPEEDING TICKETS 11–15 (Jan. 2022), https://perma.cc/G27S-3JVH; Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 443–50 (2021); Harawa, *supra* note 2, at 67–69; Michael Ostermann, Nathan W. Link & Jordan M. Hyatt, *Reframing the Debate on Legal Financial Obligations and Crime: How Accruing Monetary Sanctions Impacts Recidivism*, 62 CRIMINOLOGY 331, 344, 349 (2024) (finding, in a study of released prisoners, that more than 99% had criminal justice debts averaging nearly $6,000 each and that the amount of accumulated criminal justice debt was correlated with subsequent recidivism); *cf.* Jaclyn E. Chambers et al., *Estimated Effect of Fee Repeal on Family Financial Stress and Juvenile Probation Outcomes*, 31 PSYCH. PUB. POL'Y & L. 31, 41 (2025) (finding, in a study of the effect of repeal of fees in juvenile system in Alameda County, California, that juvenile recidivism rates were not reduced but length of probation terms was decreased; discussing inconsistent findings in prior research on effect of fees on recidivism). Particular concerns have been raised about the impact of economic penalties on unsheltered individuals. *See, e.g.*, Anna Ferron, Comment, *Taking the* Long *Road: The Excessive Fines Clause as a Tool for Protecting Washington's Unsheltered Population*, 98 WASH. L. REV. 1007, 1015–16 (2023).

enforcement agencies—the so-called "policing for profit" phenomenon.[6]

In the face of these concerning trends, several scholars have expressed hope that harsh economic penalties might be reined in through constitutional litigation,[7] particularly invoking the Excessive Fines Clause (EFC) of the Eighth Amendment.[8] The 2019 decision of the United States Supreme Court in *Timbs v. Indiana*[9] was thus greeted by some commentators as a watershed event.[10] In *Timbs*, the Court held that the EFC was incorporated into the Fourteenth Amendment Due Process Clause and hence binding on state courts and other state actors.[11] This decision might have encouraged more state-court defendants facing economic penalties to raise EFC claims and inspired more state-court judges to view such claims favorably.

---

6. *See, e.g.*, BODDUPALLI & MUCCIOLO, *supra* note 5, at v ("For example, states and localities have ramped up speeding ticket enforcement and arrests for various violations in response to budgetary shortfalls and political pressures."); Claire Johnson Raba, *Forfeiting Due Process: How Adjudicative Reform Fails Property Owners*, 51 FORDHAM URB. L.J. 299, 311 (2023) ("Opponents of civil asset forfeiture have styled this 'policing for profit,' in showing that civil asset forfeiture leads law enforcement agencies to engage in a higher number of low-dollar-value forfeitures."); Logan & Wright, *supra* note 2, at 1179 (noting the "systemic problem with incentives" created by fee practices).

7. *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 12 (2018); Ferron, *supra* note 5, at 1010; Harawa, *supra* note 2, at 68; Harry M. Hipler, *Conflicting Parameters of Code Enforcement Fines and Liens Pursuant to Chapter 162 of the Florida Statutes,* Timbs*, and the Eighth Amendment: How Much Is Too Much?*, 52 STETSON L. REV. 669, 701 (2023); Murat C. Mungan & Thomas J. Miceli, *Legislating for Profit and Optimal Eighth-Amendment Review*, 59 ECON. INQUIRY 1403, 1403–04 (2021); David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 545–47 (2017).

8. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." (emphasis added)). For an overview of the historical origins of the Clause, see Tim Donaldson, *More than Lip Service Is Required: Excessive Fines Clause Limitations Upon Fining the Homeless*, 54 ST. MARY'S L.J. 629, 632–41 (2023).

9. 139 S. Ct. 682 (2019).

10. *See, e.g.*, Harawa, *supra* note 2, at 68 ("The need for guidance in this area is more important now than it has ever been before—*Timbs* made the question of what constitutes an 'excessive fine' constitutionally relevant in all fifty states."); Wayne A. Logan, Timbs v. Indiana*: Toward the Regulation of Mercenary Criminal Justice*, 32 FED. SENT'G REP. 3, 3 (2019) ("Reaction to *Timbs* ran the gamut from regarding it as a 'huge' decision to declaring it would have little impact. . . . *Timbs* is important both because it provides a new federal constitutional basis for regulating government targeting of criminal defendants for revenue generation and because it signals the Court's broader recognition of the problematic nature of the practice." (citations omitted)).

11. 139 S. Ct. at 687.

Six years on, it is now possible to assess *Timbs*'s impact. Assessment might come from any number of distinct angles. This Article focuses specifically on the post-*Timbs* case law in state supreme courts and intermediate courts of appeals.

This Article is the third in a trilogy of papers on the nation's EFC jurisprudence in courts below the level of the U.S. Supreme Court. A great deal of scholarly ink has been spilled on the bare handful of Supreme Court cases that deal substantively with the EFC.[12] Yet, as Frederick Schauer puts it, limiting oneself to the work of the Supreme Court "is much like studying the ocean from the deck of the *Queen Elizabeth II*. There is a big world below the surface, one we will not see if we restrict our attention to what is on the top."[13]

Peeking at that "big world below the surface," the first paper in the trilogy examined the case law on the meaning of "fine" in state courts and lower federal courts.[14] Determining whether a challenged economic penalty even counts as a "fine" is the necessary first step in the EFC analysis. In brief, I found widespread judicial agreement that civil fines and certain kinds of forfeitures are covered by the EFC but splits over other kinds of forfeitures and restitution, as well as a general (but not universal) resistance to extending EFC protections to fees.[15]

The second paper turned to the second step of the EFC analysis—once an economic penalty is determined to be a "fine," then it must be examined for excessiveness.[16] Due to the volume and complexity of the case law, the second paper limited its focus to the federal circuit courts of appeals. In 1998, in *United States v. Bajakajian*,[17] the Supreme Court established a somewhat amorphous "gross disproportionality" test to be used for EFC excessiveness.[18] Over the ensuing quarter-century, a remarkably clear, consistent pattern emerged in the federal case law: at nearly every turn, the circuit

---

12. *See generally* Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461 (2000); Logan, *supra* note 10. The few articles that give substantial attention to lower-court cases focus on just one or a small number of decisions. *See, e.g.*, Donaldson, *supra* note 8, at 655–57 (discussing City of Seattle v. Long, 493 P.3d 94 (Wash. 2021)); Wesley Hottot, *What Is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 ALA. L. REV. 581, 592 (2021) (discussing State v. Timbs, 134 N.E.3d 12 (Ind. 2019)).

13. Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 682 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)).

14. *See* O'Hear, *supra* note 3, at 1171.

15. *Id.* at 1227–28.

16. *See* Michael O'Hear, *The Excessive Fines Clause in the Federal Courts: A Quarter-Century of Narrowing*, 12 TEX. A&M L. REV. 761, 761 (2025).

17. 524 U.S. 321 (1998).

18. *Id.* at 336.

courts chose to interpret the *Bajakajian* test so as to minimize EFC protections.[19] As is summarized in greater detail in Part II below, the circuit courts have displayed a strong preference for deferring to the policy choices made by legislatures regarding economic penalties.

This paper turns to the *state* cases on excessiveness. More specifically, this paper provides the first systematic analysis of the published EFC excessiveness decisions of state supreme courts and intermediate courts of appeals since *Timbs*. In total, this amounts to 52 cases—a surprisingly low number from fifty states and the District of Columbia. (The cases are listed in the Appendix.) In itself, the figure suggests that *Timbs* has hardly sparked a revolution in state courts.

Examining this set of cases more closely reveals jurisprudential patterns that, *in the aggregate*, echo the highly deferential approach of the federal cases.[20] The Ohio Supreme Court's important decision in *State v. O'Malley*[21] exemplifies the deferential model particularly well.[22] Yet, the state cases also reflect somewhat greater diversity than the federal cases. In particular, I describe distinct approaches to EFC proportionality review that have emerged in Indiana and Washington.[23] Given the paucity of post-*Timbs* EFC case law at the state level, it remains possible that other states may yet consider adopting the Indiana and/or Washington models, and the result might be a jurisprudential environment that is considerably more receptive to EFC claims in state courts rather than federal courts.

Whether other states *should* adopt the Indiana or Washington model is another question. The aims of this Article are more empirical and interpretive than prescriptive. I do show, however, that all three of the competing models can be defended, at least in some minimal sense, as *consistent with* the Supreme Court's sparse, opaque statements about EFC proportionality review.[24] The relatively robust Washington model, though, might hold some particular appeal for state-court judges who suspect that the federal courts have underenforced the EFC due to the particular nature of the federal-court role (that is, unelected, life-tenured judges who are far-removed from the established local practices that might be disrupted by non-deferential decisions).[25] Put differently, there may be good reasons for state courts (which are typically democratically accountable and closer to on-the-ground realities) to enforce the EFC more aggressively than federal courts have.

---

19. O'Hear, *supra* note 16, at 764.
20. *See infra* Part III.
21. 206 N.E.3d 662, 678 (Ohio 2022).
22. *O'Malley* is discussed in detail *infra* Section IV.B.
23. *See infra* Sections IV.A, IV.C.
24. *See infra* Section VI.A.
25. *See infra* Section VI.B.

The Article proceeds as follows. Part I describes three models of proportionality review that can be seen in *Bajakajian* and *Timbs*. I will refer to these models as individualized balancing, structural-deferential, and structural-critical. Part II summarizes my earlier findings regarding the federal case law. Using the terminology developed in Part I, the federal approach plainly reflects the structural-deferential model. Part III offers a quantitative look at the post-*Timbs* state cases, noting, among other patterns, a strong tendency for the EFC claims to be rejected on the merits. Part IV describes in more depth the leading cases from Indiana, Ohio, and Washington. The approaches in these states correspond to the individualized balancing, structural-deferential, and structural-critical models, respectively. Part V more briefly summarizes notable findings from other states. Part VI considers the path forward for state courts, including whether any of the three competing approaches is more clearly in line with the extant Supreme Court case law than the others.

I. THREE MODELS OF PROPORTIONALITY REVIEW

The U.S. Supreme Court has provided limited guidance regarding proportionality review. The Court's most extended treatment of the topic appeared in *United States v. Bajakajian*, which involved a criminal forfeiture under 18 U.S.C. § 982(a)(1) for a currency reporting violation.[26] More specifically, the defendant was convicted of attempting to take $357,144 out of the country without making a required report.[27] Since § 982(a)(1) mandates forfeiture of all property "involved in" an offense, the government was statutorily entitled to seize and retain Mr. Bajakajian's suitcase of cash.[28] However, on the facts of the case, the Court held that forfeiture of the full amount of the unreported currency would violate the EFC.[29] The majority and dissenting opinions in *Bajakajian* suggested strikingly different models of proportionality review.

A. Bajakajian *Majority: Individualized Balancing*

The majority opinion, authored by Justice Thomas and joined by four of his colleagues, exemplified an individualized, case-specific approach to proportionality review, centered on a weighing of the severity—or culpability—of the defendant's offense relative to the severity of the penalty. In finding Mr. Bajakajian's culpability to be low, the majority emphasized the technical nature and minimal harmfulness of his crime ("solely a reporting offense"),[30] as well as the

26. United States v. Bajakajian, 524 U.S. 321, 328 (1998).
27. *Id.* at 325.
28. *Id.* at 325–26 (quoting 18 U.S.C. § 982(a)(1)).
29. *Id.* at 337.
30. *Id.*

district court's finding that the non-reported money had been lawfully obtained by the defendant and was intended to pay a lawful debt, thus removing him from "the class of persons for whom the statute was principally designed" (i.e., money launderers, drug traffickers, and tax evaders).[31] The majority further "confirm[ed] a minimal level of culpability" by using as a benchmark the fine that Mr. Bajakajian faced under the federal sentencing guidelines, which was a maximum of only $5,000.[32] In the end, given such a low level of culpability, the majority concluded that Mr. Bajakajian should not be required to forfeit the full $357,144 that the government was seeking.[33]

B. Bajakajian *Dissent: Structural-Deferential*

Where the majority's approach to proportionality was individualized and case-specific, the dissent's approach might be characterized instead as structural in nature. I mean this in two overlapping senses. First, the dissent was structural insofar as it emphasized the structure of American government, specifically, the separation of powers and the primacy of the legislature over the judiciary in making policy choices.[34] Although the majority paid some lip service to this structural value,[35] the dissenters plainly gave it more weight, even accusing the majority of being "disrespectful of the separation of powers."[36]

Second, the dissent was structural insofar as it prioritized the overall efficacy of the regulatory regime embodied by the currency-reporting law.[37] This regime was less concerned with doing justice in individual cases than with diminishing the overall expected profitability—and hence the desirability—of cash-based crimes like drug trafficking.[38] Of course, concealing large sums of cash is *often* an indication of some underlying illegal activity, but not always. Proving the criminal connection may be difficult for the government in many cases in which concealed cash is intercepted at airports and border

---

31. *Id.* at 338.

32. *Id.* at 338–39.

33. *Id.* at 339–40.

34. *See, e.g.*, *id.* at 348 (Kennedy, J., dissenting) ("Courts "'should grant substantial deference to the broad authority that legislatures necessarily possess'" in setting punishments." (quoting *id.* at 336 (majority opinion))).

35. *Id.* at 336 (majority opinion) ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.").

36. *Id.* at 344 (Kennedy, J., dissenting). The dissenters also accused the majority of "ignoring" the mandate for courts to "grant "'substantial deference'" to Congress' choice of penalties." *Id.* at 350 (quoting *id.* at 336 (majority opinion)). *See also id.* at 351 ("The majority, then, departs from its promise of deference in the very case announcing the standard.").

37. *See id.* at 353 ("One of the few reliable warning signs of some serious crimes is the use of large sums of cash." (citation omitted)).

38. *See id.* at 351 ("The drug trade, money laundering, and tax evasion all depend in part on smuggled and unreported cash.").

crossings.[39] Yet, every time a forfeiture opportunity is missed where there *is* an underlying crime, the criminal's expectation of profits from future illegal activity will be confirmed.[40] Put differently, the government loses an opportunity to send a deterrent message.[41] Thus, the dissenters asserted, "[b]ecause of the problems of individual proof, Congress found it necessary to enact a blanket punishment."[42] A blanket punishment increases the odds that drug traffickers and the like will take a financial hit when they attempt to smuggle cash out of the country but at the price of also taking cash from some people who are not engaged in underlying criminal activity. The majority's individualized, case-by-case approach threatened to wreck the structural integrity of this system.[43]

Given the structural values prioritized by the dissenters—legislative control over penal policy and general deterrence of criminal wrongdoing—it should be no surprise that the dissenters would have affirmed the forfeiture prescribed by statute for Mr. Bajakajian.[44] Even assuming that he was *not* engaged in some underlying criminal activity,[45] punishing him might still be socially beneficial as a deterrent to other, higher-culpability actors. Indeed, it was not clear under what circumstances the dissenters would *ever* find a statutorily prescribed penalty to violate the EFC. One hint may come from the dissenters' criticism that the majority failed to "explain[] why Congress' blanket approach was unreasonable,"[46] implying that the EFC test might be something in the nature of rational-basis review—a notoriously generous test for the government.[47]

---

39. *See id.* ("Here, to be sure, the Government had no affirmative proof that the money was from an illegal source or for an illegal purpose. This will often be the case, however. By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean.").

40. *See id.* at 354 ("[T]he fine permitted by the majority would be a modest cost of doing business in the world of drugs and crime." (citation omitted)).

41. The dissenters noted that lesser penalties had been found by Congress to be "inadequate to deter lucrative money laundering." *Id.* at 350 (citation omitted).

42. *Id.* at 353 (citation omitted).

43. Indeed, the dissenters went so far as to say that money launderers would "rejoice" over the majority's decision, *id.* at 354, given the challenges of proving culpability and the "common practice" for "cash courier[s] not to confess a tainted source but to stick to a well-rehearsed story," *id.* at 352.

44. *Id.* at 356.

45. This, however, was not a point that the dissenters were willing to concede. *See id.* at 353 ("In short, respondent was unable to give a single truthful explanation of the source of the cash. The multitude of lies and suspicious circumstances points to some form of crime.").

46. *Id.* at 354.

47. *See* John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 483 (2013) (discussing rational-basis review under the Cruel and Unusual Punishments Clause). Another hint may come from the dissenters'

C. Timbs*: Hints of a Third Model (Structural-Critical)*

After *Bajakajian*, the Supreme Court issued no new holdings on the EFC for more than twenty years. Finally, in *Timbs v. Indiana*, the Court again turned its attention to the EFC, ruling that it was incorporated into the Fourteenth Amendment and thus binding on the states.[48] However, while the Court made no *direct* pronouncements about how proportionality review should be conducted, aspects of the Court's analysis might point the way to a third approach that contrasts with both the majority and dissenting opinions in *Bajakajian*.

If the *Bajakajian* dissent suggested that there are structural considerations that generally cut in *favor* of the government, *Timbs* suggested that there are other structural considerations that may generally cut *against* the government. In particular, the Court noted that financial penalties differ in a fundamental way from other punishments: "'fines are a source of revenue,' while other forms of punishment 'cost a State money.'"[49] This provides a concerning incentive for governments to overuse financial penalties relative to "'the penal goals of retribution and deterrence.'"[50] Indeed, in a supporting parenthetical, the Court even quoted Justice Scalia's observation from an earlier (non-EFC) case that "it makes sense to scrutinize governmental action more closely when the State stands to benefit."[51] Where the *Bajakajian* dissent may have contemplated something in the nature of rational-basis review under the EFC, did *Timbs* instead point to a form of heightened scrutiny?

More subtly, *Timbs* also seemed to have in mind another structural concern: the potential for economic penalties to reinforce or exacerbate patterns of socioeconomic disadvantage. This concern was particularly suggested by a passage in the Court's discussion of the pertinent history for the incorporation analysis:

> Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. Congressional debates over the Civil Rights Act of

---

assertion that forfeiture of "unreported currency is [constitutionally] sustainable whenever a willful violation is proved," *Bajakajian*, 524 U.S. at 352 (Kennedy, J., dissenting), implying that a penalty for a *non*-willful violation of the law might be assessed more rigorously.

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

49. *Id.* at 689 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

50. *Id.* (quoting *Harmelin*, 501 U.S. at 979 n.9).

51. *Id.* (quoting *Harmelin*, 501 U.S. at 979 n.9).

> 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.[52]

The Court's explicit recognition of the possibility that economic penalties can be used to maintain a "racial hierarchy," and that such abuses were a motivating factor in the adoption of the Fourteenth Amendment, invites consideration of whether contemporary racial disparities in the imposition of economic penalties[53] might provide further support for heightened scrutiny under the EFC (which is, after all, made binding on the states only by virtue of the Fourteenth Amendment).[54]

The *Timbs* Court connected its structural concerns to contemporary critiques of economic penalties, noting that their potential for excessive use "is scarcely hypothetical" today.[55] In support, the Court cited an *amicus* brief submitted by the American Civil Liberties Union and other organizations.[56] This brief, in turn, more fully articulated some of the structural concerns that were only hinted at in the Court's opinion:

> One reason state and local governments have shifted from generally applicable taxes to fines, fees, and forfeitures to raise revenue is that the latter are easier to implement, precisely because they are concentrated on the most vulnerable—and least politically powerful—individuals and communities. These sanctions have driven people deeper into cycles of poverty, debt, and continued criminal justice involvement. Those who cannot immediately pay often incur additional penalties, court summons, collection efforts, driver's license suspension, and even incarceration. These burdens can amount to the loss of livelihood that the Excessive Fines Clause was designed to forestall.
>
> The majority of people involved in the criminal justice system are indigent and unable to pay the fines and fees that jurisdictions impose. . . .
>
> . . . .
>
> Fines, fees, and forfeitures often disproportionately harm communities of color for reasons that include the longstanding racial and ethnic wealth gap and higher rates of poverty and unemployment. In many jurisdictions, Black people

52. *Id.* at 688–89 (citations omitted).
53. O'Hear, *supra* note 3, at 1195.
54. *Timbs*, 139 S. Ct. at 687.
55. *Id.* at 689.
56. *See id.*

> disproportionately experience driver's license suspensions for nonpayment of fines and fees.[57]

Of course, I do not mean to suggest that the Court intended to endorse the entirety of the ACLU's argument through a single citation to the ACLU's brief. However, the Court's reliance on the brief in support of its short, general statement of concern regarding contemporary economic penalties may indicate at least some sympathy for the ACLU's more fully articulated structural critique.[58]

In sum, *Timbs* seems, in an admittedly oblique way, to suggest a third approach to EFC proportionality review. This approach, like that of the *Bajakajian* dissenters, seems more attentive to structural considerations than was the *Bajakajian* majority. But, where the *Bajakajian* dissenters' approach might be characterized as fundamentally *deferential* to the imposition of any statutorily authorized economic penalty, the alternative approach suggested by *Timbs* would be fundamentally *critical*, recognizing that such penalties may reflect an effort by the politically powerful to shift the costs of government to the politically marginalized—and perhaps in so doing to reinforce race and class hierarchies. Reflecting such a structural-critical orientation, the third approach might incorporate a more rigorous standard of review than was exemplified by either of the opinions in *Bajakajian*.

II. FEDERAL CASE LAW: TRIUMPH OF THE STRUCTURAL-DEFERENTIAL APPROACH

The second paper in this series detailed how the EFC proportionality test has been developed in the federal circuit courts of appeal.[59] I argued that these lower federal courts more closely followed the lead of the *Bajakajian* dissenters than the majority.[60] Put differently, using the terminology suggested in Part I above, the structural-deferential approach has emerged triumphant in the federal system. This approach can be seen in several distinct features of the federal case law.

First, there is simply the extraordinarily low success rate of EFC claims. In 117 published decisions between 1998 and 2024, the party asserting an EFC claim won a clear victory only 6% of the time.[61] In another 13% of the cases, the circuit court determined that additional

57. Brief of ACLU et al. as Amici Curiae in Support of Petitioners at 11–12, 20–21, *Timbs*, 139 S. Ct. 682 (No. 17-1091), 2018 WL 4462202, at *11–12, 20–21 (citations omitted).

58. *Cf.* Hipler, *supra* note 7, at 702 ("The language in *Timbs* signaled an alarm by the Court that legislatures and the courts need to be on guard for profit-driven enforcement by the government, which treads on a cluster of constitutional liberties.").

59. *See* O'Hear, *supra* note 16.

60. *Id.* at 764.

61. *Id.* at 780.

fact-finding was necessary and remanded for that purpose.[62] In the remaining 81% of the cases, the EFC claim was flatly rejected.[63] At least superficially, this low success rate seems indicative of a highly deferential approach to proportionality review.

Second, although *Bajakajian* itself said nothing about burdens of proof, all the federal circuit courts that have addressed the question have placed the burden of proof entirely on the EFC claimant.[64]

Third, echoing the *Bajakajian* dissenters, several circuits have indicated that a penalty may pass constitutional muster on the basis of its deterrence value, without regard to the claimant's personal culpability.[65] No circuit has squarely rejected this position.[66]

Fourth, again going beyond anything required by *Bajakajian*, several circuits have adopted what they characterize as a "strong presumption" in favor of the constitutionality "for any exaction that lies within statutory fine limits."[67] Strikingly, indeed, some decisions reject EFC claims with little or no discussion of any consideration other than that the challenged penalty was within the statutory maximum.[68]

Fifth, in assessing offense severity, many of the federal cases weigh harmfulness in a generic or categorical fashion rather than limiting the analysis to the harm caused by the specific offense at issue.[69] This approach echoes the way that the *Bajakajian* dissenters focused on the harmfulness of cash-smuggling in general, as opposed to the harmfulness of the specific instance of cash-smuggling intended by Mr. Bajakajian himself.

Sixth, the federal circuits reject or marginalize inability to pay as a factor in the proportionality calculus.[70] The *Bajakajian* Court noted the potential relevance of inability to pay but did not rule definitively on whether this was a permissible factor.[71] Confronted with this important, unresolved question in EFC law, the federal circuits have split on whether inability to pay can be considered at all.[72] However, even in those circuits that recognize inability as relevant, the factor has been interpreted so as to make it extremely difficult for individuals to prove themselves unable to pay.[73] Indeed, financial

62. *Id.*
63. *Id.*
64. *Id.* at 783.
65. *Id.* at 785–86.
66. *See id.*
67. *Id.* at 788.
68. *Id.* at 787–88 (emphasis omitted).
69. *Id.* at 791–93.
70. *Id.* at 800–01.
71. United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998).
72. O'Hear, *supra* note 16, at 800.
73. *See id.* at 802.

limitations did not play an important role in the analysis of any of the 117 cases included in the study.[74]

Finally, some of the federal circuits have adopted categorical or nearly categorical rules approving certain kinds of financial penalties, specifically, restitution awards and treble-damages awards.[75]

III. OVERVIEW OF THE POST-*TIMBS* STATE CASE LAW

The federal courts have shown little interest in robust enforcement of the EFC. How about state courts? Plausibly, *Timbs* might have inspired state-court litigants to bring more EFC claims and state-court judges to respond to such claims more favorably. To be sure, this expectation would not result from the narrow legal holding of *Timbs*, that is, the extension of federal EFC protections to individuals facing state-level financial penalties. After all, the constitutions in forty-eight states already contained their own EFCs,[76] which were generally interpreted by state courts to provide the same degree of protection as the federal analog.[77] In a sense, the extension of federal protections in *Timbs* might be seen as a redundancy. Yet, if *Timbs*'s holding was only modestly consequential, the decision's rhetoric arguably had more potential. For one thing, the Court demonstrated that the EFC was "'fundamental to our scheme of ordered liberty,' with 'deep roots in our history and tradition.'"[78] For another, as discussed in Section I.C above, *Timbs* explicitly connected contemporary economic penalties to the historical abuses that motivated the adoption of the EFC and the Fourteenth Amendment and suggested a structural critique of current practices. It is not hard to imagine state-court litigants foregrounding these aspects of *Timbs* in briefs asserting EFC claims.

In order to develop a sense of how the state-court EFC jurisprudence has developed post-*Timbs*, I identified all published state appellate decisions that applied and/or interpreted the EFC proportionality test between February 20, 2019, when *Timbs* was decided, and February 20, 2025.[79] As listed in the Appendix, I found

74. *Id.* at 780, 800–01.

75. *Id.* at 803–05.

76. O'Hear, *supra* note 3, at 1197. The other two state constitutions contain more generally framed prohibitions on excessive punishments. *Id.* at 1197–98.

77. *Id.* at 1198.

78. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (alteration in original) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).

79. More specifically, a Westlaw search was conducted using the search term "Excessive Fines Clause." The District of Columbia was included in the search, along with the fifty states. Since this project is concerned with "step 2" of the EFC analysis (excessiveness), opinions were excluded if the government won at "step 1," i.e., if the penalty at issue was determined not to be a "fine," thus obviating the need for an excessiveness analysis. Opinions were also excluded if they were

fifty-two cases that met the search criteria—essentially just one case per state on average over a time period of almost six years. On its face, this seems a rather stark refutation of the hypothesis that *Timbs* would inspire a national flowering of EFC litigation. Indeed, there were no cases at all in twenty-seven states or the District of Columbia.[80] However, there are some indications of relatively high levels of EFC activity in a few states, most notably in Washington, which accounted for eight of the fifty-two cases (15%). (In the next Part, we will see why litigants have felt encouraged to press EFC claims in Washington.) California led the way with eleven cases (21% of the total), although this figure is not so surprising given the state's size.

The success rate for the EFC claims does not appear markedly higher than in the federal cases. In five of the cases (10%), the court held that the challenged penalty violated the EFC, while on six other occasions (12%), the case was remanded to the trial court for additional fact-finding.[81] As with the federal cases, the EFC claim was flatly rejected in the great majority of cases.

Other notable aspects of the cases include:

- 81% were at the first level of appellate review (i.e., in an intermediate appellate court or a supreme court in a state without an intermediate court);
- 65% were civil cases, as opposed to criminal;
- 65% involved fines, 31% forfeitures, 11% fees, and 9% restitution;[82]
- 24% involved drug offenses, with a wide variety of offenses accounting for the remainder, from housing code violations to robbery to consumer fraud to campaign finance violations to parking violations, among others;

---

from a trial court. If an opinion was superseded by a later opinion in the same case (e.g., an opinion by an intermediate appellate court that was superseded by a state supreme court opinion), then the earlier opinion was excluded in favor of the later. In order to ensure the completeness of the data set, I also checked all citations in and citations to the opinions that were found through the initial Westlaw search.

80. To be sure, since my search was focused only on appellate decisions, I cannot rule out the possibility that there has been significant EFC litigation at the trial-court level in some of the states where I did not find any cases that met my search criteria. However, I would expect that if trial-court judges in a state were boldly extending the state's EFC protections, there would be some evidence of that in the appellate jurisprudence—governments, after all, have financial incentives to appeal such decisions in order to protect the revenue derived from economic penalties.

81. The Appendix, *infra*, identifies which cases resulted in which outcomes. The Appendix similarly provides the supporting breakdown for the other data points that are presented in this Part.

82. The figures add up to more than 100% because there were multiple penalties at issues in a few cases.

- 54% cited both the state and federal clauses, although none indicated that one provided any greater protection than the other;
- 39% applied the federal EFC only and 2% applied the state EFC only;[83]
- 44% cited *Timbs*, but only one case cited *Timbs* for any of the structural-critical points noted above in Section I.C;[84]
- 31% cited at least one federal circuit court decision in the proportionality analysis;
- 17% cited at least one case from a different state in the proportionality analysis;
- 6% cited at least one law review article in the proportionality analysis; and
- 6% included any discussion of the structural-critical points noted above in Section I.C.

The overall picture, in short, is of business as usual in the state courts post-*Timbs*. State high courts with discretionary dockets have not shown particular interest in taking EFC cases. State and federal Clauses are treated interchangeably. The structural-critical points suggested by *Timbs* seem almost invisible in the case law. In deciding EFC cases, state courts continue to rely on their own pre-*Timbs* precedents, with little attention given to cases from other jurisdictions or to published legal scholarship. To the extent that cases from other jurisdictions are relied on, these cases are most commonly from the federal circuit courts, and thus likely reflect the structural-deferential point of view.

But this sort of quantitative analysis can get us only so far in understanding what is happening in the state courts post-*Timbs*. A qualitative assessment of the case law is also important.

IV. THE THREE MODELS IN THREE STATES

Exemplars of each of the three models of proportionality review discussed in Part I can be found in the state cases. In this Part, illustrations from Indiana, Ohio, and Washington are considered in some detail.

A. Indiana: Individualized Balancing

Indiana's leading post-*Timbs* case on EFC proportionality review is . . . *Timbs*. Ironically, while the U.S. Supreme Court's opinion arguably laid a foundation for what I have called the structural-critical approach, the subsequent work of the Indiana Supreme Court after remand was very much in line with the individualized approach of the *Bajakajian* majority.

---

83. In one case, it was not clear which EFC was applied. *See* $153,340.00 in U.S. Currency v. State, 359 So. 3d 197, 204 (Miss. Ct. App. 2022).

84. State v. Gibbons, 545 P.3d 686, 700 (Mont.), *cert. denied*, 145 S. Ct. 355 (2024).

Timbs had a long, complicated procedural history. Following his father's death in 2012, Tyson Timbs used the life-insurance payout to purchase a $42,000 Land Rover.[85] Timbs, who seems to have had a chronic dependency on heroin, mainly used the vehicle to obtain drugs for himself.[86] On two occasions, though, Timbs sold some heroin to a confidential informant.[87] While driving to a third scheduled sale, Timbs was arrested and the Land Rover was seized.[88] Later, Indiana sought to secure title to the Land Rover through a civil forfeiture proceeding, invoking a state law that authorized the forfeiture of vehicles used to illegally transport controlled substances.[89] In response, Timbs argued that the forfeiture would violate the Excessive Fines Clause, finding success on this claim in the lower Indiana courts.[90] However, the Indiana Supreme Court reversed, holding that the EFC was not applicable to the states.[91] As noted earlier, the U.S. Supreme Court then rejected this holding,[92] necessitating a remand for consideration of excessiveness.

On remand, the Indiana Supreme Court clarified the proportionality test and then sent the case back to the trial court to apply the test.[93] The trial court held once again that forfeiture of the Land Rover would violate the EFC, resulting in a fresh appeal by the state to the Indiana Supreme Court.[94]

The Indiana Supreme Court affirmed in a lengthy opinion.[95] The Court indicated that determining EFC proportionality involved "three major considerations: the harshness of the punishment, the severity of the offenses, and the claimant's culpability."[96] More specifically, in relation to Timbs's Land Rover, the court characterized the question as "whether the forfeiture's punitive value 'is grossly

85. State v. Timbs, 134 N.E.3d 12, 21 (Ind. 2019).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 22 (citing IND. CODE § 34-24-1-1). *See also* State v. Timbs, 84 N.E.3d 1179, 1184 (Ind. 2017) (quoting relevant state statute), *vacated and remanded*, 139 S. Ct. 682 (2019).

90. *Timbs*, 134 N.E.3d at 22.

91. *Timbs*, 84 N.E.3d at 1181.

92. *Timbs*, 139 S. Ct. at 687.

93. *Timbs*, 134 N.E.3d at 39.

94. State v. Timbs, 169 N.E.3d 361, 367 (Ind. 2021).

95. *Id.* at 377.

96. *Id.* at 368 (citation omitted). In relation to forfeitures of the sort at issue in *Timbs*, the court indicated that an "instrumentality" test must also be satisfied for the forfeiture to pass constitutional muster, that is, "the property must be the 'actual means' by which the relevant crimes were committed." *Id.* (quoting *Timbs*, 134 N.E.3d at 30–31). Timbs's Land Rover was held to satisfy this test. *Id.* (citation omitted).

disproportional to the gravity of the underlying offenses and the owner's culpability for the property's criminal use.'"[97]

As to "culpability," the Indiana Supreme Court employed a narrow definition of the term, at least in relation to forfeiture cases:

> "[T]he culpability consideration focuses on the claimant's blameworthiness *for the property's use as an instrumentality of the underlying offenses*." On the low end of the culpability spectrum are claimants "entirely innocent of the property's misuse," while on the high end are those "who used the property to commit the underlying offenses."[98]

Given this narrow focus on whether Timbs himself had used the Land Rover for an illegal purpose—as opposed, for instance, to loaning the vehicle to another without knowing that the other intended to commit a crime with it—the court had no difficulty in concluding that Timbs qualified as "highly culpable."[99]

The court packed much of what would fall under a broader understanding of "culpability" into another "major consideration," that is, the severity of the underlying offense.[100] The court suggested a non-exclusive set of factors that might be weighed when assessing offense severity: "the seriousness of the offense, considering statutory penalties; the seriousness of the specific crime committed compared to other variants of the offense, looking at sentences imposed; the harm caused by the crime committed; and the relationship of the offense to other criminal activity."[101] In light of these factors, the court concluded that the severity of Timbs's offense was "minimal."[102] Along the way, the court explicitly or implicitly made several important decisions.

First, the court gave greater weight to the sentence that was actually imposed on Timbs than to the sentence that might have been imposed. Based on the drug-trafficking offense of which Timbs was convicted, the *potential* sentence was quite severe indeed—up to twenty years in prison and a $10,000 fine.[103] However, crimes tend to

---

97. *Id.* (quoting *Timbs*, 134 N.E.3d at 35). Consistent with the model of individualized culpability assessment, the court described the test as "fact intensive." *Id.* (quoting *Timbs*, 134 N.E.3d at 35). Like the *Bajakajian* majority, the Indiana Supreme Court paid lip service to the structural value of separation of powers, *see id.* at 368 (noting that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature" (quoting United States v. Bajakajian, 524 U.S. 321, 336 (1998))), but after this one brief gesture, separation of powers played no discernible role in the court's analysis.

98. *Id.* at 372 (emphasis added) (quoting *Timbs*, 134 N.E.3d at 37–38).

99. *Id.*

100. *Id.* at 368.

101. *Id.* at 369 (citation omitted).

102. *Id.* at 376.

103. *Id.* at 374.

be defined in broad terms to cover a wide range of conduct, with some violations of a statute much more serious than other violations of the same law.[104] For that reason, the *Timbs* court indicated that "the sentence *actually imposed* may provide even more precise insight into the offense's severity" than the *potential* sentence.[105] Timbs's actual sentence was, in fact, the minimum that could have been imposed.[106] The court's decision to emphasize the actual sentence was an important individualizing move. Focusing on the potential sentence would lead to treating broad categories of cases similarly. Indeed, given that maximum sentences contemplate worst-case versions of the offense, there would likely be a tendency to attribute exaggerated levels of severity to many violations—with a corresponding tendency to deny EFC claims.[107]

Second, the court agreed with the state that the severity analysis should not be limited to the offense of conviction but should also encompass other related criminal activity.[108] (This, too, is an individualizing move that makes it easier for courts to recognize differences among people who as a formal matter have been convicted of the same offense.) For Timbs, the other related activity included a great deal of drug purchases for his own use.[109] But, while he may have committed many discrete offenses, the court did not see his overall pattern of criminal conduct as indicating an aggravated level of severity.[110] Instead, the court characterized Timbs's many drug transactions as simply a manifestation of addiction.[111] Notably, the court's emphasis on Timbs's addiction as a mitigating consideration suggests that it might more broadly view mental illness or other forms of diminished capacity as relevant to proportionality review.

Third, the court rejected the state's expansive theory of the harmfulness of Timbs's criminal activity. The state argued that "Timbs was on a path to engaging in increasingly dangerous criminal

104. *See* State v. O'Malley, 206 N.E.3d 662, 677 (Ohio 2022).

105. *Timbs*, 169 N.E.3d at 375 (quoting State v. Timbs, 134 N.E.3d 12, 37 (Ind. 2019)).

106. *Id.* (citation omitted).

107. The Indiana Supreme Court's approach was consistent with the reasoning of *Bajakajian*, which gave greater weight to the defendant's guidelines sentence than the much larger maximum statutory sentence. United States v. Bajakajian, 524 U.S. 321, 339 n.14 (1998).

108. *See Timbs*, 169 N.E.3d at 375 ("[A]ssessing criminal activity beyond the predicate offense is appropriate.").

109. *Id.* at 374.

110. *Id.* at 375–76.

111. *See id.* ("Timbs's drug purchases did not amplify the severity of his later dealing crime. They rather explained why he agreed to sell a small amount of drugs to an undercover officer—to help feed his addiction.").

activity to fund his addiction,"[112] thus suggesting that harmfulness should be assessed not merely by reference to what Timbs *did* but also what he *might have done* if he had not been arrested first. The state further argued that "Timbs, by buying drugs for personal use, contributed more than $30,000 to Indiana's heroin trade."[113] Here, too, the state seemed to be invoking the possibility of *future* social harm that might be caused by increasing the financial returns of drug dealers. However, the court brushed aside these speculative, future-oriented theories of harm. Instead, the court characterized the harm in the case as merely "the harm caused by dealing two grams of heroin to an undercover police officer."[114]

The final "major consideration" in the proportionality analysis was the "harshness of the punishment."[115] In ruling that this consideration, like offense severity, cut in Timbs's favor,[116] the court again made some notable decisions. First, the court turned aside the state's argument that "Timbs aggravated Indiana's serious drug-trafficking problem,"[117] indicating that the analysis properly focuses on "the specific harms of specific acts,"[118] rather than "imput[ing] to the defendant the offenses of others."[119] The court indicated that "for a proportionality analysis, 'generic considerations of harm' are 'largely unhelpful' because 'all crimes have a negative impact in some general way to society.'"[120] (Yes, it is a bit odd that this important discussion of harm occurred in relation to the "harshness of the punishment" rather than the "severity of the offense" factor, but perhaps no part of the Indiana Supreme Court's opinion more clearly

112. *Id.* at 374.

113. *Id.*

114. *Id.* at 376.

115. *Id.* at 368 (citation omitted). Relevant factors included "the Land Rover's role in the underlying offense; its use in other activities, criminal or lawful; the extent to which its forfeiture would remedy the harm caused; the vehicle's market value; other sanctions imposed on Timbs; and the effects the forfeiture will have on him." *Id.* at 372 (citation omitted).

116. Curiously, the court framed this conclusion in terms of "purpose": "the purpose of the use-based *in rem* forfeiture was to significantly punish Timbs." *Id.* at 374. However, the analysis did not in any way explore the actual subjective motivations of either the legislature that adopted the forfeiture statute or the government officials who sought to obtain the forfeiture of Timbs's vehicle. Rather, as indicated in the text that immediately follows, the "harshness of the punishment" consideration focused on the impact of the punishment on Timbs and the extent to which the forfeiture could be characterized objectively as serving a remedial purpose. *Id.*

117. *Id.* at 372.

118. *Id.* at 373.

119. *Id.*

120. *Id.* (quoting Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 190–92 (Pa. 2017)).

aligned the court with the *Bajakajian* majority over the *Bajakajian* dissenters.)

Second, the court considered the impact of the forfeiture on Timbs in a specific, individualized fashion, not limiting its analysis to the market value of the Land Rover.[121] In particular, the court noted that the loss of the vehicle "disrupted Timbs's ability to maintain employment and seek addiction treatment."[122] The court also took into account Timbs's limited financial means, observing that "it's appropriate to evaluate the market value of the forfeiture relative to the owner's economic means—because 'taking away the same piece of property from a billionaire and from someone who owns nothing' do not reflect equal punishments."[123] The forfeiture of the Land Rover was thus seen as a relatively harsher penalty because the vehicle was Timbs's only real asset.[124]

In the end, the combination of minimal offense severity with a harsh punishment led the court to conclude that forfeiture of the Land Rover would violate the EFC.[125] Tying up the analysis, the court once again emphasized the fact-intensive, case-specific nature of the proportionality inquiry:

> To be sure, the Land Rover's forfeiture is not unconstitutional just because Timbs was poor. Or because he suffered from addiction. Or because he dealt drugs to an undercover officer and not someone who would use them. And it's not simply because the vehicle's value was three-and-a-half times the maximum fine for the underlying offense. Or because he received the minimum possible sentence for his crime and wasn't a sophisticated, experienced dealer. Or because the car, his only asset, was essential to him reintegrating into society to maintain employment and seek treatment. Rather, it's the confluence of *all* these facts that makes Timbs the unusual claimant who could overcome the high hurdle of showing gross disproportionality.[126]

B. Ohio: Structural-Deferential

If the high court of Indiana seemed to follow the lead of the *Bajakajian* majority in *Timbs*, the high court of neighboring Ohio emulated the *Bajakajian* dissenters in *State v. O'Malley*.[127] The Ohio Supreme Court's opinion may more clearly and self-consciously

---

121. *See id.*
122. *Id.*
123. *Id.* at 373–74 (quoting State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019)).
124. *Id.* at 374. The court also considered the impact of the other penalties Timbs had suffered for his criminal activity—"six years of restricted liberty" and $1,200 in other financial penalties. *Id.*
125. *Id.* at 376.
126. *Id.*
127. 206 N.E.3d 662 (Ohio 2022).

exemplify the structural-deferential model than any other state-court case in the post-*Timbs* world.

Like *Timbs*, *O'Malley* grew out of a state's attempt to forfeit a vehicle. In 2018, James O'Malley was arrested for driving drunk in his Chevrolet Silverado.[128] After his conviction, the Silverado was subject to forfeiture under an Ohio law that mandated vehicle loss after a person's third DUI offense.[129] O'Malley's EFC challenge to the forfeiture was unsuccessful in the trial or intermediate appellate courts.[130] Upon O'Malley's request for further review, the Ohio Supreme Court affirmed.[131]

The Ohio Supreme Court framed the proportionality test as a matter of "balancing: weighing the value of the thing seized on the one hand against the gravity of the offense on the other hand."[132] Tellingly, though, the court devoted far more effort to one side of the balance (offense severity) than the other (value of the thing seized).[133] Indeed, the court addressed value in just a single paragraph.[134] The court acknowledged not only the market value of the Silverado, but also its "intangible" value to O'Malley as his "primary means of transportation."[135] "Under the Eighth Amendment," the court observed, "that is not nothing."[136] However, "*next to* nothing" might be a fair characterization of the court's weighing of the Silverado in the proportionality balance.

In contrast to the single paragraph devoted to the value side, the court produced *forty-eight paragraphs* on the severity of the

---

128. *Id.* at 667.

129. *Id.* (citing OHIO REV. CODE ANN. § 4511.19(G)(1)(c)(v)).

130. *Id.* at 669. O'Malley's claim was exclusively under the federal EFC, not Ohio's state counterpart. *Id.* at 672.

131. *Id.* at 686.

132. *Id.* at 676. The court also specified a burden that O'Malley had to carry: "[H]e must prove by clear and convincing evidence that the statute's application to his particular set of facts is unconstitutional. This means that O'Malley must produce evidence that creates a 'firm belief' that [the forfeiture statute] is unconstitutional as applied to him." *Id.* at 672 (quoting Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954)). By contrast, the Indiana Supreme Court in *Timbs* had not been as specific in identifying a burden of proof but had referred more generally to the claimant's "high burden." State v. Timbs, 169 N.E.3d 361, 377 (Ind. 2021). *See also id.* at 367 ("The statute is also presumed constitutional, with all doubts resolved in favor of its constitutionality." (citation omitted)).

It might also be noted that the court in *O'Malley* only applied a proportionality test, where the *Timbs* Court also applied an instrumentality test. *See supra* note 97 and accompanying text. The *O'Malley* court ruled that the instrumentality test was only required for civil *in rem* forfeitures. *O'Malley*, 206 N.E.3d at 673.

133. *See O'Malley*, 206 N.E.3d at 676–85.

134. *Id.* at 676.

135. *Id.*

136. *Id.* (citation omitted).

offense.[137] Nearly all, explicitly or implicitly, seemed animated by the ideal of deference to the legislature.[138]

The severity analysis advanced four main points. First, the court indicated that it should defer to the state legislature's scheme for responding to drunk driving.[139] The court described at great length this scheme and the role of the third-offense forfeiture within it,[140] calling to mind the *Bajakajian* dissenters' similar unspooling of the context and purpose of the cash-reporting law at issue in the earlier case. The court evidently found the forfeiture rule to be a sensible mechanism for preventing continued repeat-offending by DUI offenders.[141] As with the *Bajakajian* dissenters, the *O'Malley* court seemed intent on maintaining the structural integrity of a broader criminal-regulatory program.[142] Indeed, the court provided no sense of *any* limits to the deference it would show to the legislature's choice of penalties in this area. The court concluded that such deference "weighs *heavily* against O'Malley."[143] Notably, this was the only factor in the court's discussion that was said to carry a *heavy* weight.

Second, the court determined that O'Malley was "highly culpable for [his] offense."[144] This finding rested on the voluntariness of O'Malley's offense conduct: "O'Malley knew full well that driving drunk is illegal and that he could lose his vehicle if he was caught, yet he chose to get behind the wheel while impaired on one of the busiest travel days of the summer."[145]

Yet, in reaching its "high culpability" finding, the court confronted two difficulties: (1) O'Malley's offense was classified merely as a misdemeanor,[146] with a maximum *potential* sentence of

---

137. *See id.* at 676–85.

138. *See, e.g.*, *id.* at 677, 679–80.

139. *See id.* at 677 ("Given the legislature's broad authority to define crimes and establish the appropriate punishment for an offense, we must give substantial deference to the legislature's choice of punishment." (citations omitted)).

140. *Id.* at 677–79.

141. *See id.* at 679 ("Given these realities, it is no surprise that the General Assembly chose to require the forfeiture of vehicles owned and used by repeat drunk drivers. Simply put, drunk driving does not happen (again and again) without a vehicle."). The court also invoked deterrence and (seemingly) retributive rationales for the law. *See id.* ("The General Assembly's decision to punish repeat drunk-driving offenders more harshly than other criminal offenders speaks volumes about the purpose of the punishment—to deter people from driving drunk and unnecessarily placing Ohioans at risk and to punish those who choose to do so more than twice in a ten-year period.").

142. *Cf. id.* at 677 ("Reviewing the entire sentencing scheme places the forfeiture penalty for a third-time repeat offender into perspective.").

143. *Id.* at 680 (emphasis added).

144. *Id.* at 682.

145. *Id.* (citation omitted).

146. *Id.*

365 days in jail[147] and a fine of $2,750;[148] and (2) O'Malley's *actual* sentence was the minimum that the judge could impose.[149] As to the first difficulty, the court acknowledged that *Bajakajian* had used the potential jail and fine sentences as a benchmark for culpability, but simply brushed aside the U.S. Supreme Court's approach with the critical observation that the Court "did not explain why those numbers showed a minimum level of culpability."[150] If the legislature's view of offense severity is to play a role in the assessment of culpability, the Ohio court opined that the legislature's mandate of forfeiture should also be considered, not just the fine and jail term.[151] There is, to be sure, some good sense in this position, but, on the other hand, the Ohio approach has the effect of converting culpability assessment into just another opportunity for the court to show deference to the legislature—if the legislature's authorization of a forfeiture is good evidence that the forfeiture is proportionate to the offender's culpability, then the constitutional analysis may collapse back into a statutory analysis of whether the forfeiture actually was authorized.

As to the second objection, the court was not convinced that O'Malley's *actual* sentence really was indicative of low culpability. "We cannot glean," the court observed, "whether this imposition of the minimum mandatory jail term and probation was due to O'Malley's culpability, plea negotiations, or his decision to take responsibility for his actions."[152] Overall, the Ohio Supreme Court's discussion of the actual-sentence factor was strikingly different than that of the Indiana Supreme Court, which characterized actual sentence as a source of "insight into the offense's severity" and treated Timbs's sentence (like O'Malley's, the lowest possible) as a significant part of the proportionality analysis.[153]

The Ohio Supreme Court's discussion of culpability also differed from *Timbs* in another notable respect: although there were ample indications in the record that O'Malley suffered from alcoholism,[154] the Ohio court seemed to give this no consideration as a possible mitigator of O'Malley's culpability. By contrast, as noted above, the Indiana court treated Timbs's heroin addiction as a factor that reduced his offense severity.[155]

147. *Id.* at 669.
148. *Id.* at 677.
149. *Id.* at 669.
150. *Id.* at 680.
151. *Id.*
152. *Id.* at 681. The court also speculated that the sentencing judge might have imposed a more severe sentence if there was no forfeiture. *See id.* at 685.
153. State v. Timbs, 169 N.E.3d 361, 375 (Ind. 2021).
154. *See, e.g.*, *O'Malley*, 206 N.E.3d at 669.
155. *Timbs*, 169 N.E.3d at 375–76.

Third, the Ohio court found that "O'Malley harmed society when he drove drunk."[156] Here, again, the court encountered a difficulty, namely, that O'Malley did not hit another vehicle or otherwise cause any tangible injury to any person or property while he was driving drunk.[157] However, the court determined that "harm analysis is not limited solely to tangible forms of harm."[158] And, once again, the court's reasoning was bottomed on deference to the legislature:

> If harm were limited to merely tangible harm, every fine attached to a "victimless" crime, such as trespassing, illegal gambling, drug possession, and treason, would likely not include a harm—or at least no harm that is distinguishable from a harm against society. Fines would be subjected to additional and unwarranted scrutiny under the Excessive Fines Clause. . . . We must consider that drunk driving is prohibited and is criminalized . . . because the General Assembly—the voice of the people—made it so. Thus, it makes sense that societal harm may be considered harm in the gross-disproportionality analysis.[159]

More specifically, the societal harm that made O'Malley's offense a serious one was the risk of injury that accompanies any intoxicated driving:

> Drunk driving is a societal danger. The drunk driver essentially plays Russian roulette every time he or she drives on the road while impaired. The fact that a drunk driver is removed from lanes of travel due to effective police interdiction before any physical damage can be done does not mean that the drunk driver did not cause harm to society with the turn of the ignition key.[160]

This emphasis on risk—potential harm—in O'Malley can be contrasted with the Indiana Supreme Court's focus on the "specific harms of specific acts."[161]

Also of note in *O'Malley* was an almost complete lack of consideration of what risk the defendant *himself* specifically posed when he was driving drunk.[162] Rather, the court's attention was

156. *O'Malley*, 206 N.E.3d at 682.

157. *See id.* at 684 ("We thankfully will never know whether O'Malley's actions would have injured someone, because a state trooper intervened and pulled him over.").

158. *Id.* at 682.

159. *Id.* at 683.

160. *Id.* at 684 (citation omitted). As matters of societal harm, the court also noted that drunk drivers "impede" use of the road by other citizens and create a necessity for police intervention. *Id.*

161. State v. Timbs, 169 N.E.3d 361, 373 (Ind. 2021).

162. *See O'Malley*, 206 N.E.3d at 684.

focused on the riskiness of drunk-driving *as a general matter*.[163] The court did not discuss such case-specific factors bearing on risk as how intoxicated the defendant was,[164] risky driving behaviors observed by the arresting officer, whether there were other drivers or pedestrians in the vicinity where O'Malley was driving, or the duration or distance of O'Malley's trip. The only case-specific factor included in the court's discussion was the date of the offense—"July 4, Independence Day, which is one of the busiest travel days of the summer."[165] That may be so, but it does not necessarily follow that the roads were crowded at the specific time and place that O'Malley was arrested on Independence Day.

Fourth, and finally, the court discounted the relevance of the forfeiture-to-fine ratio.[166] In both *Bajakajian*[167] and the Indiana Supreme Court's *Timbs* opinion,[168] the high ratio between the value of the property at issue and the fine imposed was taken as an indication of the forfeiture's disproportionality. *O'Malley* also involved a sizable ratio between the property value of $31,000[169] and the fine ($2,750 maximum,[170] $850 actually imposed[171]). However, the court was unpersuaded of the relevance of this ratio, again invoking the ideal of deference to the legislature's choice to mandate forfeiture on top of the fine.[172]

---

163. *See id.*

164. It appears that O'Malley did not submit to testing to determine his blood alcohol concentration. *See id.* at 667 (noting that O'Malley was charged with refusing to submit to chemical testing). In passing at the start of the opinion, the court did note other evidence suggestive of intoxication: "When the [arresting] trooper asked O'Malley for his license, O'Malley gave his credit card. The trooper then asked for O'Malley's address, but O'Malley was unable to provide it." *Id.* However, these facts were not included in the court's risk discussion later in the opinion, suggesting that the court did not view such case-specific considerations as pertinent to the analysis.

165. *Id.* at 684 (citation omitted).

166. *Id.* at 685.

167. United States v. Bajakajian, 524 U.S. 321, 339–40 (1998).

168. State v. Timbs, 169 N.E.3d 361, 376 (Ind. 2021).

169. *O'Malley*, 206 N.E.3d at 684.

170. *Id.*

171. *Id.* at 669.

172. *See id.* at 685 ("This fine-to-forfeiture ratio-based analysis also ignores the statutory scheme. We must acknowledge that the General Assembly authorized the monetary fine in addition to the vehicle forfeiture. Thus, comparing the monetary fine and the vehicle forfeiture has little bearing on the excessiveness of the forfeiture here." (emphasis omitted) (citations omitted)). The court also objected to the "subjectiv[ity]" of the ratio, since there was no clear line to demarcate when a high ratio was too high. *Id.* This was an odd point of attack, though, since the use of a numerical ratio might be thought, if anything, to *reduce* the subjectivity of a proportionality analysis that otherwise lacks objective anchoring points. The court also thought that the ratio approach would advantage wealthier defendants who are more likely to have valuable property

In light of its four major determinations about the case, the court concluded "that O'Malley has not proved by clear and convincing evidence that the forfeiture is grossly disproportional to the gravity of the offense."[173]

The contrast with *Timbs* is all the more striking given the factual similarities between the two cases. Both cases involved the forfeiture of a vehicle that was the defendant's only real asset. Both offenses were connected to underlying substance abuse problems. Neither defendant caused any tangible harm to any identifiable victim. Both defendants received the minimum possible sentence for their offenses. Yet, the forfeiture in one case was affirmed and in the other, rejected.

Indeed, in some respects, O'Malley arguably had the *stronger* constitutional claim. After all, he was only convicted of a misdemeanor, while Timbs was convicted of a felony with a far more severe maximum possible sentence (twenty years in prison).[174] Moreover, Timbs's broader course of criminal conduct was far more extensive than O'Malley's.[175]

What explains the different outcomes? It is hard to escape the conclusion that the Indiana and Ohio courts simply applied different versions of the proportionality test. Broadly speaking, from the foregoing discussion, readers will probably already have the sense that the difference between the Indiana and Ohio courts corresponds to the difference between the *Bajakajian* majority (individualized balancing) and the *Bajakajian* dissent (structural-deference approach).

This broad difference in approach was manifested along several different dimensions. First, the Ohio court gave less weight than the Indiana court to the defendant's difficult economic circumstances. Second, the Ohio court gave more weight to maintaining the integrity of the legislature's crime-prevention scheme. Third, the Ohio court gave less weight to the actual sentence imposed as a benchmark of offense severity. Fourth, the Ohio court gave less weight—seemingly no weight at all—to the defendant's underlying substance-abuse

---

to be forfeited. *Id.* It was, of course, ironic for the court to invoke the ideal of fairness to poor defendants as a justification for the forfeiture of Mr. O'Malley's car, which was his "only significant asset." *Id.* at 676. Moreover, the class fairness concerns might be addressed through the inability-to-pay part of the proportionality analysis. If rich defendants are more likely to benefit from a high forfeiture-to-fine ratio, they are also less likely to have a viable inability-to-pay claim.

173. *Id.* at 685–86.

174. State v. Timbs, 169 N.E.3d 361, 375 (Ind. 2021).

175. *See* State v. Timbs, 134 N.E.3d 12, 21 (Ind. 2019) ("Timbs would obtain heroin by regularly driving his Land Rover sixty to ninety miles to meet his supplier. These trips accounted for most of the 16,000 miles Timbs put on the vehicle over four months.").

problem. Fifth, the Ohio court gave more weight to the *potential* harmfulness—i.e., the riskiness—of the defendant's conduct. Sixth, the Ohio court assessed harmfulness in a more generic, categorical fashion, rather than focusing in a specific way on the harmfulness or dangerousness of the defendant's own conduct.

C. Washington: Structural-Critical

The Indiana and Ohio approaches to EFC proportionality are neatly distilled by *Timbs* and *O'Malley*, respectively. Washington, by contrast, has produced at least three notable proportionality decisions in the past six years. Consideration of the three as a group points to a third distinctive approach to proportionality review.

1. City of Seattle v. Long

The first in the trilogy was the Washington Supreme Court's decision in *City of Seattle v. Long*.[176] As with *Timbs* and *O'Malley*, *Long* arose from the seizure of a vehicle; however, the underlying offense in the Washington case was decidedly less serious. In 2016, Steven Gregory Long was living in his truck, which he kept parked in a lot owned by the City of Seattle.[177] Eventually, the truck was towed for violating a city regulation prohibiting parking in one place for more than 72 hours.[178] In order to get the truck back, Long was required to pay $547.12 in impoundment charges and a $10 administrative fee.[179] Long objected that both the impoundment itself and the related charges violated the state and federal EFCs.[180]

In considering the objections, the Washington Supreme Court noted that in an earlier case it had adopted a four-part test for EFC proportionality: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused."[181] Although framed a little differently, all of these factors were also part of the proportionality analysis in *Timbs* and *O'Malley*.

From a purely legal standpoint, in the context of Washington law, the court's most important decision in the case was to add inability to pay as a fifth factor.[182] Notably, in support of this position, the court

176. 493 P.3d 94 (Wash. 2021).

177. *Id.* at 99.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 111 (quoting State v. Grocery Mfrs. Ass'n, 461 P.3d 334, 353 (Wash. 2020)). Long argued for a more favorable test under the state EFC, but this position was rejected by the Washington Supreme Court for inadequate briefing. *Id.* at 107.

182. *Id.* at 114. In a forthcoming article, Professor Nicholas McLean discusses this aspect of the *Long* decision as an expression of longstanding traditions in

cited not only historical sources and cases from other jurisdictions, but also two structural considerations.[183] First, there was the national homelessness crisis, which, among other consequences, was manifested in the estimated 2,000 individuals living in their cars in the Seattle area (including Long himself).[184] The court did not make explicit why this consideration was relevant to the EFC test, but, presumably, the discussion of homelessness reflected the court's sense that many homeless individuals are subject to economic penalties as a result of life circumstances over which they have little control and hence for which they have little culpability (exemplified perhaps by the situation of Long himself) and/or that application of economic penalties to the homeless may exacerbate their problems and make it harder for them to move out of homelessness.[185] From either standpoint, recognizing inability to pay as a proportionality factor might facilitate use of the EFC by courts as a way to mitigate unfair, counterproductive penalties levied against the homeless.[186]

Second, as another structural consideration, the *Long* court expressed concern regarding the potential overuse of economic penalties as a source of government revenue.[187] In so doing, the court quoted the same language that had been quoted in *Timbs*: "Courts scrutinize 'governmental action more closely when the State stands to benefit.'"[188] The court saw the consideration of inability to pay as a way to achieve the desired "close[r]" scrutiny.[189]

With the now-expanded five-factor test, the court had little difficulty in concluding that the impoundment of Long's truck and the imposition of the associated fees violated the EFC.[190] Beyond the consideration of structural matters already noted, the court's analysis differed little from the Indiana individualized balancing approach. Long's parking violation was hardly a serious offense in itself and was

---

English and American law that protect individuals' livelihood and compares *Long* favorably with legal doctrines outside the EFC context that similarly purport to protect minimum entitlements to income and assets. Nicholas M. McLean, *The Law of Minimum Entitlements*, 59 U. MICH. J.L. REFORM (forthcoming 2026).

183. *See Long*, 493 P.3d at 111–14.

184. *Id.* at 113 (citations omitted).

185. Again, Long himself seems to illustrate the point. *See id.* at 115 ("It is difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life." (citation omitted)).

186. The court's discussion here recalls the apparent concern of the U.S. Supreme Court in *Timbs* regarding the use of economic penalties against the disadvantaged. *See supra* Section I.C.

187. *Long*, 493 P.3d at 113.

188. *Id.* at 114 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

189. *Id.*

190. *Id.* at 116.

not connected to any other illegal activities.[191] The other authorized penalty was minor—merely a $44 ticket.[192] The harm of the offense was "minimal"—Long had not parked his truck in a high-demand lot or otherwise caused any particular inconvenience for anyone.[193] Finally, the new ability-to-pay factor also cut in Long's favor, given his homelessness and income of no more than $700 per month, a figure well below what was considered minimally necessary for living in Seattle.[194] Absent from the analysis was any sense of a need to preserve the integrity of Seattle's parking regulation system, as might have been "heavily" weighted by the Ohio Supreme Court.[195]

2. Jacobo Hernandez v. City of Kent

The structural-critical potential of *Long* was more fully realized in a subsequent decision by the Washington Court of Appeals, *Jacobo Hernandez v. City of Kent*.[196] It is not hard to imagine the Indiana Supreme Court of *Timbs* reaching the same result as the Washington Supreme Court in *Long*, even if some of the rhetoric would have differed. It is much harder to imagine the Indiana court reaching the same result as the Washington court in *Jacobo Hernandez*.

In broad outline, the facts of *Jacobo Hernandez* were similar to those of *Timbs* but, in the specifics, were far less favorable to the EFC claim. Like Tyson Timbs, Adrian Jacobo Hernandez was arrested after transporting drugs in his vehicle to a buyer who turned out to be an undercover agent.[197] As with Timbs, Jacobo Hernandez's vehicle was his only significant asset,[198] but it was statutorily subject to forfeiture based on its use in a drug offense.[199] However, Jacobo Hernandez was dealing a far greater quantity of drugs than Timbs—

191. *Id.* at 114.

192. *Id.* Due to the use of the fine as a benchmark, Tim Donaldson argues that "*Long* does not provide a workable framework for assessing the excessiveness of traditional fines." Donaldson, *supra* note 8, at 657.

193. *Long*, 493 P.3d at 114. The court did recognize, though, that "the city was harmed when it paid the costs of towing and impoundment." *Id.* However, the court did not think that the EFC always necessarily permitted recoupment of such costs without regard to other proportionality factors. *Id.*

194. *Id.* at 114–15. The court also considered the possibility that there was a "strong presumption" of constitutionality in this case because "the value of the fine is within the range prescribed by a legislative body." *Id.* at 115 (citation omitted). As noted in Part II *supra*, this "strong presumption" is well-established in the federal EFC law. The *Long* court did not reject the presumption for Washington but held it inapplicable because the towing and storage costs imposed on Long were set by a private towing company rather than the legislature. *Id.*

195. *See* State v. O'Malley, 206 N.E.3d 662, 680 (Ohio 2022).

196. 497 P.3d 871 (Wash. Ct. App. 2021).

197. *Id.* at 873.

198. *Id.*

199. *See id.* at 874 (describing Washington forfeiture law).

eight pounds of methamphetamine.[200] Moreover, unlike Timbs, there was no indication that Jacobo Hernandez was merely dealing in order to support his own addiction.[201] He was a paid drug courier and admitted to two earlier deliveries.[202] Nor was Jacobo Hernandez's sentence (twenty-four months in prison) the minimum possible, as Timbs's had been.[203] And Jacobo Hernandez's vehicle was worth only a fraction of Timbs's (about $3,000–$4,000 versus $35,000).[204] Using the individualized approach of the Indiana Supreme Court, there seemed ample grounds to affirm the forfeiture of Jacobo Hernandez's vehicle.

For that matter, there was even a very good reason to affirm on a non-merits ground: the parties reached a settlement agreement while the appeal was pending, technically rendering the appeal moot.[205] However, the court invoked an exception to the mootness doctrine for cases that "present[] substantial and continuing issues of public interest."[206] The court did not want to miss this opportunity to address certain structural problems highlighted by the case.

Remarkably, in ruling that the forfeiture of Jacobo Hernandez's car violated the EFC, the court conceded that *all the first four proportionality factors cut in favor of the government*.[207] As far as case-specific considerations went, it was only the fifth factor, Jacobo Hernandez's indigency, that supported the EFC claim and ultimately outweighed the other factors.[208]

It is hard to make sense of this ruling without regard to the court's structural concerns with civil asset forfeiture. Indeed, it was precisely with a critique of forfeiture that the court began its analysis, even before addressing the mootness problem.[209] The court repeated the point from *Long* about enhanced scrutiny of penalties "when the State stands to benefit."[210] But the court suggested that the scrutiny might be higher still where "individual law enforcement agencies,"

---

200. *Id.* at 878.
201. *Id.*
202. *Id.*
203. *Id.* at 877.
204. *Id.* at 873.
205. *Id.* at 875.
206. *Id.* at 876.
207. *See id.* at 879 ("Even given all the other proportionality factors weighing against Jacobo Hernandez, it seems illogical that the Constitution would allow the State to deprive him of his only asset, a $3,000 vehicle, when he has been found to be indigent."). As in *Timbs* and *O'Malley*, the court also indicated that the EFC has an instrumentality prong that must be satisfied in addition to the proportionality prong, but concluded, without much difficulty, that Jacobo Hernandez's car was indeed an instrumentality of his offense. *Id.* at 877–78.
208. *Id.* at 878.
209. *See id.* at 874.
210. *Id.* at 879 (quoting City of Seattle v. Long, 493 P.3d 94, 114 (Wash. 2021)).

not just the government in a general sense, "stand to benefit" financially from the penalties that they generate.[211] The court noted various criticisms that had been raised with the forfeiture law:

> [It] "creates a conflict between a law enforcement agency's economic self-interest and traditional law enforcement objectives" because law enforcement relies on forfeiture to fund their operations. "Legitimate goals of crime prevention are compromised when salaries, equipment, and departmental budgets depend on how many assets are seized during drug investigations." Another concern . . . is that even indigent claimants do not have a right to appointed counsel during the proceedings.[212]

The court further observed that forfeitures have a "disparate impact on defendants of color."[213]

Despite its evident distaste for civil asset forfeiture, the court did not go so far as to rule that *all* such forfeitures violate the EFC.[214] Rather, Jacobo Hernandez won because of the combination of forfeiture, indigency, and the fact that his culpability, though bad, could have been even worse (e.g., if he held a higher-level position in a drug-trafficking organization).[215] Still, though limited in these respects, the court's holding must be viewed as a self-consciously broader holding than, for instance, the Indiana Supreme Court's holding in *Timbs*, which was far more narrowly limited to a very unusual set of facts.[216] Indeed, the Washington court itself noted that the "vast majority of [forfeiture] cases are small time cases, not big drug dealers."[217] There was thus nothing in the court's analysis suggesting that Jacobo Hernandez's offense severity was unusually low relative to any other run-of-the-mill forfeiture case.[218] The court's holding might thus have implications for many forfeiture proceedings that had previously been regarded as routine.[219]

---

211. *Id.* at 879–80.

212. *Id.* at 874 (quoting Rsch. Working Grp., *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251, 281–82 (2011–2012)).

213. *Id.* at 879 n.15 (quoting Rsch. Working Grp., *supra* note 212, at 283).

214. *Id.* at 879 n.14.

215. *See id.* at 879 ("We agree with Jacobo Hernandez' argument that '[f]or the forfeiture of an entirety of a person's estate to be proportional . . . it would have to be far more heinous than Mr. Jacobo[ ]Hernandez's role as a courier on this one (or even three) occasions.'" (alterations in the original)).

216. *See supra* text accompanying note 127.

217. *Hernandez*, 497 P.3d at 874 (quoting H. COMM. ON JUDICIARY, H.B. REP. ON SUBSTITUTE H.B. 1995, 57th Leg., Reg. Sess., at 5 (Wash. 1993)).

218. *See id.* at 877–79.

219. One potentially important point that was left uncertain by the court was how dire exactly a defendant's economic circumstances must be to be protected from forfeiture. The court laid emphasis on two facts: (1) Jacobo Hernandez had

Further review of *Jacobo Hernandez* was denied by both the Washington Supreme Court[220] and the U.S. Supreme Court,[221] although one can never know for certain the thinking behind such denials—e.g., tacit approval of the underlying decision versus just too busy with more pressing matters.

3. State v. Grocery Manufacturers Association

Long and *Jacobo Hernandez* can be usefully contrasted with another Washington Supreme Court case, *State v. Grocery Manufacturers Association*,[222] which presented a markedly different set of facts. The Grocery Manufacturers Association (GMA) "raised more than $14 million" to oppose a ballot initiative in Washington that would have required labeling for food containing genetically modified organisms.[223] However, GMA failed to make various disclosures of its political activities that were required under Washington's Fair Campaign Practices Act (FCPA).[224] After the state sued, a trial judge imposed a "base penalty" of $6 million, which could be (and was) tripled under the FCPA to $18 million.[225] GMA appealed the fine amount on EFC grounds.[226]

In rejecting the EFC claim, the Washington Supreme Court invoked none of the structural-critical language from *Long* or *Jacobo Hernandez*. The framing of the court's analysis indicated no built-in skepticism of the penalty's propriety, as was apparent in the two earlier decisions. Given the nature of the structural concerns in the earlier cases, the different approach in GMA should not be a surprise. The critical stances of *Long* and *Jacobo Hernandez* reflected the courts' concern that economic penalties might be used to shift government funding from the broad mass of taxpayers to subsets of the politically marginalized, resulting in an exacerbation of their socioeconomic disadvantage. However, there was nothing in the nature of the FCPA penalty provision that suggested such a dynamic

---

been formally found indigent by two trial courts for different purposes (waiver of an otherwise-mandatory fine and waiver of appellate fees), *id.* at 880, and (2) the forfeiture would take from Jacobo Hernandez his only asset, *id.* at 879. Notably, findings of indigency for appointment-of-counsel purposes are extremely common in American criminal courts. One frequently cited 2002 study found that, in 1996, about 82 percent of felony defendants in the nation's seventy-five largest counties had a public defender or other assigned counsel. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://perma.cc/Y74D-THWC.

220. Hernandez v. City of Kent, 504 P.3d 828 (Wash. 2022).

221. City of Kent v. Jacobo-Hernandez, 143 S. Ct. 99 (2022).

222. 502 P.3d 806 (Wash. 2022).

223. *Id.* at 809.

224. *Id.* at 809–10.

225. *Id.* at 810–11 (citing WASH. REV. CODE § 42.17A.780).

226. *Id.* at 811.

at work.[227] Nor did the economic circumstances of the GMA bear any resemblance to those of Mr. Long or Mr. Jacobo Hernandez.[228] In short, even for a court otherwise inclined to skepticism toward economic penalties, there was no basis for such a stance in GMA.

Rather, *GMA* provided an analysis that was more in the spirit of the Indiana model, or perhaps even the Ohio model. The court worked through the four pre-*Long* proportionality factors, finding GMA's offense to be "the largest campaign finance violation in Washington's history,"[229] that "GMA's conduct involved several illegal activities,"[230] that the statutorily authorized penalty was more than $43 million,[231] and that the harm done to the public's right to know was "substantial."[232] (That the fifth factor, inability to pay, was not discussed at all presumably reflects the lack of any viable claim of economic hardship on GMA's part.) Throughout the analysis, the court's desire to maintain the integrity of Washington's scheme of campaign-finance regulation was evident,[233] suggesting a deferential approach reminiscent of *O'Malley*. Also consistent with the structural-deferential approach was the court's recognition of a mandate "to give considerable deference to the legislature's judgment on damages."[234]

4. Other Washington Cases

In addition to the trilogy of *Long*, *Jacobo Hernandez*, and *GMA*, the post-*Long* published Washington cases include four additional Court of Appeals cases. One dealt with an FCPA fine, like *GMA*, but involved an individual defendant rather than an organization.[235] Closely tracking the analysis in *GMA*, the court held that the first four proportionality factors cut in favor of the government but then

227. *See id.* at 809 (discussing adoption and purpose of law).

228. *Id.*

229. *Id.* at 812.

230. *Id.* at 814.

231. *Id.* (citing WASH. REV. CODE § 42.17A.780).

232. *Id.* at 814–15.

233. *See, e.g.*, *id.* at 813 ("GMA's decision to conceal the identities of its campaign contributors struck at the core of open and transparent elections. Under the FCPA, voters have the right to 'know of the financing of political campaigns' and 'may consider, in making their judgment, the source and credibility of the advocate.'" (first quoting WASH. REV. CODE § 42.17A.001(10); and then quoting Hum. Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 994 (9th Cir. 2010))).

234. *Id.* at 815 (citation omitted). One additional notable feature of *GMA* was the court's refusal to incorporate certain proposed new factors into the proportionality test, including the penalties imposed in other cases involving violations of the same law, and the risk that a penalty will chill free speech. *Id.* at 816. Rejecting these factors might also be seen as consistent with a deferential approach to proportionality review.

235. State v. Eyman, 521 P.3d 265, 274–75 (Wash. Ct. App. 2022).

remanded to the trial court to make findings of fact on the defendant's ability to pay,[236] recalling the holding in *Jacobo Hernandez* that this one factor could potentially outweigh the rest.

The other three dealt with restitution awards in cases of violent crime.[237] All three took the view that such awards *per se* satisfy the EFC proportionality requirement because their size is directly based on the amount of harm that the defendant has done.[238] Moreover, the decisions specifically rejected arguments that the defendant's inability to pay rendered the restitution awards disproportionate.[239] None of the decisions included any of the structural-critical language of *Long* or *Jacobo Hernandez*. And, given the nature of restitution, a more deferential approach might indeed be sensible in this context. Where forfeiture and most other economic penalties involve payments to the government, which creates possible conflicts of interest, restitution awards are intended to benefit crime victims. Such awards thus seem less prone to abuse than other types of economic penalties.

5. Summary

Putting the Washington cases together, it is evident that the structural-critical approach does not always play a role in the analysis. However, the cases suggest that economic penalties that are systematically prone to abuse will be scrutinized more rigorously, and that this more rigorous scrutiny will particularly take the form of heightened attention to inability to pay. *Jacobo Hernandez* provides the striking illustration of this approach taken to an extreme, in

236. *Id.* at 296–97.

237. State v. Matamua, 539 P.3d 28, 38 (Wash. Ct. App. 2023), *review denied*, 547 P.3d 894 (Wash. 2024); State v. Ellis, 530 P.3d 1048, 1054 (Wash. Ct. App. 2023), *review granted*, 564 P.3d 547 (Wash. 2025); State v. Ramos, 520 P.3d 65, 71 (Wash. Ct. App. 2022).

238. *Matamua*, 539 P.3d at 39; *Ellis*, 530 P.3d at 1056; *Ramos*, 520 P.3d at 80. Elsewhere, I have argued that this line of reasoning may be inconsistent with the Supreme Court's decision in *Paroline v. United States*, 572 U.S. 434 (2014). O'Hear, *supra* note 16, at 803–04.

239. *Matamua*, 539 P.3d at 39; *Ellis*, 530 P.3d at 1056; *Ramos*, 520 P.3d at 80. In reaching this conclusion, one of the decisions took a decidedly structural-deferential stance. *See Ramos*, 520 P.3d at 79 ("Were we to rule that the constitutionality of a restitution award depends, not on the gravity of the crime or the extent of the victim's injuries, but solely on whether that offender is rich or poor, we would in effect be invalidating these statutes."). Another invoked the bare possibility that the defendant might someday be able to pay the award. *See Ellis*, 530 P.3d at 1056 ("However, that amount is not so high that it would be inconceivable that Ellis would be able to pay that amount at some point after being released from prison."). Something like this "not inconceivable" standard has also been used in federal cases to effectively nullify inability to pay as a proportionality factor. O'Hear, *supra* note 16, at 802. The *Ellis* court also relied on the availability of a statutory relief mechanism to deal with inability to pay. *Ellis*, 530 P.3d at 1056.

which the defendant's inability to pay was given greater weight in the EFC calculus than all the rest of the proportionality factors combined. It is difficult to imagine either the Indiana or the Ohio Supreme Courts reaching the same result on the facts of *Jacobo Hernandez*, which highlights the extent to which Washington's jurisprudence has deviated from that of the other two states.

V. SURVEY OF OTHER STATES

Limitations in the quantity and depth of the post-*Timbs* published appellate caselaw preclude broad generalizations about what is happening with the EFC in state courts across the nation. Nonetheless, a careful review of the available cases points to some notable patterns.[240]

240. In reviewing the federal caselaw, I found that different circuits had adopted different multifactor proportionality tests, but there was no reason to think that the inclusion or exclusion of this or that broadly worded factor was analytically consequential. O'Hear, *supra* note 16, at 781–83. Similar patterns also seem evident in state-court lists of factors. *See, e.g.*, State v. Jouppi, 566 P.3d 943, 954 (Alaska 2025) (setting forth factors as "(1) the nature and extent of the defendant's crime and its relation to other criminal activity, (2) whether the defendant falls among the class of persons for whom the statute was principally designed, (3) the other penalties that might be imposed on the defendant under the applicable provisions of law, and (4) the nature and extent of the harm caused by the defendant's offense"); *In re* 3567 E. Alvord Rd., 473 P.3d 353, 358 (Ariz. Ct. App. 2020) ("To assess the proportionality, we look to 'the nature and extent of the defendant's crime, the surrounding circumstances and relationship to other illegal activities, the harm caused, and the maximum sentence and fine under the appropriate sentencing guidelines.'" (quoting *In re* 319 E. Fairgrounds Dr., 71 P.3d 930, 936 (Ariz. Ct. App. 2003))); 1812 Franklin St. v. State, 614 S.W.3d 179, 188 (Tex. App. 2020) ("(1) the nature of the offense, (2) the relationship of the offense to other illegal activities, (3) whether the defendant was in the class of persons addressed by the forfeiture statute, (4) the maximum fine and sentence for the offense committed and the level of culpability reflected by the penalties, and (5) the harm that the defendant caused" (citation omitted)); Vt. Nat'l Tel. Co. v. Dep't of Taxes, 250 A.3d 567, 589 (Vt. 2020) ("Some of the relevant factors to consider include the degree of culpability, the relationship between the penalty and the harm, and 'the sanctions imposed in other cases for comparable misconduct.'" (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435 (2001))). To these factors is sometimes added inability to pay. *See infra* Section V.A.1. Also, as discussed in Section V.B *infra*, in a few states the standard factors include intra- and inter-jurisdictional comparisons.

As noted in the discussions of *Timbs* and *O'Malley*, *supra* note 132, the test is sometimes adapted in the forfeiture context to require as an additional element that the property have a certain relationship with the offense. *See, e.g.*, State v. Brophy, 889 S.E.2d 337, 341 (Ga. Ct. App. 2023) ("Thus, to determine whether a forfeiture is excessive, Georgia courts must consider (1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm

A. Evidence of the Structural-Deferential Model

As indicated in Part III above, the bare win-loss statistics in state-court EFC litigation are suggestive of the structural-deferential model at work. This Section provides a richer qualitative assessment. Based on the comparison of *O'Malley* to *Timbs* in Part IV,[241] as well as in the federal caselaw summarized in Part II, certain jurisprudential tendencies can be identified as characteristic of the structural-deferential model. This Section considers evidence of these tendencies in courts outside Indiana, Ohio, and Washington.

1. Inability to Pay

Reflecting the structural-deferential model, some federal courts deny or question whether there should be *any* role for a person's economic circumstances in the EFC proportionality analysis.[242] However, all states to explicitly consider the question in my set of cases agree that inability to pay *should* be taken into account.[243] Even

---

caused by the claimant's conduct; (2) *the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use*; and (3) the culpability of each claimant." (emphasis added) (citation omitted)); Commonwealth v. Doebler, 626 S.W.3d 611, 622 (Ky. 2021) ("The touchstone of the constitutional inquiry under the excessive fines clause is the principle of proportionality. This determination hinges upon whether the property was '*sufficiently tainted by the criminal act to be subject to forfeiture*' and whether the forfeiture itself was grossly disproportionate to the particular offense considering 'the gravity of the offense, the potential penalties, the actual sentence, sentences imposed for similar crimes in this and other jurisdictions, and the effect of the forfeiture on innocent third parties.'" (emphasis added) (citations omitted)).

Although most cases set forth a somewhat formalized statement of permissible factors, a few characterize the proportionality test in a breezier fashion. *See, e.g.*, Singletary v. Residential Mgmt. Inc., 182 N.Y.S.3d 479, 480–81 (N.Y. App. Term. 2022) (finding no EFC violation because fine did not "notably exceed[ ] in amount that which is reasonable, usual, proper or just" (alteration in original) (citation omitted)). Even when factors are enumerated, however, there is no indication that the test should be a mechanical tallying of factors on each side of the dispute. *See, e.g.*, *In re* 4714 Morann Ave., 303 A.3d 200, 218 (Pa. Commw. Ct. 2023) ("More to the point, we reject the Commonwealth's proposition that the proportionality analysis consists of a scorecard, where the outcome is determined by the number of checkmarks thereon. A precise or mathematical explanation of the weight to assign each proportionality factor is neither required nor expected.").

241. *See supra* Section IV.B.

242. O'Hear, *supra* note 16, at 800.

243. People v. Kopp, 250 Cal. Rptr. 3d 852, 894–95 (Cal. Ct. App. 2019); Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101 (Colo. 2019); State v. Gibbons, 545 P.3d 686, 700 (Mont.), *cert. denied*, 145 S. Ct. 355 (2024); *cf. Jouppi*, 566 P.3d at 958 ("We assume, without deciding, that a forfeiture cannot constitutionally deprive Jouppi of his livelihood."); *In re 4714 Morann Ave.*, 303 A.3d at 212 (identifying proportionality factors in relation to forfeiture as

O'Malley did not disagree with this proposition.[244] Rather, the difficulty in *O'Malley* was that the factor was given only very minimal weight. Similarly, outside Washington and Indiana, it does not appear that inability to pay has been a decisive consideration in favor of any EFC claims.[245] Moreover, at least one state court has adopted the position found in some federal cases that inability to pay must take into account speculative possibilities of future earnings—a position that makes it almost impossible for claimants to establish an inability to pay.[246] This approach stands in contrast, for instance, to

---

including "the subjective value of the property taking into account whether the property is a family residence or if the property is essential to the owner's livelihood; [and] the harm forfeiture would bring to the owner or innocent third parties" (emphasis omitted)). A Massachusetts case may also be read to imply openness to considering inability to pay on a properly developed record. *See* Bisignani v. Justs. of Lynn Div., 181 N.E.3d 1095, 1102 n.13 (Mass. App. Ct. 2022) ("As Bisignani did not present evidence of his personal finances to the board or to the District Court judge, the record does not permit us to evaluate Bisignani's claims about the impact of the forfeiture on his family and livelihood.").

A California case has made clear that the burden of proof on inability to pay lies with the EFC claimant. Lent v. Cal. Coastal Comm'n., 277 Cal. Rptr. 3d 106, 146 (Cal. Ct. App. 2021). Another California case declined "to use a 10-percent-of-net-worth benchmark, or to rely exclusively on . . . net worth, in determining whether the penalty is excessive." People v. Ashford Univ., LLC, 319 Cal. Rptr. 3d 132, 178 (Cal. Ct. App. 2024).

An Oregon case raised, but did not answer, an interesting question about inability to pay—whether a defendant's change in financial circumstances *post-sentencing* can be a basis for revisiting an economic penalty and determining it to be unconstitutional. State v. Dunham, 560 P.3d 736, 746–47 (Or. Ct. App. 2024).

244. Consideration of the defendant's precarious financial circumstances was at least indirectly reflected in the court's decision to take into account the subjective value of Mr. O'Malley's vehicle to him. State v. O'Malley, 206 N.E.3d 662, 676 (Ohio 2022).

245. However, there are a few cases in which inability to pay was considered important enough to warrant remand to the trial court to make findings about the factor. This has been particularly notable in the Montana cases. *See, e.g.*, State v. Yang, 452 P.3d 897, 905 (Mont. 2019). *See also* Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 103 (Colo. 2019). *But cf.* People v. Pack-Ramirez, 271 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2020) ("Furthermore, we disagree with the suggestion that the Eighth Amendment requires a determination of ability to pay before the imposition of any fee, fine, or victim restitution or authorizes a remand to revisit the fees, fines, and victim restitution imposed in this case.").

246. People v. Aviles, 252 Cal. Rptr. 3d 727, 743 (Cal. Ct. App. 2019). *See also* O'Hear, *supra* note 16, at 802 (discussing federal cases). On the other hand, one case suggests that the factor may include consideration of the impact of an economic penalty on the payor's *family*. Commonwealth v. Doebler, 626 S.W.3d 611, 622 (Ky. 2021) (mentioning "innocent third parties" (quoting Hill v. Commonwealth, 308 S.W.3d 227, 230 (Ky. Ct. App. 2010))). The Pennsylvania

the focus on inability to pay in the more immediate sense that was exemplified in *City of Seattle v. Long*.[247]

2. Crime Prevention

Proportionality is often conceptualized in an exclusively backward-looking, "just deserts" sense.[248] Alternatively, though, it is possible to think of proportionality in a forward-looking sense. Viewed this way, a punishment that is excessive in relation to a particular offender's culpability for a particular act might nonetheless be seen as justified and proportionate based on its value in deterring or otherwise preventing future crime.[249] However, this broader approach to proportionality makes it less likely that any punishment will be found disproportionate. Not surprisingly, given their structural-deferential orientation, several federal cases explicitly approve the consideration of a penalty's crime-prevention value as part of the EFC proportionality calculus.[250] We have seen the same thing from the Ohio Supreme Court in *O'Malley*.[251] Several cases from other states also seem to take into account the forward-looking benefits of a penalty in upholding the penalty against an EFC challenge.[252] There are no cases that explicitly reject this approach.[253]

3. Potential Sentence Versus Actual Sentence

Many federal cases lay emphasis on the *potential* worst-case punishment that an individual might have received as a benchmark against which to compare the challenged economic penalty[254]—a comparison that in most cases makes the challenged penalty appear modest and more likely to be upheld. Because few defendants receive

---

caselaw suggests that one way to think about inability to pay is to calculate how long it would take a person working at the minimum wage to pay a challenged penalty, although no specific maximum payoff time has been established. *See* Commonwealth v. May, 271 A.3d 475, 486 (Pa. Super. Ct. 2022).

247. Professors Beth A. Colgan and Jean Galbraith have also made a similar observation about the significance of *Long*. *See* Beth A. Colgan & Jean Galbraith, *The Failed Promise of Installment Fines*, 172 U. PA. L. REV. 989, 1050 (2024).

248. O'Hear, *supra* note 16, at 784.

249. *Id.* at 784, 786.

250. *See id.* at 785–86, 786 n.141.

251. State v. O'Malley, 206 N.E.3d 662, 679 (Ohio 2022).

252. *See, e.g.*, City of Lewiston v. Verrinder, 275 A.3d 327, 334–35 (Me. 2022); *In re* Cash-N-Go, Inc., 286 A.3d 53, 79 (Md. Ct. Spec. App. 2022); Wendell v. Comm'r of Revenue, 7 N.W.3d 405, 417 (Minn. 2024); Jensen v. 1985 Ferrari, 949 N.W.2d 729, 740 (Minn. Ct. App. 2020); Commonwealth v. Ishankulov, 275 A.3d 498, 506 (Pa. Super. Ct. 2022).

253. To be sure, the "specific harms of specific acts" formulation of the Indiana Supreme Court in *State v. Timbs*, 169 N.E.3d 361, 373 (Ind. 2021), verges on an implicit rejection of the forward-looking approach.

254. *See* O'Hear, *supra* note 16, at 787–88 (discussing the various approaches of federal courts).

the maximum possible sentence, use of the *actual* sentence as a benchmark tends to be more favorable to EFC claimants, as we saw in Indiana's *Timbs* decision.[255] By contrast, consistent with the structural-deferential model, *O'Malley* rejected the relevance of the actual sentence to proportionality.[256] In the same spirit, many other state cases follow the federal lead in using maximum authorized penalties as a benchmark,[257] including at least a couple that adopt the federal "strong presumption" in favor of a penalty within statutory limits.[258]

4. Individualized Versus Generic/Categorical Harm

There seems broad agreement across the federal and state cases that the harm of an offense matters in assessing the proportionality of a penalty, but there is some disagreement over how harmfulness should be assessed. On one side, there is the view of the Indiana Supreme Court in *Timbs*, which focused on "the specific harms of

255. *See supra* text accompanying note 105.

256. *See supra* text accompanying note 153.

257. *See, e.g.*, People v. Ashford Univ., LLC, 319 Cal. Rptr. 3d 132, 181 (Cal. Ct. App. 2024); People *ex rel.* Rein v. Jacobs, 465 P.3d 1, 14 (Colo. 2020); Commonwealth v. Doebler, 626 S.W.3d 611, 622 (Ky. 2021); Bisignani v. Justs. of Lynn Div., 181 N.E.3d 1095, 1101 (Mass. App. Ct. 2022); People v. Orbital Publ'g Grp., Inc., 148 N.Y.S.3d 67, 69 (N.Y. App. Div. 2021); State *ex rel.* Workforce Safety & Ins. v. Boechler, PC, 974 N.W.2d 409, 414 (N.D. 2022); *In re* 4714 Morann Ave., 303 A.3d 200, 212–13 (Pa. Commw. Ct. 2023); Durham v. Tenn. Registry of Election Fin., 666 S.W.3d 459, 470–71 (Tenn. Ct. App. 2022); 1812 Franklin St. v. State, 614 S.W.3d 179, 188 (Tex. App. 2020); Vt. Nat'l Tel. Co. v. Dep't of Taxes, 250 A.3d 567, 589 (Vt. 2020). Further, a Massachusetts case joins *O'Malley* in explicitly rejecting the relevance of the *actual* sentence. *Bisignani*, 181 N.E.3d at 1101 n.11. For the purpose of determining the potential punishment, a Texas court has taken the questionable step of *aggregating* all the potential penalties of a group of co-actors, which substantially inflates the benchmark figure used for comparison with the challenged penalty. *See 1812 Franklin St.*, 614 S.W.3d at 189.

A few cases do omit discussion of potential penalties. *See, e.g.*, People v. Aviles, 252 Cal. Rptr. 3d 727, 740–41 (Cal. Ct. App. 2019). The Pennsylvania caselaw seems to echo Indiana in prioritizing actual over potential sentences. *See In re 4714 Morann Ave.*, 303 A.3d at 216.

258. *See, e.g.*, *In re* 3567 E. Alvord Rd., 473 P.3d 353, 358 (Ariz. Ct. App. 2020). *See also* O'Hear, *supra* note 16, at 788 (discussing the federal "strong presumption"). As noted earlier, the "strong presumption" appears in some of the Washington caselaw, although *Long* adopted a narrow interpretation of this doctrine. *See* City of Seattle v. Long, 493 P.3d 94, 115 (Wash. 2021). Although a penalty within statutory limits may be presumed constitutional, there is no indication in the caselaw of a flipside presumption, i.e., that forfeiture of property worth more than the maximum fine is presumed to be unconstitutional. *Cf.* Jensen v. 1985 Ferrari, 949 N.W.2d 729, 742 (Minn. Ct. App. 2020) (upholding forfeiture of a $44,900 vehicle where the maximum fine was $3,000).

specific acts."[259] This view reflects the individualized harm-assessment of the *Bajakajian* majority. On the other side, there is the view of the Ohio Supreme Court in *O'Malley*, which dealt with harm in a more generic or categorical fashion by emphasizing the general harmfulness of drunk-driving rather than the specifics of Mr. O'Malley's conduct—following the approach to harm of the *Bajakajian* dissent. The generic/categorical approach is prominent in the federal circuit court caselaw.[260] The generic/categorical approach is also used in states outside Ohio.[261] However, the individualized Indiana approach to harm can also be found in a few cases.[262]

---

259. State v. Timbs, 169 N.E.3d 361, 373 (Ind. 2021).

260. *See* O'Hear, *supra* note 16, at 791–93.

261. *See, e.g.*, People v. Braum, 263 Cal. Rptr. 3d 1, 16–17 (Cal. Ct. App. 2020) ("Braum increased the risk of the harm the City was endeavoring to enjoin and abate."); *Bisignani*, 181 N.E.3d at 1101 ("Bisignani's crimes involved a significant breach of the public trust, striking at the core of the ethical responsibilities of his positions."); *Boechler, PC*, 974 N.W.2d at 414 ("We conclude the penalties are not grossly disproportional to the law firm's persistent disregard for WSI's request for payroll records. By ignoring such lawful requests, an employer directly compromises WSI's administration of the workforce safety and insurance fund."); Commonwealth v. May, 271 A.3d 475, 486 (Pa. Super. Ct. 2022) ("Indeed, we do not underestimate the impact of Appellant's actions, and those similarly situated, which by driving after imbibing intoxicating substances put the lives and property of other citizens of this Commonwealth at risk."); *1812 Franklin St.*, 614 S.W.3d at 189 ("As for the harm caused by the offense, '[i]t is common knowledge that possession, use, and distribution of illegal drugs represents one of the greatest problems affecting the health and welfare of our population. Studies clearly demonstrate the direct nexus between illegal drugs and crimes of violence.'" (alteration in original) (quoting 1992 BMW/Thompson v. State, No. 04-07-00116, 2007 WL 2608364, at *2 (Tex. App. Sept. 12, 2007))).

Related to the use of generic or categorical harm is the consideration of enforcement costs, which is sometimes done in the cases but invariably in a summary or generic fashion (i.e., no specific toting up of the enforcement costs associated with a particular offense). *See, e.g.*, *In re 3567 E. Alvord Rd.*, 473 P.3d at 358 (noting that claimant's actions "had already cost the state two separate law enforcement investigations"); *Bisignani*, 181 N.E.3d at 1101 ("Bisignani's decision to interfere with the criminal investigation and the grand jury proceedings caused harm to the towns by creating additional investigative costs."); Wendell v. Comm'r of Revenue, 7 N.W.3d 405, 417 (Minn. 2024) ("The filing of frivolous tax returns creates unnecessary delay and waste of government resources due to the investigation necessary to correct and adjust tax assessments. A penalty of up to 25 percent of the tax amount actually owed is proportionate to the harm caused by the delayed administration of tax laws." (citation omitted)).

262. *See, e.g.*, State v. Brophy, 889 S.E.2d 337, 342–43 (Ga. Ct. App. 2023) ("With regard to the fourth subfactor, the trial court rejected the State's invitation to look to the broader implications of the Claimant's conduct in assessing harm and to consider the harms of the drug epidemic. Here, the court again emphasized that this was a simple possession case. We discern no error."); *In re 4714 Morann Ave.*, 303 A.3d at 217 ("On the harm factor, the trial court

5. Burden of Proof

On both the state and federal side, few cases provide a clear statement of who bears what burden of proof for EFC claims, but the federal courts to address the question generally place the burden entirely on the person asserting the EFC claim.[263] *O'Malley* adopted that approach, too, declaring that the defendant had to prove that the loss of his vehicle was unconstitutional by "clear and convincing evidence."[264] Indiana took a less clearly defined approach in *Timbs*, but indicated that there was a "high hurdle [in] showing gross disproportionality."[265] Some cases from other states also make clear, whether implicitly or explicitly, that the burden is on the claimant.[266]

---

explained that while the illegal sales of controlled substances 'harm the community,' the Commonwealth did not establish an 'actual or specific harm' caused by the conviction of Gavlak and her co-conspirators. Trial Court 1925(a) Op. at 6. Indeed, 'generic consideration of harm' is 'largely unhelpful' to the proportionality analysis." (quoting Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 190 (Pa. 2017))).

Where there is an actual, specific harm caused by an offense, it seems universally recognized that this harm can be considered in the proportionality calculus. However, there is no indication in the state cases that the amount of actual harm, or even a particular multiplier of that amount, constitutes a firm cap on the size of economic penalties. *See, e.g.*, *Ashford Univ., LLC*, 319 Cal. Rptr. 3d at 170 (rejecting "claim that the penalty must not exceed a single-digit ratio of the monetary loss proven at trial").

There also seems no question that individualized harm can include intangible harm. *See, e.g.*, People v. Johnson & Johnson, 292 Cal. Rptr. 3d 424, 475 (Cal. Ct. App. 2022) (considering harm caused to consumers "by depriving their doctors of material information necessary to counsel patients and forcing patients to make potentially life-altering decisions about their health and well-being based on this same false or incomplete information").

263. *See* O'Hear, *supra* note 16, at 783. The burden question is important on the federal side because, among other things, the federal courts do not limit their proportionality analysis to the specific offense(s) of conviction but also take into account related criminal activity that has not been proven through the normal criminal fact-finding process (guilty plea or proof beyond a reasonable doubt at trial). *See id.* n.130. State courts seem to do the same. *See, e.g.*, Commonwealth v. Doebler, 626 S.W.3d 611, 622–23 (Ky. 2021) (taking into account dismissed charges). For a detailed, richly argued proposal for how burdens *should* be handled in EFC litigation, see generally Colgan, *supra* note 5.

264. State v. O'Malley, 206 N.E.3d 662, 672 (Ohio 2022).

265. State v. Timbs, 169 N.E.3d 361, 376 (Ind. 2021). The court also specified, "The statute is also presumed constitutional, with all doubts resolved in favor of its constitutionality." *Id.* at 367.

266. *See, e.g.*, State v. Jouppi, 566 P.3d 943, 958 (Alaska 2025) ("Jouppi had the burden to develop both the factual and legal basis for his Eighth Amendment arguments in the trial court."); Jensen v. 1985 Ferrari, 949 N.W.2d 729, 742 (Minn. Ct. App. 2020) ("In sum, it requires 'an extreme case to warrant' a conclusion that a fine is unconstitutionally excessive." (quoting State v. Rewitzer, 617 N.W.2d 407, 412 (Minn. 2000))); Windermere Props., LLC v. City of New York, 217 N.Y.S.3d 560, 561 (N.Y. App. Div. 2024) ("[The claimant] has not

Only a couple of cases suggest the possibility of a different arrangement.[267]

6. Per Se Proportionality Rules

Reflecting the structural-deferential approach, the federal cases indicate that certain types of economic penalties may be per se proportional for EFC purposes, particularly restitution awards and other penalties that that are pegged to actual damages, including treble damages.[268] We have already seen the same view emerge in the Washington case law.[269] Outside Washington, though, there are few examples of state courts seeming to embrace per se rules in my set of cases.[270]

---

demonstrated that the default penalties at issue are 'grossly disproportional to the gravity of [the] offense[s].'" (alterations in original) (quoting OTR Media Grp., Inc. v. City of New York, 920 N.Y.S.2d 337, 340 (N.Y. App. Div. 2011))).

> On appeal, the general approach to standard of review seems to be that the "[F]actual findings made by [the trial court] in conducting the excessiveness inquiry" under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution "must be accepted unless clearly erroneous." But "whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate."

Jouppi, 566 P.3d at 951 (alteration in original) (quoting United States v. Bajakajian, 524 U.S. 321, 337 n.10 (1998)). *See also In re 3567 E. Alvord Rd.*, 473 P.3d at 358 (de novo review); Lent v. Cal. Coastal Comm'n, 277 Cal. Rptr. 3d 106, 143 (Cal. Ct. App. 2021) (quoting Sweeney v. Cal. Reg'l Water Quality Control Bd., 275 Cal. Rptr. 3d 442, 478 (Cal. Ct. App. 2021) (de novo, but clear error for facts); *Timbs*, 169 N.E.3d at 367 ("An appellate court reviews the court's factual findings for clear error and its excessiveness decision de novo." (citations omitted)); $153,340.00 in U.S. Currency v. State, 359 So. 3d 197, 205 (Miss. Ct. App. 2022) (trial court's EFC decision upheld because no clear error).

267. In *People v. Accredited Surety & Casualty Co.*, the court assumed without deciding that "the government has the initial burden of showing the amount of the forfeiture is reasonable under the circumstances." 279 Cal. Rptr. 3d 799, 808 (Cal. Ct. App. 2021) (footnote omitted). The court "further assume[d] that if the government makes an adequate initial showing of the reasonableness," then the burden would shift to the challenging party to show excessiveness. *Id.* Meanwhile, in *In re 4714 Morann Avenue*, the court ruled in favor of the EFC claimant when the government "presented no evidence to allow the trial court to make a reasonable inference of [the claimant's] actual knowledge of the illegal use of her house or consent to the underlying criminal activity." 303 A.3d 200, 218 (Pa. Commw. Ct. 2023). The court's implicit decision to put the burden on the government seems to have resulted from the court's special, heightened concerns about the attempted forfeiture of a person's residence. *See infra* Section V.C.

268. *See* O'Hear, *supra* note 16, at 804–05 (discussing treble damages).

269. *See supra* Section IV.C.4.

270. The clearest example is *Commonwealth v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 808 (Ky. 2020) ("This [award of treble damages] is not excessive and is the very definition of mathematically proportionate.").

7. Collapsing Culpability into Bare Intent

As noted above, one of the more striking differences between *Timbs* and *O'Malley* was in the weight placed on the respective defendants' substance-abuse problems. The Ohio Supreme Court's lack of interest in this feature of Mr. O'Malley's circumstances mirrors a marked tendency in the federal caselaw: the collapse of culpability into a simple question of intent.[271] As long as the defendant acted in a minimally intentional fashion, the federal courts seem uninterested in exploring nuances of culpability like excuse, justification, or role in the offense. However, beyond *Timbs* and *O'Malley*, there are no other cases in my set that neatly tee up the question of whether such case-specific culpability nuances should be given any weight in the proportionality analysis.[272]

B. Cutting Against Deference: Intra- and Interjurisdictional Comparison

Although the patterns in the post-*Timbs* state cases outside Indiana and Washington generally mirror the federal cases, there is a notable difference in the way that the proportionality analysis is structured in a handful of states. In these states, the relevant factors include a comparison of the challenged penalty with other penalties imposed for similar misconduct within the state and in other states. For instance, the Colorado Supreme Court has described its EFC proportionality test this way:

> In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the

---

Additionally, it is possible to read the summary approval of a disgorgement remedy (surrender of proceeds of an unlawful business) in *In re Cash-N-Go, Inc.* as signaling categorical approval. 286 A.3d 53, 77–78 (Md. Ct. Spec. App. 2022). Finally, there is some Pennsylvania case law that suggests categorical approval of fines that are "tailored, scaled, and in the strictest sense calculated to their offenses," e.g., a fine based on a flat per-fish amount for a number of fish killed by a pollution spill or "sliding scale" DUI fine scheme that is "based upon the substance imbibed, the level of impairment, the number of prior DUI's committed, if there was an accident that resulted in bodily injury or property damage, and if there were any minor occupants." Commonwealth v. May, 271 A.3d 475, 485 (Pa. Super. Ct. 2022) (citations omitted).

271. *See* O'Hear, *supra* note 16, at 796.

272. Perhaps the closest is *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*, in which the court brushed aside the defendant's claims about lack of notice regarding the violations that were the basis for the defendant's fines. 442 P.3d 94, 103 n.7 (Colo. 2019) ("Dami's arguments about lack of notice and the consequent length of the period of noncompliance are more properly understood as supporting a due process claim that is outside the scope of the issues upon which we granted certiorari. The fact that the DWC did not catch Dami's noncompliance for a number of years *is not relevant to the Eighth Amendment argument*." (emphasis added)).

> penalty, *considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions*.[273]

Similar tests have been adopted by courts in California, Minnesota, and Pennsylvania.[274]

These tests potentially cut against deference in some cases, specifically, when a person faces an unusually harsh, outlier-type penalty. Imagine, for instance, if a jurisdiction adopted a $10,000 fine for a parking violation or mandatory forfeiture of vehicles travelling even 1 MPH over the speed limit—in such scenarios, the comparative test might convince a court to overturn the penalty notwithstanding an otherwise-deferential orientation. It does not seem that the comparative tests have, in fact, played much of a role in overturning any penalties. However, if long-term legislative trends continue toward ever-harsher fines and fees, the comparative test might serve to rein in any jurisdiction that gets markedly out in front of the others.

C. The Critical Approach Outside Washington

The critical approach is not often seen in the state cases, but it is not entirely absent outside Washington. For instance, Pennsylvania courts have expressed particular concerns regarding attempts by the government to forfeit houses and indicated that heightened scrutiny should be applied in such cases:

> In Pennsylvania, as elsewhere, the home is an especially significant type of property. The loss of one's home, regardless of its monetary value, not only impacts the owner, but may impact other family members, and one's livelihood. Indeed, the home is where one expects the greatest freedom from

---

273. *Id.* at 103 (emphasis added). Interestingly, the test was derived from *Solem v. Helm*, 463 U.S. 277 (1983), which was a Cruel and Unusual Punishments Clause case, not an EFC case. However, the reliance on *Solem* was not necessarily inappropriate, given that *United States v. Bajakajian* also relied on *Solem*. 524 U.S. 321, 336 (1998). Professor Daniel Harawa has similarly argued that EFC proportionality review should make use of comparative benchmarks. Harawa, *supra* note 2, at 93.

274. Sweeney v. S.F. Bay Conservation & Dev. Comm'n, 276 Cal. Rptr. 3d 482, 496 (Cal. Ct. App. 2021); Wendell v. Comm'r of Revenue, 7 N.W.3d 405, 416 (Minn. 2024); Commonwealth v. Ishankulov, 275 A.3d 498, 505 (Pa. Super. Ct. 2022) (citation omitted). The Washington Supreme Court, however, has expressed skepticism of comparative analysis. *See* State v. Grocery Mfrs. Ass'n, 502 P.3d 806, 815 (Wash. 2022) ("*Bajakajian*'s test analyzes whether the penalty is grossly disproportional to the defendant's bad conduct. It does not analyze whether the penalty is disproportional to the one imposed in other (and in this case, starkly dissimilar) cases. Other legal doctrines, like equal protection of the law, constrain the State from treating similar cases differently based on impermissible characteristics." (emphasis omitted) (citations omitted)).

> governmental intrusion; it not only occupies a special place in our law, but *the most exacting process is demanded before the government may seize it*.[275]

However, the most striking illustration of the critical approach outside Washington comes from a very recent Montana case, *State v. Gibbons*.[276] In *Gibbons*, the Montana Supreme Court ruled that a mandatory minimum $5,000 fine for a DUI conviction violated the EFC to the extent that it prohibited the sentencing judge from considering the defendant's inability to pay.[277] In so doing, the court invoked the Reconstruction history of fines being used to maintain "racial hierarchy"[278] and connected this history to contemporary concerns that "the impact of mandatory minimum fines is disproportionate on families of poor defendants and minority communities, particularly those of color."[279] The court elaborated:

> A poor offender feels the impact of any fine disproportionately compared to his wealthier counterpart. An indigent defendant who remains criminally obligated to pay the same fine, but cannot pay it, risks getting caught in an endless cycle of escalating debt, incarceration, and longer periods of entanglement with the justice system. . . . Moreover, the collateral consequences of imposing disproportionate fines on an offender's family, who often pay their loved one's financial obligation, ensures that the reach of the criminal justice system and its punishment extends beyond the offender. Oftentimes, the symbiotic harm from mandatory minimum fines affects the women in an offender's family—the mother, wife, or sister pays the fine for their loved one and there is less money for food, clothing, and shelter. An indigent defendant must continue to worry about a revocation, incarceration, and a longer period of involvement with the justice system if he has no resources to pay the fine.[280]

The court here not only echoed, but actually expanded on, the concerns raised in *Long* about the tendency of economic penalties to exacerbate preexisting patterns of socioeconomic disadvantage. The court also suggested that there may be systemic reasons to be skeptical of the work

---

275. *In re* 4714 Morann Ave., 303 A.3d 200, 218 (Pa. Commw. Ct. 2023) (emphasis added) (quoting Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 197 (Pa. 2017)). Professor Nicholas McLean has similarly argued that forfeiture of homes "should be subject to a particularly searching Eighth Amendment review." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 897–99 (2013).

276. 545 P.3d 686 (Mont.), *cert. denied*, 145 S. Ct. 355 (2024).

277. *Id.* at 706.

278. *Id.* at 700 (quoting Timbs v. Indiana, 139 S. Ct. 682, 688 (2019)).

279. *Id.* at 702.

280. *Id.* at 702–03 (emphasis omitted).

of the political system in producing mandatory minimums.[281] Nor, in view of the disproportionate class and race effects of the law, was the court swayed by the argument that the threat of mandatory fines might advance public safety.[282] We seem a world away from *O'Malley*'s easy acceptance of the asserted public-safety benefits of mandatory *forfeiture* as a response to DUI offenses.[283]

D. Recap: State of the States

On the whole, as indicated in Section A, the post-*Timbs* published state cases seem most consistent with the structural-deferential model and generally echo the federal cases in several important respects. However, the states seem less fully and consistently in line with the structural-deferential model than are the federal circuits. Consider the following evidence.

First, the Indiana Supreme Court has adopted an individualized balancing approach that appears more reflective of the reasoning process of the *Bajakajian* majority.

Second, courts in Washington and Montana have adopted a structural-critical approach that strongly emphasizes inability to pay as a weighty or even dispositive factor in the EFC proportionality analysis.

Third, courts in at least a handful of states have incorporated intra- and interjurisdictional comparative factors into their analysis, which has not been done in any of the federal circuits. This additional layer of analysis has the potential to undercut deference in some circumstances.

Fourth, the concept of a "strong presumption" of the constitutionality of any penalty that is less than the statutory maximum fine seems much less prevalent in the state than the federal cases.

The states thus seem to give us a more varied jurisprudence than the federal circuits. This is not surprising. After all, there are more

---

281. *See id.* at 703 ("When the public expresses fear of victimization and a belief that criminals are not receiving a harsh enough punishment, there is a tendency to respond in kind with new crimes and stiffer penalties, including increasing mandatory minimum fines. The enactment of a mandatory minimum penalty does not involve 'any careful consideration' of the ultimate effects, Chief Justice Rehnquist once noted." (citation omitted) (quoting William H. Rehnquist, *Luncheon Address*, *in* U.S. SENT'G COMM'N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993))). *Cf. id.* at 700 ("The Excessive Fines Clause has provided 'a constant shield throughout Anglo-American history' designed to protect other constitutional rights, guarding against the government's use of fines to chill the speech of political enemies, to coerce involuntary labor by imposing a penalty unpayable by the offender, and *to generate government revenue from unjust punishments*." (emphasis added) (quoting *Timbs*, 139 S. Ct. at 689)).

282. *Id.* at 702.

283. *See* State v. O'Malley, 206 N.E.3d 662, 679 (Ohio 2022).

than four times as many states as circuits. Moreover, in contrast to lifetime-appointed federal judges who emerge from a nationally centralized process of presidential appointment and Senate confirmation, state judges are produced by, and usually made accountable through, highly varied state-level political processes. One might thus expect considerable state-level variation in constitutional adjudication, at least in areas like the EFC where the U.S. Supreme Court has not adopted clear, nationally uniform rules.

VI. PATH FORWARD: STATE COURTS AS FAITHFUL SERVANTS OR PARTNERS?

Only about half the states have weighed in with any published post-*Timbs* cases. Confronted with three competing models, how should the other states proceed when they address EFC issues? Or, for that matter, what about other states whose limited post-*Timbs* jurisprudence has not addressed some of the key questions that differentiate the models, like how to weigh inability to pay or whether to take into account generic/categorical harms? In this Part, I will consider the path forward for state courts from the standpoint of two different ways of thinking about the relationship between the U.S. Supreme Court and the state courts: as a master-servant relationship or, alternatively, as a relationship of partners with distinct roles to play in the enforcement of federal constitutional rights.

A. State Courts as Faithful Servants

When it comes to the interpretation of federal constitutional rights, the U.S. Supreme Court's views are normally regarded as definitive.[284] The "Supremes" sit at the apex of a pyramidal structure of judicial hierarchy, with the principle of "vertical stare decisis" standing largely unchallenged, giving the Court's "holdings" a unique authority—generally acknowledged as binding on state courts as to matters of federal law.[285] Yet, the distinction between "holding" and

284. *See, e.g.*, Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 203 (2014) ("Absent a formal overruling, Supreme Court decisions remain indefeasibly binding on all inferior tribunals; finding a precedent to be controlling brings the inquiry to its end."); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 971 (2016) ("Lower courts themselves often intone that they must dutifully follow the Court's edicts.").

285. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957 (2005) ("Vertical stare decisis is generally considered absolute . . . ."). *But cf.* Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1056 (1987) ("From the deductive perspective, the only strictly binding aspects of a judicial decision are the judgment and orders issued to the parties to the suit. The opinion is merely an explanation.").

mere dicta has proven maddeningly elusive,[286] and whether and how lower courts should attend to non-holding "signals" from the Supreme Court remains a matter of uncertainty and debate.[287] Even if we assume that state courts should conceptualize their role as merely faithful servants to the Supreme Court, it is not always clear what that role requires when it comes to deciding specific legal questions in specific cases.

The Supreme Court's EFC jurisprudence provides a good illustration of the difficulties. If we try to consider whether a faithful servant should follow the Indiana, Ohio, or Washington models, we may find ourselves going around in analytical circles.

There is, to be sure, a respectable case that Indiana has been the most faithful servant. After all, we still have one and only one U.S. Supreme Court case with an EFC proportionality holding, *Bajakajian*. And, as we have seen, the Indiana individualized balancing approach most closely mirrors the analysis of the *Bajakajian* majority.[288]

Yet, it is far from clear that the *Bajakajian* majority intended to establish a generalized model for EFC proportionality review. Rather, the majority's discussion seemed loosely structured and ad hoc. Although lower courts subsequently tried to translate the discussion into an enumerated set of "factors,"[289] there was nothing of such formality in the majority's language. One might plausibly read the majority opinion as merely a tentative first foray into new jurisprudential terrain, intended to foreclose little for lower courts in later cases. Moreover, at least one aspect of the majority's analysis arguably makes sense only for forfeitures,[290] which may suggest that the opinion should not be understood as controlling for other sorts of economic penalties.

There is also the cert-denial problem. Since *Bajakajian*, lower courts have more closely followed the lead of the *Bajakajian* dissent than the *Bajakajian* majority.[291] Yet, time and again, the Supreme

---

286. *See* Abramowicz & Stearns, *supra* note 285, at 958 ("[N]o satisfactory definition has yet to emerge . . . .").

287. *See* Re, *supra* note 284, at 942–45 (discussing the "signals model" and contrasting it with other models).

288. *See supra* Section IV.A.

289. *See* O'Hear, *supra* note 16, at 781–83.

290. To assist with its comparison of the forfeiture at issue with the defendant's culpability, the Court used the fine imposed on the defendant as a reference point. United States v. Bajakajian, 524 U.S. 321, 340 (1998) ("[The forfeiture amount] is larger than the $5,000 fine imposed by the District Court by many orders of magnitude . . . ."). However, it would make little sense to use the value of the fine in a case as a benchmark to assess the constitutionality of the fine itself. Tim Donaldson has made a similar argument. *See* Donaldson, *supra* note 8, at 660.

291. O'Hear, *supra* note 16, at 764.

Court has denied cert petitions in these cases.[292] Can't this be understood as a signal from the Court that it no longer favors what the *Bajakajian* majority did? True, taking into account such non-holding signals does not fit within the prevailing "authority" model of vertical stare decisis,[293] but a genuinely faithful servant might perhaps want to attend not only to the leader's formal commands but also, shall we say, to the body language.[294] Certainly, there is ample evidence that, in practice, lower courts tend to follow the non-holding cues of the Supreme Court.[295]

---

292. *See id.* at 810 n.275 (noting cert denials in fifteen of the federal EFC cases).

293. *See* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2024 (2013) ("[D]ictum and holding are usually thought to be entitled to very different weight in the American legal system, as in other common law systems: 'A court's holding defines the scope of its power; holdings must be obeyed . . . . Dicta is the stuff that doesn't have to be obeyed.'" (quoting David Post, *Commerce Clause "Holding v. Dictum Mess" Not So Simple*, VOLOKH CONSPIRACY (July 3, 2012), https://perma.cc/7XAH-9KLW)); Re, *supra* note 284, at 936 (describing "authority model").

294. *See* Re, *supra* note 284, at 940, 943 (describing the "prediction model" of precedent, which "holds that lower courts should do what they imagine that higher courts would do if faced with the same case," and the "signals model," which "maintains that signals from a majority of the Justices have precedential force").

295. *See, e.g.*, Klein & Devins, *supra* note 293, at 2025–26 (based on empirical study, finding "strikingly large" "gap between dicta-in-theory and dicta-in-practice"); *id.* at 2026 ("[N]early 14,000 out of about 700,000 Westlaw-reported cases contained allusions to the distinction, but lower courts refused to follow a directive from a higher court because they regarded it as dictum in only about 220 of these cases."); Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907, 932 (2021) ("[H]igher-court rulings that portend reversal necessarily have a prohibitory quality—somewhat like a warning shot—even if they lack any legally binding force. These structural dynamics help explain why federal courts of appeals openly claim to give weight to Court 'dicta,' which by definition seem to lack formal precedential force."); Schauer, *supra* note 13, at 683 ("Fine distinctions between holding and dicta are rarely relevant; indeed, the very question of what the Court held at all becomes increasingly less important as we follow an opinion down the hierarchy. For when we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it said. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding." (emphasis omitted)). To be sure, there are substantial objections that might be made to the lower-court practice of following dicta or other non-holding signals. *See, e.g.*, Klein & Devins, *supra* note 293, at 2026 ("[I]n the traditional image of common law judging, broad doctrine emerges over time as principles uniting individual cases come into focus. Under this view, lower courts play a critical role in the development of legal principles by exercising their own judgment as to the implications and applicability of past decisions." (footnote omitted)).

Indeed, thinking more broadly (and realistically) about the ongoing reliability of *Bajakajian* as an indicator of the Supreme Court's views, a lower court might note that *Bajakajian* was a closely divided 5-4 decision, and that four of the majority Justices (Breyer, Stevens, Souter, and Ginsburg) are no longer on the Court.

The cert-denial patterns may lead us to the Ohio model. The Supreme Court has had many opportunities to speak out against the structural-deferential approach and has not done so. Does this not plausibly signal acquiescence?[296] But then what are we to make of the cert denials in regard to the structural-critical decisions in *Jacobo Hernandez*[297] and *Gibbons*[298]? Do these not count as signals, too? And, of course, there is also the structural-critical language in *Timbs*.[299]

Given the equivocal nature of all the non-holding post-*Bajakajian* evidence, lower courts may be inclined to retreat to *Bajakajian* and more conventional ways of understanding stare decisis. But, again, what exactly do we take the holding of *Bajakajian* to be? Between the articulation of a highly indeterminate test ("gross disproportionality") and the very specific decision that the government could not keep all of Mr. Bajakajian's cash, there was precious little said that has the character of a statement of law. And so, we go around the circle again.

B. State Courts as Partners in the Enforcement of Federal Constitutional Rights

In an important 1978 article, Larry Sager posited an alternative relationship between the U.S. Supreme Court and state courts.[300] First, Sager theorized a difference between the "conception" of a

---

296. Even without the cert denials, we might still be drawn to the Ohio model because it seems to reflect the approach of most federal circuit and state appellate courts; after all, it is thought that one of the most important reasons—perhaps *the* most important reason—for vertical stare decisis is fostering greater national jurisprudential uniformity. *See* Re, *supra* note 284, at 924 ("Indeed, the entire point of having a Supreme Court is arguably to foster uniformity . . . ."). Reliance interests might also come into play. *See id.* at 947–48 ("Reliance interests often cut strongly against overruling or partial overruling. A central purpose of precedential clarity is to establish coordination and rules of practice; and interested parties, both private and public, are accustomed to relying on clear case law. So when courts displace one clear precedent in favor of another, they often undermine reliance where reliance is most appropriate." (footnote omitted)). In the present context, the chief reliance interests would appear to be those of courts and other government agencies that have relied on the currently prevailing patterns of deference in adopting and implementing revenue-raising schemes based on economic penalties.

297. City of Kent v. Jacobo-Hernandez, 143 S. Ct. 99 (2022).

298. Montana v. Gibbons, 145 S. Ct. 355 (2024).

299. *See supra* Section IV.C.

300. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1252–53 (1978).

federal constitutional norm and the "construct" of the norm that is developed in federal courts.[301]

> [T]he important difference between a true constitutional conception and the judicially formulated construct is that the judicial construct may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role. These concerns operate to produce some judicial constructs which are not at all exhaustive of the constitutional concepts they reflect. Thus, a federal judicial construct may not be a true constitutional conception because it may not exhaust the concept from which it derives; when this is the case, the construct will let go unchecked some official behavior which may well be in conflict with the concept itself.[302]

Constructs may be "truncated" due, for instance, to concerns about "the propriety of unelected federal judges[] displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them."[303] In any event, truncation—i.e., the gap between conception and construct—means that we have "underenforced constitutional norm[s]" in federal courts.[304]

Sager then considered how state-court judges are differently situated than federal, which might make truncation appear less necessary or appropriate for the former than the latter.[305] For instance, state courts, unlike the U.S. Supreme Court, don't have to worry about the difficulty of fashioning uniform national rules that might be ill-suited for the "complex and divergent conditions which obtain in the various states."[306] Additionally, judges in most states must periodically face the voters and thus may have greater democratic legitimacy than unelected federal judges.[307] Thus, Sager

---

301. *See id.* at 1214.

302. *Id.* at 1214–15. The difference between a "concept" and a "conception" is the difference "between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues." *Id.* at 1213.

303. *Id.* at 1217 (footnote omitted).

304. *Id.* at 1213–18. Sager's work here anticipates what has been called the "decision rules" school of constitutional theory, which posits "a divide between pure constitutional law and its application in practice." Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 414–15 (2012). The contrasting "pragmatist" school posits "that rights and remedies are inextricable from one another. Talking about rights without talking about remedies makes no sense because remedies inherently dictate the nature of rights." *Id.* at 416.

305. *See* Sager, *supra* note 300, at 1255–56.

306. *Id.*

307. *See* Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, 12 ANN. REV. L. & SOC. SCI. 353, 355–56 (2016) (providing overview of

suggested, when a state court confronts an underenforced constitutional norm, it should regard itself as empowered to enforce to the full extent of the norm.[308] Sager saw the "safeguarding of constitutional values," then, as a matter of "shared responsibility."[309]

> Under this view, the Supreme Court would remain the highest, and the ultimately authoritative, arbiter of our constitutional affairs. But the Court would welcome the efforts of . . . state courts to shape elusive constitutional norms at their margins, and all governmental officials would regard themselves as bound by the full reach of all constitutional norms, including those which partially elude federal judicial enforcement.[310]

In light of a highly deferential body of case law in the federal circuit courts, and the apparent Supreme Court acquiescence to that case law, the EFC certainly has the feel of an underenforced constitutional norm. The Court's *Timbs* decision suggests that some practices that have become commonplace with the expansion of economic penalties over the past generation may run afoul of the

---

judicial selection and retention methods in United States; in forty-seven states, judges must periodically undergo a retention process, which is most commonly done by election).

308. Sager, *supra* note 300, at 1221.

309. *Id.* at 1263.

310. *Id.* at 1264. Sager acknowledged that his approach may undermine national uniformity in the enforcement of federal constitutional rights, but he observed "[w]e have traditionally lauded the states as laboratories in which structures for the effectuation of social goals can be devised and tested." *Id.* at 1251. He also concedes that his approach may be criticized as lacking practical importance insofar as state courts could already go beyond the truncated federal constitutional constructs by employing analogous state constitutional provisions. *Id.* at 1259. However, he argued,

> Even when a state constitutional ground of decision is available, state courts may find it desirable to speak in a federal constitutional tongue. A state court might well wish to articulate a constitutional decision in terms which directly address the courts of other states, that is, which in effect constitute a claim that its given determination of constitutional substance is a correct determination for not just State X, but other states as well. Such an impulse towards a constitutional *lingua franca* seems entirely appropriate. It suggests the possibility of the generation of dialogue and consensus among state courts as to the appropriate enforcement of the unenforced margins of underenforced federal constitutional norms. Further, a state court might wish to speak in federal constitutional terms in order to command the attention of the Supreme Court itself and to participate in the process of advance consideration and persuasion as do federal courts of appeals. Again, such an impulse seems entirely appropriate, and ought to be welcomed in our federal system.

Id. at 1260.

constitutional norm that is embodied in the EFC.[311] However, neither the Supreme Court nor the federal circuits have shown a willingness to overturn any penalties except in very limited, extreme circumstances. Cropping up repeatedly in the cases are just the sorts of considerations that Sager labeled "institutional."[312] This area, in short, may be ripe for the kind of "cooperative effort" that Sager envisioned, with state courts venturing into the "unenforced margins."[313] The key Washington decisions, *Long* and *Jacobo Hernandez*, may be seen in this light, as they push back against the application of penalties that strip individuals of their only real assets.[314]

This strikes me as a descriptively plausible—and perhaps normatively legitimizing—way of understanding the relationship between the Supreme Court cases and the Washington cases. But, even assuming the Washington approach is defensible, we are still far short of an argument that the Washington approach *must* be adopted, or even *should* be adopted, by other states. Even though the Supreme Court seems in *Timbs* to be reaching toward a robust EFC constitutional norm, it cannot be said that the norm has any very definite content based on the extant Supreme Court case law.

Without clearer guidance from the Supreme Court, state courts must do most of the interpretive work themselves. This hardly seems an easy or straightforward task. History and tradition, which might prove helpful guides in developing constitutional norms in other contexts, seem to come up short here. Even the arch-originalist Justice Thomas has found little to use in the historical sources regarding proportionality.[315] Nor is it entirely clear where pragmatic

311. *See supra* Section I.C.

312. Even the *Bajakajian* majority itself asserted that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." United States v. Bajakajian, 524 U.S. 321, 336 (1998).

313. Sager, *supra* note 300, at 1221, 1264. *Cf.* Re, *supra* note 284, at 926 ("[A]mbiguous Supreme Court precedent can and often should be viewed as effecting a kind of delegation to lower courts, affording them legitimate space for interpretive flexibility.").

314. Among other jurisprudential benefits, such decisions may also provide useful feedback to the Supreme Court in aid of its further elaboration of the proportionality norm. *Cf.* Re, *supra* note 284, at 927 ("Too often judges and commentators assume a simplistic relationship whereby lower courts either do or don't follow their superiors' instructions. But lower courts have a substantial interpretive gray zone available to them—and, in taking advantage of that discretion, lower courts sometimes engage in a precedential dialogue with the Supreme Court." (footnote omitted)).

315. *Bajakajian*, 524 U.S. at 335–36 ("None of these sources suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive."). To be sure, seemingly sound historical arguments have been made that EFC proportionality should take into account inability to pay. *See, e.g.*, McLean, *supra* note 275, at 837–38. However, even accepting this

considerations lead. Although there seems something of a scholarly consensus that contemporary economic-penalty practices are unfair and perhaps counterproductive,[316] and that the EFC can and should be used more aggressively to change contemporary practices,[317] there is no corresponding consensus about how exactly to conceptualize the regulatory role of the EFC.[318]

Perhaps the most promising notion that has appeared in both the scholarly literature and the case law is that an economic penalty may not be so great as to deprive a person of his "livelihood."[319] The idea has been derived from the historical sources.[320] However, some considerable work remains to be done before it can be said that we have a "workable standard for the decision of concrete issues."[321]

And even then, it is not clear whether state appellate courts should enforce to the full extent of the constitutional norm. Sager argued that the practical, institutional grounds for underenforcement may be stronger for federal than state courts,[322] but that is not to say that such considerations are entirely *irrelevant* to state courts. For instance, just as the U.S. Supreme Court may be ignorant of state variation and complexity, and may be seen as a clumsy and perhaps illegitimate disruptor of functioning on-the-ground systems, a *state* supreme court may similarly be too far removed from *local* variation and complexity to fairly and effectively regulate what is happening in local courthouses. In the end, some degree of *state* underenforcement of federal constitutional norms may also be warranted.

CONCLUSION

The Supreme Court's *Timbs* decision in 2019 was greeted by some commentators as a watershed event that would more fully engage the

---

point, important questions would remain about *how* to take the factor into account (e.g., how exactly to define inability to pay and whether it should ever (or always) be treated as dispositive in itself), as well as the broader field of proportionality review.

316. *See* O'Hear, *supra* note 3, at 1191–95 (summarizing research literature).

317. *See* O'Hear, *supra* note 16, at 778–80.

318. *See id.* (discussing a variety of different proposals made in the literature).

319. *See, e.g.*, City of Seattle v. Long, 493 P.3d 94, 107 (Wash. 2021) (quoting Timbs v. Indiana, 139 S. Ct. 682, 688 (2019)); Donaldson, *supra* note 8, at 654.

320. *See Bajakajian*, 524 U.S. at 335 ("Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood . . . .").

321. *See* Sager, *supra* note 300, at 1213 (defining what he means by a constitutional "conception"). For a discussion of just one difficulty, see Donaldson, *supra* note 8, at 652 ("Courts that consider deprivation of livelihood as a factor when evaluating excessiveness disagree whether an offender's financial circumstances should be considered a component of proportionality review or an overriding separate factor.").

322. *See* Sager, *supra* note 300, at 1247–63.

nation's state courts in the constitutional fight against burgeoning economic penalties.[323] However, a review of all published EFC state-court cases since *Timbs* finds no evidence of any surge in EFC litigation.[324] In hindsight, perhaps there was a timing problem. *Timbs* landed almost exactly one year before COVID did. And once COVID hit, the time and attention of criminal courts and practitioners seemed wholly consumed by the practical challenges posed by the pandemic.[325] It was hardly a propitious moment for a revolution in constitutional jurisprudence—at least not one unrelated to social distancing or remote court proceedings.

To the extent that state-court EFC litigation has occurred post-*Timbs*, there is little evidence that it has been affected much by *Timbs*.[326] EFC claims are routinely denied without citation to *Timbs* or discussion of the structural issues raised by *Timbs*. Indeed, in the aggregate, the state case law generally resembles the federal case law, which has been marked by strong patterns of deference to legislative determinations of economic-penalty amounts.

Yet, to speak in the "aggregate" of the state case law is to overlook a handful of cases that deviate notably from the federal pattern and that are arguably more in the spirit of the Supreme Court's decisions in *Timbs* and/or *Bajakajian*. Thus, by way of shorthand, we can contrast the Ohio model (i.e., the structural-deferential approach, mirroring the federal cases) with the Indiana model (individualized balancing) and the Washington model (structural-critical).[327] Although the leading cases in the three states do not "speak" to one another in any substantial way, it is evident that they reflect quite different orientations toward the EFC proportionality analysis.

Which model is the "best" model presents a difficult jurisprudential problem, the resolution of which lies beyond the scope of this Article. Certainly, for a state court wishing to play the "faithful servant" role, there seems no entirely clear right answer, given the extremely limited and somewhat inconsistent and opaque character of the U.S. Supreme Court's signals about EFC proportionality review.[328] Indeed, all three models have at least some minimal level of jurisprudential defensibility. Even the Washington model, which represents the sharpest break from "business as usual" in the state and federal appellate courts, arguably represents a state court's

323. *See supra* note 10 and accompanying text.

324. *See supra* Part III.

325. *See* Cynthia Alkon, *Designing for Justice: Pandemic Lessons for Criminal Courts*, 52 STETSON L. REV. 185, 185–86 (2022) (describing impact of COVID on courts).

326. *See supra* Part III.

327. *See supra* Part IV.

328. *See supra* Section VI.A.

appropriate recognition of its distinct role in the federal system as an enforcer of otherwise-underenforced constitutional norms.[329]

In any event, by drawing attention to the availability of plausible alternative approaches to proportionality review, it is hoped that this Article will enrich the EFC jurisprudence, leading to more fully considered decisions that do not simply take for granted the prevailing structural-deferential model.

APPENDIX: POST-*TIMBS* PUBLISHED STATE APPELLATE CASES ON EFC PROPORTIONALITY REVIEW[330]

CITATION	STATE	WHO WON[331]	PENALTY AT ISSUE	UNDER-LYING OFFENSE	EFC[332]	*TIMBS* CITED	FEDERAL CASES CITED[333]	CASES FROM OTHER STATES CITED[334]	LAW REVIEW ARTICLES CITED[335]	STRUCTURAL CONCERNS DISCUSSED[336]
State v. Jouppi[337]	AK	G	Forfeiture	Alcohol	B	Y	Y	Y	N	N
In re 3567 E. Alvord Rd.[338]	AZ	G	Forfeiture	Drug	F	N	N	N	N	N
People v. Johnson & Johnson[339]	CA	G	Fine	Trade practices	B	N	N	N	N	N

329. *See supra* Section VI.B.

330. Published cases from all fifty states and the District of Columbia were searched using the phrase "Excessive Fines Clause." Cases were eliminated if they did not include application of the EFC proportionality test or some other substantive commentary on the content of the proportionality test. Thus, for instance, if an EFC claim was rejected because the challenged penalty was determined not to be a "fine," the case was not included. Also excluded were decisions that were superseded by subsequent decisions in the same case, e.g. a decision of an intermediate court of appeals if there was a subsequent decision of the state supreme court in the same case.

331. "C" is claimant, "G" is government, and "R" is remand. The "Who Won" assessment is based on the EFC issue only. Thus, for instance, if a claimant won on a statutory issue but lost on the EFC issue, the case would be classified as a "G."

332. "F" is federal, "S" is state, "B" is both, and "U" is uncertain.

333. "Federal Cases" here means cases from courts below the United States Supreme Court. To be counted in this column, the federal-court citation must be in the EFC proportionality discussion.

334. To be counted in this column, the state-court citation must be in the EFC proportionality discussion.

335. To be counted in this column, the law-review citation must be in the EFC proportionality discussion.

336. This refers to the concerns reviewed in Section I.C.

337. 566 P.3d 943 (Alaska 2025).

338. 473 P.3d 353 (Ariz. Ct. App. 2020).

339. 292 Cal. Rptr. 3d 424 (Cal. Ct. App. 2022).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
People v. Ashford Univ., LLC[340]	CA	G	Fine	Trade practices	B	N	N	N	N	N
People v. Pack-Ramirez[341]	CA	G	Fees, fine, restitution	Theft	B	N	N	N	N	N
Lent v. Cal. Coastal Comm'n[342]	CA	G	Fine	Beach access	B	Y	N	N	N	N
People v. Accredited Sur. & Cas. Co.[343]	CA	G	Forfeiture	Bail jumping	F	Y	N	N	N	N
People v. Braum[344]	CA	G	Fine	Drug	F	N	N	N	N	N
People v. Lowery[345]	CA	G	Fees, fine	Robbery	F	N	N	N	N	N
People v. Aviles[346]	CA	G	Fees, fine	Battery	F	Y	N	N	N	N
Sweeney v. Cal. Reg'l Water Quality Control Bd.[347]	CA	G	Fine	En'vtl.	F	N	Y	N	N	N
Sweeney v. S.F. Bay Conservation & Dev. Comm'n[348]	CA	G	Fine	En'vtl.	F	N	N	N	N	N

340. 319 Cal. Rptr. 3d 132 (Cal. Ct. App. 2024).
341. 271 Cal. Rptr. 3d 1 (Cal. Ct. App. 2020).
342. 277 Cal. Rptr. 3d 106 (Cal. Ct. App. 2021).
343. 279 Cal. Rptr. 3d 799 (Cal. Ct. App. 2021).
344. 263 Cal. Rptr. 3d 1 (Cal. Ct. App. 2020).
345. 257 Cal. Rptr. 3d 216 (Cal. Ct. App. 2020).
346. 252 Cal. Rptr. 3d 727 (Cal. Ct. App. 2019).
347. 275 Cal. Rptr. 3d 442 (Cal. Ct. App. 2021).
348. 276 Cal. Rptr. 3d 482 (Cal. Ct. App. 2021).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
People v. Cowan[349]	CA	R	Fees, fine	Burglary	B	Y	Y	N	Y	N
People *ex rel.* Rein v. Jacobs[350]	CO	G	Fine	En'vtl.	B	N	N	N	N	N
Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC[351]	CO	R	Fine	Insurance	F	Y	N	N	N	N
State v. Brophy[352]	GA	C	Forfeiture	Drug	S	Y	Y	N	N	N
State v. Timbs[353]	IN	C	Forfeiture	Drug	F	Y	Y	Y	N	N
Commonwealth v. Doebler[354]	KY	G	Forfeiture	Drug	B	Y	Y	Y	N	N
Commonwealth v. Stars Interactive Holdings (IOM) Ltd.[355]	KY	G	Fine	Gambling	B	N	N	N	N	N
Bisignani v. Justs. of Lynn Div.[356]	MA	G	Forfeiture	Public office corrupt'n	F	Y	Y	N	N	N
In re Cash-N-Go, Inc.[357]	MD	G	Fine, restitution	Trade practices	F	N	N	N	Y	N

349. 260 Cal. Rptr. 3d 505 (Cal. Ct. App.), *review granted*, 466 P.3d 843 (Cal. 2020).
350. 465 P.3d 1 (Colo. 2020).
351. 442 P.3d 94 (Colo. 2019).
352. 889 S.E.2d 337 (Ga. Ct. App. 2023).
353. 169 N.E.3d 361 (Ind. 2021).
354. 626 S.W.3d 611 (Ky. 2021).
355. 617 S.W.3d 792 (Ky. 2020).
356. 181 N.E.3d 1095 (Mass. App. Ct. 2022).
357. 286 A.3d 53 (Md. Ct. Spec. App. 2022).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
City of Lewiston v. Verrinder[358]	ME	G	Fine	Property condition	B	N	N	N	N	N
Jensen v. 1985 Ferrari[359]	MN	G	Forfeiture	DUI	B	Y	N	N	N	N
Wendell v. Comm'r of Revenue[360]	MN	G	Fine	Tax	F	N	N	N	N	N
$153,340.00 in U.S. Currency v. State[361]	MS	G	Forfeiture	Drug	U	N	N	N	N	N
State v. Gibbons[362]	MT	R	Fine	DUI	B	Y	N	Y	N	Y
State v. Yang[363]	MT	R	Fine	Drug	B	Y	N	N	N	N
State *ex rel.* Workforce Safety & Ins. v. Boechler, PC[364]	ND	G	Fine	Insurance	B	Y	N	N	N	N
People v. Orbital Publ'g Grp., Inc.[365]	NY	G	Fine	Trade practices	F	N	Y	N	N	N
Windermere Props., LLC v. City of New York[366]	NY	G	Fine	Housing	B	N	N	N	N	N

358. 275 A.3d 327 (Me. 2022).
359. 949 N.W.2d 729 (Minn. Ct. App. 2020).
360. 7 N.W.3d 405 (Minn. 2024).
361. 359 So. 3d 197 (Miss. Ct. App. 2022).
362. 545 P.3d 686 (Mont.), *cert. denied*, 145 S. Ct. 355 (2024).
363. 452 P.3d 897 (Mont. 2019).
364. 974 N.W.2d 409 (N.D. 2022).
365. 148 N.Y.S.3d 67 (N.Y. App. Div. 2021).
366. 217 N.Y.S.3d 560 (N.Y. App. Div. 2024).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
Cha v. N.Y. St. Indus. Bd. of Appeals[367]	NY	G	Fine	Employee rights	B	N	N	N	N	N
Singletary v. Residential Mgt. Inc.[368]	NY	G	Fine	Housing	F	N	N	N	N	N
State v. O'Malley[369]	OH	G	Forfeiture	DUI	F	Y	Y	Y	N	N
City of Bowling Green v. Coble[370]	OH	G	Forfeiture	DUI	B	N	N	N	N	N
State v. Tomcik[371]	OH	G	Forfeiture	DUI	B	N	N	N	N	N
State v. Dunham[372]	OR	G	Fees, fines	Not clear	B	N	N	N	N	N
In re 4714 Morann Ave.[373]	PA	C	Forfeiture	Drug	F	N	N	Y	N	N
City of Phila. v. DY Props., LLC[374]	PA	G	Fine	Housing	B	N	N	N	N	N
Commonwealth v. Ishankulov[375]	PA	G	Fine	Trucking	B	N	N	N	N	N

367. 168 N.Y.S.3d 415 (N.Y. App. Div. 2022).
368. 182 N.Y.S.3d 479 (N.Y. App. Term. 2022).
369. 206 N.E.3d 662 (Ohio 2022).
370. No. WD-22-026, 2023 WL 3034178 (Ohio Ct. App. Apr. 21, 2023).
371. No. 18CA0079-M, 2019 WL 1591950 (Ohio Ct. App. Apr. 15, 2019).
372. 590 P.3d 736 (Or. Ct. App. 2024).
373. 303 A.3d 200 (Pa. Commw. Ct. 2023).
374. 223 A.3d 717 (Pa. Commw. Ct. 2019).
375. 275 A.3d 498 (Pa. Super. Ct. 2022).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
Commonwealth v. May[376]	PA	G	Fine	DUI	B	N	N	N	N	N
Richardson v. $20,771.00[377]	SC	R	Forfeiture	Drug	B	Y	N	Y	N	Y
Durham v. Tenn. Registry of Election Fin.[378]	TN	G	Fine	Election	B	N	Y	N	N	N
1812 Franklin St. v. State[379]	TX	G	Forfeiture	Drug	F	Y	N	N	N	N
Vt. Nat'l Tel. Co. v. Dep't of Taxes[380]	VT	G	Fine	Tax	F	Y	Y	N	N	N
Jacobo Hernandez v. City of Kent[381]	WA	C	Forfeiture	Drug	F	Y	N	Y	N	Y
State v. Grocery Mfrs. Ass'n[382]	WA	G	Fine	Election	B	Y	Y	N	N	N
State v. Ramos[383]	WA	G	Restitution	Robbery	B	Y	Y	N	N	N
State v. Living Essentials, LLC[384]	WA	G	Fine	Trade practices	F	Y	Y	N	N	N

376. 271 A.3d 475 (Pa. Super. Ct. 2022).
377. 878 S.E.2d 868 (S.C. 2022).
378. 666 S.W.3d 459 (Tenn. Ct. App. 2022).
379. 614 S.W.3d 179 (Tex. App. 2020).
380. 250 A.3d 567 (Vt. 2020).
381. 497 P.3d 871 (Wash. Ct. App. 2021).
382. 502 P.3d 806 (Wash. 2022).
383. 520 P.3d 65 (Wash. Ct. App. 2022).
384. 436 P.3d 857 (Wash. Ct. App. 2019).

Citation	State	Who Won[331]	Penalty at Issue	Under-lying Offense	EFC[332]	*Timbs* Cited	Federal Cases Cited[333]	Cases From Other States Cited[334]	Law Review Articles Cited[335]	Structural Concerns Discussed[336]
State v. Matamua[385]	WA	G	Restitution	Robbery	B	N	N	N	N	N
State v. Ellis[386]	WA	G	Restitution	Homicide	B	N	Y	N	N	N
State v. Eyman[387]	WA	R	Fine	Election	B	N	N	N	N	N
City of Seattle v. Long[388]	WA	C	Fees	Parking	B	Y	Y	Y	Y	Y

385. 539 P.3d 28 (Wash. Ct. App. 2023), *review denied*, 547 P.3d 894 (Wash. 2024).

386. 530 P.3d 1048 (Wash. Ct. App. 2023), *review granted*, 564 P.3d 547 (Wash. 2025).

387. 521 P.3d 265 (Wash. Ct. App. 2022).

388. 493 P.3d 94 (Wash. 2021).