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The Case for Applying the Eighth Amendment to Corporations

Elizabeth S. Warren

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I. INTRODUCTION

ABC Corporation employs fifty drivers and transports various products across state lines. An employee of ABC corporation secretly carries small amounts of illegal drugs in the trailers of the trucks he drives and does so without detection for five years. After law enforcement authorities discover the drug trafficking, the United States files an in rem action under 21 U.S.C. section 881(a)(4)[1] seeking forfeiture of every truck that the guilty driver drove over the past five years and

1. This statute provides for the forfeiture of "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution]." 21 U.S.C. § 881(a)(4) (1994 ed.).

every trailer in which the guilty driver carried drugs. This forfeiture could result in ABC Corporation's losing a third of its trucks and trailers because it rotates its drivers among trucks and each truck pulls a different trailer on each trip. ABC Corporation plans to challenge the forfeiture under the Excessive Fines Clause.[2]

Meanwhile, the government is also seeking the forfeiture of some of the driver's property, his home[3] where he had stored the drugs, and his car in which he had brought the drugs to work. The driver also plans to challenge the forfeiture as excessive under the Eighth Amendment. Both ABC Corporation and the driver assert that the forfeitures are excessive. As an individual, the driver has eighth amendment rights and may prevail on his claim. As a corporation, ABC Corporation might not have such rights.

In another hypothetical, the State of New York seeks $250 million in punitive damages from a common law public nuisance claim against a corporation responsible for an environmental disaster in New York.[4] The corporation claims that imposing punitive damages above the maximum criminal fine of $2,000 per offense violates the Excessive Fines Clause. While the Eighth Amendment would apply to punitive damages awards paid to the sovereign if the defendant were an individual,[5] the defendant's status as a corporation raises doubt as to whether the Eighth Amendment offers it protection from any fine.

These hypotheticals demonstrate the practical issues surrounding the Eighth Amendment. In recent years, the meaning and application of the Excessive Fines Clause has become a topic of increased interest because of the controversy over the constitutionality of large punitive damages awards. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[6] the Supreme Court

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2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII.

3. 21 U.S.C. § 881(a)(7) authorizes the seizure of real property that is used "to commit, or to facilitate the commission of, a violation of [federal drug laws] punishable by more than one year's imprisonment . . . ."

4. The facts of this hypothetical are based on those in *United States v. Hooker Chemicals & Plastics Corp.*, where the state of New York sought $250 million in punitive damages on a common law public nuisance claim for Occidental Chemical Corporation's role in the Love Canal environmental disaster. 748 F. Supp. 67, 68 (W.D.N.Y. 1990)

5. In *Austin v. United States*, 509 U.S. 602 (1993), the Court held that payments to the sovereign as punishments are subject to the Excessive Fines Clause. Id. at 622. *Austin* involved a civil forfeiture rather than punitive damages. Id. at 604.

6. 492 U.S. 257 (1989). Prior te *Browning*, the controversy over large punitive damage awards was phrased in torms of constitutional limits. See Richard B. Graves III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 Tulane L. Rev. 395, 402 (1990) (stating that the defense bar hopes for a constitutional limit on punitive damages); Stephen Daniels and Joanne

held that the Eighth Amendment only applies to fines imposed and received by the government, not to punitive damages awards between private parties.[7] The Court has also held that the Excessive Fines Clause protects against excessive civil forfeitures.[8] However, the Court has not answered whether the Eighth Amendment protects corporate defendants.[9] This open question retains importance because, as the hypotheticals indicate, corporations are subject to government prosecutions, both criminal and civil.[10]

Although the Supreme Court explicitly has left the question of the Eighth Amendment's applicability to corporations unanswered,[11] it has decided that corporations receive some Bill of Rights protections.[12] Part II of this Note discusses these protections as well as the protections not extended to corporations. This discussion shows that the Court has never adopted a consistent approach to recognizing a corporation's constitutional rights, but recently has focused on the purpose, history, and nature of the amendment at issue.

Part III establishes the meaning of the Excessive Fines Clause by examining its history and how the courts have applied it.[13]

Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 6-27 (1990) (discussing the legal debate surrounding punitive damages). Advocates of a constitutional limit asserted that the Excessive Fines Clause applied to civil penal sanctions as well as criminal penalties. See, for example, Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1271 (1987); Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Cal. L. Rev. 1433, 1470-71 (1987); Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1700 (1987) (stating that "a fine that is constitutionally excessive in a criminal setting is no less excessive in a civil setting"). Both authors supported their argument by examining the histery of the Excessive Fines Clause. See, for example, Massey, 40 Vand. L. Rev. at 1240-69 (cited in this note) (discussing the history of the Eighth Amendment); Kenefick, 85 Mich. L. Rev. at 1714-19 (cited in this note).

7. *Browning*, 492 U.S. at 268, 271.

8. *Austin*, 509 U.S. at 622.

9. *Browning*, 492 U.S. at 276 n.22.

10. Prior to *Austin*, cases had implied that the Eighth Amendment only applied to criminal actions. *Browning*, 492 U.S. at 262; Laura Larose, Comment, Austin v. United States*: Applicability of the Eighth Amendment to Civil* In Rem *Forfeitures*, 29 New Eng. L. Rev. 729, 743, 755 (1995). *Austin* established that the Eighth Amendment applies to actions by the government which punish in both criminal and civil cases. 509 U.S. at 610 (holding that the Eighth Amendment applies te civil forfeitures).

11. *Browning*, 492 U.S. at 276 n.22.

12. Corporations receive the following protections: Fifth Amendment (Takings Clause, Double Jeopardy); Seventh Amendment (civil jury); Fourth Amendment (Warrants Clause); First Amendment (political speech, commercial speech, negative speech). See Part II.

13. At issue is whether the Eighth Amendment applies to corporations. However, since the Cruel and Unusual Punishments Clause only prevents the state from imposing physically or mentally cruel penalties, it has little relevance for corporations. The real concern for corpo-

Although little direct evidence on the meaning of the clause exists, history and the courts indicate that it requires fines to be proportionate to the harm committed. Part III also examines how the courts have handled eighth amendment issues when raised by corporations in the early twentieth century at the Supreme Court level and more recently at the lower court level. While no court has stated that corporations receive eighth amendment rights, courts have provided similar protection indirectly, which suggests that the Eighth Amendment is an appropriate protection for corporations.

Part IV applies the Court's most recent method for deciding which amendments apply to corporations. This analysis draws on the history and purpose of the Eighth Amendment. Part IV also addresses policy arguments for and against applying the Amendment to corporations. Part V addresses practical considerations that arise when adjudicating cases involving corporations.

Applying bill of rights protections to fictional entities can raise fears of erasing the importance of the Bill of Rights as a bastion of individual liberty.[14] While this concern is valid, whether individual liberties are being usurped by corporations depends on the nature of the amendment at issue.[15] This Note demonstrates that the Eighth Amendment centers around protecting property rights rather than personal rights, and therefore its extension does not threaten individual liberties.[16] The Eighth Amendment does not implicate policy concerns that surround extending other bill of rights protections to corporations. Rather, it fits squarely within the Court's precedent for extending rights to corporations.

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rations is receiving a fine disproportionate to the crime committed. Thus, this Note focuses on the Excessive Fines Clause.

14. Some commentators argue that granting corporations constitutional rights will unleash "corporate giants" and allow them to swallow individual rights the same way they have overwhelmed individually owned "mom and pop" businesses. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L. J. 577, 658 (1989-90) (arguing that granting rights to corporations is a zero sum game; the more rights corporations can assert, the less rights individuals will hold).

15. See Part IV.B.

16 The Supreme Court has described the rights denied to corporations as "purely personal" in nature. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978). See Part II.

II. CONSTITUTIONAL PROTECTIONS CURRENTLY RECOGNIZED AS BELONGING TO CORPORATIONS

The Supreme Court has not approached the question of which rights apply to corporations with a consistent line of reasoning. Rather, theories of corporate personhood have changed through the years with the Court playing a role in their evolution. The Court has followed a trend of extending rights to corporations, but it has not agreed to a wholesale application of the bill of rights protections to corporate entities. Instead of granting blanket protection, the Court has approached amendments separately and has used different reasoning in applying them to corporations. Some lower courts have remained steadfast in denying fundamental rights to corporations.[17]

In 1886, the Court in *Santa Clara v. Southern Pacific Railroad, Co.*[18] unanimously granted corporations a unique status by deeming them persons under the Fourteenth Amendment Equal Protection Clause. It did so without hearing argument on the issue and without explaining its conclusion.[19] The Court soon extended this holding to the Due Process Clause.[20]

In hindsight, *Santa Clara* stands as a landmark decision.[21] Modern jurisprudence on the rights of corporations and their importance in American society has made *Santa Clara* seem significant, since it started the inquiry into the legal status of corporations under the Constitution. In 1886 and the years immediately following, however, several factors limited the original importance of *Santa Clara*.

First, the Court decided *Santa Clara* at a time when the Fourteenth Amendment did not provide a high level of protection.[22] Today the Equal Protection Clause provides extensive protection against discrimination by requiring the state to demonstrate heightened or compelling justifications for its actions. However, in 1886, the Court did not require close scrutiny to pass the Equal Protection

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17. *National Paint & Coatings Assoc. v. Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995).

18. 118 U.S. 394, 396 (1886).

19. Chief Justice Waite wrote: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State te deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does." Id. at 396.

20. *Smyth v. Ames*, 169 U.S. 466, 522 (1898).

21. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L. J. 1593, 1643 (1988).

22. Id.

Clause,[23] nor had it begun to incorporate the Bill of Rights through the Fourteenth Amendment.[24] Thus, stating that corporations were persons under the Equal Protection Clause did not have groundbreaking repercussions at the time of the decision.

Second, the *Santa Clara* Court did not base its holding on a theory of corporate personhood that was conducive to extending corporations many other rights. Instead, the Court viewed corporations as aggregations of natural individuals without a separate existence from them.[25] The lawyer for the corporation in *Santa Clara* argued that the Fourteenth Amendment protects the property rights of the shareholders who joined to form a corporation, not of some separate entity.[26] This argument was a response to the traditional corporate theory which viewed corporations as artificial entities created by the states and beholden to their state-granted charters for any rights they had.[27] The corporation in *Santa Clara* wanted the Court to view corporations as a business form little different from partnerships,[28] and therefore to grant corporations the same protections enjoyed by individuals in partnerships.

While this argument, known as the aggregate theory, served the immediate ends of the corporation in *Santa Clara*, viewing corporations as aggregations limited what rights corporations could receive.[29] Under this theory, corporations receive only the rights necessary to protect the property rights of their shareholders.[30] Thus, *Santa Clara*'s enunciation of corporate personhood solved the problem of guaranteeing the property rights of shareholders without requiring

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23. Id.
24. Id.
25. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 178 (1985-86).
26. Id.
27. Id. at 181.
28. Id. at 204.
29. Id. at 182.
30. Id. at 177, 182. However, the aggregate theory can be used to extend corporations more than property rights. Justice Scalia used the theory in his dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679 (1990). See also Charles D. Watts, Jr., *Corporate Legal Theory Under the First Amendment:* Belotti *and* Austin, 46 U. Miami L. Rev. 317, 358-60 (1991). The *Austin* majority opinion allowed states to limit corporate expenditures to political candidates. *Austin*, 494 U.S. at 654. Scalia viewed the holding as a violation of the first amendment rights of the persons who voluntarily associate as a corporation. Id. at 680. Scalia saw no distinction in regulating the political expenditures of a corporation or an individual. Id. at 680 (stating that the amassing of large amounts of capital is not a sufficient justification for limiting the rights of associations of persons unless it is constitutional te prevent individuals of certain affluence from endorsing candidates).

each shareholder to litigate individually,[31] but did not establish corporations as entities with rights separate from their shareholders.

Santa Clara's limitations became more evident when the rights at issue were intangible. In later cases, the Court remained consistent with its holding in *Santa Clara* by limiting the rights corporations received to those essential for the protection of shareholder property rights even as it relied on different theories of corporate personhood. In *Smyth v. Ames*,[32] the Court recognized that corporations receive protection from takings without due process of law under the Fifth Amendment. Repeatedly, the Court made clear that corporations are not considered citizens under the Privileges and Immunities Clause of the Fourteenth Amendment.[33] The Court denied corporations the privilege against self-incrimination in *Hale v. Henkel*,[34] and fourth amendment rights to privacy in *United States v. Morton Salt Co.*[35] by relying on the artificial entity theory. The Court based both holdings on the differences between artificial and natural persons.[36] However, the *Hale* Court also used the natural entity theory. This theory views corporations as separate from their shareholders and indebted for their creation to private initiative rather than state charters.[37] In a part of the opinion discussing privacy rights, the Court referred to a corporation as "a distinct legal entity" that "[i]n organizing *itself* as a collective body waives no constitutional immunities appropriate to such body."[38]

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31. Hovenkamp, 76 Georgetown L. J. at 1641 (cited in note 21).

32. 169 U.S. 466, 522-23 (1898).

33. See, for example, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 514 (1939). This line of authority would have allowed a state te discriminate against out-of-state corporations. However, this "foreign corporations" doctrine later unraveled when the Court held that a corporation was a person within the jurisdiction and could not be expelled arbitrarily. Hovenkamp, 76 Geo. L. J. at 1650 (cited in note 21).

34. 201 U.S. 43, 74 (1906). See also *Wilson v. United States*, 221 U.S. 361, 376 (1911).

35. 338 U.S. 632, 651-52 (1950).

36. Id. *Hale*, 201 U.S. at 74. In *Hale*, the Court referred to the "clear distinction between individuals and corporations: While an individual "owes notbing to the public so long as he does not trespass upon their rigbts," and thus has rights including the privilege against self-incrimination, a "corporation is a creature of the state," presumed to bave incorporated for the benefit of the public with privileges limited by state law and its corporate charter. Id. at 74. "Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation." Id. at 74-75. Likewise, the *Morton Salt* Court emphasized that states grant corporate rights. 338 U.S. at 652. Thus, corporations could "claim no equality with individuals in the enjoyment of a right te privacy." Id.

37. David Millon, *Theories of the Corporation*, 1990 Duke L. J. 201, 211.

38. *Hale*, 201 U.S. at 76 (emphasis added). The *Hale* Court's privacy rights bolding was later limited by the *Morton Salt* Court's denial of privacy rights.

The natural entity theory favors extending rights to corporations, since along with recognizing the separate existence of the corporation from its shareholders, it recognizes that corporations have independent rights.[39] Despite this potential for granting corporations broad constitutional rights, the theory has limitations. It still preserves some distinctions between individuals and corporations,[40] and it takes a middle road between respecting the power of the state to regulate and recognizing the initiative of individuals to form corporations.[41] Thus, the natural entity theory provides the basis for extending rights to the corporate entity itself but also may be used to deny corporations rights enjoyed by individuals.

After 1960, the Court stopped pondering expressly the nature of corporate personhood and began focusing on the amendment at issue.[42] The Court used this new approach in *United States v. Martin Linen Supply Co.*[43] to apply the Double Jeopardy Clause to corporations.[44] The *Martin Linen* Court focused on the policies of the Fifth Amendment[45] when deciding to recognize double jeopardy protection for corporations.[46] It stated that the Double Jeopardy Clause is designed to prevent the government from repeatedly trying to convict a person, thereby subjecting that person to embarrassment, great expense, and the ordeal of living through the insecurity of facing a conviction.[47] The Court did not explain how applying the Clause to corporations would fulfill these purposes.[48] Rather, it apparently assumed that applying double jeopardy to corporations accomplishes these goals.

In *Ross v. Bernhard*,[49] when deciding that the seventh amendment right to a jury trial for suits at common law applies to corporations, the Court explicitly relied on the history of the amendment rather than corporate theories.[50] After dismissing the relevance of using an entity or aggregate theory,[51] the Court found

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39. Mayer, 41 Hastings L. J. at 580-81 (cited in note 14).
40. Watts, 46 U. Miami L. Rev. at 363 (cited in note 30).
41. Id. at 372.
42. Mayer, 41 Hastings L. J. at 620-21 (cited in note 14).
43. 430 U.S. 564 (1977).
44. Id. at 565, 575.
45. Mayer, 41 Hastings L. J. at 635 (cited in note 14).
46. *Martin Linen*, 430 U.S. at 565, 575.
47. Id. at 569.
48. Mayer, 41 Hastings L. J. at 634 (cited in note 14).
49. 396 U.S. 531 (1970).
50. Id. at 533-34. The issue concerned whether the Seventh Amendment applies to shareholder derivative actions. Id. at 531.
51. Id. at 531.

that "a corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted."[52]

Similarly, in *Marshall v. Barlow's, Inc.*,[53] the Court relied on the history of the amendment as it considered the applicability of the Warrant Clause of the Fourth Amendment to corporations. The *Marshall* Court held that the Clause required government inspectors to have a warrant before entering a commercial building.[54] It interpreted the history of the Fourth Amendment as demonstrating that the Founders were concerned with general warrants, which especially affected merchants and businessmen.[55] Thus, a corporation received protection from warrantless searches.[56]

In first amendment cases involving corporations, the Court has focused on the type of expression involved rather than the identity of the speaker. In *First National Bank v. Bellotti*,[57] the Court refused to ask whether corporations have first amendment rights. Instead, it asked whether the statute at issue "abridges expression that the First Amendment was meant to protect."[58] The Court discussed the importance of the speech at issue and found that it involved matters of public concern at the heart of the First Amendment.[59] The corporate identity of the speaker did not change the fact that the expression at issue was "indispensable" to decision-making in a democracy.[60]

Further, the *Bellotti* Court denied that corporate identity determines which amendments apply to corporations.[61] It explained

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52. Id.
53. 436 U.S. 307 (1978).
54. Id. at 311.
55. Id. The Court noted that this guarantee did not apply to all industries, since exceptions would be made for industries with such a history of government oversight that the industry had no reasonable expectation of privacy. Id. at 313-14.
56. Id. at 311.
57. 435 U.S. 765 (1978).
58 Id. at 776.
59 Id.
60. Id. at 777.
61. Id. at 778 n.14. The Court's jurisprudence on the first amendment rights of corporations could be viewed as having no bearing on whether other amendments apply because of the general first amendment practice of focusing on the content of the speech rather than the identity of the speaker. However, some members of the Court have viewed the corporate identity of the speaker as determinative. Justice Marshall denied that corporations bave free speech rights coextensive with those of individuals. *Pacific Gas & Electric Co. v. California Public Utilities Comm'n*, 475 U.S. 1, 25 (1986) (Marshall, J., concurring). Chief Justice Rehnquist has also disagreed with extonding free speech rights if such rights go beyond promoting a broad forum to ascribing minds to artificial entities. Id. at 33 (Rehnquist, C.J.,

that earlier decisions had denied corporations the privilege against self-incrimination and privacy because of the history behind these amendments.[62] The Court opined that whether bill of rights guarantees apply to corporations depends on the "nature, history, and purpose of the particular constitutional provision."[63]

The Court continued this line of reasoning when it used a case involving a corporation to establish the test for protection given to commercial speech.[64] Courts have applied this test, which is based on the distinction between commercial speech and political speech,[65] numerous times since its creation without developing a separate analysis for natural persons as speakers.[66]

The Court reemphasized its methodology of ignoring corporate identity when it extended negative speech rights to corporations in *Pacific Gas v. California Public Utilities Commission.*[67] In *Pacific Gas*, a private utility company included newsletters in its billing envelopes.[68] The California Public Utilities Commission attempted to require the company to include material issued by a ratemaking interest group in their billing envelopes.[69] The Court stated, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say."[70] It reasoned that the main issue in first amendment cases involving corporations is whether the state has attempted to regulate speech which the First Amendment was designed to protect.[71] Having found that a corporation's newsletter

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dissenting). Further, the *Bellotti* majority attempted to reconcile its holding with other decisions on Bill of Rights protections applying to corporations. 435 U.S. at 778-79, n.14. Thus, the Court was not merely applying its classic First Amendment analysis in reaching its holdings on the Amendment's application to corporations.

62. The Court stated that " 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Belotti*, 435 U.S. at 778-79 n.14.

63. Id.

64. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

65. Id. at 562.

66. See, for example, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *City of Cincinatti v. Discovery Network Inc.*, 507 U.S. 410 (1993); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

67. 475 U.S. at 8. "And we have held that speech does not lose its protection because of the corporate identity of the speaker." Id. at 16 (citing *Bellotti*, 435 U.S. at 777).

68. Id. at 5.

69. Id. at 4-7.

70. Id.

71. Id. at 8. The *Pacific Gas* Court feared that the regulation at issue would lead to self-censorship, which would impinge on the purpose of the First Amendment by reducing the flow of information. Id. at 14.

was protected speech,[72] the Court held that the regulation at issue violated the First Amendment.[73]

Thus, the Court's recent jurisprudence has disregarded the express use of corporate personhood theories when deciding which bill of rights guarantees apply to corporations.[74] The Court has instead looked to the "nature, history, and purpose" of the amendment at issue. However, this view has not commanded the unanimous support of the Court, as demonstrated by the dissents in *Bellotti* and *Pacific Gas*.

In *Bellotti*, Justice White and three other justices dissented in an opinion that considered the identity of the speaker when determining whether corporations have first amendment political speech rights.[75] Justice White's reasoning mirrored the aggregate theory by its emphasis on the individual's free speech rights implicated in corporate-sponsored communication.[76]

Then-Justice Rehnquist's separate dissent in *Bellotti* expressly invoked the Court's earlier corporate theory jurisprudence.[77] Justice Rehnquist viewed the correct inquiry as whether the constitutional protection is essential to the very existence of the corporation.[78]

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72. Id. at 8.

73. Id. at 21.

74. The Court's decisions can be interpreted as resting on various corporate theories, but the Court has not engaged in a forthright discussion of its view of corporate personhood. See Watts, 46 U. Miami L. Rev. at 348 (cited in note 30) (stating that while the *Bellotti* court avoided discussing corporate theories, it appeared to use the natural entity theory). Watts argues that the Court should expressly rely on corporate theories as a means to clarify the different outcomes it reaches in deciding which rights corporations receive. Id. at 339.

75. Justice Whito opined that corporate speech is subject to regulation that individual speech is not. *Bellotti*, 435 U.S. at 805. He defined the functions of the First Amendment as furthering self-expression and self-fulfillment and protecting the intorchange of ideas. Id. at 804-05. He found these functions absent in the context of a corporate speaker. Id. at 806, 808.

76. Justice White characterized the speech at issue as a "managerial decision," and focused on whether the self-expression and fulfillment of shareholders were affected by a corporation's contributions to political causes. Id. at 803, 806.

77. Then-Justice Rehnquist recited the early precedent that the Fourteenth Amendment's protection of liberty belongs to persons, not corporations. Id. at 822. He also quoted with approval Chief Justice Marshall's statement in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518, 636 (1819):

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental te its very existence. These are such as are supposed best calculated to effect the object for which it was created.

Bellotti, 435 U.S. at 823. Justice Rehnquist also stated that corporations should be subject to special regulation just as they receive special privileges different from those of individuals. Id. at 827.

78. Id. at 824.

Justice Rehnquist argued that while the protection against takings of corporate property without due process of law is incidental to corporate existence,[79] political speech is not.[80]

Justice Rehnquist continued to use this approach in his *Pacific Gas* dissent, stating that treating individuals and corporations identically for constitutional purposes is "a jurisprudential sin."[81] He accused the majority of ascribing minds to artificial entities by extending negative speech rights to corporations.[82] Justice Rehnquist stated that negative speech rights derive from the interest of natural persons in self-expression and are part of the interest of natural persons in freedom of conscience.[83] In contrast, he thought that corporate free speech rights arise from the first amendment interest in promoting a broad forum for political discussion.[84] Thus, Justice Rehnquist denied that corporations had negative speech rights.[85]

Justice Rehnquist's method is not without followers.[86] While his use of corporate identity theory to determine what constitutional protections apply to corporations has not attracted other members of the Court,[87] a complete discussion of whether the Eighth Amendment applies to corporations must include considerations of the methodologies historically employed by the Court. The main focus should remain, however, on an inquiry into the history of the Eighth Amendment, the purposes of the Framers, and the practical issues in applying the amendment.

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79. Id.
80. Id. at 828.
81. 475 U.S at 35.
82. Id. at 33.
83. Id. at 32.
84. Id. at 33.
85. Id. at 35.
86. Critics of the *Pacific Gas* holding have phrased their criticism in terms similar to Justice Rehnquist's. For example, Mitchell C. Tilner maintains that corporations cannot meaningfully enjoy a freedom of conscience because they are "inanimate entities." Mitchell C. Tilner, *Government Compulsion of Corporate Speech: Legitimate Regulation or First Amendment Violation? A Critique of* PG & E v. Public Utilities Commission, 27 Santa Clara L. Rev. 485, 498 (1987). Tilner cites *Dartmouth College*, 17 U.S. (4 Wheat) at 534, an artificial entity decision (see note 77), and Justice Rehnquist's *Pacific Gas* dissent. Tilner, *Government Compulsion of Corporate Speech* at 503-04.
87. See Watts, 46 U. Miami L. Rev. at 362-63 (cited in note 30) (ohserving that no current justice has joined Rehnquist's reliance on the artificial entity theory). Professor Watts argues, however, that the *Austin v. Michigan* majority relies on the natural entity, or aggregate theory, viewing corporations merely as a group of individuals joined by contract. Id. at 357-60.

III. THE EIGHTH AMENDMENT

A. The Intent of the Framers

The language of the Eighth Amendment first appeared in section 10 of the English Bill of Rights in 1689: "[E]xcessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[88] The English Bill of Rights sought to remedy the injustices of the last two Stuart kings.[89]

The American colonists established charters which claimed the rights of Englishmen.[90] As the Revolution developed, the colonists included provisions in their new constitutions and declarations of rights that copied the English model.[91] The revolutionary leaders knew English constitutional history,[92] and thus knew of the restraints the English people had created to limit governmental power.[93]

Despite this background, neither a provision on bail, fines, or punishments, nor a bill of rights, was included in the Constitution

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88. Richard Petty, ed., *Sources of Our Liberties* 247 (American Bar Foundation, 1959).

89. Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 23 (Oxford U., 1977). The Habeus Corpus Act of 1679 was meant to provide relief to those kept prisoner without trial. William Holdsworth, 6 *A History of English Law* 214 (Methuen & Co., 1987). The writ of habeas corpus was a traditional method of obtaining the release of one wrongly imprisoned. Frederic Maitland, *The Constitutional History of England* 146 (Cambridge U., 1968). The Habeas Corpus Act required the writ to be issued upon any request to release a prisoner except for those prisoners who faced charges or were convicted of treason or a felony. Id. Those imprisoned on felony or treason charges had to be tried "at the following session or the following sessions but one" of the court or receive bail. Id. at 147. During the reigns of Charles II and James II, judges nullified the Habeus Corpus Act by setting high hail. Id. at 314-15. The English Revolution of 1688-89 sought to restore the rights the Stuart kings had trampled. Mark Thomson, *A Constitutional History of England, 1648-1801* at 168, 174 (Methuen & Co., 1938).

90. Schwartz, *Great Rights* at 27 (cited in note 89). The Virginia Charter established the precedent of stating that the colonists possessed all the rights of Englishmen. Id. The charters of New England, Massachusetts Bay, Maryland, Connecticut, Rhode Island, Carolina, and Georgia included similar guarantees. Id.

91. Id. at 67, 72-78; Petty, *Sources of Our Liberties* at 430 (cited in note 88). Virginia led the way with its Declaration of Rights in 1776, parts of which used the exact words of the English Bill of Rights. Schwartz, *Great Rights* at 67, 70 (cited in note 89). The declarations of rights of Delaware, Maryland, North Carolina, and Massachusetts; the constitutions of Pennsylvania and Georgia; and the bill of rights of New Hampshire all contained provisions concerning excessive bail and fines, with some variance on whether a prohibition against cruel and unusual punishments was included. Id. at 90.

92. Robert A. Rutland, *The Birth of the Bill of Rights* 3 (Northeastern U., 1991).

93. Mark Thomson, *Constitutional History* at 169 (cited in note 89).

submitted to the states in 1787.[94] In the ratification debates, a major issue was the lack of a bill of rights.[95] As the states began ratifying the Constitution, some attached proposed amendments.[96] Four states included provisions in their proposed amendments against excessive fines, bail, and cruel and unusual punishments.[97]

Madison built upon the states' proposals[98] for a draft of constitutional amendments that he submitted to the First Congress on June 8, 1789.[99] He made one small but significant change to the language used in the English Bill of Rights and copied by the states in their declarations of rights and proposed amendments.[100] Madison changed the provision on bail, fines, and cruel and unusual punishment from a recommendation to a requirement. Instead of stating that excessive bail, fines, and cruel and unusual punishments "ought not" be imposed, Madison used the definitive words, "shall not."[101]

The Committee of the Whole considered what eventually became known as the Eighth Amendment on August 17, 1789.[102] Madison's language sparked very little debate other than some concerns over "cruel and unusual punishments" being too indefinite[103] and unnecessarily broad in defining the types of punishments that would be banned.[104] The only recorded reference to the Excessive

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94. Schwartz, *Great Rights* at 103 (cited in note 89). Near the end of the Convention, George Mason proposed that a committee draft a bill of rights, but his motion was easily defeated. Id. at 104-05. Charles Pinckney also made an unsuccessful attempt to protect the freedom of the press and freedom from quartering troops. Id. at 105.

95. Id. at 103-05. For instance, George Mason published his *Objections to the Constitution*, which began with the complaint that the Constitution lacked a bill of rights. Id. at 106. For a further discussion of the debate, see id. at 105-18.

96. Pennsylvania was the second state to ratify the Constitution, and an attempt to attach proposed amendments was defeated. However, the dissenters to ratification widely disseminated their amendments, which influenced several states that ratified later to attach amendments. Id. at 123-55.

97. The unsuccessful Pennsylvania attempt to add amendments contained provisions on bail, fines, and cruel and unusual punishment. Id. at 158. Virginia and New York adopted amendments with the same provision. Id. at 138, 147, 158. North Carolina did not ratify or reject the Constitution, but passed a resolution with a declaration of rights that copied the Virginia model. Id. at 155, 158.

98. Id. at 159. Madison faced the difficult task of choosing among the many state proposals, which contained almost one hundred different substantive guarantees. Id. at 157, 159.

99. Id. at 232.

100. Id. at 169.

101. Id. at 169-70.

102. Annals of Congress, 1st Congress vol. 1 at 753 (1789).

103. "Mr. Smith of South Carolina objected to the words, 'nor cruel and unusual punishments,' the import of them being too indefinite." Id.

104. Mr. Livermore of New Hampshire stated,

> No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it

Fines Clause is by Mr. Livermore of New Hampshire who stated, "What is understood by excessive fines? It lies with the court to determine."[105] The record simply states that the amendment was voted on and "agreed to by a considerable majority."[106] Madison's language was not altered, and Congress passed the Eighth Amendment on September 25, 1789.[107]

Despite the apparent consensus in perception that what later became the Eighth Amendment was a basic liberty, the absence of debate over the Eighth Amendment's language and meaning creates doubt over the Framers' intent. Yet that silence may also shed light on its meaning. The lack of debate by Congress and duplication of the wording of the English Bill of Rights suggests that the Framers considered the meaning of the clause self-explanatory. The verbatim use of the English wording along with the colonial claims to the rights of Englishmen indicates that the English interpretation of the clause is relevant to discerning intent. In England, the clause had served to prevent the crown from abusing its powers of prosecution through arbitrary and excessive punishment.[108] By inference, the Framers intended the Eighth Amendment as an explicit limitation on the prosecutorial power of the government.

This interpretation is consistent with the Supreme Court's recent jurisprudence on applying the Bill of Rights protections to corporations: the applicability of the Eighth Amendment depends on whether the government has attempted to impose an excessive fine rather than the identity of the defendant invoking the Amendment for protection.

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could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by a declaration of this kind.

Id.

105. Id.

106. Id.

107. Schwartz, *Great Rights* at 232, 236, 240, 244, 246 (cited in note 89).

108. See Thomson, *Constitutional History* at 169 (cited in note 89) (stating that the English Revolution in 1688-89 was against arbitrary power).

B. *The Meaning of the Excessive Fines Clause in Practice*

1. In General

The Supreme Court has twice ruled on the meaning of the Excessive Fines Clause. In *Browning*, the Court held that the Eighth Amendment in its entirety applies only as a limitation on the government.[109] The *Browning* Court rejected arguments that the Eighth Amendment applies to civil jury awards of punitive damages and found that the Framers intended to limit only those fines that the government directly imposed and received.[110] The Court reasoned that unlike when the government shares in the recovery of fines, civil jury awards of punitive damages do not raise concerns of the sovereign's oppressing political opponents or raising revenue in unfair ways.[111]

In *Austin*, the Court applied the Excessive Fines Clause to civil forfeitures, and found that the applicability of the amendment depends not on whether the sanction is criminal or civil but rather on whether the government pursues a penalty that is a punishment.[112] Thus, the Excessive Fines Clause only applies when the government pursues a remedy, but the clause protects defendants regardless of the type of sanction used.

The Court in *Browning* noted that it had "never considered an application of the Excessive Fines Clause."[113] Instead, it had considered the Eighth Amendment in its entirety.[114] The Court has indirectly determined the method for applying the Excessive Fines Clause by interpreting the Eighth Amendment as placing the same limita-

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109. 492 U.S. at 268. The Court stated that Congress did not discuss what it meant by "fine," but that histery shows the word meant a payment to a sovereign. Id. at 264-67. The history of the clause does not support a conclusion that the clause acts as a limitation on civil jury awards of punitive damages. Id. at 271.

110. Id. at 268.

111. Id. at 272.

112. *Austin*, 509 U.S. at 610. The Court concluded that civil forfeitures serve to punish the owner of tbe land and are covered by the Eighth Amendment because they are payments to the government. Id. at 603, 605.

113. 492 U.S. at 262.

114. Id. The Cruel and Unusual Punishments Clause has been applied to the states since *Robinson v. California*, 370 U.S. 660 (1962). *Browning*, 492 U.S. at 284 (O'Connor, J., concurring). Justice O'Connor stated there was no reason to distinguish the Excessive Fines Clause for purposes of incorporation and that she would find tbat it applied te the states. Id. Since the Cruel and Unusual Punishments Clause is incorporated through the Fourteenth Amendment, it is a small jump in logic to incorporate the Excessive Fines Clause as well. Massey, 40 Vand. L. Rev. at 1272 (cited in note 6).

tions on each part of the amendment.[115] Thus, the debate surrounding the application of the Cruel and Unusual Punishments Clause is also relevant to discerning the Court's views on the Excessive Fines Clause.

The Cruel and Unusual Punishments Clause has generated controversy over whether it merely regulates modes of punishments or also requires sentences proportionate to the crime committed.[116] In *Weems v. United States*,[117] the Court held that the Cruel and Unusual Punishments Clause not only prohibits modes of punishment, but also prohibits excessive punishments.[118] The Court thus decreed that the prison sentence at issue was cruel and unusual.[119]

Although *Weems* could be limited to extraordinary cases,[120] the Court has continued to require a sentence to be proportionate to the

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115. *Solem v. Helm*, 463 U.S. 277, 289 (1983).

116. For instance, many scholars believe the clause was a response to the cruel methods of the Bloody Assizes. Anthony Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 860 (1969). In June 1685, James II crushed the invasion of the Duke of Monmouth, illegitimate son of the late Charles II and nephew of James II. Massey, 40 Vand. L.Rev. at 1244 n.62 (cited in note 6). The invasion meant the autumn assizes were cancelled, but James appointed Chief Justice Lord Jeffreys to travel the western circuit and capture the rebels. Granucci, 57 Cal. L. Rev. at 843 (cited in this note). Lord Jeffreys offered plea bargains to the traitors to save time. Id. at 843-44. The traitors pled guilty to avoid the death penalty, but Lord Jeffreys went back on his word and signed death warrants for 200 of them. Id. at 844.

One commentator, however, has argued that the Framers misinterpreted the original meaning behind cruel and unusual punishments in the English Bill of Rights as a ban against extreme modes of punishment. Id. at 843. Professor Granucci argues that before 1689, a general principle against excessive punishments existed but not a concern about modes of punishment. Id. Blackstone described punishments such as beheading, quartering, and branding as legal. William M. Blackstone, 4 *Commentaries* *291.

For positive evidence of the clause's meaning, Professor Granucci relies on the Titus Oates affair. A minister named Titus Oates created hysteria in 1678 by proclaiming a Catholic plot to kill the king. Granucci, 57 Cal. L. Rev. at 852 (cited in this note). Fifteen Catholics were executed as a result. Id. In 1685, evidence revealed that Oates had lied, and he received a sentence of life in prison, whippings, pilloring four times a year, defrocking, and a 2,000 mark fine. Id. at 858. Oates petitioned unsuccessfully for release. Id. Dissenters in Parliament called the punishment inhumane and unparalleled. Id. at 858-59. They also stated that the sentences were contrary to the law because a temporal court could not defrock a minister. Id.

Professor Granucci concludes that these objections, plus the continued use of the modes of punishment imposed on Oates, demonstrates the clause's true meaning. Id. at 860. Cruel and unusual punishments referred to punishment unauthorized by statute and outside a court's jurisdiction as well as a reiteration of the English policy against disproportionate penalties. Id.

117. 217 U.S. 349, 377 (1910).

118. Id.

119. Id. at 380.

120. *Solem*, 463 U.S. at 313 (Burger, C.J., dissenting). Weems was working for the United States government in the Philippines when he was convicted of falsifying an official public document and received a fifteen year sentence of hard and painful labor chained from ankle to wrist. In addition, the court deprived him of certain civil privileges, such as disposing of prop-

crime.[121] For example, in *Robinson v. California*[122] the Court struck down as cruel and unusual a California statute that prescribed a prison term for being a narcotic addict, even though a prison term itself is not a cruel and unusual mode of punishment.

In *Solem v. Helm*,[123] the Court established a three factor test focusing entirely on proportionality to determine what constitutes cruel and unusual punishment. The first factor is the relative gravity of the offense, determined by a comparison of the circumstances of the crime with circumstances of similar crimes.[124] The second factor is the relative harshness of the sentence imposed when compared to other sentences imposed for similar crimes in the same jurisdiction.[125] The third factor is the relative harshness of the sentence imposed when compared to sentences in other jurisdictions.[126]

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erty inter vivos, subjected him to surveillance during his lifetime, and disqualified him from ever holding office or voting. *Weems*, 217 U.S. at 351, 362-64.

121. *Solem*, 463 U.S. at 284 ("The [Cruel and Unusual Punishments Clause] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

122. 370 U.S. 660, 667 (1962). See also Joseph L. Hoffman, *The "Cruel and Unusual Punishment" Clause: A Limit on the Power to Punish or Constitutional Rhetoric*, in David J. Bodenhamer and James W. Ely, Jr., eds., *The Bill of Rights in Modern America* 139, 149 (Indiana U., 1993).

123. 463 U.S. at 290-93.

124. Id. at 290-91.

125. Id. at 291.

126. Id. at 291-92. Helm had six prior nonviolent felony convictions before being convicted for writing a "no account check" of $100. Id. at 279, 281. The normal sentence for such a crime was five years in the state penitentiary and a $5000 fine. Id. at 281. Because of South Dakota's recidivist statute, Helm received a life sentence without parole. Id. at 281-82. The Court held that since Helm received the "penultimate" sentence for minor conduct, was treated more harshly than criminals within the jurisdiciton who committed worse crimes, and was more harshly treated than similar offenders in any other jurisdiction with the possible exception of one state, his eighth amendment rights were violated. Id. at 303.

The facts in *Solem* mirror the current debate over the "Three Strikes and You're Out" laws. Under California's scheme, Calif. Penal Code § 1170.12 (West Supp. 1995), a violent or serious felony conviction counts as strike one. J. Anthony Kline, *Comment: The Politicalization of Crime*, 46 Hastings L. J. 1087, 1089 (1995). A second conviction counts as strike two and warrants twice the sentence as that crime would otherwise warrant. Id. at 1089. A third conviction, regardless of whether it is for a violent or serious crime, receives a life sentence with a minimum term of the greater of (1) three times the sentence the crime would normally receive; (2) twenty-five years; or (3) the term determined by the court for the new crime. Id. The court does not have the discretion to consider the specific facts and circumstances surrounding a particular defendant's case. Loren L. Barr, *The "Three Strikes Dilemma": Crime Reduction at Any Price?*, 36 Santa Clara L. Rev. 107, 132 (1995).

Because the third strike does not have to be a violent or serious crime, defendants who have committed minor crimes are subject to life sentences. Crimes counting as strike three include: stealing a piece of pizza, Victor S. Sze, Note, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 Loyola L.A. L. Rev. 1047, 1068-69 (1995); stealing two bicycles, Rebin Clark, *California's New "Three Strikes" Law Casts a Very Wide Net for Two-Time Felons, Even Bicycle Theft Could Mean Life in Prison*, Philadelphia Inquirer at A1 (May 10, 1994); and being found asleep behind the wheel of a stolen car. Id.

In a recent decision, only two justices held that the Cruel and Unusual Punishments Clause does not forbid disproportionate punishments, while seven reaffirmed the holding that it does.[127] These seven justices disagreed over the actual standard for proportionality, with three justices stating it is a "narrow" principle that only requires evaluation of the gravity of the offense and the harshness of the penalty.[128] While this debate may reduce the *Solem* test to a single factor, at a minimum the Court still requires proportionality.

Thus, although the Supreme Court has not established a test solely for excessive fines, it has established a test for the Cruel and Unusual Punishments Clause. This test is just as workable if a fine is at issue as when a prison sentence is challenged as cruel and unusual.[129] The Court has read "cruel and unusual punishments" as implicitly requiring what the Excessive Fines Clause requires explicitly: proportionate or non-excessive punishment. Thus, while the Court has not expressly stated a formula for excessive fines, logic dictates that the *Solem* test for proportionate sentences applies to fines as well. At the very least, proper analysis involves a comparison of the harshness of the fine with the seriousness of the crime involved.

2. As Applied to Corporations

Although the Supreme Court has not decided whether corporations receive eighth amendment protection, corporations have successfully challenged fines under the Fourteenth Amendment. In the early twentieth century, the Supreme Court reviewed fines imposed on corporations under the Due Process Clause.[130] These cases

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Thus, like Helm, a defendant under a Three Strikes regime can receive a "penultimate" sentence for minor crimes. Some California judges, perhaps noticing the similarity, have refused to enforce the state's Three Strikes law. Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 Hastings Const. L. Q. 219, 225 (1994). One judge declared the law unconstitutional because it required "cruel and unusual" jail terms. Id.

127. *Harmelin v. Michigan*, 501 U.S. 957, 961, 965 (1991).

128. Id. at 997 (Kennedy, J., concurring) (stating that the Court has recognized a narrow proportionality principle, whereby sentences grossly disproportionate to the crime violate the Eighth Amendment). But see id. at 1018 (White, J., dissenting) (criticizing Justice Kennedy for looking at only one facter).

129. In the area of civil forfeitures, the Court has left it to the lower courts to develop a method for evaluating proportionality. *Austin* 509 U.S. at 622-23.

130. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66-67 (1919). Although state power is supreme in defining crimes and setting sentences, the states are limited by the Constitution, and one

occurred in the early twentieth century before the Eighth Amendment applied to the states.[131]

Under this line of cases, fines reasonably intended to assure compliance with the law passed due process scrutiny.[132] Yet the Supreme Court distinguished fines as arbitrary and oppressive when the corporate defendant acted neither recklessly nor intentionally and did not depart from a known standard. Such a fine, the Court reasoned, deprives the corporation of property without due process and is a taking.[133] Thus, although the Court has not invoked the Eighth Amendment, the Due Process Clause provided corporations with protection from overbearing fines, at least at the turn of the century. This use of due process suggests that corporations also receive protection from such penalties under the Excessive Fines Clause now that the Eighth Amendment applies to the states.[134]

More recently, lower court decisions have involved challenges under the Eighth Amendment itself. Courts often have dismissed eighth amendment challenges in cases involving corporations on other grounds without addressing whether the Eighth Amendment applies to corporations.[135] The United States Court of International Trade held that while a corporate defendant could not raise an eighth amendment claim before a fine was actually imposed, it could raise the issue after the government imposed a penalty.[136] A district court found that a penalty in a *qui tam* action[137] did not correspond to the level of culpable conduct committed by the corporate defendant and therefore declared the penalty to be excessive under the Eighth

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constitutional limit is the Due Process Clause. *Coffee v. Harlan County*, 204 U.S. 659, 662-63 (1907).

131. *Browning*, 492 U.S. at 285 (O'Connor, J., concurring). Since *Robinson*, the Court has extonded the Cruel and Unusual Punishments Clause to the states. 370 U.S. at 667. The Court has not articulated any reason why the amendment as a whole should not be applied. *Browning*, 492 U.S. at 284 (O'Connor, J., concurring).

132. *United States v. Clyde S.S. Co.*, 36 F.2d 691, 694 (2d Cir. 1929).

133. *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490-91, (1915). Some cases did not raise questions of excessive fines per se but concerned true procedural due process violations, where a fine was so large that it appeared to have been established to prevent persons from challenging it in court for fear of enormous liability. *F.C. Henderson, Inc. v. Railroad Comm'n of Texas*, 56 F.2d 218, 223 (W.D. Tex. 1932).

134. *Browning*, 492 U.S. at 285 (O'Connor, J., concurring).

135. For example, *United States v. Fleetwood Enterprises Inc.*, 689 F. Supp. 389, 392 (D. Del. 1988) (finding the Eighth Amendment claim unripe); *ABC Book, Inc. v. Benson*, 315 F. Supp. 695, 701-02 (M.D. Tenn. 1970) (denying a facial challenge to a statute); *United States v. Schechter Poultry Corp.*, 8 F. Supp. 136 (E.D.N.Y. 1934) (finding the eighth amendment claim unripe).

136. *United States v. Valley Steel Products Co.*, 765 F. Supp. 752, 754 (Ct. Int. Trade 1991).

137. Defined as an action brought by an informer who receives part of the penalty with the remainder going to the state as provided by a statute. *Black's Law Dictionary* 1251 (West, 6th ed. 1990).

Amendment.[138] In another action, the First Circuit assumed that the Eighth Amendment applied to corporations and proceeded to find that the fine was not excessive.[139] These cases suggest that the Eighth Amendment should apply to corporations.

Courts have also used a cruel and unusual punishments analysis to evaluate fines. A three judge district court stated that fines could be cruel and unusual, although in the case at bar, the corporation had not received such a fine.[140] Another court dismissed an eighth amendment claim as frivolous under the *Solem* test, finding that the corporation had been convicted of a serious crime, that a fine was used in lieu of incarceration, that the corporation was able to pay, and that the fine was therefore not disproportionate to the crime committed.[141]

Thus, although the Court has not applied the Eighth Amendment to corporations, it has not found the amendment to be inappropriate for corporations. The Court has provided the same protection guaranteed by the Eighth Amendment using the Fourteenth Amendment Due Process Clause. Also, lower courts have examined Eighth Amendment claims without dismissing them on grounds of corporate identity. These cases provide precedent for the application of the Eighth Amendment to a defendant regardless of identity.

IV. REASONS FOR APPLYING THE EIGHTH AMENDMENT TO CORPORATIONS

A. The Nature, History, and Purpose Analysis

The nature, history, and purpose analysis supports applying the Eighth Amendment to corporations for three reasons. First, courts can apply the amendment to corporations without destroying the essence of the amendment. As Justice O'Connor reasoned, "the payment of monetary penalties, unlike the ability to remain silent, is

138. *United States Smith v. Gilbert Realty Co., Inc.*, 840 F. Supp 71, 74 (E.D. Mich. 1993).
139. *U.S. v. Pilgrim Market Corp.*, 944 F.2d 14, 22 (1st Cir. 1991).
140. *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406, 411 (D.S.C. 1968) (per curiam), aff'd, 393 U.S. 9, 21 (1968).
141. *United States v. Atlantic Disposal Serv., Inc.*, 887 F.2d 1208, 1209 (3d Cir. 1989).

something that a corporation can do as an entity."[142] The corporation itself can pay a fine from corporate funds. In contrast, applying the privilege against self-incrimination to corporations would stretch the logic of the Fifth Amendment. Forcing a corporation to pay a fine requires no leap in logic. Paying fines is possibly the portion of the Bill of Rights that most easily translates to the corporate setting[143] because it clearly involves questions of property rights.

Second, the history of the amendment demonstrates that the Framers intended it as a restraint on the government's prosecutorial power. The identity of the defendant does not affect this purpose. The history of the amendment could be interpreted as indicating that only individuals are protected from the government, but such an interpretation does not square with the holding in *Bellotti*. In *Bellotti*, the Court expressly stated that the issue of whether the First Amendment applies to corporations does not depend upon the identity of the speaker, nor should corporate identity determine whether other amendments apply.[144] Interpreting the history of the Eighth Amendment to support the proposition that only individuals are protected would violate the spirit of *Bellotti* by focusing on the identity of the entity asserting eighth amendment rights. Every amendment could be interpreted narrowly so as to protect only individuals. However, such reasoning ignores the Court's post-1960 movement away from drawing distinctions between natural persons and corporations as a means to decide which bill of rights protections apply to corporations.[145]

Third, the concerns of the Eighth Amendment are present in the corporate world. The government does not pursue sanctions only against individuals; just as corporations are considered persons under the Fourteenth Amendment, they are considered persons under criminal statutes as well. For instance, the Racketeer Influenced and Corrupt Organizations Act ("RICO") defines a person as "any individual or entity capable of holding a legal or beneficial interest in

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142. *Browning*, 492 U.S. at 285 (O'Connor, J., concurring).

143. For example, in *Pilgrim Market Corp.*, the court cited the district court's finding that repeated felony violations established that the corporation was not a good citizen and held that the fine served the purpose of punishment and deterrence without being excessive in light of the defendant's conduct. 944 F.2d at 22.

144. The Court stated that the value of political speech did not depend on the identity of the speaker. 435 U.S. at 777. The Court distinguished cases that denied rights to corporations on the grounds that they involved purely personal protections. Id. at 779 n.14 ("Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."). See notes 57-74 and accompanying text.

145. Mayer, 41 Hastings L. J. at 620-21 (cited in note 14).

property."[146] Since corporations are capable of holding property, they are within the definition, and thus the courts have held that corporations are persons under RICO.[147] In addition, the numerous cases with corporations as defendants demonstrate that corporations are persons subject to criminal and civil sanctions.[148] Since a corporation is subject to penalties under RICO and other statutes, it stands to reason that the same limits on government power should apply when the government prosecutes a corporation.

B. Application Does Not Distort the Bill of Rights

To some, allowing fictional entities to assert the same rights for which patriots gave their lives tramples on the country's founding principles.[149] The average American might not understand how the supreme law of the land equally protects conglomerates of capital and breathing individuals.[150] Extending the Eighth Amendment to corporations, however, does not distort the Bill of Rights. Although other amendments cover purely personal guarantees that are unavailable to corporations,[151] the Eighth Amendment, under the nature, history, and purpose analysis established in *Bellotti* and discussed above, does not.[152] Applying the Eighth Amendment to corporations merely fulfills the purposes of the Bill of Rights by treating all defendants fairly instead of granting the government arbitrary power.

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146. 18 U.S.C. §1961(3) (1994 ed.).

147. *R.E. Davis Chemical Corp. v. Nalco Chemical Co.*, 757 F. Supp. 1499, 1521 (N.D. Ill. 1990).

148. For example, *United States v. R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971); *Atlantic Disposal*, 887 F.2d at 1209.

149. The Framers were concerned with corruption of the public virtue, which included a fear of the evil that great wealth could produce. John S. Schockley and David A. Schultz, *The Political Philosophy of Campaign Finance Reform as Articulated in the Dissents in* Austin v. Michigan Chamber of Commerce, 24 St. Mary's L. J. 165, 187-88 (1992). For example, Thomas Jefferson, while calling for a bill of rights, did not advocate the interests of wealthy and powerful individuals and corporations. He preferred the virtuous life of rural farmers over the corrupting ways of urban manufacturers. Id. at 188-89. In Jefferson's view, manufacturing interests did not further public morality. Julian P. Boyd, ed., Letter from Thomas Jefferson to George Washington, (August 14, 1985) in 12 *The Papers of Thomas Jefferson, 1797-98* at 38 (1995). James Madison's writings also indicate he did not object to minimal restrictions on private corporations that tried to influence puhlic affairs. Schockley and Schultz, 24 St. Mary's L. J. at 191 (cited in this note).

150. See Mayer, 41 Hastings L. J. at 655 (cited in note 14) (arguing that from the lay perspective, it is hard to understand how the Bill of Rights protects corporations as persons).

151. See Part II (explaining that corporations do not have the privilege against self-incrimination nor do they have fourth amendment privacy rights).

152. See Part II; *Bellotti*, 435 U.S. at 778 n.14.

In 1991 Congress recognized the need to treat corporations as well as individual defendants fairly by establishing the Federal Sentencing Guidelines for Organizations.[153] These guidelines provide a system for selecting an appropriate fine that is just punishment for the offense and that will deter the corporate defendant.[154] During the hearings, the Sentencing Commission heard from those who believed corporations should face tough criminal punishments such as probation and charter revocation,[155] and others who were concerned about the Eighth Amendment and feared that tougher punishments would drive corporations out of business.[156] The final guidelines address these concerns by considering the seriousness of the offense in order to establish a base fine which is adjusted according to the corporation's culpability score.[157] These factors mimic the *Solem* test for the Cruel and Unusual Punishments Clause, which focuses on whether the punishment is proportionate to the offense committed.[158] Thus, the treatment of corporate defendants by federal courts comports with the standards applicable to individuals. This similar treatment does not distort the Bill of Rights, but rather fulfills its goals by eliminating arbitrary government power.

Some fear that extending rights and privileges to corporations will allow them to usurp the liberties of individuals and control the political process.[159] However, this fear is unfounded when the Eighth

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153. The Guidelines became law in November 1991. Ilene H. Nagel and Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L. Q. 205, 208 (1993).

154. Id. at 210.

155. Sentencing Guidelines for Organizational Defendants, Hearing before the United States Sentencing Commission at 11 (February 14, 1990) (statement of Carl J. Mayer, Hofstra Law School).

156. Id. at 75. (statement of Joseph diGenova, Defense Attorney's Advisory Group on Organizational Sanctions).

157. Nagel and Swenson, 71 Wash. U. L. Q. at 233 (cited in note 153). The culpability score evaluates the corporation's degree of fault. Id. at 235-36. The Federal Sentencing Guidelines represent a departure from the common law concept of respondeat superior, which ignored the culpability of the corporate entity. Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 Ariz. L. Rev. 743, 796 (1992). The judge measures the corporation's culpability by examining the organization's behavior. Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 Wash. L. Q. 329, 332 (1993). Having an effective program to prevent and detect crime, voluntarily disclosing violations, and fully cooperating with the government can reduce the score up to 95%. Id. If the corporation failed to do such "good citizen" acts, and if high-level personnel were involved with, condoned, or were willfully ignorant of the culpable activity, the base fine can be increased by as much as 400 percent. Id.

158. *Solem*, 463 U.S. at 290-91.

159. These critics view the natural consequences of extending rights te corporations as an overrunning of individuals who are undoubtedly weaker. Schockley and Schultz argue that those against limiting corporate contributions and independent expenditures for political candidates "are defending the rights of corporations and the wealthy to continue to exercise those

Amendment is at issue. Extending the Eighth Amendment to corporations does not decrease the protections that individuals receive. The Eighth Amendment is a passive guaranty: while extending the First Amendment to corporations endows them with a number of positive privileges such as an opportunity to influence public opinion,[160] the Eighth Amendment only serves as a shield from government abuse.

The Eighth Amendment's purpose of limiting the government's prosecutorial power is accomplished whether a corporation or an individual benefits. The government has no valid interest in overfining any person or entity. If a fine is excessive, the fine no longer serves a valid purpose and the government has overstepped its legitimacy. Applying the Eighth Amendment to corporations would allow the goals behind legitimate prosecutions to remain intact, since corporations will still be subject to fines that relate to corporate misbehavior. Only fines out of proportion to the offense would be curtailed.

Another reason that extending protection to corporations does not diminish individual rights is that a fine imposed on a corporation does not only affect the fictional entity. The fiction of corporate personhood often leads to the misperception that individuals are not affected by actions against corporations. The right of corporations to

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'corrosive and distorting effects' upon our political process, moving us toward plutocracy rather than democracy." Schockley and Schultz, 24 St. Mary's L. J. at 195 (cited in note 149) (referring specifically to the *Austin* dissenters, Justices Kennedy, O'Connor and Scalia). Indeed, some scholars advocate the increased government regulation of speech "in the public interest." David M. Rabban, *Free Speech in Progressive Social Thought*, 74 Tex. L. Rev. 951, 1036 (1996). They view the risk of suppression as small since the party likely to raise a first amendment claim is not a representative of a persecuted minority view but rather a rich corporation or powerful person. Id.

In his *Bellotti* concurrence, Chief Justice Burger noted the success of some media enterprises in using the corporate form te amass "vast wealth and power" and to engage in activities that reach beyond publishing and broadcasting. 435 U.S. at 796. Chief Justice Burger also noted the fears of those who feel that the existence of such vertically integrated conglomerates means a powerful few have the ability to inform and shape public opinion. Id. at 797. The Chief Justice cited Justice White's *Bellotti* dissent which voiced fears that corporations have an unfair advantage in the political process. Id. at 796. Justices Brennan and Marshall joined Justice White's dissent, which stated, "[T]he special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process." Id. at 809. Restricting corporate political activity is an attompt to prevent corporations from gaining too much political power. Id. Justice White added, "[t]he State need not permit its own creation to consume it." Id.

160. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248-49 (1974) (noting that advocates of a right to reply to press criticism of candidates claim that enormously powerful corporate newspaper chains could manipulate public opinion and the course of events).

freedom from government abuse supports protection of individuals, albeit indirectly. When the government fines a corporation, the fine impacts the shareholders' property rights since corporate capital is based on shareholder investments. Employees may also lose employment if the fine is so excessive that it forces the business to close. The concern for shareholder property rights led to the establishment of legal personhood in *Santa Clara*.[161] Preventing the government from trampling property rights is no less a concern today, and still furthers the purposes of the Bill of Rights.

C. The Corporate Identity Analysis

If Chief Justice Rehnquist's view that the application of bill of rights protections to corporations depended on questions of corporate identity commanded the majority of the Court, the Eighth Amendment would still apply to corporations. Historically, the Court has not found it difficult to extend bill of rights protections that deal with property interests to corporations under the corporate identity analysis.[162] It has denied only the rights that seem personal in nature such as the fifth amendment privilege against self-incrimination under the corporate identity analysis.[163] In contrast, corporations have received protection from takings without disapproval, even from Chief Justice Rehnquist.[164]

The Excessive Fines Clause protects property rights by restricting what the government can seize. In this way, the clause serves a function similar to that of the Fifth and Fourteenth Amendments, which protect against takings of property without due process of law. Applied to corporations, the Eighth Amendment would directly protect corporate-owned property, and as discussed in the preceding subsection, would indirectly protect shareholder property rights. Thus, even if the Court did not use the nature,

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161. See Part II.

162. As discussed in Part II, the Court extended the Fourteenth Amendment to corporations when it viewed them as aggregations of individuals. In the years following *Santa Clara*, the Court extended fifth amendment protection from takings to corporations. *Smyth*, 169 U.S. at 522.

163. The Court denied corporations the privilege against self-incrimination, *Hale*, 201 U.S. at 74; *Wilson*, 221 U.S. at 376; and the fourth amendment right to privacy, *Morton Salt*, 338 U.S. at 651-52.

164. See *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting) (listing the rights recognized as belonging to corporations, which include the protection of corporate property under the Due Process Clause of the Fourteenth Amendment); Id. at 824 (Rehnquist, J. dissenting) (stating there is little douht that a state-created corporation necessarily has protection from takings without due process of law).

history, and purpose analysis, the Eighth Amendment should still apply to corporations.

D. Proportionate Fines Fulfill Complementary Goals

The government has a valid interest in deterring unacceptable conduct and in making the penalty fit the offense committed. At the same time, any penalties imposed on corporations should not be designed to destroy them or make the corporate form of organization unattractive, unless society desires to eliminate the corporate form in favor of some other. In light of the fact that corporations appear to be an accepted business form and are the predominate form of organization,[165] it appears that society has not made such a choice. The Federal Sentencing Guidelines provide a framework for accomplishing both these interests.

The Federal Sentencing Guidelines were promulgated in light of empirical research showing that sentences imposed on corporations were less than the actual dollar loss caused by the offenses.[166] Thus, corporations realized a net gain for transgressing the law. The research also showed that the public perceived white collar offenders as receiving lesser sentences.[167] Further, social science supported this perception.[168] The Sentencing Commission sought to remedy these

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165. Corporations occupy a substantial segment of the American economy. Meir Dan-Cohen, *Rights, Persons, and Organizations*, 13 (U. of California, 1986).

166. Nagel and Swenson, 71 Wash. U. L. Q. at 214-15 (cited in note 153). This research covered fines imposed on corporations with the ability to pay the fines. Id. at 215.

167. Studies show white collar criminals receive long sentences only to have them suspended for probation or result in parole. Patricia M. Jones, Note, *Sentencing*, 24 Am. Crim. L. Rev. 879, 879 (1987). The public perceives white collar crime as rising, Peter Binzen, *Watch Out for White Collar Crime, Corporate Directors are Warned*, Philadelphia Inquirer at F2 (Oct. 30, 1985), and white collar criminals rarely receive jail time, Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envir. L. J. 43, 59 (1993). For instance, in the 1980s, Congress questioned why no General Electric or E.F. Hutton executives received jail time for perpetrating fraud, while a woman who shoplifted four sweaters received a thirty day sentence. Aaron Epstein, *Failure to Prosecute Executives in Hutton and GE Cases is Assailed*, Philadelphia Inquirer A2 (May 16, 1985). Hutton had pled guilty to 2,000 counts of fraud and paid $2 million in fines. *When Did Hutton Execs Learn of Funds Ploy*, San Jose Mercury News 14D (June 19, 1985). House Judiciary Subcommittee Chairman William Hughes (D., N.J.) stated, "[n]o individuals were prosecuted in this and there is a public perception that justice wasn't done." Id.

168. Nagel and Swenson, 71 Wash. U. L. Q. at 215-16 (cited in note 153). Studies supported the public's belief that white-collar crime costs society more than common crimes. John Braithwaite, *Challenging Just Desserts: Punishing the White Collar Criminals*, 73 J. Crim. L. & Criminol. 723, 743 (1982).

problems through systematic guidelines[169] that set appropriate and effective punishments.[170]

The Sentencing Commission established a two-track system. For corporations on either track, the Guidelines authorize courts to require all appropriate steps to remedy the harm caused by criminal conduct through restitution, remedial orders or probation, and community service that directly relates to the offense.[171] Under the first set of guidelines, if the court finds that a criminal purpose was the driving force behind the corporation, the court has the authority to set a fine intended to divest a corporation of all of its net assets.[172] The Sentencing Commission intended this measure to give courts the power to eliminate criminal organizations.[173] A different set of guidelines applies to corporations that were not set up for criminal purposes but nonetheless have broken laws. For these corporations, the Guidelines prescribe a base fine that generally measures the seriousness of the offense.[174] The fine can be increased or lowered according to the culpability score of the corporation.[175]

The Guidelines demonstrate that corporations can be penalized to achieve just punishment and deterrence through proportionate fines while protecting the existence of corporations that benefit society.[176] While a criminal organization may be destroyed, a more complicated structure of fines is in place to punish and correct wrongdo-

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169. Nagel and Swenson, 71 Wash. U. L. Q. at 217 (cited in note 153).

170. See United States Sentencing Commission, *Guidelines Manual* 337 (West, 1995) ("USSG") ("This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain intornal mechanisms for preventing, detecting, and reporting criminal conduct.").

171. Id. at 343.

172. Id. § 8C1.1 at 345.

173. This penalty is the organizational equivalent of the death penalty. Moore, 34 Ariz. L. Rev. at 781 (cited in note 157).

174. USSG § 8C2.4 at 350. The court determines the base fine by referencing a schedule of crimes. Bucy, 71 Wash. L. Q. at 332 (cited in note 157).

175. See note 157. The culpability score is based on such factors as prior history of violations, willfully ignorant conduct, the presence of an effective program for preventing violations, and self-reporting violations.

176. The Federal Sentencing Guidelines promote compliance with the law better than the common law basis for corporate liability, respondeat superior. See Bucy, 71 Wash. L. Q. at 333-34 (cited in note 157) (stating that respondeat superior creates liability for the corporation when an agent commits a crime in any way linked to the agent's employment and does not consider the culpability of the corporation itself). Unlike the common law, the Federal Sentencing Guidelines require proof of criminal intent, which promotes voluntary compliance. Id. at 336. By adjusting the culpability score according to the corporation's behavior, the Federal Sentencing Guidelines provide incentive for following the law. In contrast, under respondeat superior, a corporation can be liable for acts committed by an agent even though the corporation has instructed its agents not to engage in such behavior.

ing for corporations not set up for criminal purposes. The fines authorized by the Federal Sentencing Guidelines can become extremely high, but since they are based on the culpability of the guilty corporation, they are not arbitrary or excessive. Such fines police corporations without making the survival of generally law-abiding corporations impossible. However, the Federal Sentencing Guidelines only apply to federal courts, and thus they are only a partial protection. Applying the Eighth Amendment to the corporations would provide complete protection from disproportionate penalties.

E. Consistency and Clarity in the Rule of Law

The Eighth Amendment should apply to corporations to assure consistency and clarity in the rule of law. First, not applying the Eighth Amendment to corporations would make the law inconsistent, since corporations received "eighth amendment" protection in early decisions under the Fourteenth Amendment.[177] While the Supreme Court did not begin protecting civil rights until much later,[178] these early cases asked whether the state had imposed too large of a fine—the same issue the Eighth Amendment addresses.

Another reason the early fourteenth amendment cases provide support for applying the Eighth Amendment is that even though these decisions used a different amendment, they provided protection to corporate defendants within the scope of the Eighth Amendment. In certain contexts, the Fourteenth Amendment may cover more situations than does the Eighth Amendment. For example, the Fourteenth Amendment covers prison conditions whether or not a person is convicted, while the Cruel and Unusual Punishments Clause only applies to convicted persons.[179] Such a discrepancy does not exist, however, for the Excessive Fines Clause. Eighth amendment protection from excessive fines only applies to post-conviction or civil penalties.[180] Likewise, the cases using the Fourteenth Amendment addressed fines that had been imposed.

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177. See notes 131-34 and accompanying text.

178. John E. Nowak, *Essay on the Bill of Rights: The "Sixty Something" Anniversary of the Bill of Rights*, 1992 Univ. Ill. L. Rev. 445, 451-52, 455.

179. *Riddle By and Through Brewster v. Innskeep*, 675 F. Supp. 1153, 1159 (N.D. Ind. 1987). See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (stating that the history of the Eighth Amendment shows it was intended to protect those convicted of crimes).

180. *Ingraham*, 430 U.S. at 664.

Second, applying the Eighth Amendment to corporations also promotes clarity in the law. Frequently, corporations are jointly prosecuted with individuals in civil and criminal cases.[181] In practice, the courts address the claims raised by the defendants without distinguishing the individuals from the corporate defendants.[182] If the Eighth Amendment did not apply, the court would have to evaluate a fine for the individual under the Eighth Amendment but would be forced to evaluate the fine imposed on the corporation under the Fifth or Fourteenth Amendment Due Process Clause. The court would consider the same issue of whether a fine was excessive as applied to each defendant, but would separately label two identical discussions.[183] Separating the analysis would obfuscate the court's reasoning since the court would evaluate the fines as if the defendants had raised different claims, when both have challenged what the Eighth Amendment guards against—excessive fines. In contrast, a forthright discussion of the Eighth Amendment would develop any distinctions in how it applies to corporations and individuals rather than creating the pretense that any differences in outcomes results from applying the Eighth Amendment as opposed to the Fifth or Fourteenth Amendment's Due Process Clause.

V. PRACTICAL CONSIDERATIONS FOR APPLYING THE EIGHTH AMENDMENT TO CORPORATIONS

The preceding discussion is not meant to imply that distinctions between corporations and individuals have no relevance in setting fines. Although the law refers to corporations as legal persons, this concept of personhood does not mean courts can deter unacceptable corporate behavior by treating corporations and individuals identically. By establishing a separate chapter for organizations, the United States Sentencing Guidelines Commission recognized this principle, but in other contexts, the law's ubiquitous references to corporations as persons obscure the organizational properties that distinguish corporations from individuals.[184] In cases involving corpo-

181. See, for example, *Gilbert*, 840 F. Supp. at 72; *Toepleman v. United States*, 263 F.2d 697, 698 (4th Cir. 1959); *Schechter Poultry*, 8 F. Supp. at 140.

182. *Gilbert*, 840 F. Supp. at 72-74; *Toepleman*, 263 F.2d at 698-700; *Schecter Poultry*, 8 F. Supp. 140-42.

183. The court would ask whether the fine against the individual was excessive and ask whether the fine against the corporation was so large as to violate due process.

184. Dan-Cohen, *Rights, Persons, and Organizations* at 44 (cited in note 165). Unlike individuals, corporations have the following properties: a fixed and perceptible structure,

rations, courts can avoid this problem by allowing the distinctions between corporations and individuals to influence the type of adjudicatory model that is used[185] and by considering what level of fines will induce corporate efforts to eradicate unlawful agent behavior.[186]

First, as a general rule, courts should emphasize a regulatory approach[187] over an arbitration method[188] when dealing with corporate parties.[189] Corporations, unlike individuals, do not have protectable interests in dignity, autonomy, and respectful treatment.[190] While an individual would object to sacrificing her rights to establish a long-term beneficial rule for society,[191] an organization has greater interest in the future implications of a ruling.[192] A corporation has less at stake in a single lawsuit, but more to lose from a negative ruling's effect on its future transactions.[193] These differences between individuals and corporations reveal that when dealing with corporations courts should engage in a more legislative style of decision-making that considers policy-making for society,[194] rather than concentrating on the rights of the specific parties involved.[195]

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permanence, a focus on decision-making, large size, formality, complexity, and a functional, goal-oriented existence. Id. at 31-36.

185. Id. at 123.

186. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. of Legal Stud. 833, 837 (1994).

187. A more regulatory style would mean taking into account policies as well as the arguments for existing rights, de-emphasizing precedent justifications, becoming more active in determining the interests, shaping the issues, and designing remedies, and considering the various interests that the decision will affect. Dan-Cohen *Rights, Persons, and Organizations* at 157 (cited in note 165).

188. With an arbitration method, the court deals with events in the past and the actual persons before the court, relies on precedent and the litigants' conceptions of the case as described in the pleadings, motions, and briefs, and does not base its rulings on the socially optimal decision. Id. at 137. These constraints result from concerns about the rights of those before the court. Id. at 138. However, with a corporation, the court's decision, while specific to the transaction at bar, is not specific to particular people. Id. at 139.

189. Id. at 139.

190. Id. at 66, 69, 141.

191. Id. at 140, 144.

192. Id. at 144.

193. Id. Unlike individuals, corporations exist in perpetuity, and thus the court's holding will affect corporations for much longer. Most individuals are concerned about losing the immediate suit, not about future transactions that involve the same issue. Id.

194. Id. at 139, 144. With an organization, a judge has a greater opportunity to make a lasting impact. Id. at 133. Corporations are organized deliberately with an ability to change their modes of operation, are permanent structures, and engage in repeat functions. Id. at 132. Thus, a judge can influence future transactions of the corporations involved in the suit as well as other corporations engaged in the same type of transaction.

195. Id. at 139.

Second, when setting fines, courts should consider the realities of how corporate crime occurs.[196] Corporations themselves do not commit crimes.[197] Rather, corporate agents commit crimes and do so for their own self-interests.[198] The principle behind holding corporations liable for the crimes of their agents is that corporations will sanction their agents.[199] In order for this effect to occur, the corporation must increase its spending on enforcement.[200] However, greater enforcement expenditures also increase the chances that the government will detect crimes.[201] If the expected cost of an increased probability of government detection is greater than the benefit of catching the criminal agents, corporations will not spend more on enforcement.[202]

Thus, effective fines should reflect the need to induce corporations to institute effective enforcement measures.[203] One method is to allow mitigation for corporations that have effective monitoring programs.[204] Such mitigation is part of the Federal Sentencing Guidelines[205] but not an explicit part of state law provisions on sentencing.[206] Other suggestions for encouraging corporate enforcement expenditures include eliminating liability for crimes committed by agents if the corporation exercises due care by instituting an efficient enforcement scheme, and granting corporations a use privilege so that

196. "Corporate crime is not analogous to individual crime." Arlen, 23 J. of Legal Stud. at 834 (cited in note 186).

197. At first glance, a corporation set up for criminal purposes looks like an exception, but even in that case, individuals still actually commit the crimes.

198. Arlen, 23 J. of Legal Stud. at 834 (cited in note 186) The corporation may experience incidental benefits, but the agent does not committ the crime for those benefits. Id.

199. Id. at 835.

200. Id. at 835-36.

201. Id. at 836. A corporation doubles its chances of being detected by implementing optimal enforcement measures under vicarious liability. Id. at 844. Professor Arlen assumes that corporations reveal crimes they detect to the government. Id. at 850. Even if corporations do not report all the crimes they detect, they recognize that the government may find evidence of crime on its own and subpoena the corporate records. Id. at 859. The records may provide prosecutors with evidence against the corporation. Id.

202. Id. at 836.

203. See id. at 837 (stating the proper fine could be found by dividing the net social cost of crime over the actual probability of detection, as determined by the corporation's enforcement expenditures).

204. Id. at 839-40.

205. USSG §C2.5(f) at 353. However, the Federal Sentencing Guidelines may not mitigate enough to encourage corporate effective enforcement. Arlen, 23 J. Legal Stud. at 840 (cited in note 186). Even with mitigation under the Federal Sentencing Guidelines, a corporation may face substantial liability, and no mitigation is available for some of the major corporate crimes such as securities fraud and antitrust violations. Id.

206. Id.

information a corporation discloses can be used to prosecute agents but not the corporation.[207]

The above discussion attempts to clarify the practical implications of extending eighth amendment protection to corporations. Corporations should receive protection from excessive fines. However, what is excessive varies according to the identity of the defendant. Extending the Eighth Amendment to corporations does not translate into imposing identical fines on individuals and corporations. Rather, the real differences between individuals and corporations deserve consideration when setting a fine and when deciding whether or not it is excessive.

VI. CONCLUSION

Whether using the old or current Supreme Court method for determining what rights apply to corporations, the Eighth Amendment should apply to corporations. Prior to 1960, the Court pondered the difference between natural persons and fictional corporate persons. Using this analysis, the Court denied personal liberties such as the privilege against self-incrimination, but extended bill of rights protections that protected the property rights of shareholders. The Excessive Fines Clause protects property rights by preventing the government from imposing a greater penalty than is due.

Since 1960, the Court has focused on the amendment at issue and ignored the corporate identity of the defendant. An examination of the Excessive Fines Clause demonstrates that its nature, history, and purpose support applying it to corporations. Application to corporations vindicates the Framers' intention of limiting the arbitrary use of the government's prosecutorial power.

Further, concerns of distorting the individual rights emphasis of the Bill of Rights do not outweigh the logical arguments for extending the Eighth Amendment to corporations. Preventing the government from imposing excessive fines against corporations does not diminish that same protection held by natural individuals because corporations can only invoke the Eighth Amendment against the

207. Id. at 862, 865. A negligence-based scheme encourages corporations to increase enforcement expenditures since they will escape liability by demonstrating due care. Id. at 862. Similarly, a use privilege would encourage enforcement expenditures because the corporation would not increase its chances of being found liable. Id. at 865.

government acting as plaintiff or prosecutor. Corporations cannot raise the Eighth Amendment as a defense against civil parties.

In addition, extending eighth amendment protections to corporations will not obstruct the prosecution of corporations guilty of violating the law. The government can punish illegal corporate activity without penalties that are disproportionate to the culpable conduct. Applying the Eighth Amendment to corporations allows the continued deterrence and punishment of unlawful conduct while sustaining the legitimacy of the justice system.

Elizabeth Salisbury Warren[*]

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