BROWNING FERRIS INDUSTRIES OF VERMONT

V

KELCO DISPOSAL, INC.

SUPREME COURT OF THE UNITED STATES
492 U.S. 257
June 26, 1989

OPINION: Justice Blackmun...We face here the questions whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive...damages, and, if so, whether an award of $6 million was excessive in this particular case. This Court has never held...that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with **criminal process** and with **direct actions initiated by government to inflict punishment**. Awards of punitive damages do not implicate these concerns. **We therefore hold...that the Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.**

I

[This Part I was **9 - 0**]

These weighty questions of constitutional law arise from an unlikely source: the waste-disposal business in Burlington, Vt...Browning-Ferris Industries of Vermont...(BFI)...operates a nationwide commercial waste-collection and disposal business. In 1973 BFI entered the Burlington area trash-collection market, and in 1976 began to offer roll-off collection services. Until 1980 BFI was the sole provider of such services in the Burlington area; that year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting respondent Kelco Disposal, Inc. Within a year Kelco obtained nearly 40% of the Burlington roll-off market, and by 1982 Kelco's market share had risen to 43%. During 1982 BFI reacted by attempting to drive Kelco out of business, first by offering to buy Kelco and then by cutting prices by 40% or more on new business for approximately six months. The orders given to the Burlington BFI office by its regional vice president were clear: "**Put Kelley out of business. Do whatever it takes. Squish him like a bug**." BFI's Burlington salesman was also instructed to put Kelco out of business and told that if "it meant give the stuff away, give it away."

Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical dumpster.

During the first four months of BFI's predatory campaign, Kelco's revenues dropped 30%. Kelco's attorney wrote to BFI's legal department asserting that BFI's pricing strategy was illegal, and threatened to initiate court proceedings if it continued. BFI did not respond, and continued its pricecutting policy for several more months. BFI's market share remained stable from 1982 to 1984, but by 1985 Kelco had captured 56% of the market. That same year BFI sold out to a third party and left the Burlington market.

In 1984, Kelco...brought an action...alleging a violation of §2 of the Sherman Act for attempts to monopolize the Burlington roll-off market...[It] also claimed that BFI had interfered with Kelco's contractual relations in violation of Vermont tort law...After a 6-day [jury] trial BFI was found liable on both counts. A 1-day trial on damages followed, at which Kelco submitted evidence regarding the revenues and profits it lost as a result of BFI's predatory prices. Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors to "deliver a message to Houston [BFI's headquarters]." Kelco also stressed BFI's total revenues of $1.3 billion in the previous year, noting that this figure broke down to $25 million a week. BFI urged that punitive damages were not appropriate, but made no argument as to amount.

The District Court instructed the jury that it could award punitive damages on the state-law claims if it found by clear and convincing evidence that BFI's conduct "**revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights.**" It also told the jury that in determining the amount of punitive damages it could take into account "the character of the defendants, their financial standing, and the nature of their acts." BFI raised no relevant objection to the charge on punitive damages. The jury returned a verdict of **$51,146 in compensatory damages** on both the federal-antitrust and state-tort counts, and **$6 million in punitive damages**.

...The District Court...awarded Kelco $153,438 in treble damages and $212,500 in attorney's fees and costs on the antitrust claim, or, in the alternative, $6,066,082.74 in compensatory and punitive damages on the state-law claim...The...Court of Appeals...affirmed the judgment both as to liability and as to damages. On the issue of punitive damages, the court noted that the evidence showed that BFI "wilfully and deliberately attempted to drive Kelco out of the market," and found no indication of jury prejudice or bias. Addressing the Eighth Amendment issue, the court noted that even if the Amendment were applicable "to this nominally civil case," the damages were not "so disproportionate as to be cruel, unusual, or constitutionally excessive" and upheld the award...[W]e granted certiorari on the punitive damages issue.

II

[Part II: Justice Blackmun/Rehnquist/Brennan/White/Marshall/Scalia/Kennedy...**7 - 2**]

...Although this Court has never considered an application of the Excessive Fines Clause, it has interpreted the [Eighth] Amendment in its entirety in a way which suggests that the Clause does not apply to a **civil**-jury award of punitive damages. Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. *Ex parte Watkins* ("The eighth amendment is addressed to courts of the United States exercising criminal jurisdiction"); *Fong Yue Ting v. United States* (Amendment inapplicable to deportation because deportation is not punishment for a crime); *Ingraham v. Wright* (Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.)

We left open in *Ingraham* the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases. The examples we cited as possibilities -- persons confined in mental or juvenile institutions -- do not provide much support for petitioners' argument that the Excessive Fines Clause is applicable to a civil award of punitive damages. In any event, petitioners have not made any argument specifically based on the Cruel and Unusual Punishments Clause.

There is language in *Carlson v. Landon* suggesting that the Bail Clause may be implicated in civil deportation proceedings. The Court there held that "the Eighth Amendment does not require that bail be allowed" in such cases, but the opinion in that case never addressed the question whether the Eighth Amendment applied in civil cases: the Court held that the Bail Clause does not require Congress to provide for bail in *any* case, but prohibits only the imposition of *excessive* bail. *Carlson* provides petitioners with little support for another reason as well. Bail, by its very nature, is implicated only when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding. The potential for governmental abuse which the Bail Clause guards against is present in both instances, in a way that the abuses against which the Excessive Fines Clause protects are not present when a jury assesses punitive damages.

To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.

The Eighth Amendment received little debate in the First Congress...and the Excessive Fines Clause received even less attention...Congress did not discuss what was meant by the term "fines," or whether the prohibition had any application in the civil context. **In the absence of direct evidence of Congress' intended meaning, we think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a**

sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than in private civil actions...

The primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages...

The history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.

Petitioners...argue that the Excessive Fines Clause "derives from limitations in English law on monetary penalties exacted in private civil cases to punish and deter misconduct." They recognize that nothing in the history we have recounted thus far espouses that view. To find support, they turn the clock hundreds of years further back to English history prior to Magna Carta, and in particular to the use and abuse of "**amercements**." According to petitioners, amercements were essentially civil damages, and the limits Magna Carta placed on the use of amercements were the forerunners of the 1689 Bill of Rights' prohibition on excessive fines. In their view, the English Bill of Rights and our Eighth Amendment must be understood as reaching beyond the criminal context, because Magna Carta did. Punitive damages, they suggest, must be within the scope of the Excessive Fines Clause because they are a modern-day analog of 13th-century amercements.

The argument is somewhat intriguing, but we hesitate to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation we are urged to adopt appears to conflict with the lessons of more recent history. Even so, our understanding of the use of amercements, and the development of actions for damages at common law, convince us that petitioners' view of the relevant history does not support the result they seek.

Amercements were payments to the Crown, and were required of individuals who were "in the King's mercy," because of some act offensive to the Crown... The use of amercements was widespread; one commentary has said that most men in England could expect to be amerced at least once a year.

In response to the frequent, and occasionally abusive, use of amercements by the King, Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement. The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown. The Amercements Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Petitioners, and some commentators, find in this history a basis for concluding that the

Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages. We do not agree...

Our conclusion that the Framers of the Eighth Amendment did not expressly intend it to apply to damages awards made by civil juries does not necessarily complete our inquiry. Our Eighth Amendment jurisprudence has not been inflexible. The Court, when considering the Eighth Amendment, has stated: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions." *Weems v. United States.* This aspect of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days. But the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century; and the doctrine was expressly recognized in cases as early as 1763. Despite this recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope. Rather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government...

We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments...

III

[This Part III was **9 - 0**]

Petitioners also ask us to review the punitive damages award to determine whether it is excessive under the Due Process Clause of the Fourteenth Amendment. The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme, but **we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day. Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award.**

IV

[This Part IV was **9 - 0**]

Petitioners also ask us to hold that this award of punitive damages is excessive as a matter of federal common law...Although petitioners...would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, **these are matters of state, and not federal, common law**...[Judgment Affirmed.]

CONCURRENCE: Justice Brennan/Marshall...**Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages,...you may take into account the character of the defendants, their financial standing, and the nature of their acts." Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "the touchstone of due process is protection of the individual against arbitrary action of government" (*Daniels v. Williams*), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.**

Since the Court correctly concludes that Browning-Ferris' challenge based on the Due Process Clause is not properly before us, however, I leave fuller discussion of these matters for another day.

Warning! You may not want to read the O'Connor Opinion, below. It is a lengthy history lesson on punitive damages and the origins of the legal term "fine." I encourage you to feast upon it; however, don't ever let a difficult stretch of asphalt stop your forward progress. If that is feared, better not to read it, lest ye wind up stranded alongside the road, never to be heard from again!

CONCURRENCE/DISSENT: Justice O'Connor/Stevens...Awards of punitive damages are sky-rocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

The trend toward multimillion dollar awards of punitive damages is exemplified by this case...The

award of punitive damages was 117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont court.

The Court holds today that the Excessive Fines Clause of the Eighth Amendment places no limits on the amount of punitive damages that can be awarded in a suit between private parties. That result is neither compelled by history nor supported by precedent, and I therefore respectfully dissent from Part II of the Court's opinion. I do, however, agree with the Court that no due process claims...are properly presented in this case, and that the award of punitive damages here should not be overturned as a matter of federal common law...

In the words of Chief Justice Marshall, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*. As such, it is not entitled to "purely personal guarantees" whose "historic function...has been limited to the protection of individuals." Thus, a corporation has no Fifth Amendment privilege against self-incrimination (*Wilson v. United States*) or right to privacy (*United States v. Morton Salt Co.*). On the other hand, a corporation has a First Amendment right to freedom of speech (*Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*) and cannot have its property taken without just compensation (*Penn Central Transportation Co. v. New York City*). A corporation is also protected from unreasonable searches and seizures (*Marshall v. Barlow's, Inc.*) and can plead former jeopardy as a bar to a prosecution (*United States v. Martin Linen Supply Co.*). Furthermore, a corporation is entitled to due process (*Helicopteros Nacionales de Colombia v. Hall*) and equal protection (*Metropolitan Life Ins. Co. v. Ward*) of law.

Whether a particular constitutional guarantee applies to corporations "depends on the nature, history, and purpose" of the guarantee. The payment of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity, and the Court has reviewed fines and monetary penalties imposed on corporations under the Fourteenth Amendment at a time when the Eighth Amendment did not apply to the States. If a corporation is protected by the Due Process Clause from overbearing and oppressive monetary sanctions, it is also protected from such penalties by the Excessive Fines Clause.

Language in *Ingraham v. Wright* and *Ex parte Watkins* suggests that the *entire* Eighth Amendment is confined to criminal prosecutions and punishments. But as the Court correctly acknowledges, that language is not dispositive here.

In *Ingraham*, the Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment at a public school. Because the Excessive Fines Clause was not at issue in *Ingraham*, the Court's statement that the "text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government" is not controlling. The similar

statement in *Ex parte Watkins*, that the Eighth Amendment "is addressed to courts of the United States exercising criminal jurisdiction" is dictum, for the Court there held only that it did not have appellate jurisdiction to entertain a challenge, by way of a writ for habeas corpus, to criminal fines imposed upon a defendant: "[T]his Court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence." There is another reason not to rely on or be guided by the sweeping statements in *Ingraham* and *Ex parte Watkins*. Those statements are inconsistent with the Court's application of the Excessive Bail Clause of the Eighth Amendment to civil proceedings in *Carlson v. Landon* (immigration and deportation). See *United States v. Salerno* (recognizing that *Carlson* "was a civil case"). In sum, none of the Court's precedents foreclose application of the Excessive Fines Clause to punitive damages.

The history of the Excessive Fines Clause has been thoroughly canvassed in several recent articles, all of which conclude that the Clause is applicable to punitive damages. In my view, a chronological account of the Clause and its antecedents demonstrates that the Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct. History aside, this Court's cases leave no doubt that punitive damages serve the same purposes -- punishment and deterrence -- as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent...

Under the Saxon legal system in pre-Norman England, the victim of a wrong would, rather than seek vengeance through retaliation or "bloodfeud," accept financial compensation for the injury from the wrongdoer. The wrongdoer could also be made to pay an additional sum "on the ground that every evil deed inflicts a wrong on society in general."

At some point after the Norman Conquest in 1066, this method of settling disputes gave way to a system in which individuals who had engaged in conduct offensive to the Crown placed themselves "in the King's mercy" so as not to have to satisfy all the monetary claims against them. In order to receive clemency, these individuals were required to pay an "amercement" to the Crown...But...a share of the amercement went to the victim or the victim's family. Because the amercement originated at a time when there was little distinction between criminal law and tort law, it was "neither strictly a civil nor a criminal sanction." Blackstone, however, clearly thought that amercements were civil punishments...The list of conduct meriting amercement was voluminous: trespass, improper or false pleading, default, failure to appear, economic wrongs, torts, and crimes...

Because of the frequency and sometimes abusive nature of amercements, Chapter 20 of Magna Carta (1225), prohibited amercements that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his **contenement**; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours

shall be likewise amerced, saving his **wainage**, if he fall into our mercy...

Contenement: "that which is necessary for the support and maintenance of men, agreeable to their several qualities or states of life."

Wainage: "that which is necessary to the farmer for the cultivation of his land."

Fines and amercements had very similar functions. Fines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid royal displeasure. The fine operated as a substitute for imprisonment. Having no actual power to impose a fine, the court would sentence the wrongdoer to prison. "To avoid imprisonment, the wrongdoer would then 'make fine' by 'voluntarily' contracting with the Crown to pay money, thereby ending the matter. The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. Once the fine was no longer voluntary, it became the equivalent of an amercement." Although in theory fines were voluntary while amercements were not, the purpose of the two penalties was equivalent, and it is not surprising that in practice it became difficult to distinguish the two.

By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word "fine" took on its modern meaning, while the word "amercement" dropped out of ordinary usage. But the nomenclature still caused some confusion. See *Griesley's Case* ("fine" for refusing to serve as a constable analyzed as an "amercement"). William Shakespeare, an astute observer of English law and politics, did not distinguish between fines and amercements in the plays he wrote in the late 16th century. In Romeo and Juliet, published in 1597, Prince Escalus uses the words "amerce" and "fine" interchangeably in warning the Montagues and the Capulets not to shed any more blood on the streets of Verona:

> I have an interest in your hate's proceeding,
> My blood for your rude brawls doth lie a-bleeding;
> But I'll amerce you with so strong a fine,
> That you shall all repent the loss of mine.
>
> Act III, scene 1.
> Romeo and Juliet

The preeminence of fines gave courts much more power, for only they could impose fines. Once it was clear that Magna Carta did not apply to fines for offenses against the Crown, English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown. After James II fled England during the Glorious Revolution of 1688-1689, the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange...[S]ome of the men who made up the committee had been subjected to heavy fines by the courts of James II. The committee

ultimately reported 13 Articles to the House of Commons. The final draft of Article 10 provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted." *1 Wm. & Mary* (1689).

According to Blackstone, the English Bill of Rights was "only declaratory...of the old constitutional law."...Of course, the only prohibition on excessive monetary penalties predating Article 10 was contained in Magna Carta. "**Since it incorporated the earlier prohibition against excessive amercements -- which could arise in civil settings -- as well as other forms of punishment, [Article 10's limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts.**" Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings."...

The Court argues that Chapter 20 of Magna Carta and Article 10 of the English Bill of Rights were concerned only with limiting **governmental** abuses of power. Because amercements and fines were paid to the Crown, the Court assumes that governmental abuses can only take place when the sovereign itself exacts a penalty. That assumption, however, simply recalls the historical accident that, prior to the mid-18th century, monetary sanctions filled the coffers of the King and his barons.

As early as 1275, with the First Statute of Westminster, double and treble damages were allowed by statute. However, "[i]t was only after the prevalence of the amercement had diminished that the cases began to report the award of punitive damages as a common law entitlement." One of the first reported cases allowing punitive damages is *Wilkes v. Wood (1763):* "A jury have it in their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." **The link between the gradual disappearance of the amercement and the emergence of punitive damages provides strong historical support for applying the Excessive Fines Clause to awards of punitive damages...If anything is apparent from the history set forth above, it is that a monetary penalty in England could be excessive, and that there is a strong link between amercements, which were assessed in civil cases, and fines...There is, in short, considerable historical support for application of the Excessive Fines Clause to punitive damages.**

The Court, however, thinks otherwise, and emphasizes that at the time the Eighth Amendment was enacted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." In my view, the meaning of that word was much more ambiguous than the Court is willing to concede. In defining the word "fine," some 18th-century dictionaries did not mention to whom the money was paid...That the word "fine" had a broader meaning in the 18th century is also illustrated by the language of §37 of the Massachusetts Body of Liberties of 1641. That provision granted courts the authority to impose on a *civil* plaintiff who had instituted an improper suit "a proportionable *fine* to the use of the defendant, or accused person." It is noteworthy that the "fine" was payable to a private party, and not a governmental entity. In 1646, the Massachusetts General Court ruled that §37

of the Body of Liberties was based directly on Chapter 20 of Magna Carta.

The Court also finds it significant that, in the 18th and 19th centuries, "fines were assessed in criminal, rather than in private civil, actions." Again, in my view the Court's recitation of history is not complete. As noted above, §37 of the Massachusetts Body of Liberties required that "fines" payable to private litigants in civil cases be proportional. Furthermore, not all 17th-century sources unequivocally linked fines with criminal proceedings...Nor did all American courts in the 19th century view "fines" as exclusively criminal. The Massachusetts Supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." It explained that "the word 'fine' has other meanings" besides pecuniary penalties "inflicted by sentence of a court in the exercise of criminal jurisdiction...as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty." The Iowa Supreme Court had the following to say about fines: "The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly...A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in *some* form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property." **Hence, around the time of the framing and enactment of the Eighth Amendment some courts and commentators believed that the word "fine" encompassed civil penalties.**

In my view, the $6 million award of punitive damages imposed on BFI constitutes a fine subject to the limitations of the Eighth Amendment...

A governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law. I also note that by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim that it leaves the question open) that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity...

The only remaining question is whether the award of over $6 million in this case is "excessive" within the meaning of the Eighth Amendment.

Using economic analysis, some of the *amici* in support of BFI argue that the wealth of a defendant should not, as a constitutional matter, be taken into account in setting the amount of an award of punitive damages. It seems to me that this argument fails because the Excessive Fines Clause is only a substantive ceiling on the *amount* of a monetary sanction, and not an economic primer on what factors best further the goals of punishment and deterrence...Moreover, as a historical matter, the argument is weak indeed. First, Magna Carta only required that an amercement be proportionate and not destroy a person's livelihood. Second, Blackstone remarked that the "*quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's."

Determining whether a particular award of punitive damages is excessive is not an easy task. The

proportionality framework that the Court has adopted under the Cruel and Unusual Punishments Clause, however, offers some broad guidelines...I would adapt the *Solem* framework to punitive damages in the following manner. **First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.**

The Court of Appeals did not think that the Excessive Fines Clause applied to awards of punitive damages and therefore did not conduct any sort of proportionality analysis. I would remand the case to the Court of Appeals so that it could, in the first instance, apply the *Solem* framework set forth above and determine whether the award of over $6 million imposed on BFI violates the Excessive Fines Clause.