NOTE

Uncharted Waters: The Supreme Court Plots the Course to a Constitutional Bright-Line Restriction on Punitive Awards in *Exxon Shipping Co. v. Baker*[*]

I. Introduction

In *Exxon Shipping Co. v. Baker*, the United States Supreme Court established for the first time in its history a mathematical bright line to limit the amount of a punitive damages award.[1] The Court reduced a punitive award levied against Exxon in the aftermath of the 1989 *Exxon Valdez* oil spill from $2.5 billion to $507.5 million, the maximum amount allowed under the Court's newly created 1:1 ratio of punitive to compensatory damages.[2] Before the *Exxon* decision, the Supreme Court had consistently expressed an unwillingness to adopt a bright-line ratio when addressing constitutional challenges to the size of state punitive damages awards.[3] *Exxon*, however, did not involve a constitutional analysis according to Justice Souter's majority opinion.[4] Instead, the Court reviewed the punitive damages award for conformity with principles of maritime law—an area where the Court may exercise its federal common law authority.[5] Because the Court acted in its capacity as "a common law court of last review,"[6] it was not limited by the Constitution and "was free to craft a rule based purely on policy considerations."[7]

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* The author wishes to thank Associate Dean Liesa Richter of the University of Oklahoma College of Law for her advice, support, and encouragement during the writing of this note.

1. *See* 128 S. Ct. 2605, 2633 (2008) (holding that a 1:1 ratio of punitive to compensatory damages marks the "fair upper limit" in maritime cases); *see also* discussion *infra* Parts II-III.

2. *See id.* at 2611, 2634.

3. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . ."); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991))).

4. *See* 128 S. Ct. at 2626.

5. *Id.*

6. *Id.* at 2629.

7. Lester Sotsky & Daniel J. Stuart, *Punitives Post-'*Exxon*'?*, NAT'L L.J., Sept. 29, 2008, at 12; *see also infra* text accompanying notes 145-46.

The most significant question after *Exxon* is whether the decision will have any effect outside the narrow context of maritime law. The early reaction from both courts and commentators suggests that *Exxon* is limited in scope and application to maritime cases.[8] This note explores the possibility that *Exxon* could have a broader impact. Although the majority attempted to confine its new bright-line rule to the unique maritime context of the case,[9] a close reading of the decision, coupled with an understanding of the Court's recent punitive damages jurisprudence, leads to the conclusion that *Exxon* is likely to have far-reaching implications outside the maritime arena. Specifically, the Supreme Court laid the groundwork for adopting a constitutional bright-line ratio by embracing the simplicity and certainty of a quantitative approach to limiting punitive awards.[10]

Part II of this note discusses the Supreme Court's punitive damages jurisprudence before *Exxon*, focusing primarily on the Court's substantive due process cases and the evolution of constitutional protections against excessive punitive damages awards. Part III examines the *Exxon* case in depth and includes a statement of the facts and procedural history, an explanation of the majority opinion, and a discussion of the important points in the concurring and dissenting opinions. Part IV explains four major reasons why the *Exxon* decision will likely extend beyond the maritime context and spill over into the Court's constitutional framework: (1) the fact that the same considerations

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8. *See, e.g.*, JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 876 n.9 (8th Cir. 2008) (noting that *Exxon* does not mandate a 1:1 ratio of punitive to compensatory damages "as a matter of constitutional law"); Kunz v. DeFelice, 538 F.3d 667, 678 (7th Cir. 2008) (observing that *Exxon* draws a distinction between federal common law claims of excessiveness and constitutional claims of excessiveness); Am. Family Mut. Ins. Co. v. Miell, 569 F. Supp. 2d 841, 859 (N.D. Iowa 2008) (explaining that *Exxon* does not mean that "the Constitution prohibits a punitive damage award greater than the amount awarded for compensatory damages"); VICKI LAWRENCE MACDOUGALL, 8 OKLAHOMA PRACTICE SERIES: OKLAHOMA PRODUCT LIABILITY LAW § 12:17(C)(2)(b), at 82 (Supp. 2009-2010) (noting that *Exxon* "judicially created a 1:1 ratio rule under maritime law and has no real precedential value outside the limited scope of admiralty"); Erwin Chemerinsky, *A Narrow Ruling on Punitive Damages*, TRIAL, Sept. 2008, at 62, 63 ("[T]he Court was clear that it was dealing only with punitive damages in maritime cases. At most, its reasoning can be applied to other areas of federal common law where punitive damages are allowed."); *cf.* Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008) (stating that "[a]lthough *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application," but then concluding that "the 1:1 ratio imposed by *Exxon* is limited to cases such as *Exxon* itself" and that "*Exxon* does not automatically limit an award of punitive damages under § 1983 to an amount equal to compensatory damages").

9. *See Exxon*, 128 S. Ct. at 2626.

10. *See id.* at 2629 (describing quantitative standards as "more rigorous" than current constitutional standards and lauding them for "eliminating unpredictable outlying punitive awards").

supporting *Exxon*'s ratio also underlie the Court's due process approach, (2) the Court's explicit recognition that verbal constraints fail to adequately curb excessive punitive awards, (3) the majority's express intermingling of *Exxon* with due process precedent, and (4) the Supreme Court's general hostility to large punitive awards and recent activism in the area of punitive damages. Part V briefly summarizes and concludes this note.

II. The Supreme Court's Use of Substantive Due Process to Limit Punitive Damages Awards

Throughout most of its history, "[t]he Supreme Court has . . . taken a relatively laissez-faire approach toward punitive damages law, viewing punitive awards as a discretionary function of the state common law courts."[11] As recently as 1989, the Court stated that "where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."[12] Everything changed in the early 1990s, however. Since 1991, the Supreme Court has handed down a series of cases recognizing that the Due Process Clause of the Fourteenth Amendment places substantive and procedural limitations on punitive damages awards.[13] These cases mark a dramatic shift in the Court's punitive damages jurisprudence "from an essentially hands-off approval of common-law practice for awarding and reviewing punitive damages to an express recognition of a right not to be subjected to grossly excessive punitive awards."[14]

A. Pacific Mutual Life Insurance Co. v. Haslip*: The Court Hints at a Substantive Due Process Right to a Reasonable Punitive Damages Award*

The Supreme Court first applied the Due Process Clause to a punitive damages award in *Pacific Mutual Life Insurance Co. v. Haslip*.[15] In that case, the plaintiff sued Pacific Mutual under a theory of vicarious liability for the

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11. Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 796 (2006); *see also* Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 468 (2005) ("For more than two hundred years, the Court deferred to the states' choice of substantive, procedural, and evidentiary rules for assessing and awarding punitive damages.").

12. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989).

13. Paul DeCamp, *Beyond* State Farm*: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231, 233, 268 (2003).

14. *Id.* at 268.

15. *See* 499 U.S. 1, 12, 18 (1991).

fraud committed by one of its agents.[16] The jury awarded the plaintiff $200,000 in compensatory damages and more than $800,000 in punitive damages.[17] The trial court entered judgment accordingly, and the Alabama Supreme Court affirmed on appeal.[18] In upholding the punitive damages award,[19] the U.S. Supreme Court focused on the procedures used by the lower courts in Alabama to impose and review the award.[20] The Court found that the award satisfied due process because of the proper provision of procedural safeguards—the trial court had provided adequate jury instructions, and both the trial court and the Alabama Supreme Court had conducted appropriate postverdict review.[21]

Though the *Haslip* Court relied primarily on notions of procedural due process, the case also contained an important substantive due process component.[22] Much of the language in the opinion suggested that the Court was concerned with the size of punitive damages awards. For example, Justice Blackmun noted the Court's "concern about punitive damages that 'run wild.'"[23] The Court also feared that unlimited jury or judicial discretion in setting punitive damages "may invite extreme results that jar one's constitutional sensibilities."[24] Although the Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,"[25] it foreshadowed the future importance of the substantive element of the Due Process Clause when it explained that concerns of "reasonableness" factor into the constitutional analysis.[26] Moreover, the Court hinted at the relevance of ratios when it observed that the punitive award imposed against Pacific Mutual, which totaled more than four times the amount of compensatory damages, might have been close to but did not "cross the line into the area of constitutional impropriety."[27]

This aspect of the majority opinion prompted Justice Scalia to write separately to emphasize his view that the Court should focus solely on

16. *Id.* at 5-6.
17. *See id.* at 7 n.2.
18. *Id.* at 7.
19. *Id.* at 23-24.
20. *See id.* at 18-23.
21. *See id.* at 23-24.
22. *See* DeCamp, *supra* note 13, at 270 n.201; Jiang, *supra* note 11, at 796; Rustad, *supra* note 11, at 508 n.331.
23. *Haslip*, 499 U.S. at 18.
24. *Id.*
25. *Id.*
26. *See id.*
27. *See id.* at 23-24.

procedural due process.[28] Because the procedures at issue in the case accorded with the traditional practice of American courts and did not violate the Bill of Rights, Justice Scalia argued that there was no need for the Court to consider "fairness" or "reasonableness."[29]

B. TXO Production Corp. v. Alliance Resources Corp.: *The Supreme Court Determines That the Due Process Clause Places Substantive Limitations on Punitive Damages Awards*

In *TXO Production Corp. v. Alliance Resources Corp.*, the Supreme Court explicitly addressed a substantive due process challenge to a significant punitive damages award.[30] The case arose out of a dispute over oil and gas development rights.[31] Although TXO knew that Alliance had good title to the oil and gas rights at issue, it tried to cloud Alliance's title by recording a faulty quitclaim deed as part of a fraudulent scheme to renegotiate the parties' royalty agreement.[32] TXO then brought a declaratory judgment action against Alliance, and Alliance counterclaimed alleging slander of title.[33] At trial, the jury found TXO liable for slander of title and awarded Alliance $19,000 in compensatory damages and $10 million in punitive damages.[34]

The issue on appeal before the Supreme Court was whether "a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law."[35] According to the plurality opinion authored by Justice Stevens, the Court's previous decisions established "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'"[36] The plurality returned to the Court's language in *Haslip* and once again refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable."[37] Instead, Justice Stevens reiterated that whether a punitive award is "grossly excessive" depends at least in part on a "general concer[n] of reasonableness."[38]

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28. *See id.* at 24-25 (Scalia, J., concurring in judgment).
29. *Id.*
30. *See* 509 U.S. 443, 446 (1993) (plurality opinion).
31. *See id.* at 447.
32. *See id.* at 447-49.
33. *Id.* at 449-50.
34. *See id.* at 450-51.
35. *Id.* at 453.
36. *Id.* at 453-54 (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).
37. *Id.* at 458 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).
38. *Id.* (alteration in original) (quoting *Haslip*, 499 U.S. at 18; Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)).

Applying this broad principle to the facts, the plurality concluded that the punitive award did not violate due process.[39] According to Justice Stevens, the award was not unconstitutionally excessive considering "the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[40] Thus, a plurality of the Supreme Court established that a large disparity between the size of a punitive damages award and the amount of compensatory damages does not, without more, constitute a violation of substantive due process.[41] The plurality failed, however, to provide specific guidelines that courts should consider when confronted with challenges to the size of punitive awards.[42] This led Justice O'Connor to criticize the subjectivity of the plurality's approach and to argue that the Court's judgments "should be informed by objective factors to the maximum possible extent."[43]

Justice Scalia, joined by Justice Thomas, concurred in the judgment because he believed that the punitive award satisfied procedural due process.[44] He refused to join the plurality opinion "since it ma[de] explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable."[45] According to Justice Scalia, there is no "constitutional right to a substantively correct 'reasonableness' determination."[46] As long as lower courts comply with the requirements of procedural due process, the Court has no business disturbing punitive damages awards.[47]

C. BMW of North America, Inc. v. Gore: *The Court Establishes "Guideposts" to Determine Whether a Punitive Damages Award Comports with Substantive Due Process*

Just three years after *TXO*, the Supreme Court in *BMW of North America, Inc. v. Gore* found a punitive damages award to be excessive and in violation

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39. *See id.* at 462.

40. *Id.* at 460. The Court noted that the value of the oil and gas rights, and hence the value of the royalty obligation that TXO fraudulently attempted to renegotiate, was in the millions. *See id.* at 460-61. Thus, although the only actual harm to Alliance was the cost of litigation, the potential harm if TXO's scheme had succeeded was enormous. *See id.* at 462.

41. *See id.* at 462.

42. *See id.* at 480 (O'Connor, J., dissenting) ("The plurality opinion erects not a single guidepost to help other courts find their way through this area.").

43. *Id.* at 480-81 (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)).

44. *See id.* at 470 (Scalia, J., concurring in judgment).

45. *Id.* (citation omitted).

46. *Id.* at 471.

47. *See id.*

of the substantive component of the Due Process Clause for the first time.[48] The facts of the case are relatively simple. Dr. Ira Gore brought suit against BMW after he discovered that his black sports sedan had been repainted before he purchased it.[49] As part of a national policy, BMW did not disclose repairs to cars damaged during the course of manufacture or transportation if the repair cost did not exceed 3% of the retail price of the car.[50] The cost of repainting Dr. Gore's car had only totaled around 1.5% of its retail price; consequently, BMW had sold the car as new.[51]

The jury awarded Dr. Gore $4000 in compensatory damages—the difference in value between his car and a car that had not been refinished—and $4 million in punitive damages on the grounds that BMW's nondisclosure policy "constituted 'gross, oppressive or malicious' fraud."[52] The jury arrived at the punitive damages number by multiplying the actual damages by 1000—the approximate number of vehicles BMW had sold nationwide for more than they were worth.[53] The Alabama Supreme Court remitted the award to $2 million, finding that it was improper for the jury to factor in car sales that occurred outside of Alabama.[54] That court, however, did not adequately explain how it arrived at the $2 million number.[55] The U.S. Supreme Court granted certiorari to clarify the standard for determining whether a punitive award is unconstitutionally excessive.[56]

Writing for the majority, Justice Stevens first reiterated the principle that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."[57] He then explained that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[58] Further, he noted that states have tremendous flexibility in determining the appropriate amount of punitive damages in various types of

48. *See* 517 U.S. 559, 585-86 (1996).
49. *Id.* at 563.
50. *Id.* at 563-64.
51. *Id.* at 564.
52. *Id.* at 564-65 (quoting ALA. CODE § 6-11-21 (1993)).
53. *See id.*
54. *Id.* at 567.
55. *See id.* at 567 & nn.10-11. The Alabama Supreme Court claimed to use a "comparative analysis" that considered punitive damages awards in cases from Alabama and other states involving misrepresentation in the sale of automobiles; however, the court neither cited any such cases nor otherwise documented how it arrived at the $2 million figure. *Id.*
56. *Id.* at 568.
57. *Id.* at 562 (quoting TXO Prod. Corp. v. Alliance Res. Corp. 509 U.S. 443, 454 (1993)).
58. *Id.* at 568 (citing, inter alia, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)).

cases.[59] Despite this "homage to federalist principles,"[60] however, the Court ultimately reversed the judgment of the Alabama Supreme Court.[61]

As in *Haslip* and *TXO*, the *Gore* majority refused to draw a bright line marking the constitutional outer limit for punitive damages awards,[62] but the Court stated that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose."[63] To that end, the Court erected three "guideposts" to help determine whether an award is excessive under the Due Process Clause: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio between the harm or potential harm suffered by the plaintiff and the punitive damages award, and (3) the comparison of the punitive award to civil penalties that could be imposed for similar misconduct.[64]

The Court referred to reprehensibility as "the most important indicium of the reasonableness of a punitive damages award"[65] and found that BMW's conduct was not especially reprehensible, in part because it caused only economic harm and did not involve deliberate wrongdoing or an evil motive.[66] With respect to the ratio guidepost, the Court stated that high ratios may be appropriate where egregious conduct has resulted in minimal compensatory damages or where injury is difficult to detect or value.[67] Accordingly, the Court "rejected the notion that the constitutional line is marked by a simple mathematical formula,"[68] but noted that "[w]hen the ratio is a breathtaking 500 to 1, . . . the award must surely 'raise a suspicious judicial eyebrow.'"[69] Finally, the Court observed that the maximum possible civil sanction in any state for BMW's conduct was only a fraction of the $2 million punitive award.[70] After analyzing the three guideposts, the Court concluded that "the

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59. *Id.*
60. Rustad, *supra* note 11, at 509.
61. *Gore*, 517 U.S. at 586.
62. *Id.* at 585.
63. *Id.* at 574.
64. *Id.* at 574-75.
65. *Id.* at 575.
66. *See id.* at 575-80.
67. *Id.* at 582.
68. *Id.*
69. *Id.* at 583 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).
70. *See id.* at 584. The maximum statutory fine in Alabama for violating the Deceptive Trade Practices Act (DTPA) was only $2000, while some other states had maximum fines ranging between $5000 and $10,000. *See id.* & nn.39-40 (citing seven states' civil penalty provisions for DTPA violations).

grossly excessive award imposed in th[e] case transcend[ed] the constitutional limit."[71]

Justice Scalia wrote a vigorous dissent criticizing the majority for its "unjustified incursion into the province of state governments."[72] According to Justice Scalia, due process requires only that a defendant have "an opportunity to contest the reasonableness of a [punitive award] in state court," not that such an award "actually *be* reasonable."[73] He chided the majority for creating a new constitutional standard constrained only by "the Justices' subjective assessment of . . . 'reasonableness'"[74] and ultimately concluded that the majority's "'guideposts' mark[ed] a road to nowhere" because they failed to provide any actual guidance.[75]

D. State Farm Mutual Automobile Insurance Co. v. Campbell: *The Supreme Court Creates a Presumption Against Punitive-to-Compensatory Ratios Greater than 9:1*

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court used principles of substantive due process to overturn a punitive damages award for only the second time.[76] The case arose out of State Farm's bad-faith failure to settle a claim against its insured, Curtis Campbell, within the limits of his automobile insurance policy.[77] While driving with his wife, Campbell attempted to pass six vans on a two-lane highway by crossing into the oncoming-traffic lane.[78] Todd Ospital was driving in the opposite direction

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71. *Id.* at 585-86.

72. *Id.* at 598 (Scalia, J., dissenting). Justice Ginsburg agreed with Justice Scalia. *See id.* at 607 (Ginsburg, J., dissenting) ("The Court . . . unnecessarily and unwisely ventures into territory traditionally within the States' domain . . . .").

73. *Id.* at 599 (Scalia, J., dissenting).

74. *Id.*

75. *Id.* at 605. Justice Scalia went on to describe the consequences of the Court's new approach:

> The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct,"—a loophole that will encourage state reviewing courts to uphold awards as necessary for the "adequat[e] protect[ion]" of state consumers. By effectively requiring state reviewing courts to concoct rationalizations—whether within the "guideposts" or through the loophole—to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

Id. (alterations in original) (citations omitted).

76. *See* 538 U.S. 408, 416, 429 (2003).

77. *See id.* at 413-14.

78. *Id.* at 412.

and was forced to swerve into a vehicle driven by Robert Slusher to avoid colliding head-on with Campbell.[79] The collision killed Ospital and left Slusher permanently disabled.[80] Slusher and Ospital's estate (Ospital) brought suit against Campbell, and investigators and witnesses quickly reached a consensus that Campbell was at fault.[81] Nevertheless, State Farm insisted on contesting liability and refused offers to settle the claims for the policy limit of $25,000 per claimant.[82] To make matters worse, State Farm assured the Campbells that their assets were not in jeopardy and that they were not liable.[83]

Despite State Farm's assurances, however, the jury found Campbell entirely at fault and returned a judgment against him in the amount of $185,849, which was $135,849 more than Campbell's policy limit.[84] State Farm initially refused to cover the excess liability, even telling the Campbells that they might have to sell their property to pay the judgment.[85] Shortly thereafter, Campbell struck an agreement with Slusher and Ospital whereby Campbell would enlist Slusher's and Ospital's attorneys to sue State Farm for bad faith in return for Slusher's and Ospital's promises not to enforce their judgment against the Campbells.[86] State Farm finally agreed to pay the amount of the judgment in excess of the policy limits, but the Campbells pursued claims for bad faith, fraud, and intentional infliction of emotional distress, ultimately securing a judgment against State Farm for $1 million in compensatory damages and $145 million in punitive damages.[87]

The Supreme Court agreed to hear State Farm's appeal to determine whether "an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause."[88] Writing for the majority, Justice Kennedy stated the now-familiar principle that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[89] The Court then turned to the *Gore* guideposts, beginning with reprehensibility.[90] The majority explained that the Utah

79. *Id.* at 412-13.
80. *Id.* at 413.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* In addition, "Slusher and Ospital would receive 90 percent of any verdict against State Farm." *Id.* at 414.
87. *See id.* at 414-15.
88. *Id.* at 412.
89. *Id.* at 416 (citing, inter alia, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996)).
90. *See id.* at 418-19.

Supreme Court erred in finding State Farm's conduct to be especially reprehensible, because that court considered other dissimilar acts by State Farm and conduct by State Farm that occurred in other jurisdictions.[91] Justice Kennedy criticized the Utah Supreme Court for "adjudicat[ing] the merits of other parties' hypothetical claims against [State Farm] under the guise of the reprehensibility analysis"[92] and using the case "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[93] The Court concluded that the reprehensibility of State Farm's conduct should be assessed only in light of the specific conduct that harmed the Campbells.[94]

The most important aspect of the Court's opinion was its discussion of the ratio guidepost. The Court again refused to adopt "a bright-line ratio which a punitive damages award cannot exceed," but stated, "Our jurisprudence and the principles it has now established demonstrate . . . that . . . *few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*."[95] The Court also explained that "[s]ingle-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1."[96] These statements had the practical effect of creating a new rule of constitutional law: punitive-to-compensatory ratios greater than 9:1 presumptively violate due process.[97]

Next, the Court reiterated its observation from *Gore* that higher ratios may be appropriate where an especially egregious act has resulted in low compensatory damages or where injury is difficult to detect or value.[98] Given the context, the Court may have included this comment to describe the types of cases where lower courts may deviate from the new single-digit rule.[99] The Court then continued with its most significant statement in light of the recent *Exxon* decision: "When compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee."[100] This language strongly suggests that the

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91. *See id.* at 420-24.
92. *Id.* at 423.
93. *Id.* at 420.
94. *Id.* at 424.
95. *Id.* at 425 (emphasis added).
96. *Id.* (citation omitted).
97. *See* DeCamp, *supra* note 13, at 234; Andrew C.W. Lund, *The Road from Nowhere? Punitive Damage Ratios After* BMW v. Gore *and* State Farm Mutual Automobile Insurance Co. v. Campbell, 20 TOURO L. REV. 943, 982 (2005).
98. *State Farm*, 538 U.S. at 425.
99. *See* Lund, *supra* note 97, at 982-83.
100. *State Farm*, 538 U.S. at 425 (emphasis added).

Constitution prohibits ratios greater than 1:1 in cases with substantial compensatory damages, though the Court has yet to explicitly adopt such a rule.[101]

After thoroughly analyzing the reprehensibility and ratio guideposts, the Court paid little attention to the third guidepost—penalties for comparable misconduct.[102] Ultimately, the Court held that "application of the *Gore* guideposts to the facts of this case . . . likely would justify a punitive damages award *at or near the amount of compensatory damages*,"[103] once again suggesting 1:1 as the appropriate ratio of punitive to compensatory damages. The case was "neither close nor difficult,"[104] and because the $145 million punitive award "was an irrational and arbitrary deprivation of the property of the defendant," the Court remanded the case back to the Utah courts with instructions to recalculate the punitive damages.[105]

In dissent, Justice Ginsburg criticized the majority for unduly trampling on principles of federalism.[106] She noted that a state's decision "in setting single-digit and 1-to-1 benchmarks could hardly be questioned," but that the Court's decision to impose numerical controls "under the banner of substantive due process" was "boldly out of order."[107] Moreover, she denounced the majority's transformation of the flexible *Gore* guideposts into "marching orders" for the states.[108]

The Supreme Court's due process cases reflect a broad and relatively quick jurisprudential shift in the area of punitive damages. As recently as twenty years ago, the Court left punitive damages almost entirely up to the individual states.[109] Then, in the 1990s, the Court recognized and began to define constitutional limitations on the size of punitive awards, while still leaving states with a significant degree of flexibility.[110] Finally, in 2003, the Court eliminated much of the remaining state discretion by creating a presumption against punitive-to-compensatory ratios greater than 9:1 and suggesting 1:1 as the maximum ratio in some types of cases.[111]

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101. *But see* DeCamp, *supra* note 13, at 234 (claiming that the Court "arguably" created a 1:1 maximum ratio in cases with substantial compensatory damages).

102. *See State Farm*, 538 U.S. at 428. The Court briefly mentioned that the punitive damages award "dwarfed" the $10,000 maximum fine for an act of fraud. *Id.*

103. *Id.* at 429 (emphasis added).

104. *Id.* at 418.

105. *Id.* at 429.

106. *See id.* at 438-39 (Ginsburg, J., dissenting).

107. *Id.* at 438.

108. *Id.* at 439.

109. *See supra* note 12 and accompanying text.

110. *See* discussion *supra* Part II.A-C.

111. *See* discussion *supra* Part II.D.

III. Exxon Shipping Co. v. Baker: *The Supreme Court Expressly Limits the Ratio of Punitive to Compensatory Damages to 1:1 in Maritime Cases*

In 2008, yet another punitive damages case came before the Court.[112] This time, however, the dispute arose under federal maritime law and provided the Court with an opportunity to work with a clean slate.[113]

A. Facts and Procedural History

On March 24, 1989, the *Exxon Valdez* oil tanker struck a reef off the Alaskan coast, dumping approximately eleven million gallons of crude oil into Prince William Sound.[114] The captain that evening, Joseph Hazelwood, "had completed a 28-day alcohol treatment program while employed by Exxon . . . but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings."[115] Hazelwood continued to drink after the program, and there was evidence suggesting that his superiors at Exxon were aware of his relapse and even drank with him.[116] Additionally, although Exxon's company policy prohibited any employees from working on board a ship within four hours of drinking alcohol, Exxon officials failed to monitor Hazelwood after he returned from the alcohol treatment program.[117] According to witnesses, Hazelwood drank at least five double vodkas before the ship left port on the night of the accident, "enough that a non-alcoholic would have passed out."[118]

Because of poor weather conditions when the *Valdez* set sail, the tanker was forced to take an alternate route that diverted it from the usual outbound shipping lane.[119] Accordingly, the vessel steered east across the inbound lane to a less hazardous path.[120] This maneuver pointed the ship directly toward an underwater reef near Bligh Island and thus required Hazelwood to turn the tanker back west into the outbound lane at a specific point north of the reef.[121] Just before the required turn, Captain Hazelwood, the only individual on board licensed to navigate that particular stretch of the sound, inexplicably left the

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112. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).
113. *See id.* at 2611, 2626.
114. *See id.* at 2611, 2613.
115. *Id.* at 2612.
116. *Id.*
117. *See id.*
118. *Id.* (internal quotation marks omitted) (quoting *In re* Exxon Valdez, 270 F.3d 1215, 1236 (9th Cir. 2001)).
119. *Id.*
120. *Id.*
121. *Id.*

bridge and retired to his cabin "to do paperwork."[122] He also placed the ship on autopilot, increasing its speed and making the turn far more difficult for the officer and the helmsman who remained on the bridge.[123] "For reasons that remain a mystery," the officer and helmsman did not make the turn, and the *Valdez* ran aground on Bligh Reef.[124] To make matters worse, Hazelwood tried and failed to rock the tanker off the reef when he returned to the bridge, an action which may have caused even more oil to spill.[125] Relying on a blood test taken several hours after the accident, experts estimated that Hazelwood's blood-alcohol level at the time of the spill must have been about "three times the legal limit for driving in most States."[126]

In the wake of the accident, Exxon spent approximately $2.1 billion in cleanup efforts and agreed to pay substantial fines and restitution after pleading guilty to criminal violations of various federal statutes.[127] Although the company also settled civil suits brought by the United States and the State of Alaska, as well as several claims brought by private parties, many plaintiffs refused to settle their claims.[128] The case that is the subject of this note began in federal district court as a consolidation of the remaining civil cases against Exxon.[129] After dividing the plaintiffs seeking compensatory damages into three different classes—commercial fishermen, Native Alaskans, and landowners—the trial court created a mandatory class comprising all plaintiffs seeking punitive damages.[130] Members of that mandatory class, collectively referred to as "Baker," became the respondents in the case before the Supreme Court.[131]

Exxon stipulated to its negligence and liability for compensatory damages before trial, so the trial court adjudicated only three issues: (1) the amount of compensatory damages, (2) whether Exxon was liable for punitive damages, and (3) the amount of punitive damages.[132] After a jury trial, the trial court calculated "relevant" compensatory damages totaling $507.5 million[133] and left undisturbed the jury's award of $5 billion in punitive damages against

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122. *Id.*
123. *Id.*
124. *Id.* at 2612-13.
125. *Id.* at 2613.
126. *Id.*
127. *Id.*
128. *See id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 2634 (citing *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002)).

Exxon.[134] The Ninth Circuit Court of Appeals remanded the issue of the size of the punitive damages award twice in light of the Supreme Court's substantive due process cases before finally remitting the award to $2.5 billion.[135] The Supreme Court then granted certiorari to determine "whether the punitive damages awarded against Exxon . . . were excessive as a matter of *maritime common law*."[136]

B. The Majority Opinion of Justice Souter

In a 5–3 decision,[137] the Supreme Court held that a 1:1 ratio of punitive to compensatory damages marks the upper limit in maritime cases with "no earmarks of exceptional blameworthiness."[138] Thus, the Court vacated the $2.5 billion punitive damages award and remanded the case to the Ninth Circuit with instructions to remit the award to $507.5 million, an amount equal to the compensatory damages.[139]

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134. *See id.* at 2614.

135. *Id.* (citing *In re* Exxon Valdez, 270 F.3d 1215, 1246-47 (9th Cir. 2001) (first remand); 472 F.3d 600, 601, 625 (9th Cir. 2006) (per curiam) (second remand); 490 F.3d 1066, 1068 (9th Cir. 2007) (remitment)).

136. *Id.* (emphasis added). The Constitution grants federal courts jurisdiction over admiralty and maritime cases. *See* U.S. CONST. art. III, § 2, cl. 1; *see also* 28 U.S.C. § 1333(1) (2006) (authorizing the federal courts to exercise exclusive admiralty and maritime jurisdiction). This admiralty and maritime jurisdiction extends to all cases that arise on navigable waters. *See In re* Garnett, 141 U.S. 1, 14 (1891). The judiciary has been largely responsible for the development of maritime law, which the Supreme Court has described as "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864-65 (1986). Absent a statute on point, this judge-made law applies in maritime cases. *Id.* at 864. Because the *Exxon Valdez* oil spill occurred on navigable waters and no federal statute addressed maritime punitive damages, principles of maritime common law governed the case. *See Exxon*, 128 S. Ct. at 2626-27.

137. Justice Souter, Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas formed the five-member majority. *See Exxon*, 128 S. Ct. at 2611. Justice Stevens, Justice Ginsburg, and Justice Breyer concurred in part and dissented in part. *See id.* Justice Alito owned Exxon stock and recused himself. Lewis Goldshore & Marsha Wolf, *The Mother of All Oil Spills: U.S. Supreme Court Clarifies Punitive Damages*, N.J. L.J., Aug. 18, 2008, at 38, 38.

138. *Exxon*, 128 S. Ct. at 2633.

139. *Id.* at 2614, 2634. Before considering the punitive damages award, the Court addressed two preliminary questions: (1) "whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents," and (2) "whether the Clean Water Act (CWA) forecloses the award of punitive damages in maritime spill cases." *Id.* at 2614 (citation omitted). The Court was equally divided on the derivative liability question and therefore unable to order reversal on that ground, leaving the Ninth's Circuit's decision allowing derivative liability undisturbed. *See id.* at 2615-16. With respect to the preemption question, the Court agreed with the Ninth Circuit that the CWA does not preempt common law punitive damages remedies. *See id.* at 2618-19.

The Court began its discussion by noting that the issue of punitive damages in maritime law is a matter "which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."[140] The Court then set forth a broad history of punitive damages law, discussing the nature and purpose of punitive damages, the various procedures used for imposing punitive damages, scholarly criticism of punitive damages, and the Court's constitutional punitive damages jurisprudence.[141] From this history, the Court concluded that "[t]he real problem . . . is the stark unpredictability of punitive awards."[142] In language reflecting the same concerns underlying the Court's approach in *Gore* and *State Farm*, Justice Souter remarked that this unpredictability is problematic because "[c]ourts of law are concerned with *fairness* as consistency."[143] According to the Court, outlier awards that "subject defendants to punitive damages that dwarf the corresponding compensatories" create unfairness because they are not predictable.[144]

With this idea in mind, the Court turned to the specifics of Exxon's claim and immediately tried to distinguish the case at bar from its substantive due process cases:

> Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and *we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process*; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. . . .
>
> *Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy* for which responsibility lies with this Court as a source of judge-made law in the absence of statute.[145]

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140. *Id.* at 2619.

141. *Id.* at 2620-26.

142. *Id.* at 2625.

143. *Compare id.* (emphasis added) *with* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003), *and* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

144. *See Exxon*, 128 S. Ct. at 2610; *see also id.* at 2627 (noting that the unpredictability of punitive damages awards "is in tension with the function of the awards as punitive, just because of the *implication of unfairness* that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of *fairness* in dealing with one another" (emphasis added)).

145. *Id.* at 2626-27 (emphasis added).

The Court then made explicit that principles of fairness would guide its common law analysis, reasoning that "a penalty should be reasonably predictable in its severity" so that defendants know in advance the possible consequences of various types of conduct.[146]

To accomplish the goal of bringing uniformity and predictability to punitive damages in maritime law, the Court chose from three different approaches, "one verbal and two quantitative."[147] The Court quickly rejected the verbal approach—regulation through the use of jury instructions and judicial review criteria.[148] Using reasoning that necessarily undermines the *Gore* guideposts,[149] the Court concluded that verbal formulations offer nonspecific guidance and fail to insure against unpredictable outlying awards.[150] Justice Souter wrote, "[O]ur experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us *doubtful that anything but a quantified approach will work*."[151] The Court also stated that "as long as there are no punitive-damages guidelines, corresponding to the federal and state [criminal] sentencing guidelines, it is *inevitable that the specific amount of punitive damages* awarded whether by a judge or by a jury *will be arbitrary*."[152] Thus, the Court reasoned that a quantified approach with "*more rigorous standards than the constitutional limit*" was necessary to "eliminat[e] unpredictable outlying punitive awards."[153]

Next, the Court considered the first quantitative option—"a hard dollar cap on punitive damages."[154] The majority gave two reasons for eliminating this alternative. First, no particular dollar figure would be appropriate in all cases since there is no such thing as a "standard" tort or contract injury.[155] Second, the judiciary would not be as effective as a legislature in implementing a hard cap, because the judiciary, unlike a legislature, could not revisit the cap when

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146. *See id.*

147. *See id.* at 2627.

148. *See id.* at 2627-29.

149. Though not specifically mentioned by the *Exxon* Court, one can safely assume that the *Gore* guideposts approach, as expounded in *State Farm*, qualifies as a "verbal approach." *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418-28 (2003). Even with *State Farm*'s 9:1 presumption, the constitutional approach remains quasi-quantitative at best, because it still requires courts to consider a multitude of elusive factors that resemble the sorts of abstract judicial review criteria criticized in *Exxon*. *See id.* at 425.

150. *See Exxon*, 128 S. Ct. at 2627-29.

151. *Id.* at 2628 (emphasis added).

152. *Id.* at 2628-29 (emphasis added) (internal quotation marks omitted) (quoting Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003)).

153. *Id.* at 2629 (emphasis added).

154. *Id.*

155. *Id.*

it needed "tinkering."[156] Courts must have an issue on the docket to take action and thus would lack the flexibility of a legislature to modify a hard cap whenever necessary.[157]

The Court eventually concluded that "[t]he more promising alternative [was] to . . . peg[] punitive to compensatory damages using a ratio or maximum multiple."[158] This was the preferred method because many states and Congress had already adopted this model in other areas of law.[159] Moreover, the Court reasoned that "the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in [the] due process analysis."[160] The Court anticipated and dismissed potential criticism that this method resembled judicial legislation by explaining that its duty as "a common law court of last review, faced with a perceived defect in a common law remedy," included crafting a solution to eliminate outlier punitive damages awards.[161] The Court further observed that because "courts have [traditionally] accepted primary responsibility for reviewing punitive damages and thus for their evolution," the judiciary could not "wash its hands of a problem it created, simply by calling quantified standards legislative."[162] Additionally, the Court referenced its decision in *State Farm* and reasoned that "adopting an admiralty-law ratio is no less judicial than picking one as an outer limit of constitutionality for punitive awards."[163]

In an attempt to determine the appropriate ratio, the Court began by surveying state and federal statutes adopting ratios.[164] Although the Court noted that a small majority of states using ratios have elected 3:1, it decided that 3:1 was not a "reasonable limit" in the case at bar, which involved a substantial recovery and only reckless action that was "profitless to the tortfeasor."[165] The state 3:1 statutes apply to all types of cases, including those featuring egregious and malicious conduct, so the Court reasoned that the 3:1 upper limit was not appropriate in a case involving conduct only slightly worse than negligence.[166] The Court also considered and rejected the 2:1 ratio used

156. *Id.*
157. *See id.*
158. *Id.*
159. *See id.*
160. *Id.*
161. *Id.* at 2629-30.
162. *Id.*
163. *Id.* at 2630 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).
164. *See id.* at 2631-32.
165. *See id.*
166. *See id.*

in federal treble-damages statutes.[167] These statutes, according to the Court, apply to entirely different types of cases and often serve the dual function of augmenting official enforcement of the law by creating incentives for private litigation, a concern not present in the kind of case before the Court.[168]

Ultimately, the Court concluded that the median ratio of punitive to compensatory damages across a broad spectrum of cases provides the best evidence of the accepted limit for a reasonable punitive award.[169] This ratio, the Court said, "reflect[s] what juries and judges have considered reasonable across many hundreds of punitive awards."[170] Relying on empirical studies of *land-based* punitive damages awards,[171] the Court determined that the median ratio for all types of cases—ranging from those with the least blameworthy conduct triggering punitive damages to those featuring malice—is less than 1:1.[172] Thus, "given the need to protect against the possibility . . . of awards that are unpredictable and unnecessary," the Court concluded that a 1:1 ratio marks the "fair upper limit" in maritime cases not featuring especially blameworthy conduct.[173] As additional support for the 1:1 ratio, the Court cited its statement in *State Farm* that a 1:1 ratio may represent the *constitutional* ceiling when a case involves substantial compensatory damages.[174] And in an intriguing footnote at the end of the opinion, the Court observed that because of the substantial class recovery of over $507 million, "[i]n this case, . . . the *constitutional* outer limit may well be 1:1."[175]

C. Concurring and Dissenting Opinions

Justice Scalia, joined by Justice Thomas, wrote a two-sentence concurring opinion in which he expressed his belief that the Court's previous cases imposing constitutional limits on punitive damages were wrongly decided.[176]

Justice Stevens wrote an opinion concurring in part and dissenting in part in which he argued that Congress, not the Court, should make the sort of

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167. *See id.* at 2632.

168. *See id.* (noting that the rules governing patent, trademark, and antitrust cases are not applicable in the maritime context and explaining that, in the antitrust context specifically, Congress intended the treble damages remedy to encourage private suits as a means of supplementing official enforcement of the law).

169. *Id.*

170. *Id.*

171. *See id.* at 2624-25 & n.14.

172. *Id.* at 2633.

173. *Id.*

174. *Id.* at 2634 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

175. *Id.* at 2634 n.28 (emphasis added).

176. *Id.* at 2634 (Scalia, J., concurring).

empirical judgments expressed in the majority opinion.[177] Although he acknowledged that maritime law is judge made to a significant degree, Justice Stevens argued that maritime law is now based primarily on federal statute rather than common law.[178] Citing several maritime statutes that could have contained a limitation on punitive damages had Congress so intended, Justice Stevens concluded that Congress had affirmatively chosen not to restrict the availability of punitive damages in maritime law.[179]

Additionally, Justice Stevens found two problems with the Court's empirical approach. First, since maritime law restricts plaintiffs' access to compensatory damages more than land-based tort law, maritime punitive damages may help compensate for certain types of injuries not otherwise fully compensable.[180] Second, Justice Stevens noted that legislatures rather than courts typically impose ratios, because legislatures are better situated to evaluate empirical data and balance policy considerations.[181] For these reasons, Justice Stevens favored judicial restraint and would have affirmed the Ninth Circuit's decision using the traditional abuse-of-discretion standard.[182]

Justice Ginsburg also dissented from the punitive damages portion of the majority opinion and expressed her view that the Court should have left the matter to Congress.[183] Though Justice Ginsburg acknowledged that the Court had the power to craft a numerical limitation on punitive damages in maritime law,[184] she echoed Justice Stevens's concerns about the "venturesome character of the Court's decision" to impose a fixed ratio in the absence of evidence that courts have traditionally acted in this manner.[185] Additionally, she questioned the need to depart from the common law approach to punitive damages since the Court failed to note any problems with outlier punitive damages awards in maritime cases.[186] Even "assuming a problem in need of

177. *Id.* (Stevens, J., concurring in part and dissenting in part).

178. *Id.* at 2634-35.

179. *See id.* at 2635-36.

180. *Id.* at 2636-37.

181. *Id.* at 2637. In fact, Justice Stevens pointed out that the majority opinion cited no state court that had ever "imposed a precise ratio . . . under its common-law authority." *Id.*

182. *Id.* at 2635.

183. *See id.* at 2639-40 (Ginsburg, J., concurring in part and dissenting in part).

184. *Id.* at 2639. Because the Court acted under its common law authority, Justice Ginsburg distinguished this case from "the Court's recent forays into the domain of state tort law under the banner of substantive due process." *Id.*

185. *Id.*

186. *Id.* Under the common law approach, "punitive damages are determined by a properly instructed jury, followed by trial-court, and then appellate-court review, to ensure that [the award] is reasonable." *Id.* (alteration in original) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991)).

solution," Justice Ginsburg found the Court's 1:1 ratio problematic because of its uncertain application in cases with different facts and more egregious conduct.[187] Finally, Justice Ginsburg drew attention to the unresolved questions concerning the broader significance of the Court's opinion:

> In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed "the constitutional outer limit"? On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?[188]

Justice Breyer concurred in part and dissented in part, contending that the Court could have accomplished the objective of bringing uniformity and certainty to punitive damages in maritime law "without the rigidity that an absolute fixed numerical ratio demands."[189] Moreover, Justice Breyer argued that the facts of this case warranted an exception to the Court's 1:1 ratio since a jury, the trial court, and the Ninth Circuit all had concluded that Exxon's conduct was egregious enough to justify an enormous punitive damages award.[190] Justice Breyer would have upheld the award because he found no basis in the record for disagreeing with the lower courts' characterization of Exxon's conduct as sufficiently reprehensible to warrant a punitive damages award greater than the compensatory damages.[191]

IV. Implications Beyond the Maritime Arena: Why Exxon *Foreshadows a Constitutional Bright-Line Ratio*

The *Exxon* decision ostensibly affects only a narrow category of cases and adds nothing to the Supreme Court's constitutional punitive damages jurisprudence. Indeed, the majority made every effort to cabin its decision to maritime law with the apparent intention of leaving *Gore* and *State Farm* undisturbed.[192] Nevertheless, although the precise holding in *Exxon* may be narrow, the case is likely to have a substantial impact on the constitutional

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187. *See id.* Justice Ginsburg questioned, "What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain? Should the magnitude of the risk increase the ratio and, if so, by how much?" *Id.* (citation omitted).

188. *Id.* (citation omitted).

189. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part). Justice Breyer mentioned the Court's constitutional approach as a flexible yet effective means of controlling punitive awards. *See id.*

190. *See id.*

191. *See id.*

192. *See id.* at 2626-27; *see also supra* text accompanying note 145.

dimension of punitive damages law because *State Farm* failed to clearly define when a punitive award violates due process.[193] Instead, *State Farm* left lower courts to grapple with the application of the "clarified" *Gore* guideposts. Thus, the Court will inevitably confront a due process challenge to the size of a state punitive damages award in the future,[194] and the tortfeasor is certain to rely heavily on *Exxon* when arguing that the award is excessive.[195] At that point, the Court will have two options: (1) ignore *Exxon* and somehow attempt to refine the *Gore* guidepost approach, or (2) tread down the path created by *Exxon* and adopt a mathematical bright line as part of the due process guarantee.[196] For the reasons discussed below, the Court will likely use *Exxon* as the vehicle to finally establish a constitutional bright-line ratio.

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193. *See* Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779, 812 (2004) ("Although the Court obviously intended *State Farm* to clarify past ambiguities and provide practical guidance to lower courts considering punitive damage claims, an examination of a number of recent lower court cases reveal [sic] that it fell seriously short in this endeavor. Moreover, *State Farm* raises new questions about the demands of due process in the context of punitive damages, and it fails to address several important issues left unresolved by its earlier cases. Even after *State Farm*, the Court's application of due process norms to punitive damages remains very much a work in progress."); *id.* at 800 ("*State Farm*'s warnings about excessive punitive damages ratios may well have been loud, but they are far from clear."); *see also* Jiang, *supra* note 11, at 799 ("Despite the *State Farm I* majority's best efforts to create a more cohesive punitive damages framework through the use of the [*Gore*] factors, it has resoundingly failed to achieve this result.").

194. *See* Lund, *supra* note 97, at 989 ("[I]f *State Farm* proves unable to constrain capricious jury awards, it is likely that the analysis that Justice Scalia called the 'road to nowhere' and 'insusceptible of principled application' will again come before the Court . . . ." (footnote omitted)).

195. *See* Sotsky & Stuart, *supra* note 7, at 12.

196. *See* Lund, *supra* note 97, at 989 (noting that the Court will be forced to choose between the guidepost approach, animated by a distrust of bright-line rules, and a defined numerical limitation, animated by concerns for predictability and fairness); *see also* Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2083 (2008) ("At some point, the Justices may find themselves sufficiently informed to formulate—and willing to bear the costs of implementing—a rule, and . . . impose an absolute . . . ratio with respect to compensatory damages that punitive awards may not exceed . . . ."); Benjamin J. Robinson, Comment, *Distilling Minimum Due Process Requirements for Punitive Damages Awards:* Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)*, 60 FLA. L. REV. 991, 1006 (2008) (noting that the most important remaining issue in punitive damages law is whether the Court will use substantive due process to establish a bright-line restriction on the size of punitive damages awards).

A. The Considerations Driving the Court's Maritime Law and Due Process Analyses Are Identical and Should Produce Similar Rules

In formulating a 1:1 punitive-to-compensatory ratio for maritime law, the Court placed tremendous emphasis on fairness, predictability, and the need to eliminate outlier punitive damages awards.[197] Significantly, these exact same concerns inform the Court's judgment when it reviews state punitive awards for conformity with the Constitution. Fairness and predictability lie at the heart of due process.[198] Perhaps not surprisingly, then, the *Exxon* majority relied heavily on its due process decisions to conclude that high punitive-to-compensatory ratios are problematic in maritime law.[199] Whether the Court is applying the Constitution or maritime common law, it begins with the same basic premise: excessive punitive damages awards are unreasonable and must be judicially regulated. Reasonableness, a concept that encompasses fairness, predictability, and nonarbitrariness, is the touchstone of an appropriate punitive damages award in both contexts.

In *Exxon*, the Court took a significant step by judicially defining a reasonable punitive damages award.[200] Never before had the Court quantified reasonableness. *Gore* merely provided a list of factors that bear on reasonableness,[201] while *State Farm* warned that punitive-to-compensatory ratios exceeding single digits would rarely be reasonable.[202] *Exxon* went further by announcing that the median ratio of punitive to compensatory damages across hundreds of judge and jury verdicts represents the outer limit

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197. *See Exxon*, 128 S. Ct. at 2625-27; *see also* discussion *supra* Part III.B.

198. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (referring to "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" (alteration in original)); *id.* at 416-18 (discussing the problems with grossly excessive and arbitrary punitive awards); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) (explaining the importance of punitive damages standards that promote "the uniform general treatment of similarly situated persons that is the essence of law itself"); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (noting the importance of reasonableness in the "constitutional calculus" (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991))); *see also* discussion *supra* Part II.

199. *See* 128 S. Ct. at 2625-26, 2629 (citing, inter alia, *State Farm*, 538 U.S. 408, *Gore*, 517 U.S. 559, and *TXO*, 509 U.S. 443); Sotsky & Stuart, *supra* note 7, at 12 ("That the court relied so heavily on its prior due process pronouncements on punitives to conclude as a matter of maritime law that high ratios are problematic will surely invite defendants to argue that the court's reasoning—*if not its conclusion*—should apply to a broader range of cases on constitutional grounds." (emphasis added)).

200. *See* 128 S. Ct. at 2632-33.

201. *See* 517 U.S. at 574-75.

202. *See* 538 U.S. at 425.

of reasonableness for a punitive award.[203] The Court then drew a bright line to protect against "unpredictable and unnecessary" awards with ratios greater than 1:1.[204]

Importantly, "neither the reasoning nor the authority relied on by the court to establish this maritime rule dictate or suggest that a different result should obtain in other cases."[205] In fact, the Court relied on *land-based* tort verdicts to come up with its median ratio.[206] Thus, the maritime context of the case was in no way relevant to the Court's determination of reasonableness. As one prominent scholar has noted, the Court's "reasoning was less about maritime law and more about the need for predictable and consistent rules for punitive damages awards."[207]

Moreover, the Court did not attempt to offer a distinction between punitive awards that are reasonable in maritime law and those that are reasonable as a matter of constitutional law.[208] Nor does any principled distinction exist when identical concerns apply in both contexts. If 1:1 represents the upper limit of a reasonable punitive award in maritime law, and no peculiar feature of maritime law leads to that result, then surely 1:1 also marks the outermost boundary of a reasonable award under the Constitution. *Exxon* fails to explain why the appropriate size of a punitive damages award should depend on whether the conduct subject to punishment occurred on navigable waters or on land. Accordingly, when the Court confronts a due process challenge to the size of a punitive damages award in the future, the most intellectually honest and logically consistent response will be to hold that the Constitution limits punitive damages to an amount equal to compensatory damages.

B. The Exxon *Court Recognized the Inherent Flaws in the Court's Substantive Due Process Framework When It Rejected a Verbal Approach to Reining in Punitive Damages Awards*

Even if the Court can get past the general problem of identical considerations resulting in different rules—perhaps by adopting a legal fiction that reasonableness in maritime law differs from reasonableness in constitutional law—*Exxon* casts doubt on the continuing validity of the

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203. 128 S. Ct. at 2632-33.

204. *Id.* at 2633. Although the Court did not explicitly say that awards with ratios greater than 1:1 are "unreasonable," the Court's description of such awards as "unpredictable" and "unnecessary" plainly suggests that the Court believes them to be "unreasonable."

205. Sotsky & Stuart, *supra* note 7, at 12.

206. *See Exxon*, 128 S. Ct. at 2624-25 & n.14.

207. Chemerinsky, *supra* note 8, at 62. Professor Chemerinsky nonetheless concluded that *Exxon* is a "narrow ruling." *Id.*

208. *See Exxon*, 128 S. Ct. at 2632-34.

Court's substantive due process approach for a more fundamental reason. The *Gore* guidepost approach, as expounded in *State Farm*, has failed to achieve the Court's goal of bringing certainty and uniformity to punitive damages law.[209] The primary reason for this is that the Court has consistently refused to draw a mathematical bright line.[210] Rather than delineating clear constitutional limits, the Court has instead opted for "laundry lists of factors"[211] that appear "insusceptible of principled application."[212] The *Exxon* Court acknowledged this problem when it explained that verbal standards would be incapable of bringing fairness and consistency to punitive damages in maritime law.[213] Indeed, the Court explicitly recognized the need for "more rigorous standards than the constitutional limit"[214] and expressed its doubt "that anything but a quantified approach [would] work" to ensure the reasonableness of maritime punitive awards.[215]

If maritime law demands a quantitative approach, then it would seem that due process similarly requires a quantitative approach. After all, the discussion of verbal approaches in *Exxon* indicates that the *Gore* guideposts are simply too subjective, malleable, and unpredictable to control the size of punitive awards.[216] Perhaps not surprisingly, some scholars have suggested approaching punitive damages with a framework similar to the Federal Sentencing Guidelines used in criminal law.[217] Congress created the Federal Sentencing Guidelines for the same reason the Supreme Court ventured into the realm of punitive damages: to promote uniformity.[218] Adopting a standard analogous to criminal sentencing guidelines would undoubtedly be more effective in promoting uniformity than the Court's current due process

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209. *See* sources cited *supra* note 193.

210. *See* Hines, *supra* note 193, at 800 (noting that "the Court's appropriate refusal to announce a *per se* ratio" explains *State Farm*'s lack of clarity).

211. *See* Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 218 (2008).

212. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting).

213. *See* 128 S. Ct. at 2628-29 (2008); *see also supra* text accompanying notes 148-53.

214. *Exxon*, 128 S. Ct. at 2629.

215. *See id.* at 2628.

216. *See id.* at 2628-29.

217. *See, e.g.*, Green, *supra* note 211, at 218 ("[T]he Federal Sentencing Guidelines represent a far more detailed assessment of the quantum of punishment appropriate to different sorts of misbehavior than anything in the law of punitive damages. . . . Guidelines to govern the size of punitive damages, akin to sentencing guidelines, may make more sense than the current laundry lists of factors."); Jiang, *supra* note 11, at 795 (recommending a set of guidelines similar to the Federal Sentencing Guidelines for determining the size of punitive awards).

218. Jiang, *supra* note 11, at 824 (citing, inter alia, 28 U.S.C. § 991(b)(1)(B) (2006)).

approach, because "[i]nstead of being forced to grapple with inherently elusive concepts like reprehensibility, potential harm, and comparable penalties, judges . . . would have more concrete and objective criteria for adjudging the constitutional propriety of punitive damages awards."[219] As the *Exxon* Court stated, as long as punitive damages guidelines resembling criminal sentencing guidelines do not exist, "it is inevitable that the specific amount of punitive damages awarded . . . will be arbitrary."[220]

One of the primary obstacles to adopting punitive damages guidelines is logistical: the Court itself cannot draft a set of guidelines, and no other institution has endeavored to do so.[221] This reality leaves the Court in a bind. On the one hand, the Court needs quantified limits "more rigorous" than the constitutional guideposts to eliminate "unpredictable outlying punitive awards."[222] On the other hand, the Court lacks both the power and the institutional capacity to create a framework akin to the Federal Sentencing Guidelines.[223]

Exxon solves the Court's problem. A 1:1 punitive-to-compensatory ratio would be easier to apply and result in more predictable punitive awards than the *Gore* guideposts.[224] In fact, such a ratio would be even more effective in promoting certainty and uniformity than criminal sentencing guidelines, because it would leave no room for discretion in most cases.[225] If the *Gore* guideposts are not rigorous enough to eliminate outlier punitive damage awards, the Court must inevitably explore the possibility of adopting a constitutional bright line to satisfy the well-established due process requirement of reasonableness.[226] Continued adherence to the *Gore* guideposts would be inconsistent with *Exxon*'s rejection of verbal approaches to restraining punitive awards.

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219. *Id.*

220. 128 S. Ct. at 2628-29 (quoting Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003)).

221. *See* Jiang, *supra* note 11, at 826.

222. *See Exxon*, 128 S. Ct. at 2629.

223. *Cf.* Jiang, *supra* note 11, at 813 (discussing the process by which the Federal Sentencing Guidelines were developed and later adopted by Congress).

224. *But see Exxon*, 128 S. Ct. at 2639 (Ginsburg, J., concurring in part and dissenting in part) (questioning how the 1:1 ratio would apply in cases with more egregious conduct).

225. To the extent that the Court left room for exceptions to the 1:1 rule—perhaps in cases featuring conduct more reprehensible than recklessness or cases with moderate compensatory damages—there would be *some* discretion despite the bright-line rule. *See id.* at 2633 (majority opinion) ("In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum . . . and cases . . . without the modest economic harm or odds of detection that have opened the door to higher awards.").

226. *See supra* note 198 and accompanying text.

C. The Court Has Already Expressly Intertwined Exxon *with* State Farm *Despite an Ostensible Effort to Treat the Two Analyses as Distinct*

The *Exxon* Court went to great lengths to emphasize the differences between its maritime common law analysis and due process review of punitive damages awards.[227] It was careful to point out that the exercise of its "federal maritime common law authority . . . precede[d] and . . . obviate[d] any application of the constitutional standard,"[228] thereby confining its actual holding to the narrow maritime context of the case. Nonetheless, the last part of the majority opinion brings the Constitution to the forefront by explicitly discussing *State Farm*.[229] This portion of the Court's opinion suggests that *Exxon* will be highly persuasive the next time the Court hears a constitutional challenge to a punitive damages award. Indeed, as Justice Ginsburg observed, the Court may have already signaled that any ratio higher than 1:1 will be held to violate due process in the future.[230]

Given the nature of the Court's references to *State Farm*, it is hard to believe that *Exxon* will *not* have an impact in the due process context. As part of the justification for its newly created 1:1 ratio, the Court cited *State Farm*'s observation that a 1:1 ratio may mark the constitutional ceiling in cases involving substantial compensatory damages.[231] And because the compensatory award in *Exxon* met the Court's definition of "substantial," Justice Souter plainly stated in a footnote that "the constitutional outer limit [in this case] may well be 1:1."[232] These statements not only provide support for *Exxon*'s ratio but also strengthen *State Farm* and likely signal the future of due process punitive damages jurisprudence. *Exxon*'s ratio stood on firm ground independent of any language in *State Farm* because of the Court's power as "a common law court of last review."[233] The Court did not need to broaden the discussion to include the 1:1 ratio that "may" exist under *State Farm*, nor did it need to surmise what "may" have happened had the Court decided the case under the Due Process Clause.

Thus, the *Exxon* majority might have included the language about the Constitution to set the stage for its next due process case. Without the nod of approval from *Exxon*, *State Farm*'s discussion of a possible 1:1 ratio in some

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227. *See* 128 S. Ct. at 2626-27; *see also supra* text accompanying note 145.

228. *Exxon*, 128 S. Ct. at 2626.

229. *See id.* at 2634 & n.28; *see also supra* text accompanying notes 174-75.

230. *See Exxon*, 128 S. Ct. at 2639 (Ginsburg, J., concurring in part and dissenting in part); *see also supra* text accompanying note 188.

231. *Exxon*, 128 S. Ct. at 2634 (majority opinion).

232. *Id.* at 2634 n.28.

233. *See id.* at 2629.

cases would have remained speculative, confusing, and of limited precedential value.[234] Now, even though the *Exxon* Court did not technically add anything to *State Farm*, the Court's message is clear. By endorsing *State Farm*'s language about a 1:1 ratio in a decision explicitly adopting a 1:1 ratio, and by noting that the Constitution might have required a 1:1 ratio on *Exxon*'s facts,[235] the Court has all but drawn a constitutional bright line in cases with substantial compensatory damages. Now that the Court has intertwined *Exxon* and *State Farm* in a meaningful way, all that remains is for the Court to rely on both cases and specifically hold that the Constitution mandates a 1:1 maximum ratio.

D. Exxon *Reflects Two Decades of Judicial Hostility to Large Punitive Awards and Represents the Next Logical Step in the Court's Evolving Due Process Framework*

The *Exxon* decision is hardly surprising in light of the cases that preceded it and the Court's growing activism in the punitive damages arena.[236] Since the 1990s, the Court has demonstrated an increasing willingness to interfere with state punitive damages awards under the guise of substantive due process.[237] In *Haslip* and *TXO*, the Court first recognized that the Due Process Clause places restrictions on the size of punitive awards.[238] Although it refused to overturn awards in those cases, the Court set the stage for a more searching examination of state punitive awards a few years later. In *Gore* and *State Farm*, the Court became more active by setting aside excessive state punitive awards, but it still refused to impose a numerical ceiling on punitive damages.[239] Nonetheless, the *State Farm* Court moved closer to a bright-line rule by creating a presumption against punitive-to-compensatory ratios greater than 9:1 and stating that 1:1 may be the constitutional outer limit in cases with substantial compensatory damages.[240] Finally, although *Exxon* arose in a

234. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

235. *Exxon*, 128 S. Ct. at 2634 & n.28.

236. *See* Chris Bergen, Note, Exxon Shipping Co. v. Baker*: The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards*, 22 TUL. ENVTL. L.J. 141, 154 (2008) ("The Court's decision to further restrain punitive awards is also apt, given the jurisprudence that led up to the noted case. The noticeable tightening of punitive awards is evident in the Court's reaction to a 500:1 ratio in *Gore*, which was reiterated in *State Farm*'s holding that punitive damages should be at or near the amount of compensatory damages. It seemed likely that the Court would continue to curb punitive awards given its evident concern about the fairness and unpredictability involved in punitive damage calculations.").

237. *See* discussion *supra* Part II.

238. *See* discussion *supra* Part II.A-B.

239. *See* discussion *supra* Part II.C-D.

240. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); *see also*

different context than the Court's due process cases, the Court continued its trend of closely policing punitive damages and went one step beyond *State Farm* by explicitly adopting a rigid mathematical limitation on the size of punitive awards.[241]

This series of cases leads to one inescapable conclusion: the Supreme Court is hostile to large punitive damages awards.[242] Over the last twenty years, the Court has exhibited a growing desire to take stronger measures to restrict the size of punitive awards, "either through procedural due process, substantive due process, or a federal common law 1:1 ratio rule."[243] A Court that is wary of large punitive awards and becoming progressively more active in limiting punitive damages[244] should soon be prepared to incorporate *Exxon*'s 1:1 ratio into constitutional law.[245] Indeed, given that the *State Farm* Court already suggested a 1:1 ceiling in cases with substantial compensatory damages[246]—a point cited with approval in *Exxon*[247]—the Court need not make a large leap to rule that the Constitution requires a 1:1 punitive-to-compensatory ratio in at least some types of cases. The *Exxon* decision merely represents the next logical step in the evolution of the Court's substantive due process framework and provides the Court with the precedential foundation to finally draw a constitutional bright-line restriction on punitive awards—a direction in which the Court has been moving for almost two decades.

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supra text accompanying notes 95-97, 100.

241. *See* discussion *supra* Part III.B.

242. *See* Chemerinsky, *supra* note 8, at 63; *see also* MACDOUGALL, *supra* note 8, at 82 (noting that *Exxon* provides "strong evidence of the Supreme Court's judicial dislike of punitive damages or at least dislike of what the Court considers outlier awards").

243. MACDOUGALL, *supra* note 8, at 83.

244. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634-35 (2008) (Stevens, J., concurring in part and dissenting in part) (arguing that the Court should have exercised judicial restraint since Congress had affirmatively chosen not to act); *id.* at 2639-40 (Ginsburg, J., concurring in part and dissenting in part) (arguing that the Court, though competent to act, should have left the matter to Congress); *see also State Farm*, 538 U.S. at 438-39 (Ginsburg, J., dissenting) (criticizing the majority for acting like a legislature and imposing numerical constraints on state punitive damages awards through the Due Process Clause); MACDOUGALL, *supra* note 8, at 83 ("*Exxon Shipping* provides further proof that the Court has an arguable tendency to engage in judicial legislation in creating limitations on punitive damages . . . .").

245. *Cf.* Bergen, *supra* note 236, at 157 (noting that *Exxon* will likely have a significant impact in other areas of law because of "the Court's desire to curb excessive punitive awards").

246. 538 U.S. at 425; *see also supra* text accompanying note 100.

247. *See* 128 S. Ct. at 2634.

V. Conclusion

In *Exxon Shipping Co. v. Baker*, the Supreme Court placed a fixed numerical ceiling on a punitive damages award for the first time when it held that a punitive-to-compensatory ratio of 1:1 marks the fair upper limit in maritime cases. The Court departed from precedent in that it had always been unwilling to draw bright mathematical lines when reviewing state punitive awards for conformity with the Due Process Clause of the Fourteenth Amendment. But, unlike in previous cases, the Court in *Exxon* examined a punitive award in the exercise of its federal maritime common law authority, unconstrained by the Constitution and its due process precedents. The Court endeavored to confine its holding to the narrow maritime context of the case, but multiple aspects of the decision indicate that *Exxon* will ultimately spill over into the Court's constitutional framework.

The same considerations underlying the creation of a ratio in *Exxon* also drive the Court's constitutional approach to reviewing punitive awards. Furthermore, the *Exxon* Court recognized the inherent deficiencies in the Court's current substantive due process approach and took an unprecedented step by rejecting elusive verbal constraints in favor of a rigid numerical limitation on the size of punitive awards. Additionally, the Court expressly intertwined *Exxon* with its most recent due process case in a way that strongly suggests that the Court is close to drawing a constitutional bright-line restriction on punitive damages. Finally, the *Exxon* decision marks the culmination of two decades of judicial hostility to large punitive awards and represents the next logical development in the Court's due process framework. For these reasons, *Exxon* lays the foundation for the Court to take another step in the evolution of its punitive damages jurisprudence and implement a constitutional bright-line rule in the near future. This ostensibly narrow maritime decision has the potential to revolutionize the law of punitive damages.

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