South Carolina Law Review

Volume 60 | Issue 4 Article 4

2009

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Recommended Citation

Victor E. Schwartz, et. al., The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law, 60 S. C. L. Rev. 881 (2009).

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THE SUPREME COURT'S COMMON LAW APPROACH TO EXCESSIVE PUNITIVE DAMAGE AWARDS: A GUIDE FOR THE DEVELOPMENT OF STATE LAW†

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† This Article was peer-reviewed, prior to selection and publication, as part of the *South Carolina Law Review*'s Peer Review Pilot Program. For more information on the peer review program, see John P. Zimmer and Jason P. Luther, *Peer Review As an Aid to Article Selection in Student-Edited Legal Journals*, 60 S.C. L. REV. 959 (2009).

Published by Scholar Commons, 2020

I. INTRODUCTION

For over three decades, state supreme courts have wrestled with an exponential increase in the frequency and size of punitive damage awards.[1] Several state legislatures have also responded by reducing the unpredictability of punitive awards by enacting laws that place outer bounds on their amount, often tying them to a multiple of compensatory damages awarded to the plaintiff.[2] The United States Supreme Court, over this same period, has incrementally recognized constitutional limitations on punitive damages based both in procedural and substantive due process.[3] State courts are compelled to follow these constitutional guidelines, which have gained grudging acceptance.[4]

Exxon Shipping Co. v. Baker,[5] however, marks the first time that the Supreme Court has had an opportunity to consider whether a punitive damage award is excessive from a common law standpoint.[6] Unlike the Supreme Court's constitutional decisions on punitive damages, state courts are not bound to follow the high court's ruling in *Exxon*. Will state courts view the decision as solely limited to the field of federal maritime law, or will the high court's powerful reasoning broadly influence state courts struggling to cabin in "outlier" punitive damage verdicts?

Part II of this Article examines the common law methods state courts use to determine whether a punitive damage award is excessive, including jury instructions and appellate review. These highly subjective verbal thresholds,

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1. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008–09 (1999) (citing John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982); Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989)) (discussing the history of punitive damage awards).

2. *See, e.g.*, ALA. CODE § 6-11-21(a), (d) (LexisNexis 2005) (allowing the greater of 3:1 or $1.5 million in most personal injury suits, and 3:1 or $500,000 in most other actions); ALASKA STAT. § 09.17.020(f) (2008) (allowing the greater of 3:1 ratio or $500,000 in most actions); COLO. REV. STAT. § 13-21-102(1)(a) (2008) (allowing only a ratio of 1:1); MO. ANN. STAT. § 510.265(1) (West Supp. 2008) (allowing the greater of 5:1 or $500,000 in most cases); N.D. CENT. CODE § 32-03.2-11(4) (1996 & Supp. 2007) (allowing the greater of 2:1 or $250,000); OHIO REV. CODE ANN. § 2315.21(D)(2)(a) (LexisNexis 2005) (providing a 2:1 ratio of punitive to compensatory damages in most tort cases); VA. CODE ANN. § 8.01-38.1 (2007) (establishing a $350,000 punitive damages cap).

3. *See infra* Part III.A.

4. *See* Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33, 35 (2003).

5. 128 S. Ct. 2605 (2008).

6. *See id.* at 2619.

such as whether the award "shocks the conscience" of the court, provide little, if any, predictable guidelines to persons who might be subject to such awards. State courts routinely skip this common law analysis and move straight into a constitutional review of the award, plunging into the matrix of complicated and sometimes contradictory Supreme Court constitutional decisions.

For that reason, Part III of this Article provides a brief review of the United States Supreme Court's hesitant and gradual wading into the area of constitutional punitive damage jurisprudence. The Article then examines the Court's decision in *Exxon*, which contains some similarities to the Court's prior constitutional reasoning but reaches its result on the basis of data, logic, and careful reasoning rooted in common law. On these bases, the Court rejects verbal thresholds as both unwise and ineffective. In spite of the hundreds of decisions rendered by state supreme courts, none have zeroed in on the outlier verdict like the Supreme Court does in *Exxon*.

Part IV of the Article demonstrates that state courts have followed pivotal Supreme Court rulings as a matter of sound policy and legal reasoning, even when they have no constitutional tether. For example, state courts have looked for guidance to the Supreme Court in determining whether and when to admit scientific and other expert evidence, how to interpret the language of state constitutional or statutory language where there is a federal equivalent, and whether to award pure emotional harm damages in asbestos cases where a plaintiff has suffered no physical injury.

Part V of this Article concludes that *Exxon* provides a sound basis and a clear guide for state courts to incorporate into their understanding and development of common law. It has the potential to persuade state courts to move away from traditional, subjective verbal thresholds, such as whether the award shocks the conscience or arouses "passion and prejudice," and move toward more precise empirical standards for evaluating whether punitive damage awards are excessive. *Exxon* may ultimately prove even more influential as persuasive guiding authority for state courts determining whether an award is excessive under common law than the Court's constitutional punitive damages jurisprudence.

II. STATE COMMON LAW STANDARDS OFFER AN INEFFECTIVE SOLUTION TO OUTLIER AWARDS

Prior to the Supreme Court's recognition of constitutional limits on both the procedure and substance of punitive damages awards, [7] states primarily

7. *See infra* Part III.A.

controlled excessive award amounts through common law standards.[8] As the *Exxon* Court astutely observed, these state standards often failed to provide meaningful criteria and promote consistency among awards.[9] For this reason, there is a growing trend for state courts to bypass the "superfluous verbiage" of the common law in favor of a consideration of the constitutional factors which must be met.[10]

Courts have used their common law authority to review punitive damages verdicts for excessiveness since 1763, when England's high court, in *Huckle v. Money*,[11] suggested that judges could review damages awards that "all mankind at first blush" would find "outrageous."[12] This common law authority carried over to the American Colonies and, in the nineteenth century, developed in many state courts to a review of damage awards for "partiality" or "passion and prejudice."[13] Similarly, many jurisdictions adopted a "shocks the conscience" standard that still provides the verbal formulation of the common law standard of review for punitive damages in many states today.[14] Pursuant to such standards, courts employ the common law method of remittitur to reduce punitive damages awards deemed excessive.[15]

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8. Some states expressly limited punitive damages by statute or prohibited their recovery. *See, e.g.*, N.H. Rev. Stat. Ann. § 507:16 (LexisNexis 1997) (prohibiting punitive damages absent an express statutory provision); Flesner v. Technical Commc'ns Corp., 575 N.E.2d 1107, 1112 (Mass. 1991) (barring punitive damages absent express statutory authorization); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989) (per curiam) (citing Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975); Abel v. Conover 10 N.W.2d 684, 688 (Neb. 1960)) (barring punitive damage awards in state); Fisher Props., Inc. v. Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986) (en banc) (citing Barr v. Interbay Citizens Bank, 635 P.2d 441, 443 (Wash. 1981), *amended by* 649 P.2d 827 (Wash. 1982)) (barring punitive damages absent express statutory authorization).

9. *See Exxon*, 128 S. Ct. at 2627.

10. *See* Allison L. Bussell, Comment, *The Eclipse of State Common-Law Review and Assessment of Punitive Damages By the Due Process Analysis: The Aftermath of* BMW of North America, Inc. v. Gore, 71 TENN. L. REV. 337, 359 (2004).

11. (1763) 95 Eng. Rep. 768 (K.B.).

12. *Id.* at 769; *see also* Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the* Hard Look, 76 WASH. L. REV. 995, 1014 (2001) (citing *Huckle* and describing two "flavors" of state judicial review for excessiveness).

13. Honda Motor Co. v. Oberg, 512 U.S. 415, 424–25 (1994) (internal quotation marks omitted).

14. *See, e.g.*, Kiesau v. Bantz, 686 N.W.2d 164, 178–79 (Iowa 2004) (applying a "shock the judicial conscience" standard); Baldwin v. McConnell, 643 S.E.2d 703, 708 (Va. 2007) (applying a "shocks the conscience" standard for review of punitive damage awards).

15. *See* Bussell, *supra* note 10, at 340 ("Remittitur is the state common-law method by which a court reviews and reduces excessive punitive damages awards. . . . Unlike constitutionally-reduced verdicts, remittitur is a discretionary device and is reviewable under an abuse of discretion standard." (footnote call numbers omitted) (citing Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331 (11th Cir. 1999); Murphy, *supra* note 12, at 1015)).

Not surprisingly, the vague standards left in place by such terse language in these common law checks on excessive punitive awards have prompted some states to elaborate more meaningful criteria. For example, as the Court in *Exxon* discussed, Maryland courts consider a nonexclusive list of nine common law factors that include "'degree of heinousness,' 'the deterrence value of [the award],' and '[w]hether [the punitive award] bears a reasonable relationship to the compensatory damages awarded.'"[16] Similarly, Alabama provides seven factors, including the defendant's "profit from [the] misconduct," the defendant's "financial position," the plaintiff's litigation costs, whether the defendant "has been subject to criminal sanctions for similar conduct," and "other civil actions" against the defendant "arising out of similar conduct."[17]

Other states, such as Arkansas, also attempt to instill greater meaning in their shocks the conscience standards, yet without enumerated criteria. Rather, courts may separately consider "the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party."[18]

It remains unclear the extent to which such attempts to more precisely define the standard of judicial review for punitive awards result in substantive protections that are greater than the constitutional guidelines establishing the outer level of due process rights with regard to punitive damage awards. In other words, the question is whether common law standards functionally matter if, in the end, the constitutional standard is the more exacting and, in effect, a higher standard than the states' common law approaches. Indeed, several courts have indirectly arrived at this conclusion.

For example, the Indiana Supreme Court, applying judicial review of a punitive damage award under the state's common law standard, has found the constitutional factors outlined by the United States Supreme Court in *BMW of North America, Inc. v. Gore*[19] "persuasive, but not dispositive, indicia of whether a particular award is appropriate under Indiana common law."[20] The United States Court of Appeals for the Second Circuit, in a decision not analyzing excessiveness on constitutional grounds, also recognized that *Gore* "should assist . . . in the application of [the] standard, by which [a court]

16. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2627 (2008) (alterations in original) (citing Bowden v. Caldor, Inc., 710 A.2d. 267, 277–84 (Md. 1998)).

17. Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (applying Green Oil Co. v. Hornsby, 539 So. 2d 218, 223–24 (Ala. 1989); Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986)).

18. Bank of Eureka Springs v. Evans, 109 S.W.3d 672, 683 (Ark. 2003) (internal quotation marks omitted) (quoting Ellis v. Price, 990 S.W.2d 543, 548 (Ark. 1999)).

19. 517 U.S. 559 (1996).

20. Stroud v. Lints, 790 N.E.2d 440, 446–47 (Ind. 2003) (citing Stroud v. Lints, 760 N.E.2d 1176, 1180 & n.2 (Ind. Ct. App. 2002)).

deem[s] excessive a punitive damage award that 'shocks [the] judicial conscience.'"[21] The Oregon Supreme Court has gone further, finding that, except where expressly authorized by statute, a challenge to a punitive damages award may *only* be made on constitutional grounds.[22] States such as these have effectively federalized punitive damages review.[23]

The Supreme Court in *Exxon* similarly recognized this ineffectiveness of common law standards for review of punitive damages and the trend towards bypassing the common law analysis in favor of constitutional guidelines. The Court remained appropriately "skeptical" that courts can and should rely on the verbal formulations that comprise the common law standards of states to protect individuals from excessive awards.[24]

III. THE SUPREME COURT'S PUNITIVE DAMAGES JURISPRUDENCE

Exxon is the latest in a series of Supreme Court cases on punitive damages, yet it is unique in falling outside the realm of constitutional jurisprudence.

A. Brief Review of the Supreme Court's Constitutional Punitive Damages Jurisprudence

As Supreme Court Justice Sandra Day O'Connor recognized, "As little as 30 years ago, punitive damages were 'rarely assessed' and usually 'small in amount.'"[25] By the late 1970s and early 1980s, "unprecedented numbers of

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21. Lee v. Edwards, 101 F.3d 805, 809 (2d Cir. 1996) (citing Hughes v. Patrolmen's Benevolent Ass'n, Inc., 850 F.2d 876, 883 (2d Cir. 1988)).

22. Parrott v. Carr Chevrolet, Inc., 17 P.3d 473, 483 (Or. 2001); *see also* OR. REV. STAT. § 31.730(2) (2007) ("If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.").

23. *See also* Frank A. Perrecone & Lisa R. Fabiano, *The Federalization of Punitive Damages and the Effect on Illinois Law*, 28 N. ILL. U. L. REV. 537, 549–52 (2007) (discussing Illinois's response to Supreme Court punitive damages decisions and subsequent state cases applying federal guideposts).

24. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2628 (2008); *see also* Bussell, *supra* note 10, at 359 ("*Gore* and its progeny have impeded significantly states' rights to determine what factors juries should consider in awarding punitive damages as well as juries' consideration of those factors. It now appears that juries' assessments of punitive damages awards and the state law empowering them to do so are vestigial factors in the punitive damages process . . . ." (citing Daniel Van Horn, *Restraining Punitive Damages:* State Farm *Decision Clarifies the Court's Efforts at Reform*, TENN. B.J., Dec. 2003, at 18, 38–40)).

25. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500–01 (1993) (O'Connor, J., dissenting) (citing Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)); *see also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE

punitive awards in product liability and other mass tort situations began to surface,"[26] and the size of punitive damage awards "increased dramatically."[27]

Since then, the Supreme Court has increasingly placed legal controls on both the amount of and procedures for reaching punitive damage awards, emphasizing its concern that excessive awards may infringe upon fundamental principles of due process.[28] These legal controls include procedural due process requirements to guard against arbitrary awards and provide for meaningful judicial review,[29] substantive due process restrictions on the amount of punitive awards,[30] and Commerce Clause limitations on a state court's ability to consider activity outside its jurisdiction as a basis for punitive awards.[31]

The Supreme Court, however, entered the world of punitive damages with great hesitancy in part because of a view on the part of at least some members of the Court that determinations as to excessiveness are within the sound discretion of state court judges applying the tools available under traditional common law and not a matter of federal constitutional concern. In the Court's first foray into the excessiveness of punitive damages in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,[32] it found punitive damages in private civil actions were "too far afield from the concerns that animate the Eighth Amendment" and therefore held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages.[33] The Court declined to address the issue of whether the award was excessive under the Due Process Clause of the Fourteenth Amendment because the parties had not raised it

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BY STATE GUIDE TO LAW AND PRACTICE § 1:4, at 5 (2008–2009 ed.) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves.").

26. Jeffries, *supra* note 1; *see also* Philip Borowsky & Jay Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. REV. 147, 148 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency" (citing Victor B. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 INS. L.J. 257, 259)).

27. Priest, *supra* note 1.

28. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (holding that a multi-million dollar punitive damages award against a cigarette manufacturer for injuries inflicted to nonparties violated constitutional procedural due process).

29. *See id.* at 352–53; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Honda Motor Co. v. Oberg, 512 U.S. 415, 430–32 (1994); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18–19 (1991).

30. *See Campbell*, 538 U.S. at 416; Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433–34 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); *TXO Prod. Corp.*, 509 U.S. at 453–56; *Haslip*, 499 U.S. at 18–19.

31. *See Gore*, 517 U.S. at 571–73.

32. 492 U.S. 257 (1989).

33. *Id.* at 275–76.

before either the district court or the court of appeals below.[34] Nevertheless, in dicta, the Court invited the defendants to bring the issue before the Court again, noting that "[t]here is some authority in [the Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award," but "[t]hat inquiry must await another day."[35]

That day came two years later in 1991, when the Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip* that punitive damages awards had "run wild" in this country and are subject to constitutional due process limitations.[36] Finding that the award did not violate due process, the Court rooted its decision in the adequacy of procedural protections.[37] For constitutional purposes, it found that the instructions given to the jury, the post-trial review procedures, and the appellate review procedures "impos[ed] a sufficiently definite and meaningful constraint on the discretion [of the jury to award] punitive damages."[38]

In *TXO Production Corp. v. Alliance Resources Corp.*,[39] a plurality of the Supreme Court moved into the realm of substantive due process limits on punitive damages.[40] In this case the Court again found that the award did not exceed constitutional boundaries.[41] The Court also declined to adopt a bright-line test for making such a determination.[42]

The Supreme Court returned to consider the procedural issue of whether a state must provide judicial review of the amount of a punitive damages award in *Honda Motor Co. v. Oberg*.[43] The Court held that states must allow for judicial review of the size of punitive damages awards, and Oregon's failure to do so violated due process.[44] Although the Court's decision centered on procedural issues, the Court took the opportunity to reiterate that punitive damages awards that are so large as to be "grossly excessive" are unconstitutional.[45]

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34. *Id.* at 277.
35. *Id.* at 276–77.
36. 499 U.S. 1, 18 (1991) (internal quotation marks omitted).
37. *Id.* at 19–24.
38. *Id.* at 19–22.
39. 509 U.S. 443 (1993).
40. *Id.* at 453–54 ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907))).
41. *Id.* at 462.
42. *See id.* at 458 (quoting *Haslip*, 499 U.S. at 18).
43. 512 U.S. 415, 420 (1994).
44. *Id.* at 432.
45. *Id.* at 420 (internal quotation marks omitted) (quoting *TXO Prod. Corp.*, 509 U.S. at 456) ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards." (citing *TXO Prod. Corp.*, 509 U.S. 433; *Haslip*, 499 U.S. 1)).

In 1996, the Court returned to the open question in *TXO* to provide guidance on how to determine whether the size of a punitive damage award falls outside the limits of due process.[46] In *BMW of North America, Inc. v. Gore*, an Alabama jury returned a $4 million verdict, an amount the Alabama Supreme Court reduced to $2 million.[47] In that case, the plaintiff, who purchased a new BMW sedan, experienced $4,000 in compensatory damages related to the unauthorized repainting of his car during detailing by the distributor.[48] Ultimately, the Supreme Court decided that the $2 million award still left a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens because the award relied on out-of-state conduct; therefore, the award was unconstitutionally excessive.[49] The Court's decision also provided three "guideposts" for determining whether a punitive damages award is "unconstitutionally excessive."[50] These guideposts include the "degree of reprehensibility of the defendant's conduct";[51] the ratio of actual damages to punitive damages;[52] and a comparison to "civil or criminal penalties that could be imposed for comparable misconduct."[53] These guideposts serve both to "prohibit[] a State from imposing a 'grossly excessive' punishment on a tortfeasor"[54] and ensure that "a person receive[s] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[55] In *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*,[56] the Supreme Court clarified that courts must consider all three *Gore* factors when reviewing a punitive damages award for excessiveness and do so through de novo review.[57]

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[58] where a jury awarded a $145 million punitive damage award stemming from bad faith, fraud, and intentional infliction of emotional distress claims based on State Farm's initial refusal to settle a case, the Court essentially put "meat" on the due

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46. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562–63 (1996).

47. *See id.* at 566–67.

48. *Id.* at 563–65. The jury apparently calculated the $4 million punitive damage award by multiplying the plaintiff's damage estimate ($4,000) by 1,000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. *See id.*

49. *See id.* at 585–86.

50. *See id.* at 575–85.

51. *Id.* at 575 (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 387 (1994)).

52. *Id.* at 580.

53. *Id.* at 583.

54. *Id.* at 562 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993)).

55. *Id.* at 574.

56. 532 U.S. 424 (2001).

57. *See id.* at 440 & n.14 (citing *Gore*, 517 U.S. at 574–75).

58. 538 U.S. 408 (2002).

process "bones" outlined in the *Gore* factors.[59] First, the Court reminded lower courts that the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[60] The Court indicated that trial courts must instruct juries that they "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[61] The Court also stated that juries may not calculate punitive damages based upon the hypothetical claims of other claimants because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."[62]

Most importantly, however, in leading up to *Exxon Shipping Co. v. Baker*,[63] *Campbell* closely considered, from a constitutional standpoint, the permissible ratio between compensatory and punitive damages awards.[64] The Court declined once again to create a "bright-line ratio which a punitive damages award cannot exceed" but indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[65] The Court noted that in exceptional cases a higher ratio may be justified where "a particularly egregious act has resulted in only a small amount of economic damages."[66] The Court, however, observed that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[67] The Court also reminded lower courts that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[68]

Finally, in its most recent pre-*Exxon* punitive damages decision, the Supreme Court ruled in *Philip Morris USA v. Williams*[69] that juries can consider

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59. *See id.* at 418–28.
60. *Id.* at 419 (internal quotation marks omitted) (quoting *Gore*, 517 U.S. at 575).
61. *Id.* at 422 (citing *Gore*, 517 U.S. at 572–73).
62. *Id.* at 423 (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring)).
63. 128 S. Ct. 2605 (2008).
64. *Campbell*, 538 U.S. at 424–28.
65. *Id.* at 425.
66. *Id.* (internal quotation marks omitted) (quoting *Gore*, 517 U.S. at 582). We have posed a hypothetical where somebody throws harmful acid at another person intending serious physical injury but causes only minimal damage to that person's clothing. In such a case, punitive damages substantially exceeding actual damages may be justified. *See* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U.L. REV. 1365, 1379 & n.86 (1993).
67. *Campbell*, 538 U.S. at 425.
68. *Id.* at 427 (citing *Gore*, 517 U.S. at 585).
69. 549 U.S. 346 (2007).

harm to others in assessing the reprehensibility of the defendant's conduct, but courts must adequately instruct the jury that it cannot punish the defendant specifically for harm done to others.[70]

Throughout this line of cases, two members of the Court, Justices Scalia and Thomas, have refused to join the majority view that the Constitution provides substantive protections against excessive awards.[71] In *TXO* they expressed their disagreement with the Court's recognition of a "so-called 'substantive due process' right that punitive damages be reasonable."[72] Justice Scalia has stated that "the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed."[73] Rather, Justice Scalia has noted that state courts have ample authority to address any perceived "'unfairness'" in punitive damages through the common law "and have frequently exercised that authority."[74] In *Exxon*, however, Justices Scalia and Thomas, while reiterating their view against constitutional substantive limits on the size of punitive damages awards, joined in the Court's analysis from a common law standpoint.[75]

B. *Courts Have Struggled with Evaluating Excessive Punitive Damage Awards Through a Constitutional Lens*

Despite the dearth of meaningful standards in state common law approaches to review of punitive damage awards, the United States Supreme Court's constitutional jurisprudence has not always served as a model of clarity. State courts have sometimes struggled in applying the high court's standards.[76] Three examples include the Court's instructions regarding consideration of conduct involving individuals other than those before the court, the comparison between the punitive damage award and the potential civil and criminal penalties provided by statute for the conduct at issue, and the application of the *Gore*-factor approach generally.

The Court's recent distinction in *Philip Morris USA v. Williams*,[77] which allows a jury to consider a defendant's bad conduct toward those other than the

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70. *Id.* at 356–57.

71. *See Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* (Thomas, J., dissenting).

72. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., joined by Thomas, J., concurring).

73. *Id.* at 472 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 27–28 (1991) (Scalia, J., concurring)). However, Justices Scalia and Thomas have supported the Court's rulings on procedural due process as a means to guard against arbitrary awards. *See id.* at 471.

74. *Id.* at 472 (citing *Haslip*, 499 U.S. at 39).

75. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008) (Scalia, J., joined by Thomas, J., concurring).

76. *See* Schwartz et al., *supra* note 4.

77. 549 U.S. 346 (2007).

individuals before the court for the purpose of determining the level of reprehensibility but not directly in awarding damages, is one that is likely to result in significant confusion.[78] Justice Stevens commented in dissent that "[t]his nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm."[79] Likewise, as Professor Erwin Chemerinsky observed:

> Trial judges are likely to struggle for years with formulating jury instructions that simultaneously tell the jury to consider *and* not consider harm to people other than the plaintiffs. Appellate courts are left with little guidance on when the size of a punitive damages award is appropriate and when it is unconstitutional. Juries can consider harm to others in determining reprehensibility, but they cannot base punitive damages on harm to others. How can an appeals court possibly determine whether a punitive damages award violates this command?[80]

Courts have also found application of the third *Gore* factor, comparison of the punitive damage award to the "civil or criminal penalties that could be imposed for comparable misconduct,"[81] particularly challenging. Many appellate courts have simply disregarded this guidepost.[82] Others have outwardly defied its application, finding available penalties too low to compare

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78. *Id.* at 356–57; *see also* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We Can Get There from Here*, 2 CHARLESTON L. REV. 407, 407–08 (2008) (calling the pronouncement either a "profound paradox" or "ill-considered distinction"); Steven Moulds, Note, *Who's On First?: Why* Philip Morris USA v. Williams *Left Juries Confused About Whose Injuries Can Be Considered when Determining Punitive Damages*, 59 MERCER L. REV. 1043, 1059 (2008) (noting that "juries now have one more constraint placed upon them when considering punitive damages" and suggesting that this constraint will be difficult for juries to understand).

79. *Philip Morris USA*, 549 U.S. at 360 (Stevens, J., dissenting).

80. Erwin Chemerinsky, *More Questions About Punitive Damages*, TRIAL, May 2007, at 72, 72; *see also* Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 359 (2008) ("I have read this passage scores of times. I have also taught it to hundreds of students in Remedies courses so far. . . . How can the jury consider conduct toward others to determine reprehensibility but not to punish the defendant?").

81. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996).

82. *See, e.g.*, Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1253–54 (10th Cir. 2000) (discussing the reprehensibility of the defendant's conduct and the ratio between compensatory and punitive damages but not making any reference to the third *Gore* factor); Dean v. Olibas, 129 F.3d 1001, 1007–08 (8th Cir. 1997) (analyzing the first and second *Gore* factors but making no mention of factor three); Wal-Mart Stores, Inc., v. Goodman, 789 So. 2d 166, 182 (Ala. 2000) (stating that the court had "no basis for considering [the third *Gore*] factor relevant").

to a punitive damages award[83] or simply declaring that there are no comparable penalties.[84] Perhaps courts find that comparing punitive damages to available regulatory or criminal penalties for the conduct at issue is, at least in some cases, like comparing apples and oranges.

The third *Gore* factor is not the only one that certain cases gloss over. Although the Supreme Court has "instructed" lower courts to consider all three of its factors,[85] some have performed only a cursory analysis. For example, in *Williams v. Aetna Finance Co.*,[86] a consumer fraud case in which a jury awarded the plaintiff $15,000 in compensatory damages and $1.5 million in punitive damages, the Supreme Court of Ohio cryptically stated that "it would appear that when one of the guideposts is particularly relevant, a lesser reliance on the other guideposts may be justified."[87]

In addition, there are many still-developing areas of constitutional punitive damages jurisprudence, such as the consideration of the defendant's out-of-state conduct,[88] imposition of punitive damages multiple times for the same or

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83. For instance, even the Alabama Supreme Court, on remand in *Gore*, reconsidered the punitive damages verdict against defendant BMW in light of the United States Supreme Court's decision in that case. *See* BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 509 (Ala. 1997). The state high court considered the first two factors given by the Supreme Court and found that the reprehensibility of the defendant's conduct and the large ratio between compensatory and punitive damages indicated that the award was excessive. *Id.* at 512–14. Turning to the third factor, however, the Alabama Supreme Court noted that the United States Supreme Court had instructed it to accord "substantial deference" to legislative judgments regarding the appropriate penalty in similar cases, but it then proceeded to completely disregard the Court's direction. *Id.* at 514 (internal quotation marks omitted) (quoting *Gore*, 517 U.S. at 605). The Alabama Supreme Court stated that the maximum civil penalty under Alabama law would be $2,000 and then declared that because the statutory penalty was set "at such a low level, there is little basis for comparing it with any meaningful punitive damages award." *Id.* Alabama courts have echoed this sentiment in other cases as well. For example, in *Wal-Mart Stores, Inc. v. Robbins*, 719 So. 2d 245 (Ala. Civ. App. 1998), the court again found that the statutory penalty for misfiling a prescription was too low to merit comparison to the punitive damages awarded in that case. *Id.* at 247.

84. For example, a Mississippi court awarded two former employees $10,000 and $35,102, respectively, and $1.5 million each in punitive damages after they were fired for reporting forged checks. Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 440 (Miss. 1999). The Mississippi Supreme Court summarily concluded that "there are no other sanctions which would be imposed under the facts of this case." *Id.* at 445.

85. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001).

86. 700 N.E.2d 859 (Ohio 1998).

87. *Id.* at 859–60, 871.

88. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

similar conduct,[89] use of controversial procedures such as "reverse bifurcation,"[90] and the role of wealth in properly arriving at an award.[91]

State courts, however, retain the ability to develop and apply their own common law standards to effectively address outlier verdicts within this constitutional framework. The Supreme Court's decision in *Exxon* may provide a starting point for doing so.

C. Considering Punitive Damages from a Common Law Perspective

Exxon opens a new chapter in the Supreme Court's punitive damages jurisprudence. By considering punitive damages from the vantage point of the common law, the Court acted with a different purpose than it would when making a constitutional determination. The Constitution of the United States sets the outer boundaries of acceptable conduct. These boundaries are necessarily imprecise, requiring lower courts to struggle to determine on which side of the due process line individual cases fall. On the other hand, common law is directed at lesser thresholds that develop based on the legal reasoning of the courts in creating a fair and just judicial system. It is capable of providing greater precision than constitutional law.

Thus, in *Exxon* the Court did not base its determination of excessiveness on the constitutional due process guideposts expressed in *Gore* and expanded upon in *Campbell*[92] or the procedural requirements of *Haslip*, *Oberg*, or *Cooper*

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89. *See, e.g.*, *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1091–92 (D. Alaska 2004) (noting Exxon's exposure to "a multiplicity of claims" that were not all before the court and describing the "very real risk that two punitive damages awards in different courts, but based upon the same incident, could result in a doubling up on deterrence and punishment").

90. *See* State *ex rel.* Chemtall Inc. v. Madden, 655 S.E.2d 161, 167 (W. Va. 2007), *cert. denied sub nom.*, Chemtall Inc. v. Stern, 128 S. Ct. 1748 (2008); *see also* Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 376 (2008) (describing the "rare, harsh penalty" of reverse bifurcation).

91. *See Campbell*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award." (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996))).

92. *See supra* text accompanying notes 58–68. The Court's analysis, however, did consider each of the due process factors from a policy standpoint, including the reprehensibility of the conduct (recklessness, not malice), *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2631–33 (2008), the ratio between punitive and compensatory damages (noting a 1:1 ratio is the upper limit *Campbell* suggested for unexceptional cases with substantial compensatory damages), *id.* at 2634 (citing *Campbell*, 538 U.S. at 425), and civil and criminal penalties for comparable conduct (noting that the Clean Water Act provides for criminal fines of up to $25,000 per day for negligent violations of pollution restrictions and up to $50,000 per day for knowing violations), *id.* (citing 33 U.S.C. § 1319(c)(1)(B), (2)(B) (2006)).

Industries;[93] instead, it conducted its review under federal maritime jurisdiction as a "common law court of last review, faced with a perceived defect in a common law remedy."[94] As the Court explained in a message that appears to embrace state common law jurisprudence, its review of the punitive damages "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."[95] While not binding on state courts, the reasoning of the Court may prove influential in determining whether an award is excessive before reaching the outer limits of what the Constitution permits.

The case stems from the well-known grounding of the Exxon Valdez supertanker on Bligh Reef off the Alaskan coast in 1989, in which the ship's hull ripped open, spilling millions of gallons of crude oil into the Prince William Sound.[96] The tanker's captain, Joseph Hazelwood, had a history of severe alcohol abuse during his employment with Exxon that was known to his superiors.[97] Before leaving port the night of the accident, "Hazelwood downed at least five double vodkas . . . enough 'that a nonalcoholic would have passed out.'"[98] Before a required turn, Hazelwood, the only officer licensed to complete the maneuver, left the bridge and put the ship on autopilot.[99] The crew failed to make the turn, leading to the catastrophic result that ruined the livelihoods of commercial fishermen and native Alaskans and devastated the region's wildlife.[100] At the time of the accident, Hazelwood had at least three times the legal limit of alcohol in his bloodstream for driving in most states.[101] Exxon ultimately faced a class action of approximately 32,000 fishermen, property owners, and other private parties who sought punitive damages, leading to a $5 billion punitive damage award against Exxon in addition to a total of $507.5 million in compensatory damages.[102]

After the Ninth Circuit reduced the punitive damage award to $2.5 billion,[103] *Exxon* expectedly went up to the Supreme Court. On June 25, 2008, the high court addressed whether the multi-billion dollar punitive damage award was excessive from a very different perspective than its previous constitutional

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93. *See supra* text accompanying notes 36–38, 43–45, 56–57.
94. *See Exxon*, 128 S. Ct. at 2626, 2629.
95. *Id.* at 2626–27.
96. *See id.* at 2612–13.
97. *Id.* at 2612.
98. *Id.* (quoting *In re* Exxon Valdez, 270 F.3d 1215, 1236 (9th Cir. 2001)).
99. *Id.*
100. *Id.* at 2612–13.
101. *Id.*
102. *See In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1050, 1058–63 (D. Alaska 2002).
103. *See In re* Exxon Valdez, 472 F.3d at 625.

decisions. The case came to the Court under maritime law, one of the limited areas where federal courts exercise common law decision making.[104] In essence, the Supreme Court acted as if it were a state supreme court rather than as a court examining federal constitutional questions.

In order to place the $5 billion punitive damage award in perspective, the Court found it important to consider the complete picture of the costs Exxon faced in the aftermath of the disaster.[105] Exxon spent approximately $2.1 billion on cleanup efforts.[106] The company also paid $100 million in restitution and a $25 million fine for criminal violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.[107] Exxon paid at least $900 million toward restoring natural resources to settle a civil action brought by the federal government and the State of Alaska as well as another $303 million in voluntary settlements with fishermen, property owners, and other private parties.[108] Finally, in the case that came before the Court, Exxon faced a huge class action of fishermen, property owners, and other private parties seeking punitive damages.[109] The jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon.[110] In addition, Exxon paid a total of $507.5 million in compensatory damages.[111] On appeal, the Ninth Circuit reduced the punitive damage award with respect to Exxon to $2.5 billion.[112] After dividing on the issue of a corporation's liability for punitive damages stemming from the acts of reckless employees and finding that the Clean Water Act's penalties did not preempt maritime common law on punitive damages, the Supreme Court considered whether the already-reduced $2.5 billion punitive damage award remained excessive under maritime law.[113]

Justice Souter, writing for the Court, went to the core issue, which he deemed "[t]he real problem" of "the stark unpredictability of punitive awards"

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104. *Exxon*, 128 S. Ct. at 2619; *see* U.S. CONST. art. III, § 2, cl. 1 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"); *see also* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23 (2004) ("Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts."); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (footnote call numbers omitted)).

105. *See Exxon*, 128 S. Ct. at 2613.

106. *Id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *Id.* at 2614.

111. *Id.* at 2634.

112. *Id.* at 2614.

113. *Id.* at 2615–19.

and "outlier" verdicts.[114] The Court closely examined empirical studies on punitive damage awards, finding a troubling range of almost complete unpredictability.[115] This led the Court to question whether the judicial system is treating defendants that engage in similar conduct in a fair and consistent manner.[116] While "by most accounts" the Court found that "the median ratio of punitive to compensatory awards [is] less than 1:1,"[117] a comprehensive study of punitive damages in state civil trials found a "mean ratio of 2.90:1 and a standard deviation of 13.81."[118] Justice Souter stated that even those "unsophisticated in statistics" can see that "the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories."[119] Bench trials showed a narrower distribution, but they still exhibited a level of variability and unpredictability that concerned the Court.[120] The Court suggested that such a range might be acceptable if rationally based on the facts of the cases, but it noted that "anecdotal evidence suggests that nothing of that sort is going on."[121] Justice Souter gave a telling example flowing from one of the Court's constitutional cases, *Gore*, where an Alabama jury awarded $4 million in punitive damages and a second Alabama jury, in a strikingly similar case, awarded no punitive damages at all.[122] Both cases involved cars that were repainted without the owner's knowledge.[123] Justice Souter observed that the Supreme Court was "[a]ware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances."[124]

The Court found problems with current approaches state courts used to avoid or correct excessive, or "outlier," punitive damage awards.[125] It expressed skepticism with the effectiveness of verbal thresholds—the practice of trial courts avoiding unpredictable outliers by instructing the jury that punitive

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114. *Id.* at 2625.

115. *Id.*

116. *Id.* at 2625–26.

117. *Id.* at 2624.

118. *Id.* at 2625 (citing Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUDIES 263, 269 tbl.1 (2006) (reporting median ratios of 0.62:1 in jury trials and 0.66:1 in bench trials)).

119. *Id.* at 2625.

120. *See id.* (citing Eisenberg et al., *supra* note 118) (noting a "remarkable" distribution among punitive damages assessed by judges with a mean ratio of 1.60:1 and a standard deviation of 4.54).

121. *Id.* at 2625–26 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 565 n.8 (1996)).

122. *See id.* at 2626.

123. *See Gore*, 517 U.S. at 565; Yates v. BMW of N. Am., Inc., 642 So. 2d 937, 938 (Ala. Civ. App. 1993).

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

125. *See id.* at 2628.

damages are to deter, but not bankrupt or destroy, a defendant and should be proportionate to the wrongfulness of the conduct.[126] The Court observed that "[i]nstructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage."[127] Likewise, the Court found that traditional post verdict and appellate standards, such as the shocks the conscience standard or passion and prejudice test, even with the enumeration of more specific factors, had not yielded consistent awards.[128] The Court's comprehensive review of cases and data supported its bottom line: words alone, no matter how carefully crafted, are an ineffective safety net against both arbitrary and excessive damage awards.[129]

In a search for a better way, the Court looked to its experience in the realm of criminal sentencing, where it found quantified limits necessary to rein in "relatively unguided discretion."[130] As it searched for better approaches to outlier punitive damage verdicts, the Court showed a careful balance in considering the interests of plaintiffs and defendants.[131] For that reason, it rejected a universal hard cap, like the maximum term of imprisonment in a criminal case, because there is no standard universal tort injury.[132] In addition, a hard cap would not provide an index to inflation.[133] On the other hand, the Court found a ratio based on the median of punitive damage awards much more promising.[134] For that reason, the Court established a 1:1 ratio—slightly above the median supported by empirical study—as an upper limit for punitive damages in ordinary cases falling under maritime law.[135] Further, the Court made clear that the common law opens the door to higher awards in some circumstances, such as when the defendant's conduct is intentional or malicious, driven by a desire for gain, or unlikely to be discovered.[136] Likewise, a higher award may be permissible when a plaintiff experiences only modest economic harm.[137]

The Court considered but found inappropriate the adoption of a higher ratio as a judicial standard, such as the 3:1 ratio codified by a slim majority of state legislatures that have adopted a ratio to restrain punitive damages.[138] Higher

126. *Id.*
127. *Id.*
128. *Id.* at 2627–28.
129. *See id.*
130. *Id.* at 2628.
131. *See id.* at 2628–29.
132. *See id.* at 2629.
133. *See id.*
134. *See id.* at 2633.
135. *Id.*
136. *See id.*
137. *See id.*
138. *Id.* at 2631–32.

ratios may provide an acceptable outer bound when dealing with exceptionally malicious conduct, but the Court found them not suitable in ordinary cases.[139] Treble damage provisions, such as those contained in some state consumer protection acts, adopt a higher ratio for a different public policy reason: to provide an incentive to bring a claim when the plaintiff's economic harm is likely to be low or, in the case of antitrust actions, to supplement government enforcement by inducing private litigation.[140] These justifications, the Court found, are inapplicable in cases involving significant compensatory damages.[141]

In another message of importance to state judges who shape individual states' common law, the Court rejected the dissenting view of Justices Stevens and Ginsberg[142] that the Court should leave the issue of control of outlier punitive damage awards to the legislature.[143] Justice Souter, speaking for the majority, stated that, "it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative."[144] The same can be said of the judiciary in state common law courts.

The *Exxon* Court based its analysis in common law principles, informed by empirical data, and rooted it in the belief that penalties such as punitive damages must contain a degree of consistency and predictability. As the Court noted in reaching its determination that a 1:1 ratio is appropriate in most cases:

> [A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.[145]

Moreover, the Court recognized: "History certainly is no support for the notion that judges cannot use numbers."[146] For instance, the Court noted, "[t]he

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139. *Id.* at 2631.

140. *See id.* at 2632.

141. *See id.*

142. *See id.* at 2630 & n.21.

143. *See id.* at 2634–39 (Stevens, J., concurring in part and dissenting in part); *id.* at 2639–40 (Ginsburg, J., concurring in part and dissenting in part). Justice Breyer also dissented from the portion of the Court's opinion finding punitive damages excessive because he found that the facts of the case supported a level of egregiousness sufficient to provide an exception to the general 1:1 ratio. *See id.* at 2640 (Breyer, J., concurring in part and dissenting in part).

144. *Id.* at 2630.

145. *See id.* at 2627 (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

146. *See id.* at 2630

21-year period in the rule against perpetuities was a judicial innovation."[147] Likewise, limitation periods for civil actions are judge-made law, with some time constraints borrowed from statutes but others deriving from wholly judicial balancing and determination.[148] Therefore, the Court's establishment of a 1:1 ratio between punitive and compensatory damages has clear common law precedents.

The Court expressed its belief that the 1:1 ratio, while furthering predictability for defendants and the civil justice system generally, will not harm or be unfair to plaintiffs.[149] As the Court made clear, today's punitive damages are not compensatory in nature.[150] Thus, plaintiffs will continue to receive full compensation and, under the Court's ratio, will, in cases involving more than negligence but less than malicious conduct, have an opportunity to receive up to double the monetary value of their economic harm. Moreover, a 1:1 limit on punitive damages also furthers the interests of plaintiffs in two respects. First, it avoids the situation where one or more massive early punitive damage verdicts bankrupt a business, leaving little or no resources to compensate plaintiffs who experienced similar injury at the hands of the same defendant.[151] Second, it avoids a rush to the courthouse to throw the dice at being the first to obtain an extraordinarily high punitive damage award.

Exxon provides state court judges with an opportunity to reconsider their application of common law standards for determining whether punitive damage awards are excessive. Judges have set and modified the standards for the award of punitive damages[152] with occasional legislative intervention.[153] Courts have

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147. *Id.* (citing Cadell v. Palmer, (1833) 6 Eng. Rep. 956, 963 (H.L.)).

148. *Id.* (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *451; CECIL HERBERT SANSOME PRESTON & GEORGE HAROLD NEWSOM, LIMITATIONS OF ACTIONS 241–42 (2d ed. 1943); 1 HORACE G. WOOD, LIMITATIONS ON ACTIONS § 1, at 4 (4th ed. 1916)).

149. *See id.* at 2633.

150. *See id.* at 2620–21.

151. For example, early punitive damage verdicts in asbestos litigation led to the bankruptcy of as many as eighty-five primary defendants, leaving pennies on the dollar for settlements with current and future plaintiffs for basic medical expenses. *See* David C. Landin, Victor E. Sewartz & Phil Goldberg, *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 BROOK. J.L. & POL'Y 589, 603 (2008) (citing Quenna Sook Kim, *Asbestos Trust Says Assets are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6); William P. Shelly et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 257 (2008) (citing STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION xxvii (2005); MASS TORT SUBCOMM., AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS AND TRENDS 5 (2007), http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf).

152. For example, in the late 1960s, American courts began to depart from the historical "intentional tort" underpinnings of punitive damages. *See, e.g.*, Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 418 (Cal. Ct. App. 1967) (holding for the first time that punitive damages are

the common law authority to place an appropriate limit where there is a demonstrated problem, namely, the outlier verdict. The fact that the Supreme Court considered alternatives, including a reasoned rejection of verbal thresholds, provides a framework for use by common law courts who are seeking the most effective means to stem unpredictable and potentially infinite punitive damage awards in our state courts before throwing a constitutional red flag.

IV. THE SUPREME COURT'S PERSUASIVE AUTHORITY AS A GUIDE FOR STATE COURTS

If courts and commentators pigeonhole *Exxon Shipping Co. v. Baker* as relevant only to punitive damage awards in federal maritime cases, then its impact on the judicial landscape is but a grain of sand on the punitive damages beach. For example, Westlaw reports only approximately ten maritime cases each year involving punitive damage awards.[154] The language of the opinion and the Court's reliance on empirical data stemming from punitive damage awards in ordinary state common law cases,[155] however, provide the ruling with potentially far broader applicability, even if only persuasive in authority. The question, therefore, is whether state courts will follow the guidance offered by the Supreme Court and adopt a flexible 1:1 ratio as a red flag for excessive punitive damage verdicts. Alternatively, will state courts post-*Exxon* simply continue to apply ineffective verbal thresholds through jury instructions and the "dance before the jury"[156] of traditional shocks the conscience and passion and prejudice tests for excessive awards?

Although *Exxon* does not have the force of law for state courts, there is a long history of state courts looking to the United States Supreme Court for guidance in their own state law decision making. For example, state courts have changed their interpretation of state rules regarding the admission of expert evidence in response to Supreme Court rulings directed at federal cases.[157] In addition, there are many state constitutional concepts such as due process and state statutes such as antidiscrimination laws that have federal counterparts with

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recoverable in a strict products liability action). State courts also allowed lesser conduct such as recklessness and even gross negligence to provide a foundation for punitive damages. *See, e.g.*, Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) (gross negligence).

153. *See* statutes cited *supra* note 2.

154. A March 11, 2009 Westlaw search of the federal maritime law case database (FMRT-CS) returned 97 cases over the past decade with the phrase "punitive damages" in the case summary or digest.

155. *See supra* notes 118–20 and accompanying text.

156. JEROME FRANK, LAW AND THE MODERN MIND (1949).

157. *See infra* Part IV.A.

very similar language. State courts frequently consider the guidance of the Supreme Court in interpreting such laws.[158] Finally, as in *Exxon*, state courts have looked to the Supreme Court when deciding what are essentially common law issues, such as whether there is a claim for medical monitoring absent a present physical injury.[159] State courts do not always follow the nonbinding reasoning of the Supreme Court, but they appear to find its reasoning persuasive more often than not.

A. Following the Supreme Court's Interpretation of Rules of Evidence

A fundamental distinction regarding the jurisdiction of the United States Supreme Court exists between when it is operating under its power to interpret the Constitution of the United States and when it is exercising federal supervisory power. Traditionally, the Supreme Court exercises supervisory power to establish and maintain standards of evidence and procedure where Congress has not specifically required rules.[160] These decisions are binding on federal courts,[161] but the Supreme Court has no supervisory authority over state judicial proceedings absent a constitutional violation.[162] Federal courts have used their supervisory authority to protect a defendant's basic rights, to deter illegal conduct, and to protect judicial integrity.[163]

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158. *See infra* Part IV.B.

159. *See infra* Part IV.C.

160. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) (holding that the Court has inherent supervisory power to fashion rules of evidence); *see also* United States v. Hasting, 461 U.S. 499, 505 (1983) (holding that judges may not use the supervisory power doctrine to reverse convictions because of prosecutorial misconduct in cases involving harmless error); Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (citing Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976)) (asserting supervisory authority to adopt a rule requiring certain questions to be asked on voir dire); United States v. Nobles, 422 U.S. 225, 231 (1975) (acknowledging the judiciary's inherent power to adopt rules regarding discovery in criminal cases); Barker v. Wingo, 407 U.S. 514, 530 n.29 (1972) (acknowledging supervisory power of a federal court to adopt a rule governing the time in which cases must be brought); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (asserting authority to prescribe a rule regulating qualifications for jury service in the absence of congressional or constitutional authorization).

161. *See* Carlisle v. United States, 517 U.S. 416, 425–26 (1996).

162. Smith v. Phillips, 455 U.S. 209, 221 (1982) (citing Chandler v. Florida, 499 U.S. 560, 570, 582–83 (1981); Cupp v. Naughten, 414 U.S. 141, 146 (1973)); *see also* Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (recognizing the Court's "authority is limited to enforcing the commands of the United States Constitution"); Harris v. Rivera, 454 U.S. 339, 344–45 (1981) (per curiam) ("Federal judges . . . may not require the observance of any special procedures [in state courts] except when necessary to assure compliance with the dictates of the Federal Constitution.").

163. *Hasting*, 461 U.S. at 505 (citing United States v. Payner, 447 U.S. 727, 735–36, 736 n.8 (1980); Elkins v. United States, 364 U.S. 206, 222 (1960); Rea v. United States, 350 U.S. 214, 217 (1956); *McNabb*, 318 U.S. at 340).

In 1993, the Supreme Court exercised its supervisory authority to address the standard for admission of expert testimony by interpreting the Federal Rules of Evidence.[164] In *Daubert* the Court broke with seventy years of tradition and established a new multi-factor-based approach to evaluating the reliability of proposed expert testimony.[165] In ruling that Congress's adoption of the Federal Rules of Evidence in 1975 supplanted the test for admissibility of expert testimony then in effect in federal courts,[166] the Court required that expert testimony be subject to a strong and careful judicial gatekeeper function in order to protect a fundamental tenant of justice: finding the truth.[167]

The Supreme Court instructed that when "[f]aced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[168] The Court tasked district courts with screening proffered expert testimony to ensure that what is admitted "is not only relevant, but reliable."[169] In determining reliability, the Court provided a nonexclusive list of key factors for courts to consider before admitting expert testimony, including (1) whether the "theory or technique can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community.[170] It also required a determination whether the reasoning or methodology underlying the testimony is scientifically valid and properly applied to the facts of the case.[171]

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164. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 *passim* (1993) (interpreting Rule 702 of the Federal Rules of Evidence). Congress amended Rule 702 in 2000 to include *Daubert*'s holding. *See* FED. R. EVID. 702 advisory committee's note.

165. *Daubert*, 509 U.S. at 593–94.

166. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), *superseded by statute*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. at 586–87.

167. *See Daubert*, 509 U.S. at 589, 597.

168. *Id.* at 592 (citing FED. R. EVID. 104(a)).

169. *Id.* at 589.

170. *Id.* at 593–94. The Rules Advisory Committee, in amending Rule 702 to reflect *Daubert*, recognized several additional factors that courts might consider. FED. R. EVID. 702 advisory committee's note. Some courts, such as the Third Circuit, have taken this "*Daubert*-plus approach," which encourages courts to consider the *Daubert* factors as well as the additional factors the Advisory Committee added, if applicable, in each case. *See* United States v. Mitchell, 365 F.3d 215, 234 n.14 (3d Cir. 2004) ("The Advisory Committee's note accompanying [the 2000] amendment is a useful consolidation of commentary and precedent . . . so we will refer to it at points in our opinion.").

171. *Daubert*, 509 U.S. at 592–93. Two subsequent Supreme Court decisions, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), further clarified that *Daubert* requires a fit between the expert's reasoning and conclusions,

Daubert coincided with the emergence of toxic torts and the burgeoning use of experts in civil litigation.[172] It came after juries in the mid-1980s, adrift in a sea of conflicting "expert" testimony, rendered multimillion-dollar awards in cases alleging that the morning sickness drug Bendectin caused birth defects.[173] Courts ultimately reversed these verdicts on appeal or replaced them with judgments notwithstanding the verdicts[174] but not before the manufacturer removed Bendectin from the market in 1983, depriving women of the only Food and Drug Administration-approved medication that blunted the hard symptoms of morning sickness.[175] After *Daubert*, these Bendectin cases were thoroughly

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Joiner, 522 U.S. at 146–57, and applies to all technical or other specialized expert testimony, not just scientific evidence, *Kumho Tire*, 526 U.S. at 149. Together, this trio of cases stands for the fundamental principle that trial court judges must act as gatekeepers and carefully screen expert testimony to ensure its reliability. The United States Court of Appeals for the Third Circuit summarized Rule 702 as "embod[ying] three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit." Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000) (citing Brown v. Se. Penn. Transp. Auth. (*In re* Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 741–43 (3d Cir. 1994)). Effective December 1, 2000, Congress amended the Federal Rules of Evidence to effectively codify this trilogy of U.S. Supreme Court cases. *See* FED. R. EVID. 702 advisory committee's note ("The [2000] amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.").

172. *See, e.g.*, Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 31 (1993) (citing studies that found a 1500% rise in the number of experts testifying in Cook County, Illinois between 1974 and 1989 and finding that experts testified in 86% of all cases, 95% of personal injury cases, and 100% of product liability cases in a sample of California cases in 1985 and 1986 (citing Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 NW. U. L. REV. 643, 669 (1992); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1120)).

173. *See, e.g.*, Ealy v. Richardson-Merrell, Inc., No. 83-3504, 1987 WL 18743, at *6 (D.D.C. Oct. 1, 1987) (awarding a $95 million verdict), *rev'd*, 897 F.2d 1159, 1164 (D.C. Cir. 1990); Richardson v. Richardson-Merrell, Inc., 649 F. Supp. 799, 799, 804 (D.D.C. 1986) (granting defendant manufacturer's motion for judgment notwithstanding a jury award of $1.6 million), *aff'd*, 857 F.2d 823, 824 (D.C. Cir. 1988). *See generally* Sanders, *supra* note 172 (analyzing why juries often are unable to understand scientific evidence and, focusing on trials involving the drug Bendectin, recommending proposals to facilitate jury verdicts that conform to the weight of scientific evidence and judicial opinion); Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2171–73 (2000) (describing juries' "erroneous and inconsistent liability decisions" in cases involving Bendectin, breast implants, and vaccines).

174. *Ealy*, 897 F.2d at 1164 (reversing a $95 million verdict); *Richardson*, 649 F. Supp. at 799, 804 (granting defendant manufacturer's motion for judgment notwithstanding a jury award of $1.6 million), *aff'd*, 857 F.2d at 824. Eventually, the manufacturers prevailed on appeal in all instances but one, *Oxendine v. Merrell Dow Pharm., Inc.*, 506 A.2d 1100, 1100 (D.C. Cir. 1986). *See* Sanders, *supra* note 172, at 28–29 & n.139; Stewart, *supra* note 173, at 2171 & n.19.

175. Barbara Culliton, *Merrell Dow Stops Marketing Bendectin*, 221 SCI. 37, 37 (1983).

discredited.[176] Another example is the silicone breast implant litigation that forced Dow Corning to file Chapter 11 bankruptcy in 1995. When scientists carefully examined the issue and acted as a gatekeeper, juries found no link between implants and autoimmune disorders, cancer, or any other serious disease.[177]

Although the Supreme Court's ruling does not apply to state courts interpreting their own rules of evidence, about half of the states have gradually adopted the essential principles of *Daubert*, either expressly or by implication.[178] Only fourteen states, but including some of the most populous

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176. *See, e.g.*, Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 738 (Tex. 1997) (extensively considering scientific methodology in a Bendectin case to find that the offered epidemiological studies failed to show a sufficiently increased risk and were not published or subject to peer review and concluding that offered animal studies did not support causation in humans). In *Daubert* itself, the trial court granted the defendant's motion for summary judgment because the plaintiff's expert based its theory on animal and test tube studies. Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572–73, 575 (S.D. Cal. 1989). No study supported plaintiff's theory that Bendectin could cause malformations in human fetuses. *Id.* at 575–76. For these reasons, the trial court concluded that this theory did not meet the *Frye* general acceptance test. *Id.* The plaintiffs appealed and the Ninth Circuit upheld the trial court's ruling. *See* Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128, 1131 (9th Cir. 1991). The Supreme Court then set forth the *Daubert* factors and remanded the case for proceedings consistent with them. *Daubert*, 509 U.S. at 593–94, 598.

177. *See* MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 90–110 (1996) (authored by the executive editor of the *New England Journal of Medicine*). *See generally* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 192–93 (1991) (praising courts' rejection of arguments that AIDS can be transmitted by casual contact after experts presented strong evidence contradicting the "junk science alternative" and stating that "[b]y refusing to take the junk science of AIDS seriously, wise judges help put a stop to it").

178. *See* DEF. RESEARCH INST., FRYE/DAUBERT: A STATE REFERENCE GUIDE 3 (2005). Jurisdictions adopting the principles of *Daubert* include Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Vermont, West Virginia, and Wyoming. *See id.* Some states may apply *Daubert* to certain types of expert testimony, such as experts seeking to speak on novel scientific evidence, but not to other types of evidence. *See, e.g.*, State v. Bowman, 89 P.3d 986, 994 (Mont. 2004) (concluding the district court did not err in not holding a *Daubert* hearing because the defendant's expert's association with "a forensic lab that is the only one in the world that works on a full-time basis with wildlife" did not make the expert's testimony novel science). Not all state courts that have adopted *Daubert* apply its factors as stringently as federal courts. *See* David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 JURIMETRICS 351, 358–61 (2004); *see also* DEF. RESEARCH INST., *supra*, at 30 ("New Jersey courts are known to be quite liberal about admitting expert scientific testimony in civil matters."); J.E. Cullens, Jr., *A Review of Recent* Daubert *Decisions of Louisiana State Courts*, 52 LA. B.J. 352, 352 (2005) ("*Daubert* gatekeepers in Louisiana state courts seem more like friendly doormen . . . .").

ones, continue to apply the *Frye* "general acceptance" test,[179] the standard used by federal courts prior to *Daubert*.[180]

Some state courts adopted *Daubert* primarily due to the comparable language between the federal and state rules of evidence or to further consistency between admissibility of expert evidence in federal and state courts.[181] Others did so based more on the reasoning underlying the Supreme

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179. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), *superseded by statute*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. at 586–87.

180. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572–73, 576 (S.D. Cal. 1989) (using the *Frye* test to reject proffered expert testimony), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated*, 509 U.S. 579, 597–98 (1993). Jurisdictions rejecting *Daubert* and continuing to follow the *Frye* general acceptance test include Arizona, California, Florida, Illinois, Kansas, Maryland, Minnesota, New York, North Dakota, Pennsylvania, and Washington. DEF. RESEARCH INST., *supra* note 178, at 3. Other states have adopted their own standards or hybrids of the two approaches and conform to neither *Daubert* nor *Frye*. *See* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 267 n.302 (2006).

181. *See, e.g.*, M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 522 (Del. 1999) ("Although this Court is not bound by the United States Supreme Court's interpretation of comparable federal rules of procedure or evidence, we hereby adopt the holdings of *Daubert* and *Carmichael* as the correct interpretation of Delaware Rule of Evidence 702."); Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 813 A.2d 409, 415 (N.H. 2002) ("Although *Daubert* is binding only in federal court, the text of New Hampshire Rule of Evidence 702 is identical to the federal rule at the time of the *Daubert* decision."). It is common for state courts to consider federal case law when interpreting state rules of procedure, particularly since many state rules are modeled after the federal rules. *See, e.g.*, Mitchell v. H & R Block, Inc., 783 So. 2d 812, 816 (Ala. 2000) (citing Rowan v. First Bank of Boaz, 476 So. 2d 44, 46 (Ala. 1985)) (finding federal class action decisions persuasive); Smith v. Washington, 10 S.W.3d 877, 880 (Ark. 2000) (citing Bussey v. Bank of Malvern, 603 S.W.2d 426, 430 (Ark. Ct. App. 1980)) (finding federal case law on dismissals by stipulation "to be of significant precedential value"); Weiner v. Kneller, 557 A.2d 1306, 1310 (D.C. 1989) (looking to federal decisions related to exclusion of evidence as a sanction for failure to provide required discovery); Harada v. Burns, 445 P.2d 376, 380 (Haw. 1968) (finding federal court interpretation of federal rules of evidence "highly persuasive" in construing Hawaii rules of procedure); *In re* Tina T., 579 N.E.2d 48, 55 (Ind. 1991) (citing Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 485 n.27 (5th Cir. 1982)) (looking to the federal class certification rule); Sipes v. Bd. of Mun. & Zoning Appeals, 635 A.2d 86, 94 (Md. Ct. Spec. App. 1994) (finding that in absence of Maryland authority, federal decisions interpreting rule on intervention are of "'considerable precedential value'" (quoting Md. Radiological Soc'y, Inc. v. Health Servs. Cost Review Comm'n, 402 A.2d 907, 911 n.5 (Md. 1979))); Montgomery v. Montgomery, 759 So. 2d 1238, 1240 (Miss. 2000) (citing Stringfellow v. Stringfellow, 451 So. 2d 219, 221 (Miss. 1984); McGriggs v. Montgomery, 710 So. 2d 886, 889 (Miss. Ct. App. 1998)) (finding that "[w]hen considering rules of procedure, Mississippi courts will routinely look to interpretation of the same federal rule" in evaluating request to set aside judgment); N. Shore, Inc. v. Wakefield, 542 N.W.2d 725, 727 (N.D. 1996) (giving "'great deference' to federal case law" regarding motions for relief from judgment (quoting Gruebele v. Gruebele, 338 N.W.2d 805, 811 n.5 (N.D. 1983))); Yahnke v. Carson, 613 N.W.2d 102, 108–09 (Wis. 2000) (quoting Rios v. Bigler, 67 F.3d 1543, 1551 (10th Cir. 1995)) (adopting the "federal 'sham affidavit' rule" as furthering the purposes of summary judgment procedure).

Court's decision. For example, the Supreme Court of Connecticut adopted *Daubert* because it believed that trial judges should take a more active role in examining the "validity of the methodologies underlying proffered scientific evidence . . . in determining . . . admissibility" and that the court was indeed moving toward this gatekeeping approach in the years preceding the United States Supreme Court's ruling.[182] Similarly, the Supreme Court of Nebraska followed the high court not because it was required to do so but because it was "convinced that by shifting the focus to the kind of reasoning required in science—empirically supported rational explanation—the *Daubert/Joiner/ Kumho Tire Co.* trilogy of cases greatly improves the reliability of the information upon which verdicts and other legal decisions are based."[183] The Supreme Court of Nebraska also found, after closely considering the experience of other states, that *Daubert* provided "a more effective and just means of evaluating the admissibility of expert opinion testimony."[184] Likewise, state courts may find that *Exxon* offers a more effective and just means of evaluating whether a punitive damage verdict is excessive than their current common law standards.

B. *Congruent Interpretation of State and Federal Constitutional and Statutory Provisions*

Many state constitutional principles such as due process[185] and state statutes such as antidiscrimination laws have federal counterparts with very similar language. These similarities provide another area where state courts look to the United States Supreme Court's nonbinding decisions for guidance.

There is a great deal of ongoing scholarly debate as to how state courts should interpret their state constitutions in light of the federal Constitution.[186]

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182. *See* State v. Porter, 698 A.2d 739, 746–47 (Conn. 1997); *see also* State v. O'Key, 899 P.2d 663, 680 (Or. 1995) (finding *Daubert* persuasive and adopting the U.S. Supreme Court's test after finding the state and federal case law congruent in treating general acceptance as one factor in the trial court's decision on admissibility and an obligation on the part of trial court judges to act as gatekeepers).

183. Schafersman v. Agland Coop., 631 N.W.2d 862, 876 (Neb. 2001).

184. *Id.*

185. *See, e.g.*, State v. Laurent, 744 A.2d 598, 600 (N.H. 1999) (quoting State v. Marti, 732 A.2d 414, 417 (N.H. 1999)) (noting that New Hampshire courts may look to federal due process decisions for the purpose of aiding their state constitutional analysis).

186. *See, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005) (arguing that state courts should independently interpret their state constitutions based on their own state identities and act as agents of federalism); Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 683 (2005) (finding that the Rhode Island Supreme Court has not taken full power to give its state constitution independent vitality and meaning); James A. Gardner & Jim

As Justice William J. Brennan, Jr. cautioned years ago, rulings of the Supreme Court "are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them."[187] Nevertheless, state courts frequently turn to Supreme Court decisions when interpreting state constitutional provisions. They do so for two reasons. First, looking to federal constitutional decisions promotes consistency between state and federal law. Some state judiciaries closely adhere to a rule interpreting state constitutional provisions in harmony with their federal counterparts.[188] Second, and perhaps more importantly, federal constitutional jurisprudence is quite extensive when compared to the sparse availability of reported state court decisions. Although the earliest state constitutions preceded the federal Constitution by two decades, states have frequently amended and sometimes wholly replaced their governing document.[189] Moreover, historically, courts, attorneys, and the American public have largely ignored state constitutions.[190] Thus, turning to United States Supreme Court rulings provides state courts with ready access to over two centuries of scholarly thought and a firm foundation to serve as a starting point for their decisions.[191]

For example, the Wisconsin Supreme Court, looking to United States Supreme Court decisions, recently found that a dog sniff that briefly prolonged

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Rossi, *Foreword: The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231 (2005) (providing introduction to symposium on the issue and participant viewpoints); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 72–73 (2006) (finding that overall courts have not taken the aggressive independent approach to interpreting state constitutions many commentators urge); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1196 (2005) (arguing that state courts have improperly used state constitutional provisions to interfere with experiments in public policy).

187. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (suggesting that state courts adopt greater protections than the U.S. Supreme Court for protecting individual rights).

188. *See, e.g.*, State v. Linton, 93 P.3d 183, 185 (Wash. Ct. App. 2004) (quoting State v. Schoel, 341 P.2d 481, 482 (Wash. 1959)) (interpreting state double jeopardy clause consistently with federal interpretation); State v. Arias, 752 N.W.2d 748, 754 (Wis. 2008) (citing State v. Jennings, 647 N.W.2d 142, 151 (Wis. 2002)) ("Generally, we have interpreted provisions of the Wisconsin Constitution consistent with the United States Supreme Court's interpretation of their counterparts in the federal [C]onstitution.").

189. *See* Witt, *supra* note 186, at 1163–64.

190. *See id.* ("[I]n the late 1980s only one in two Americans even knew their state had a constitution." (citing John Kincaid, *The New Judicial Federalism*, 61 J. ST. GOV'T 163, 169 (1988))).

191. *See* People v. Brumfield, 366 N.E.2d 1130, 1133–34 (Ill. 1977) ("In construing statutes, federal authority should be consulted where there is a lack of Illinois precedent." (citing Fitzgerald v. Chi. Title & Trust Co., 361 N.E.2d 94, 96 (Ill. App. Ct. 1977))). The Illinois Supreme Court followed federal decisions holding that there is no constitutional right to direct voir dire examination of potential jurors, given the "virtual dearth of Illinois cases on the question." *Id.* at 1134.

a traffic stop for potential underage drinking was not an unreasonable search or seizure after the sniff revealed cocaine in the vehicle.[192] The court not only did so for the sake of consistency with federal law but also because it found compelling the policy underlying the high court's decisions.[193] For instance, the Wisconsin Supreme Court agreed with the United States Supreme Court's finding that there is a significant public interest in using narcotics sniffing dogs to prevent the flow of drugs into distribution channels.[194] The Wisconsin court also looked to extensive Supreme Court Fourth Amendment jurisprudence to find that there was no state constitutional violation where use of the dog was minimally intrusive, was part of an ongoing traffic stop, and prolonged the stop for only a few seconds.[195]

Some state courts have cautiously incorporated federal case law into their own decisions, being careful to note that they follow the federal jurisprudence only due to the strong persuasiveness of the federal opinion, not because they are required to do so. For instance, when the Texas Court of Criminal Appeals found that the state constitutional standard for determining the ineffective assistance of counsel is not more protective of a defendant's rights than the federal constitutional standard,[196] a concurring judge clarified that:

> [W]hen this Court in deciding a claim under *state* law approvingly cites language from a federal court opinion we do so only because we find the language helpful or the reasoning persuasive. In adopting the "reasonably likely to render and rendering reasonably effective assistance" test . . . , we in no way bound ourselves to follow future pronouncements on the subject from the Fifth Circuit or any other federal court; not when we are interpreting Texas law. It means simply that we cast about for a "reasonably acceptable definition" of effective assistance of counsel, and having found one, made it our own.[197]

Likewise, the Oregon Supreme Court has noted that it is

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192. *See Arias*, 752 N.W.2d at 755–63.

193. *Id.* at 761 (quoting United States v. Place, 462 U.S. 696, 704 (1983)).

194. *Id.*; *see* United States v. Mendenhall, 446 U.S. 544, 561–62 (1980) (Powell, J., concurring).

195. *See Arias*, 752 N.W.2d at 753–63. In its analysis, the Wisconsin Supreme Court cited, *inter alia*, the following United States Supreme Court cases: *Illinois v. Caballes*, 543 U.S. 404 (2005), *Knowles v. Iowa*, 525 U.S. 113 (1998), *Pennsylvania v. Mimms*, 434 U.S. 106 (1997), *United States v. Sharpe*, 470 U.S. 675 (1985), and *Terry v. Ohio*, 392 U.S. 1 (1968).

196. Hernandez v. State, 726 S.W.2d 53, 56 (Tex. Crim. App. 1986).

197. *Id.* at 61 (Clinton, J., concurring) (citations omitted).

> expected that counsel and courts often will refer to federal decisions, or to commentary based on such decisions, even in debating an undecided issue under state law. Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.[198]

The Oregon court ultimately found that when prosecutorial conduct causes a mistrial, the double jeopardy clause of its state constitution provides broader protection than the federal standard; however, the court emphasized that the difference between the federal and Oregon standards is "actually quite narrow."[199]

State courts not only look to the United States Supreme Court for guidance when interpreting their state constitutions but also when interpreting state statutes that mirror federal law. These decisions generally follow a similar pattern as the constitutional rulings. In some cases, state courts have followed the Supreme Court primarily to further consistency between federal and state law, particularly when the state legislature looked to the federal law as a model when drafting its own legislation.[200] Federal court decisions are also helpful to

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198. State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983) (footnote call number omitted).

199. *Id.* at 1324. The court held that the Oregon constitution bars a retrial when a "prosecutor or other responsible official intentionally provokes the defendant to demand a mistrial" and that a court may find such intent based on "the character and the circumstances of the prejudicial conduct . . . without having to obtain an admission to that effect." *Id.* at 1325.

200. *See, e.g.*, Kamen v. Lindly, 114 Cal. Rptr. 2d 127, 132 (Cal. Ct. App. 2001) ("Where, as here, California law is modeled on federal laws, federal decisions interpreting substantially identical statutes are unusually strong persuasive precedent on construction of our own laws." (citing Bldg. Material & Constr. Teamsters' Union, Local 216 v. Farrell, 715 P.2d 648, 651 (Cal. 1986) (in bank); Holmes v. McColgan, 110 P.2d 428, 430 (Cal. 1941))); O'Malley v. St. Thomas Univ., Inc., 599 So. 2d 999, 1000 (Fla. Dist. Ct. App. 1992) (according "great weight" to federal RICO decisions in interpreting and applying Florida's RICO Act (citing Wilson v. State, 596 So. 2d 775, 781 (Fla. Dist. Ct. App. 1992); Boyd v. State, 578 So. 2d 718, 720 (Fla. Dist. Ct. App. 1991); State v. Nishi, 521 So. 2d 252, 253–54 (Fla. Dist. Ct. App. 1988))); CTS Corp. v. Coons (*In re* CTS Corp.), 428 N.E.2d 794, 798–99 (Ind. Ct. App. 1981) (interpreting the Indiana Business Take-Over Offers Act and relying on federal interpretations of the Williams Act); Bahre v. Pearl, 595 A.2d 1027, 1031 n.5 (Me. 1991) (interpreting terms in the state blue sky laws and looking to federal case law for "some guidance"); Marx v. Bragalini, 160 N.E.2d 611, 616 (N.Y. 1959) (noting that in adopting the New York state personal income tax, the state legislature modeled it on the federal law, and therefore the state policy is to adopt reasonable and practical construction of those similar terms); N.Y. State Labor Relations Bd. v. Holland Laundry, Inc., 63 N.E.2d 68, 74 (N.Y. 1945) (giving federal court opinions construing the National Labor Relations Act equal applicable force to the state act).

state courts when there is an absence of state precedent on a similar issue.[201] But state courts do not blindly follow federal precedent; they do so when they find the underlying reasoning of the decision is sound.

For instance, since many state antidiscrimination laws closely resemble Title VII of the Civil Rights Act of 1964, federal jurisprudence provides a useful guide to state courts. State courts have looked to Supreme Court reasoning to help them resolve various civil rights issues such as the burden of proof in racial discrimination,[202] disparate treatment, and hostile work environment claims[203] as well as the running of the statute of limitations for an employment discrimination claim under state law.[204] In the area of employment discrimination as well as other areas, some state courts have followed federal precedent "[u]nless there is a good reason for deviating from the United States Supreme Court's interpretation."[205] State courts may also look to federal

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201. *See, e.g.*, Fitzgerald v. Chi. Title & Trust Co., 361 N.E.2d 94, 96 (Ill. App. Ct. 1977) (considering interpretation of the Federal Trade Commission Act to determine the existence of an unfair or deceptive trade practice under state law).

202. *See* Baldwin v. Bd. of Supervisors, 961 So. 2d 418, 422 (La. Ct. App. 2007) (citing Hicks v. Cent. La. Elec. Co., 712 So. 2d 656, 658 (La. Ct. App. 1998) (considering federal interpretations of racial antidiscrimination laws regarding burden of proof).

203. *See* White v. Rainbo Baking Co., 765 S.W.2d 26, 28 (Ky. Ct. App. 1988) ("'United States Supreme Court decisions regarding the federal provision are most persuasive, if not controlling, in interpreting the Kentucky statute.'" (quoting Ky. Comm'n on Human Rights v. Commonwealth, 586 S.W.2d 270, 271 (Ky. Ct. App. 1979))).

204. *See* Gusciara v. Lustig, 806 N.E.2d 746, 751–52 (Ill. App. Ct. 2004) (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117–18 (2002)). *Morgan* ruled that a hostile working environment claim is timely so long as a single unlawful employment practice that has some relation to the earlier acts falls within the 180-day period. *Morgan*, 536 U.S. at 117–18. The Illinois Court of Appeals followed the federal decision because it was "confident that *Morgan's* holding will discourage potential claimants from undue delay in filing charges." *Gusciaria*, 806 N.E.2d at 752. *See also* Faulkner-King v. Dep't of Human Rights, 587 N.E.2d 599, 602–03 (Ill. App. Ct. 1992) (citing Del. State Coll. v. Ricks, 449 U.S. 250, 255–61 (1980)) (finding statute of limitations began to run as of date of notice of termination in accordance with federal precedent); Weber v. Moses, 938 S.W.2d 387, 390–93 (Tenn. 1996) (citing Chardon v. Fernandez, 454 U.S. 6, 7–9 (1981); *Ricks*, 499 U.S. at 257–58, 261)) (determining running of statute of limitations for retaliatory discharge based on federal case law). In another case, however, *Vollemans v. Town of Wallingford*, 928 A.2d 586 (Conn. App. Ct. 2007), a Connecticut appellate court opted not to follow *Ricks* or *Chardon*, holding that the period for filing a discriminatory discharge complaint accrues when the employer unequivocally notifies the employee of termination rather than at the date of termination. *Id.* at 602, 605. It did so after a careful analysis of Connecticut's policy preference of deciding cases on the merits whenever possible and because it found unsound and unpersuasive the reasoning of the U.S. Supreme Court in *Ricks* and *Chardon*. *See id.* at 593–605. As the court recognized, "federal law defines the beginning and not the end of our approach to the subject." *Id.* at 600 (internal quotation marks omitted) (quoting State v. Comm'n on Human Rights & Opportunities, 559 A.2d 1120, 1124 (Conn. 1989)).

205. State v. Gunnison, 618 P.2d 604, 606–07 (Ariz. 1980) (in banc) (discussing securities statutes); *see also Gusciara*, 806 N.E.2d at 751–52 (finding that the court would opt not to follow federal precedent only if there was a compelling reason to adopt a contrary interpretation).

precedent and opinions of the Federal Trade Commission in determining whether an act is unfair or deceptive under their consumer protection laws.[206]

While the federal precedent to which they look for guidance clearly does not bind state courts in interpreting their state constitutions and statutes, the ease in and advantages of doing so, at least as a starting point, have made it a routine practice among most states. Its federal maritime basis notwithstanding, the United States Supreme Court's ruling in *Exxon* provides another tool in the kit of state courts for gauging whether a punitive damage award is excessive as a matter of state common law.

C. *The Influence of the Supreme Court on the Development of State Common Law*

Nonbinding Supreme Court decisions have also had a significant impact on several areas of state common law. For example, in 1997, the Supreme Court considered a question that has taken center stage in state courts dealing with massive actions stemming from situations where plaintiffs believe they were exposed to a toxic substance but have not shown any physical symptoms or other evidence of illness or disease. In *Metro-North Commuter Railroad Co. v. Buckley*,[207] the Supreme Court faced this issue under the Federal Employers' Liability Act (FELA), a law that addresses claims by workers who are injured while acting in the course of employment on interstate railroads.[208] Although the Court was interpreting a federal statute, it essentially was making a common law determination, namely whether an asymptomatic pipefitter could bring a claim against his employer for negligent infliction of emotional distress or medical monitoring for occupational exposure to asbestos.[209] In a case that influenced many state courts that later addressed the issue from a common law standpoint, the Court ruled 7–2 against such claims.[210]

The Supreme Court concluded that a worker "cannot recover unless, and until, he manifests symptoms of a disease."[211] The Court carefully considered the policy concerns militating against adoption of a medical monitoring cause of

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206. *See, e.g.*, People v. All Am. Aluminum & Constr. Co., 524 N.E.2d 1067, 1071–72 (Ill. App. Ct. 1988) (citing *Fitzgerald*, 361 N.E.2d at 96) (applying Federal Trade Commission standards).

207. 521 U.S. 424 (1997).

208. *See* 45 U.S.C. §§ 51–60 (2000).

209. *See Buckley*, 512 U.S. at 437–38, 442–44 ("[I]f the common law concludes that a legal rule permitting recovery here, from a tort law perspective, and despite benefits in *some* individual cases, would on balance cause more harm than good, and if we find that judgment reasonable, we cannot find that conclusion inconsistent with the FELA's humanitarian purpose.").

210. *Id.*

211. *Id.* at 427.

action, including the difficulty in identifying which medical monitoring costs are over and above the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs.[212] The Court noted that the suffering of "tens of millions of individuals . . . might justify some form of substance-exposure-related medical monitoring."[213] The Court, however, rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.[214]

The *Buckley* opinion has been highly influential on state courts. In accordance with *Buckley*, traditional principles of tort law, and sound public policy, most state courts of last resort recently presented with the issue have rejected medical monitoring. Since 1999, seven of the eight state high courts addressing the issue have expressly rejected medical monitoring absent a showing of a present physical injury, including the high courts of Alabama, Kentucky, Michigan, Mississippi, Nevada, New Jersey, and Oregon.[215]

Although state supreme courts did not have to follow the United States Supreme Court's decision, *Buckley* was central to many of these rulings. For example, before reaching its decision, the Alabama Supreme Court recounted the arguments and counterarguments for recognizing a medical monitoring claim which *Buckley* closely examined.[216] Similarly, the Michigan Supreme

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212. *Id.* at 441–42.

213. *Id.* at 442.

214. *See id.* at 442–43 ("[W]here state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits" because the remedy would allow recovery "irrespective of the presence of a 'collateral source' of payment.").

215. *See* Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827, 831–32 (Ala. 2001); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 859 (Ky. 2002); Henry v. Dow Chem. Co., 701 N.W.2d 684, 701 (Mich. 2005); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 7 (Miss. 2007); Badillo v. Am. Brands, Inc., 16 P.3d 435, 441 (Nev. 2001); Sinclair v. Merck & Co., 948 A.2d 587, 595 (N.J. 2008); Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008). For examples of a few courts reaching contrary outcomes, see Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) (en banc); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 434 (W. Va. 1999); Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355, 360 (La. 1998). *See also* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After* Meyer ex rel. Coplin v. Fluor Corp.*: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135 (2007) (exploring the implications of the Missouri Supreme Court's decision and suggesting solutions for lower courts).

216. *Hinton*, 813 So. 2d at 830–32 (quoting *Buckley*, 521 U.S. 441–43).

Court "share[d] the concerns raised by the United States Supreme Court in *Buckley*" that judicial adoption of medical monitoring

> may do more harm than good—not only for Michigan's economy but also for "other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other."[217]

Likewise, the Mississippi Supreme Court noted the United States Supreme Court's reasoning that "to recognize medical monitoring costs alone as a separate injury is to go 'beyond the bounds of currently evolving common law.'" [218] "Accordingly," the Mississippi Supreme Court concluded, "as plaintiffs invite this Court to recognize a medical monitoring cause of action, an act which would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action, this Court declines that invitation."[219]

These courts could have classified *Buckley* as a FELA case, but as the Supreme Court of Kentucky observed, "the [United States Supreme] Court was clearly speaking to the more general issue of medical monitoring" when it discussed the "unlimited and unpredictable liability" associated with permitting claims based on mere exposure.[220] As state courts consider the Supreme Court's latest decision providing an empirical means of addressing outlier punitive damages, they should similarly view it not as a maritime case but as sound reasoning that can assist courts to develop a common law jurisprudence that can further a more predictable civil justice system.

V. CONCLUSION

In informal discussions with state court judges, the authors have learned an interesting fact. A number of state supreme court justices strongly object to the United States Supreme Court's utilization of the Constitution to place substantive due process limits on punitive damages. Even some liberal judges suggest that they agree with Justices Scalia and Thomas on this specific issue. More basically, they view themselves as common law judges, and they resent such intrusions. On the other hand, state judges have been quite receptive to

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217. *Henry*, 701 N.W.2d at 696 (quoting *Buckley*, 521 U.S. at 443–44).

218. *Paz*, 949 So. 2d at 6 (quoting *Buckley*, 521 U.S. at 439).

219. *Id.*

220. *Wood*, 82 S.W.3d at 857 (internal quotation marks omitted) (quoting *Buckley*, 521 U.S. at 442).

well-reasoned decisions by the Supreme Court when it is exercising its federal supervisory power to interpret rules of procedure or evidence, interpreting constitutional provisions or federal statutes that have a state equivalent, or deciding common law concepts in a federal statutory context. In such instances, when the high court acts from the judges' perspective as just another state court and renders decisions that have sound reason and cogent arguments behind them, state justices are often willing to follow.

As this Article has shown, the opinion of Justice Souter in *Exxon Shipping Co. v. Baker* is carefully crafted to address an ongoing, unsolved problem: the "outlier" punitive damage award. Justice Souter carefully considered alternative approaches, utilized existing data, and openly and carefully explained his reasoning for adopting a 1:1 ratio of punitive damages to compensatory damages. The decision has the power and substance of other United States Supreme Court supervisory decisions that state courts have embraced and may prove highly influential in state courts. For reasons expressed in this Article, we suggest that it be a welcome resource for state common law courts in their attempt to place meaningful limits on outlier punitive damage awards.

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