Run Aground Again: The *Exxon Valdez*'s Collision With the Supreme Court's Punitive Damages Jurisprudence

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Editors' Summary

After 20 years of litigation, the Supreme Court's decision in the Exxon Valdez *case established a new constraint on punitive damages. The decision will impact the future of punitive damage awards in the United States, and will have implications for federal and state common-law claims frequently raised in environmental cases. The decision will also have consequences for the constitutional due process limitation on punitive damages, and may lead to exceptions to these seemingly narrow punitive damages rules. Although rooted in federal maritime law, the* Exxon Valdez *decision may signal a tide change in punitive damages jurisprudence.*

The *Exxon Valdez* has long been on a collision course with the U.S. Supreme Court's punitive damages jurisprudence. Just as the supertanker ran aground off the coast of Alaska in early 1989, the high court began to signal a tide change in the regulation of punitive damages awards.[1] At that time, punitive damages were largely regulated by state law, but the Court soon established a constitutional limitation on grossly excessive punitive awards.[2] As that limitation has taken form over the last two decades, the catastrophic fallout from the *Exxon Valdez* oil spill was being litigated in the lower courts. Nearly 20 years after the spill, those who sought punitive damages for their resulting injuries were met by a Supreme Court still hostile toward punitives, and poised to limit them in a new and unique way.

Long before the *Exxon Valdez* case made it to the Supreme Court's docket, there were concerns that punitive damages awards had run amuck.[3] Eventually, the Court devised a means of limiting grossly excessive punitives as a matter of substantive due process.[4] An important element of the Court's due process analysis involved the relationship between compensatory and punitive damages: the prevailing notion was that punitive damages should be tied to compensatory damages by means of a ratio or maximum multiple.[5] As the Court's punitive damages jurisprudence was developing, so too was the litigation on behalf of plaintiffs injured as a result of the *Exxon Valdez* spill. The parties, and the legal community, expected that the *Exxon Valdez* litigation would at some point test the confines of the due process limitation on punitive damages. In a surprise move, however, the Court refused to address the constitutional issue, and instead examined the prospect of limiting punitive damages as a matter of federal maritime common law.[6] Thus, the Court established a new limitation on punitive damages, grounded not in the U.S. Constitution, but in the Court's authority as a common-law court of last review to construct (or in this case, repair) a remedy. The Court ultimately held that a punitive award should not exceed a compensatory award, thus

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1. The *Exxon Valdez* ran aground on March 23, 1989. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2612, 38 ELR 20149 (2008). The Supreme Court first signaled that punitive damages may be subject to limitation under the Due Process Clause of the Fourteenth Amendment on April 26, 1989. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275-76 (1989).
2. *See infra* Part I.
3. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1989) (expressing concern about punitive damages that "run wild").
4. *See infra* Part I.
5. *See infra* Part I.
6. *See infra* Part II.B.

setting a presumptive 1:1 ratio of punitive to compensatory damages in federal maritime common-law claims.

This Article analyzes the Court's decision in *Exxon Shipping Co. v. Baker* and examines its potential impact on future punitive damage awards in the United States. First, the evolution of the substantive due process limitation on punitive damages is discussed as a run-up to *Exxon Shipping*.[7] A primer on the substantive due process limitation on punitive damages is especially important because *Exxon Shipping* may be signaling a change in this body of law.[8] The facts relating to the *Exxon Valdez* spill are then introduced, followed by an analysis of the Court's decision to limit punitive damages as a matter of federal maritime common law (rather than due process).[9] The implications of this landmark decision are then evaluated,[10] including the potential impact on other federal common-law claims, such as those raised in environmental cases.[11] Important exceptions to both the substantive due process and common-law punitive damage limitations, which depend in large part on a defendant's culpability, are also discussed.[12]

I. The Evolution of the Constitutional Constraint on Punitive Damages

The doctrine of punitive damages is an advent of the common law that has long been accepted in American courts to further the goals of deterrence and retribution.[13] At earlier points in history, punitive damages were also used to compensate victims for intangible injuries for which no other remedy was available.[14] The doctrine has since evolved to serve purely punitive purposes.[15] As the Supreme Court most recently noted, "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[16] Generally, punitive damages are available against defendants whose conduct is exceptionally blameworthy.[17] Although the type of conduct that warrants punitive damages can vary depending on the jurisdiction and applicable substantive law, punitives are generally available when a defendant's conduct is grossly negligent, willful, wanton, reckless, malicious, intentional, outrageous, or if the defendant has demonstrated a flagrant disregard for the rights of others.[18]

Procedurally, the amount of a punitive award is subject to the discretion of a jury in the first instance, and the instructions juries receive can vary by jurisdiction.[19] Awards are then subject to judicial review, at both the trial and appellate levels, to ensure reasonableness.[20] In some states, punitive awards may be further limited, or even eliminated, by statute.[21]

Although punitive damages have historically been policed by state law, concerns that punitives had "run wild" eventually led the Supreme Court to weigh in on the issue.[22] In the string of cases discussed below, the Court has limited punitive damages awards via the Due Process Clause of the Fourteenth Amendment.[23] The Clause has both a procedural and a substantive component. It ensures that individuals receive notice and a fair hearing before they are deprived of liberty or property by the government. It has also been read to include a guarantee of substantive rights that protect individuals from government interference, irrespective of process.[24] While the procedural and substantive components are often intertwined in the punitive damages case law, it is widely understood that the constitutional limit on grossly excessive punitive damages is a matter of substantive due process.[25]

To guard against excessive punitive damage awards, the Court incrementally created a framework for determining whether an award violates due process. Eventually, that framework came to tie punitive to compensatory damages

7. *See infra* Part I.
8. *See infra* Part III.B.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part III.A.
12. *See infra* Part III.C.
13. *See, e.g.*, *Exxon Shipping*, 128 S. Ct. at 2620. Foreign jurisdictions do not enjoy the same relationship with punitive damages. *See id.* at 2623; *see also infra* note 111.
14. *See Exxon Shipping*, 128 S. Ct. at 2620; *see also* Alexandra B. Klass, 92 Minn. L. Rev. 83, 91-92 (2007) (explaining that punitive damages have not always served solely punitive purposes, and that some states still use punitive damages to provide additional compensation to injured plaintiffs).
15. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437-38 n.11 (2001).
16. *Exxon Shipping*, 128 S. Ct. at 2621. Whether deterrence is the appropriate theory for awarding punitive damages is of course open to debate. *See, e.g.*, Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 Iowa L. Rev. 957 (2007) (arguing that the deterrence theory does not sufficiently explain the purpose of punitive damages and that a new theory of punitive damages based on private retribution may be better suited to the modern tort system).
17. The Supreme Court has found that reprehensibility of a defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award [because it reflects the accepted view that some wrongs are more blameworthy than others." BMW of N. Am., Inc. v. Gore, 517 U.S. 550, 575 (1996).
18. *See, e.g.,* Christian E. Schlegel, *Is a Federal Cap on Punitive Damages in Our Best Interest?: A Consideration of H.R. 956 in Light of Tennessee's Experience*, 69 Tenn. L. Rev. 677, 686-87 (2002) (discussing the spectrum of blameworthiness as it is defined by various states).
19. *See* Klass, *supra* note 14, at 92 (discussing the factors juries consider in awarding punitive damages).
20. *Haslip*, 499 U.S. at 15.
21. *Gore*, 517 U.S. at 614-19 (Ginsburg, J., dissenting) (indexing state statutes limiting punitive damages awards). Louisiana has abolished punitive damages by statute. *See* La. Civ. Code Ann. art. 3546 (1997). New Hampshire has abolished them unless otherwise permitted by statute. *See* N.H. Rev. Stat. Ann. §507:16 (2006).
22. *Haslip*, 499 U.S. at 18. *See also* Sebok, *supra* note 16, at 962-76 (arguing that the notion that punitive damages are "out of control" is a myth).
23. U.S. Const. amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
24. *See, e.g.*, Thomas B. Colby, *Clearing the Smoke From* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 188 Yale L.J. 392, 400-01 (2008).
25. In the course of developing a constitutional limit on punitive damages, the Court has intertwined its procedural and substantive due process analysis. *See, e.g.*, Colby, *supra* note 24, at 401-05 (arguing that the Court has often couched its substantive due process analysis in procedural terms to ward off criticism of *Lochner*-era decisionmaking). As Prof. Thomas Colby explains, however shrouded, the Court's analysis has been concerned with whether punitive damages are "'grossly excessive in relation to' the 'State's legitimate interests in punishing unlawful conduct and deterring its repetition'—a quintessentially substantive inquiry." *Id.* at 403 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 550, 568 (1996); *Cooper Indus.*, 532 U.S. at 433-34). For further discussion of how the procedural and substantive due process protections have become intertwined, see F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damage Awards: "Morals Without Technique"?*, 60 Fla. L. Rev. 349, 356-57 (2008).

by means of a ratio or maximum multiple.[26] The Court grounded this limitation on punitive damages in the Anglo-American legislative tradition of doubling, trebling, or quadrupling damages to punish and deter wrongful conduct.[27] Because it provides context for the Court's most recent decision to establish a ratio for limiting punitive damages as a matter of federal maritime common law, the battle over the appropriate ratio of punitive to compensatory damages as a matter of substantive due process is examined in more detail below.

A. *Step One: The "Objective Criteria" Requirement*

The Court first signaled that an excessive punitive damages award may violate the Due Process Clause of the Fourteenth Amendment in 1989, but did not reach the issue because it was not properly before the Court.[28] Two years later, the Court addressed the due process limitation on punitive damages in *Pacific Mutual Life Insurance Company v. Haslip*,[29] where an insurer found liable for fraud was assessed punitive damages in excess of $800,000.[30] The *Haslip* majority found that reasonableness and adequate judicial guidance must attend a punitive damages award as a matter of due process.[31] The majority tied its due process analysis to the "common-law approach" of determining punitive damages whereby "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct [and later] reviewed by trial and appellate courts to ensure that it is reasonable."[32] While those appear to be procedural considerations, in a more substantive vein, the majority concluded that due process was satisfied because the methods used to determine the punitive damage award in *Haslip* were based on "objective criteria."[33] Despite the vagueness of that standard, the Court refused to draw a mathematical bright line between constitutionally acceptable and excessive punitive damages.[34] However, the Court noted that the *Haslip* award, which was four times greater than the compensatory damages,[35] "may be close to the line."[36]

B. *Step Two: Testing the "Objective Criteria" Requirement*

The next case to challenge the constitutionality of punitive damages involved an award that was 526 times greater than the amount of the compensatory damages. *TXO Production Corp. v. Alliance Resources Corp.*[37] involved claims of slander of title against an oil and gas venturer who, in bad faith, challenged the title of a landowner in order to gain an advantage when renegotiating its royalty agreement.[38] The compensatory damages of $19,000 included only the landowner's cost of defending the bad-faith action, but the jury returned a punitive damage award of $10 million.[39] The parties invited the Court to formulate a more explicit test for determining whether a punitive damages award is constitutionally excessive,[40] but the Court declined, citing *Haslip* as controlling. While the majority acknowledged that punitive damages must bear a reasonable relationship to compensatory damages, it explained that this relationship is just one factor in the calculus, thus rejecting an approach that would strictly peg punitive to compensatory damages.[41] The Court then emphasized that punitive damages should also account for "potential harm that might result from the defendant's conduct," not just the harm that has actually occurred.[42] Considering the multimillion dollar loss that the landowners could have suffered had the venturer been successful in its attempt to defraud them, the Court found that, the "shocking disparity between the punitive award and the compensatory award . . . dissipates."[43] Given the venturer's bad faith, the harm it *could* have caused, its wealth, and the fact that its conduct was part of a larger scheme of deceit, the Court was not convinced that the punitive damage award was grossly excessive.[44]

26. *See infra* Parts I.C. and I.D.
27. BMW of North America, Inc. v. Gore, 517 U.S. 550, 581 and n.3 (1996) (noting the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish").
28. *See Browning-Ferris*, 492 U.S. at 275-76 (refusing to apply the Excessive Fines Clause of the Eighth Amendment to protect defendants from high punitive damage awards in civil cases). Some scholars believe that the Court erred in *Browning-Ferris* and that punitive damages should be subject to constitutional constraints under the Excessive Fines Clause. *See* Michael I. Krauss, 2007 Cato Sup. Ct. Rev. 315, 323 (arguing that large punitive awards "cross the line to become public ordering and are therefore excessive fines").
29. 499 U.S. 1 (1989).
30. *Haslip,* 499 U.S. at 6 n.2 (1989).
31. *Id.* at 18-19.
32. *Id.* at 15.
33. *Id.* at 21-23. Under the applicable state law, that criteria could have included the relationship between the punitive damages award and the potential and actual harm imposed by the defendant's conduct, the degree of reprehensibility of the defendant's conduct, its duration, the profitability of the wrongful conduct to the defendant, the financial position of the defendant, comparable criminal sanctions, other civil awards against the defendant for the same conduct, and the costs of litigation. *Id.*
34. *Id.* at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.").
35. *Id.* at 23.
36. *Id.*
37. 509 U.S. 443 (1993).
38. *Id.* at 446-50.
39. *Id.* at 451.
40. *Id.* at 454-58. The landowners proffered a "rational basis" test that the Court believed would not restrict any punitive award as long as it furthered a legitimate state interest, no matter how large. *Id.* at 456. The venture, on the other hand, suggested that the Court examine the following "objective criteria of fairness[:] (1) awards of punitive damages upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards." *Id.* at 456-57. It appears that this test resembles the one later adopted by the Court. *See infra* Part II.C.; *see also* Sebok, *supra* note 16, at 992-93 (noting resemblance between tests).
41. *TXO Production Corp.*, 509 U.S. at 459-60.
42. *Id.* at 460.
43. *Id.* at 462.
44. *Id.*

C. Step Three: Establishing Guideposts for Determining Excessiveness

The Court invalidated a punitive damages award as excessive for the first time in the 1996 case of *BMW of North America, Inc. v. Gore*,[45] where the punitive award was 500 times greater than the plaintiff's compensatory damages. The case concerned BMW's failure to disclose pre-delivery damage to new automobiles. When the plaintiff discovered that his new sports sedan had been repainted before the sale, he pursued a fraud claim, arguing that he suffered a diminution in property value.[46] The plaintiff also sought punitive damages based on BWM's nationwide policy to conceal pre-delivery repairs under a certain value.[47] The jury awarded compensatory damages of $4,000 and punitive damages of $4 million.[48] Upon review, Alabama's highest court found that the jury improperly used BMW's sales in other jurisdictions as a multiplier when assessing punitive damages, and reduced the punitive award to $2 million.[49] An appeal to the Supreme Court on substantive due process grounds followed, and the Court agreed that BMW could not be punished for conduct (that was actually lawful) in other states.[50]

Taking the opportunity to add more precision to its test for excessiveness, the Court established three guideposts that would put would-be tortfeasors on notice of the potential for and magnitude of punishment.[51] The *Gore* guideposts, still the controlling test for excessiveness of a punitive damage award under the substantive arm of the Due Process Clause, call for examination of: (1) the reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the difference between the punitive damage award and comparable civil sanctions.[52] The Court identified the reprehensibility prong as the most important, under which many nonexclusive facts may be examined.[53] While BMW could not be punished for its out-of-state conduct, the Court found that such conduct would be relevant to the reprehensibility analysis.[54] Nevertheless, the Court did not find BMW's conduct sufficiently reprehensible to justify the $2 million punitive award.[55] Turning to the 500:1 ratio of punitive to compensatory damages, the Court again refused to set a strict mathematical formula, and instead pointed to the "reasonable relationship" standard established in *Haslip* and refined in *TXO Production Corp*. The Court explained that the $4,000 in actual harm did not justify the $2 million in punitives, nor was there a risk of *potential* harm that might justify it.[56] Finally, the range of possible civil penalties paled in comparison to the punitive damage award.[57] Accordingly, the Court, for the first time, invalidated the punitive damage award.[58]

D. Step Four: Strict Mathematical Constraints on Punitive Damages Remain Elusive, but the Court Signals the Imposition of a Single-Digit Ratio

Despite the Court's continued reluctance to impose strict mathematical constraints on punitive damages as a matter of substantive due process, it came closest to doing so in the 2003 case of *State Farm Mutual Automobile Insurance v. Campbell*,[59] where the punitive award was 145 times greater than the compensatory award. *Campbell* involved bad-faith, fraud, and intentional infliction of emotional distress claims against an insurer for failing to settle an automobile insurance claim,[60] for which the plaintiffs were awarded $1 million in compensatory damages.[61] To support their claim for punitive damages, plaintiffs introduced evidence of State Farm's 20-year national practice of denying claims to reduce payouts and increase corporate profits.[62] However, most of those practices related to first-party insurance claims, which were distinct from the third-party claim pursued by the plaintiffs.[63] Nonetheless, plaintiffs were awarded $145 million in punitive damages.[64] Following *Gore*, the Court found that the defendant could not be punished for its (potentially lawful) out-of-state conduct, nor could it enter the reprehensibility analysis because it lacked "a nexus to the specific harm suffered by the plaintiff[s]."[65] With regard to the 145:1 ratio of punitive to compensatory damages, the Court cau-

45. 517 U.S. 559 (1996).
46. *Id.* at 563-65.
47. *Id.* at 563-64. Where pre-delivery damage was less than 3% of the automobile's value, BMW did not disclose pre-delivery repairs to dealers and/or purchasers. *Id.*
48. The jury awarded compensatory damages of $4,000, representing the plaintiff's diminished value, and punitive damages of $4 million to punish BMW for selling approximately 1,000 cars under similar circumstances nationwide. *Id.* at 564-65.
49. *Id.* at 567.
50. *Id.* at 568-70. Sixty percent of BMW's nondisclosure took place in states where such conduct was lawful. *Id.* at 574. Although Alabama had an obvious state interest in deterring tortfeasors by imposing punitive damages for tortuous conduct within its borders, principles of sovereignty and comity preclude Alabama from imposing sanctions for conduct lawful in other states. *Id.* at 572.
51. *See id.* at 574-75.
52. *See id.* at 575.
53. *See id.* at 575. The reprehensibility analysis may include examination of whether

> [t]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576-77).

54. *Gore*, 517 U.S. at 575, n.21.
55. *Id.* at 580.
56. *Id.* at 582.
57. *Id.* at 583-85. The potential civil penalties ranged from $2,000-$10,000, while the punitive damage award was $2 million.
58. The case was sent back to the Alabama Supreme Court for a new trial or further *remittitur*. *Id.* at 586.
59. 538 U.S. 408 (2003).
60. *Campbell*, 538 U.S. at 413.
61. *Id.* at 415. The trial court reduced the jury's compensatory damage award of $2.5 million.
62. *Id.* at 415-16; *see also id.* at 420 (noting that this case "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country").
63. *Id.* at 415-16.
64. *Id.* The compensatory damage of $2.5 million and punitive damages of $145 million were later remitted by the trial court to $1 million and $25 million respectively, and the state Supreme Court later reinstated the $145 million punitive award. *Id.* at 415.
65. *Id.*; *see also id.* at 423-24 (explaining how evidence of defendant's claims-handling practices on which a punitive damages claim was based was largely unrelated to plaintiff's specific claim).

tioned that "few awards exceeding a single digit ratio" will comport with due process."[66] Eschewing a hard and fast rule, the Court explained that higher ratios may still pass constitutional muster where egregious acts result in a small amount of economic damages, or where an injury is hard to detect or difficult to value.[67] The converse also holds: a substantial compensatory damage award could dictate "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[68] Applying this reasoning, the Court found that the $145 million punitive damage award violated due process.[69]

Not since *Campbell* has the Supreme Court revisited the issue of the appropriate ratio between punitive and compensatory damages as a matter of substantive due process.[70] The Court had the opportunity to again review this constraint in *Exxon Shipping*, but it declined.[71] Instead, the Court chose to address an issue of first impression: whether a $2.5 billion punitive damage award against Exxon was excessive as a matter of federal maritime common law.[72]

II. A New Limitation on Punitive Damages

When the *Exxon Valdez* ran aground, it spilled 11 million gallons of crude oil into the Prince William Sound, impacting commercial fisherman, Native Alaskans, and landowners. These parties sought recovery for their economic injuries in *Exxon Shipping*.[73] After years of litigation, the Supreme Court was asked to review the $2.5 billion punitive award, which was roughly five times the amount of the plaintiffs' compensatory damages.[74] Summoning its power as a common-law court of last review, the Court focused on the need for consistency across punitive damage awards and relied on empirical data in concluding that punitive damages should not exceed the amount of the compensatory damages in a case of reckless conduct.[75] Three dissenting Justices argued, among other things, that the punitive damages limitation was a policy decision better left to the U.S. Congress.[76] The Court's reasoning, and the facts underlying it, are examined in more detail below.

A. *The* Exxon Valdez *Spill and Resulting Litigation*

The *Exxon Valdez* ran aground on Bligh Reef off the coast of Alaska on March 23, 1989, spilling 11 million gallons of crude oil into Prince William Sound.[77] Avoiding the collision would have required the presence and expertise of Capt. Joseph Hazelwood who, two minutes before the required turn, inexplicably retired to his cabin, leaving the complicated maneuver to a third mate unlicensed to navigate these particular waters.[78] When the captain returned, he attempted to rock the tanker off the reef, which could have exacerbated the damage to the ship and worsened the spill.[79] When the U.S. Coast Guard responded, they found that the captain, who had a history of alcoholism, had an elevated blood alcohol level 11 hours after the spill.[80] Expert testimony at trial revealed that the captain's blood alcohol level at the time of the spill must have been three times the legal limit for driving in most states.[81]

The spill "spread far and wide around Prince William Sound," damaging land and vessels, and disrupting commercial fisheries, recreational activities, and subsistence fishing by residents in the affected area.[82] Exxon spent approximately $2.1 billion to remediate the spill.[83] In addition, Exxon pled guilty to criminal violations of federal environmental statutes, which resulted in fines and restitution of approximately $125 million.[84] Exxon also settled civil natural resource damage claims brought against it by the United States and the state of Alaska for approximately $900 million.[85] Voluntary settlements with private parties amounted to another $303 million.[86] Accordingly, prior to adjudication of the remaining civil claims in *Exxon Shipping*, Exxon already paid approximately $3.4 billion in connection with the spill.

In *Exxon Shipping*, three classes of private plaintiffs (commercial fisherman, Native Alaskans and landowners) sought compensatory damages for economic injuries they suffered as a result of the spill.[87] A mandatory class of 32,000+ plaintiffs seeking punitive damages was also certified.[88] The jury ultimately awarded $287 million in compensatory damages to the commercial fisherman, while the Native Alaskans settled for approximately $22.6 million.[89] The landowners' claims were settled before that phase of the trial was reached. The jury then awarded $5 billion in punitive damages.[90]

66. *Id.* at 425.
67. *Id.*
68. *Id.*
69. *Id.* at 426-28. The Court also found that the third *Gore* guidepost—the disparity between the punitive award and comparable civil penalties—suggested a due process violation. *Id.* at 428.
70. However, the Court has since considered other issues pertaining to the substantive due process constraint on punitive damages. *See* Philip Morris USA v. Williams, 549 U.S. 346 (2007) (holding that harm to nonparties may enter reprehensibility analysis but jury must be instructed not to use punitive damages to directly punish defendant for harm to parties not before the court).
71. Exxon Shipping v. Baker, 128 S. Ct. 499 (2007) (denying certiorari).
72. Exxon Shipping v. Baker, 128 S. Ct. 2605, 2614, 38 ELR 20149 (2008).
73. *See infra* Part II.A.
74. *Id.*
75. *See infra* Part II.B.
76. *See infra* Part II.C.
77. *Id.* at 2613.
78. *Id.* "To make matters worse, before going below, [Captain] Hazelwood put the tanker on autopilot, speeding it up, making the turn trickier, and any mistake harder to correct." *Id.*
79. *Id.*
80. *Id.* Exxon was aware of Captain Hazelwood's alcoholism, including the fact that he completed a 28-day treatment program but dropped out of follow-up treatment and Alcoholics Anonymous, and continued to drink, even aboard Exxon tankers. *Id.* at 2612.
81. *Id.* at 2613.
82. In re Exxon Valdez, 236 F. Supp. 2d 1043, 1046-47 (D. Alaska 2002).
83. *Exxon Shipping*, 128 S. Ct. at 2613.
84. *Id.* Exxon pled guilty to violations of the Clean Water Act, 33 U.S.C. §§1311(a) and 1319(c)(1), ELR Stat. FWPCA §§101-607, the Refuse Act of 1899, 33 U.S.C. §§407 and 411, and the Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a).
85. *Exxon Shipping*, 128 S. Ct. at 2613.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 2614. When released claims and settlement were deducted from the fishermen's $287 million jury award, the outstanding balance was approximately $19.6 million. *Id.*
90. *Id.* While, the $5 billion was awarded against Exxon, the jury also awarded $5,000 in punitive damages against the Captain himself. *Id.*

The U.S. Court of Appeals for the Ninth Circuit remanded twice for adjustments to the punitive damages award in light of the Supreme Court's substantive due process jurisprudence, which was continuously evolving as this case was pending in the lower courts. On its first appeal, the Ninth Circuit remanded so that a lower punitive award could be set in accordance with *Gore*.[91] On remand, the trial court paid lip service to *Gore*, but concluded that there were no "principled means" by which it could reduce the award.[92] Another appeal followed, and the Ninth Circuit responded by vacating the trial court's judgment and ordering that it again reconsider the award in light of the Supreme Court's decision in *Campbell*,[93] which was decided in the meantime, and which suggested that "few awards exceeding a single digit ratio" would comport with due process."[94]

The trial court again concluded that the award did not violate due process,[95] noting that it even satisfied *Campbell*'s single-digit multiplier standard since the punitive to compensatory ratio was 9.74 to 1.[96] However, to satisfy the Ninth Circuit's direction to reduce the award, the trial court reluctantly entered a judgment for $4.5 billion in punitive damages.[97] A third appeal to the Ninth Circuit followed, and the court honed in on Exxon's conduct, noting that it was not in the highest realm of reprehensibility.[98] Noting that the ratio of punitive to compensatory damages "bordered on the presumption of constitutional questionability," the court concluded that a ratio of 5:1 would be more in line with Supreme Court precedent.[99] The Ninth Circuit again remanded, this time, with instructions to reduce the award to $2.5 billion.[100]

Exxon appealed to the Supreme Court, which refused to address the issue of whether the $2.5 billion award violated substantive due process. The Court instead granted certiorari to consider whether the punitive damages were excessive as a matter of federal maritime common law.[101] Certiorari was also granted to consider whether maritime law allows corporate liability for punitive damages based on the acts of managerial agents,[102] and whether the Clean Water Act (CWA)[103] preempts punitive damages, which are not examined here. This Article is limited to an evaluation of the punitive damages aspect of the decision.[104] Here, a majority of the Supreme Court concluded that punitive damages should not exceed a 1:1 ratio with compensatory damages as a matter of federal maritime common law.[105]

B. The Majority's Concern for Consistency Across Punitive Damage Awards

In a decision that reads somewhat like a dissertation on "the place of punishment in modern civil law,"[106] the majority began by framing its inquiry in broad terms, asking whether the $2.5 billion punitive award against Exxon exceeded the bounds justified by the punitive damages goal of deterrence.[107] After examining how the common-law rationale for punitive damages has evolved,[108] the majority emphasized the modern consensus that "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[109] Under this regime, judges and juries should refine their judgments not only to reach an optimal level of penalty and deterrence, but also to ensure consistent results in like cases.[110] Based on its review of the punitive damages literature, the majority concluded that these goals were not being met, and that the wide spread of awards indicated that punitive damages were starkly unpredictable.[111] Thus, while this case specifically concerned punitive damages in a maritime case, the majority's goal of ensuring consistency across punitive damage awards in cases involving similar claims and circumstances was readily apparent.[112] According to the majority, "a penalty should be reasonably predictable in its severity, so that even the [theoretical bad actor] can look ahead with some ability to know what the stakes are in choosing one course of action over another."[113]

Although the substantive due process limitation on punitive damages appeared to provide an established position

91. In re Exxon Valdez, 270 F.3d 1215, 1246-47, 32 ELR 20320 (9th Cir. 2001). For a discussion of the *Gore* standard, see notes 45-58 and accompanying text.
92. In re Exxon Valdez, 236 F. Supp. 2d 1043, 1052, 1068 (D. Alaska 2002). The trial court noted that the post-*Gore* decisions were inconsistent and offered little guidance in reconsidered the $5 billion punitive damage award against Exxon. *Id.* at 1052.
93. In re Exxon Valdez, No. 30-35166, No. 03-32519, 2003 U.S. App. LEXIS 18219, at *2 (9th Cir. Aug. 18, 2003). For a discussion of *Campbell*, see notes 59-69 and accompanying text.
94. *Id.* at 425.
95. In re Exxon Valdez, 296 F. Supp. 2d 1071, 110 (D. Alaska 2004).
96. *Id.* at 1106. The court found Exxon caused plaintiffs actual harm in the amount of $513,147,740, which, when considering the punitive damages award of $5 billion, leads to a ratio of 9.74 to1. *Id.* at 1103.
97. *Id.* at 1110. The trial court still insisted that it "[did] not perceive any principled means by which it [could] reduce [the] award." *Id.*
98. In re Exxon Valdez, 472 F.3d 600, 612-18, 37 ELR 20001 (9th Cir. 2006).
99. *Id.* at 623-24.
100. *Id.* at 625.
101. *Exxon Shipping*, 128 S. Ct. at 2614.
102. The issue of corporate liability for exemplary damages was central to *Exxon Shipping*, but given that the Supreme Court was equally divided as to whether maritime law allows corporate liability for punitive damages based on the acts of managerial agents, that issue was not reached. *See id.* at 2615-17. Therefore, the Ninth Circuit's opinion finding Exxon liable for punitive damages was undisturbed in that respect. *See id.* at 2616.
103. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
104. *See Exxon Shipping*, 128 S. Ct. at 2616-134. The Court concluded that there was no clear congressional intent to preempt punitive damages under the CWA, nor would permitting punitive damages frustrate the goals of the Act. *See id.* at 2619.
105. *See id.* at 2633-34 ("[W]e consider that a 1:1 ratio, which is above the median award, is a fair upper limit in maritime cases [a]nd our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low.").
106. *Id.* at 2620.
107. *Id.* at 2619-20.
108. *Id.* at 2620. Historically, punitive damages were intended to punish extraordinary wrongdoing, to deter others from engaging in similar future wrongdoing, and to compensate for intangible injuries not available as compensatory damages at earlier points in our jurisprudential history. *Id.* As the types of compensatory damages available to plaintiffs broadened, punitive damages lost their compensatory function. *Id.* at 2621.
109. *Id.* at 2621.
110. *Id.* at 2625.
111. *Id.* at 2625-26. In concluding that the problem with punitive damages was their unpredictability, the majority rejected criticisms that punitive damages are out of control in the United States. *See id.* at 2625. Overall, however, punitive damages are still higher in the United States than elsewhere in the developed world. *See id.* at 2623. For a comparison of the American and European approach to punitive damages, see Helmut Koziol, *Punitive Damages—A European Perspective*, 68 La. L. Rev. 741, 751-61 (2008).
112. *See Exxon Shipping*, 128 S. Ct. at 2626-27.
113. *Id.* at 2627 (citing *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897)).

from which to analyze the fairness of the punitive damages award in this case, the majority drew a distinction between the due process cases,[114] which were matters of state law in the first instance, and this maritime case, which is first a matter of federal common law.[115] Because an analysis of the remedies available under the common law precedes the application of any constitutional standard, the Court did not reach the issue of whether the $2.5 billion in punitives violated Exxon's substantive due process rights.[116] To meet its goal of ensuring reasonably predictable punitives as a matter of federal common law, the majority considered three alternatives: verbal instructions, which the majority believed do not go far enough in promoting systemic consistency[117]; establishing a hard dollar limit on punitives, which would be difficult given the lack of a "standard" injury on which to base such a cap[118]; and finally, by using a ratio or maximum multiple that ties punitive to compensatory damages.[119]

Perhaps unsurprisingly, given the Court's experience in pegging punitive to compensatory damages in the substantive due process arena,[120] the majority chose to establish a ratio.[121] For guidance, the majority surveyed the ratios applied by various state and federal statutes. Those schemes were deemed to be ill-suited to this particular case however, either because the schemes were designed to punish and deter conduct more egregious than Exxon's,[122] or because they were too scattered in their application to offer a good measure for punitive damages in the maritime context.[123] The majority even eschewed borrowing from state environmental damage schemes,[124] which one may think would be most analogous given that the plaintiffs' injuries were the result of environmental damage. The majority instead took an empirical approach, relying on data from a survey of state court punitive damages awards.[125]

The key data on which the majority relied was derived from a study examining state court trials involving tort, contract, and property cases from a random sample of 46 of the 75 most populous counties in the United States.[126] The data revealed that where punitive damages were awarded by juries, the median punitive to compensatory damage ratio was only 0.62:1.[127] However, the mean ratio of 2.90:1, and the standard deviation of 13.81, demonstrate the great spread in awards that was the majority's cause for concern.[128] The data on judge-issued punitives told a similar story of inconsistency: a median punitive to compensatory ratio of 0.66:1, a mean ratio of 1.60:1, and a standard deviation of 4.54.[129] From this data, the majority surmised that the "*median ratio of punitive to compensatory damages [was] about 0.65:1.*"[130]

The majority was of the opinion that the median ratio reflected "reasonable penalties in cases with no earmarks of exceptional blameworthiness [and] without modest economic harm or [low] odds of detection."[131] Exxon's conduct was, at most, reckless. Given that Exxon's conduct did not rise to the level of intent or malice, was not driven by desire for financial gain, and did not result in modest or undetectable harm, the majority believed the median ratio to be appropriate.[132] To protect against the unpredictability of high damage awards, the majority ultimately held that a 1:1 ratio, which is slightly above the 0.65:1 median, is a fair upper limit in maritime cases such as this.[133] The majority concluded by noting that its substantive due process jurisprudence confirms that the 1:1 ratio is not too low,[134] echoing the *Campbell* majority's warning 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."[135]

Expecting criticisms that this decision "smacks too much of policy and too little of principle," the majority noted that establishing a ratio for limiting punitive damages as a matter

114. *See infra* Part I.
115. *Exxon Shipping*, 128 S. Ct. at 2626.
116. *Id.* at 2626-27 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.").
117. *Id.* at 2627-29. The majority was of the opinion that verbal formulations—such as limits based on the "degree of heinousness" or "degree of reprehensibility"—which are superimposed on jury instructions do not promote consistency to the same extent as tying punitives to a "specifically proven item of damage," such as the cost of medical treatment. *Id.* at 2728. The majority draws an analogy to criminal sentencing guidelines to illustrate that without specific, quantifiable guidance, punitive damages awards run a serious risk of being arbitrarily awarded. *Id.* at 2629-30. Calls for a more uniform approach to imposing punitive damages, akin to criminal sentencing guidelines, are not new. *See, e.g.*, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law,* 94 Cal. L. Rev. 793, 813-19 (May 2006) (proposing a guidelines system for punitive damages).
118. *Exxon Shipping*, 128 S. Ct. at 2629. The majority noted that the judiciary, unlike the legislature could not "pick a figure, index it for inflation, and revisit its provision whenever there seems to be a need for further tinkering," because the court has no control over when a specific issue will be brought back before it. *Id.* This might be construed as an invitation for Congress to enact such a maximum cap on punitive damages. *See also* Leo M. Romero *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 Conn. L. Rev. 109, 151-60 (2008) (proposing a policy for capping punitive damages that would still permit higher awards in certain cases).
119. *Id.*
120. *See infra* Parts I.C. and I.D.
121. *Exxon Shipping*, 128 S. Ct. at 2629. ("The more promising alternative is to leave the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages.").
122. *Id.* at 2632. In particular, the 3:1 ratio of punitive to compensatory damages (adopted by a majority of states that so limit punitive damages) are applied across the board, including cases involving the highest degree of blameworthiness, which was not present in *Exxon Shipping. See id.* at 2631-32.
123. *Id.* at 2632 (noting that federal and state treble damages states are targeted at various areas, unrelated to one another, and more importantly, unrelated to federal maritime law).
124. *See id.* Similar to its analysis of other state and federal damage schemes, the majority found that state statutes that punish defendants for environmental harm are not suited to Exxon's degree of blameworthiness here. Noting that some environmental schemes punish negligent conduct, and others punish only willful conduct, the majority believed that, on the whole, the schemes were too inconsistent to be imported and applied here. *See id.*
125. *See id.* at 2629, 2632-33.
126. *Id.* at 2625 n. 16. (citing T. 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 Stud. 263, 278 (2006)).
127. *Id.* at 2625.
128. *Id.*
129. *Id.*
130. *Id.* at 2633 (emphasis added).
131. *Id.*
132. *Id.*
133. *Id.* at 2633.
134. *Id.* at 2634.
135. *State Farm*, 538 U.S. at 425.

of federal maritime common law was no less judicial than establishing a limit as a matter of substantive due process.[136] Moreover, the majority explained that the inconsistency in punitive damage awards was a problem that the judiciary itself created.[137] As a common-law court of last review, the majority reasoned that the Court bore the responsibility of correcting the defects in this common-law remedy.[138] Congress could, of course, alter the decision by enacting legislation targeting punitive damages.[139]

C. *Institutional (In)Competence and an Ill-Founded Comparison: A Recipe for Dissent*

The dissenting Justices—John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer—challenged the Court's ability to place a principled limitation on punitive damages, its reliance on land-based torts to establish a punitive damages ceiling under maritime law, and its failure to recognize this case as an exception to its own rule.[140] Justice Stevens argued, and Justice Ginsburg agreed, that the Court essentially lacks the institutional competence to limit punitive damages as a matter of federal maritime common law.[141] Because maritime law has come to be dominated by federal statute, and is not merely judge-made, the Justices argued that Congress is better suited to examine the empirical data and determine whether and to what extent punitive damages should be limited.[142] Justice Stevens also argued that it was error for the Court to rely on empirical data from land-based torts in reaching a ratio of punitive to compensatory damages in a maritime case.[143] Justice Stevens explained that because maritime law has not evolved to remedy as broad a swath of injuries as land-based torts, punitive damages continue to play a compensatory role.[144] Where an injury is not fully compensable, he argued that there is less reason to limit punitive damages.[145]

While emphasizing the importance of legal standards that provide notice of punishment and ensure uniform treatment of similarly situated defendants, Justice Breyer recalled the Court's reluctance to set a fixed numerical ratio as a matter of due process.[146] Under that rubric, he explained that the Court "foresaw exceptions to the numerical constraint[s]."[147] Noting no distinction between the constitutional and common-law analyses, Justice Breyer argued that this case presents such an exception.[148] He explained that Exxon's decision to allow a relapsed alcoholic to pilot a supertanker through waters on which the plaintiffs relied for their livelihood was "no mine-run case of reckless behavior," and justified departing from the Court's new 1:1 ratio.[149]

In her dissent, Justice Ginsburg suggested that the majority's holding raised more questions than it settled. For example, because the majority tied the new 1:1 ratio to the lower end of the blameworthiness spectrum, i.e., to reckless conduct, she questioned how the Court would define the appropriate ratio in cases involving more egregious conduct.[150] Justice Ginsburg also questioned the extent to which the magnitude of risk would increase the 1:1 ratio, as it would under a due process analysis.[151] Finally, Justice Ginsburg sounded an alarm when she questioned the Court's direction on punitive damages. Was the Court signaling that the 1:1 ratio will become the outer limit for both federal common-law claims *and* state-law claims as a matter of substantive due process?[152]

III. What's Next? Punitive Damages After *Exxon Shipping*

Although the precedential value of *Exxon Shipping* may be limited to the maritime context, it offers a clear indication of the Court's direction on the issue of punitive damages. First, by grounding the limitation in its common-law authority, the Court opens the possibility that punitive damages may soon be restricted in other federal common-law causes of action.[153] In addition, the Court's suggestion that the constitutional standard is insufficient to ensure consistency across punitive damages awards suggests that the due process limitation on punitive damages may be tightened in the future.[154] Notwithstanding the narrowing of punitive damage awards generally, exceptions still remain intact in cases that are marked by egregious conduct.[155]

136. *Exxon Shipping*, 128 S. Ct. at 2629-30.
137. *Id.*
138. *Id.*
139. *See supra* note 118; *see also* Romero, *supra* note 118, at 151-60 (2008) (proposing a policy for capping punitive damages that would still permit higher awards in certain cases).
140. The dissenting Justices concurred with the Court's opinion regarding Exxon's vicarious liability and preemption under the CAA, dissenting only as to the punitive damages aspect of the decision. *See Exxon Shipping*, 128 S. Ct. at 2634 (Stevens, J., dissenting); *id.* at 2369 (Ginsburg, J., dissenting); *id.* at 2640 (Breyer, J., dissenting).
141. *Id.* at 2634-36 (Stevens, J., dissenting); *see also id.* at 2639 (Ginsburg, J., dissenting).
142. *Id.* at 2634-36 (Stevens, J., dissenting); *id.* at 2639 (Ginsburg, J., dissenting).
143. *Id.* at 2636-37 (Stevens, J., dissenting).
144. *Id.* at 2637. This fits with the older conception of punitive damages, which views them as a backstop for remedies that fail to fully compensate tort victims. *See supra* note 14.
145. *Exxon Shipping*, 128 S. Ct. at 2637 (Breyer, J., dissenting).
146. *Id.* at 2640.
147. *Id.* Indeed, it appears that the majority here foresees exceptions to the 1:1 ratio, depending on a defendant's degree of blameworthiness. *See id.* at 2633 (majority opinion).
148. *Id.* at 2640 (Breyer, J., dissenting). In arguing that this case presents an exception to the strict numerical rule, Justice Breyer did not distinguish between exceptions under the Court's substantive due process jurisprudence and exceptions under the majority's new common-law limitation on punitive damages. Rather, he treats them as fungible. *See id.*
149. *Id.* Accordingly, Justice Breyer would have upheld the award at $2.5 billion as remitted by the Ninth Circuit. *Id.* at 2640-41.
150. *Id.* at 2640 (Ginsburg, J., dissenting).
151. *Id.* (citing *TXO Production Corp.*, 509 U.S. at 460-62). *See supra* notes 41-44 and accompanying text.
152. *Id.*
153. *See infra* Part III.A.
154. *See infra* Part III.B.
155. *See infra* Part III.C.

A. *Broad Reading of* Exxon Shipping *Suggests That Limitations on Punitive Damages in Other Federal and State Common-Law Claims May Follow*

At bottom, the Court's decision in *Exxon Shipping* limited punitive damages to a 1:1 ratio with compensatory damages, as a matter of federal maritime common law. Read narrowly, its holding could be limited to cases arising under federal maritime law. The defense bar, however, is likely to seek a broader interpretation of the holding as a means of limiting punitive damages in other contexts. Plaintiffs looking to sustain the status quo, where exceptionally high punitive damage awards are possible, could certainly argue that the 1:1 ratio was only appropriate given the unique circumstances of *Exxon Shipping*.[156] A truly comparable case would indeed be hard to come by.[157] However, it was not the circumstances surrounding the grounding of the *Exxon Valdez*, or even its disastrous consequences, at which the Court principally took aim. It was the very fact of inconsistent punitive damage awards throughout the United States that drew the majority's ire.[158] In order to remedy what it perceived as the "stark unpredictability of punitive awards,"[159] the majority summoned its power as common-law court, making clear that the imposition of the 1:1 ratio was derived from the Court's authority to fashion federal common-law remedies.[160] To read this holding too narrowly would be to miss an obvious signal from a Court that has generally been hostile toward punitive damages.

Given the Court's reliance on its common-law authority, the majority's reasoning in *Exxon Shipping* could foreseeably apply beyond the maritime context, to other areas of federal common law where punitive damages are available. In the realm of environmental law, for example, the federal common law of nuisance permits aggrieved parties to seek damages for injuries they sustain as a result of an environmental wrong.[161] This rather flexible cause of action has filled the gaps in environmental law by enabling private litigants to seek damages were federal statutes fall short of providing a remedy.[162] As in other tort causes of action, punitive damages can result if it is found that the nuisance was created (or maintained) intentionally, willfully, or maliciously.[163] Indeed, it is not uncommon for an aggrieved party to seek punitive damages in connection with a nuisance claim.[164] Read broadly, the decision in *Exxon Shipping*, with its emphasis on repairing the defects of common-law remedies,[165] could extend to these and other federal common-law claims. If so, defendants could prevail in limiting punitive damages for environmental harm, among other injuries.

It also bears noting that the Court took this opportunity to speak out against punitive damages, not just as a matter of federal common law, but as an issue of national concern.[166] The data on which the Court relied in adopting the 1:1 ratio was not derived exclusively from maritime cases, or even from federal cases alone. Rather, the ratio was based on surveys of cases from state courts around the country, involving various causes of action.[167] The breadth of the data on which the Court based its reasoning in this maritime case may be indicative of the Court's desire to limit punitive damages across the board. As discussed, there is potential for extension of the 1:1 ratio in other areas of federal common law, given the Court's power to fashion remedies as the common-law court of last review in the federal system.[168] But the reach of *Exxon Shipping* may not end there. It is also possible that high state courts could import this reasoning, and perhaps limit punitive damages by virtue of their power to fashion the common law in their jurisdictions. As Justice Stevens noted in his dissent, no single state court imposed a precise ratio under its common-law authority prior to *Exxon Shipping*.[169] Now that the nation's highest court has done so, others may view it as an invitation. As such, litigants should also consider the extent to which *Exxon Shipping* can be used persuasively before other common-law courts, particularly in jurisdictions eager to limit punitive damages.

B. *The Substantive Due Process Limitation on Punitive Damages May Tighten in the Wake of* Exxon Shipping

There was no constitutional inquiry in *Exxon Shipping*. As the majority explained, its inquiry "differ[ed] from due process review" because the punitive damage award against Exxon was reviewed for its conformity with federal maritime com-

156. *See Exxon Shipping*, 128 S. Ct. at 2633 (noting that a 1:1 ratio is a fair upper limit in maritime cases "like" *Exxon Shipping*).
157. *See* notes 77-105 and accompanying text, for a recitation of the facts, Exxon's efforts to mitigate damages, the penalties already levied against the company, and the unique procedural history.
158. *See Exxon Shipping*, 128 S. Ct. at 2624-25 and nn.13-15.
159. *Id.* at 2625.
160. *See id.* at 2626-27 ("Our review of punitive damages [considers] 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."); *see also id.* at 2629-30 (explaining how the Court is acting "in the position of a common law court of last review").
161. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 107-08, 2 ELR 20201 (1972) (holding that cases addressing interstate pollution implicate the federal common law of nuisance and give rise to federal question jurisdiction); *See also* Donald G. Glifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 778-79 (2003) (discussing the distinction between private and public nuisance); *id.* at 806-14 (discussing the evolution of public-nuisance law through the environmental law movement); Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26A Stan. Envtl. L.J. 77, 84-86 (discussing the long-standing federal common law of public nuisance). Of course, there is always the important question of whether a federal common-law claim can survive a preemption challenge. This was a question in *Exxon Shipping*, and the Court ultimately found that the plaintiffs' common-law (maritime) claims were not preempted by the CWA. *See Exxon Shipping*, 128 S. Ct. at 2616-19.
162. *See* Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, 32 Ecology L.Q. 113, 144-47 (2005) (discussing nuisance case law and concluding that "the nuisance tort remains available as a backstop to pollution statutes").
163. 58 Am. Jur. 2d. *Nuisances* §288 (2008).
164. *See, e.g.*, Middlesex County Sewerage Auth. v. Nat. Sea Clammers Ass'n, 453 U.S. 1, 5-6, 11 ELR 20684 (1981) (plaintiffs sought punitive damages for nuisance posed by sewage discharge into waters).
165. *See supra* notes 137-38, 159-60 and accompanying text.
166. *See Exxon Shipping*, 128 S. Ct. at 2624-45 (discussing "*American* punitive damages," without distinguishing between maritime and other cases, or even between federal and state-based common-law claims) (emphasis added).
167. *See id.* at 2624-25 and nn.13-15.
168. *See supra* notes 160-65 and accompanying text.
169. *See Exxon Shipping*, 128 S. Ct. at 2637 (Stevens, J., dissenting).

mon law, which preceded and obviated application of the substantive due process standard.[170] Nevertheless, the majority borrowed frequently from the Court's due process jurisprudence when explaining the basis of its new common-law limit on punitive damages. For example, the majority used the constitutional standard to justify the continued judicial practice of pegging punitive to compensatory damages by means of a ratio.[171] Although it briefly considered other schemes on which to base the common-law limitation,[172] the majority concluded that the "relevance of the ratio between compensatory and punitive damages is *indisputable*, being a central feature in [the Court's] due process analysis."[173]

The majority's reliance on the substantive due process case law also added a much-needed dimension of principle to the establishment of the 1:1 ratio of punitive to compensatory damages. As discussed, the Court settled on the 1:1 ratio after reviewing surveys of punitive damages awards in state court actions across the country.[174] Believing that Congress is better suited to make empirical judgments, the dissenting Justices argued that the majority ought not venture into policymaking.[175] Perhaps in an effort to escape allegations of judicial legislation, and to further ground the 1:1 ratio in legal principle, the majority pointed to its substantive due process jurisprudence, which it said "confirms that the 1:1 ratio is not too low."[176] Most notably, the majority went even further to suggest that the 1:1 ratio may be the appropriate *constitutional* limit in this case,[177] although that suggestion is merely dicta in light of the Court's refusal to consider the constitutional issue.

Under a substantive due process analysis, when compensatory damages are substantial "a lesser ratio [of punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[178] Although it was not open for review under the constitutional standard, the high compensatory damages led the majority to suggest the 1:1 ratio may be the appropriate due process limit in this case.[179] The compensatory award against Exxon was approximately $500 million, and although it was a class action award, the majority believed it met the criterion of substantial, and therefore would have justified a punitive damage award no greater than $500 million as a matter of due process.[180] Of course, that suggestion is merely dicta in light of the Court's refusal to consider the issue. However, it may be indicative of the Court's future approach to punitive damages as a matter of substantive due process.

There is no question that litigants should consider whether and to what extent punitive damages may be further limited as a matter of substantive due process in the future. In her dissent, Justice Ginsburg voiced real concern that, on its next opportunity, the Court may find that any punitive to compensatory ratio greater than 1:1 is unconstitutional as a matter of substantive due process.[181] The actual direction of the substantive due process limitation may soon become evident when the Court again considers the case of *Philip Morris v. Williams*[182] later this term. The Court previously considered the case, which involved a punitive award more than 60 times the compensatory award, but it did not reach the question of whether the punitive damages exceeded the constitutional limit.[183] The case has since been reconsidered by the state court, which reinstated the punitive damage award, and the Supreme Court will again consider its constitutionality.

Aside from the fact that the Court grounded its latest punitive damages limitation in its common-law authority, there is little that distinguishes its reasoning from that in the constitutional context. Therefore, Justice Ginsburg was more than justified in asking just how far the Court intended its holding to reach.[184] Is the Court merely holding that the 1:1 ratio is the punitive damages ceiling in maritime cases? Or was it signaling that the 1:1 ratio will become the outermost limit for punitive damages as a matter of substantive due process, required in all of the states? Given the direction of the Court and its attitude toward punitive damages, it may very well be the latter.

C. Despite the Supreme Court's Hostility Toward Punitive Damages, Exceptions to Its Punitive Damage Constraints Appear to Remain Intact

Despite the narrowing of the ratio of punitive to compensatory damages permissible as a matter of substantive due process, and the new 1:1 ratio as a matter of federal maritime common law, exceptions remain that would permit higher punitive damages awards in some cases.

While the Court has thus far been reluctant to establish a strict mathematical formula limiting punitive damages as a matter of substantive due process,[185] it has cautioned that "few awards exceeding a single digit ratio will comport with due process."[186] Among the exceptions to the single-digit rule are cases characterized by egregious conduct that only results in a small amount of economic harm, or those where injuries

170. *Exxon Shipping*, 128 S. Ct. at 2626.
171. *See id.* at 2629.
172. The majority also considered verbal instructions, which they believed would not stem arbitrary awards, and establishing a hard dollar cap on punitive damages, which would be difficult given the lack of a "standard" injury on which to base the cap. *See id.* at 2727-29.
173. *Id.* at 2729 (emphasis added).
174. *See id.* at 2624-25 and nn.13-15; *see also supra* notes 166-68 and accompanying text.
175. *See id.* at 2634-46 (Stevens, J., dissenting); *id.* at 2639 (Ginsburg, J., dissenting). In response, the majority argued that congressional silence on punitive damage limitation under federal maritime common law did not imply that there should be no rule, and that Court's decision would nevertheless be subject to congressional revision. *Id.* at 2530 n.27 (majority opinion).
176. *Id.* at 2634.
177. *Id.* at 2634 n.28.
178. *Campbell*, 538 U.S. at 425.
179. *Exxon Shipping*, 127 S. Ct. at 2634 and n.28.
180. *Id.*
181. *Id.* at 2639 (Ginsburg, J., dissenting).
182. 128 S. Ct. 2904 (2008) (granting certiorari).
183. Justice Breyer, writing for the majority, framed the issue as procedural—whether the defendant's conduct against nonparties could serve as a basis for the $79.5 million punitive damage award—and declined to reach the issue of whether the award was excessive as a matter of substantive due process. *Williams*, 549 U.S. at 349-53.
184. *Id.* at 2639 (Ginsburg, J., dissenting).
185. Thus, the ratio of punitive to compensatory damages is subject to the reasonable relationship standard. *See TXO Production Corp.*, 509 U.S. at 459-60.
186. *Campbell*, 538 U.S. at 425.

are hard to detect or difficult to value.[187] This suggests that due process will only permit a punitive award that exceeds a single-digit ratio with compensatory damages in the rarest of cases. Several types of cases may fall under this exception, including some in the environmental arena. Oftentimes, environmental harm is undervalued, can be hard to detect, i.e., cases of "midnight dumping," or is otherwise not recoverable due to legal issues, such as a private citizen's lack of standing to sue for damage to the environment.[188] For instance, in *Johansen v. Combustion Engineering, Inc.*,[189] the U.S. Court of Appeals for the Eleventh Circuit found that a punitive award 100 times the amount of the compensatory damages did violate the due process limitation on punitive damages.[190] Although this case was decided before *Campbell*, which preferences single-digit multipliers, it was a rare instance of egregious conduct that causes only modest economic harm. In *Johansen*, the defendant mining company caused $47,000 in pollution-related property damage to the plaintiffs, but was saddled with $4.35 million in punitive damages.[191] The high award was justified given the state's substantial interest in deterring environmental pollution.[192] *Johansen* demonstrates that the substantive due process limitation on punitive damages is not a hard and fast rule.

Despite its interest in ensuring consistency across punitive damage awards,[193] the majority in *Exxon Shipping* also signaled that its federal common-law limit on punitive damages is not black letter law.[194] Again borrowing from the substantive due process jurisprudence, the majority suggested that cases characterized by an exceptional level of blameworthiness, modest economic harm, or low odds of detection may exceed the 1:1 ratio of punitive to compensatory damages.[195] The majority honed in on the importance of a defendant's level of blameworthiness, probably because there was no hint of the other exceptions in *Exxon Shipping*—the harm was substantial and given the sheer magnitude of the spill, it would not have escaped detection.

As the majority reminds us, Exxon's conduct was not especially blameworthy. The company's behavior was not intentional or malicious, nor was it driven primarily by a desire for financial gain.[196] At most, Exxon's behavior was reckless.[197] Normatively, recklessness is close to center on the blameworthiness spectrum.[198] Turning to the empirical data, the Court noted that the median ratio of punitive to compensatory damages was 0.65:1. The court found that reckless conduct of the sort that led to the grounding of the *Exxon Valdez* should be grouped "near" the median, and therefore set the outer limit of punitive to compensatory damages at 1:1.[199]

Where a defendant's conduct ranks on the higher end of the blameworthiness scale, a punitive damage award is less likely to be confined by the 1:1 ratio. Specifically, where a defendant's behavior is found to be malicious or intentional, there is at least an argument that a higher punitive award would be justified.[200] A similar argument is plausible if a defendant's egregious behavior is motivated by its desire for financial gain. In those cases, the question will likely become: How far beyond the 1:1 standard should punitive damages be allowed to extend?[201] The same questions can be asked in the substantive due process context. As discussed, the substantive due process limitation on punitive damages, though looser than the court's 1:1 federal common-law limit, also permits higher awards for exceptionally blameworthy conduct. In both instances, the future of punitive damages will involve further tinkering with the ratios that tie punitive to compensatory damages. However, given that a defendant's level of blameworthiness is still a vital component in determining whether a punitive award violates either the constitutional or federal common-law standard, a hard and fast rule limiting punitive damages may remain elusive.

IV. Conclusion

In *Exxon Shipping*, the Supreme Court established a new mode of limiting punitive damages, not as a matter of substantive due process as it had done in the past, but as a matter of federal maritime common law. The Court continued the practice of pegging punitives to compensatory damages by means of a ratio, which had become an essential component of its due process analysis. Although reluctant to set a strict numerical ratio as a matter of due process, the Court took more decisive action in *Exxon Shipping*. Motivated by empirical data that evinced a great spread in punitive damage awards, the Court concluded that it must exercise its common-law authority to ensure consistency across punitive damages awards. The Court noted that while the spread of awards has been great, the median ratio of punitive to compensatory damages was under 1:1. Reasoning that an award consistent with the median ratio would be appropriate in a case of reckless conduct, the Court found that the punitives awarded against Exxon should not exceed the amount of the plaintiffs' compensatory damages. Accordingly, the Court established a rule of federal maritime common law that limits punitive damages to a 1:1 ratio with compensatory damages.

By grounding this new limitation in its common-law authority to construct remedies, the Court has opened the

187. *See id.*
188. *See* Klass, *supra* note 14, at 111-38 (discussing environmental claims where harm has been undervalued, thus permitting higher punitive damage awards).
189. 170 F.3d 1320, *cert. denied*, 528 U.S. 931, 29 ELR 21219 (11th Cir. 1999).
190. *Id.* at 1339.
191. *Id.* at 1326-27.
192. *Id.* at 1338.
193. *Exxon Shipping*, 127 S. Ct at 2626-27.
194. *Id.* at 2633.
195. *Id.*
196. *Id.*
197. *Id.*
198. *See supra* note 18 and accompanying text.
199. *Id.*
200. In his dissent, Justice Breyer argued that Exxon's conduct was not a simple case of reckless behavior, that this caveat for exceptional blameworthiness applied in this case, and that Exxon should face the full $2.5 billion punitive award. *Id.* at 2640 (Breyer, J., dissenting). *See also supra* notes 147-49 and accompanying text.
201. Justice Ginsburg poses similar questions in her dissent. *See Exxon Shipping*, 128 S. Ct. at 2639 (Ginsburg, J., dissenting).

door to punitive damage constraints in other areas of federal common law. Although *Exxon Shipping* arose under maritime law, little about its analysis was unique to the maritime context. Not even the empirical data on which the Court relied in constructing the 1:1 ratio was related to maritime law. The data was derived from state court punitive damage awards across the country, and involved land-based claims. It seems that the Court was making a larger statement about punitive damage awards in general—essentially that they should be consistent across cases involving similar claims and circumstances. Given the Court's reliance on its common-law authority, and data from a broad swath of cases, it is foreseeable that the 1:1 ratio established in *Exxon Shipping* could be applied to other federal common-law claims where punitive damages are available. For the same reasons, it is also possible that some state courts might follow suit and invoke their common-law authority to similarly limit punitive damages.

The Court's hostility toward punitive damages also signals that further constraints to the due process limitation may follow. Although the Court did not consider whether the award in *Exxon Shipping* violated the constitutional constraint on grossly excessive punitive damages, the Court made several suggestions that the due process limitation should be stricter. Although those suggestions were merely dicta, the Court may be signaling that it is moving toward a 1:1 ratio of punitive to compensatory damages as a matter of due process. Should the Court make such a move, the new 1:1 ratio could become the outermost limit for punitive damages in both federal common-law and state-based claims.

Despite the new limitation on punitive damages in federal maritime cases, and clear signals that further common-law and constitutional limitations may follow, a hard and fast rule could still remain elusive. In *Exxon Shipping* and the due process cases, the Court has articulated exceptions to the permissible ratio of punitive to compensatory damages. In both instances, the Court has explained that cases characterized by an exceptional level of blameworthiness, modest economic harm, or low odds of detection may justify exceeding the applicable ratio. To what extent these exceptions will remain intact is an open question, answerable only by future cases that test the boundaries of excessiveness in a system now primed to ensure consistency across punitive awards.