U.S. SUPREME COURT TORT REFORM: LIMITING STATE POWER TO ARTICULATE AND DEVELOP TORT LAW—DEFAMATION, PREEMPTION, AND PUNITIVE DAMAGES

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I. INTRODUCTION

Ian McEwan's most recent novel, *Saturday*,[1] is about one very eventful day in the life of a London neurosurgeon, Dr. Henry Perowne. Perowne is a gifted, accomplished, and confident surgeon with a loving, devoted family. During the day he and the reader are struck by how much Perowne does not know, as he is faced with a world of terror, war, violence, and other subjects beyond his expertise. In the end, Perowne acts and acts well, but his place in the world might be a little less stable than it was before he awoke "[s]ome hours before dawn."[2]

Today's American tort lawyer or torts professor may well feel a bit like McEwan's Dr. Perowne. Our comfort in knowing our subject is not enough today. Something else is going on and it requires us to reach outside our narrow world of intellectual comfort—torts. That something else is U.S. Supreme Court tort reform. Ignoring it is risky; rejecting it is impossible.[3]

Normally, when one mentions "tort reform," one thinks of proposed or enacted legislation. Most frequently, the legislation is at the state level and may involve modification of some substantive standard

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1. IAN MCEWAN, SATURDAY (2005).

2. *Id.* at 1.

3. When it comes to the U.S. Supreme Court, when the Court speaks, it is the law of the land. And, as Sonny Curtis (the song's author) and the Crickets, The Bobby Fuller Four, The Clash, and even Colin Farrell have all sung: "I fought the law and the law won." So, one had better adjust.

governing liability, such as the right to recover in a products liability case or a medical malpractice case.[4] Alternatively, the state statute may limit a remedy, such as by modifying the collateral source rule[5] or capping recovery of compensatory[6] or punitive damages.[7] Or, the state legislation may involve immunity.[8] Recently, legislative tort reform has occurred at the federal level with the passage of the Class Action Fairness Act, an intensive regulation of the jurisdiction of federal courts in class actions.[9] The Class Action Fairness Act is procedural tort reform because it modifies procedures applicable in class actions, but frequently those class actions are tort cases.

Alternatively, tort reform may mean state and federal judicial decisions limiting the rights of plaintiffs to recover in tort cases. These decisions, which may be viewed as judicial tort reform, are now prevalent at both state and federal levels. Of course, one may argue that these defendant-friendly cases are merely the evolutionary (or devolutionary) development of the common law, and that they should be called a manifestation of common law development in the field of torts rather than tort reform.

This Article is not about legislative tort reform or judicial retrenchment in rights of recovery in state and federal courts. Rather, this Article is about what might be called U.S. Supreme Court tort reform or constitutional tort reform.[10] It is about the U.S. Supreme Court's effectively reforming state tort law through the application of constitutional limitations on state power in ways that limit a plaintiff's right to recover in certain tort cases. Concomitantly, these Supreme Court decisions limit a state's ability to articulate and apply its own law. This limit raises a federalism issue involving a federal limit on state power and autonomy.

This Article discusses the three primary instances of U.S. Supreme Court tort reform: First Amendment limitations on state power (through the Fourteenth Amendment), particularly in defamation and related

4. *See, e.g.*, Jay M. Feinman, *Unmaking and Remaking Tort Law*, 5 HIGH TECH L. 61 (2005); FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW, Chs. 15 & 21 (2004).

5. *See* Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989).

6. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005).

7. *See* DAN B. DOBBS, THE LAW OF TORTS, § 384, at 1074 (2000).

8. Frank L. Maraist & Thomas C. Galligan, Jr., *The Ongoing "Turf War" for Louisiana Tort Law: Interpreting Immunity and the Solidarity Skirmish*, 56 LA. L. REV. 215 (1995).

9. Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005).

10. Professor Mark Geistfeld apparently coined the phrase "constitutional tort reform." *See* Mark Geistfeld, *Constitutional Tort Reform*, 38 LOYOLA L.A. L. REV. 1093 (2005).

cases; Supremacy Clause-based limitations on state tort law in preemption cases; and Fourteenth Amendment limitations on punitive damages recovery. While commentators have discussed these discrete legal topics, this Article brings all three together for comprehensive treatment and analysis.

To set some scheme or matrix for review and critique of these developments and cases, Part II articulates a traditional and modest model of adjudication that contemplates judicial opinions manifesting a process of reasoned elaboration; growth, development, and at least some consistency in jurisprudence over time; purposive statutory interpretation; and respect for the role of the jury in tort cases.

Part III analyzes the defamation and related cases, concluding that they are generally consistent with the model. The Supreme Court's defamation cases have constitutionalized state tort law by placing what one may call elemental and constitutional burdens on the plaintiff's prima facie case. While these burdens limit the plaintiff's right to recover under state law and the state's power to articulate its own tort law, the burdens are built into traditional tort processes of adjudication and leave a significant, continuing role for the jury.

Part IV considers the Supreme Court's preemption cases noting that for the most part these cases represent a court interpreting statutes in a manner that is consistent with the model. However, the preemption cases do raise some troubling issues regarding the difference between contract-related state claims and pure tort claims. They also raise issues about general and special duties in tort cases.

Part V reviews the Supreme Court's recent punitive damages cases, concluding that the punitive damages decisions intrude the most upon state power because the Supreme Court has arguably made *every* state punitive damages case a constitutional case. As a result, courts are left to ask "how much is too much" as a constitutional question in virtually *every* punitive damages case. The punitive damages cases are also the least consistent with Part II's traditional adjudication model because certain aspects of the opinions, such as the ratio presumption articulated in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[11] lack reasoned or principled bases. Likewise, the punitive damages cases radically limit the jury's authority in traditional tort cases. Part VI compares the three groups of cases, summarizes, and makes several suggestions for clearing the punitive damages waters, including a constitutional standard for recovery and heightened burdens of proof.

This Article is traditional legal scholarship. It reviews jurisprudence

11. 538 U.S. 408 (2003).

and seeks common themes as well as conflicts. Necessarily, as it goes through the three areas discussed, it winds and occasionally follows the Court's lead, and raises interesting and related side issues. Like Henry Perowne's Saturday, this piece forces tort lawyers to go beyond their comfort zones.

II. A MODEST MODEL OF ADJUDICATION

This Part sets forth a traditional but modest model of what judges do when they adjudicate cases.[12] The articulation of a model of adjudication is important in its own right because it describes and sheds light on an important institution in American government—the judiciary. A model of adjudication is of paramount importance in a society that purports to be governed by a rule of law.[13] Its explanation of the common law is important. Tort cases are common law cases. Thus, in writing about Supreme Court tort reform or constitutional tort reform, some underlying basis for analyzing the relevant cases is necessary. Moreover, insofar as the cases discussed below limit the power of state courts to articulate their common law, the Supreme Court's impact on the common law is manifest, and some explanation of the common law judging process is thus critical. Additionally, an articulated model of adjudication is important in a democracy where courts play a key role in deciding cases that both articulate and impact upon our basic rights and values. Moreover, a model is crucial to explaining the relationship between courts and legislatures, and the relationship between federal and state courts interpreting and applying the Constitution and state law. This model is modest because it merely purports to be descriptive and makes no bold normative claims about the nature or extent of the adjudication process. As such, its modesty may fairly be said to also make it traditional. The model contemplates party input or the opportunity to be heard, opinions manifesting a process of reasoned elaboration, purposive interpretation of statutes, development of the law over time, and a meaningful role for the jury.

In *The Forms and Limits of Adjudication*,[14] Lon Fuller described

12. The model does not make refined distinctions between trial and appellate judges but necessarily is more concerned with appellate judges as the focus of the article is on appellate cases. Of course, it does contemplate a meaningful role for the jury that is relevant both at trial and in the review of jury decisions on appeal.

13. *See generally* James W. Torke, *What Is this Thing Called the Rule of Law?*, 34 IND. L. REV. 1445 (2001).

14. 92 HARV. L. REV. 353 (1978). While the article was published in 1978, portions of it had been included in two previous articles and initial versions had been circulated to a legal philosophy discussion group at Harvard Law School in 1957 and other versions had been used in Professor Fuller's

adjudication as a mode of social ordering.[15] Fuller claimed that the "distinguishing feature of adjudication lies in the mode of participation which it accords to the party affected by the decision."[16] He stated that adjudication is "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[17] Fuller claimed that, as a result of the nature of the adjudication process, a requisite standard of rationality was not necessarily present in other modes of social ordering.[18] But why rational, and reasoned from what? Here, Fuller claimed that the judge's reasoned decision was to be based on "principle."[19] He wrote: "Courts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity."[20] For Fuller, the principles that the court would apply came from what one commentator has called a sort of secular natural law.[21] While one may not necessarily accept Fuller's optimistic aspirations for the development of a secular natural law, his emphasis on the importance of reason either as grounds for decision or as a tool for justification remains important. It bears emphasis that Fuller wrote in the World War II and post-World War II era and attempted to articulate some justification or theoretical basis for law and adjudication that avoided both the excesses of positivism and the harsh reality of the realist criticism that, at its extreme, would equate judging with pure political fiat or whim.[22]

Others complemented and built on Fuller's work. Professors Hart and Sacks created teaching materials called *The Legal Process*.[23] In *The Legal Process*, Hart and Sacks analyzed and articulated various institutions in American law, including, of course, the courts. Drawing on an earlier phrase first used by Professors Wellington and Bickle, Hart

jurisprudence course and for other purposes.

15. *Id.* at 357.

16. *Id.* at 364.

17. *Id*. at 366.

18. *Id.* at 367.

19. *Id.* at 372.

20. *Id.*

21. Neil Duxbury, *Faith and Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 623 (1993).

22. *See generally* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89 (2005); William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525 (2005).

23. Duxbury, *supra* note 21, at 653–70. In 1994, Foundation Press for the first time published HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

and Sacks emphasized the importance of "reasoned elaboration" in the judicial opinion.[24] Thus, Fuller, Hart, and Sacks all called for courts to engage in a process of reasoning that judges elaborated in their opinions. These process theories grew up in the grand tradition of jurists like Benjamin Cardozo, whose book *The Nature of the Judicial Process*[25] is one of the most insightful and oft-read judicial texts ever written.

While Fuller highlighted the importance of reasoning from principle in the judicial process, and Hart and Sacks proclaimed the need for reasoned elaboration, Herbert Wechsler went a step further in calling for courts, particularly the U.S. Supreme Court, to ground decisions in general and neutral principles.[26] Both Wechsler and Hart were critical of the Court's "reasoned elaboration" in *Brown v. Board of Education*, and the Court's failure to come up with a principled explanation for the case's result. Wechsler offered—but never fully developed—a theory for *Brown* based upon freedom of association.[27] Hart never could articulate a principled basis for the decision.[28] Perhaps Hart and Wechsler's failures ultimately impacted their efforts to fully justify and explain judicial review in a democratic state.[29] However, their efforts did emphasize the importance of reason, or the appearance of reason, in the process of adjudication.

Naturally, one is left somewhat troubled. From what should judges reason? Bias? Prejudice? Predilection? All would agree these are improper sources for decision. Among the important lessons learned from the realists,[30] feminist scholars,[31] and the critical legal studies movement[32] are that we must be aware of these possible underlying forces or motives in the process of adjudication. Alternatively, one may be equally concerned about the judge's personal view of policy. Are judicial opinions based on judges' *personal* views of policy? If so, how is judging different from the legislative function? Alternatively, if Fuller, Hart, Sacks, and Wechsler were right, and judges must reason

24. Duxbury, *supra* note 21, at 639.

25. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

26. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

27. *Id*. at 32.

28. *See, e.g.*, Duxbury, *supra* note 21, at 670–71.

29. *See id.*

30. *Id*. at 620.

31. *See, e.g.*, Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 337–40 (2002).

32. *See, e.g.*, Paul Butler, *Should Radicals Be Judges?*, 32 HOFSTRA L. REV. 1203 (2004); Duncan Kennedy, *Imagining a Judge's Reasoning Process*, *in* ANALYTIC JURISPRUDENCE ANTHOLOGY 204 (Anthony D'Amato ed., 1996); Calvin Woodard, *Toward a "Super Liberal State*,*"* N.Y. TIMES, Nov. 23, 1986, § 7, at 27; (reviewing ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986), *available at* http://www.robertounger.com/cls.htm).

from principle, how is the court to choose the appropriate principle? Does the principle truly come from prior decisions or principles articulated in prior decisions?[33] If so, how does the law change? If judges do not reason from prior decisions or existing principles, are judges, when deciding cases, making purely legislative or policy choices and not relying on preexisting law? If courts are not relying on preexisting law and are not engaging in a process that is truly different from the legislative process, then are we in fact truly governed by a rule of law? These questions are at the heart of explaining and justifying judicial review in a democracy. The model articulated herein does not purport to answer those questions. Notably, even without those answers, judges continue to strive to engage in a reasoning process, or at least to display reason in their opinions. Whatever the internal motives or processes (and this remains a key concern for both judicial awareness and restraint), judges tend to use reason in explaining their decisions—or they at least purport to do so. This core of reason, or appearance of reason, from precedent, statute, common sense, or principles, remains a key part of any model of adjudication in America.

Let us switch gears to a key judicial development of the last twenty-five to thirty years that merits consideration in this modest model of adjudication: the development of the public law model of litigation. The most noteworthy early proponent of the public law model of litigation or adjudication was Abram Chayes. In his seminal article *The Role of the Judge in Public Law Litigation*,[34] Chayes argued that the traditional bipolar lawsuit was being replaced by a larger, amorphous type of lawsuit. In this public lawsuit, courts were called upon to reorder public institutions, such as schools and prisons. This change had many potential ramifications, including a more vibrant and amorphous remedial context and a more active role for the judge. Several years later, Professor Owen Fiss wrote about this new model. Fiss argued that judges under the public law model were not merely, nor even primarily, deciding discrete cases. Instead, judges gave meaning to our constitutional values.[35] Thus, the public law model called for a potentially more active (if not activist) role for the judge. But even the proponents of the public law model understood the need for judges to explain themselves, i.e., that judges should articulate reasons for their decisions. How else could a judge give meaning to our constitutional

33. *See generally* Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

34. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

35. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

values without explaining herself?

Of course, the possibility that judges might do too much has been an abiding concern both in the traditional models of adjudication described and in the public law model. They might decide too much, thereby threatening the delicate balance we call American government. They might unduly interfere with the authority of another branch of government, or, in the case of federal judges, they might unduly trample upon the authority of the states. Professor Alexander Bickel was perhaps the most famous proponent of judicial minimalism. In *The Least Dangerous Branch*,[36] Bickel argued that the U.S. Supreme Court should, if possible, employ passive virtues to avoid decisions. These virtues included devices—doctrines of standing and mootness, and denials of certiorari—that would allow judges to avoid key decisions, if that seemed the wisest course. One may view Bickel's passive virtues as a response to Wechsler's demand that a judge should not avoid a constitutional decision if called upon to make one.

Recently, Professor Jonathan T. Molot has articulated and recalled both the process theorists' call for principled reasoned elaboration and Bickel's minimalism.[37] Molot has argued that courts must not rely too heavily on judicial minimalism, and must recall Wechsler's plea to decide cases based upon neutral principles. Molot's theory of principled minimalism (one might call it "Wechselian") provides that institutional and historic constraints on judicial activism exist that tend to frustrate and later correct broad, erroneous principles articulated in earlier opinions. Molot sees two versions of principled minimalism: forward-looking minimalism and backward-looking minimalism. As he states:

> In its ideal form, principled minimalism relies on judges to decide cases in a principled manner but to be consciously minimalist where they lack confidence in their decisions and do not wish to impose sweeping doctrinal pronouncements on their successors. The Article will suggest, however, that even the less-than-ideal version exhibited by the Supreme Court—a version which often relies on later decisions to make sense of earlier ones and to confine their scope—is superior to minimalism alone.[38]

In his article *On Analogical Reasoning*,[39] Professor Cass Sunstein

36. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

37. *See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753 (2004). *See also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003).

38. Molot, *Principled Minimalism*, *supra* note 37, at 1759.

39. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

articulates another important, related notion about adjudication. Sunstein points out the virtues of reasoning by analogy and the strength of analogical reasoning vis-à-vis other top-down theories and other more idealistic theories of adjudication, such as John Rawls' reasoned equilibrium or Ronald Dworkin's theory of fit. To Sunstein, analogical reasoning "has four different but overlapping features: principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction."[40] To Sunstein, analogical reasoning typifies what lawyers do—reasoning by analogy—without the need to articulate grand theories about the law or democracy. Analogical reasoning is desirable because it may enable one to make decisions in concrete cases even when there is no agreement on overarching principles. The notion that judges articulate their reasoning *in* the cases before them is implicit in Sunstein's work. The case provides the reason to decide and hence to reason. Moreover, courts frequently develop law slowly, adding an element here, modifying or deleting another one there.

In any event, the message is clear—from process theorists, through the public law proponents, through Molot, through Sunstein—that adjudication involves participation by the parties and, at least where an articulated decision is involved, adjudication involves reasoned elaboration based upon or influenced by prior cases and perhaps by principle. Even if one believes that judicial opinions are the result of bias, prejudice, predilection, or politics, one cannot deny the prevalence of what we may call the appearance of reason in the judicial opinion. Thus, in analyzing those areas where the Supreme Court has limited or impacted state tort law, the traditional model of adjudication supports our review and critique of the articulated or elaborated reasons for the Court's decisions.

However, the model is not yet complete. The duty of courts to interpret statutes has been one of the key aspects of adjudication since the earliest days of our democracy.[41] In interpreting statutes, courts are called upon to give meaning to words used by the legislature. Indeed, the court's role in interpreting legislation gives rise to tension in our democracy. This tension is apparent in the discussion above. How does a court avoid a purely political act when interpreting legislation? How is the court's interpretation of legislation different from the legislature's role in enacting legislation? Among Hart and Sacks's enduring legacies is the idea that courts must engage in a purposive interpretation of a

40. *Id.* at 746 (emphasis omitted).

41. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803).

statute. Obviously, there can be much disagreement about how a court should engage in such a purposive interpretation. Should the court rely merely on the words of the statute? Should the court delve beyond the words to so-called legislative intent? How does a court "discover" or "divine" legislative intent? Should a court interpret the statute in light of other statutory enactments, or in derogation of the common law? All of these are basic but thorny questions. For our purposes, however, it seems beyond cavil that part of the model of adjudication includes the interpretation of statutes, and it does not seem particularly controversial to add the word purposive to describe that interpretation—that is, courts engage in the purposive interpretation of statutes.

Finally, let us slightly refine this modest model of adjudication to consider the role of the jury, particularly the role of the jury in tort cases. The jury certainly plays a key role in the American justice system, particularly in criminal trials. The jury also plays a key role in civil trials because the right to a trial by jury at common law is guaranteed by the Seventh Amendment to the Constitution.[42] At its most basic level, the jury in a tort case decides the facts. However, the jury also makes certain normative decisions, deciding mixed questions of fact and law. This did not necessarily have to be the case. Tort law could have developed in a manner where courts gave juries detailed, case-specific instructions and asked juries to decide *only* the facts.[43] Instead, juries in tort cases decide whether a person has breached the standard of care of a reasonable person under the circumstances. This is clearly a normative question because it involves the application of a broad standard of care to the particular facts of the case before the court. Likewise, juries make normative judgments when deciding cause-in-fact and proximate cause. Moreover, they make normative judgments in setting both compensatory and punitive damages and in allocating fault.

One might conclude that American courts ask juries in tort cases to decide issues where explanation is virtually impossible—that is, juries decide issues where persuasive and reasoned elaboration is extremely difficult. Juries decide issues a court might decide, but, if the court decided them, the reasons for the decision either would not be rationally persuasive or would inherently be the result of the judge's personal views.[44] Thus, rather than having one person decide such a matter based

42. The Seventh Amendment right to a jury trial does not apply to the states but many state constitutions have similar provisions.

43. *See* Molot, *Old Judicial Role*, *supra* note 37, at 82–83.

44. Indeed, recently, Professor Geistfeld has argued that many issues that are now given to the jury in tort cases may be subject to constitutional challenge in the wake of the punitive damages cases discussed below. *See* Geistfeld, s*upra* note 10.

upon personal policy views, we ask a larger group to make that decision based upon the common sense of the community.

The decisions of juries are given great deference on appeal in American tort law. Indeed, the Seventh Amendment forbids the reexamination of a fact tried to the jury.[45] That said, a notable tension still exists in American tort cases between the role of the judge and the role of the jury. The debate between Justice Cardozo and Justice Andrews in *Palsgraf v. Long Island Railroad*[46] was, to be precise, a dispute over the role of the jury. Should the judge decide whether there is a duty in the particular case before the court (Cardozo's position), or should the jury decide the scope of liability in a particular case when it decides proximate cause (Andrews's position)? The tension between judge and jury in deciding duty, reasonable care, and proximate cause has been manifest at least since the work of Dean Leon Green.[47] Judges do exercise some control over the jury in tort cases through summary judgments, judgments as a matter of law, new trials, remittiturs, and additurs. While the judge's power to utilize these procedural devices is cabined by applicable standards and deference to the role of the jury, these are areas where the tension between the role of the judge and the jury in the tort case may become both manifest and critical.

In conclusion, the traditional model of adjudication provides that courts, when deciding cases, allow the parties the opportunity to make reasoned or rational arguments in support of their positions. Later, the court employs a process of reasoned elaboration to explain its result. This process of reasoned elaboration frequently involves reasoning by analogy and the development of "principled" consistency both over time and across a group of decisions. In deciding cases, courts frequently are called upon to interpret legislation, and in so doing they engage in a purposive interpretation. Finally, courts deciding tort cases frequently rely upon and respect the jury as the common sense voice of the community on questions of fact and certain critical normative issues. Let us now turn to First Amendment cases limiting state tort law.

III. DEFAMATION AND RELATED CASES

The seminal U.S. Supreme Court decision articulating a constitutional limit on a state's power to articulate and apply its own law of defamation[48] was *New York Times Co. v. Sullivan.*[49] Of course, *New*

45. U.S. CONST. amend. VII.

46. 162 N.E. 99 (1928).

47. LEON GREEN, JUDGE & JURY (1920).

48. In actuality, all of the Supreme Court cases involving constitutional limits on defamation are

York Times Co. v. Sullivan is one of the Supreme Court's most well-known, oft-cited, and important First Amendment cases. For the defamation lawyer, there is perhaps no more important case. But *New York Times Co. v. Sullivan* is also important because of its significance to the American civil rights movement and its significance to the federalization or constitutionalization of state tort law.

New York Times was the first in a series of defamation and related "speech" tort cases in which the Court relied upon federal constitutional limits on the state-based common law of defamation. These limits come in the form of additional (or heightened) elements in the underlying tort. While some of the constitutional elements or hurdles may have at first seemed radical, over time the jurisprudence is consistent with the traditional model of adjudication. Most readers will recall that the facts of *New York Times* are poignant, but a brief recitation is appropriate. L.B. Sullivan, one of the elected commissioners of the City of Montgomery, Alabama, sued the *New York Times*, contending that a full page advertisement published in the paper in 1960 had libeled him.[50] Entitled "Heed Their Rising Voices," the advertisement called for Americans to take note of the civil rights movement, the brave role African-American students and others were playing in the movement through non-violent demonstrations, and the "wave of terror" facing civil rights proponents in the American South.[51] The ad appealed for funds to support the students, the right-to-vote campaign, and the legal defense of Dr. Martin Luther King, Jr., one of the movement's leaders. The advertisement's text was followed by the names of sixty-four famous Americans and then another line providing: "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal."[52] The names of sixteen other individuals appeared thereunder, fourteen of whom were identified as clergy in various Southern cities.[53]

The advertisement made several statements that were not completely accurate descriptions of events. For instance, the advertisement stated that Dr. King had been arrested seven times when in fact he had been arrested only four times.[54]

Sullivan sued the *Times* and the alleged signatories for libel, contending that the factual inaccuracies in the ad harmed his

libel cases—printed word defamation.

49. 376 U.S. 254 (1964).

50. *Id.* at 256.

51. *Id.* at 256–57.

52. *Id.* at 257.

53. *Id.*.

54. Id. at 258–59.

reputation—that is, they defamed him. Although Sullivan was not named in the advertisement, he contended that a person could read the false statements of fact as referring to him because he was the Montgomery Commissioner of Public Affairs, and his duties included supervision of the police department. Thus, he contended that any criticism of the police department could be construed as a statement "of and concerning" Sullivan—an element of Sullivan's Alabama common law libel claim.[55] The jury that heard the case awarded Sullivan $500,000 in damages, although he had not pointed to any particular pecuniary loss.[56] The $500,000 award did not differentiate between compensatory and punitive damages.[57]

The trial judge had rejected the defendants' arguments that the decision abridged their rights to freedom of speech and freedom of the press under the First and Fourteenth Amendments to the U.S. Constitution—the First as applied to the states through the Fourteenth. On appeal, the Supreme Court of Alabama had affirmed.[58] The Alabama Supreme Court summarily stated that the First Amendment did not protect libelous publications, that the Fourteenth Amendment was directed against state action and not private action, and a court's application of its common law of defamation was not state action.[59] The U.S. Supreme Court granted certiorari. In the Supreme Court, Professor Herbert Wechsler—who had also played an instrumental role in writing the Times Company's brief, and had articulated the theory of judicial decisions based on neutral principles discussed in Part II—argued the position of the *New York Times*.[60] Justice William Brennan, who wrote the majority opinion for the Court, turned first to the plaintiff's argument that the Alabama decision was not state action. In rejecting this argument, Justice Brennan stated:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[61]

55. *Id.* at 258, 267.
56. *Id.* at 260.
57. *Id.* at 262.
58. 144 So. 2d 25 (Ala. 1962).
59. *Id.* at 40.
60. 376 U.S. at 255.
61. *Id.* at 265 (citations omitted).

Thus, the Court held that a state court decision, applying state tort law—here, defamation—was state action for purposes of the Fourteenth Amendment.[62] State tort law was potentially limited by the federal Constitution.

Justice Brennan further noted that, under Alabama law at the time, once a statement was deemed libelous per se (i.e., that it would tend to injure a person's reputation or subject him to public contempt), the defendant effectively had no defense unless it could prove that the statement was true in all its particulars. Justice Brennan went on to boldly and clearly state why, in the Court's opinion, Alabama law was unconstitutional as applied.

Libel, he said, "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[63] He then noted that "uninhibited, robust, and wide-open"[64] debate on public issues sometimes included "unpleasantly sharp attacks on government and public officials."[65] The ad was speech about a major public issue and did not lose its First Amendment protection because of its falsity. Nor did it lose its First Amendment protection because it was defamatory. Here, Justice Brennan quoted James Madison: "'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'"[66] Thus, Justice Brennan concluded that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct . . . ."[67] Moreover, "the combination of the two elements is no less inadequate."[68]

Pointedly, Justice Brennan noted that concern over a potential damages award in a tort case "may be markedly more inhibiting than the fear of prosecution under a criminal statute."[69] In fact, the jury award had "dwarfed" the highest possible criminal fine. Because the various protections afforded to a defendant in a criminal case were not available

62. Indeed, in one of the early preemption cases, *San Diego Builders v. Garmon*, 359 U.S. 236 (1959), the Court had held that a state court's decision in a tort case was state action that could be preempted by federal legislation. The conclusion that a decision in a "common-law" case was state action had indeed been the subject of an earlier Supreme Court case involving restrictive covenants, *Shelley v. Kraemer*, 334 U.S. 1 (1948). Ironically, Wechsler had criticized that opinion in his neutral principles. *See* Wechsler, *supra* note 26, at 29–30.

63. *New York Times*, 376 U.S. at 269.

64. *Id*. at 270.

65. *Id.*

66. *Id*. at 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

67. *Id*. at 273.

68. *Id.*

69. *Id*. at 277.

in a civil case, the civil case might have a severe chilling effect upon the defendant's willingness to speak. Moreover, the defense of truth or total truth as it was applied by Alabama did not save Alabama law. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'"[70] As further support for his conclusions, Justice Brennan related the controversy arising from the Sedition Act of 1798, which the Court had never considered or declared unconstitutional. However, protest against the Act had been pronounced and persuasive, and the attack on the Sedition Act had "carried the day in the court of history."[71]

The Court in *New York Times* thus held that state tort law and its application in a particular case could be unconstitutional under the First and Fourteenth Amendments, but would the Court pronounce a rule for the future? The answer to that question was yes. Justice Brennan stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[72]

Thus, according to the Court, a public official plaintiff in a defamation case would be required to prove that any statement was made with "actual malice" in order to recover. The Court seemingly had borrowed an element from the common law of torts: malice. Likewise, the Court had arguably taken one common law ground for piercing or avoiding the privilege of fair comment on matters of public concern.[73] Thus, a ground for avoiding a privilege or affirmative defense (if the plaintiff behaved with malice or other fault) was turned into a part of the plaintiff's prima facie case. The public official plaintiff now had to prove that the defendant acted with malice. In this regard, the opinion reasoned from preexisting common law authorities.[74] And it reasoned by analogy, because the common law privilege cases were analogous and supported the creation of a new constitutional rule. The Court's rule articulation is, therefore, consistent with the modest model of

70. *Id*. at 279.

71. *Id*. at 276

72. *Id*. at 279–80.

73. RESTATEMENT (SECOND) OF TORTS §§ 600, 602, 603 (1977).

74. The Court cited and discussed a Kansas Supreme Court defamation case as analogous authority for its rule. *New York Times*, 376 U.S. at 279–80 (citing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)). The Court also analogized to the limited liability of a public official *sued* for defamation and cited several tort treatises. *Id.* at 282–83.

adjudication described above.

While the Court's use of the phrase "actual malice" had tort roots, "actual malice" in the *New York Times* context does not mean ill-will or evil motive, as the term is used at common law. Instead, "actual malice" under *New York Times* has special constitutional meaning—it means knowledge of falsity or reckless disregard for the truth. Thus, this aspect of the Court's opinion was reminiscent of state tort law because of the use of the word malice and the emphasis on the privilege of fair comment, *but* it was different because the Court provided an independent definition of the words "actual malice" and made proof of "actual malice" part of the plaintiff's prima facie case. Perhaps the Court articulated its own definition of "actual malice" because of the common law rule that malice would be presumed once the defamatory nature of the communication was shown—that is, perhaps the Court was concerned that deferring to state law concepts of malice in defamation cases would provide inadequate protection to the speaker, prompting the Court to provide a federal constitutional definition.

Returning to the traditional model of adjudication, the critic might contend that the Court's opinion was not at all minimalist and that it was thinly reasoned. The Court created a rule out of whole cloth (albeit in the name of articulating and giving meaning to our constitutional values). It relied on state common law cases involving one ground to justify the failure ("abuse") of a privilege (or defense) to create an element a plaintiff must prove—"actual malice." And, in part of the opinion, the Court had analyzed defamation cases *against* government officials in a suit *by* a government official, and it analogized to an act of Congress repealed 150 years before the decision, which had never come before the Court. On these points, the case is arguably inconsistent with the traditional model's call for reasoned elaboration. My bias runs with those who praise the opinion, but this paragraph points out that there are at least two ways to read it.

Returning to the decision, the Court also held that to recover in a libel suit, the public official plaintiff would have to establish absolute malice with "convincing clarity."[75] The phrase "convincing clarity" seems analogous to the more commonly used "clear and convincing evidence," and one wonders why the Court did not use that phrase.[76] While the "convincing clarity" burden was uttered in deciding whether Sullivan

75. *Id.* at 285–86.

76. Perhaps, like good literature or good poetry, the Court merely used slightly different words to convey a slightly different meaning. Sadly, for this tort lawyer with a little mind, a foolish consistency might have been both more helpful and more desirable. *See* RALPH WALDO EMERSON, SELF-RELIANCE (John Carlos Rowe ed., Houghton Mifflin 2003) (1841).

could meet his burden of proof at a second trial (he could not),[77] the phrase and its similarity to "clear and convincing evidence" imply that a jury or fact-finder might have a meaningful role to play in a public official libel case. This contemplation and respect for the jury's role in a tort case is consistent with the traditional model of adjudication.

The *New York Times* opinion arguably contains two other constitutional aspects. The Court also held that, from a constitutional perspective, the statements in the advertisement were not sufficiently "of and concerning" the plaintiff. In defamation cases, the plaintiff must establish that the false statements of fact were made about him—i.e., they are of and concerning him. In *New York Times*, the Court noted that there was no reference to Sullivan in the advertisement either by name or official position. If the Constitution allowed such vague references as those in the ad to be read as referring to Sullivan, then any criticism of the government could be translated into criticism of individual government officers in defamation cases. Such a state of affairs would unduly chill the defendants' right to free speech. Consequently, upholding a libel judgment for the plaintiff was constitutionally suspect.[78] The Court did not provide a clear constitutional standard for what a plaintiff must show to fulfill the "of and concerning" requirement. This aspect of the opinion in *New York Times* has not received significant Supreme Court development or attention since.

Finally, the Court refused to hold that the *New York Times* had knowledge that some of the facts in "Heed Their Rising Voices" were false, even though the paper's news files contained stories against which the facts contained in the advertisement could have been checked.[79] Arguably, this aspect of the case has some constitutional dimension to it, because it limits inconsistent state law on imputed knowledge or vicarious liability in similar cases. But, like the "of and concerning" aspect of the case, the constitutional limits on vicarious liability have not been further plumbed.[80]

Thus, *New York Times Co. v. Sullivan* was a major victory for the

77. 376 U.S. at 286–87.

78. *Id.* at 287–88.

79. *Id.* The Court also refused to find a refusal to retract and a later retraction sufficient to establish "actual malice." *Id.* at 286–87.

80. Justice Black, joined by Justice Douglas, concurred in the opinion. *Id*. at 293 (Black, J., concurring). Justice Black would have recognized that the *Times* and the individual defendants "had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials." *Id.* Justice Goldberg also concurred and also was joined by Justice Douglas. *Id.* at 297 (Goldberg, J., concurring). Like Justice Black, Justice Goldberg thought that the *Times* was afforded even greater protection than the majority's absolute "actual malice" rule.

proponents of the civil rights movement. It deprived a state of the ability to frustrate the progress of the movement through its common law of defamation. By the time the decision was published, numerous other suits alleging defamation were pending against the *New York Times*; the victory was a significant one both in principle and in financial terms, preventing a negative financial impact on the *Times*.[81] That financial impact may have had a very serious chilling effect on the *Times* in particular and on the news industry in general. Moreover, the case was a victory for the First Amendment. It established the press's right in public official defamation cases to be free from state common law defamation liability that bordered on strict liability. The decision also recognized that the right to comment and criticize the government and government officials included a limited right to publish false statements of fact that may, from the common law perspective, be defamatory.

The Court's opinion balanced the critic's First Amendment right to speak against the state's interest in protecting its citizens' reputations. Implicitly, the state's right to articulate and apply its own law of defamation also went into the balance. In the context of the public official plaintiff, the First Amendment right was paramount. As a result, *New York Times Co. v. Sullivan* is a great and significant decision for the civil rights movement and the media, and it remains so today. But the Court's judicial regulation of the common law of defamation did not stop with *New York Times*. We now turn to the nature of this judicial regulation in light of the articulated model of adjudication.

First, the Court in *New York Times Co. v. Sullivan*—acting in the name of First Amendment rights—took a significant step in limiting a state's power to articulate and apply its own tort law. The Supreme Court imposed additional burdens on a public official plaintiff's defamation case; these burdens arose out of the Constitution, not out of state tort law. These were bold developments. While the Court looked to the common law and the purposes of the First Amendment in a reasoned manner, the articulation of the limit was new and unprecedented. Moreover, the Court invented a rule—"actual malice"—and infused it with a constitutional dimension.

To the extent that the opinion reasoned from analogous cases and history, one may view it as reasoned and consistent with the traditional model of adjudication. To the extent that the rule was a rather bold articulation of constitutional law, one may view it as radical. However,

81. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

the Court did incorporate its burdens and hurdles into the common law of torts. In doing so, the Court arguably did what courts do. It balanced competing interests and articulated a rule. This rule would then be applied in subsequent cases involving public official plaintiffs. According to the Court's rule, a public official plaintiff must show "actual malice." One will note the "elemental" nature of "actual malice": it is an element (albeit a constitutional element) of the public official's case. If the public official plaintiff proved "actual malice," the public official plaintiff would recover. Moreover, the Court announced that the burden of proof on "actual malice" was convincing clarity. The reader obviously notes the Court's expectation that its "actual malice" rule would be applied within the context of the common law of torts, utilizing both the judge and a jury. The Court's rule regarding "actual malice" is an appropriate one for a jury instruction. For instance, one might imagine a jury instruction that provides, in part: "Ladies and gentlemen of the jury, in this defamation case involving a public official plaintiff, the plaintiff must establish with convincing clarity (by clear and convincing evidence) that the defendant published defamatory statements about the plaintiff with actual malice. Actual malice means knowledge of falsity or reckless disregard for the truth." Relying on the jury in a tort case is consistent with the traditional model.[82]

Thus, while the critic might say that the Court's decision in *New York Times* limited and altered state tort law, the decision appeared to be based on reason, and it incorporated its constitutional limits into state tort law and common law procedures. The decision articulated a rule that placed a hurdle arising from the First Amendment in a defamation case involving a public official plaintiff. The public official could clear that hurdle in an individual case, but only if he or she established for the jury, with "convincing clarity," that the defendant acted with "actual malice"—knowledge of falsity or reckless disregard for the truth.

Predictably, while the Court's *New York Times* decision built upon and incorporated its rules into the common law of torts, the fit was not quite seamless. The Court used the phrase "actual malice" to mean something different from what the word "malice" means at common law. This usage has led to confusion and the need for further development.[83] Indeed, in *Masson v. New Yorker Magazine, Inc.*,[84] the

82. Of course no statutory interpretation was involved in *New York Times*.

83. *See generally* Garrison v. Louisiana, 379 U.S. 64 (1964) (holding state criminal statute to be unconstitutional where it punished false statements made against public officials where those statements are made with ill will, the common law definition of malice, without regard to whether they were made with knowledge of falsity or reckless disregard for the truth); St. Amant v. Thompson, 390 U.S. 727 (1968) (indicating that "actual malice" is a subjective standard but leaving some room for doubt about its possibly objective nature); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)

Court went so far as to say that it might be better to altogether jettison the phrase "actual malice" in jury instructions because of the confusion it has engendered.[85] Additionally, the Court's imposition of a burden of proof higher than a preponderance of the evidence standard in public official defamation cases arguably signaled an increased role for judges in deciding these cases. While the Court's rule contemplated an orderly and traditional process of defamation litigation (with a constitutional twist), the imposition of a slightly higher burden of proof arguably meant a more aggressive role for the judge at trial and on appeal. Indeed, this concern proved accurate in later jurisprudence. But before we address this point, let us turn to subsequent developments in the constitutionalization of state defamation law after *New York Times*.

First, the Court extended *New York Times*'s "actual malice" requirement to libel suits filed by public figures who were not public officials in *Curtis Publishing Co. v. Butts*.[86] The case actually consolidated two cases involving the athletic director at the University of Georgia and a private citizen who had "pursued a long and honorable career in the United States Army before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957."[87] Next, in a fractured and divided opinion, *Rosenbloom v. Metromedia, Inc*.,[88] the plurality opinion indicated that the *New York Times* standard may apply to any case in which the speech involved was a matter of public concern or interest. The Court seemingly backed away from this requirement in its next significant decision involving state tort law and defamation, *Gertz v. Robert Welch, Inc*.[89]

Gertz is perhaps the Court's second most significant defamation case after *New York Times*. In *Gertz*, the plaintiff, a lawyer, was suing a publisher who allegedly made false statements about the plaintiff's membership in various Communist or Marxist organizations and the plaintiff's participation in an alleged conspiracy to undermine local police that eventually would lead to the overthrow of democracy in America. The Court, in an opinion by Justice Powell, refused to apply the *New York Times* standard to the case. Once again, the Court was

(purposeful avoidance of the truth may constitute "actual malice"). The Court also has addressed just who is a public official. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966).

84. 501 U.S. 496 (1991).

85. *Id.* at 511.

86. 388 U.S. 130 (1967).

87. *Id.* at 140.

88. 403 U.S. 29 (1971).

89. 418 U.S. 323 (1974).

faced with balancing the individual's interest in his reputation against the interests of a free press and free speech. Further, although not expressly stated, the Court also considered the state's right to develop and apply its own law of defamation, its own tort law.

In *Gertz*, the Court held that the balance of competing interests did not yield the same result as in *New York Times*. Justice Powell wrote that where the plaintiff was not a public official or a public figure, but instead a private figure, the state's interest in protecting the reputation of its citizens (and in articulating its own law of defamation) did not require application of the *New York Times* "actual malice" standard. While First Amendment values of free speech were important in such a case, they were not as weighty as in the *New York Times* context. The Court said that a state was free to apply a less demanding standard than *New York Times* as long as it did not impose liability without fault. Consequently, *Gertz* seemed to hold that, constitutionally, a private figure plaintiff had to establish at least negligence regarding the truth or falsity of the statement to recover. Interestingly, the Court did not provide a constitutional definition of fault or negligence, apparently leaving that to state courts.

On a related subject involving damages, the *Gertz* Court held that a private figure could not recover at all without showing actual injury that included mental or emotional distress, *unless* the private figure made a showing of *New York Times* "actual malice." If the plaintiff proved *New York Times* "actual malice," then presumed and punitive damages were constitutionally permissible.[90]

Who was a private figure and who was a public figure? The *Gertz* Court noted that two types of public figures exist: universal public figures and vortex public figures. The universal public figure was someone who had gained such notoriety as to be a public figure for all purposes. The more common (or vortex) public figure was someone who had thrust herself into the limelight of some public controversy. The Court felt that the *New York Times* standard was applicable to a public figure because the public figure had greater access to the media than the private figure, and because the public figure, from a normative

90. At common law, once the plaintiff established that a defamatory statement had been published of and concerning him or her, presumed and often punitive damages were recoverable. Presumed damages left the jury free to conclude that defamation had harmed the plaintiff even though the plaintiff could not establish any particular loss. Of course, there were significant limitations on the doctrine of presumed damages in slander cases in which the plaintiff had to establish special injury or special damage—loss of a pecuniary nature. But if the defamation involved slander per se, then the plaintiff did not have to establish special damages. Moreover, in certain libel cases the plaintiff had to establish injury if the libel was not apparent on its face. This was known as the doctrine of libel per quod. *See* Lent v. Huntoon, 470 A.2d 1162 (Vt. 1983).

standpoint, had voluntarily entered the field of public debate and assumed the risks of scrutiny and even possible defamation. The private figure did not have the public figure's access to the media, nor had she assumed the risk of a public life.

Clearly, *Gertz* signaled a major modification of *New York Times Co. v. Sullivan.* It held that the rule of *New York Times* did not apply in a case involving a private figure. However, the Court imposed (or at least seemed to impose) significant limitations on the private figure's right to recover in a defamation action. The private figure had to establish at least negligence, and had to establish actual injury unless he or she proved *New York Times* "actual malice," in which case presumed and punitive damages would be constitutionally permissible.

Let us now reconnoiter and consider the judicial mode of analysis after *Gertz*, in light of *New York Times*. Like *New York Times*, the holding in *Gertz* may be viewed as consistent with state tort law and tinkering with state tort law. It tinkers with state tort law by imposing a constitutional hurdle for the private figure plaintiff in a defamation case. That hurdle provides that the plaintiff must establish at least negligence and actual injury to recover, unless he or she proves *New York Times* "actual malice." These are constitutional hurdles that would not be present without the Supreme Court's intervention. In this way, *Gertz*, like *New York Times*, intrudes on the development and application of state tort law. In so doing, it might be called constitutional tort reform.

Like *New York Times Co. v. Sullivan*, the *Gertz* opinion operates within the context of the traditional tort case and within the process of traditional tort law. While the source of the fault rule is not clear and thus subject to some criticism, the reasoning process seems to follow and emanate from *New York Times*—the precedent. A constitutional hurdle is appropriate, but not one as high as "actual malice." The opinion's reasoned elaboration is consistent with the traditional model to this extent. Moreover, the actual injury requirement reasonably derives from the common law of torts and the alternative "actual malice" requirement for presumed or punitive damages is derived from *New York Times*. Thus, while the *Gertz* rules do intrude upon state power, they build themselves into the traditional tort process. *Gertz* articulates elements, albeit additional elements, that the plaintiff must establish in his traditional defamation case. *Gertz*, like *New York Times*, contemplates that defamation claims will go forward. Within the context of the traditional common law tort suit, however, the plaintiff must now establish or clear the applicable constitutional hurdles.

Moreover, the *Gertz* decision contemplates a continuing and meaningful role for the jury in deciding defamation cases. The fault

requirement, the actual injury requirement, and the alternative *New York Times* "actual malice" standard may be neatly tailored and employed as jury instructions. Thus, the Court must have contemplated the continued involvement of the jury in state law defamation cases after *Gertz*—again consistent with the model of adjudication. Moreover, one could argue that *Gertz* is even more familiar to the state judge and jury than *New York Times*, because the state judge and jury will have had significant experience and background with the concept of negligence. By requiring actual injury, Justice Powell made a commitment to traditional state law, because he defined actual injury as those damages normally recoverable in a tort suit.[91] Thus, like *New York Times*, *Gertz* limited state power through the application of constitutional law, but it did so in a way that was consistent with the model of adjudication.

The development of the constitutional law of defamation did not stop with the *Gertz* case. Later, in *Philadelphia Newspapers, Inc. v. Hepps*,[92] the Supreme Court held that a state could not constitutionally require a defendant in a case like *Gertz* (at least for allegations of statements of public concern) to establish truth as a defense. Rather, the plaintiff had to establish falsity.[93]

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.[94] is more significant than *Hipps* in the overall development of the constitutional tort of defamation. In that case, defendant Dun & Bradstreet employed a high school student to check bankruptcy filings. As a result of the student's error, the defendant reported that the plaintiff, Greenmoss Builders, had filed bankruptcy. This was not true, but Dun & Bradstreet communicated the information through a credit report to five people with whom Greenmoss dealt or hoped to deal. Greenmoss filed a libel action against Dun & Bradstreet. The Supreme Court held that Vermont's interest in protecting the reputation of its citizens (and in articulating its own law of defamation) justified a Vermont court's awarding presumed and perhaps even punitive damages to a private figure even when *New York Times* "actual malice" was not proved, because the speech was not a matter of public concern. Justice Powell, who wrote the *Gertz* opinion, also wrote the plurality opinion in *Greenmoss*. The plurality seemed to reinterpret the *Gertz* case by

91. *Gertz*, 418 U.S. at 350.

92. 475 U.S. 767 (1986).

93. Requiring the plaintiff to establish falsity in a case like *Gertz* was probably implicit in the decision. Likewise, one may say that the requirement was implicit in *New York Times* and that *Hepps* made the requirement explicit. Interestingly, in one post *New York Times* case, the Court seemed to indicate that truth could still be a defense. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489–90 (1975). *Hepps* seems to put this possibility to rest.

94. 472 U.S. 749 (1985).

reintroducing the "matter of public concern" criteria. *Gertz* had not expressly conditioned its holding on the speech involved being a matter of public concern. But the facts of *Gertz* indicated that the speech was, in actuality, a matter of public concern. While the *Gertz* majority had jettisoned the *Rosenbloom* holding and the "matter of public concern" test as devoid of meaningful content, the Court in *Greenmoss* reiterated and resuscitated a similar test that the dissent attacked as vacuous.[95]

According to the *Greenmoss* plurality, determining whether speech was a matter of public concern should be decided based upon the form, content, and context of the relevant speech. One may justifiably wonder about a court or jury's ability to determine whether speech is legitimately a matter of public or private concern. The *Greenmoss* plurality has indicated that when the speech involved is not a matter of public concern, the balance between the state's right to protect the reputations of its citizens and the state's right to develop its own tort law weighs more heavily than free speech concerns.[96] One may wonder whether, in the wake of *Greenmoss*, a state may be free to once again impose strict liability in a defamation case when the speech does not relate to a matter of public concern, and whether a state could make truth a defense rather than making falsity an element of the plaintiff's prima facie case.[97] If the balance between the plaintiff's reputation, the state's interest, and the First Amendment authorizes the imposition of presumed and punitive damages, one wonders why it might not also authorize imposing strict liability and treating truth as a defense (rather than treating falsity as an element of the plaintiff's prima facie case). In such a case, the Constitution may leave state tort law alone.

The Court's decision in *Greenmoss* was clearly consistent with its approach to state tort law in *New York Times*, *Gertz*, and other cases. The Court did not radically alter the landscape of state tort law. While the Court tinkered with state tort law in *New York Times* and *Gertz*, it essentially left state law alone in *Greenmoss*. The reasoned or precedential basis for the "matter of public concern" criterion is partly *Rosenbloom*. But the "matter of public concern" test also seems to be an attempt to give meaning to the balance between the defendant's federal constitutional rights and the state's interest in protecting its citizens' reputations. Moreover, as noted below, *Greenmoss* manifests the development of doctrine through analogous reasoning from and to prior

95. *Id.* at 774, 786–94 (Brennan, J., dissenting).

96. Perhaps, critically, the Court noted that the motive for the defendant's speech was profit and such an activity would not be easily deterred. Thus, the Court seemed to say that the chilling effect of liability would be mitigated by the profit seeking context in which the speech was articulated.

97. *See, e.g.*, MARAIST & GALLIGAN, *supra* note 4, Ch. 19.

cases over time.

Of course, there have been other Supreme Court cases involving defamation. In *Milkovich v. Lorain Journal Co.*,[98] the Court essentially following the lead of *Greenmoss*, refused to create a constitutional law of opinion in defamation cases. Instead, the Court held that if a statement, although couched as opinion, implied the existence of underlying facts, a state would be free to apply its traditional law of defamation, subject to *New York Times* and its progeny without further constitutional constraint based on a discrete constitutional "opinion" rule. Moreover, in *Masson v. New Yorker Magazine, Inc.*,[99] the Court considered the constitutional relevance of altering quotations and noted that as long as the alteration was not substantial, liability would not necessarily ensue. Moreover, the Court refused to constitutionalize a doctrine of incremental harm. Thus, after *Greenmoss*, *Milkovich*, and *Masson*, one may have wondered whether the Court, while not backing off *New York Times*, *Gertz*, and *Hepps*, was not extending those cases to further limit a state's power to determine its own common law of defamation.

Here, a paragraph or two discussing some of the procedural developments articulated in and applicable to defamation cases is appropriate. In *Anderson v. Liberty Lobby, Inc*.,[100] the Court essentially articulated the standard applicable in summary judgment cases under Rule 56 of the Federal Rules of Civil Procedure. The case was a defamation case and the Court, properly and adeptly, linked the burdens in a summary judgment motion to what the parties would have to prove at trial.

In a more critical case for present purposes, *Bose Corp. v. Consumers Union of United States, Inc*.,[101] the Court treated a trade libel or trade disparagement case as a defamation case, and held that the clearly erroneous standard of review was not the applicable standard when reviewing a determination of "actual malice" in a case governed by *New York Times*. The Court held that appellate judges in such a case must exercise independent judgment to determine whether the record established "actual malice" with convincing clarity. Interestingly, the *Bose Corp.* holding on the exercise of independent review on appeal may have been foreshadowed by *New York Times*'s requirement that the burden of proof in public official defamation cases was convincing clarity. If the requirement that the public official plaintiff prove his or

98. 497 U.S. 1 (1990).
99. 501 U.S. 496 (1991).
100. 477 U.S. 242 (1986).
101. 466 U.S. 485 (1984).

her case to a level of convincing clarity signaled the possibility of a more aggressive role for judges in defamation cases, *Bose Corp.* brought that concern to the fore. The holding in *Bose Corp.* is arguably an intense intrusion into the normal way tort cases are decided. Once a jury or judge renders a finding, it normally is entitled to great deference. However, appellate review under an independent judgment standard signals a heightened role for the appellate court. Based on this observation, one may conclude that *Bose Corp.* is more than a mere tinkering with the traditional allocation of decisionmaking power in a tort case, and signals more aggressive federal constitutional oversight and review. Thus, *Bose Corp.* arguably deviates from the traditional model of adjudication because it disrupts and diminishes the jury's role. The *Bose Corp.* case is also significant because the Court assumed that the *New York Times* requirement applied in another (albeit related) area: trade libel. Before we turn to other areas in which *New York Times* has been applied, let us summarize.

First, *New York Times* and its progeny are cases where federal constitutional concerns with free speech limited a state's ability to apply and develop its own tort law, and to protect its citizens' reputations. Of course, significant interests of the press and the interests of other citizens were also at stake. *New York Times*, while imposing constitutional hurdles in traditional tort cases, articulated hurdles that arguably were different in degree rather than kind from state tort doctrine. In other contexts, such as *Gertz*, the additional hurdles—negligence and actual injury—were hurdles with which state courts were familiar. The Court's reasoned elaboration and reliance on precedent and analogy are consistent with the traditional model of adjudication. The independent review standard of *Bose Corp.* may constitute a more significant limitation on state power, and its limitation of jury power in a tort suit is somewhat inconsistent with the traditional model.

One may wonder whether the extensive post-*New York Times* development of the constitutional law of defamation has been worth the confusion. The pendulum has swung back and forth, and *New York Times*, *Gertz*, and their progeny have had a profound and sometimes confusing impact on the development of state tort law, because state judges attempted to reconcile the state tort of defamation with the constitutional requirements of *New York Times.* The Second Restatement of Torts reflected this confusion when it attempted to incorporate *New York Times* into its statement of the common law. The drafters obviously could not completely anticipate the details of subsequent Supreme Court decisions, so one is left wondering whether aspects of the Restatement were informed by the drafters' sound

decisions about tort law or by the drafters' concern that their work would be consistent with the constitutionalized tort of defamation.[102]

Interestingly, one may view the series of three major defamation cases—*New York Times*, *Gertz*, and *Greenmoss*—as examples of Professor Molot's backward-looking principled minimalism that are consistent with the traditional model.[103] In *New York Times*, the Court articulated a broad and arguably bold rule that limited state autonomy in the field of defamation. But in the subsequent decisions of *Gertz* and *Greenmoss*, the Court softened *New York Times* and possibly recognized an area in which a state's power over its law of defamation remains unfettered by any constitutional limit: speech that is a matter of private concern.[104]

Let us turn now to the extension of *New York Times Co. v. Sullivan* to other torts. *New York Times* has not been neatly cabined to the law of defamation, but has instead been applied in other contexts, including invasion of privacy and intentional infliction of emotional distress. In the invasion of privacy cases, the Court has often limited state power, and its anchor in reason (or precedent) was *New York Times* and its progeny.

The privacy torts are appropriation or right to publicity; intrusion into seclusion; publicity of private facts; and false light invasion of privacy. The Supreme Court has considered the extension of *New York Times* and its constitutional protections to all of the types of invasion of privacy except intrusion into seclusion.[105] False light invasion of privacy arises where the defendant casts the plaintiff in a false light in the public eye. The Court first considered the application of *New York Times* to a false light case in 1967 in *Time, Inc. v. Hill*.[106] *Hill* involved the review of a play, which dealt with a family held hostage by three escaped convicts. The review linked the play to the real events that had arguably inspired it. The play had significant differences from the real-life events. Family members sued under a New York privacy statute alleging false light invasion of privacy. The tort of false light invasion of privacy generally protects against public portrayals of the plaintiff in a "false light."

The Court in *Hill* held that the magazine publisher was entitled to a jury instruction under New York law stating that liability could be

102. *See* Lund v. Chi. & Nw. Transp. Co., 467 N.W.2d 366, 371–74 (Minn. Ct. App. 1991) (Crippen, J., dissenting).

103. *See generally* Molot, *Principled Minimalism*, supra note 37.

104. Defamation cases continue to reach the Court. *See* Tory v. Cochran, 544 U.S. 734 (2005) (finding that death rendered injunction in defamation case an overly broad prior restraint).

105. *But see* Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding wiretap statute imposition of liability against radio station playing recorded conversation was unconstitutional).

106. 385 U.S. 374 (1967).

predicated only on a finding of knowing or reckless falsity in the publication of the article. The Court thereby extended the *New York Times* "actual malice" requirement to a false light invasion of privacy case. The propriety of that decision is debatable,[107] but for present purposes *Time, Inc. v. Hill* was consistent with *New York Times* and its progeny. *Hill* imposed an additional hurdle on a plaintiff in a state court tort case, but it worked within the context of state tort law and traditional tort processes in its contemplation of continuing case-by-case development and its utilization of the jury as a vehicle for decisionmaking. The Court's reliance on *New York Times* as authority was based on reason and, at the time, the Court had not worked through the public/private figure issue or the public/private speech issue. Later, in *Cantrell v. Forest City Publishing Co.*,[108] the Court considered a false light invasion of privacy where the jury found that the defendant had published with *New York Times* "actual malice." Without deciding whether that was the appropriate standard (in light of *Gertz*), the Court affirmed in a manner consistent with *Hill* and *New York Times*.[109]

The Court has also considered the application of *New York Times* in cases involving the disclosure of private facts. In *Cox Broadcasting Corp. v. Cohn*,[110] the father of a rape victim who had not survived the ordeal filed suit against a broadcasting company for disclosing his daughter's identity and thereby invading *his* right to privacy, in violation of a Georgia statute that prohibited the publication of a rape victim's name. The defendant gained access to the rape victim's name in judicial records that were open to the public. In fact, the defendant accidentally identified the victim by name in violation of its own policies. However, the defendant argued that the disclosure of the identity was still constitutionally protected. The Supreme Court agreed, holding that there was no claim under the circumstances because the defendant had lawfully obtained the name from judicial records that were open to the public.

Interestingly, one may view *Cox* as slightly different in style from *New York Times* and its progeny, because the Court in *Cox* barred an entire claim. The Court did not contemplate that the claim could go forward after the plaintiff cleared a hurdle or threshold in a common law

107. *See, e.g.*, LEWIS, *supra* note 81.

108. 419 U.S. 245 (1974).

109. Interestingly, the Court held the publisher was vicariously liable for the reporter's fault, without noting the arguable discrepancy between that holding and the failure to impose vicarious liability in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). On false light, see also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

110. 420 U.S. 469 (1975).

case; instead, the claim was barred. But the Court did purport to limit its analysis to the facts of the particular case, and in so doing it acted consistently with the role of a court in a common law case. The *Cox* Court relied upon and extended the pre-existing authority of *New York Times*. Applying *New York Times* to another tort can also be viewed as reasoning by analogy. Thus, the decision, at least in this regard, is consistent with the traditional model.

Subsequently, the Court faced a similar privacy claim in *Florida Star v. B.J.F.*[111] In that case, a rape victim filed suit against a newspaper for publishing her name in violation of a Florida statute. As in *Cox*, the defendant newspaper had lawfully obtained the name of the victim through a publicly released police report that had been made available in the police press room. The defendant argued that the Court should hold that truthful publications are never punishable. Had the Court accepted the defendant's invitation, the Court would have barred an entire arena of disclosure claims. The Court refused to do so and instead limited its holding by finding that since the paper had lawfully obtained truthful information about a matter of public significance, no liability could exist. The Court cited its previous opinion in a case involving a criminal indictment for publishing the name of a youth charged as a juvenile offender.[112] After *Florida Star*, one justifiably wonders whether the Court's jurisprudence has effectively foreclosed a disclosure of private facts claim, at least where the subject of the controversy is a matter of public interest. However, the Court's opinions purport to limit their holdings to the particular facts and, in this way, the opinions are consistent with common law development of law in general and tort law in particular. One may also view them as minimalist. A broad rule did not need to be articulated beyond the facts of the case.

The Court considered the application of *New York Times* to appropriation cases in *Zacchini v. Scripps-Howard Broadcasting Co.*[113] Zacchini performed as a human cannonball: he was fired out of a cannon. While performing at a fair in Ohio, a television station broadcast Zacchini's *entire* fifteen-second act on the local news. Zacchini sued for appropriation of his identity or right to publicity. The defendant claimed that its broadcast of the act was constitutionally protected under *New York Times* and its progeny. In a five-to-four opinion, the Supreme Court held that while the State of Ohio could provide greater protection to the press, the First and Fourteenth Amendments of the U.S. Constitution did *not* bar the appropriation

111. 491 U.S. 524 (1989).

112. Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).

113. 433 U.S. 562 (1977).

claim. As in *Greenmoss*, the Court found that the balance between free speech and private interests tipped in favor of the private interests. This balance in favor of private interests also authorized the state to impose liability, if the imposition of liability was consistent with state constitutional law and state tort law. Justice White, speaking for the majority, drew a distinction between liability for appropriating property—the human cannonball act—and defamation or placing the plaintiff in a false light. Justice White wrote that the false light and defamation did not involve "an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid."[114] He also stated that in a false light case the injury is in the publication itself, whereas in a right to publicity case the issue is not the fact of publication but rather arises from who does the publishing.[115] Justice White stated that the "broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance."[116] The right of control was critical to that economic value. One may justifiably wonder why a state seemingly has greater freedom to provide protection to a property interest than to reputation or emotional tranquility. On its face, the Court's reasoning seems suspect. *New York Times* is limited to speech and reputation; it does not apply to property. But the Court explained no more; there is no reasoned elaboration. The *Zacchini* claim was allowed to proceed without any constitutional limitation.

Moving from invasion of privacy to intentional infliction of emotional distress, we encounter *Hustler Magazine v. Falwell*.[117] As part of a popular ad campaign, Campari Liquor had included interviews with various celebrities about their "first times." The ads expressly referred to the first time the celebrities had sampled Campari, but played on the sexual double entendre of the subject. Apparently unable to resist the temptation, *Hustler Magazine* ran a parody of Jerry Falwell's "first time." While the details are too sordid to recount here, the parody involved alcohol, immorality, drunkenness, an outhouse, and Falwell's mother. Reverend Falwell filed suit against *Hustler* seeking damages for libel, invasion of privacy, and intentional infliction of emotional distress. The district court granted a directed verdict on the invasion of privacy claim and the jury found against Reverend Falwell on the libel claim, concluding that the parody could not "reasonably be understood as describing actual facts . . . or actual events . . . ."[118] However, the

114. *Id.* at 574.

115. *Id*. at 572.

116. *Id*. at 575.

117. 485 U.S. 46 (1988).

118. *Id.* at 49 (internal quotation marks omitted).

jury ruled in favor of Reverend Falwell on the intentional infliction claim and awarded him $100,000 in compensatory damages and $50,000 from each of the various defendants. The United States Court of Appeals for the Fourth Circuit affirmed.[119]

The Supreme Court granted certiorari and held that the requirements of *New York Times Co. v. Sullivan* applied even though the claim was for intentional infliction of emotional distress. The Court stated that parody, particularly in cartoons, had long been a part of America's conversation, comment, and debate on public issues. The Court held that where speech about a public figure was involved (and arguably speech about a matter of public concern), the plaintiff in an emotional distress claim had to establish that the speech involved a false statement of fact that was uttered with knowledge of falsity or reckless disregard for the truth ("actual malice"). The plaintiff argued that the common law requirement in intentional infliction cases that the defendant's conduct must be "outrageous" provided sufficient constitutional protection. The Supreme Court disagreed; the Court concluded that outrageousness lacked sufficient meaning to protect the defendant from liability for properly exercising its right to free speech. Because the jury had concluded that no reasonable person could believe that the parody contained a false statement of fact, liability for intentional infliction was precluded.

One may wonder whether the Court's extension of *New York Times* to intentional infliction cases is a neat fit. Is it rational and consistent with the traditional model? While the Court was clearly concerned with protecting *Hustler Magazine*'s freedom of speech, one must question whether wholesale importation of the falsity requirement from defamation cases was the best way to deal with intentional infliction cases. Why transport a defamation-based requirement to intentional infliction cases? Could the Court have implied some constitutional content into the outrageousness requirement? Or was the "actual malice" requirement appropriate because the alleged intentional infliction involved speech, and an alternative holding might have weakened *New York Times* by allowing public officials and figures to turn defamation claims into intentional infliction claims? Perhaps the Court saw the common law "outrageousness" element as akin to the common law's malice requirement in defamation cases, in that it was susceptible to manipulation because of its alleged vagueness. Of course, malice could be presumed at common law in a defamation case; the same could not be said of the "outrageous" conduct requirement in

119. 797 F.2d 1270 (4th Cir. 1986).

intentional infliction cases. Further, the Court could have articulated its own constitutional definition of outrageousness. Nonetheless, the Court in *Falwell* clearly applied the *New York Times* requirement to an intentional infliction case. In doing so, the Court limited the ability of a state to articulate and apply its own tort law concerning intentional infliction involving speech about a public figure (and arguably a matter of public concern). Clearly, while *Falwell* resulted in no recovery for the plaintiff, it was consistent with *New York Times* and its progeny because it contemplated that public figure/speech/intentional infliction claims could proceed as long as the public figure cleared the hurdles imposed by *New York Times*. Additionally, in its defense, one could say that the *Falwell* Court reasoned by analogy from *New York Times*, as courts are supposed to do according to the traditional model.

Finally, let us turn to *Cohen v. Cowles Media Co.*[120] *Cohen* is *not* a tort case; it is a promissory estoppel case, but it raises critical questions about the application of *New York Times* and its progeny. Dan Cohen was employed by a Minnesota gubernatorial candidate. During the closing days of his employer's campaign, Cohen contacted reporters from two papers and offered to provide them with information concerning another candidate in the upcoming election. "Cohen made clear to the reporters that he would provide the information only if he was given a 'promise of confidentiality.'"[121] The reporters published the information and independently decided that they would publish Cohen's name as part of the stories. After the publication, Cohen's employer fired him, and Cohen sued the newspaper claiming fraudulent misrepresentation and breach of contract. The jury found in Cohen's favor and awarded him $200,000 in compensatory damages and $500,000 in punitive damages. The Minnesota Court of Appeals reversed the award of punitive damages but upheld the compensatory damages award. The Minnesota Supreme Court reversed the compensatory damages award, finding that a contract cause of action was inappropriate and that the only possible avenue of recovery under Minnesota law was promissory estoppel, which had neither been tried to the jury nor briefed (or argued) by the parties on appeal. In addressing promissory estoppel, the Minnesota Supreme Court noted that promissory estoppel was applicable where injustice could be avoided *only* by enforcing the promise—here, the promise of confidentiality. However, in considering the "avoiding injustice" element, the Minnesota Supreme Court looked to the First Amendment as articulating and

120. 501 U.S. 663 (1991).

121. *Id*. at 665.

providing a relevant and important value. The Minnesota Supreme Court held that using promissory estoppel to enforce the promise of confidentiality would violate the defendant newspaper's First Amendment rights.

The U.S. Supreme Court granted certiorari and reversed. The Court held that state action was involved because damages awarded under a promissory estoppel theory would be enforced through the official power of the states. This aspect of the opinion is clearly consistent with *New York Times* and its progeny. The Court said that promissory estoppel was a "law" that would be generally applied, and it did not single out the press in any fashion. The Court held that the Minnesota law of promissory estoppel, to the extent it would "otherwise be enforced under state law," would simply require those making promises to keep them.[122] Thus, any restriction on publication was self-imposed by the promise itself. The liability was generated, at least in part, by the promise and not (simply) by the operation of state law. Of course, the promise would not even be enforceable absent the state law of promissory estoppel. But the Court noted that the plaintiff in *Cohen* was not trying to avoid the strictures of defamation law (as in *Falwell*) and was not seeking damages for harm to reputation or state of mind. The plaintiff had lost his job and his earning capacity. Thus, the Court held that the case was distinguishable from *Falwell*, and that the U.S. Constitution did not limit Cohen's state law promissory estoppel claim.

Interestingly, the Court in *Cohen* refused to find a First Amendment limitation on the promissory estoppel theory. Analogizing to *Zacchini*, where the Court refused to find a First Amendment limitation on the appropriation of a property interest, the *Cohen* Court saw a difference between liability based on keeping a promise and liability arising out of tort law. One may justifiably wonder whether there is a meaningful difference between tort liability and contract liability, and between "pure" tort liability and liability for appropriation of a property interest. One may wonder whether the Court created a sort of hierarchy of interests without a clearly articulated reason. Does the state have a weightier interest in protecting property rights or contract rights than it does in protecting reputation or state of mind through tort law? Alternatively, does the Court view tort law as public law subject to constitutional strictures more than contract law or appropriation of a property right? We will reexamine the contract questions in the context of the Court's preemption cases, but one searches in vain for reasoned differences. To that extent, *Cohen*—lacking in a reasoned justification

122. *Id*. at 672.

for its holding—seems at odds with the traditional model.

In conclusion, *New York Times* and its progeny, while not always consistent and not free of troublesome distinctions and detail, rely upon rules in analogous cases. In this sense, they appear to be based on pre-existing authority—albeit authority extended in the particular cases. Thus, they are consistent in their reliance on and manifestation of "reasoned elaboration." *New York Times* establishes limitations on the state's power to articulate and apply its own tort law, *but*, at the same time, the case attempts (at least in principle) to work within the traditional tort system. *New York Times* and *Gertz* impose and articulate rules to be applied in the context of the traditional tort case. If the plaintiff clears the rule or hurdle, then the plaintiff's claim may proceed and may be successful. These hurdles are rules *or* elements—"actual malice," negligence, and actual injury. In that regard, they are either clearly defined ("actual malice" means knowledge of falsity or reckless disregard for the truth) or are commonly used "tort" terms or concepts (negligence and actual injury). Moreover, the jury plays a key role in deciding whether the plaintiff clears that hurdle. While the Court's appellate review in *Bose Corp.* threatens the jury's traditional role, *New York Times* and its progeny arguably still represent common law constitutional decisionmaking that is implemented in the context of the particular case. Importantly, the common law jury will (subject to *Bose Corp.*) play a meaningful role in deciding those cases.

The disclosure of private facts cases are arguably different, because their results hint at the preclusion of an entire line of liability in state court. But the Court in these cases expressly limited its holdings to the relevant facts. Perhaps most troublesome are *Zacchini* and *Cohen*, which arguably set up a hierarchy of private law. Under this hierarchy, contract and property rights seem entitled to greater protection under state law than "tort" rights protecting reputation and state of mind. Tort protections of reputation and state of mind are subject to constitutional limitation under *New York Times* and *Falwell*, at least when the plaintiff is a public official or figure or the speech involves a matter of public concern. Contract or property rights, even where the event is newsworthy and the speech involves a matter of public concern, are not subject to the same constitutional limitations. One wonders if the articulated differences are persuasive. Let us now turn to the second of our three areas of constitutional tort reform: the preemption of state tort claims by federal legislation under the Supremacy Clause.

IV. PREEMPTION OF STATE TORT CLAIMS

Commentators have ably written on the preemption jurisprudence and some of its implications.[123] This Article does not seek to create a unified theory to explain the preemption jurisprudence. Rather, it places the preemption cases within the larger framework of Supreme Court tort reform. It analyzes the preemption cases insofar as they limit the power of a state to articulate and develop its own tort law, and it comments on the cases' impact and the interpretation of tort law in general, especially their consistency or lack thereof with the modest model.

The traditional model provides that one common characteristic of adjudication is statutory interpretation. All of the preemption cases involve statutory interpretation and thus fall under the umbrella of the model. Moreover, while the different statutory words at issue preclude broad general rules, the cases may be subject to general analysis and criticism based on their reasoning and consistency in approach. Individually, they are confusing and conflicting. But at another level, they are consistent with the traditional model—reasoned elaboration and purposive statutory interpretation.

The Supremacy Clause of the U.S. Constitution[124] provides the basis for preemption. Where there is congressional intent to displace state law, or where state law would conflict with federal law, state law must give way. Preemption may be express or implied. When preemption is express, Congress has expressed its intent regarding the operation of state law in the relevant legislation. If Congress expressly provides that state law is displaced, then it is displaced. However, the extent and purpose of express preemption clauses must be interpreted. And even if Congress has not expressly preempted state law, the operation of state law may be impliedly preempted where there is a conflict between state and federal law, where it is impossible for both state and federal law to operate, or where the application of state law would obviate or frustrate the federal purpose or end. Traditionally, the question of preemption arose most commonly where a state statute was arguably preempted by a federal enactment.[125] But since at least 1959 federal law has been held

123. *See generally* Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913 (2004); Michael D. Green, Cipollone *Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L. REV. 1257 (1997); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411 (2004). *See also* Thomas C. Galligan, Jr., *Product Liability—Cigarettes and* Cipollone*: What's Left? What's Gone?*, 53 LA. L. REV. 713 (1993).

124. U.S. CONST. art. VI.

125. Arguably, the dormant commerce clause cases can be viewed as a type of federal preemption. Moreover, the extent to which federal maritime law, whether articulated or inchoate, preempts the

to preempt the operation of state tort law—that is, federal law may preempt a state court's ability to hold a defendant liable under a state tort theory.[126]

In *San Diego Building Trades Council v. Garmon*, an employer sued a union alleging that its picketing constituted an unfair labor practice under state tort law.[127] The California court issued an injunction and awarded damages. The case reached the U.S. Supreme Court twice. On its second appearance, the Court considered the state court's jurisdiction to award damages for injuries caused by the picketing. In an opinion by Justice Frankfurter, the Court held that where the picketing was arguably within the ambit of the National Labor Relations Act's provision dealing with employees' rights to organize, collectively bargain, or avoid unfair labor practices, the California court's jurisdiction to hold the defendant liable under state tort law was preempted. The Court did what a Court must do in any preemption case: it interpreted the scope and reach of a federal statute. Interestingly, *Garmon* preceded *New York Times* by five years.

Later, in *International Paper Co. v. Ouellette*,[128] Vermont land owners sued the operator of a New York pulp and paper mill, alleging that the operation of the paper mill in New York constituted a nuisance under Vermont law. The Supreme Court held that the federal Clean Water Act preempted Vermont's nuisance law to the extent that Vermont sought to impose liability on a New York point source under Vermont law. However, the Clean Water Act did not bar the plaintiffs from claiming the source was a nuisance under New York law.[129] While obvious federalism concerns were at stake in the decision, both the logic and the result indicate that the Court parsed various state law claims and concluded that some were preempted and others were not. Thus, *Ouellette* exemplifies a court doing what a court is frequently called upon to do in preemption cases: interpreting the relevant statute, applying it to the existing common law, and determining the statute's reach and effect. The Court engaged in a traditional judicial function—

operation of state law in a maritime case is in essence a preemption issue and it is arguably a preemption issue of constitutional dimension; however, given the highly specialized nature of that inquiry, I elected not to pursue it here. *See generally* FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., ADMIRALTY IN A NUTSHELL, Ch. I (5th ed. 2005); FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., PERSONAL INJURY IN ADMIRALTY 3–10 (2000); FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., & CATHERINE M. MARAIST, MARITIME LAW 4–30 (2003).

126. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

127. *Id.*

128. 479 U.S. 481 (1987).

129. Perhaps one might have foreseen the *Gore*/*Campbell* sovereignty limits on punitive damages (i.e., a state cannot punish conduct occurring in another state that has no effect inside the forum state) from the *Ouellette* holding.

statutory interpretation—consistent with the defamation cases discussed above. In contrast to the defamation cases, a preemption case may result in preclusion of a whole set of claims. In the defamation cases, the Court frequently concluded that the plaintiff's claim could proceed once the plaintiff cleared the judicially articulated constitutional hurdle. In both instances, the Court is still engaged in a traditional judicial function—the interpretation of a statute and the application of that interpretation to the common law. In this manner, the Court's role is consistent with the traditional model.

While *Garmon* and *Ouellette* are cases involving the preemption of state tort law, perhaps the first major modern case dealing with the question of state preemption (or lack thereof) of more common personal injury claims was *Silkwood v. Kerr-McGee Corp.*[130] In *Silkwood*, the plaintiff's decedent, Karen Silkwood, was exposed to the nuclear contaminant plutonium. The plaintiff alleged that Silkwood was exposed in the workplace. Unfortunately, Karen Silkwood was killed in an unrelated traffic accident shortly after the contamination was discovered. Her father then sued her employer seeking compensatory and punitive damages. The lower court held that the plaintiff's claims for punitive damages were preempted by extensive federal safety regulation of the nuclear energy industry. The extensive federal regulation included the Atomic Energy Act of 1954, which the Supreme Court had earlier interpreted as preempting state regulation of the safety aspects of nuclear energy.[131] That earlier decision was based upon Congress's conclusion that the Nuclear Regulatory Commission had superior technical expertise with nuclear power and safety that the states did not possess. However, in *Silkwood*, the Court held that while Congress might have displaced state safety regulation, Congress did *not* intend to displace state tort law. Thus, the plaintiff's punitive damages claim was not preempted.

The Court noted that Congress had been silent on state tort law in the relevant statutes and that this "silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[132] This concern that a finding of preemption will leave the plaintiff without a remedy is an important one that the Court has reiterated in later cases.

130. 464 U.S. 238 (1984).

131. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 205 (1983).

132. *Silkwood*, 464 U.S. at 251.

Interestingly, the *Silkwood* Court essentially lumped compensatory and punitive damages together and rejected Kerr-McGee's argument that the two types of damages should be treated differently. In rejecting that argument, the Court stated that punitive damages had long been a part of traditional state law.[133] Justice Blackmun, joined by Justice Marshall, dissented, noting the extensive federal regulation of safety in the provision of nuclear energy. Justice Blackmun also noted that the punitive damages that the jury had imposed were one hundred times greater than the maximum fine that could be imposed by the Nuclear Regulatory Commission for a single violation of federal standards. Additionally, Justice Blackmun drew what he thought was a critical distinction between punitive and compensatory damages. In drawing that distinction, he said that:

> It is to be noted, of course, that the same preemption analysis produces the opposite conclusion when applied to an award of compensatory damages. It is true that the prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility. But so did the state statute upheld in *Pacific Gas*. The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims. Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the preemption analysis established by *Pacific Gas* comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not preempted whereas punitive damages are.[134]

Justice Blackmun also noted the difference between the methods for calculating compensatory and punitive damages. Compensatory damages are calculated to make the victim whole for his or her injuries. Punitive damages are awarded to "compel adherence to a particular standard of safety . . . ."[135] He argued that the punitive award would, therefore, allow a state to punish a defendant nuclear power provider's failure to adhere to a standard that was stricter than the federal standard. This state punishment would interfere with the federal regulatory scheme. Justice Powell, joined by Chief Justice Burger and Justice

133. *Id.* at 255. Interestingly, Professor Geistfeld has echoed a similar theme when he wrote: "Insofar as the incentive effects of a damage award provide the direct restriction of the defendant's liberty interest, there is no fundamental difference between punitive damages and compensatory damages." Geistfeld, *supra* note 10, at 110.

134. *Silkwood*, 464 U.S. at 263–64 (Blackmun, J., dissenting).

135. *Id.* at 264.

Blackmun, also dissented. Like Justice Blackmun, Justice Powell argued that punitive damages were regulatory[136] Interestingly, in a footnote, he also drew a distinction between compensatory and punitive damages, stating:

> The distinction in this case between the two types of damages is of major importance. There is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault as authorized by state law. Moreover, personal injuries are finite. To be sure, as the compensatory award in this case illustrates, these can result in large compensatory judgments. But juries do have guidance from physicians, medical records, lost wages, and—where permanent disability or death occurs—actuarial testimony as to lost earnings and life expectancy. None of these is present when punitive damages are awarded. The contrast also is illustrated by this case. A jury with neither pretrial knowledge of nuclear plant operations nor evidence to guide or limit its discretion, chose $10 million. It could, as well, have been almost any other amount.[137]

Justice Powell also called the case "disquieting"[138] because it demonstrated how the "jury system can function as an unauthorized regulatory medium."[139]

Thus, the *Silkwood* majority engaged in a preemption analysis that effectively lumped together compensatory and punitive damages, the tort claims at issue in the case. Both dissents argued for a more precise claim-by-claim analysis splitting compensatory and punitive damages. Both dissents would have treated the two types of claims differently under their preemption analyses, concluding that compensatory damage claims were not preempted but that punitive damage claims were. Compensatory damages' goal of making the plaintiff whole, contrasted with the regulatory nature of punitive damages, provided the essential distinction for the dissenters. According to the dissenters, the award of punitive damages would result in state "regulation" that could be inconsistent with the federal scheme and thus should be preempted. But why are punitive damages regulatory and compensatory damages not regulatory? Liability in a tort suit, by encouraging expenditures that might induce different behavior, could be considered "regulatory." Of course, the defendant need not change its behavior; it might choose to keep doing what it was doing and pay the judgment (and possibly future judgments). The Court in *Silkwood* began a wrestling match with the

136. *Id.* at 274–75 (Powell, J., dissenting).

137. *Id.* at 276 n. 3.

138. *Id.* at 283.

139. *Id.*

nature of tort law: is tort law primarily concerned with corrective justice or regulation? A meaningful resolution of the question has not yet been reached, and that failure detracts from the Court's reasoning and consistency. But whatever criticism may be leveled at the preemption jurisprudence, the *Silkwood* Court engaged in a traditional judicial activity—interpreting statutes and explaining itself. Interestingly, the disagreement in *Silkwood* was over the Court's treatment of punitive damages, which were a concern in the First Amendment cases (*New York Times*, *Gertz*, and *Greenmoss*) and, obviously, in the punitive damages cases discussed below.

After *Silkwood*, the Court held in *Goodyear Atomic Corp. v. Miller*[140] that federal regulation of nuclear energy did not preempt the operation of state worker's compensation law. In *English v. General Electric Co.*,[141] the Court held that the Energy Reorganization Act did not preempt an employee's state law claim for intentional infliction of emotional distress. *English* involved preemption of a relatively narrow area of state law, and the Court refused to preempt the claim.

Cipollone v. Liggett Group, Inc.[142] is arguably the most significant tort preemption case to date. *Cipollone* was a tobacco case. The plaintiff's mother, Rose Cipollone, had smoked cigarettes for many years and died from tobacco-related diseases. Before her death, she and her husband sued various cigarette manufacturers alleging design defects, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud. During the pendency of the case, Cipollone's husband died; her son continued the case. The case reached the U.S. Supreme Court approximately nine years after it was filed. A lower court had concluded that some of the plaintiff's claims were preempted while others were not. The case required the Court to interpret the preemptive effect of the Federal Cigarette Labeling and Advertising Act of 1965 (the 1965 Act)[143] and the Public Health Cigarette Smoking Act of 1969 (the 1969 Act).[144] The 1965 Act, which required a warning on all cigarette packages, included an express preemption section. The preemption section mandated that no statement relating to smoking and health, other than the federally mandated warning, would be required on a cigarette package or in advertising. Seven justices held that the 1965 Act did not preempt common law

140. 486 U.S. 174 (1988).

141. 496 U.S. 72 (1990).

142. 505 U.S. 504 (1992).

143. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331–1340 (2000)).

144. Pub. L. No. 91-222, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. § 1340).

damages actions. In his majority opinion on the preemptive effect of the 1965 Act, Justice Stevens articulated a presumption against preempting state police power. This presumption seems consistent with the *Silkwood* majority's concern about leaving tort victims remediless in the wake of a preemption decision. In *Cipollone*, Justice Stevens concluded that the 1965 Act was best read as preempting only positive enactments by legislatures and administrative agencies mandating particular warning fields; it did not preempt the operation of state law through decisions in common law tort cases. This conclusion was also consistent with *Silkwood.* Thus, tort cases were not preempted. Justice Scalia and Justice Thomas concluded that the 1965 Act preempted state tort claims for breach of express warranty, intentional fraud, and misrepresentation.[145]

The Public Health Cigarette Smoking Act of 1969 had strengthened the package statements on cigarettes by requiring a statement that cigarettes were dangerous. The 1969 Act also banned advertising in electronic communications subject to the jurisdiction of the Federal Communications Commission. Moreover, the 1969 Act modified the express preemption provision to provide that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarette the packages of which are labeled in conformity with the provisions of this Act."[146] The Court was divided in its interpretation of the 1969 Act, and Justice Stevens's opinion was only a plurality opinion in regards to that act. Consistent with *Ouellette*, the Court engaged in a claim-by-claim analysis to determine which claims were preempted under the 1969 Act. Its reasoning method was, therefore, consistent with what it had done in *Ouellette*.

The Court held that the 1969 statute's language was broad enough to reach tort judgments in common law cases, noting that state tort law (including compensatory damages) can regulate activity.[147] The plurality's critical inquiry for determining if claims were expressly preempted by the Act was "[w]hether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' given that clause a fair but narrow reading."[148] One must praise the plurality's analytic effort while sometimes questioning its consistency in answering the preemption

145. *Id*. at 544, 544–45 (Scalia, J., dissenting).

146. 15 U.S.C. § 1334(b).

147. 505 U.S. at 521 (majority opinion).

148. *Id.* at 522–23.

questions for each claim. The answers were varied. On the failure to warn claims, the plurality held that insofar as those claims would require additional or clearer statements about the effects of smoking and health, they were preempted. However, failure to warn claims based solely on testing, research, or activities unrelated to advertising and promotion were not preempted. Furthermore, the plurality held that breach of express warranty claims were not preempted because those claims were not imposed under state law, but were instead best viewed as being voluntarily undertaken by the manufacturer or seller.

One may question why an express warranty claim is not imposed under state law. After all, state law creates and recognizes the claim.[149] Treating the breach of express warranty claim as different from other tort claims because it is voluntarily undertaken as a contract claim is reminiscent of the Court's treatment of promissory estoppel in *Cohen*. The reader will recall that the *Cohen* Court held that the promissory estoppel claim was merely the enforcement of a promise and was, thus, not subject to heightened First Amendment protection. In *Cipollone*, the Court held that a breach of express warranty claim was essentially a contract claim based on a voluntary undertaking by the manufacturer-seller. As such, the claim was not preempted.[150] One may wonder why a state contract claim is less likely to be preempted than a state tort claim. Of course, enforcing a promise or undertaking is appealing from a normative perspective. But one may ask whether that normative appeal is absent when the obligation is a general tort obligation imposed under state tort law. Further, the Court cited *no* persuasive authority for its broad statement about contract claims being self-imposed rather than imposed by the state.

The plurality's analysis of the fraud claims in *Cipollone* was even more complex. The plurality indicated that the plaintiff's claims that the defendant neutralized the mandated warnings through advertising were preempted.[151] However, claims that the defendant had falsely misrepresented a fact or had concealed a fact were not preempted because those claims were based on a general duty not to deceive—not a duty based on smoking and health. The plurality reached the same conclusion on the conspiracy claims. Thus, the fraud and conspiracy claims were not preempted to the extent that they were based on a general duty not to deceive rather than a particular duty based on

149. Recall the Court's language in *Cohen* stating that state law was the source of any obligation arising under a theory of promissory estoppel. *See supra* note 122 and accompanying text.

150. 505 U.S. at 526–27.

151. *Id.* at 527–29.

smoking and health.[152] Using this logic, one wonders why failure to warn claims were *not* preempted, because they were based on a general duty to exercise reasonable care to provide a fair warning, not on a particular duty with respect to smoking and health. While the majority's statutory interpretation and reasoning is judicial by nature and consistent with the traditional model of adjudication, one is left puzzling over its persuasiveness, wisdom, and rationality.

Justice Blackmun, joined in his partial concurrence and partial dissent by Justices Kennedy and Souter, took the Court to task for its inconsistent and varying levels of generality, particularly regarding what qualified as a legal duty based on smoking and health, and what qualified as a legal duty based on more general state-imposed duties. Justices Blackmun, Kennedy, and Souter did not think any claims were preempted.[153] Justices Scalia and Thomas also partially concurred and partially dissented. Justice Scalia thought that some claims were preempted under the 1965 Act. Scalia also believed that certain post-1969 claims were preempted, including warning, express warranty, and fraud claims.[154] Thus, Blackmun, Kennedy, and Souter joined the plurality to create a majority on the 1965 Act claims, and Scalia and Thomas joined the plurality to create a majority on the post-1969 Act claims.

One may justifiably scratch one's head in frustration over the result in *Cipollone*. In particular, the plurality's distinction between specific duties and general duties is doubtful. The applicable law of New Jersey did not draw particularized distinctions between tort duties based on smoking and health with respect to advertising or promotion, and general duties like the duty to warn. The Court, however, did draw (or create) those distinctions. Likewise, one is justifiably confused about the different treatment of tort (state-imposed) and contract (supposedly self-imposed) duties. Despite any frustration, *Cipollone* held that federal cigarette labeling statutes preempted at least certain state tort claims. To that extent, the opinion operates as Supreme Court tort reform. Moreover, the Court held that state tort law can be classified as inconsistent state regulation when considering preemption. Despite criticism of *Cipollone*, the Justices engaged in a traditional judicial function by interpreting legislation and its impact. One may, however, be justifiably critical of its "reasoned elaboration."

The next significant preemption case was *CSX Transportation, Inc. v.*

152. *Id.* at 530–31.

153. *Id.* at 534–44 (Blackmun, J., concurring, in part, and dissenting, in part).

154. *Id.* at 551–55 (Scalia, J., concurring, in part, and dissenting, in part).

Easterwood.[155] In *Easterwood*, the decedent was killed at a grade crossing when the truck he was driving collided with the defendant's train. His wife filed a state law wrongful death action alleging that the defendant was negligent in failing to provide adequate warning devices at the crossing and for operating the train at an excessive speed. The defendant argued that both claims were preempted by the Railroad Safety Act of 1970.[156] The Act's preemption and savings provisions allowed states to adopt or continue in force any laws, rules, or regulations relating to railroad safety until the Secretary of Transportation had adopted a rule covering the same subject. Even after the promulgation of federal safety standards, a state had the right to adopt more stringent safety standards when necessary to eliminate or reduce essentially local safety hazards, as long as those standards are not incompatible with federal laws or regulations and do not pose an undue burden on interstate commerce. In *Easterwood*, the Court held that legal duties imposed by common law courts fell within the language of the preemption statute.[157] To be preempted, however, a federal regulation had to cover or subsume the subject matter of the relevant state law. The "cover or subsume" test was a particularized interpretation of the relevant statute. The Court said that the aspect of the federal regulations requiring the installation of certain safety devices at grade crossings could have some preemptive effect, but the defendant had not established that those regulations applied. Thus, the plaintiff's claims about warning devices were not preempted.[158] However, the Court held that the applicable speed regulations were preemptive. The majority did not care that the speed regulations were apparently adopted to prevent derailments rather than to prevent grade-crossing accidents. The Court held that the statute's savings clause did not apply to the speed requirements because the savings clause was addressed to local hazards, and the applicable law was the law of negligence—which deals with due care applicable to all hazards, not only those hazards arising from local conditions.[159] In *Easterwood*, the general duty claim, rather than the special local duty claim, was preempted. Justice Thomas, joined by Justice Souter, dissented, arguing that none of the plaintiff's claims were preempted.[160]

Consistent with *Ouellette* and *Cipollone*, the *Easterwood* Court

155. 507 U.S. 658 (1993).

156. Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 49 U.S.C. §§ 20101–20153 (2000)).

157. 507 U.S. at 664.

158. *Id.* at 670.

159. *Id.* at 675.

160. *Id.* at 676 (Thomas, J., dissenting).

engaged in a claim-by-claim preemption analysis. The Court engaged in a traditional analysis of the applicable statutes and applied the legislation to particular claims. However, the majority seemed to treat the existence of any speed regulation as determinative of the preemptive effect of the statute rather than engaging in a more careful analysis of the applicable speed regulation's purpose. Thus, if speed regulations were enacted to avoid derailments, the frustration of Congress's and the Secretary's purpose of avoiding derailments by tort judgments concerned with grade-crossing accidents is difficult to see.

In *American Airlines, Inc. v. Wolens*,[161] the Court considered claims that were not truly common law tort claims. However, the analysis and result are both interesting and relevant. In *Wolens*, members of defendant's frequent-flyer program sued the defendant airline, alleging breach of contract and violations of the Illinois Consumer Fraud and Deceptive Practices Act.[162] These statutory claims were akin to common law fraud claims. The plaintiff alleged that changes made in the defendant's frequent-flyer program constituted a breach of contract and violated Illinois law. The defendant argued that the claims were preempted by the Airline Deregulation Act, which prohibited states from enacting or enforcing any "law . . . or other provision having the force and effect of law relating to [air carrier] rates, routes, or services."[163] The majority held that claims under the Illinois Act were preempted. It stated that the "Act is prescriptive; it controls the primary conduct of those falling within its governance."[164] Thus, the majority apparently believed that the operation of the Illinois Act would upset Congress's regulatory scheme, mandating preemption.

On the other hand, the majority held that the contract claims were not preempted. Hearkening back to the *Cipollone* (and *Cohen*) distinction between contract and tort claims, the Court stated:

> We do not read the ADA's preemption clause, however, to shelter the airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own self-imposed undertakings. As persuasively argued . . . terms and conditions airlines offer and passengers accept are privately ordered obligations,[165]

and thus do not amount to state enactment or enforcement of law. According to the majority, a remedy for breach of contract is not state imposed, but merely holds a party to its agreement.

161. 513 U.S. 219 (1995).

162. 45 Ill. Comp. Stat. § 505 (2005).

163. 49 U.S.C. App. §§ 1305 (a)(1) (2000).

164. 513 U.S. at 227.

165. *Id*. at 228–29.

Justice Stevens, the author of the *Cipollone* partial majority/partial concurrence, again concurred in part and dissented in part.[166] Justice Stevens would not have found the consumer protection claims preempted. He argued that those claims were analogous to a codification of common law negligence.[167] Thus, he viewed them as arising out of a general rule that a person has a duty to exercise reasonable care. Recall his distinction between general and special duties in *Cipollone*. The general standard of ordinary care is a "general background rule against which all individuals order their affairs."[168] As such, Stevens would not find the consumer protection act claims preempted, because they were mere negligence rules, not state policy. He also pointed to the general duty to avoid deception.

Justice O'Connor, joined by Justice Thomas, also concurred in part and dissented in part.[169] She agreed with the majority that the Illinois statutory claims were preempted, but she would also have found the contract claims preempted. Justice O'Connor powerfully argued that contract claims, like tort claims, can only be enforced through state law. She pointed out that, under modern contract theory, many principles of contract law are essentially the effectuation of state public policy, rather than merely the enforcement of a promise. O'Connor quoted Professor Fried for the proposition that the "law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments."[170] She noted that the legal system allows private parties to use the "coercive power" of the state to enforce contractual obligations. Impliedly, therefore, she saw no difference between contract claims and tort claims for preemption purposes. The entire Court engaged in reasoned, purposive statutory construction, but the legacy of *Cipollone* infected at least some of the Court's reasoning. The Court still did not effectively explain a principled distinction between the tort and contract claims. Moreover, the dispute over appropriate levels of generality remained. At the end of the day, however, the claims that were preempted (the Illinois statutory claims) and the claims that could go forward (the contract claims) were clear.

Next, in *Freightliner Corp. v. Myrick*,[171] the plaintiff alleged that vehicles without anti-lock braking systems were unreasonably dangerous. The Court held that the claims were neither expressly nor

166. *Id*. at 235 (Stevens, J., concurring, in part, and dissenting, in part).

167. *Id*. at 236.

168. *Id*. at 236–37.

169. *Id.* at 238 (O'Connor, J., concurring, in part, and dissenting, in part).

170. *Id*. at 249 (quoting CHARLES FRIED, CONTRACT AS PROMISE, 69 (1981)).

171. 514 U.S. 280 (1995).

impliedly preempted by federal legislation or regulations. No anti-lock braking system regulation existed, and a finding of liability would not undermine any federal rule, regulation, or policy, because none was in place.

Subsequently, in *Medtronic, Inc. v. Lohr*,[172] the Court engaged in a more extensive and meaningful preemption analysis. In *Lohr*, a pacemaker recipient sued the product's manufacturer in negligence and strict liability, alleging a range of claims involving the manufacture, design, and warnings associated with the sale and use of the pacemaker. The pacemaker was a Class III medical device marketed and sold under the Medical Device Amendments of 1976[173] as substantially equivalent to products that the Food and Drug Administration (FDA) had previously approved—that is, the substantially equivalent determination was pursuant to the grandfathering of a device. The Act's express preemption provision stated that no state may "establish or continue in effect with respect to a device intended for human use any requirement . . . which is different from, or in addition to, any requirement applicable under this chapter to the device . . . ."[174] The Court held that Congress did not intend to preempt any and all common law actions (defective design, manufacturing, or labeling) brought against medical device manufacturers. The Court concluded that Congress had seemingly used the word "requirement" to mean state statutes and regulations rather than the "general duties enforced by common-law actions."[175] As a result, Congress did not intend to preempt plaintiffs' design claims. Nor did the Act preempt a state's right to provide remedies for violations of common law duties that paralleled federal requirements. The applicable FDA regulations confirmed the plaintiffs' reading of the statute. Interestingly, *Lohr* represents one of the first cases in which the Court articulated the possibility that a state may provide a remedy for the violation of a federal standard. In essence, the Court seemed to say that even if, arguably, the federal statute did not create a federal right of action, a state could provide a remedy for violation of the federal standard. This statement may create a sort of negligence per se standard, but the interesting aspect is that the statute violated was a federal statute rather than a state statute.

172. 518 U.S. 470 (1996).

173. Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified at 21 U.S.C. §§ 360c–k, 379–379a, 42 U.S.C. § 3512 (2000)).

174. 21 U.S.C. § 360k(a)(1).

175. 518 U.S. at 489. Of course the "general" duty reference is an analytically uncomfortable reminder of *Cipollone* and its levels of generality.

Returning to the *Lohr* holding, the Court held that manufacturing and labeling claims were not preempted. While the regulations contained some general labeling requirements and an obligation to comply with what the FDA calls Good Manufacturing Practices, the regulations did not preempt the relevant claims because the federal requirements "reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements."[176] The state common law requirements at issue in the suit also were not specifically developed for medical devices. The relevant common law duty for the negligent manufacturing claim was the general duty to use due care. The relevant common law duty for the warning claim was the general duty to inform of risks. The Court concluded that these general duties were not a threat to applicable federal requirements.[177] But, once again, what are general duties? And do states really have specific tort duties?

Justice Breyer concurred.[178] He believed that "requirements," as used in the statute, can include requirements growing out of state tort law, but he found no express or implied preemption. Justice O'Connor concurred in part and dissented in part.[179] She opined that the negligent manufacture and labeling claims were preempted. Again, while the Court was divided, it carefully parsed the relevant statute, sought to explain its reasons, and even accommodated parallel but non-conflicting state tort liability.

The Court's next foray into preemption was *Geier v. American Honda Motor Co.*[180] In *Geier*, an injured motorist and her parents sued an auto manufacturer, claiming that the car that she was driving was negligently designed and defective because it did not have an air bag or other passive restraint system. The car was equipped with manual shoulder and lap belts. An administrative regulation in effect at the time had given auto manufacturers the choice of whether to install air bags. The choice was part of a regulatory policy designed to encourage seat belt use, allow development of alternatives at reasonable costs, and improve overall auto safety. The standard was promulgated under the National Traffic and Motor Vehicle Safety Act of 1966.[181] The Act contained an

176. *Id.* at 501.

177. *Id.* at 501–02.

178. *Id.* at 503 (Breyer, J., concurring).

179. *Id.* at 509 (O'Connor, J., concurring, in part, dissenting, in part).

180. 529 U.S. 861 (2000).

181. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101-30169 (2000)).

express clause preempting state safety standards that were not identical to any applicable federal safety standard in effect. However, the statute also contained a savings clause, which provided that compliance with a federal statute did not exempt any person from liability under state common law.

The Court held that the state common law claims were not expressly preempted. However, the Court noted that the common law claims might be impliedly preempted for frustration of purpose if a particular common law claim conflicted with the federal statutes of limitations. The Court concluded that the plaintiffs' claims were preempted, because allowing the claims to proceed would have interfered with the federal scheme that provided a range of choice designed to bring about a "mix of different devices introduced gradually over time; and [that the regulation] would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance . . . ."[182] Interestingly, the Court treated the potential for liability for failing to install a passive restraint system as the equivalent of a state statute, regulation, or rule requiring the installation of a passive restraint device, which would be applicable across the board to all manufacturers. Of course, the effect of liability in a single tort case does not necessarily mean any such thing.[183] Liability can result in a defendant's decision to keep doing business exactly the same way it had before the judgment, because one isolated jury verdict does not necessarily mean that the product is unreasonably dangerous. Alternatively, the defendant might choose to simply pay judgments and continue doing business the way it had before the judgment. However, the Court noted that, for purposes of preemption analysis, it generally presumes the defendant would comply with any conflicting regulation. Treating (potential) liability in a single tort case as a "conflicting regulation" that a manufacturer would "obey" by changing its design takes a public law view of tort liability. This view treats liability in a tort case not as a balancing of the rights of the individual plaintiff and defendant in a particular case, but as a judicial decision requiring a change in conduct. Moreover, the treatment of tort law as regulation was somewhat inconsistent with the *Silkwood* Court's treatment of the matter, particularly the dissenters' views concerning compensatory damages.

182. 529 U.S. at 875.

183. *But see* Geistfeld, *supra* note 10, at 109 ("Tort law also directly restricts the defendant's liberty interest by imposing behavioral requirements on the defendant as duty-holder. The negligence standard of reasonable care, for example, requires certain conduct on the part of the duty-holder with respect to particular forms of risky behavior.").

Returning to *Geier* itself, Justice Stevens dissented, joined by three other justices.[184] He argued that there should be a special burden on the defendant to prove interference with purpose and hence preemption. He relied upon federalism concerns for this special burden. Stevens also questioned whether liability in a particular case would frustrate Congress's purpose. Liability in a particular tort case, he argued, was not an "immutable, mandatory"[185] rule requiring the installation of an air bag in every car.

Interestingly, *Geier* clearly contemplated that liability in a tort case could frustrate Congress's purpose and, therefore, a tort claim could be impliedly preempted. To find frustration, however, the Court depended upon its conclusion that liability in a tort case is the necessary equivalent of a rule or regulation. The opinion in *Cipollone* turned on the same logical underpinning. Liability in a warning case would necessarily require the addition of language on the cigarette package, which the Court concluded was preempted. Somewhat ironically, the Court in *Silkwood* refused to find that liability in a state tort case—even liability for punitive damages—constituted regulation. Thus, the Court in preemption cases clearly continues to wrestle with the appropriate level of general inquiry and the effect of liability in a particular tort case vis-à-vis federal regulatory policy. However, the Court also continued to interpret federal legislation on a claim-by-claim basis to decide the effect of the applicable federal legislation.

On the heels of *Geier*, the Court held in *Buckman v. Plaintiffs' Legal Committee*[186] that the Medical Device Amendments preempted the plaintiffs' claims that defendant had committed fraud on the FDA during the approval process for surgical bone screws. Then came *Sprietsma v. Mercury Marine*,[187] in which the plaintiffs' decedent had fallen overboard while traveling in a vessel manufactured by the defendant. She was struck by the vessel's propeller and killed. The plaintiffs alleged that the vessel was defectively designed under Illinois law because the boat's motor was not protected by a propeller guard. The defendant argued that the claims were preempted by the Federal Boat Safety Act of 1971[188] and the Coast Guard's failure to promulgate a regulation requiring outboard motor propeller guards.

The Federal Boat Safety Act of 1971 provides that a state may not "establish, continue in effect, or enforce a law or regulation establishing

184. 529 U.S. at 886 (Stevens, J., dissenting).

185. *Id.* at 903, n.18.

186. 531 U.S. 341 (2001).

187. 537 U.S. 51 (2002).

188. 46 U.S.C. § 4306 (2000).

a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation proscribed under . . . this title."[189] However, the Act has a savings provision providing that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[190] The Court interpreted the express preemption clause as only applying to positive enactments and not to common law claims. This is essentially what the Court had done in *Silkwood*, *Lohr*, and *Cipollone* (with regard to the 1965 Act). In *Sprietsma*, the Court noted that it "would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims."[191] Thus, as in *Silkwood*, *Lohr*, and several other cases, the Court relied upon the possibility that preemption may leave a plaintiff remediless. Of course, after *Geier*, a state tort law claim might still be impliedly preempted because of a conflict with federal law. But in *Sprietsma*, the Court found that neither the Coast Guard's failure to adopt a propeller regulation nor the entire statutory scheme at issue preempted the state law claims involved.[192]

Bates v. Dow Agrosciences LLC is the Supreme Court's most recent foray into preemption of state law tort claims.[193] *Bates* dealt with preemption of state law tort claims under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[194] FIFRA's preemption provision provided: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[195] While the Court indicated that judge-made rules of law—tort decisions—may be preempted under FIFRA, it said the statute's preemption provisions apply to requirements articulated in state law, not to an "event," such as a verdict finding liability, "that merely motivates an optional decision . . . ."[196] The Court's statement about an event that merely motivates an optional decision by manufacturers was in response to the holding below. However, the idea can be true of all tort liability, at least

189. *Id.*

190. *Id.* § 4311(g).

191. 537 U.S. at 64.

192. Interestingly, the Court did not consider because the parties did not raise it below the issue of the extent to which maritime law might have preempted the operation of state law.

193. 544 U.S. 431 (2005).

194. 7 U.S.C. §§ 136–136y.

195. *Id.* § 136v(b).

196. 544 U.S. at 443.

in certain cases. One may view all tort judgments as occurrences that merely motivate an optional decision. This was essentially the thrust of Justice Stevens's partial concurrence and dissent in the *Geier* case. The optional decision idea treats tort liability not as regulation but as giving rise to a decision to change or not change (and keep paying judgments). In *Bates*, one again sees the Court wrestling with the nature of tort law.

In any event, the Court in *Bates* clearly held that FIFRA might have some preemptive effect on state tort law claims. The Court held that to be preempted, a state-based judge-made rule, statute, or regulation must (1) be a requirement for labeling or packaging, and (2) impose labeling or packaging requirements in addition to or different from those required by FIFRA.[197] Design claims, mismanufacturing claims, negligent testing claims, express warranty claims, or other contract claims were thus *not* preempted. These claims were not necessarily requirements for labeling or packaging and did not necessarily impose labeling or packaging requirements in addition to or different from those required by FIFRA.

Interestingly, in reference to the express warranty claim, the Court said that "a cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment it voluntarily undertook by placing that warranty on its product."[198] The Court held that a common law liability rule for breach of an express warranty was not a requirement. Once again, this language demonstrates the Court's belief that warranty or contract claims are to be treated differently from tort claims. Under the Court's hierarchy of laws, contract claims are arguably subject to less constitutional scrutiny than tort law claims. The rationale or principle for this distinction remains unclear.

The *Bates* Court also held that a claim based on violation of the Texas Deceptive Trade Practices-Consumer Protection Act was not preempted, at least to the extent the claim was based upon an express warranty claim. The Court remanded the case on the plaintiffs' fraud and failure to warn claims. These claims were based upon common law rules that "qualify" as requirements for labeling or packaging. But the Court held that it must be determined on remand if these so-called requirements were "in addition to or different from"[199] FIFRA's misbranding provisions, which prohibit "false or misleading" statements" on a label.[200] The Court held that state law need not explicitly incorporate FIFRA's standards to survive a preemption analysis. State law would

197. *Id.* at 444.

198. *Id*.

199. 7 U.S.C. § 136v(b).

200. *Id.* § 136(q)(1)(A).

only be preempted if the state law requirement was "in addition to or different from" the FIFRA standards. Thus, the lower court must determine if the state "common-law duties are equivalent to FIFRA's" misbranding standards.[201] The Court called this analysis a "parallel requirements' reading"[202] of the statute. A state may impose additional or different remedies, but not additional or different requirements. An alternative reading would favor, rather than disfavor, preemption. Moreover, "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."[203] Furthermore, FIFRA, unlike the cigarette warning statute at issue in *Cipollone*, contemplated the evolution of label content over time. According to the Court, the lower court examining the issue on remand should consider, for instance, if falsity under Texas law is broader than falsity under FIFRA. If so, then Texas law would be preempted to the extent that it was broader. Moreover, if Texas law required use of the word DANGER instead of CAUTION (the FIFRA requirement), Texas law would be preempted.[204] Finally, the Court said:

> In undertaking a pre-emption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence. To survive pre-emption, the state-law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA. If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable under a state labeling requirement subject to . . . [the FIFRA pre-emption clause] unless the manufacturer is also liable for misbranding as defined by FIFRA.[205]

The use of the jury is, of course, reminiscent of the Court's contemplation of the jury's role in libel cases after *New York Times.*

Justice Breyer concurred in *Bates*, emphasizing the EPA's authority and expertise and its potentially superior ability to determine the impact of state liability rules.[206] In some ways, one may analogize his concurrence to a sort of "negligence per se" reading of FIFRA and its

201. 544 U.S. at 447.

202. *Id*.

203. *Id*. at 451.

204. *Id.* at 453.

205. *Id*. at 454.

206. *Id.* (Breyer, J., concurring).

regulations. Justice Thomas, joined by Justice Scalia, concurred in part and dissented in part, substantively believing that the majority mistreated the breach of warranty and Texas DTPA claims.[207]

Let us pause for a moment to consider the *Bates* Court's conclusions about preemption and equivalence. As the Court did in *Lohr*, the *Bates* Court apparently contemplated potential liability under state law for violation of a federal statute or standard. A state is free, the Court seemed to say, to provide a remedy for violation of a federal standard. In many ways, this statement is consistent with the holding in *Silkwood*, which allowed the plaintiffs' punitive damage claims to go forward. However, this conclusion seems to ignore the concerns in *Geier* about the potential for state court liability to frustrate Congress's purpose. Of course, one cannot read too much into any of the preemption cases because each decision must be based upon the particular statutes at issue. This "particular statute"-based focus makes it hard to draw general conclusions and, in fact, contributes to the overall confusion. However, the Court clearly seems likely, in an appropriate case, to authorize a state's provision of a remedy for violation of a federal standard, as it did in *Lohr*, *Bates*, and *Silkwood*. The state apparently lacks the power, when federal regulation is sufficiently complete to mandate potential preemption, to require or impose a *different* standard of liability.

More generally, *Bates* continues the Court's approach of analyzing various claims separately in a preemption case. This approach is complex but appropriate. *Bates* also continues the Court's trend towards exempting contract and contract-based claims from preemption because those claims merely enforce the defendant's promise or private undertaking. Perhaps this distinction for contract or promise-based claims is appropriate because of the normative power of promise. Alternatively, as Justice O'Connor pointed out in her concurrence/dissent in *Wolens*, this distinction may take an overly simplistic view of the role of courts and public policy in enforcing contracts. It also may understate the normative importance of tort law in our culture and legal system. Moreover, the source of the contract-tort distinction is unclear and unarticulated. It seems based on intuition or uncertain views of contract or promise rather than precedent.

The broad lesson to be drawn from the preemption cases is this: federal interests, through the Supremacy Clause, can have a limiting effect upon the state's ability to articulate, develop, and apply its own tort law. Clearly, as many of the preemption cases show, an entire

207. *Id.* at 455–56 (Thomas, J., concurring, in part, and dissenting, in part).

universe of claims may be precluded when the Court finds preemption. Consequently, a finding of preemption has a real public law impact. To that extent, one may argue that a finding of preemption is more intrusive into state law and authority than the additional hurdles imposed upon recovery in *New York Times* and its progeny. Of course, claims that are not preempted go forward under state law. Courts in preemption cases are interpreting and applying statutes. In this regard, they are behaving in a manner that is consistent with the traditional model of adjudication. They are also coming up with clear guidelines for the future concerning those state law claims that may proceed and those that may not because of preemption. These decisions are also based on reasoned (if not always persuasive) elaboration, although one may be critical of the contract-versus-tort reasoning *and* the attempt to distinguish general and specific duties. On this latter point, instead of referring to special duties that arguably do not exist as such under state law, the Court might ask simply whether the factual predicate for the plaintiff's (general) state tort claim implicates a (preemptively) regulated subject. Thus, the question in *Cipollone* would not be whether the "legal duty" is a requirement based on smoking and health with respect to advertising or promotion. Instead, the question is whether the *facts* alleged to constitute the breach of a general state tort duty involve smoking and health with respect to advertising and promotion.

Finally, while one traditionally sees the preemption issue as a question for the court in the exercise of its judicial function, the *Bates* case contemplates a potential role for the jury in deciding what is essentially the scope of preemption. As the language quoted above indicates, where a plaintiff proceeds on a claim under state law, the Court seems to indicate that the jury has some role to play in deciding whether the state law rule is "equivalent" to the federal rule, or is additional or different. The idea that the jury will make this decision is intriguing, but it is also consistent with traditional notions of the importance of juries in personal injury and tort cases. We now turn to the third area of constitutional tort reform: due process limitations on the recovery of punitive damages.

V. PUNITIVE DAMAGES

Punitive damages are, by definition, an award of damages in addition to compensatory damages. Punitive damages are designed to punish and deter the defendant and others from engaging in conduct that is more blameworthy than mere negligence. When the punishment aspect of punitive damages is emphasized, it becomes apparent that the goals of

the criminal law and the law of punitive damages may overlap. However, punitive damages are awarded in civil cases and, thus, the various constitutional and statutory protections available to criminal defendants are generally not available in punitive damages cases. This fact and concern about potentially unlimited damage awards has led to much gnashing of teeth by commentators, legislative reform in various states,[208] and, as discussed herein, several U.S. Supreme Court decisions limiting a state's ability (under both the substantive and procedural due process clauses of the Fourteenth Amendment) to award punitive damages.[209] One will note that several of the cases discussed above as defamation and preemption cases involve the award of punitive damages. These include *New York Times*, *Gertz*, *Greenmoss*, and *Silkwood*.

The Court's recent punitive damages cases are, as a group, the least consistent with the traditional model. They provide little prediction force, tread the most oppressively upon state power, and, in general aspects, lack reasoned or persuasive analytical bases. The Supreme Court's recent[210] significant treatment of punitive damages began with *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[211] which was an antitrust and commercial dispute between two warring refuse disposal companies. The lower court affirmed a $6 million jury verdict for the plaintiff and the defendant appealed. On appeal, the defendant argued that the Eighth Amendment's prohibition on cruel and unusual punishment limited the state's authority to impose a punitive damage award that it argued was excessive. The U.S. Supreme Court rejected that Eighth Amendment argument, reasoning that the Eighth Amendment only applied to cases where the state was a party and not to cases between private parties.[212] In *Browning-Ferris*, the Court held that the defendant's claim that the award violated due process had not been properly preserved.

208. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 495–97 (2005).

209. Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2003).

210. *See* Rustad, *supra* note 208, at 497–505 for a discussion of pre-Rehnquist Court constitutional punitive damages cases.

211. 492 U.S. 257 (1989). *See also* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) (due process claims had not been raised and considered by state court); Aetna Life Ins. Co. v. Laroie, 475 U.S. 813 (1986) (decided on other grounds).

212. Interestingly, the Court has never considered the constitutionality of various state statutes that provide for the sharing of recovered punitive damages between a private party plaintiff and the state or a special state fund. To the extent that the state benefits from recovery of punitive damages in these cases, one may argue that the Eighth Amendment's prohibition on cruel and unusual punishment may have application.

After *Browning-Ferris*, the door remained open for defendants in punitive damages cases to make arguments based upon the Due Process Clause, contending that particular awards of punitive damages were so high that they offend traditional notions of due process. The first such case after *Browning-Ferris* to reach the Supreme Court was *Pacific Mutual Life Insurance Co. v. Haslip*.[213] In that case, Cleopatra Haslip brought an action against her life insurance company and an insurance agent for fraud. She alleged that the agent had accepted premium payments from her even though the policy had been canceled without notice. The trial court awarded over $800,000 in punitive damages, which was more than two hundred times Haslip's out-of-pocket expenses (and more than four times the compensatory damages Haslip had *claimed*). The defendant alleged that the award violated its due process rights. First, the Court indicated that holding the insurance company vicariously liable for the agent's act did not violate substantive due process. Next, the Court held that the "common-law method for assessing punitive damages does not in itself violate due process."[214] While the Court indicated that unlimited jury or judicial discretion in awarding punitive damages might violate the Constitution, a mathematical bright line between the constitutional and unconstitutional could not be drawn. Nor was the award in the particular case unconstitutional, because the award did not "jar" the Court's "constitutional sensibilities."[215] The jury instructions, post-trial procedures, and appellate review were sufficient.[216] Justice Scalia concurred, arguing that the process by which punitive damages were awarded was longstanding and did not violate the defendant's due process rights.[217] Justice Kennedy also concurred.[218] Justice O'Connor dissented, finding the jury instructions vague and believing they provided the fact-finder with unlimited discretion.[219] Post-trial and appellate review provided no cure.

While the plaintiffs prevailed in the case, the opinion signaled the Court's willingness to engage in a substantive due process review of punitive damage awards—that is, whether the award is too high. However, one *might* have read the case as saying that as long as the procedures followed were reasonable, consistent with tradition, and

213. 499 U.S. 1 (1991).

214. *Id.* at 17.

215. *Id.* at 18.

216. *Id.* at 18–23.

217. *Id.* at 24 (Scalia, J., concurring).

218. *Id.* at 41 (Kennedy, J., concurring).

219. *Id.* at 42 (O'Connor, J., dissenting).

objective, an award made (and affirmed) pursuant to those procedures would not violate the defendant's right to due process.

The Court next considered the issue of punitive damages in tort cases in *TXO Production Corp. v. Alliance Resources Corp.*,[220] which involved a slander of title claim arising out of a joint venture in an oil and gas development project. The jury awarded the counter-claimants, who had alleged slander of title, $19,000 in compensatory damages and $10 million in punitive damages, more than four hundred times the compensatory damages awarded. The slander of title counter-claimants had alleged that the potential damages they could have suffered were substantially greater. In a fractured plurality opinion, the Court held that the award did not violate due process.[221] Justice Stevens, writing for the plurality, said that in deciding whether a punitive damage award is so grossly excessive as to violate the Due Process Clause, no mathematical bright line can be drawn between constitutionally acceptable and unacceptable awards.[222] He stated that a general concern with reasonableness necessarily entered the constitutional calculus, and that in the case before the Court the punitive award was not so grossly excessive as to violate the defendant's right to due process. The Court pointed to the possibility that the jury could have found that the defendant engaged in a malicious and fraudulent course of conduct.[223] Potentially millions of dollars were at stake and, given the reprehensibility of the defendant's conduct, the award was not excessive. Justice Kennedy concurred, arguing that Justice Stevens's reasonableness formulation was an inadequate guide.[224] Justice Scalia and Justice Thomas concurred, claiming that while procedural due process required judicial review of punitive damage awards, no substantive due process right to a reasonableness determination of the amount of punitive damages existed.[225]

In *Haslip* and *TXO*, the Court compared the procedures and their application to historically accepted procedures. The Court was deferential to state authority and procedure. Likewise, the review of the amount awarded, while proceeding from an unclear source of authority (to allow the review under the Due Process Clause), was likewise deferential.

220. 509 U.S. 443 (1993).

221. *Id.* at 466.

222. *Id.* at 458.

223. *Id.* at 444.

224. *Id.* at 466 (Kennedy, J., concurring, in part, and dissenting, in part).

225. *Id.* at 470 (Scalia, J., concurring, in part, and dissenting, in part).

Then, in *Honda Motor Co. v. Oberg*,[226] the Court for the first time struck down a punitive damage award in a state law personal injury case. *Oberg* involved a products liability action filed against the Honda Motor Company. The Oregon jury that heard the case awarded compensatory damages and $5 million in punitive damages, and Honda appealed. Under applicable Oregon constitutional law and procedure, judicial review of the amount of punitive damages was proscribed *unless* the court affirmatively held that there was *no* evidence to support the jury's verdict. Thus, once the Oregon court found that evidence supported the jury's decision to award *any* punitive damages, review of the amount was precluded. The U.S. Supreme Court held that the failure to provide meaningful post-trial or appellate review of the *amount* of punitive damages violated the defendant's right to procedural due process. While *Oberg* was a procedural rather than substantive due process case, it signaled the Court's willingness to strike down a punitive damage award. Thus, *Oberg* was the Court's first holding limiting the authority of a state court in a personal injury action to award punitive damages under the Due Process Clause alone. The decision necessarily limited the state's ability to articulate and apply its own law of punitive damages. Notably, the Supreme Court had earlier limited recovery of punitive damages in *New York Times*, *Gertz*, and *Falwell*. *Oberg*, however, was the first case where punitive damages were limited outside the First Amendment context.

On the heels of *Oberg*, the Supreme Court decided *BMW of North America, Inc. v. Gore*.[227] In *Gore*, a doctor who had bought a BMW took the car to be detailed by a local painter, who then informed Dr. Gore that the car had already been repainted. When Dr. Gore investigated the matter, it turned out that his car had in fact been damaged by acid rain in transit, and BMW had repainted it. BMW had a national policy that where pre-sale damage to a car constituted less than three percent of the value of the car, the car would be repaired, repainted, and sold as new, without disclosure to the customer. Dr. Gore alleged that, as a result of the repainting and repair, the car was worth $4,000 less than he paid for it. Consequently, he filed suit. The jury awarded Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages, ostensibly sending a national message. The Alabama Supreme Court conditionally affirmed the award of punitive damages after reducing it to $2 million. The U.S. Supreme Court granted certiorari and reversed. The Court, in an opinion by Justice Stevens,

226. 512 U.S. 415 (1994).

227. 517 U.S. 559 (1996).

held that conduct that was lawful outside the state of Alabama could not be the basis of an Alabama court's award of punitive damages. Moreover, the Court held that the award was unconstitutionally excessive in light of three factors: (1) the defendant's reprehensibility, (2) the ratio between punitive and compensatory damages, and (3) a comparison between the punitive award and existing criminal and civil penalties for similar misconduct. Justice Breyer filed a concurring opinion joined by Justices O'Connor and Souter.[228] Justice Scalia filed a dissenting opinion joined by Justice Thomas.[229] The dissenters saw no due process limit on Alabama's ability to award the punitive damages at issue. Justice Ginsberg filed a dissenting opinion[230] in which Chief Justice Rehnquist joined. Importantly, *Gore* was the first time the Supreme Court overturned an award as offensive to substantive due process.

The Court's three guidelines were drawn from those factors that common law courts consider in instructing juries in punitive damage cases, and in reviewing punitive damage awards post-trial and on appeal. In this regard, one could say that the Court in *Gore* acted analogously to its decisions in *New York Times* and its progeny—reasoning from the common law of torts and imposing tort-derived constitutional standards. This reading would be consistent with the traditional model calling for "reasoned elaboration." Recall how the Court in *New York Times* and *Gertz* relied upon the common law word "malice," the privilege of fair comment, negligence, and actual injury to impose constitutional requirements. In the libel cases, however, tort-based hurdles were rules or elements, and they were either clearly defined or of long lineage. In *Gore*, the common law punitive damages factors are not elements. They are a mélange. Of course, the factors are a mélange at common law as well. Still, the *Gore* factors (reprehensibility, ratio, and similar fines and penalties) were incorporated into an uncertain constitutional dynamic. Ironically, the common law factors that ostensibly provide inadequate notice for defendants and inadequate instruction and control for juries are transformed into a constitutional test for judges to administer. Clearly, jury mistrust sits at the core of this transformation, as members of the Court had indicated in earlier cases like *Haslip*, *Gertz*, and others. Jury mistrust became crystal clear in the Court's next punitive damages case. Moreover, the source of the Court's power to limit the right of a state to punish out-of-state conduct remains unclear,[231] although the

228. *Id.* at 586 (Breyer, J., concurring).

229. *Id.* at 598 (Scalia, J., dissenting).

230. *Id.* at 607 (Ginsberg, J., dissenting).

231. One is reminded of *Ouellette* where New York law could apply to the New York source but

Court referred to this territorial limit again in its most recent punitive damages case. First, let us turn to the current role of and respect for the jury in punitive damages cases.

In *Cooper Industries, Inc. v. Leatherman Tool Corp.*,[232] the Court overturned a jury's punitive damages award of $4.5 million in a case alleging false advertising and "passing off." The jury had awarded $50,000 in compensatory damages. The Court held that, at least in federal cases, an appellate court reviewing a punitive damage award should not apply the clearly erroneous standard, but rather should undertake de novo review. The Court mandated de novo review because an award of punitive damages was *not* a finding of fact. Consequently, de novo review was not proscribed by the Seventh Amendment's "reevaluation" clause. The decision is reminiscent of the *Bose Corp.* trade libel/defamation case, where the Court had held that appellate review of decisions finding "actual malice" under *New York Times* demanded the independent judgment of the reviewing judge, not a clearly erroneous review. Together with *Gore*, *Leatherman* stands for the proposition that punitive damages may be excessive in individual cases under substantive due process, and appellate review of those individual awards should be de novo rather than with deference to the lower court's findings. *Leatherman* radically altered the role of the jury and appellate court in a tort case, giving the court more power and the jury less.

Most recently, the Court considered the issue of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[233] *Campbell* was a bad faith insurance claim brought against a third-party insurer by one of its insureds. Curtis Campbell, the insured, was driving on a Utah road when he decided to pass six vans traveling ahead of him. Todd Ospital was approaching from the opposite direction. To avoid a collision with Campbell, who was by then passing the vans and driving on the wrong side of the road, Ospital swerved onto the shoulder, losing control of his vehicle and colliding with a vehicle driven by Robert G. Slusher. In the collision, Ospital was killed and Slusher suffered permanent disabling injuries. In the tort claim against Campbell, Campbell insisted he was free from fault. Despite early indications that Campbell's negligence had caused the crash, Campbell and his insurance company, State Farm, decided to contest liability and declined offers to settle the claims for the policy limits of $50,000. State Farm assured the Campbells that their assets were safe; that they would be

not Vermont law. *See supra* notes 128 and 129 and accompanying text.

232. 532 U.S. 424 (2001).

233. 538 U.S. 408 (2003).

represented by counsel; and that they did not need separate counsel. The jury that heard the case decided that the Campbells were completely at fault and returned a verdict of $185,849 against them,[234] an "excess judgment" of $135,000.

State Farm initially refused to cover the excess judgment. In fact, State Farm's counsel told the Campbells: "'You may want to put for sale signs on your property to get things moving.'"[235] State Farm also refused to post a supersedeas bond. Campbell sought separate representation to appeal the verdict. While the appeal of the underlying tort suit was pending, Slusher and the Ospital interests and the Campbells reached an agreement under which Slusher and Ospital agreed not to seek full satisfaction against the Campbells personally if the Campbells agreed to pursue a bad faith insurance action against State Farm, and to be represented in that action by Slusher and Ospital's attorneys. The parties also agreed that Slusher and Ospital would have a right to be involved in major decisions concerning the bad faith action, and they would receive ninety percent of any verdict against State Farm.[236]

The Utah Supreme Court affirmed the trial court's decision in the underlying tort suit, and State Farm then paid the entire judgment, including the excess. The Campbells still filed an action against State Farm alleging bad faith, fraud, and intentional inflection of emotional distress. At trial,[237] the court bifurcated the case into two phases before two different juries. The first jury determined that State Farm's decision not to settle the underlying case was unreasonable. The second jury held that State Farm was liable to the Campbells for fraud and intentional infliction of emotional distress. It awarded compensatory damages of $2.6 million and punitive damages of $145 million. The punitive award was based, in substantial part, on the plaintiff's attack on State Farm's "performance, planning and review policy" (PP & R policy), an alleged nationwide scheme to "meet corporate fiscal goals by capping payouts on claims company wide."[238] The trial court reduced the compensatory award to $1 million and the punitive award to $25 million. On appeal, the Utah Supreme Court applied the three guideposts for due process review of punitive damage decisions from *BMW of North America, Inc.*

234. *Id*. at 412–13.

235. *Id*. at 413.

236. *Id*. at 413–14.

237. In actuality, the trial court first granted State Farm's motion for summary judgment because State Farm had paid the entire judgment. That ruling was reversed.

238. *Campbell*, 538 U.S. at 415 (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001)).

v. Gore.[239] The court reinstated the $145 million punitive damages award, concluding that State Farm's conduct in implementing and conducting the PP & R policy was reprehensible. The Utah Supreme Court also pointed to State Farm's massive wealth and to testimony that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability . . . ."[240] Thus, the Utah Supreme Court concluded that the ratio between punitive and compensatory damages was not constitutionally excessive, and the award was not excessive compared to civil and criminal penalties that could have been imposed against State Farm—including a $10,000 fine for each act of fraud, the potential suspension of its license to conduct business in the state, the disgorgement of profits, and imprisonment.[241]

The U.S. Supreme Court granted certiorari and, in an opinion by Justice Kennedy, reversed. Generally, the Court pointed out that while compensatory damages are designed to put the plaintiff in the position he would have been in but for the wrong, punitive damages "serve a broader function; they are aimed at deterrence and retribution."[242] The Court stated that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[243] Reiterating what it had said in both *Gore* and *Leatherman*, the Court said that consistent with "[e]lementary notions of fairness,"[244] a person must receive fair notice not only of the conduct that was subject to punishment, including punitive damages, but must also receive fair notice of the potential severity of the penalty.[245] Justice Kennedy noted that punitive damages, at least in some aspects,[246] serve the same purposes as the criminal law, but lack the constitutional and other protections applicable in a criminal proceeding. He noted that this lack of protection could lead to an imprecise administration of punitive damages, potential arbitrariness, broad jury discretion in choosing the amount of punitive damages under very general instructions, and net

239. 517 U.S. 559 (1996).

240. *Campbell*, 538 U.S. at 415 (quoting *Campbell*, 65 P.3d at 1153).

241. *Id.* at 416.

242. *Id*.

243. *Id.*

244. *Id.* at 417.

245. *Id.*

246. As to other potential purposes of punitive damages arising from economic efficiency based deterrence, see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Galligan, *supra* note 209; Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

worth considerations that could lead to bias, particularly against big business.[247] Continuing, he stated: "Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded."[248]

The Court then turned to the application of the *Gore* guideposts to the jury's punitive damage award. As *Gore* mandated, the Court began its discussion of the guideposts by considering the most important indicator of the reasonableness of a punitive damages award—its reprehensibility. The Court articulated the factors that it has considered to gauge reprehensibility: Was the harm physical or economic? Did the tortious conduct evince an indifference to or a reckless disregard for the health or safety of others? Was the target of the conduct financially vulnerable? Did the conduct involve repeated actions or was it an isolated incident? Was the harm the result of intentional malice, trickery, or deceit, or mere accident?[249]

Justice Kennedy stated that while the existence of one factor may not be sufficient to sustain a punitive damage award, the absence of any of them would render an award suspect.[250] In conducting the reprehensibility review, Justice Kennedy stated that it "should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[251]

The Court then applied its reprehensibility factors to the facts before it. Justice Kennedy said that State Farm's conduct merited no "praise"[252] and that a punitive award might be justified, but the punitive damages awarded by the jury were unconstitutionally high. The Court concluded that the Utah Supreme Court was punishing State Farm for its nationwide policies. Justice Kennedy, pointing once again to *Gore*, noted that a state does not have the constitutional authority to punish a defendant for conduct that was lawful where it occurred. Moreover, he extended that prohibition by stating that generally a state does not have a legitimate interest in imposing punitive damages as punishment for

247. 538 U.S. at 417.

248. *Id.* at 418.

249. *Id.* at 419 (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 576–77 (1996)).

250. *Id*.

251. *Id*.

252. *Id.*

"unlawful acts committed outside" the state.[253] Importantly, the Court noted that federalism concerns effectively limited the state's interest in punishing conduct that occurred outside the state. Once again, as in *Gore*, the principled source of this limit on state power was unclear. But Justice Kennedy continued and stated that the award against State Farm was flawed "[f]or a more fundamental reason . . . ."[254] That is, the Utah courts had "awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm."[255] The Court went on to discuss how some of the evidence admitted at trial related to State Farm's insurance practices bore no relation to the defense of a third-party liability claim, like the one the Campbells had filed. The Court referred to this and other evidence in the reprehensibility analysis as "tangential."[256] Justice Kennedy stated,

> The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.[257]

As noted in the *Gore* discussion, the Court's reprehensibility factors and its analysis build on common law punitive damages ideas, but that building takes place on a constitutional level. The common law's multi-factor analysis is generally used to instruct juries and review these decisions. At common law, they are *not* part of a constitutional stew.

Justice Kennedy then turned to the second *Gore* guidepost, which addresses the ratio between harm or potential harm to the plaintiff in the punitive damages award. He began his discussion by reiterating that the Court was not imposing a "bright-line ratio which a punitive damages award cannot exceed."[258] But, belying that statement, he continued:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23–24, 111 S. Ct. 1032. We cited that 4-to-1

253. *Id.* at 421.
254. *Id.* at 422.
255. *Id.*
256. *Id.* at 424.
257. *Id.*
258. *Id*. at 425.

> ratio again in *Gore*. 517 U.S., at 581, 116 S. Ct. 1589. The Court further referenced a 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. *Id*. at 581, and n. 33, 116 S. Ct. 1589. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1, *id.* at 582, 116 S. Ct. 1589, or, in this case, of 145 to1.[259]

The Court then said that there are no rigid benchmarks, and that ratios greater than those previously sustained might be constitutional where "a particularly egregious act has resulted in only a small amount of economic damages."[260] The Court also noted that where the injury is hard to detect or where the monetary value of non-economic harm difficult to determine, a higher ratio may be appropriate.[261] However, the Court also noted that when the compensatory damages are "substantial,"[262] a lesser ratio—perhaps only one-to-one—might "reach the outermost limit of the due process guarantee."[263] Of course, Justice Kennedy noted "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[264] To summarize: while there is no bright line, the Court has indicated that double-digit ratios will rarely satisfy due process. In fact, the Court has twice mentioned four-to-one as the possible outer limit of a constitutionally permissible award. Finally, one-to-one may reach the outermost limit where compensatory damages are substantial. However, consistent with theoretical examinations of punitive damages, the Court indicated that where the amount of economic loss was small, a greater ratio may be justified because small damages to many people may not be sufficient incentive for any to sue. Alternatively, where injury or damage is difficult to detect, an increased award for those who detect and prove their injury may be appropriate.

The Court then turned to the facts of the particular case, and indicated that a presumption against constitutionality arose when the ratio was 145 to 1. The Court stated that courts must "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[265] Interestingly,

259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 426.

the focus for the particular case was on the amount of actual harm and compensatory damages, not actual and potential harm. The Court had often spoken of the ratio between punitive damages and actual *and* potential harm. In any event, the Court in *Campbell* focused on the ratio between punitive damages and actual harm suffered by the particular plaintiffs involved. Likewise, in deciding that the punitive award in the case was outside the bounds of any acceptable ratio, the Court indicated that because there were no physical injuries and only minor economic injuries, the

> compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.[266]

The Court was indicating that outrage and humiliation overlap with emotional distress and, in *Campbell*, they arguably overlapped with components of the punitive award. In dicta, the Court pointed out that the wealth of a defendant cannot justify an otherwise unconstitutional punitive award.[267]

Finally, the Court turned to the third *Gore* guidepost, that of comparable penalties. This guidepost focused on the relationship or disparity between the punitive damages awarded and the criminal and civil penalties that could be authorized or imposed in comparable cases. However, in *Campbell* the court indicated that, when used to measure or assess a punitive damages award, the criminal penalty has less utility. In any event, the Court rather tersely compared the punitive damages with the most relevant sanction under Utah law, a $10,000 fine for an act of fraud. The Court stated the punitive damages awarded "dwarfed" this fine.[268]

The Court in *Campbell* thus reiterated the *Gore* guideposts: reprehensibility, ratio, and comparison to other (civil) penalties. In its statement and reiteration of the reprehensibility factors, the Court continued to adhere to the statement that reprehensibility is the most important factor in assessing the reasonableness of a punitive damage award. The reprehensibility factors that the Court has articulated are

266. *Id.* at 426 (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977)).

267. *Id.* at 427.

268. *Id.* at 428. While traveling in Michigan, I recently saw in a construction area a road sign that read: "Kill or Injure a Worker—$7,500 and 15 Years in Jail." I wondered how the court would deal with those penalties in a punitive damages case involving an injured or dead Michigan road construction worker. What would be more important: the $7,500 or the fifteen years?

what might be called qualitative factors—that is, they are part of a multi-factor test in which no one factor is neither sufficient nor determinative of the ultimate due process review. The factors are part of a blend. The Court, in assessing and considering the factors, considers the presence, absence, and importance of each to the particular case. Thus, one may opine that the Court balances the factors in the assessment of its cumulative analytical judgment on reprehensibility. There is no magic or clear line to which the factors draw or point. While arising from the common law, they are to be applied somewhat haphazardly in the constitutional setting.

Prior to *Campbell*, one might also have concluded that the ratio analysis was a qualitative analysis, albeit in the fabric of a quantitative statement—the ratio between punitive damages and actual or potential damages. But after *Campbell*, the numbers seem more important, and there seems to be absolutely *no* articulated or principled basis for the Court's 9-to-1 guideline. It is not tied to any clear purpose of punitive damages, nor is it tied to any arguable theoretical basis. Finally, it does not appear to be based on any identifiable body of jurisprudence, certainly not Supreme Court jurisprudence. It is not based on pre-existing law, principle, reason, or analogy. Consequently, the guideline seems entirely inconsistent with the traditional model of adjudication.

Professor Geistfeld has defended the ratio rule as follows: "As a matter of individual deterrence, a presumptive ratio between the plaintiff's harm and the punitive damages award makes sense. Ordinarily, a defendant who must pay some single-digit multiple of damages to the plaintiff presumably has a sufficient incentive to avoid future violations of the plaintiff's right."[269] But he does not say (as he cannot) where the 9-to-1 ratio comes from. No source is apparent. Geistfeld also clearly notes that exceeding the inexplicable multiple *is* only a presumption of unconstitutionality.[270]

The Supreme Court's punitive damages cases constitute a significant intrusion on a state's ability to define, articulate, and apply its own tort law. Indeed, the aggressive, judicial case-by-case review mandated by *Gore*, *Leatherman*, and *Campbell* makes *every* punitive damages case a potential constitutional case. Interestingly, the punitive damages cases are similar to the defamation cases in that particular aspects of traditional tort law are incorporated into the constitutional factors. However, the cases differ because they do not contemplate "elemental" rules ("actual malice," negligence, actual injury) to be applied by judges

269. Geistfeld, *supra* note 10, at 108.

270. *Id.*

and juries in particular cases. Instead, the punitive damage holdings in *Gore*, *Leatherman*, and *Campbell* signify intensive review of punitive damages on a case-by-case basis. Thus, any punitive damage case may—and from the defense lawyer's perspective must—be a potential constitutional law case. The exception to the "every case a constitutional case" statement may be in states where punitive damages are capped by statute. Those statutorily regulated cases may not raise constitutional issues of the same dimension.

Moreover, in the defamation cases, the Court articulated particular rules for future application in individual cases. In the punitive damages cases, the Court is not articulating rules but merely drawing lines between what is too much and what is not. This is a particularly troublesome area, because opinions on how much is too much cannot be the result of (or display) reasoned elaboration or persuasive explanation. Why is $1 million too much, but not $900,000? Explain it if you dare. What meaningful guidance is provided to lower courts? By merely drawing lines, the Court opens itself up to criticisms that its judgments are arbitrary, not persuasive, and not sufficiently prescriptive. It also opens itself up to claims of judicial activism in cases that are troublesome at best.

Alternatively, the Court might have taken the approach it took in the defamation cases by prescribing a constitutional fault standard that had to be established before punitive damages could be awarded (such as recklessness or willfulness). The Court could constitutionally increase the burden of proof from a preponderance of the evidence standard to proof by clear and convincing evidence.[271] While these changes might not solve the problem of potentially excessive punitive damage awards in particular cases, they at least would be consistent with constitutional development in First Amendment cases while respecting the traditional role of the jury. In fact, the line-drawing that will go on in punitive damages cases is line-drawing for which we typically use juries, because juries do not have to explain themselves.

Finally, in preemption cases the Court is guided by extensive statutory language and legislative history; the punitive damages cases involve none of that. In the preemption cases, the Court parses legislative history to determine which claims are preempted and which may go forward. However, in the punitive damages context, the Court acts on a case-by-case basis in saying an award is too much. Punitive damage cases now promise to be troublesome and confusing, and to raise questions about the future predictive value of opinions in the

271. Rustad, *supra* note 208, at 496–97, states that this heightened burden of proof is already the law in the "vast" majority of states. Perhaps the Court felt that such a requirement was not sufficient.

area.[272]

VI. RECAP & CONCLUSION

Let us now reconsider and reiterate some of the themes raised in the three bodies of case law considered. First, and perhaps most basically, each of the three areas—the defamation and related cases, the preemption cases, and the punitive damages cases—are areas where the Supreme Court has constitutionally limited the power of the states to impose tort liability under their common law. Thus, in each of the three areas, the Supreme Court's decisions impose a constitutional restriction on a particular area of state tort law—or, at the very least, they impose constitutional restrictions on particular *parts* of particular areas of tort law. From a federalism perspective, the defamation and related cases, the preemption cases, and the punitive damage cases are areas where the Court has used the U.S. Constitution to limit the state's ability and authority to articulate, apply, and develop its own tort law. The cases are thus not "minimalist" decisions as that word is used in the traditional model of adjudication.

The defamation and related cases are consistent with the modest model of adjudication outlined in Part II. The paradigm defamation cases (*New York Times* and *Gertz*) articulate what have been referred to as elemental rules for decision. These rules ("actual malice," negligence, and actual injury), while arguably radical in their initial pronunciations, were articulated in opinions in which the Court reasoned from precedent and from the underlying principles of the First Amendment. In that regard, whether one agrees with the decisions or not, they are based upon and manifest a process of reasoned elaboration. The decisions are also consistent with the role of the jury in the American tort system, because the decisions place elemental burdens on certain plaintiffs seeking to recover for defamation and related torts. Whether the plaintiff has cleared the burden ("actual malice," negligence, actual injury) is a question susceptible to decision by a jury which must be persuaded to a level of "convincing clarity" or a preponderance of the evidence standard, depending upon the type of plaintiff and speech. Somewhat inconsistently with the traditional model's respect for the jury, the Court in *Bose Corp.* pronounced a

272. Curiously, what of *Greenmoss* after *Gore* and *Campbell*? *Greenmoss*, the reader will recall, authorized the recovery of presumed and punitive damages under state law absent any constitutional limitation if the speech involved did not involve a matter of public concern. *See supra* notes 94–96 and accompanying text. But how could punitive damages pass muster under *Gore* and *Campbell* where the compensatory damages are presumed, not actual?

standard of review under which the appellate court would exercise independent judgment when reviewing lower court decisions finding "actual malice" instead of a more deferential standard.

Moving beyond *New York Times* and *Gertz*, the *Greenmoss* decision potentially removes all federal control if the speech is *not* a matter of public concern. While one may be cynical about the Court's "speech which is a matter of public concern" test, the *Greenmoss* plurality opinion, when considered in light of *New York Times* and *Gertz*, represents what Professor Molot has called an example of backward-looking principled minimalism. The Court has set up an overly complex but still logical taxonomy of increasing liability in defamation cases as the subject of the speech moves from private to public, and as the plaintiff moves from private figure to public figure or public official. Taken together, a series of logical rules and principles appears in *New York Times*, *Gertz*, and *Greenmoss* together.

When one considers the Court's extension of *New York Times* and its progeny to other areas of tort law—such as invasion of privacy and intentional infliction of emotional distress—one can see a Court reasoning by analogy and attempting to preserve the free speech principles that underlie *New York Times* and *Gertz*. The failure to extend *New York Times* and its progeny to appropriation cases (*Zacchini*) and promisory estoppel cases (*Cohen*) is somewhat more troubling insofar as the Court created a hierarchy of claims ranging *from* promisory estoppel and appropriation (a property related claim) where constitutional limits do not apply, *to* defamation, privacy, and speech-related intentional infliction claims where the constitutional limitations of *New York Times* and its progeny do apply. The basis for this differential treatment is unexplained.

Moving from the defamation-related cases to the preemption cases, one is struck by the fact that the Court is not simply dealing with constitutional limits on common law claims, but rather is dealing with a constitutional limit arising out of a congressional regulatory scheme, and that scheme's effect on the state's common law under the Supremacy Clause. While the focus of these cases may be more public law-oriented, the cases are consistent with the modest model of adjudication articulated above. The preemption cases involve the Court interpreting and applying statutes, a traditional judicial function that has become even more common since the early twentieth century. One may argue with the results in the cases, and one may quibble with the levels of generality articulated in the Court's analysis. One may also scratch one's head trying to find a principled basis for the difference between a tort duty imposed by law and a supposedly self-imposed contract duty

(somehow *not* imposed by law). The vague but "special"[273] treatment accorded to contract-based claims in the preemption cases parallels the "special" treatment accorded appropriation and promissory estoppel in the First Amendment cases. But despite these criticisms, the preemption cases still manifest reasoned elaboration, and the conclusions are drawn from a combination of the statutory scheme, prior jurisprudence, and the Court's understanding of the law. Although some doubt may exist after the preemption cases, the state and its citizens are left knowing which claims are preempted and which are not. Alternatively, after *Bates*, the state court is left with guidelines to apply in determining which claims are preempted, and those guidelines are based, in part, upon whether the state regulation is parallel to or in conflict with the federal regulation.

Turning to the punitive damages cases, those cases are consistent with the traditional model of adjudication in some ways and inconsistent in others. The punitive damages cases, like the defamation and preemption cases, attempt to reason from pre-existing principle. Like the defamation cases, the Court attempts to shape its constitutional rules from the common law itself. However, some significant differences exist between the punitive damages cases and the defamation and preemption cases; these differences make the punitive damage cases more inconsistent with the traditional model of adjudication and more of a threat to state sovereignty. Most basically, the punitive damages cases have no rules. In the defamation-related cases, the courts articulate elemental rules and burdens. This does not occur in the punitive damages cases that, while they employ common law principles in articulating the three *Gore* guideposts, result instead in a multi-factor mélange. Tort law certainly has many multi-faceted tests for whether a person owes a duty to another, whether a person has exercised reasonable care under the circumstances, proximate cause, allocation of fault, damages, punitive damages, and more. However, the *Gore* goulash is not a stew entrusted to the jury, nor is it a stew used to define mere liability in a particular case. Rather, it is a constitutional gumbo.

While a multi-factor constitutional test may not be objectionable in and of itself, it is problematic in the punitive damages context. After *Gore*, *Leatherman*, and *Campbell*, potentially every punitive damage case that arises under state (or federal) law is a constitutional case. After *Gore* and *Campbell*, the prudent defense lawyer in a punitive damages case will necessarily raise a constitutional challenge to any punitive damage award, and she will do so at the earliest possible time because

273. "Special" here is used to mean less constitutional scrutiny.

that constitutional challenge may otherwise be waived.[274] Thus, the *Gore* goulash is a constitutional "standard" that will potentially be applied in virtually every state punitive damages case.

This development is a significant intrusion on state power and autonomy. This intrusion is potentially more significant than the intrusion under the defamation-related cases or under the preemption cases. Under the defamation-related cases after *Greenmoss*, if the speech at issue does not involve a matter of public concern, then there is arguably no federal constitutional limitation on state power. That is not the case in the punitive damages area. Likewise, while *Bose Corp.* signaled heightened judicial review of "actual malice" findings, that heightened review only applies to "actual malice" findings—not other aspects of the case or cases where "actual malice" is not applicable. Moreover, in the preemption area, if the Court decides that state law claims are not preempted, then the state claim goes forward under state law with no federal constitutional control. Indeed, after *Lohr* and *Bates*, states may have the power to treat the violation of a federal statute or standard as tortious. But, after *Gore*, *every* punitive damages case is potentially a constitutional case.

We now turn to the ratio articulated in *Campbell*. Quite simply, the rationale articulated for the 9-to-1 rule is not consistent with the traditional model of adjudication. No articulated, principled reason exists for the 9-to-1 ratio. The ratio is clearly based on the idea that an articulated (albeit presumptive) number provides notice and certainty. But where did the ratio come from? Only one previous U.S. Supreme Court case struck down a punitive damages award on substantive due process grounds—*Gore*—and the 9-to-1 ratio was not mentioned in that case. Moreover, in the wake of *Gore*, there was no roiling of competing constitutional ratios in the courts of appeal that the Supreme Court relied upon. The 9-to-1 ratio does not seem tied to punishment, deterrence, or any other purpose of punitive damages. While an outside ratio certainly gives notice of the severity of a potential limit on recovery, the analytical anchor of the limit is simply missing.

I must confess that when I first read *Campbell*, I wondered whether a 7-to-1 ratio might make more sense because the number seven, rather than the number nine, has mystical significance. But then, it occurred to me that the 9-to-1 test may have been a principled application of baseball thinking. After all, there were three *Gore* guideposts, and there are three outs in each side of an inning of a baseball game, and three strikes make an out. Then, it occurred to me that the Court had referred

274. *See, e.g.*, Mosing v. Domas, 830 So. 2d 967 (La. 2002).

to the 4-to-1 ratio as another possible guideline, and that there are four bases and four balls yield a walk. Finally, it struck me that there are nine players on a team in a baseball game (and nine justices on the U.S. Supreme Court). Thus, I opined that the constitutional limit may be based on the game of baseball—and underlying principles of the game.[275] Unfortunately, when I explained my thinking to a friend, she reminded me that in the American League there are ten players, so my analogy was not apt (and 10 to 1 is presumptively unconstitutional). However, rather than give up the analogy, I prefer to use the baseball principle to conclude that the designated-hitter rule, because it involves a tenth player, is unconstitutional.[276] The point is that even though the baseball principle may work (and I apologize to the Court for any disrespect), courts do not rely on just *any* principle to justify a holding. We lawyers prefer a legal principle.

The 9-to-1 ratio, as the Court seemed to say and as Professor Geistfeld has noted, is only a presumption. Thus, one may hope that the Court will effectively abandon the 9-to-1 ratio in favor of some more principled or reasoned constitutional limitation.

The punitive damage cases also seem inconsistent with the traditional model of adjudication because the jury's role is extremely limited. The defamation cases (and even the most recent preemption case, *Bates*) contemplate a continued role for the jury in tort cases, even with the constitutional limitation. The same cannot be said of the punitive damages cases. The punitive damages cases manifest deep distrust of the jury. Unlike the defamation and related cases, the result of the constitutional limitation is not a jury instruction but rather a rule for review without any deference to the jury's decision. At least in federal court, this review is de novo. In this regard, the punitive damage cases may be consistent with the Court's decision in *Bose Corp.*, but they are still a significant intrusion on the power of the jury and the power of the state.

Finally, rather than articulate an elemental hurdle as in the defamation cases, or articulate a rule concerning which cases can proceed, as in the preemption cases, the Court in the punitive damages cases simply says certain awards are too high. That is, the Court is merely line-drawing, and the issue of how much is too much is not being addressed on a

275. And baseball is America's National Past Time. *Cf.* Flood v. Kuhn, 407 U.S. 258, 259 n.1 (1972) (upholding the reserve clause against an antitrust challenge).

276. *See id.* at 274 (quoting an historical brief's argument that *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), was wrong and should be overruled—it was not). And thanks to Jeff Hirsch for the last two footnotes. Interestingly, even before *Flood*, Hart and Sacks devoted significant discussion in *The Legal Process* to the ridiculousness of the Court's baseball cases. *See* HART & SACKS, *supra* note 23, at 1333–38.

motion for remittitur, or a motion for new trial, or a motion for judgment as a matter of law. Rather, the issue is being decided as a matter of constitutional law. Courts are best at articulating rules or standards. They are less persuasive when drawing lines and saying how much is too much. For this reason, perhaps, we have entrusted line-drawing decisions in tort cases involving reasonable care, proximate cause, cause in fact, fault allocation, and the quantification of damages, to juries or judges as fact-finders. But in the punitive damages cases, the Court has created a constitutional question of how much is too much, and entrusted this question to judges. Further, the constitutional issue is applicable in *every* punitive damages case. The closest analogy for the punitive damages cases is not other tort cases, but rather cruel and unusual punishment cases arising under the Eighth Amendment. Interestingly, in *Browning Ferris*, the Court refused to apply the Eighth Amendment to a standard punitive damages case. But after six other cases, the Court seems to have employed a cruel and unusual punishment-type analysis to punitive damages cases through the Due Process Clause.

These criticisms of the punitive damage cases may be unfair because no significant body of case law exists, and no significant period of time has passed (as in the First Amendment and preemption contexts). The punitive damages cases may work themselves out over time and provide another example of Professor Molot's backward-looking principled minimalism. That said, how might the Court deal with punitive damages in a manner that is more consistent with at least the defamation-related cases? Perhaps the Court could articulate some constitutional hurdle applicable in punitive damages cases, for example, requiring plaintiffs in punitive damages cases to prove the defendant was reckless or willful, as defined by the Court. This hurdle would be like the "actual malice" or negligence requirements under *New York Times* and *Gertz*. It would provide a nationwide, constitutional definition of "reckless or willful." Of course, one might be concerned that a recklessness requirement would be unduly vague and not provide sufficient constitutional protection. This concern is apparently what led the Court in *Falwell* to reject outrageousness under state law as a constitutionally sufficient limitation on speech-based intentional infliction claims by public figures. However, in *Falwell*, the argument was that state law outrageousness supplied sufficient constitutional protection. In the punitive damages arena, the Court could articulate its own definition of malice or recklessness akin to its articulation of the "actual malice" requirement in *New York Times*.

Moreover, the Court could require that plaintiffs in punitive damages cases clear a heightened burden, such as the clear and convincing

evidence standard. This heightened burden would be consistent with the Court's decision in *New York Times* requiring certain plaintiffs to prove "actual malice" by "convincing clarity." These limitations would arguably be consistent with what courts do best: articulate rules. These limitations would also increase respect for and reliance upon the jury in deciding key punitive damages elements. Such requirements would place the constitutional law of punitive damages on a sounder and less intrusive basis than the aggressive line-drawing that is apparently the current state of the law. Finally, should state legislatures act to impose ratio limitations on punitive damages awards, these limitations would seem rational in a purely political sense. If the limitations are rational, they should pass constitutional scrutiny. Intuitively, a legislatively articulated and drawn line seems more acceptable than a randomly drawn judicial line. Such statutes will provide a state response to the dilemma raised by *Gore*, *Leatherman*, and *Campbell*.[277]

The most significant contribution of this jurisprudential review may, in the long run, be the identification and explication of the reality that the Supreme Court has and continues to play a large and prominent role in the development of tort law. Since at least *Garmon* and *New York Times*, the Court has utilized the U.S. Constitution to limit and define state tort law and, by extension, state power. Consequently, like Dr. Henry Perowne in *Saturday*, the tort lawyer and professor may continue to take solace in what she loves and does well, but she had better open her eyes to the reality of U.S. Supreme Court tort reform.

277. *See generally* Geistfeld, *supra* note 10.