Walking the Invisible Line of Punitive Damages: TXO Production Corp. v. Alliance Resources Corp.

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I. INTRODUCTION

On June 25, 1993, with its decision in _TXO Production Corp. v. Alliance Resources Corp._, the United States Supreme Court turned down an embossed invitation to set forth bright line due process standards for punitive damages. In _TXO_, six Justices joined in upholding a punitive damages award over 500 times the actual damages award. However, the majority could not agree on the same rationale for upholding the award, leaving legal practitioners in the dark concerning the standards...
against which punitive awards will be assessed by juries and reviewed by trial and appellate courts in the future. All that is certain is that punitive damages awards must be "reasonable" and that the procedures utilized to award punitive damages must be "due."

TXO's fatal mistakes were recording a frivolous quitclaim deed and then suing Alliance to clear this purported "cloud" on Alliance's title to oil and gas rights on a West Virginia tract known as "Blevins Tract." Catching wind of TXO's "turnabout" behavior, Alliance filed a counterclaim against TXO for slander of title. The jury found TXO liable for slander of title and returned a verdict for $19,000 in actual damages and $10 million in punitive damages. In response to TXO's due process challenge on appeal, the West Virginia Supreme Court upheld the award, holding that because TXO was not merely a "really stupid" negligent defendant, but a "really mean" intentional wrongdoer, this defendant got what it deserved. Despite overwhelming criticism of the

notes 200-77 and accompanying text. See also Andrew L. Frey & Evan M. Tanger, Stopping the Deluge of Costly Punishment, LEGAL TIMES, Aug. 9, 1993, at 16 (terming the TXO decision "a cacophony of opinions").

5. Supreme Court Proceedings, U.S.L.W., daily ed., Aug. 11, 1993. "The problem in the wake of the [C]ourt's splintered decision is not whether there are substantive due process limits on punitive damages, but how to determine what they are. The [Justices were unable to craft a majority opinion . . . ."

6. TXO, 113 S. Ct. at 2720. The TXO plurality held that the substantive due process of punitive damages awards should be judged against a "mid-tier" reasonableness standard. Id. See also Ruth Gastel, The Liability System, INS. INFO. INST. REP., Sept. 1993 (noting that the determination of whether punitive damages awards are reasonable will now be in the hands of state courts).

7. TXO, 113 S. Ct. at 2723. In this instance, the definition of "due" encompasses procedural protections, such as proper jury instructions and meaningful trial and appellate court review of punitive damages awards. Id. See also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991) (setting forth specific procedural safeguards that must exist in order for punitive damages awards to stand).

8. TXO, 113 S. Ct. at 2714-15. For further discussion of the facts and procedural history of the case, see infra notes 181-99 and accompanying text.

9. TXO, 113 S. Ct. at 2716.

10. Id. at 2717. The plurality pointed out several times in its opinion that this punitive damages award is 526 times the actual damages award. See, e.g., id. at 2718, 2721.

11. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992), aff'd, 113 S. Ct. 2711 (1993). The West Virginia Supreme Court set forth two main categories of defendants and explained that punitive damages are allowed against "really stupid" or extremely careless defendants in order "to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." Id. at 888-89. On the other hand, "really mean" defendants, those who act intentionally to harm others, can have larger punitive damages awards assessed against them because their evil acts require a greater amount of deterrence. Id. at 889.
state supreme court decision by commentators,\textsuperscript{12} the United States Supreme Court affirmed.\textsuperscript{13}

The \textit{TXO} decision marked an end to the \textit{Pacific Mutual Life Insurance Co. v. Haslip}\textsuperscript{14} era.\textsuperscript{16} In upholding a punitive damages award that was just over four times the compensatory damages award, the \textit{Haslip} Court suggested that this ratio was "close to the line . . . of constitutional impropriety."\textsuperscript{16} In response to \textit{Haslip}, lower courts throughout the country made great efforts to adhere to this inferred "four-to-one" rule.\textsuperscript{17} The \textit{TXO} decision now grants lower courts permission to violate that \textit{Haslip} "rule" and award punitive damages as high as 500 times the actual damages if the defendants are "mean" enough.\textsuperscript{18}

\textit{TXO} has received massive media coverage since its announcement in June 1993.\textsuperscript{19} Many have criticized the Court for declining to set forth

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\item[12.] See id. at 895-96 (McHugh, C.J., concurring) (criticizing the majority for their use of such nontraditional and nontechnical language). See also Shartel, supra note 2, at 2; Arvin Maskin & Peter A. Antonucci, \textit{Developments in the Law of Punitive Damages}, CS37 ALI-ABA 541, 621 (1993).
\item[13.] \textit{TXO}, 113 S. Ct. at 2713. The Court affirmed the West Virginia Supreme Court's decision, holding that the punitive damages award assessed against \textit{TXO} violated neither substantive nor procedural due process. \textit{Id.}
\item[15.] \textit{Haslip} was the first case in which the United States Supreme Court addressed due process challenge to punitive damages. See, e.g., J. Mark Hart, The Constitutionality of Punitive Damages: \textit{Pacific Mutual Life Insurance Co. v. Haslip}, 21 CUMB. L. REV. 584, 589 (1991). \textit{TXO} did not overrule \textit{Haslip}. In fact, \textit{TXO} followed \textit{Haslip}. See \textit{TXO}, 113 S. Ct. at 2711. However, \textit{TXO} did put an end to the idea that a punitive damages award that is four times the actual damages award is "close to the line" of constitutional acceptability \textit{Id.} at 2721. For further discussion of \textit{Haslip}, see infra notes 138-53 and accompanying text.
\item[16.] \textit{Haslip}, 499 U.S. at 23-24.
\item[17.] See, e.g., Harrell v. Old Am. Ins. Co., 829 P.2d 75, 80 (Okla. Ct. App. 1991) (upholding a punitive damages award six times the actual damages award); Dunn v. Owens-Corning Fiberglass, 774 F. Supp. 929, 950-51 (1991) (ordering remittitur of a punitive damages award 19 times the actual damages award to be consistent with the \textit{Haslip} four-to-one rule); Wollersheim v. Church of Scientology, 6 Cal. Rptr. 2d 532, 547 (Ct. App. 1992) (ordering remittitur of a punitive damages award to $2 million and remittitur of a compensatory damages award to $500,000 to be consistent with \textit{Haslip}).
\item[18.] See \textit{TXO}, 113 S. Ct. at 2721. According to the plurality, punitive damages awards should be proportional to the harm that is likely to be caused and the harm actually caused by the defendant's conduct. \textit{Id.}
\item[19.] See, e.g., Frey & Tanger, supra note 4, at 20; Mullinix, supra note 2, at 54; Robert Giuffra, \textit{Turning Down the Volume}, THE RECORDER, Aug. 26, 1993, at 9 (discussing the \textit{TXO} decision and its ramifications).
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clear standards for the constitutionality of punitive damages awards. On the other hand, some commentators have praised the Court for withstanding the pressure from tort reformers to set forth such a test. The end result is that the state courts and legislatures are left to determine what constitutes a "reasonable" award.

This Note will critique the Court's decision in TXO and discuss TXO's place and impact on the future development of punitive damages in the United States. Part II traces the history of punitive damages, with a specific focus on the major due process challenges to punitive damages. Part III presents a summary of the facts and procedural history of TXO. Part IV analyzes the plurality, concurring, and dissenting opinions in the TXO decision. In Part V, the judicial, legislative, political, and social impacts of TXO are considered. Part VI provides a concluding word on TXO, discusses the present state of punitive damages and due process, and presents some recently decided and currently pending punitive damages cases.

II. HISTORICAL BACKGROUND

A. Origins of Punitive Damages

Punitive damages can be traced back to sources as ancient as the Babylonian Hammurabi Code, the Hindu Code of Manu, and the Bible. Early Roman law employed a form of punitive damages to pro-

20. Frey & Tanger, supra note 4, at 20 (noting and rebutting such criticism of the TXO decision). TXO has been criticized for "constitut[ing] a near fatal blow to due process review of large punitive verdicts." Id. The TXO Court has been described as "an example of a judiciary that has lost its collective mind." Robert Rice, Business and the Law: The Right Rules Supreme—America's Highest Court Was Dominated by Conservatives in the '92-'93 Term, FIN. TIMES, Sept. 14, 1993, at 14.

21. See, e.g., Shartel, supra note 2, at 2 (arguing that while the Court should set forth standards, these standards should not be too specific). For a detailed discussion of the tort reform movement and its response to the TXO case, see infra notes 72-97, 370-83 and accompanying text.

22. See infra notes 359-60 and accompanying text (noting that the pronouncement of punitive damages limitations is probably now left for state courts and legislatures).


25. See infra notes 200-325.

26. See infra notes 326-409.

27. See infra notes 410-22.

tect the common people from wealthy elites. During the Eighteenth Century, the concept of using punitive damages to protect the poor from the rich was adopted first by England, and then by the United States.

Genev v. Norris, decided in 1784 by the South Carolina Supreme Court, is the earliest reported United States punitive damages case. The Genev court established that assessing "vindictive damages" was allowed where "a very serious injury to the plaintiff... entitles him to

(1987). For a detailed discussion of these and other ancient sources of punitive damages, see Linda L. Schlueter & Kenneth R. Redden, Punitive Damages 3-6 (2d ed. 1989).

29. Rustad & Koenig, supra note 28, at 1286 (citing William Warwick Buckland, A Text-Book Of Roman Law 598 (3d ed. 1966)). For example, in early Roman law, punitive damages were awarded in cases in which the defendant threw something from his home onto a common street, thereby injuring the plaintiff. Id. However, it has been argued that this sort of multiple damage remedy was not analogous to modern punitive damages. Id.

30. See Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763) (assessing "exemplary damages" against agents of the King in conjunction with liability for false imprisonment and trespass actions); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763) (awarding the publisher of a newspaper critical of the King's staff "exemplary damages" in conjunction with a trespass action). Huckle and Wilkes are the landmark English "exemplary damages" cases. Demarest & Jones, supra note 28, at 799. "Exemplary damages" was an early term for "punitive damages," the two terms are virtually synonymous. Id. An early King's Bench described exemplary damages as "damages... awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer." Grey v. Grant, 2 Wils. K.B. 252 (C.P. 1764). For a more in depth discussion of punitive damages in Eighteenth and Nineteenth Century England, see Schlueter & Redden, supra note 28, at 12-16; Punitive Damages: Divergence In Search Of A Rationale, 40 Ala. L. Rev. 741, 745-50 (1989); James D. Ghiardi & John J. Kircher, Punitive Damages Law And Practice § 1.01 (1985).

31. Punitive damages first appeared in American case law in 1784, just 21 years after Huckle and Wilkes. For further discussion of the development of punitive damages in America, see infra notes 32-38 and accompanying text.

32. 1 S.C.L. (1 Bay) 6 (1784).

33. Rustad & Koenig, supra note 28, at 1290. "Vindictive damages" were assessed against a physician who secretly spiked the plaintiff's drink with a medical chemical, which caused the plaintiff "extreme and excruciating pain." Genev, 1 S.C.L. (1 Bay) at 6.

34. "Vindictive damages" is yet another early term for punitive damages. The two are virtually synonymous. See Schlueter & Kenneth, supra note 28, at 2. See, e.g., G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985) (using the two terms interchangeably).
very exemplary damages" and where the defendant had knowledge of the likely harmful effects of his actions. By the late 1700s and early 1800s, several American courts had upheld punitive damages awards, primarily based on outrageous, wilful, and wanton conduct. By 1851, the United States Supreme Court recognized that punitive damages were "a well-established principle of the common law . . . for torts . . . [based on] the enormity of [the] offence."

B. Original Purposes Behind Punitive Damages

Unlike compensatory damages, a remedy designed to make the plaintiff whole by compensating for actual losses, punitive damages extend above and beyond actual losses. Punitive damages were originally assessed against powerful, more fortunate people who bullied the less powerful. Punitive damages were designed to protect disadvantaged people, such as women, children, and invalids, against those who were more socially or physically powerful. The purpose behind this remedy was to punish and deter wrongdoers and to maintain social peace and norms. Punitive damages served as a bridge between civil

35. Genay, 1 S.C.L. (1 Bay) at 7. The Court held that the plaintiff, by virtue of his "professional character," must have had knowledge of this chemical's potential effects. Id.

36. Rustad & Koenig, supra note 28, at 1291. See, e.g., Coryell v. Colbaugh, 1 N.J.L. 77 (1791) (awarding punitive damages against a defendant for breaching his promise to marry the plaintiff); Bateman v. Goodyear, 12 Conn. 575, 575-77 (1838) (awarding punitive damages in a trespass case); Boston Mfg. Co. v. Fiske, 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1681) (awarding punitive damages in a patent infringement case); The Amiable Nancy, 16 U.S. 546 (1818) (awarding punitive damages in an admiralty case where a woman was held captive at sea).

37. Demarest & Jones, supra note 28, at 800. See, e.g., Bateman, 12 Conn. at 575-77 (assessing punitive damages against a defendant who broke into the plaintiff's shop); Day v. Woodworth, 54 U.S. 363, 371 (1851) (upholding punitive damages in trespass and tort cases when justified by the enormity of the offense).


41. Rustad & Koenig, supra note 28, at 1292.

42. See, e.g., Hollins v. Gorham, 66 S.W. 823, 823 (Ky. 1902) (assessing punitive damages against a defendant who assaulted a twelve year old boy); Nyman v. Lynde, 101 N.W. 163, 163 (Minn. 1904) (assessing punitive damages against a defendant for child abuse); Cathey v. St. Louis & S.F.R.R., 130 S.W. 130, 131-34 (Mo. 1910) (assessing punitive damages against a defendant who kicked a cripple in the face).

43. Rustad & Koenig, supra note 28, at 1294. Punitive damages maintained social justice because they served as an incentive for tort victims to pursue civil punish-
and criminal law, whereby victims of civil offenses, to whom the criminal system afforded no punitive remedy, could seek to punish the perpetrator.44

In general, early Nineteenth Century courts assessed punitive damages only in cases of willful conduct or gross disregard,46 offenses that were largely seen as quasi-criminal.46 The focus was on the protection of individuals from other individuals.47 By the late Nineteenth Century, however, the focus had shifted to protecting individuals from powerful corporations, due to the advent of the corporate culture.48
C. Early Opposition to Punitive Damages

Along with the increasing acceptance of punitive damages by United States courts during the Nineteenth Century came opposition from many legal scholars and academicians. Opponents contended that punitive damages could not be reconciled with the compensatory nature of tort law. Furthermore, the social justice of punitive damages was questioned. Many commentators believed that punitive damages should go to the state, rather than the plaintiff. Additionally, they argued that punitive damages were only appropriate in cases where traditional methods of damage assessment were inapplicable.

Much of this opposition stemmed from the strong push toward a clear separation between public law and private law, which occurred during the Nineteenth Century. Many legal scholars, led by Harvard Law School Professor Simon Greenleaf, viewed punitive damages as a means by which tort law could regulate conduct, effectively blurring the
public/private law distinction. In response to Greenleaf’s opposition to punitive damages, a support movement arose, spearheaded by Theodore Sedgwick, a legal writer and practitioner. Sedgwick argued that “oppression, brutality or insult in the infliction of a wrong is a cause for the allowance of exemplary damages.” The Greenleaf-Sedgwick debate continued throughout the remainder of the Nineteenth Century; however, courts continued to award punitive damages.

D. Punitive Damages Modernly

By the turn of the century, punitive damages were well established and accepted in the United States. Until the late 1950s, punitive damages award amounts remained relatively small and relatively proportional to compensatory damages. For example, as of 1955, one of the largest punitive damages awards in United States history amounted to only $75,000. However, in the early 1960s, the size and frequency of punitive damages awards increased, and they have been increasing steadily ever since. Furthermore, many commentators have observed

55. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 n.2 (16th ed. 1899). Private law was non-coercive. Punitive damages, being a regulatory measure, were viewed as coercive. According to many legal scholars, coercive elements belonged only in public law areas and had no place in private law areas. Id. See also Morris, supra note 49, at 1177 n.7 (citing 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 n.2 (14th ed. 1883) (noting that punitive damages give the plaintiff an “out and out windfall”).

56. Theodore Sedgwick, The Rule Of Damages In Actions Ex Delicto, 10 LAW REP. 49, 53 (1847) [hereinafter Sedgwick]. See also THEODORE SEDGWICK, SEDGWICK ON DAMAGES §§ 353-54 (9th ed. 1912) (outlining and rebutting criticism to “exemplary damages”) [hereinafter SEDGWICK ON DAMAGES].

57. Sedgwick, supra note 56, at 53. Sedgwick believed that the distinction between public and private law was unrealistic in practice. Id.

58. See Rustad & Koenig, supra note 28, at 1301 (citing examples of such cases).

59. Hart, supra note 15, at 586. This trend of accepting punitive damages has continued; currently, all but four states permit punitive damages. Galanter & Luban, supra note 39, at 1407. Louisiana, New Hampshire, and Nebraska prohibit punitive damages altogether, and Michigan prohibits punitive damages in certain cases. Id. at 1407 n.62.

60. Hart, supra note 15, at 586.

61. Id. In the Nineteenth Century, the largest punitive damages award was worth about $58,000 in 1987 dollars, and the largest total verdict, including compensatory and punitive damages, was equal to $20,000 in actual dollars. Id.

62. Id. For example, from 1960 to 1984, the frequency of punitive damages verdicts increased by 400% in San Francisco County, California and by 2000% in Cook County, Illinois. Id. at 586 n.11. Furthermore, the average size of punitive damages awards in-
that the disparity between punitive damages and actual damages within a given case has become increasingly larger.\textsuperscript{63} Much of this increase is due to the expanding scope of punitive damages in many jurisdictions beyond intentional, willful and wanton, and outrageous conduct to include grossly negligent conduct as well.\textsuperscript{64} The effect of this expansion has been a marked increase in the incidence and size of punitive damages awards in business and contract cases.\textsuperscript{65}

It is important to note that this dramatic increase in the size and frequency of punitive damages awards over the last thirty-five years has occurred predominantly in business and contract cases. Galanter & Luban, supra note 39, at 1416. Business and contract cases grew more than any other type of case during this period. Id. Furthermore, studies have concluded that corporate defendants are the most likely targets of large punitive damages awards. Brief for The Product Liability Advisory Council, Inc., supporting Petitioner at 22, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (No. 92-479) [hereinafter Product Liability Advisory Council's Brief]. This helps explain the aforementioned increases.

\textsuperscript{63} Maskin & Antonucci, supra note 12, at 579 (noting that “[t]he specter of large punitive damages awards has raised fears that these awards over and above hundreds or thousands of compensatory damages awards will spell the financial ruin of [the] corporations” against which they are assessed). But cf. Daniels & Martin, supra note 62, at 60-63 (arguing that the ratio of punitive damages and other damages has actually remained relatively stable over time).

\textsuperscript{64} TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887 (W. Va. 1992), aff'd, 113 S. Ct. 2711 (1993). West Virginia Supreme Court Justice Neely, in his majority opinion, wrote that “the punitive damages definition of malice has grown to include . . . extremely negligent conduct that is likely to cause serious harm.” Id.

\textsuperscript{65} Galanter & Luban, supra note 39, at 1415-17. “Between 1960 and 1986, torts dropped from 38% of total federal court filings to 17%, while diversity contract matters increased from 8% to 13% of total filings. Contract cases in the federal courts grew at a rate of 259% during this period, while torts grew at a rate of 113%.” Id. at 1416 (citing Marc Galanter, \textit{The Life and Times of the Big Six}; or, \textit{The Federal Courts Since the Good Old Days}, 1988 Wis. L. Rev. 921, 927, 942). See also supra note 62 and accompanying text (citing the increase in business litigation as a cause for the rise in punitive damages awards).
1. Modern Rationales

Modernly, there are two primary rationales for punitive damages awards. The first rationale is that punitive damages are a form of punishment for past conduct. The second rationale is that punitive damages deter people from future similar wrongs because of the risk of having to pay money above and beyond the actual damages they caused. There are two types of deterrence: specific and general. Specific deterrence is designed to deter the particular tortfeasor from future wrongful acts of a similar nature, while general deterrence is designed to deter others similarly situated from similar wrongful conduct. Most jurisdictions rely on both rationales to justify the assessment of punitive damages.

2. The Modern Tort Reform Debate

The punitive damages debate that began in the Nineteenth Century has, in the later part of the Twentieth Century, become increasingly heated and political in nature. As punitive damages awards have in-

66. Demarest & Jones, supra note 28, at 801-02. Additional rationales include vindication, retribution, additional compensation for intangible damages, compensation for plaintiff's attorney fees, and discouragement of anti-social behavior. Id.; Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 3 (1982); Daniels & Martin, supra note 62, at 7. For a detailed discussion of the two primary rationales, see generally Abraham & Jeffries, supra note 40.

67. Demarest & Jones, supra note 28, at 802-03. Some commentators believe that punishment can only be justified as a rationale for punitive damages by its deterrent effect on the defendant and others. Id. Furthermore, critics of this rationale argue that punitive damages duplicate criminal punishment without important criminal law procedural safeguards, such as a higher burden of proof and the right to remain silent. Daniels & Martin, supra note 62, at 7-8.

68. Ellis, supra note 66, at 3.


70. May, supra note 69, at 574.

71. Demarest & Jones, supra note 28, at 803 (noting that the two rationales are sometimes combined, such that the "deterrent" effect of punitive damages is what justifies "punishment" of the defendant).

72. Daniels & Martin, supra note 62, at 2. The tort reform movement has shifted the punitive damages controversy from a debate over the doctrinal merits of punitive
creased both in size and frequency, and as the disparity between punitive damages and actual damages has, in many cases, risen dramatically, punitive damages critics have worked harder than ever toward reforming the punitive damages system. This reform effort is part of a larger movement to reform many procedural areas of the civil justice system.

Some tort reform proponents believe that the civil justice system is out of control. They claim that punitive damages constrain big business, inequitably provide plaintiffs with a windfall, hamper the development of beneficial products, encourage needless litigation, discourage settlement, foster "runaway juries," and are too unpredictable.

damages to a public policy debate. Id. See generally Demarest & Jones, supra note 28; Schwartz & Behrens, supra note 44, at 1370-72.

73. See supra notes 62-65 and accompanying text.
74. See supra note 63 and accompanying text (discussing this phenomenon).
76. See Dan Quayle, Civil Justice Reform, 41 AM. U. L. REV. 559 (1992). Other areas of proposed reform include encouraging voluntary dispute resolution processes, limiting discovery, restricting expert witness testimony, and modifying the shifting of attorney fees. Id.
78. Rustad & Koenig, supra note 28, at 1277. Tort reformers have been criticized for seeking to reform only civil justice provisions that "impede the activities of economic elites." Id.
79. Maskin & Antonucci, supra note 12, at 626.
   The concern is not so much with the fact that the defendant is assessed a large financial penalty for its willful or wanton conduct; rather, the concern is that the awarding of such multi-million dollar punitive awards to a plaintiff becomes tantamount to that plaintiff and his lawyer winning the lottery, which does not fulfill the public's interest in such awards.

Id.
80. Stacy Adler, High Courts Review Punitive Damages; Justices to Consider Award Limits, BUS. INS., Oct. 1, 1990, at 1. For a detailed discussion of the proposed reform on punitive damages for regulated products, see generally Teresa M. Schwartz, supra note 77. But cf. Galanter & Luban, supra note 39, at 1416 (noting that, except for asbestos cases, "federal product liability . . . [litigation] is shrinking rather than expanding"). For an argument that punitive damages do not hamper the production of beneficial products, see generally Rustad & Koenig, supra note 28.
81. Bruce Keppel, Poll Backs Insurance Industry Priority; Public Wants Civil Suit Reforms, Survey Says, L.A. TIMES, Mar. 9, 1987, § 4 (Business), at 2 (recognizing Americans' belief that the civil justice system is overused).
82. Id. See also infra notes 406-09 and accompanying text (discussing the potential impact of frequent and large punitive damages awards on a plaintiff's willingness to settle).
83. Demarest & Jones, supra note 28, at 805. Tort reformers argue that a major
able and arbitrary.⁴ Four tort reformers cite a massive "litigation explosion"⁵ and an "insurance crisis,"⁶ occurring toward the latter half of the Twentieth Century, as two major catalysts of the reform movement,⁷ and they cite punitive damages as the cause of these problems.⁸

In the Model State Punitive Damages Act, former Vice President Dan Quayle set forth recommendations on how to reform the punitive damages system.⁹ The act recommended six reforms: (1) Eliminating ad damnum clauses in punitive damages cases;¹⁰ (2) raising the standard of proof to clear and convincing evidence;¹¹ (3) requiring proof of mal-

⁴ See Quayle, supra note 76, at 564 ("Lacking a unifying structure, the current approach to punitive damages will continue to generate disproportionately high awards in a random and capricious manner."). The lack of guidelines, both legislative and judicial, has been cited as the main reason for the arbitrary assessment of punitive damages. Schwartz & Behrens, supra note 44, at 1370-71.

⁵ Daniels & Martin, supra note 62, at 3 n.9 (noting that although there has been a "litigation explosion," its size has been exaggerated). For example, in federal courts between 1960 and 1990, the number of lawsuits filed annually increased from 51,000 to 218,000. Quayle, supra note 76, at 560.

⁶ Daniels & Martin, supra note 62, at 3 n.9. See also SCHLUETER & REDDEN, supra note 28, at 79 (discussing the effects of punitive damages on insurance costs). But see Prentice, supra note 62, at 123 (noting that "reports of a litigation explosion . . . have been greatly exaggerated, and the insurance crisis is, at least in part, an invention of the insurance industry").

⁷ Daniels & Martin, supra note 62, at 3.

⁸ Id.

⁹ Rustad & Koenig, supra note 28, at 1277-82; MODEL STATE PUNITIVE DAMAGES ACT (Office of the Vice President 1992) [hereinafter MODEL ACT]. The statute was introduced in a report entitled "Agenda for Civil Justice Reform in America" and was proposed by the President's Council On Competitiveness. Rustad & Koenig, supra note 28, at 1278 n.60. For an in depth discussion and analysis of the Model Act, see id.

¹⁰ MODEL ACT, supra note 89, § 4(c). Some reformers argue that since punitive damages are regulatory in nature, plaintiffs should not be allowed to plead specific amounts of punitive damages. Rustad & Koenig, supra note 28, at 1278 n.62. Plaintiffs plead amounts of damages in ad damnum clauses. Id. See also Quayle, supra note 76, at 565 (arguing that "plaintiffs seeking punitive damages should not be able to assign specific dollar amounts to their request").

¹¹ MODEL ACT, supra note 89, § 6. Twenty-four states have invoked a clear and
ice or intent to cause serious harm; (4) bifurcating trials, so that a trial on punitive liability would precede a trial on punitive damages; (5) allowing only judge-determined punitive awards; and (6) limiting the punitive award to the amount of the total compensatory award.

convincing evidence standard of proof for punitive damages. For a list of states and authority for this requirement, see Rustad & Koenig, supra note 28, at 1278 n.63.

92. MODEL ACT, supra note 89, § 6. The proposal is that punitive damages not be allowed in negligence cases, even gross negligence, because of the lack of a "quasi-criminal" element. Id. See also Quayle, supra note 76, at 565 ("Because punitive damages are 'quasi-criminal,' an award should be predicated on a standard of proof requiring some element of intent."); Demarest & Jones, supra note 28, at 827 (noting that most jurisdictions only allow punitive damages for conscious disregard, which is more than mere negligence, but less than criminal).

93. MODEL ACT, supra note 89, § 5(a)-(d). The first stage of the trial would involve a determination of liability for compensatory damages and the amount of such damages. Id. During the second stage of the trial, which would only occur if the plaintiff was awarded compensatory damages, the same jury would determine liability for punitive damages. Id. This bifurcation would occur only at the defendant's request. Id. The purpose behind this proposal is to prevent the wrongful contamination of the jury's determination of compensatory liability by preventing the presentation of evidence relevant only to the punitive issue until after the compensatory issue has been decided. Rustad & Koenig, supra note 28, at 1280 n.65.

94. MODEL ACT, supra note 89, § 5(f). This proposal is designed to prevent runaway jury verdicts. Quayle, supra note 76, at 565. Furthermore, it would allow for consideration of prior damage awards for the same tort, the effect of a punitive damages award on other potential plaintiffs, the deterrent effect of compensatory damages, and possible criminal or administrative penalties against the defendant for the same act. MODEL ACT, supra note 89, § 5(f). Three states, Connecticut, Kansas, and Ohio, have enacted statutes that call for judge-assessed punitive damages. See Malcolm E. Wheeler, The Constitutional Case For Reforming Punitive Damages Procedures, 69 VA. L. REV. 269, 302 (1983) (favoring judge-assessed punitive damages).

However, the Seventh Amendment of the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. Some commentators suggest that a tort reform measure that removes the punitive damages determination from the jurisdiction of the jury might violate this seventh amendment guarantee. See generally Scheiner, supra note 83 (discussing this Seventh Amendment issue in detail).

95. MODEL ACT, supra note 89, § 7. There are three main types of caps on punitive damages. Rustad & Koenig, supra note 28, at 1281 n.67. The first, a fixed ratio ceiling, allows punitive damages only to the extent that they do not exceed a specified ratio of compensatory damages. Id. This is the type proposed by the Model Act. See MODEL ACT, supra note 89, § 7. The second, fixed amounts, sets an absolute dollar amount as a cap on punitive damages. Rustad & Koenig, supra note 28, at 1281 n.67. The third, a hybrid of the first two, sets a maximum dollar amount for punitive damages and a fixed ratio of punitive to compensatory damages, but limits punitive damages to the lesser of the two. Id. Several states have adopted cap measures. See, e.g., ALA. CODE § 6-11-21 (Supp. 1987) (limiting punitive damages in certain cases to $250,000); FLA. STAT. ANN. § 768.73 (West Supp. 1988) (capping punitive damages at three times the compensatory damages); TEX. CIV. PRAC. & REM. CODE
Other suggestions include giving some or all of the punitive damages to the State or abolishing punitive damages altogether.

E. Punitive Damages and the Constitution

Punitive damages have been challenged on constitutional grounds several times within the past 100 years. However, the number of con-
stitutional challenges has increased tremendously in recent years in the
wake of the politically charged tort reform movement. Such chal-
genues have most commonly been based on first amendment concerns re-
lated to libel cases, the Excessive Fines Clause of the Eighth
Amendment, and the Due Process Clause of the Fourteenth Amend-
ment, which was the basis of TXO’s challenge. Until very recent-
ly, the Supreme Court had declined to respond to due process challeng-
es similar to the one asserted by TXO. Before surveying a few of the

“juries assess punitive damages in wholly unpredictable amounts bearing no necessary
relation to the actual harm caused”), appeal after remand, 680 F.2d 527 (7th Cir.
1982), and cert. denied, 469 U.S. 1226 (1983).

99. The tort reform movement, and specifically the effort to reform punitive dam-
ages, has been active for several decades, picking up steam as the years have gone
by. See generally Rustad & Koenig, supra note 28, at 1275-84; Tobias, supra note 76,
at 1522-26. It seems that as tort reformers have pushed harder, expressing strong
dissatisfaction with the present punitive damages system, there have been more con-
stitutional challenges to punitive damages. See, e.g., John C. Jeffries, Jr., A Comment
on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 139 (1986) (noting
that “punitive damages are out of control” and, therefore, should be “more vulnerable
to constitutional attack”). Additionally, as there has been an increase in constitutional
challenges, tort reformers have been induced to fight harder for punitive damages
limitations. Id. The idea that constitutional challenges and tort reform feed each other
seems a bit circular, but it does appear to be the trend. For a discussion of many
recent constitutional challenges to punitive damages, see infra notes 117-53 and ac-
companying text. For a discussion of the tort reform movement, see supra notes 72-
97 and accompanying text.

100. Olson & Botrous, supra note 44, at 909. For a detailed discussion of first
amendment challenges to punitive damages, see generally SCHLUETER & REDDEN, su-
pra note 28, at 45-49; Donald B. Petrie, Comment, Punitive Damages and the Con-

101. See infra notes 128-37 and accompanying text (discussing the only eighth
amendment excessive fines challenge to punitive damages that the Supreme Court has
ever reviewed). The Eighth Amendment provides, “Excessive bail shall not be re-
quired, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
U.S. CONST. amend. VIII. In 1989, the Supreme Court held that large punitive damages
awards do not violate the Eighth Amendment. Browning-Ferris Indus. v. Kelco Dispos-
decision, see Gary T. Schwartz, supra note 69, at 1237. For an in depth discussion of the
eighth amendment issues related to punitive damages, see generally Olson &
Botrous, supra note 44; Jeffries, supra note 99, at 139.

102. See infra notes 117-53 and accompanying text (discussing several such chal-
genues). The Due Process Clause of the Fourteenth Amendment provides, “nor shall
any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONSt. amend. XIV, § 1. For a more in depth discussion of the due
process concept generally, see infra notes 105-16 and accompanying text.


104. Maskin & Antonucci, supra note 12, at 588.

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recent Supreme Court cases dealing with due process challenges, it is necessary to take a brief look at the concept of due process and why it has potential implications in the punitive damages area.

1. Due Process

The due process clause of the Fourteenth Amendment prohibits states from "depriving any person of life, liberty or property without due process of law." The primary concept behind due process is a policy of fundamental fairness. Over the years, two main components of due process have emerged: substantive due process and procedural due process. Because these concepts, as well as their relationship to punitive damages, are so different, they are addressed individually.

a. Substantive due process

The substantive due process issue regarding punitive damages may be stated as follows: at what point, if any, will the size of the award become so "grossly excessive" in relation to the defendant's conduct as to constitute an unlawful deprivation of property and violate the due process clause? Generally, substantive due process provides standards against which governmental actions, including jury verdicts, are to be scrutinized. The Court will judge governmental actions that impact fundamental rights with a higher level of scrutiny than actions that

106. See, e.g., Snyder v. Massachusetts, 291 U.S. 97 (1934) (suggesting that fundamental fairness is a very basic element of procedural due process), overruled on other grounds by Duncan v. Louisiana, 391 U.S. 145 (1968).
107. May, supra note 69, at 576. See infra notes 109-16 and accompanying text for a brief discussion of the substantive and procedural components of due process.
108. See infra notes 109-16 and accompanying text. Substantive due process focuses on whether the actual deprivation is constitutional, while procedural due process focuses on whether the procedures involved in the deprivation were sufficient to survive constitutional attack. May, supra note 69, at 576.
110. Id.
111. Fundamental rights are non-economic individual rights expressed in the Bill of Rights, plus other individual rights implied by the Supreme Court, such as family, marriage, and child rearing. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting "more exacting judicial scrutiny" when legislation "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments"). See also Michael H. v. Gerald D., 491 U.S. 110, 101
do not impact fundamental rights. This continuum of scrutiny revolves around a nucleus of reasonableness, an abstract standard that requires weighing all of the relevant factors in deciding whether the governmental action was “reasonable.”

b. Procedural due process

The procedural due process issue regarding punitive damages centers on whether the procedures involved in awarding punitive damages, including jury instructions, post-trial review, appellate review, and burden of proof, satisfy the due process requirements for depriving the plaintiff of his property. Generally, procedural due process sets forth what procedures are required in order to constitutionally deprive people of life, liberty, or property. Often, the determination of whether

(1989) (holding that the right to rear children is fundamental); Zablocki v. Redhail, 434 U.S. 374, 390 (1978) (holding that the right to marry is fundamental); Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (holding that familial rights are “fundamental” in nature and are entitled to the stricter scrutiny contemplated in Carolene Products).

112. For an in depth discussion of substantive due process, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-55, 564-576 (1978). In the early 1900s, in an era known as the Lochner-era, named after the Court’s decision in Lochner v. New York, 198 U.S. 45 (1905), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), governmental actions were judged based on a pure reasonableness standard. See TRIBE, supra, at 435. In the 1930s, the Supreme Court rejected the reasonableness analysis as too abstract and substituted two more concrete tests: rational basis and strict scrutiny. Id at 450-51. See Carolene Prods., 304 U.S. at 153 n.4 (suggesting for the first time that two separate standards should be adopted). The rational basis test would be applied to governmental actions that did not affect fundamental rights and would presume that the governmental action was valid unless the opponent could prove that the action was not rationally related to a legitimate governmental objective. Id. at 153-54 (adhering to Justice Harlan’s suggestion in Lochner that economic legislation must only be rationally related to a legitimate governmental objective). Strict scrutiny would be applied to governmental actions that denied fundamental rights and would presume that the governmental action was invalid unless the government could prove that the action was narrowly tailored to further a compelling state interest. Id. at 153 n.4 (requiring stricter scrutiny for non-economic legislation that impacted fundamental rights).

113. During the latter half of the Twentieth Century, there has been a trend back toward a reasonableness standard in assessing certain governmental actions that cannot easily be placed into one of the aforementioned categories. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (applying a reasonableness standard in assessing the impact of governmental intrusions on a woman’s right to have an abortion); Cruzan v. Missouri Dep’t of Health, 497 U.S. 261 (1990) (applying a reasonableness test in assessing the right to die). Because the concept of reasonableness is quite subjective and difficult to define, it is helpful when the Court sets forth factors to assist other courts in applying this standard.

114. Olson & Boutrous, supra note 44, at 923.

115. For an in depth discussion of procedural due process, see generally TRIBE,
certain procedures are required is based on a balancing of the burdens these procedures place on the system against the benefits these procedures confer upon individuals. 116

2. Due Process Challenges to Punitive Damages

a. First signs of Supreme Court interest in due process issues regarding punitive damages

The first time the Supreme Court chose to consider the interplay between due process and punitive damages was in 1986, in *Aetna Life Insurance Co. v. Lavoie.* 117 The *Aetna Life* case originated in Alabama and involved claims of bad faith against an insurance company. 118 Although the Court noted "that the lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment," 119 the Court expressly reserved this important issue for a more "appropriate setting." 120

In 1988, the Court considered an equal protection challenge to punitive damages in the case of *Bankers Life & Casualty Co. v. Crenshaw.* 121 The *Bankers Life* case involved the denial of a claim for

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119. *Id.* at 828.
120. *Id.* at 828-29. The Court, finding that this case was "inappropriate" for a consideration of the due process issues surrounding the punitive damages award, did not decide the issue at all. *Id.* See also Hart, supra note 15, at 588.
121. 486 U.S. 71, 73 (1988). The *Bankers Life* case originated in Mississippi. *Id.* For a more in depth discussion of *Bankers Life*, see Olson & Boutrous, supra note 44, at 909-10; May, supra note 69, at 578; Hart, supra note 15, at 588; Maskin & Antonucci, supra note 12, at 588-89.
the accidental loss of a limb. The jury verdict was $20,000 in actual damages and $1.6 million in punitive damages.

While the Court noted the importance of due process issues regarding punitive damages, the Court again left these issues unresolved, this time based on jurisdictional grounds. However, Justice O'Connor's concurring opinion, which was joined in by Justice Scalia, provided some insight as to their position on the issue. Justice O'Connor wrote, "Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause."

In 1989, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment does not apply to civil lawsuits between private parties. Again the Court avoided the due process issues, this time based upon the inappropriateness of reviewing issues not considered by either the trial court or the appellate court. However, in upholding the jury verdict of $51,146 in actual damages and $6 million in punitive damages,

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122. *Bankers Life*, 486 U.S. at 73-76. See also Maskin & Antonucci, *supra* note 12, at 588 (detailing the facts of *Bankers Life*).
123. *Bankers Life*, 486 U.S. at 75.
124. *Id.* at 76.
125. *Id.* (refusing to reach the due process issues because such issues "were not raised and passed upon in state court").
126. *Id.* at 86-89 (O'Connor, J., concurring). See also Olson & Boutrous, *supra* note 44, at 909-10 (discussing the rationale of Justice O'Connor's concurring opinion).
127. *Bankers Life*, 486 U.S. at 87 (O'Connor, J., concurring). Justice O'Connor continued, "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.' . . . The Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits." *Id.* at 87-88 (O'Connor, J., concurring) (quoting *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979)). See also Hart, *supra* note 15, at 588 (noting Justice O'Connor's interest in the due process issues regarding punitive damages); Maskin & Antonucci, *supra* note 12, at 560 (providing a more detailed discussion of Justice O'Connor's comments on the due process issues regarding punitive damages).
129. *Id.* at 280. *Browning-Ferris* arose out of an antitrust violation and an interference with contract action. *Id.* at 260-62. Justice Blackmun wrote the majority opinion, which was joined in by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Scalia, and Kennedy. *Id.* at 258. Justice Brennan wrote a concurring opinion, which was joined in by Justice Marshall. *Id.* Justice O'Connor wrote a concurring and dissenting opinion, which was joined in by Justice Stevens. *Id.* See *supra* note 101 (providing sources that discuss *Browning-Ferris* and the Eighth Amendment in more detail).
130. *Browning-Ferris*, 492 U.S. at 276-77.
the Court, in dictum, noted that excessive awards might be subject to due process review and acknowledged the importance of these issues.\textsuperscript{131}

Although the Court in \textit{Browning-Ferris} did not resolve the due process issues, several Justices took an interest in the potential due process issues for the first time.\textsuperscript{132} In a concurring opinion Justice Brennan, joined by Justice Marshall, wrote, "Without . . . standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves . . . ."\textsuperscript{133} Justice Brennan expressed concern that a jury instruction allowing consideration of the defendant's character, financial position, and the nature of the defendant's conduct in determining the punitive damages award, provides the jury with very little guidance and basically allows the jurors to "do what they think is best."\textsuperscript{134}

Justice O'Connor, in her concurring and dissenting opinion, which was joined in by Justice Stevens, reiterated the concerns she raised in \textit{Bankers Life}.\textsuperscript{135} She noted that giving juries vague guidelines regarding punitive damages is akin to giving them "unbridled discretion," which may raise procedural due process issues.\textsuperscript{136} Furthermore, Justice O'Connor stated that the Court's decision in \textit{Browning-Ferris} did not foreclose future due process challenges to punitive damages.\textsuperscript{137} With that statement, Justice O'Connor provided an invitation for such a challenge in the future.

\textsuperscript{131} Id. See also Maskin & Antonucci, supra note 12, at 590-91.
\textsuperscript{132} Hart, supra note 15, at 589. In \textit{Browning-Ferris}, Justices Brennan, Marshall, O'Connor, and Stevens addressed the idea of potential due process issues regarding punitive damages. Id.
\textsuperscript{133} \textit{Browning-Ferris}, 492 U.S. at 281 (Brennan, J., concurring).
\textsuperscript{134} Id. (Brennan, J., concurring). Furthermore, Justice Brennan noted that "[g]uidance like this is scarcely better than no guidance at all . . . . I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." Id. (Brennan, J., concurring).
\textsuperscript{135} See supra notes 126-27 and accompanying text (noting Justice O'Connor's concerns in the \textit{Bankers Life} case).
\textsuperscript{136} \textit{Browning-Ferris}, 492 U.S. at 283 (O'Connor, J., concurring and dissenting). Justice O'Connor stated, "I adhere to my comments in [\textit{Bankers Life}] regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." Id.
\textsuperscript{137} Id. (O'Connor, J., concurring and dissenting). See also Hart, supra note 15, at 589 (discussing Justice O'Connor's opinion).
b. The first appropriate case to consider due process of punitive damages

The Supreme Court finally found the long-awaited and largely invited "appropriate case" in 1990 when it granted review to Pacific Mutual Life Insurance Co. v. Haslip.138 This Alabama case involved an insurance agent who fraudulently appropriated a client's employee health insurance premiums and failed to notify the client that its insurance had lapsed.139 As a result, Mrs. Haslip, an employee of the insured client, faced a collection action for her medical bills.140 The jury found in Mrs. Haslip's favor and awarded her $200,000 in actual damages and $840,000 in punitive damages.141 The Supreme Court granted certiorari to consider the substantive and procedural due process challenges to the punitive damages award. Ultimately, the Court rejected both challenges and upheld the award.142

Based upon substantive due process grounds, the appellant argued that the award was so grossly excessive that it offended constitutional sensibilities.143 The Court held that although punitive damages do have substantive due process limits, no "mathematical bright line" could be drawn to distinguish between constitutional and unconstitutional punitive damages award amounts.144 However, the Court did indicate that a punitive damages award that is four times the actual damages award "may be close to the line."145 In this case, the Court upheld the award because they found that it did not cross this undefined constitutional line.146 Justice O'Connor dissented, concluding that the award did cross the line.147 Justices Kennedy and Scalia each wrote separate con-

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138. 499 U.S. 1 (1991). This was the first time that a majority of the Court acknowledged that there are due process constraints on punitive damages. Maskin & Antonucci, supra note 12, at 593. For more detailed discussions of Haslip, see generally Richards, supra note 115; Maskin & Antonucci, supra note 12, at 593-99; Rustad & Koenig, supra note 28, at 1273-74, 1311-18; King, supra note 115.
139. Haslip, 499 U.S. at 4-6.
140. Id. at 5.
141. Id. at 6 n.2.
142. Id. at 24.
143. Id. at 23-24.
144. Id. at 18; Maskin & Antonucci, supra note 12, at 593-94. Justice Scalia wrote a separate opinion, concurring in the judgment, stating his belief that punitive damages have no substantive due process limitations because the Constitution does not explicitly or implicitly grant a "fundamental right" to punitive damages. Haslip, 499 U.S. at 24-28 (Scalia, J., concurring).
145. Id. at 23. Several subsequent cases used this statement as an implied rule. For a discussion of such cases, see infra notes 159-65 and accompanying text.
147. Id. at 64 (O'Connor, J., dissenting).
curring opinions, both concluding that punitive damages do not implicate substantive due process.48

Based upon procedural due process grounds, the appellant next argued that the procedures employed by the state of Alabama failed constitutional scrutiny.49 The Court held that a state's procedure for awarding punitive damages passes constitutional muster if it provides "meaningful constraints" on the fact finder's discretion.50 The Court then upheld the punitive damages award because it found that Alabama's procedures provided adequate procedural safeguards, such as jury instructions, which serve as a reasonable constraint on jury discretion, post-trial review, and adequate appellate review.51 Justice O'Connor dissented,52 stating that she would have reversed the punitive damages award because she believed that Alabama's procedures for awarding punitive damages were unconstitutionally vague.53

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148. Id. at 24 (Scalia, J., concurring); Id. at 42 (Kennedy, J., concurring).
149. Id. at 7-8.
150. Id. at 22. The Court upheld Alabama's procedures for reviewing punitive damages awards, which included the following factors:
   (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.
Id. at 21-22. For further discussion of these factors, see Rustad & Koenig, supra note 28, at 1311-18.
151. Id. at 19-23. For a detailed discussion of the procedures upheld in Haslip, see supra note 150 and accompanying text.
152. Haslip, 499 U.S. at 42 (O'Connor, J., dissenting).
153. Id. at 43 (O'Connor, J., dissenting). Justice O'Connor's response to the jury instruction was that "it speaks of discretion, but suggests no criteria on which to base the exercise of that discretion." Id. at 44 (O'Connor, J., dissenting). Justice O'Connor continued, "Instead of reminding the jury that its decision must rest on a factual or legal predicate, the instruction suggests that the jury may do whatever it 'feels' like. It invites individual jurors to rely upon emotion, bias, and personal predilections of every sort." Id. at 44-45 (O'Connor, J., dissenting).
In the aftermath of Haslip

Although the Supreme Court finally made a statement regarding due process considerations of punitive damages, the statement did not provide much guidance to lower courts in assessing whether punitive damages awards satisfy due process. The Supreme Court's conclusion that the punitive damages award in Haslip, while not crossing the line into the realm of constitutional impropriety, was "close to the line," begged the question, exactly where is the line to be drawn. While the Court explicitly referred to the existence of this "line," they seemingly left the rest to the imagination.

Several other cases were pending review by the Supreme Court at the time Haslip was decided. In all of these cases, the Court reversed the judgment and remanded the case to the lower courts for further consideration in light of the Haslip decision. A brief look at these lower court opinions on remand, as well as other appellate court decisions regarding due process punitive damages issues, reveals that the Haslip decision provided no rhyme nor reason for determining when punitive damages awards meet due process requirements and when they do not.

For example, some lower courts based their decisions of due process issues regarding large punitive damages awards on the egregiousness of the defendant's conduct. Other courts based such determinations

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154. Id. at 23. See also supra notes 138-53 and accompanying text.
158. Stewart & Piggot, supra note 155, at 696-97 (noting that while the Haslip majority recognized the existence of constitutional limits on punitive damages, they left "many unanswered questions," including where the constitutional line is to be drawn).
159. Id. at 698. For a list of these cases, see infra note 160.
161. See infra notes 162-80 and accompanying text.
162. See, e.g., Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854 (Ala. 1991) (upholding large punitive damages award against an insurer because the fraud was egregious). The court indicated its willingness to uphold large punitive damages awards where such awards were justified by the facts. Id. at 858. For more a more detailed discussion of Southern Life, see Maskin & Antonucci, supra note 12, at 601-04.
upon whether large punitive damages awards were rationally related to the "legitimate goals of punishment and deterrence." Several courts suggested that *Haslip* did not mandate an analysis of the proportionality between compensatory and punitive damages when considering due process issues. Some courts overturned punitive damages awards, holding that the procedural safeguards employed in awarding such damages did not comport with the requirements set forth in *Haslip*. The wide range of outcomes in these cases indicates that *Haslip* failed to set a definite standard regarding when, in the face of due process challenges, punitive damages awards should or should not be upheld.

When the Supreme Court granted review to *TXO Production Corp. v. Alliance Resources Corp.*, many practitioners hoped that the Court would use this opportunity to set forth clear standards for punitive damages determination and provide guidance to lower courts. The

163. See, e.g., Intercontinental Life Ins. Co. v. Lindblom, 598 So. 2d 886, 891 (Ala.) (upholding a large punitive damages award against an insurance company that accepted premiums on a void policy because the award bore a rational relationship to the deterrence and punishment goals of punitive damages), cert. denied, 113 S. Ct. 200 (1992). For a more in-depth treatment of *Lindblom*, see Stewart & Piggot, supra note 155, at 705-06.

164. See, e.g., Hospital Auth. v. Jones, 409 S.E.2d 501, 504 (Ga. 1991) (upholding a punitive damages award substantially higher than the nominal damages award), cert. denied, 112 S. Ct. 1175 (1992); Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1382 (5th Cir. 1991) (upholding a disproportionately large punitive damages award against an insurance company for wrongful denial of a health insurance claim and concluding that the "size of an award of punitive damages and the relationship between the award and the amount of compensatory damages are relevant factors in determining whether the award is constitutional, but these factors are not dispositive").

165. See, e.g., Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 907-08 (W. Va. 1991) (overturning a substantial punitive damages award against a solid waste disposal facility because the trial court's method of reviewing punitive damages was too unrestrictive and, therefore, violated due process); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 111-12 (4th Cir. 1991) (reversing a large punitive damages award because the trial court failed to use meaningful standards); Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (refusing to uphold a large punitive damages award because the jury instruction regarding punitive damages was too open-ended); Alexander & Alexander, Inc. v. Evander & Assoc., 596 A.2d 687, 721-22 (Md. Ct. Spec. App. 1991) (vacating a substantial punitive damages award and remanding the case for retrial in light of *Haslip* requirements), cert. denied, 605 A.2d 137 (Md. 1992). For a detailed discussion of these and other related cases, see generally Stewart & Piggot, supra note 155, at 698-708; Maskin & Antonucci, supra note 12, at 606-20.

166. See supra note 2 and accompanying text.
TXO decision was one of the most greatly anticipated in the 1993 term.167

d. West Virginia punitive damages procedure

Before turning to a more detailed analysis of the United States Supreme Court decision in TXO Production Corp. v. Alliance Resources Corp., it is necessary to briefly outline the history of West Virginia's punitive damages determination methods.

Until Haslip, West Virginia, not unlike many other jurisdictions, left much of the determination of punitive damages awards to jury discretion.168 However, Garnes v. Fleming Landfill, Inc.,169 a West Virginia case to which the United States Supreme Court granted review, but remanded in light of Haslip,170 changed this procedure dramatically.171 Garnes involved a nuisance action against a solid waste disposal facility.172 The jury did not award the plaintiffs any compensatory damages, but they awarded $105,000 in punitive damages.173 The defendant appealed the constitutionality of the punitive damages award to the West Virginia Supreme Court, but that court denied review.174 The case ventured on to the United States Supreme Court, where the case was remanded to the state supreme court for consideration in light of Haslip.175

167. Mullenix, supra note 2, at S4. Some other high profile cases from this term included: Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2461, 2468-69 (1993) (holding that public schools may provide sign language interpreters for students attending religious schools); Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753, 768 (1993) (holding that federal civil rights legislation may not be used to keep abortion protesters from blockading health clinics); Minnesota v. Dickerson, 113 S. Ct. at 2130, 2138-39 (1993) (holding that a police officer may seize contraband felt through a suspect’s clothing during a routine weapon search).

168. See, e.g., Berry v. Nationwide Mut. Fire Ins. Co., 381 S.E.2d 367, 375-76 (W. Va. 1989) (allowing the plaintiffs to amend their ad damnum clause upward from $200,000 to $500,000 in order to conform with the jury’s punitive damages award of $500,000 without reviewing the punitive damages award for "reasonableness"); Jarvis v. Modern Woodmen of Am., 406 S.E.2d 736, 743 (W. Va. 1991) (upholding a punitive damages award because there was no particular reason not to, noting that this "test" was subjective); Wells v. Smith, 297 S.E.2d 872, 880-81 (W. Va. 1982) (upholding a $10,000 punitive damages award where no compensatory damages were awarded), overruled by Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991).


170. Id. For a list of other cases remanded in light of Haslip, see supra note 160.

171. See Stewart & Piggot, supra note 155, at 699-700; Maskin & Antonucci, supra note 12, at 611-13. See also infra note 178 and accompanying text.

172. Garnes, 413 S.E.2d at 900.

173. Id.

174. Id.

On remand, the West Virginia Supreme Court reversed the punitive damages award, concluding that the trial court's method for determining punitive damages awards violated due process.\textsuperscript{176} The court held that the lack of state judicial and statutory standards and the unrestrictive nature of the trial court's determination of punitive damages was inconsistent with the \textit{Haslip} Court's call for clearer standards.\textsuperscript{177} Thus, the court set forth more concrete standards to aid trial courts in determining punitive damages awards, including: (1) whether the punitive damages are reasonably related to actual damages, (2) the reprehensibility and time involvement of the defendant's conduct, (3) whether the defendant profited from his wrongful conduct, (4) the amount of compensatory damages, (5) the wealth of the defendant, (6) the costs of litigation, and (7) any other civil or criminal sanctions already imposed against the defendant for the same conduct.\textsuperscript{178}

\textit{TXO Production Corp. v. Alliance Resources Corp.} was the first due process challenge to punitive damages since \textit{Games} that the West Virginia Supreme Court reviewed.\textsuperscript{179} The court relied heavily on the \textit{Games} decision in upholding the $10 million punitive damages award, which was 526 times the actual damages.\textsuperscript{180}

III. STATEMENT OF THE CASE

A. Facts of the Case

The case began in 1984, when TXO's geologists discovered that extracting oil and gas from beneath a large tract of land called "Blevins

\textsuperscript{176} \textit{Games}, 413 S.E.2d at 901-02. The court noted that although punitive damages were necessary in some situations to deter defendants from future similar acts, "[u]nchecked punitive damages awards . . . can have effects that are detrimental to society as a whole." \textit{Id.} at 902.

\textsuperscript{177} \textit{Id.} at 905.

\textsuperscript{178} \textit{Id.} at 909-11.


\textsuperscript{180} See \textit{id.} at 877. The court did not employ a strict application of \textit{Games}, reasoning that if they did, too many punitive damages awards would be remanded and judicial efficiency would be sacrificed. \textit{Id.} at 886. However, in light of \textit{Games} and \textit{Haslip}, the court promised an "especially diligent" review of punitive damages awards. \textit{Id.} For a detailed discussion of the court's rationale, see infra note 198 and accompanying text.
"Tract" would be quite profitable for the company.\textsuperscript{181} Therefore, TXO decided that it would work hard to acquire the rights from Alliance in order "to develop the oil and gas resources" on this tract of land.\textsuperscript{182} TXO presented an offer to Alliance whereby, in exchange for these valuable rights, TXO would pay Alliance twenty dollars per acre, twenty-two percent of the revenues in royalties, and TXO would pay all of the development costs.\textsuperscript{183} Alliance accepted this offer, which was contingent upon the outcome of a title examination; if TXO determined that the title had failed, Alliance would have to reimburse TXO for any consideration paid.\textsuperscript{184}

While checking the Blevins Tract chain of title, TXO found a 1958 deed in which Tug Fork, a predecessor in interest to Alliance, conveyed the right to mine coal to another party, Mr. Signaigo, but expressly reserved for itself "all the oil and gas underlying."\textsuperscript{185} In July 1985, knowing that such a claim was frivolous, TXO informed Alliance that its leasehold title to the oil and gas development rights had probably failed due to a cloud on title.\textsuperscript{186} TXO made two attempts to prove this frivolous claim.\textsuperscript{187} First, TXO tried unsuccessfully to convince Mr. Signaigo to sign a pre-printed affidavit, which falsely indicated that oil and gas rights might have been included in the 1958 deed.\textsuperscript{188} Second, TXO paid Virginia Crews, a successor in interest to Mr. Signaigo, to convey whatever interest it had in the land to TXO by executing a quitclaim deed, which TXO recorded without informing Alliance.\textsuperscript{189}

\textsuperscript{182} Id. A company called Tug Fork managed Blevins Tract until 1984, when Tug Fork leased the oil and gas rights to a company called Georgia Fuels, which in turn assigned the lease to Alliance. TXO, 419 S.E.2d 870 (W. Va. 1992) at 875.
\textsuperscript{183} TXO, 113 S. Ct. at 2715. TXO's offer, which Alliance thought to be "phenomenal," was a counter to an original offer presented by Alliance in late 1984, which TXO rejected, despite its more favorable terms. TXO, 419 S.E.2d 870 (W. Va. 1992) at 875. For the terms of this original offer, see id.
\textsuperscript{184} TXO, 113 S. Ct. at 2715. For the relevant text of the agreement between TXO and Alliance, see id. at 2715 n.2.
\textsuperscript{185} Id. at 2715.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 2716; TXO, 419 S.E.2d (W. Va. 1992) at 876. In fact, Mr. Signaigo actually told TXO that the 1958 deed did not include oil and gas rights prior to TXO presenting him with the affidavit. Id. For the pertinent contents of the affidavit, see id. For the pertinent language of the deed, see id. For the full text of the deed, see id. at 890-94, Appendix A.
\textsuperscript{189} TXO, 113 S. Ct. at 2716. At first, TXO tried to convince Virginia Crews that the oil and gas rights were included in the interest that Virginia Crews owned. Id. When this approach failed, TXO decided to purchase any and all rights that Virginia Crews owned, in order to assert the same false claim that the oil and gas rights were included. Id.
On July 12, 1985, after recording the quitclaim deed, TXO informed Alliance that TXO had probably obtained the oil and gas development rights from Virginia Crews by virtue of this deed. In August, TXO and Alliance unsuccessfully attempted to renegotiate the royalty agreement.

B. Procedural History

When the negotiations failed, TXO sought a declaratory judgment, an action that Alliance met with a counterclaim for slander of title. On TXO's claim, the trial court found that the quitclaim deed did not convey the oil and gas rights to TXO. A jury tried Alliance's counterclaim and returned a verdict against TXO for $19,000 in actual damages and $10 million in punitive damages. The court denied TXO's post-trial motions for judgment notwithstanding the verdict and for remittitur.

TXO appealed to the West Virginia Supreme Court on three bases: the first two involved state law issues and the third argued that the punitive damages award violated the Due Process Clause. In response to the third issue, the court applied the "reasonable relationship" test that it espoused in Garnes. This test requires consideration of: '(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future.' In holding that TXO's actions met this test, the court stated that TXO's intentionally fraudulent conduct could potentially cause great harm to others, was extremely reprehensible, and warranted a large punitive award to deter TXO from such conduct in the future. The United States Supreme Court

190. Id. TXO did not inform Alliance of a possible title problem until after recording this deed. Id.
191. Id.
192. Id. The trial court bifurcated the action. TXO, 419 S.E.2d (W. Va. 1992) at 877.
193. TXO, 113 S. Ct. at 2716 & n.8.
194. Id. at 2716-17.
195. Id. at 2717.
196. Id. See also supra notes 176-78 and accompanying text (discussing the Garnes "reasonable relationship" test).
197. Id. at 2718 (quoting TXO, 419 S.E.2d (W. Va. 1992) at 888).
198. Id. (quoting TXO, 419 S.E.2d (W. Va. 1992) at 888-89). In examining punitive damages opinions, the West Virginia Supreme Court split defendants into two main categories: (1) really stupid and (2) really mean. TXO, 419 S.E.2d (W. Va. 1992) at 888-89. In fact, the court set forth a third category as well, but discussion of such is
Court granted review to consider the due process challenges to the punitive damages award.\textsuperscript{199}

IV. \textbf{ANALYSIS OF TXO V. ALLIANCE}

In \textit{TXO}, a majority of the Supreme Court denied TXO's substantive due process challenge, ruling that no mathematical bright line can be drawn between punitive damages awards that adhere to due process and those that violate due process.\textsuperscript{200} This majority, however, was splintered into three separate opinions.\textsuperscript{201} The first and second each advocated what they believed to be the proper analysis for substantive due process limits on punitive damages awards.\textsuperscript{202} The third concluded that punitive damages have no substantive due process limits.\textsuperscript{203} Additionally, a majority of the Court held that even punitive damages awards that are 526 times the corresponding actual damages award may be upheld if the facts warrant the award and if the lower court employs adequate procedures.\textsuperscript{204}

\textsuperscript{199} inapplicable here. \textit{See id.} at 888.

The court explained that punitive damages should be allowed against "really stupid" defendants, those who are extremely careless, so that plaintiffs have "a sword with which to fight well-armored, bureaucratic defendants." \textit{Id.} However, the court believed that the ratio of punitive damages to compensatory damages should be capped at "roughly five to one." \textit{Id.} at 889 (emphasis added). However, for "really mean" defendants, those who act intentionally, the punitive damages ratio need not be so restrictive. \textit{Id.} For example, in this particular "really mean defendant" case, even a punitive damages award 526 times the compensatory damages award was found to be within constitutional boundaries. \textit{Id.} at 889-90.

\textsuperscript{200} This majority included Chief Justice Rehnquist and Justices Blackmun, Kennedy, Scalia, Stevens, and Thomas. \textit{Id.} at 2715, 2720; \textit{id.} at 2724-25 (Kennedy, J., concurring); \textit{id.} at 2726-27 (Scalia, J., concurring).

\textsuperscript{201} \textit{Id.} at 2713. The first was the plurality opinion written by Justice Blackmun, which was joined in by Chief Justice Rehnquist and Justice Stevens. \textit{Id.} The second was Justice Kennedy's concurring opinion. \textit{Id.} at 2724 (Kennedy, J., concurring). The third was Justice Scalia's concurring opinion, which was joined in by Justice Thomas. \textit{Id.} at 2726 (Scalia, J., concurring).


\textsuperscript{203} Justice Scalia, joined by Justice Thomas, concluded that there is no substantive due process right that punitive damages be reasonable. \textit{Id.} at 2726-27 (Scalia, J., concurring).

\textsuperscript{204} This majority included Chief Justice Rehnquist and Justices Blackmun, Kennedy, Scalia, Stevens, and Thomas. \textit{Id.} at 2723; \textit{id.} at 2725-26 (Kennedy, J., concurring); \textit{id.} at 2726-27 (Scalia, J., concurring).
In response to TXO's procedural due process challenge, a majority concluded that West Virginia's procedures for determining and reviewing punitive damages awards were adequate. However, the majority was again split, this time into two groups, each with its own reasoning.

A third group dissented on both the substantive and procedural due process issues, concluding that while there are substantive and procedural due process limitations regarding punitive damages, the award in this case did not fall within those limitations.

A. Plurality Opinion

1. Substantive Due Process

Justice Stevens first examined several past opinions in which a majority of the Court had recognized that the Due Process Clause of the Fourteenth Amendment "imposes substantive limits beyond which penalties may not go." The plurality noted that "plainly arbitrary and oppressive" penalties have been held violative of substantive due process. In response to the respondents' argument, discounting these cases as "Lochner-era precedents," the plurality reasoned that these penalties have been held violative of substantive due process. In response to the respondents' argument, discounting these cases as "Lochner-era precedents," the plurality reasoned that these penalties have been held violative of substantive due process.

205. This was the same majority that denied the substantive due process challenge and consisted of Chief Justice Rehnquist and Justices Blackmun, Kennedy, Scalia, Stevens, and Thomas. Id. at 2722 (1993); id. at 2724-25 (Kennedy, J., concurring); id. at 2725-27 (Scalia, J., concurring).

206. The first group included Chief Justice Rehnquist and Justices Blackmun, Kennedy, and Stevens. Id. at 2722-24; id. at 2725-26 (Kennedy, J., concurring). The second group included Justices Scalia and Thomas. Id. at 2726-27 (Scalia, J., concurring).

207. Id. at 2728 (O'Connor, J., dissenting). Justice White joined in this opinion, and Justice Souter joined in part. Id.

208. Id. at 2718. See, e.g., Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907) (upholding the penalty, but recognizing that "there are limits beyond which penalties may not go . . . "); Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (setting aside the penalty, finding it "arbitrary and oppressive" with regards to due process because the defendant had acted in good faith); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (noting that state penalties may be reviewable if "the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law"). Although some of these penalties were upheld, these cases represent the Court's early recognition that such penalties could and would be overturned if they crossed an undefined constitutional line.

209. See supra note 208 and accompanying text.

210. TXO, 113 S. Ct. at 2718 (citing Respondent's Brief at 17-18, TXO (No. 92-479)). For an historical background on Lochner, see supra note 112.
decisions still had weight given that the *Lochner* dissenters joined in the majority opinions. Thus, the plurality reached its first conclusion: punitive damages do have substantive due process limits.

a. Standard of review

Having decided that there are substantive due process limits on punitive damages, Justice Stevens next discussed the level of scrutiny against which punitive damages awards should be judged. The respondents argued that punitive damages awards should generally be upheld, provided they are rationally related to a legitimate government purpose, such as deterrence and punishment of wrongful conduct. They reasoned that punitive damages are similar to state economic legislation and, thus, are entitled to the same presumption of validity. The petitioner argued that a strict scrutiny test that includes “objective criteria” should be applied in determining whether punitive damages awards presumptively violate the due process notion of “fundamental fairness.” The petitioner reasoned that because punitive damages are assessed without guidance from elected legislators, they warrant stricter scrutiny than other legislative penalties.

Despite the parties’ desire to create a concrete test against which to judge the substantive due process of punitive damages awards, the plurality rejected both parties’ arguments. Justice Stevens reasoned

211. *TXO*, 113 S. Ct. at 2718-19. See also *Lochner* v. New York, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting). Joining in Justice Harlan’s dissent were Justices Holmes, White, and Day. Id. (Harlan, J., dissenting). All of these Justices joined with the majority in all of the cases at supra note 208, except that Justice Harlan died prior to the decision in *Southwestern Tel.*, 238 U.S. at 482. *TXO*, 113 S. Ct. at 2719 n.19.

212. *TXO*, 113 S. Ct. at 2719. Justice Scalia disagreed. Id. at 2726 (Scalia, J., concurring); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991) (Scalia, J., concurring). See also *infra* notes 138-53 and accompanying text (discussing in detail the Haslip decision and that majority’s conclusion that punitive damages have substantive due process limits).


214. Id.

215. Id.

216. Id. The petitioner argued that the Court should consider objective criteria, such as “(1) awards of punitive damages upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards.” Id. (citing Petitioners Brief at 16, *TXO* (No. 92-479)).

217. Id. The petitioner, relying upon *Schad v. Arizona*, 111 S. Ct. 2491, 2500 (1991), argued that “fundamental fairness” requires the use of concrete indicators. Id. (citing Petitioners Brief at 15-16, *TXO* (No. 92-479)).

218. Id. (citing Petitioners Brief at 13-14, *TXO* (No. 92-479)).

219. Id. The outcome angered many commentators who were hoping that the Court
that the respondents' rational basis test was too broad in that it allowed any punitive damages award amount as long as it deterred and punished wrongful conduct.\textsuperscript{220}

In rejecting strict scrutiny as the appropriate standard of review, the plurality reasoned that the petitioner's analogy of jury awards to legislation was not sufficient to warrant this heightened scrutiny.\textsuperscript{221} The plurality also expressed concern about the appropriateness of using the petitioner's suggested objective criteria to assess the substantive due process of punitive damages.\textsuperscript{222} Justice Stevens noted that, historically, such objective criteria have been used to compare jurisdictional definitions of first degree murder\textsuperscript{223} and punishments for nonviolent repeat offenders.\textsuperscript{224} However, because punitive damages awards are often the result of intangible factors and can be so different from one another, the plurality decided that such comparisons would not be practical when assessing punitive damages.\textsuperscript{225} Furthermore, the plurality reasoned that, with sufficient procedural safeguards,\textsuperscript{226} there is a dimin-

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Id. at 2720. The plurality was not "persuaded that reliance on petitioner's 'objective' criteria is the proper course to follow." Id.

\textsuperscript{223} Id. See Schad v. Arizona, 111 S. Ct. 2491, 2501-03 (comparing one state's definition of first degree murder to traditional definitions in determining whether that definition violated due process).


\textsuperscript{225} TXO, 113 S. Ct. at 2720. The plurality noted that punitive damages awards involve many factors that may be quite different from case to case. Id. "[A] jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." Id. This seems inconsistent with Haslip, where the Court justified their conclusion that the award did not violate due process by stating that, "[w]hile the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria." See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

\textsuperscript{226} Sufficient procedural safeguards include fair procedures, such as proper jury instructions, trial court review, and appellate court review. TXO, 113 S. Ct. at 2720. See also Haslip, 499 U.S. at 18-23.
ished need for any substantive due process review. Thus, a heightened level of scrutiny is simply unnecessary in most cases.

Ultimately, the plurality followed the Court's holding in Haslip that, rather than drawing a mathematical bright line, which would be a very difficult feat, courts should use a general test of reasonableness to assess the substantive due process of punitive damages.

b. Application of reasonableness standard

i. Reasonableness factors

The petitioner argued that the court should have held the punitive damages award to be "grossly excessive" and violative of substantive due process because the award was 526 times the actual damages award. The plurality recognized the importance of the numerical proportionality between the compensatory damages award and the punitive damages award. However, they refused to view this factor as controlling. Looking to the West Virginia Supreme Court's decision in Garnes, relied upon by the state supreme court in TXO, Justice Stevens held that the reasonableness inquiry also involved other factors, including "the magnitude of the potential harm that the defendant's conduct would have caused to its victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." Justice Stevens noted that this reasonableness inquiry is consistent with Haslip.

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227. TXO, 113 S. Ct. at 2720.
228. Id. In fact, according to Justice Scalia, if courts use fair procedures in the assessment of a punitive damages award, then the award, no matter what its size, is valid on due process grounds. Id. at 2726 (Scalia, J., concurring). See also Haslip, 499 U.S. at 24 (Scalia, J., concurring).
229. TXO, 113 S. Ct. at 2720. In fact, the plurality reiterated the Court's statement in Haslip that "[a] general concern[n] of reasonableness . . . properly enter[s] into the constitutional calculus." Id. (quoting Haslip, 499 U.S. at 18) (alterations in original).
230. Id. at 2721.
231. Id. Justice Stevens acknowledged the Haslip Court's concern that a punitive damages award four times the compensatory damages was a close call. Id. (citing Haslip, 499 U.S. at 23). He further recognized that the West Virginia Supreme Court, in Garnes, relied upon this statement in Haslip in requiring punitive damages to "bear a reasonable relationship to compensatory damages." Id. (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991)).
232. Id. The plurality noted that the relationship between punitive and compensatory damages "was only one of several factors that the State Court mentioned in its Garnes opinion." Id.
233. Id. at 2722.
234. Id. at 2721. In Haslip, the Court upheld Alabama's standards for testing the validity of punitive damages awards, which included the following factor to be considered: "whether there is a reasonable relationship between the punitive damages
ii. Application of factors to the present case

The plurality based its conclusion that the large punitive damages award assessed against TXO did not violate substantive due process upon an analysis of the above factors and the record evidence in this case. The plurality recognized that the amount of Alliance's potential royalties was quite large, possibly even several million dollars. The plurality reasoned that this large potential harm justified the huge disparity between the actual damages and the punitive damages award. Furthermore, the plurality concluded that the bad faith of the petitioner and the fact that this conduct was "part of a larger pattern of fraud, trickery and deceit" justified the $10 million punitive damages award. Thus, the petitioner's substantive due process challenge failed.

2. Procedural Due Process

The petitioner sought a reversal of the punitive damages award based on the following procedural due process arguments: (1) inadequate jury instruction, (2) inadequate trial and appellate court review, and (3) "unconstitutionally vague" procedures. The plurality did not even consider the first argument, concerning the adequacy of the jury instruction, because this issue was not raised at the state supreme court level.

award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." Haslip, 499 U.S. at 21. For a complete list of the factors used by Alabama, see id. at 21-22; supra note 150.

235. TXO, 113 S. Ct. at 2722.

236. Id. The respondents argued that the potential harm was between five and eight million dollars. Id. Justice Stevens acknowledged the possibility that this number might be exaggerated. Id. However, he was persuaded that the potential harm was substantial enough to justify the large punitive damages award on substantive due process grounds. Id.

237. Id. The plurality was persuaded by the respondent's argument that TXO only acted as it did because it had a huge profit potential, which also would have translated into a huge loss potential for Alliance. Id. (citing Appendix to Respondents Brief at 23a, TXO (No. 92-479)).

238. Id. at 2722-23.

239. Id. at 2723.

240. Id. at 2723-24. The plurality explained that the punitive damages jury instruction departed from the approved Haslip instruction in that it allowed the jury to consider the wealth of the defendant and to use punitive damages to provide additional compensation to the plaintiff. Id. at 2723. For the text of the TXO jury instruc-
a. Lower courts' review

i. Trial court

The petitioner argued that the trial court judge's refusal to articulate his reasons for denying the motions for judgment notwithstanding the verdict and remittitur constituted a procedural due process violation. The plurality disagreed, reasoning that although an explanation from a trial judge is "helpful," the mere opportunity to be heard on these motions fulfilled any procedural due process obligations.

ii. Appellate court

With respect to the West Virginia Supreme Court, the petitioner argued that Justice Neely's "really mean" and "really stupid" categories of defendants were inappropriate and violative of procedural due process. The plurality again disagreed, reasoning that these terms had little to do with the court's opinion, an opinion the plurality believed was well reasoned with "careful attention" to important case law from both Haslip and Garnes. This satisfied the plurality that the state supreme court's review met procedural due process requirements.
b. Vagueness argument

Finally, the petitioner argued that the procedure followed in awarding the punitive damages was unconstitutionally vague because the petitioner did not have notice of the possibility that punitive damages would not be linked to compensatory damages.246 The plurality, however, rejected this argument outright, reasoning that the petitioner was put on notice of this possibility by the *Wells v. Smith* case, in which the West Virginia Supreme Court held that punitive damages could be awarded even in cases where no compensatory damages were awarded.246

B. Justice Kennedy's Concurring Opinion

Justice Kennedy concurred with the plurality's holding that the punitive damages award violated neither substantive nor procedural due process.247 Additionally, Justice Kennedy agreed with the plurality's reasoning regarding procedural due process.248 However, Justice Kennedy disagreed with the plurality's reasoning regarding substantive due process, and therefore, he wrote separately to articulate his own reasoning.249

1. Standard of Review

a. Rejection of reasonableness test

Although Justice Kennedy did not agree with either of the parties' suggested standards,250 he also disagreed with the plurality's reasonableness test.251 Justice Kennedy criticized the reasonableness test as

245. Id.
246. Id. (citing *Wells v. Smith*, 297 S.E.2d 872, 880 (W. Va. 1982)). "[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." Id. (citing *Haslip*, 499 U.S. at 24). It is important to note that in *Garnes*, the West Virginia Supreme Court overturned *Wells* insofar as it allowed punitive damages without any compensatory damages. *Garnes*, 413 S.E.2d at 908.
247. *TXO*, 113 S. Ct. at 2724 (Kennedy, J., concurring).
248. Id. (Kennedy, J., concurring).
249. Id. (Kennedy, J., concurring). Justice Kennedy also wrote separately in *Haslip* for quite similar reasons. See *Haslip*, 499 U.S. at 40 (Kennedy, J., concurring).
250. See supra notes 214-18 and accompanying text (summarizing the parties' arguments).
251. *TXO*, 113 S. Ct. at 2724 (Kennedy, J., concurring). See supra notes 229-34 and accompanying text (discussing and analyzing the plurality's reasonableness test).
vague and "unhelpful."\textsuperscript{252} He believed that the inherent subjectivity and uncertainty of the reasonableness standard diminished its value as a workable test.\textsuperscript{253}

b. Justice Kennedy's suggested test

Justice Kennedy preferred to focus on the jury's reasons for awarding the large award, rather than the reasonableness of the monetary amount.\textsuperscript{254} He reasoned that instead of contemplating appropriate dollar amounts for punitive damages awards, the Constitution protects citizens against arbitrary deprivation of property.\textsuperscript{256} Thus, Justice Kennedy believed that the proper inquiry was whether the jury based its punitive damages award upon the "the rational concern for deterrence and retribution" rather than on "bias, passion or prejudice," and the size of the award is just one factor to be considered in this determination.\textsuperscript{255}

Furthermore, Justice Kennedy believed that since juries may consider only the evidence presented to them at trial,\textsuperscript{257} the best way to determine whether a jury's verdict comports with due process is to determine whether a reasonable jury could arrive at such a figure based on the record.\textsuperscript{258} Thus, if the record indicates that a reasonable jury could

\textsuperscript{252} Id. at 2725 (Kennedy, J., concurring). Justice Kennedy strongly believed that the reasonableness test was simply inadequate. \textit{Id.} (Kennedy, J., concurring).

\textquote{We are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution.}

\textit{Id.} (Kennedy, J., concurring).

\textsuperscript{253} Id. (Kennedy, J., concurring). \textit{See also supra} note 252 and accompanying text.

\textsuperscript{254} Id. (Kennedy, J., concurring). "[A] more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on the reasons for doing so." \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{255} Id. (Kennedy, J., concurring). "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions." \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{256} Id. (Kennedy, J., concurring). Justice Kennedy criticized both the plurality and the dissenters for relying too heavily on the size of the punitive damages award in deciding whether the award violates the Constitution.

\textsuperscript{257} Id. (Kennedy, J., concurring). Justice Kennedy explained that juries are "bound to consider only the evidence presented." \textit{Id.} (Kennedy, J., concurring). On the other hand, legislatures may base their judgments on "educated guesses." \textit{Id.} (Kennedy, J., concurring) (citing Heller v. Doe, 113 S. Ct. 2637, 2643 (1993); Vance v. Bradley, 440 U.S. 93, 111 (1979)).

\textsuperscript{258} Id. at 2725 (Kennedy, J., concurring).
render a similar punitive damages award, Justice Kennedy would, in the face of a substantive due process challenge, uphold the award as a likely product of the legitimate concerns of deterrence and retribution.  

2. Application of Justice Kennedy's Analysis

Justice Kennedy criticized the plurality for upholding the award on the basis of the relationship between the award size and the potential harm because the record lacked evidence regarding potential harm. Thus, Kennedy delved further into the record to search for a legitimate justification for the jury's large punitive damages award. He found one in TXO's malicious conduct. Justice Kennedy reasoned that since TXO committed an intentional tort and there was "ample evidence of wilful and malicious conduct by TXO," the jury's large punitive damages award stood up to a substantive due process challenge.

C. Justice Scalia's Concurring Opinion

Justice Scalia, joined by Justice Thomas, concurred with the plurality's decision that the punitive damages award violated neither substantive nor procedural due process. Like Justice Kennedy, Just-

259. Id. (Kennedy, J., concurring).
260. Id. (Kennedy, J., concurring). Justice Kennedy noted that "the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct and so would not have permitted a reasonable jury to render its verdict on this basis." Id. (Kennedy, J., concurring). In her dissenting opinion, Justice O'Connor asserted the same criticism of the plurality. Id. at 2794-96 (O'Connor, J., dissenting). See also infra notes 309-16 and accompanying text.
261. Id. at 2725 (Kennedy, J., concurring).
262. Id. at 2726 (Kennedy, J., concurring).
263. Id. (Kennedy, J., concurring). Justice Kennedy observed that "[t]his was not a case of negligence, strict liability, or respondeat superior. TXO was found to have committed . . . the intentional tort of slander of title." Id. (Kennedy, J., concurring). Kennedy admitted to "feeling a certain degree of disquiet in affirming [the] award," but he did so because he believed that, given the record, the jury based its determination on legitimate concerns. Id. (Kennedy, J., concurring).
264. Id. at 2726 (Scalia, J., concurring). It is interesting to note that in Haslip, Justice Marshall joined in the majority, while his replacement, Justice Thomas, did not join in the TXO plurality. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 3 (1991); TXO, 113 S. Ct. at 2726 (Scalia, J., concurring). For a detailed discussion of how changes in the court since Haslip have impacted the punitive damages issue, see supra notes 347-50.
Justice Scalia disagreed with the plurality's reasoning regarding substantive due process. However, unlike Kennedy, Justice Scalia believed that the size of a punitive damages award fails to raise a substantive due process issue. Additionally, Justice Scalia disagreed with the plurality's reasoning regarding procedural due process, concluding that the plurality's analysis in depth was unnecessary.

1. Substantive Due Process

Justice Scalia recognized the principle of substantive due process and its protection of rights enumerated in the Bill of Rights. However, he explained that such branch of due process stops there and does not encompass other rights, such as economic rights. Thus, Scalia found it "particularly difficult to imagine that 'due process' contain[ed] the substantive right not to be subjected to excessive punitive damages." Scalia reasoned that if this were true, the same would follow for excessive fines, and the Excessive Fines Clause of the Eighth Amendment would never have been necessary.

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265. TXO, 113 S. Ct. at 2727 (Scalia, J., concurring). Justice Scalia wrote a separate opinion in Haslip for similar reasons. See Haslip, 499 U.S. at 24 (Scalia, J., concurring).

266. TXO, 113 S. Ct. at 2726 (Scalia, J., concurring).

267. Id. at 2726-27 (Scalia, J., concurring). See also U.S. CONST. amends. I-X, XIV.

268. TXO, 113 S. Ct. at 2727. Justice Scalia has a reputation for limiting the substantive branch of due process to rights expressly provided for in the Constitution. Jeffrey W. Stempel, The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy, 22 U. Tol. L. Rev. 583, 605 (1991) (calling Justice Scalia a "rigid textualist" in his approach to statutory construction); Blanche Duett, First Amendment Freedom of Association: Destruction by the Supreme Court's New Stare Decisis Doctrine?, 33 S. Tex. L.J. 617, 637 (1992) (describing Justice Scalia as a "strict constructionist"). Other Justices have held that there are implied rights, such as the right to family, marriage, and procreation, which are also protected by substantive due process. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 502-04 (1977) (holding that a person's decision regarding family is a fundamental right under substantive due process); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the fundamental right of privacy affords substantive due process protection to a person choosing to use contraceptives). However, most Justices decline to extend substantive due process protection to mere economic regulations. See, e.g., U.S. v. Carolene Prods. Co., 304 U.S. 144, 147 (1938) (holding that mere economic regulations have no substantive due process rights as long as the regulation is rationally related to the health, safety, and welfare of the state); LOCKHART ET AL., CONSTITUTIONAL LAW—CASES, COMMENTS, QUESTIONS 449 (6th ed. 1985) (noting that the Court has not struck down an economic regulation on substantive due process grounds since 1937).

269. TXO, 113 S. Ct. at 2727 (Scalia, J., concurring).

270. Id. (Scalia, J., concurring).
Justice Scalia further explained that while "procedural due process requires judicial review of punitive damages awards for reasonableness," this does not include a substantive due process right to a "reasonable" award. He reasoned that the same is true for compensatory damages awards.

2. Procedural Due Process

Justice Scalia believed that punitive damages awards comport with procedural due process requirements when the trial court explains the purpose of punitive damages to the jury and the award is reviewed for reasonableness. Since the award against TXO involved both of these procedural protections, Justice Scalia concluded that it did not violate procedural due process.

Justice Scalia, despite his disagreement with the plurality's reasoning, believes that the decision constituted a necessary step toward creating standards for due process review of punitive damages. Scalia ex-
plained that the plurality more closely followed traditional procedural requirements by allowing larger punitive damages awards than in Haslip. Justice Scalia would have gone “one step further” than the plurality by “shut[ting] the door [that] the Court [left] slightly ajar” by dismissing the idea of substantive due process rights regarding the size of punitive damages awards, but he was pleased to find out just how far the plurality’s “constitutional sensibilities” would bend without being “jarred.”

D. Justice O’Connor’s Dissenting Opinion

Justice O’Connor, joined by Justices White and Souter, disagreed with the majority’s affirmance of the punitive damages award. O’Connor would have struck down the award on both substantive and procedural due process grounds. Justice O’Connor expressed her remorse that the Court’s holding rendered false the Haslip Court’s “promise” that “punitive damages awards would receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system.” Justice O’Connor expressed her concern about “skyrocketing” punitive damages awards, not accompanied by “a corresponding expansion of procedural protections.”

Justice O’Connor began her opinion with a rather lengthy discussion of the history and ideas behind the American jury system. O’Connor

276. TXO, 113 S. Ct. at 2727 (Scalia, J., concurring). For example, while the Haslip Court called a punitive damages award four times the compensatory damages award “close to the line,” Haslip, 499 U.S. at 24, the TXO plurality affirmed a punitive damages award of over 500 times the compensatory damages award with no reference to “the line” at all. TXO, 113 S. Ct. at 2718-20. Furthermore, the plurality in this case was much more lenient on the procedural requirements than the Haslip Court. Id. at 2720-22; Haslip, 499 U.S. at 16.

277. TXO, 113 S. Ct. at 2727-28 (Scalia, J., concurring). Justice Scalia thinks that by recognizing a punitive damages substantive due process right, the plurality is “spawning wasteful litigation.” Id. at 2728 (Scalia, J., concurring). “The Constitution gives federal courts no business in this area, except to assure that due process (i.e. traditional procedure) has been observed.” Id. (Scalia, J., concurring).

278. Id. at 2728 (O’Connor, J., dissenting). Justice Souter only joined in the opinion as to parts II-B-2, II-C, III, and IV. Id. (O’Connor, J., dissenting). It is interesting to note that in Haslip, Justice Souter had no part in the decision, and Justice White joined with the majority. See Haslip, 499 U.S. at 2, 24.

279. TXO, 113 S. Ct. at 2728 (O’Connor, J., dissenting).

280. Id. (O’Connor, J., dissenting). Justice O’Connor would have reversed the award because she found it inconsistent with Haslip. Id. (O’Connor, J., dissenting).

281. Id. at 2728, 2742 (O’Connor, J., dissenting). Justice O’Connor’s loyalty to Haslip and its promise are remarkable considering that she was the sole dissenter in that case. See Haslip, 499 U.S. at 42 (O’Connor, J., dissenting).

282. TXO, 113 S. Ct. at 2742 (O’Connor, J., dissenting).

283. Id. at 2728-31 (O’Connor, J., dissenting).
acknowledged that the jury system is founded on principles of fairness and usually works very well, especially in conjunction with procedural protections such as the rules of evidence, jury instructions, and appellate review. However, she also recognized that jurors are not infallible and sometimes the system falters, allowing the negative influences of bias, passion, and prejudice to enter into the fact finding process and invalidate the verdict on procedural due process grounds.

Justice O'Connor noted that while the risk of such influences affecting the verdict is present in all cases to some extent, the risk is especially substantial in the area of punitive damages, where jurors are often given only cursory guidance. O'Connor reasoned that vague instructions increase this risk because when people are "[d]eprived of any fixed landmarks and guideposts . . . [they] can be distracted . . . to the point where [their] best guess is far from reliable." Justice O'Connor recognized that it is often very difficult, if not impossible, to ascertain the precise bases of the jury's verdict; however, she maintained that such influences must be discovered by inference if necessary. Furthermore, O'Connor noted that, traditionally, disproportionate and/or excessive jury verdicts have commanded such an inference, resulting in a retrial.

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284. Id. at 2728-29 (O'Connor, J., dissenting). Justice O'Connor made reference to the Sixth and Seventh Amendments of the U.S. Constitution, which set the foundation for the jury system. See U.S. Const. amend. VI, VII. Furthermore, Justice O'Connor observed that "the jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." TXO, 113 S. Ct. at 2728 (O'Connor, J., dissenting). See U.S. Const. amends. VI, VII. Furthermore, Justice O'Connor observed that "the jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." TXO, 113 S. Ct. at 2728-29 (O'Connor, J., dissenting).

285. Id. at 2729 (O'Connor, J., dissenting).

286. Id. at 2729 (O'Connor, J., dissenting).

287. Id. (O'Connor, J., dissenting) (quoting WALTER OLSON, THE LITIGATION EXPLOSION 175 (1991)). Based on the language in her opinion, it does not appear that Justice O'Connor was belittling jurors or insulting the intelligence of lay people. For example, Justice O'Connor expressed her belief that "[l]ike everyone else in the court system, juries need and deserve objective rules for decision," and that "any of us can be distracted . . . to the point where our best guess is far from reliable" if we are "deprived of any fixed landmarks and guideposts." Id. (O'Connor, J., dissenting) (emphasis added) (quoting WALTER OLSON, THE LITIGATION EXPLOSION 175 (1991)). However, Justice O'Connor did recognize that jurors may be more susceptible to such "distractions" because "the layman jury cannot be so quickly domesticated to official role and tradition." Id. (O'Connor, J., dissenting) (quoting HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 497-98 (1966)).

288. Id. (O'Connor, J., dissenting).

289. Id. at 2729-30 (O'Connor, J., dissenting). In a footnote, Justice O'Connor pointed out several English common law cases in which the court remanded the case for
Justice O'Connor also believed that since punitive damages are a form of punishment, the principle of proportionality between the punishment and the offense becomes relevant. She pointed to several cases throughout history that have applied this principle to punitive damages, requiring that punitive damages awards "bear a reasonable relationship to the actual harm imposed."

1. Substantive Due Process
   a. Standard of review

   Justice O'Connor criticized the plurality's reasonableness standard for appearing to be a test, when in reality it provided no guidance to other courts at all. O'Connor agreed with the plurality that it was impractical, if not impossible, to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." However, she did not see this as a valid excuse for failing to set forth clear standards. Furthermore, Justice O'Connor believed

retrial because, based upon the large size of the damages award, the court inferred that the jury was probably influenced by improper motives. See id. at 2730 n.1 (O'Connor, J., dissenting) (citing, e.g., Hewlett v. Cruchley, 128 Eng. Rep. 696, 698 (C.P. 1813) (holding that clearly excessive verdicts will be sent to another jury for retrial); Fabrigas v. Mostyn, 96 Eng. Rep. 549 (K.B. 1774) (holding that large awards may be "so monstrous and excessive, as to be . . . evidence of [jury] . . . passion or partiality"). In another footnote, O'Connor presented a list of early and modern American cases that reached similar results. See id. at 2730 n.2 (O'Connor, J., dissenting) (citing, e.g., Pleasants v. Heard, 15 Ark. 403, 406 (1855) (mandating reversal of a verdict where its size "shocks our sense of justice"); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 94 (1991) (Kennedy, J., concurring) (noting that "the extreme amount of an award . . . can be some evidence of bias or prejudice in an appropriate case").


291. Id. at 2731 & n.3 (O'Connor, J., dissenting). The cases that Justice O'Connor used to support this contention are the very same cases used by the plurality to support their finding that punitive damages have substantive due process limitations. See supra note 208 and accompanying text. See also, e.g., Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (holding that awards that are "plainly arbitrary and oppressive" violate due process); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (holding that "grossly excessive" awards violate due process).

292. TXO, 113 S. Ct. at 2731 (O'Connor, J., dissenting). Justice O'Connor observed that the plurality "reject[ed] both petitioner's and respondents' proffered approaches, [and] instead select[ed] a seemingly moderate course . . . . But the course the plurality chooses is, in fact, no course at all." Id. (O'Connor, J., dissenting).

293. Id. at 2732 (O'Connor, J., dissenting) (quoting Haslip, 499 U.S. at 18).

294. Id. (O'Connor, J., dissenting). In fact, Justice O'Connor believed that the lack of a "mathematical bright line" actually created a greater obligation to provide guide-
that these standards should be objective, so as to avoid purely subjective decisions based on personal preferences.\footnote{296}

O'Connor suggested some possible standards that she found to be especially probative in this case.\footnote{296} First, O'Connor believed that careful judicial review is very important where, as here, the relationship between punitive and compensatory damages is disproportionate.\footnote{297} This 526-fold discrepancy should at least "raise a suspicious judicial eyebrow," especially in light of the Court's statement in Haslip that a punitive damages award four times the actual damages was "close to the line."\footnote{298} Secondly, Justice O'Connor saw the need for a comparison of this punitive damages award to others upheld against other defendants in West Virginia,\footnote{299} and she noted that this award was twenty times greater than the largest punitive damages award ever handed down in West Virginia.\footnote{300} Third, Justice O'Connor called for a comparison of this punitive damages award to others upheld for similar torts in all jurisdictions.\footnote{301} O'Connor's research revealed that this punitive damag-
es award was ten times larger than the largest award for slander of title in any jurisdiction. Finally, Justice O'Connor prescribed a comparison between the punitive damages award and legislative penalties for similar conduct, and she discovered that this award was several times larger than both civil and criminal penalties for similar offenses.

Although Justice O'Connor warned about the limitations of this “objective criteria” approach since all cases are different, O'Connor believed that objective criteria are essential to substantive due process determinations regarding punitive damages and that the Court should have employed this particular set of criteria. Pointing to these objective criteria and their application to the punitive damages award assessed against TXO, Justice O'Connor would have concluded that this award was "grossly out of proportion to the severity of the offense" and bears no "understandable relationship to compensatory damages."

b. Criticism of the plurality's potential harm approach

Justice O'Connor recognized that basing punitive damages awards on potential harm has its merits in serving the state's interests in deterrence and retribution. However, O'Connor believed that because there was very little evidence on the record regarding potential harm and the jury instruction regarding punitive damages made no mention of potential harm, the jury could not have relied on such evidence.

302. Id. at 2733 (O'Connor, J., dissenting) (citing Petitioners Brief at 5a-8a, TXO (No. 92-479) (Appendix)).
303. Id. at 2732 (O'Connor, J., dissenting).
304. Id. at 2733 (O'Connor, J., dissenting) (citing Petitioners Brief at 19 nn. 17-18, TXO (No. 92-479) (Appendix)).
305. See supra notes 292-304 and accompanying text.
306. TXO, 113 S. Ct. at 2733 (O'Connor, J., dissenting).
307. Id. (O'Connor, J., dissenting) (quoting Hastlip, 499 U.S. at 18, 22).
308. Id. at 2734 (O'Connor, J., dissenting). Furthermore, courts traditionally linked punitive damages to potential harm. Id. (O'Connor, J., dissenting) (citing Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1765)).
309. Id. at 2734-36 (O'Connor, J., dissenting). Justice O'Connor discussed the record evidence in detail. Id. (O'Connor, J., dissenting). O'Connor observed that no one, not a single expert or lay witness, testified or presented the jury with evidence regarding potential harm. Id. at 2734 (O'Connor, J., dissenting). Also, none of the respondents' attorneys argued at trial that punitive damages should be linked with potential harm. Id. at 2736 (O'Connor, J., dissenting). Furthermore, she observed that the respondents did not present their multi-million dollar estimate of potential harm until they were before the United States Supreme Court. Id. (O'Connor, J., dissenting).
310. Id. at 2735 (O'Connor, J., dissenting). The jury was instructed to consider "the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party
and, thus, the plurality should not have relied on it as a justification for that same jury's verdict.311

Justice O'Connor suspected that, given the vast amount of record evidence regarding TXO's wealth and out-of-state status312 and the fact that the punitive damages jury instruction permitted consideration of such evidence,313 the jury likely relied upon this, rather than potential harm, in assessing punitive damages.314 Justice O'Connor noted that jurors have traditionally disfavored large corporations and, thus, have been willing to award large sums of money against them.315 She also

committing the act, the wealth of the perpetrator, as well as any mitigating circumstances," but not the potential harm resulting from the perpetrator's conduct had it been successful. Id. (O'Connor, J., dissenting) (citing id. at 2723 n.29 (plurality opinion)). O'Connor recognized that the jury may have relied upon potential harm even though it was not instructed to do so, but she maintained that this possibility was mere speculation and should not be relied upon in this case. Id. (O'Connor, J., dissenting).

311. Id. (O'Connor, J., dissenting). Justice O'Connor characterized the respondents' potential harm argument as a mere "after-the-fact rationalization." Id. at 2736 (O'Connor, J., dissenting).

312. Id. at 2736-39 (O'Connor, J., dissenting). Once again, Justice O'Connor took a long walk through the trial record, this time pointing out an enormous amount of evidence concerning the wealth and out of state status of TXO. Id. (O'Connor, J., dissenting). O'Connor observed that the respondents' estimate of TXO's total resources, which amounted to two billion dollars, was repeatedly presented to the jury, as well as the fact that TXO was not from West Virginia, but rather from Texas. Id. at 2738 (O'Connor, J., dissenting). Furthermore, she noted that the respondents' attorneys repeatedly reminded the jury of these two points during closing arguments. Id. at 2738-39 (O'Connor, J., dissenting).

313. Id. at 2736-37 (O'Connor, J., dissenting). Justice O'Connor noted that the jury instruction allowed the jury to consider the defendant's wealth and to award punitive damages as "additional compensation" if necessary. Id. (O'Connor, J., dissenting). O'Connor expressed concern that this instruction invited the jury to assess a large punitive damages award. It is important to note that, unlike the jury instruction in this case, the instruction that the Court approved in Haslip did not contain the two factors mentioned above. However, the Haslip Court did rule that the defendant's "financial position" could be considered by the jury in assessing punitive damages. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991).

314. TXO, 113 S. Ct. at 2736-37 (O'Connor, J., dissenting). Once again, there is a possibility that the jury did not obey the instruction. However, as Justice O'Connor mentioned in her discussion of potential harm, this possibility is highly speculative and, thus, immaterial. See supra notes 309-11 and accompanying text.

315. TXO, 113 S. Ct. at 2737-38 (O'Connor, J., dissenting). Justice O'Connor noted that "[c]ourts long have recognized that jurors may view large corporations with disfavor." Id. at 2737 (O'Connor, J., dissenting) (citing, e.g., Illinois Central R.R. v. Welch, 52 Ill. 183, 188 (1869)).
noted that the three largest punitive damages awards ever upheld in West Virginia were against out-of-state defendants.\(^{316}\)

Justice O'Connor recognized that jury consideration of the defendant's wealth when determining punitive damages awards has its merits, but she warned that when the jury is flooded with evidence of such wealth, a grave danger of jury bias and undue influence arises.\(^{317}\) Because Justice O'Connor believed that this jury's determination of punitive damages was unduly influenced by the defendant's great wealth, she concluded that the award should not be upheld.\(^{318}\)

2. Procedural Due Process

Justice O'Connor also concluded that the punitive damages award violated procedural due process because the review by both the trial court and the West Virginia Supreme Court was inadequate in providing the "meaningful constraint" on jury discretion required by Haslip.\(^{319}\) The Court in Haslip upheld the award in that case partially because the trial court was required to go on record as to its reasons for interfering or not interfering with a jury verdict.\(^{320}\) Justice O'Connor distinguished this case because the trial court was not required to and did not make any such findings.\(^{321}\)

Furthermore, Justice O'Connor believed that the state supreme court's review was too "cursory" to pass constitutional muster.\(^{322}\) The supreme court first refused to consider a remittitur motion because the petitioners "failed to conduct themselves as gentlemen"\(^{323}\) and then refused to strike the punitive damages award as excessive simply because the petitioner was "really mean."\(^{324}\) Justice O'Connor maintained that

\(^{316}\) Id. at 2738. These three punitive damages cases are: TXO, 419 S.E.2d (W. Va. 1992) at 870 (affirming a $10 million punitive damages award); Jarvis v. Modern Woodmen of Am., 406 S.E.2d 736 (W. Va. 1991) (affirming a $500,000 punitive damages award); Berry v. Nationwide Mut. Fire Ins. Co., 381 S.E.2d 367, 377 (W. Va. 1989) (affirming a $500,000 punitive damages award).

\(^{317}\) TXO, 113 S. Ct. at 2737-38 (O'Connor, J., dissenting). The Haslip majority called for jury consideration of the defendant's wealth. Haslip, 499 U.S. at 21. But see Morris, supra note 49, at 1191 ("[R]ich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurors may be more interested in divesting vested interests than in attempting to fix [appropriate] penalties.").

\(^{318}\) TXO, 113 S. Ct. at 2739 (O'Connor, J., dissenting).

\(^{319}\) Id. at 2740 (O'Connor, J., dissenting).

\(^{320}\) Id. (O'Connor, J., dissenting) (citing Haslip, 499 U.S. at 20).

\(^{321}\) Id. (O'Connor, J., dissenting).

\(^{322}\) Id. at 2740-41 (O'Connor, J., dissenting).

\(^{323}\) Id. at 2741 (O'Connor, J., dissenting) (quoting TXO, 419 S.E.2d (W. Va. 1992) at 887-89).

\(^{324}\) Id. (O'Connor, J., dissenting) (citing TXO, 419 S.E.2d (W. Va. 1992) at 889).
while the state supreme court articulated the proper rule of law, the
court had not adequately applied the rule and, thus, their review violat-
ed procedural due process.325

V. IMPACT OF TXO V. ALLIANCE

The TXO decision did more than simply reiterate the soft due process
standards regarding punitive damages that the Court first articulated in
Haslip.326 TXO is significant for several reasons. First, it is only the
second due process punitive damages case to be decided by the United
States Supreme Court.327 Second, instead of clarifying the standards
set forth in Haslip, the TXO Court actually created more confusion.328

Justice O'Connor called the state supreme court's "really mean" terminology "a carica-
ture of the difficult task of determining whether an award may be upheld consistent
with due process." Id. (O'Connor, J., dissenting). Furthermore, O'Connor maintained
that malicious conduct alone was simply not enough to support the due process
validity of such a large punitive damages award. Id. (O'Connor, J., dissenting). Justice
O'Connor was surprised by the West Virginia Supreme Court's cursory review of
TXO's punitive damages in light of that court's thorough review in Games. Id.
(O'Connor, J., dissenting) (citing Games v Fleming Landfill, Inc., 413 S.E.2d 897, 909-
10).

325. Id. at 2742 (O'Connor, J., dissenting). "We . . . rely primarily on state courts to
fulfill the constitutional role as primary guarantors of federal rights. But, the state
courts must do more than recite the constitutional rule. They also must apply it." Id.
at 2741-42.

Ct. at 2730. See also Newman & Ahmuty, supra note 275, at 3.

327. Haslip was the first Supreme Court case to consider the due process of puniti-
tive damages. Haslip, 499 U.S. at 1. See also supra notes 138-53 (discussing Haslip
in detail). Because TXO was only the Supreme Court's second reply to a due process
challenge to punitive damages and because this reply was only two years after the
only other opinion regarding this issue, many commentators expected the Supreme
Court to clarify the law in this area by setting forth a multi-part test or specific stan-
dards. See infra note 373 (discussing expectations in anticipation of the Court's deci-
sion in TXO).

328. Haslip and TXO adopted similar "reasonableness" standards. Haslip, 499 U.S.
at 18; TXO, 113 S. Ct. at 2719-20. However, in Haslip, the Court almost unanimously
upheld this standard, while in TXO, not even a majority could agree on this standard.
Haslip, 499 U.S. at 2 (the majority included Chief Justice Rehnqust and Justices
Blackmun, Marshall, Stevens, and White); TXO, 113 S. Ct. at 2714 (the plurality opin-
ion was joined in by Chief Justice Rehnquist and Justices Blackmun and Stevens).

The uncertainty created by TXO as to the due process standards for punitive
damages may generate even more inconsistent lower court opinions than there were
after Haslip. For a discussion of such inconsistencies in light of Haslip, see supra
Finally, TXO referred to the vague "line of constitutional impropriety" for punitive damages that was set forth in Haslip without ever expounding upon where that line lies. The following analysis will examine these and other probable implications and impacts of TXO.

A. Judicial Impact

1. Impact on the Haslip Holding

Pacific Mutual Life Insurance Co. v. Haslip, decided only two years before the TXO case, was the Court's first pronouncement on the due process implications of punitive damages. In Haslip, the Court held that there are due process limitations on punitive damages and implied that a punitive damages award four times the actual damages award was "close to the line of constitutional impropriety." Formally, Haslip left "the line" undefined; however, the Court's "four-to-one" statement provided a small hint as to how the Court might define that line in the future.

Unfortunately, the Court's decision in TXO did not define "the line" referred to in Haslip. In fact, the Court retreated from the guidance it provided in Haslip. In TXO, the Court upheld a punitive damages award 526 times the actual damages award. Now the definition of "the line" is even more obscure and tentative than before.

notes 154-67 and accompanying text.

329. Supreme Court Proceedings, supra note 5. "The problem in the wake of the Court's splintered decision [in TXO] is not whether there are substantive due process limits on punitive damages, but how to determine what they are." Id. In Haslip, the Court did indicate that a "four-to-one" ratio of punitive damages to compensatory damages was "close to the line." Haslip, 499 U.S. at 23-24. However, the TXO Court neither followed this "standard," nor set forth a substitute. TXO, 113 S. Ct. at 2719.


331. For further discussion of the evolution of the Court's willingness to review due process issues regarding punitive damages, see supra notes 117-53 and accompanying text.

332. Haslip, 499 U.S. at 23. See also supra notes 138-53 and accompanying text (discussing the Haslip holding more specifically).

333. Haslip, 499 U.S. at 23. This statement was followed by some courts in the two years between Haslip and TXO. See supra notes 159-65 and accompanying text (discussing cases that followed and ignored this four-to-one "rule").

334. The Court accomplished this by upholding a punitive damages award that greatly exceeded the four-to-one ratio that the Haslip Court warned might be "close to the line." TXO, 113 S. Ct. at 2724.

335. Id.

336. In Haslip, although "the line" was not specifically defined, the Court did give lower courts some guidance by suggesting that a "four-to-one" punitive damages and compensatory damages ratio was "close to the line." Haslip, 499 U.S. at 23. Many people expected TXO to be at least another step toward defining "the line" or
Justice O'Connor, joined by Justices White and Souter, warned against such a result in her dissenting opinion.\textsuperscript{337} Although Justice O'Connor would not have provided a word-for-word definition of "the line," she would have provided some clear standards to help other courts review the constitutionality of punitive damages in the future.\textsuperscript{338} However, six Justices did not agree. Rather, they felt that due process determinations regarding punitive damages are very fact-specific, making clear, objective standards inappropriate.\textsuperscript{339}

The \textit{TXO} decision stands for the proposition that punitive damages awards of any size might be upheld if the defendant's conduct is, in the words of Justice Neely of the West Virginia Supreme Court, "really mean."\textsuperscript{340} The result is that when the dust settles, other courts are left establishing specific standards that could be used to determine "the line" in particular cases. Mullenix, \textit{supra} note 2, at S4. However, in \textit{TXO}, the Court seemed to back away from its four-to-one statement in \textit{Haslip} and did everything but provide guidance for lower courts who will need to define "the line" in the future. \textit{See TXO}, 113 S. Ct. at 2718-24. By not defining a "mathematical bright line," the Court seemed to imply that although award size is a factor in the substantive due process analysis, it is not determinative. \textit{Id.} at 2719. Rather, the award size must be commensurate with what the Court termed "potential harm." \textit{See id.} at 2718; \textit{supra} notes 233, 236-37 and accompanying text. Thus, it seems that even a punitive damages award over one thousand times the compensatory damages award could conceivably be upheld if such award was commensurate with the "potential harm" caused by the defendant's intentionally wrongful conduct. This is consistent with the West Virginia Supreme Court's reasoning. \textit{See TXO}, 419 S.E.2d (W. Va. 1992) at 887-88; \textit{supra} note 198 and accompanying text; \textit{infra} note 340 and accompanying text.

\textsuperscript{337} \textit{TXO}, 113 S. Ct. at 2733. (O'Connor, J., dissenting). O'Connor stated, "I do not see what can be gained by blinding ourselves to the few clear guideposts in an area so painfully bereft of objective criteria." \textit{Id.}

\textsuperscript{338} \textit{Id.} (O'Connor, J., dissenting).

\textsuperscript{339} \textit{Id.} at 2719; \textit{Id.} at 2724-25 (Kennedy, J., concurring); \textit{Id.} at 2726 (Scalia, J., concurring). It should be noted that Justices Scalia and Thomas refrained from setting standards because they do not think punitive damages are a substantive due process issue. \textit{Id.} at 2727 (Scalia, J., concurring).

\textsuperscript{340} \textit{TXO}, 419 S.E.2d (W. Va. 1992) at 889. Justice Neely explained:

By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful . . . .

In really mean cases, the cynosure in determining the reasonableness of the jury's verdict . . . is the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct.

Accordingly, we find that in cases where the defendant [was really
with even less of an indication regarding "the line" than they had before.\textsuperscript{341}

2. From \textit{Haslip} Majority to TXO Plurality

The punitive damages awards in both \textit{Haslip} and \textit{TXO} were upheld by a Court majority.\textsuperscript{342} However, unlike in \textit{Haslip}, the \textit{TXO} majority was fractured into several opinions because the Justices could not agree on a single rationale for upholding the award.\textsuperscript{343} This seems to be largely a function of the changing Court.

In \textit{Haslip}, Justice Blackmun wrote the majority opinion, which was joined in by Chief Justice Rehnquist and Justices White, Marshall, and Stevens; Justices Scalia and Kennedy each wrote separate concurring opinions; and Justice O'Connor wrote a dissenting opinion.\textsuperscript{344} In \textit{TXO},

\textit{Id.} 341. A brief look at cases decided since the Supreme Court's \textit{TXO} decision illustrates the obscurity of "the line." \textit{See}, e.g., Dunn v. Hovic, 1 F.3d 1371, 1380 (relying on \textit{Haslip}, rather than \textit{TXO}, because the latter was only joined by a plurality of the Court, but noting Justice Scalia's statement that "the procedures approved in \textit{TXO} . . . [were] 'far less detailed and restrictive than those upheld in \textit{Haslip}'") (quoting \textit{TXO}, 113 S. Ct. at 2725 (Scalia, J., concurring)), \textit{cert. denied}, 114 S. Ct. 650 (1993); Troutt v. Charcoal Steak House, Inc., 835 F. Supp. 899, 901 (W.D. Va. 1993) (noting that, "Under well settled law, [the existence and frequency of similar past conduct is] typically considered in assessing punitive damages") (quoting \textit{TXO}, 113 S. Ct. at 2722 n.28)); \textit{Brennan v. Owens-Corning Fiberglass Corp.}, No. 92-00064A, 1993 WL 470426, at *8 (D. Guam Oct. 19, 1993) (upholding a large punitive damages award, reasoning that, under \textit{TXO}, punitive damages awards are afforded a strong presumption of validity so long as fair procedures were followed); \textit{Carlough v. Amchem Prods., Inc.}, 834 F. Supp. 1437, 1460 (E.D. Pa. 1993) (finding that plaintiff class satisfied jurisdictional minimum with its large punitive damages claim, reasoning that, in light of \textit{TXO}, there is no mathematical limit to punitive damages).

342. In \textit{Haslip}, the award was upheld by Chief Justice Rehnquist and Justices Blackmun, Kennedy, Marshall, Scalia, Stevens, and White. \textit{Haslip}, 499 U.S. at 4; \textit{id.} at 40 (Kennedy, J., concurring); \textit{id.} at 24 (Scalia, J., concurring). In \textit{TXO}, the award was upheld by Chief Justice Rehnquist and Justices Blackmun, Kennedy, Scalia, Stevens, and Thomas. \textit{TXO}, 113 S. Ct. at 2714; \textit{id.} at 2724 (Kennedy, J., concurring); \textit{id.} at 2726 (Scalia, J., concurring).

343. \textit{See supra} notes 200-06 and accompanying text. Although the majority encompassed three separate opinions in both \textit{Haslip} and \textit{TXO}, only \textit{Haslip} had an actual majority opinion. \textit{See infra} notes 344-45 and accompanying text. In \textit{TXO}, the greatest number of justices concurring together in a single opinion was three. \textit{See supra} notes 200-06 and accompanying text.

344. \textit{Haslip}, 499 U.S. at 4; \textit{id.} at 40 (Kennedy, J., concurring); \textit{id.} at 24 (Scalia, J., concurring); \textit{id.} at 42 (O'Connor, J., dissenting). Justice Souter did not take part in the decision of this case. \textit{id.} at 24.
Chief Justice Rehnquist and Justices Blackmun, Kennedy, O'Connor, Scalia, and Stevens all reached virtually the same conclusion that they reached respectively in Haslip and employed almost precisely the same rationale for their conclusions. However, Justice White made a drastic change from his decision in Haslip, shifting from the majority to the dissent. This shift had the important effect of reducing the fragile five Justice majority to a mere plurality.

Additionally, there were several major changes in the Court between Haslip and TXO that impacted the Court's alignment. TXO was decided after Justice Marshall retired. Justice Thomas, Marshall's replacement, did not join in the plurality opinion as Marshall probably would have, but rather joined in Justice Scalia's separate opinion concur-

345. Chief Justice Rehnquist and Justices Blackmun and Stevens all upheld both the Haslip and TXO awards based on a generalized reasonableness test, joining in the Court's main opinion in both cases. Haslip, 499 U.S. at 18-19; TXO, 113 S. Ct. at 2720. In both cases, Justice Kennedy wrote separate concurring opinions, agreeing with the conclusion of the main opinion, but disagreeing with the reasoning. Haslip, 499 U.S. at 40 (Kennedy, J., concurring); TXO, 113 S. Ct. at 2724 (Kennedy, J., concurring). In both cases, Justice Scalia wrote separate opinions, concluding that punitive damages are not protected under substantive due process. Haslip, 499 U.S. at 24 (Scalia, J., concurring); TXO, 113 S. Ct. at 2726 (Scalia, J., concurring). Finally, Justice O'Connor dissented in both cases, arguing that the awards violated due process and should be reversed. Haslip, 499 U.S. at 42 (O'Connor, J., dissenting); TXO, 113 S. Ct. at 2728 (O'Connor, J., dissenting).

346. In Haslip, Justice White joined with the majority, arguing that the punitive damages award did not violate due process. Haslip, 499 U.S. at 4. However, in TXO, Justice White disagreed with the plurality's affirmance of the punitive damages award because he believed that this award violated due process. TXO, 113 S. Ct. at 2728 (O'Connor, J., dissenting). In light of this shift, it would have been interesting to read an opinion written by Justice White in the TXO case, especially given that "he was very attentive to the need to give guidance to lower courts," according to David O. Stewart, a former law clerk to Justice White. Marcia Coyle, The High Court's Center Falls Apart, NAT'L L.J., Aug. 23, 1993, at S1.


348. This prediction is based on the fact that Justice Marshall joined in the majority opinion in Haslip, and the fact that Justice Marshall joined with Justice Blackmun in other major punitive damages cases. See Haslip, 499 U.S. at 4 (Justice Blackmun wrote the majority opinion in which Justice Marshall concurred); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 257 (1989) (Justice Blackmun authored the majority opinion in which Justice Marshall concurred); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 71 (Justice Marshall wrote the majority opinion, and
ring in the judgment. Thus, Marshall's retirement, notwithstanding Justice White's change of heart, dismantled the Haslip majority and, simultaneously, increased Court support by 100 percent for Justice Scalia's conclusion that punitive damages do not have substantive due process implications. Furthermore, Justice Souter, who did not participate in the Haslip decision, joined in Justice O'Connor's dissenting opinion.

Therefore, it is evident that the alignment of the Court on due process issues regarding punitive damages is changing rapidly. In just two short years, the Court majority on the due process implications of punitive damages has splintered into several factions. Currently, not more than three of the nine United States Supreme Court Justices can agree upon why they are upholding large punitive damages awards in the face of due process challenges. All that is agreed upon is that this particular award should be upheld. Perhaps in the future the Court will not even be able to agree on that. This is significant because it may indicate a step toward the Court's reversal of such awards in the future.

Justice Ginsburg, President Clinton's most recent addition to the United States Supreme Court, may add an interesting twist to the alignment of the Court on the punitive damages issue. Justice Ginsburg is reputed to be a moderate centrist. This makes it very difficult to predict her opinion on the due process punitive damages issue. It seems unlikely that Ginsburg will follow in the footsteps of Justices Scalia and Thomas, finding that punitive damages do not have substantive due process limits. However, because punitive damages do not fall neatly into traditional political coalitions, Justice Ginsburg could decide

Justice Blackmun wrote a concurring opinion).

349. TXO, 113 S. Ct. at 2726 (Scalia, J., concurring).
350. See Haslip, 499 U.S. at 4 (noting that Justice Souter took no part in consideration of the Court's decision); TXO, 113 S. Ct. at 2728 (O'Connor, J., dissenting).
351. See supra notes 200-06 and accompanying text (describing the alignment of the Justices in the TXO case).
352. Six Justices agreed to uphold the award. See supra notes 3, 200-06 and accompanying text.
353. This prediction is based on the fact that two years ago the Court fashioned a majority opinion to uphold a large punitive damages award, but now that majority has been dismantled. See also supra notes 342-50 and accompanying text.
354. Rice, supra note 20, at 14. However, many legal commentators believe that Ginsburg is "not naturally aligned with the moderate conservatives of the court and is likely to be more left of the center." Id.
355. Justices Scalia and Thomas' conclusion that punitive damages have no substantive due process rights is a very strict construction of the Constitution, a construction that is inconsistent with Ginsburg's "activist record." Id.
356. Interview with Gregory Ogden, Professor of Law at Pepperdine University
either way on the punitive damages due process issue, upholding them or striking them down.\textsuperscript{357} It is also possible that she may be willing to uphold some large awards, but not others.\textsuperscript{358}

Some commentators think that \textit{TXO} was the Court’s last word on the due process implications of punitive damages.\textsuperscript{359} These commentators believe that the \textit{TXO} decision was the Court’s way of charging the political process and legislatures with the task of deciding what to do about punitive damages.\textsuperscript{360} It is to these two areas that we now turn.
B. Political and Legislative Impact

1. The Conservative Court

Twelve straight years of Republican Presidents have left the Supreme Court quite conservative. Together, Reagan and Bush appointed five of the nine current Supreme Court Justices, a majority of the Court. As a result, this Court is likely to favor big business just as the Reagan and Bush administrations did. One would expect that this would lead the conservative Court majority to overturn large punitive damages awards against large corporations such as TXO. Furthermore, one would expect the Court to set forth clear standards that limit punitive damages in order to protect similar corporations.

However, contrary to this popular belief, the conservative nature of the Court has seemingly backfired on the ex-Presidents who compiled it. It seems that the more conservative a Justice is, the less likely he or she will be to overturn lower court decisions. For example, Justices exercised that authority in recent years. TXO, 113 S. Ct. at 2725 (Scalia, J., concurring). One commentator interpreted Justice Scalia's statement to mean that "advocates of punitive damage reform will have to redouble their lobbying efforts to achieve meaningful standards in state legislatures around the country." Taking it to the States, NAT'L UNDERWRITER, Aug. 2, 1993, at 32. See also Max Boot, Supreme Court's 1992-93 Legacy: A Zigzag Course, CHRISTIAN SCI. MONITOR, July 1, 1993, at 1 (noting that "the lower court deliberately may be issuing narrow decisions in the expectation that lower courts and legislatures will fill in the gaps").

361. Coyle, supra note 346, at S1. "Even as President Clinton begins to put his imprint on the U.S. Supreme Court, the term just ended showed that the Court is still very much the house that Reagan and Bush built." Id.


364. In its 1992-93 term, the Supreme Court affirmed 40% of the 110 cases to which it granted review. Coyle, supra note 346, at S1. Furthermore, the Court affirmed 55% of the 11 state supreme court cases that it reviewed. Id.

Scalia and Thomas, reputed as two of the most conservative Justices on the Court, were far less in favor of reversing TXO’s punitive damages award than any of the other Justices. Furthermore, Justices Scalia and Thomas were loyal to Justice Scalia’s previous conviction in Haslip that punitive damages have no substantive due process limitations at all. This illustrates that the most conservative Justices have no intention of protecting large corporations from punitive damages awards.

In addition to the conservative Court’s reluctance to reverse lower court decisions, punitive damages opponents face another potential barrier when asking the United States Supreme Court to reverse punitive damages awards: punitive damages seem to be an issue where political opinions do not fall neatly into the traditional categories of “conservative” and “liberal.”

2. Feeding the Fire of Tort Reform Efforts

The TXO decision disappointed many people who have spent several decades fighting for tort reform, including ex-Vice President Dan

The Court’s decision in TXO was an affirmance of the lower court’s decision to uphold the punitive damages award. TXO, 113 S. Ct. at 2711. However, it was affirmed by a mix of both conservative and liberal Justices. See TXO, 113 S. Ct. 2715; id. at 2724 (Kennedy, J., concurring); id. at 2725 (Scalia, J., concurring). This illustrates Professor Ogden’s theory that the punitive damages issue does not fall into traditional political coalitions. See supra note 356 and accompanying text. Would the Court have affirmed the lower court decision if it had held the punitive damages award unconstitutional? Based on its affirmance record, it just might have, but this is mere speculation. Coyle, supra note 346, at S1 (examining the Court’s affirmance record).

365. Justice Scalia has been described as a “long all[y] for conservative activism.” Reuben, supra note 362, at 35. According to Professor Choper, Justice Thomas is “the most reliable conservative on the [C]ourt.” Constitutional Law Conference, supra note 358, at 2263. Professor Choper went on to comment that Justice Thomas “is periodically alone paired with Justice Scalia in rejecting individual rights claims, which is not a bad criterion for determining just how conservative he is.” Id.

366. Justices Scalia and Thomas concluded that punitive damages awards should be upheld so long as fair and reasonable procedures were employed in the determination and review of such awards. TXO, 113 S. Ct. at 2726-27 (Scalia, J., concurring).

367. Id. at 2727 (Scalia, J., concurring).

368. “The [TXO] ruling . . . is a startling example of how a ‘conservative’ [C]ourt can be bad for big business.” Savage, supra note 359, at A14.

369. Interview with Gregory Ogden, supra note 356. See supra notes 356, 364 and accompanying text.

370. The tort reform movement has been very active over the past 40 years.
Quayle. However, tort reformers were encouraged by the Court’s grant of certiorari to the TXO case. Many anxiously awaited the announcement of the Court’s decision, expecting the opinion to set forth some standards, and even specific limitations, for punitive damages. However, on June 25, 1993, these hopes were dashed by the Court’s affirmation of the award and its pronouncement that the best it could give to tort reformers was a soft “reasonableness” standard.

The American Tort Reform Association (ATRA), a formal organization whose main goal is to lobby for tort reform, filed an amicus brief with the Supreme Court in TXO on behalf of the petitioner, arguing for limitations on punitive damages. ATRA argued that although punitive

supra notes 72-76 and accompanying text.

371. Dan Quayle headed the Bush Administration’s push for tort reform, which included several reform proposals for punitive damages. See Saundra Torry, Quayle to Seek Trial Revisions Including Punitive Award Cap, WASH. POST, Aug. 6, 1991, at A6; Saundra Torry, Quayle and Bush Administration Take on Civil Justice Reform, WASH. POST, Feb. 3, 1992, at F6; supra notes 76, 89-95 and accompanying text.

372. Savage, supra note 369, at A14. “Last fall, lawyers for big business were cheered when the justices announced that they would hear the appeal from TXO . . . [but [the TXO decision] . . . dashed those hopes.” Id. See also Mullenix, supra note 2, at S4.

373. See Newsletter to Track Landmark Punitive Damage Case, PR NEWSWIRE, Dec. 4, 1992 (noting that Scott Jacobs, editor of a litigation report, expected the TXO decision to clarify Haslip); Shartel, supra note 2, at 2 (stating that the TXO Court should set forth standards for due process review of punitive damages); Nancy E. Roman, 2 Supreme Court Decisions to Chart Tort-Reform Course, WASH. TIMES, Feb. 14, 1993, at A12 (hoping that the TXO Court would set forth such standards). But see Marcia Coyle, Punitives at Issue, Yet Again: Justices Examine Either “Mirage” or “Crisis”, NAT’L L.J., March 29, 1993, at 1 (noting that Andrew L. Frey, amicus counsel for tort reform associations in the TXO case, did not expect “a sweeping pronouncement” from the Court in TXO).

374. See TXO, 113 S. Ct. at 2720. Many commentators have criticized the reasonableness test for being too “soft” and indefinite. For example, Justices Kennedy and O’Connor both observed that the reasonableness “test” was not really a test at all. TXO, 113 S. Ct. at 2725 (Kennedy, J., concurring); id. at 2731 (O’Connor, J., dissenting). See also supra notes 252-53, 292 and accompanying text. Carter Phillips, counsel for TXO, commented that “the problem with [the reasonableness test] . . . is that ‘reasonableness’ is in the eye of the beholder.” Joanne Wojcik, Two Supreme Letdowns: Failure to Set Punitive Rules May Fuel State Tort Reform Drive, BUS. INS., July 5, 1993, at 2. Another commentator noted that “what is ‘reasonable’ is left to one’s individual imagination.” Taking It to The States, supra note 360 at 32.

damages are appropriate in some situations, they have become too large in both size and frequency.\textsuperscript{376} The Court was not persuaded by ATRA’s arguments.\textsuperscript{377}

In addition to ATRA, there are many other interest groups whose members feel strongly about the \textit{TXO} decision. For example, business groups, the American Medical Association, and the pharmaceutical industry vehemently oppose the Court’s decision to uphold large punitive damages awards. These groups contend that such awards are unfair and adversely affect the international competitiveness of American businesses.\textsuperscript{378} On the other hand, consumer groups and plaintiffs’ attorneys argue that large punitive damages awards are necessary in some situations to “keep dangerous products off the market and to protect the public against corporate greed.”\textsuperscript{379}

Due to the Court’s “passive” response to their repeated appeals for punitive damages limitations,\textsuperscript{380} tort reformers are likely to start lobbying the other two branches of the federal government, as well as state

\textsuperscript{376} ATRA’s Brief at 4, \textit{TXO} (No. 92-479) (noting that “as the size of punitive damages awards has grown exponentially in recent years, more and more of them—like the judgment in this case—have borne no discernible relationship to the gravity of the defendant’s misconduct”). \textit{See also} Product Liability Advisory Council’s Brief at 23, \textit{TXO} (No. 92-479) (recognizing that “the frequency and size of punitive damages has skyrocketed”).

\textsuperscript{377} \textit{See} \textit{TXO}, 113 S. Ct. at 2718-24 (affirming the punitive damages award, despite claims by many, including the petitioner and ATRA, that the award in this case was excessive).

\textsuperscript{378} \textit{High Court Upholds Large Punitive-Damage Award: The $10 Million Was 526 Times the $19,000 in Damages. The Court Said That Was Not “Grossly Excessive”, PHILA. INQUIRER, June 26, 1993, at D1. \textit{See also} Savage, supra note 359, at A14. \textit{TXO} has been termed “a major setback for corporate America.” \textit{Id.} The insurance industry, a major component of corporate America is equally concerned about the Court’s decision. Gastel, supra note 6. The National Association of Manufacturers was also disappointed by the \textit{TXO} decision. \textit{High Court Refuses to Cap Punitive Damage Awards, supra note 2, at B1.}

\textsuperscript{379} \textit{High Court Upholds Large Punitive-Damage Award, supra note 378, at D1. In response to \textit{TXO}, Linda Lipsen, legislative director of Consumers Union said, “Today’s decision sends a message to corporations . . . that they can’t harm victims of dangerous products and shoddy services with impunity.” Savage, supra note 359, at 14. \textit{See also infra} note 402 and accompanying text.

\textsuperscript{380} For examples of unsuccessful attempts by tort reformers to argue for a national punitive damages limitation policy from the Supreme Court, see generally \textit{TXO Prod. Corp. v. Alliance Resources Corp.}, 113 S. Ct. 2711 (1993); \textit{Pacific Mut. Life Ins. Co. v. Haslip}, 499 U.S. 1 (1991); ATRA’s Brief, \textit{TXO} (No. 92-479); Product Liability Advisory Council’s Brief, \textit{TXO} (No. 92-479).
legislatures. Large corporations, along with ATRA, are likely to head up the fight for legislative punitive damages limits. Not too far behind will follow the defense lawyers and manufacturing professionals.

3. The Clinton Administration’s Response

In the late 1980s, the Bush Administration became involved in a civil justice reform campaign, which was headed by former Vice President Dan Quayle. This reform campaign included proposed limitations on punitive damages. Some commentators believed that the Bush Administration only proposed punitive damages reforms because, as conservative Republicans, they wanted to appease large corporations by shielding them from liability for multi-million dollar judgments.

Unfortunately for those Bush Administration critics, but perhaps fortunately for large corporations that are vulnerable to large punitive damage awards, the Clinton Administration appears to be following former President Bush’s lead in punitive damages reform. For example, the Health Care Reform proposal includes a provision that would possibly tie the amount of punitive damages to actual damages.

381. “Upholding a punitive damages award 526 times the size of the compensatory award . . . handed the reformers a piece of propaganda.” Rice, supra note 20, at 14.
382. Gastel, supra note 6 (discussing in depth the insurance industry’s response to TXO).
383. These two groups were well represented among the amicus curia who submitted briefs to the Supreme Court in support of TXO. See generally Product Liability Advisory Council’s Brief, TXO (No. 92-479); Brief for the Washington Legal Foundation as Amicus Curiae supporting Petitioner, TXO (No. 92-479) [hereinafter Washington Legal Foundation’s Brief]; Brief for the American Automobile Manufacturers Association, American Insurance Association, American Petroleum Institute, Business Roundtable, Chamber of Commerce of the United States, Chemical Manufacturers Association, and National Association of Manufacturers as Amicus Curiae supporting Petitioner, TXO (No. 92-479) [hereinafter American Automobile Manufacturer’s Brief]. See also Mullenix, supra note 2, at S4 (“The products liability bar followed with great trepidation this controversial appeal concerning the limits on punitive damages, and defense lawyers now know that apparently there aren’t many limits.”).
384. See supra notes 76, 89-95 (discussing Quayle’s involvement in the tort reform movement).
385. See supra notes 89-97 (discussing proposals for punitive damages reform).
386. See Rustad & Koenig, supra note 28, at 1277 (arguing that former Vice President Quayle “wishes to undermine punitive damages precisely because such damages constrain big business” and that “he attacks only those provisions of the civil justice system that impede the activities of economic elites”).
388. Id. (noting that Congress has enacted similar punitive damages limitations in federal antitrust laws by capping punitive damages at three times the actual damage
4. New Legislation on Punitive Damages

In 1991, in light of the Haslip decision, many commentators believed that states would be quick to respond to the Court's "hint" that legislatures were the proper forum for improvement of the punitive damages system. At that time, many states already had legislation limiting punitive damages, and much of this legislation is still in place today. In fact, most of the state statutory law regarding punitive damages limitations was enacted prior to the Haslip decision, not in response to it.

Now, in the wake of the TXO decision, there are predictions of new legislation in this area. Because the TXO punitive damages award was a great deal larger and much more disproportionate with its corresponding compensatory damages award than the award upheld in Haslip, and because the TXO Court provided even less guidance to

es). See also Rorie Sherman, Health Plan to Have Major Legal Impact, NAT'L L.J., Sept. 20, 1993, at 1 (recognizing that caps on punitive damages are likely to be included in Clinton's health care plan).

388. King, supra note 115, at 350.

389. See, e.g., CAL. CIV. PROC. CODE §§ 732, 733 (Deering 1983) (limiting punitive damages awards in certain waste and trespass actions to treble damages); COLO. REV. STAT. § 13-64-302 (Supp. 1990) (limiting medical malpractice non-economic damages to $250,000); N.J. STAT. ANN. § 2A:58C-5(c) (West 1987) (disallowing punitive damages in products liability actions involving food or drugs licensed by the FDA). For a more complete list, see Petitioners Brief at 18-20, TXO (No. 92-479).

391. Although some legislation limiting punitive damages was enacted in 1992, such as Colorado's statute capping punitive damages in medical malpractice cases, most punitive damages legislation that is currently in existence was enacted in the 1970s and 1980s, well before the Court's announcement of the Haslip decision in 1991. See, e.g., supra notes 95, 390 and accompanying text (discussing various types of legislative caps on punitive damages).

392. Gastel, supra note 6 ("[E]xperts say that the . . . [TXO] ruling will make legislation at the federal or state level more likely.").

393. The punitive damages award upheld in Haslip was $840,000, four times the compensatory damages award of $200,000. Haslip, 499 U.S. at 4. The punitive damages award upheld in TXO was $10 million, 526 times the compensatory damages award of $19,000. TXO, 113 S. Ct. at 2717. The TXO punitive damages award was both significantly higher and more disproportionate to its corresponding compensatory award than the Haslip punitive damages award. Moreover, the compensatory damages awarded in TXO were significantly lower than the Haslip compensatory damages, the TXO award being one tenth of the Haslip award. See Haslip, 499 U.S. at 4; TXO, 113 S. Ct. at 2717.

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lower courts than the Haslip Court did,⁴⁴ tort reformers are probably more likely to channel their disappointment into social action.

Despite the fact that many jurisdictions have already limited punitive damages to some extent, tort reformers apparently are not yet satisfied.⁵⁵ It is quite likely that state legislatures will soon find themselves inundated with letters, phone calls, and visits from lobbyists who think that the current legislation simply does not go far enough.⁵⁶ There will no doubt be a stronger push for limitations such as absolute caps on punitive damages, proportionality requirements between actual and punitive damages, and the abolition of punitive damages completely in some situations.⁵⁷ Whether state legislatures will respond to the pressure remains to be seen.

C. Social Impact

The potential social impact of the TXO decision is substantial. For example, in response to the wealth of commentary that TXO is “a victory for plaintiffs,”⁵⁸ many people who feel that they have been wronged by large entities with large resources may be encouraged to pursue large punitive damages awards in court.⁵⁹ After all, in this already

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394. The Haslip Court at least inferred that a punitive damages award that was four times larger than the compensatory damages award was “close to the line.” Haslip, 499 U.S. at 23. The TXO plurality, other than in references to the Haslip decision, did not repeat this statement, or present any similar inferences. See TXO, 113 S. Ct. at 2718-24. In fact, the TXO plurality conveniently avoided presenting any numerical guidelines whatsoever.

395. Despite this long list of statutes limiting punitive damages, the tort reform movement is still alive and very healthy. See supra notes 72-76 and accompanying text. See also ATRA’s Brief at 29, TXO (No. 92-479) (arguing that “state legislation has not proved to be a uniformly effective answer to the problem of excessive punishments”); GHIARDI & KIRCHER, supra note 30, at Appendix 21A (listing state statutes limiting punitive damages, most of which were enacted prior to 1991).

396. See, supra note 20, at 14. “The National Law Journal predicts that the Court’s decision in TXO will increase pressure from business for legislative caps on punitive damages.” Id.

397. Interview with Gregory Ogden, supra note 356. See also Wojcik, supra note 374, at 2 (“Business groups . . . say that TXO affirms their decision to lobby state legislatures individually to set limits on punitive damage awards.”).

398. Mullenix, supra note 2, at S4 (recognizing that “the [TXO] decision was . . . great for plaintiffs”); High Court Refuses to Cap Punitive Damage Awards, supra note 2, at B1 (noting that the TXO ruling is “hailed as a victory for consumers”).

399. See Gene Fadness, Time to Cap Big Awards in the Lawsuit Lottery, IDAHO FALLS POST REG., April 9, 1993, at A8 (terming the current punitive damages system “the lawsuit lottery”); Ruth Marcus, Are Punitive Damage Awards Fair to Firms?: Supreme Court Finally Agrees to Referee High-Stakes Dispute, WASH. POST, Sept. 23, 1990, at H1 (analogizing civil litigation to state lotteries); Adler, supra note 80, at 1 (arguing that “the current punitive damages system . . . effectively turns the
very litigious society, where punitive damages awards have become increasingly popular, people are likely to feel quite confident about their chances of obtaining large punitive awards. If this increase in lawsuits does occur, it will put quite a burden on the judicial system's resources. Furthermore, if large punitive damages awards continue to be assessed frequently against large corporations, some of these companies may be driven out of business, further impinging upon America's already sunken economy. Finally, large manufacturers may be discouraged from producing new products for fear of being slapped with large punitive damages awards.

On the other hand, the TXO decision is also likely to make large corporations think harder before they act, thus protecting their customers by providing them with better products and services. This might
courtroom into a gambling casino").

400. Daniel B. Moskowitz, Punitive Damages: Setting Standards for Legal Wild Card, WASH: POST, Oct. 1, 1990, at F26. “Western civilization has gotten along for centuries without detailed standards on punitive damages, primarily because they were so rarely awarded. But lawyers for plaintiffs have been getting increasingly adept at winning such bonanzas for their clients.” Id. If this quote truly reflects public perception of punitive damages, it explains the confidence of many plaintiffs suing for punitive damages.

401. Marcus, supra note 399, at H1 (noting the asbestos industry's complaints that punitive damages "helped drive companies into bankruptcy"). Furthermore, business organizations argue that large punitive damages awards like the one in TXO are "typical of those that . . . destroy international competitiveness." High Court Refuses to Cap Punitive Damage Awards, supra note 2, at B1.

402. Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 988 (1989). “Uncertainty as to potential liability induces overinvestment in liability avoidance, or worse, suppresses innovation.” Id. (citing Gurule v. Illinois Mut. Life and Casualty Co., 734 P.2d 85, 86-87 (1987)). See also Fadness, supra note 399, at A8 (arguing that “the threat of such huge financial losses stifles competition and innovation,” citing pharmaceutical companies’ reluctance to test AIDS vaccines as an example); Marcus, supra note 399, at H1 (arguing that the potential for large punitive damages awards discourages manufacturers’ innovative activity); Moskowitz, supra note 400, at F26 (providing an example of an asbestos substitute manufacturer that decided against marketing a product because of the risk of large punitive damages awards); GHIARDI & KIRCHER, supra note 30, §§ 6.08-6.09 (discussing the public policy problems associated with allowing large punitive damages awards in products liability cases).

403. Consumer groups argue that “one solution to punitive damages is for companies to market only safe products and to treat customers, employees and the public with care.” Moskowitz, supra note 400, at F26. The argument is that if companies are more careful, their chances of having to pay large punitive damages awards will decrease substantially. Id. Thus, it follows that if punitive damages are not limited,
be good for the economy because people might be more willing to spend money if they can count on receiving the quality they believe they deserve. Moreover, the availability of large punitive damages awards might mitigate the oppression of ordinary people by large corporations, thereby furthering one of the oldest and most fundamental policies behind punitive damages: protection of the disadvantaged.

Finally, many commentators argue that the continued potential for large punitive damages awards will discourage plaintiffs from settling their cases because of the likelihood that courts will uphold large punitive damages awards assessed by juries. This could end up costing the judicial system unnecessary time and money. It may also obstruct the growing alternative dispute resolution movement, thereby

companies will be more careful to protect consumers.

Furthermore, many people argue that punitive damages limitations would actually eliminate the incentive to avoid the production of dangerous products in some cases. For example, before the Haslip decision was announced, consumer groups argued that capping punitive damages awards would allow defendant corporations to reduce the risk of being slapped with large punitive damages awards to mathematical calculations, thus allowing these corporations to "shield themselves" from liability. Adler, supra note 80, at 20. See also Marcus, supra note 399, at H1 (arguing that if punitive damages were limited, companies "would simply factor them into their calculations as a cost of doing business"); D. Frederick Hoopes, Punitive Award Must be High to Deter Corporations, IDAHO FALLS POST REG., Apr. 28, 1993, at A8 (arguing that punitive damages caps would permit "callous corporate calculations"); Ghiardi & Kircher, supra note 30, § 6.12 (discussing how companies calculate punitive damages as a cost of doing business).

404. See supra note 403 and accompanying text. If more consumers purchase goods and services, companies will have more money to invest, yielding a positive net result for the economy. Of course, punitive damages is only one of many factors that contribute to the ebb and flow of the economy.

405. For example, Bruce Ennis, Mrs. Haslip's lawyer in the Haslip case, argued that "when you make it easy for people to calculate the consequences of conduct, then you don't deter it." Marcus, supra note 399, at H1. See also supra notes 39-48 (describing the original purposes of punitive damages); supra notes 66-71 (describing the modern rationales of punitive damages).

406. For example, Don Bowen, President of the Texas Trial Lawyers Association, argues that "the anti-lawsuit movement in Texas has resulted in fewer cases being settled and more going to court," and he does not view this as success. Nancy E. Roman, Lobby Effort to Curb Litigation Turns to States for Tort Reform, WASH. TIMES, Feb. 4, 1993, at A4. Furthermore, plaintiffs might be similarly discouraged from submitting their cases to arbitration because "arbitrators rarely grant huge dollar judgments and are loathe to hand out punitive damages for willful corporate wrongdoing." Jane B. Quinn, More Companies Hide Behind the Shield of Arbitration, WASH. POST, Nov. 8, 1992, at H3.

407. According to Andrew L. Frey, author of the ATRA's amicus brief, "there are lots of cases out there that would have been settled long ago, but for the chance of hitting the jackpot." Biskupic, supra note 275, at C1.

408. See Diane Seo, Talk is Cheap, and also Valuable: Dispute Resolution Process Gains Popularity by Avoiding High Cost of Long Legal Battles, L.A. TIMES, Aug. 22,
slowing down the evolution of what may potentially be a more efficient justice system in which the parties, and not a judge or jury, hold the fate of their cases in their own hands.409

VI. CONCLUSION

Up against an animal sacrifice case,410 an abortion access case,411 and a pornography case,412 the TXO v. Alliance decision has been described as “this year's most sensational U.S. Supreme Court case.”413 Perhaps this description stems from the potential massive impact of TXO on so many aspects of this nation.414 TXO evinces the conservative Court's deference to the political process415 and constitutes a

1993, at J1 (noting that a growing number of individuals and businesses are choosing alternative dispute resolution processes to resolve their disputes); The Go Betweenes: Fed Up With a Costly Judicial System, an Increasing Number of Individuals and Businesses Are Trying to Resolve Their Disputes With the Help of Trained Mediators, Conciliators and Arbitrators, L.A. TIMES, July 18, 1993, City Times section, at 14 (recognizing the increasing popularity of alternative dispute resolution); Thomas W. Lippman, Utilities Find Alternative to a Costly Court Battle: Private Resolution Keeps Cases from Public, WASH. POST, Apr. 21, 1992, at C1 (describing the alternative dispute resolution movement as "a fast-growing phenomenon").

409. Benny L. Kass, Choosing to Arbitrate Instead of Litigate, WASH. POST, Mar. 27, 1993, at E10 (recognizing that litigation is expensive, in terms of time and money, and that arbitration is often much less expensive and more efficient); Lippman, supra note 408, at C1 (noting that "more and more companies are circumventing the cluttered calendars, expensive procedures and public scrutiny of conventional court trials in favor of informal tribunals").


411. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 768 (1993) (holding that a federal civil rights law cannot be used to prevent anti-abortion activists from blockading health clinics).

412. Alexander v. United States, 113 S. Ct. 2766, 2776 (1993) (holding that the government can seize and destroy adult magazines and videos that were part of a pornography empire, but not the basis of criminal charges, without offending the First Amendment).

413. Mullenix, supra note 2, at S4.

414. See generally supra notes 326-409 and accompanying text (discussing the judicial, legislative, political, and social impacts of TXO). See also Mullenix, supra note 2, at S4 (discussing generally some of the likely impacts of TXO).

415. Giuffra, supra note 364, at 10. "Changes in the political landscape have lowered the Court's profile. For the first time in more than a generation, the same party controls the presidency and . . . Congress, while the Court is dominated by justices
sweeping victory for plaintiffs.416 Whether defendants will fight back remains to be seen.

TXO officially marks the end of the short-lived Haslip era, during which a four-to-one ratio of punitive damages to actual damages was "close to the line."417 State courts must now rethink their strategies, while state legislatures are likely to begin buzzing with activity toward the enactment of local standards for punitive damages.418 Meanwhile, in Washington, D.C., President Clinton and Congress are diligently working to incorporate punitive damages standards into the health care plan.419

In short, TXO was not the test-producing case that many had envisioned.420 In fact, TXO threw certainty and predictability out the window regarding due process limitations on punitive damages.421 However, in light of TXO, one thing is certain: if bright line punitive damages limitations are to be set, the United States Supreme Court is not going to be the one to do it.422

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416. Mullenix, supra note 2, at S4 (arguing that the TXO decision favors plaintiffs who seek large punitive damages awards against powerful defendants).

417. Wojcik, supra note 374, at 2. According to Laurence Tribe, TXO left the Haslip four-to-one ratio argument "dead as a doornail." Id. See also supra notes 14-18 and accompanying text (discussing TXO's effect on the four-to-one ratio limitation implied in Haslip).

418. Andrew L. Frey & Evan M. Tanger, Punitive Damages, the Constitution, and Due Process, THE RECORDER, Sept. 9, 1993, at 8. "TXO sends the clear message that legislation and state common law, not federal constitutional law, must play the primary role in ensuring a sensible system for imposition of punitive damages and in preventing excessive punishments." Id. "There is a real need for new guidelines but state legislatures are going to have to fashion them." Savage, supra note 359, at A14. See also Steven Brostoff, Top Court Sets No Standard to Limit Punitive Damages, NAT'L UNDERWRITER, July 5, 1993, at 1 (recognizing that because the TXO Court refused to set forth punitive damages standards, state legislatures will now have to address the issue); supra notes 359-60 and accompanying text.

419. See supra notes 387-88 and accompanying text (discussing the punitive damages cap in President Clinton's health care plan).

420. Supreme Court Proceedings, supra note 5. See also supra note 373 and accompanying text (discussing commentators expectations for the TXO decision).

421. See supra note 336 and accompanying text. See also Biskupic, supra note 275, at C1 ("Because . . . TXO did not produce a majority in favor of any particular reasoning, the decision is likely to add to the controversy rather than resolve it.").

422. According to Victor Schwartz, author of the amicus brief of the National Association of Manufacturers and several other business organizations, "The Court is not going to write new rules of law in this area . . . . There is a real need for new guidelines but state legislatures are going to have to fashion them." Savage, supra note 359, at A14.