

**OIL AND WATER DO NOT MIX: AN ARGUMENT FOR THE  
UNITED STATES SUPREME COURT'S DEFERRAL TO  
CONGRESS IN EXXON V. BAKER**

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I. INTRODUCTION

In 1994, an Alaskan jury entered a verdict of \$5 billion in punitive damages against oil giant Exxon, which at the time was the largest punitive damages award in American history.<sup>1</sup> The award stemmed from events that occurred in 1989, when Exxon Valdez, a tanker owned and operated by Exxon,<sup>2</sup> collided with an underwater reef, thereby breaking the hull and leaking eleven million gallons of oil into Prince William Sound, Alaska.<sup>3</sup> The oil spill was also “the worst in American history”<sup>4</sup> and wreaked enormous environmental,<sup>5</sup> economic,<sup>6</sup> and emotional damage<sup>7</sup> on both

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<sup>1</sup> *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001).

<sup>2</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611–12 (2008). The tanker was operated by Exxon Shipping Co., Inc., a subsidiary of the corporation now called Exxon Mobil Corp. See, e.g., *Renamed Exxon Valdez Will Ply Different Waters*, N.Y. TIMES, July 7, 1990. Exxon Mobil acquired their new name after Exxon’s merger with Mobil in 1999. See, e.g., *Exxon-Mobil Merger Done*, CNNMONEY.COM, Nov. 30, 1999, <http://money.cnn.com/1999/11/30/deals/exxonmobil>.

<sup>3</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2612–13 (2008). See also EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, MAP OF THE EXXON VALDEZ OIL SPILL (1993), <http://www.evostc.state.ak.us/facts/spillmap.cfm> (displaying a map of the areas affected by the Exxon Valdez oil spill).

<sup>4</sup> Adam Liptak, *Damages Cut Against Exxon in Valdez Case*, N.Y. TIMES, June 26, 2008, at A19.

<sup>5</sup> See, e.g., Charles H. Peterson et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, 302 SCIENCE 2082, 2082 (2003) (“[M]ass mortalities of 1000 to 2800 sea otters . . . and unprecedented numbers of seabird deaths estimated at 250,000 . . . were documented during the days after the spill.”); Jeff Short, Stanley Rice & Mandy Lindeberg, *The Exxon Valdez Oil Spill: How Much Oil Remains?*, ALASKA FISHERIES SCIENCE CENTER, Sept. 2001, [http://www.afsc.noaa.gov/Quarterly/jas2001/feature\\_jas01.htm](http://www.afsc.noaa.gov/Quarterly/jas2001/feature_jas01.htm) (“Long-term

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humans and wildlife. Although hundreds of lawsuits stemmed from the devastation,<sup>8</sup> the plaintiffs represented in *Exxon v. Baker* were over 32,000 Alaska Natives, landowners, and commercial fishermen.<sup>9</sup> The case was also a consolidated and mandatory punitive damages class action.<sup>10</sup> The United States Supreme Court opinion in *Exxon v. Baker* effectively ended the punitive damages matter that had been the source of complex litigation for over a decade.<sup>11</sup>

*Exxon v. Baker* raised three issues of law: vicarious liability, federal preemption, and punitive damages.<sup>12</sup> However, this article only analyzes

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monitoring in the oiled areas has also shown that fauna from higher trophic levels such as sea otters and sea ducks still have not recovered.”); Kyle Hopkins, *Debate Persists About Long-Term Effects Of Exxon Valdez Oil Spill*, ANCHORAGE DAILY NEWS, Feb. 6, 2009, at A1, available at <http://www.adn.com/exxonvaldez/story/682335.html>.

<sup>6</sup> See, e.g., Exxon Valdez Oil Spill Trustee Council, *Economic Impacts of the Spill*, <http://www.evostc.state.ak.us/facts/economic.cfm> (providing five studies undertaken by the Alaskan state government evaluating the economic impact to recreational fishing, tourism, and replacing birds and mammals); SAMUEL K. SKINNER & WILLIAM K. REILLY, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT 31–32 (1989) (explaining the harmful impacts the oil spill had on commercial fisheries, recreation, and natives).

<sup>7</sup> *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1062 (D. Alaska 2002) (“Communities affected by the spill ‘reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems.’” (quoting Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impact of the Exxon Valdez Oil Spill*, in FOLK MANAGEMENT IN THE WORLD’S FISHERIES 207, 227 (Christopher L. Dyer & James R. McGoodwin eds., 1994))).

<sup>8</sup> *In re Exxon Valdez*, 270 F.3d 1215, 1223–24 (9th Cir. 2001); see, e.g., *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 775 (9th Cir. 1994) (discussing civil and criminal prosecutions brought by the state of Alaska and the United States government); *State v. Hazelwood*, 866 P.2d 827, 828 (Alaska 1993) (discussing criminal prosecutions brought against the ship’s captain, Joseph J. Hazelwood).

<sup>9</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2613 (2008).

<sup>10</sup> *Id.*

<sup>11</sup> Liptak, *supra* note 4, at A1.

<sup>12</sup> See *Exxon Shipping Co.*, 128 S. Ct. at 2611. See Aaron T. Duff, Comment, *Punitive Damages in Maritime Torts: Examining Shipowners’ Punitive Damage Liability in the Wake of the Exxon Valdez Decision*, 39 SETON HALL L. REV. 955 (2009), for recent analyses on the vicarious liability issue; Brandon T. Morris, Comment, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the Exxon Valdez Litigation*, 33 TUL. MAR. L.J. 165 (2008).

the punitive damages aspect of the opinion, and only in a limited fashion.<sup>13</sup> As a result, the area of law under consideration will not only be punitive damages, but also federal maritime law, which was the jurisdictional basis for which the Supreme Court accepted the case on certiorari.<sup>14</sup> The 5-3 decision in *Exxon v. Baker* created a 1:1 ratio between compensatory and punitive damages in federal maritime law, drastically reducing the original \$5 billion punitive damage award to \$507 million<sup>15</sup> to be shared amongst the 32,000 plus plaintiffs.<sup>16</sup>

Analyzing whether the Supreme Court made the right decision in *Exxon v. Baker* is not an easy task. On the surface, it may appear that people who support the opinion are against the environment, and people who side with the plaintiffs are anti-corporation.<sup>17</sup> However, this simplistic approach fails to consider the nuanced legal equities involved in

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<sup>13</sup> For example, this article does not evaluate the pros and cons of punitive damages, whether punitive damages are excessive, or whether a lower ratio will upset the objectives of punitive damages such as deterrence and punishment. See Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 16–23 (2009) (comparing punitive damages to criminal sentencing), for analyses of other punitive damages issues in light of the *Exxon v. Baker* decision; Charles S. Doskow, *What Do You Do with a Drunken Sailor? Reprehensibility, The Exxon Valdez, and Punitive Damages*, 27 QUINNIPIAC L. REV. 465 (2009) (considering the issue of reprehensibility and due process in punitive damages).

<sup>14</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2614.

<sup>15</sup> *Id.* at 2633–34. The figure rose, however, to about \$995 million when interest was included. Nate Raymond, *Attorneys' Fees Plummet Following Exxon Valdez Decision*, THE AM LAW DAILY, June 25, 2008, <http://amlawdaily.typepad.com/amlawdaily/2008/06/attorneys-fees.html>. For a breakdown of how the punitive damages will be divided and general updates on lingering Exxon Valdez issues see the ANCHORAGE DAILY NEWS website, <http://www.adn.com/exxonvaldez>.

<sup>16</sup> *Id.* at 2613. Interestingly, “Exxon itself will actually get 11 percent of the verdict, under a settlement with a group of seafood companies known as ‘the Seattle Seven.’ The firm agreed in 1991 to pay them \$63.75 million for their stake. That stake, it turns out, is worth around \$106 million.” Raymond, *supra* note 15.

<sup>17</sup> See, e.g., *A Supreme Court on the Brink*, N.Y. TIMES, July 3, 2008, at A22 (“Corporations fared especially well in this term.”); *Exxon verdict: Supreme Court Makes Life Easier for Corporate Wrongdoers*, ANCHORAGE DAILY NEWS, June 26, 2008, at B4; *Supreme Court: A Win for Big Oil*, SEATTLE POST-INTELLIGENCER, June 25, 2008, at B6 (discussing how corporate responsibility has not exactly been on this court's agenda).

the case.<sup>18</sup> The Supreme Court was faced with balancing the interests of large corporations against those of small businesses and the public's value of oil against the simultaneous concern for the environment. With Alaska, one of the nation's most beautiful environmental areas<sup>19</sup> as the stage, and Exxon, the largest American oil company, Native Alaskans, and fishermen as the actors,<sup>20</sup> the legal drama was bound to be intense. Harmonizing these tensions defied an easy solution.

The ratio offers the simplicity of a bright-line rule, which is an often sought but rare notion in matters of legal complexity. Nevertheless, the Court should not have created the rule. Although the Court had authority to construct the ratio as a federal common law court sitting in admiralty,<sup>21</sup> the Court should have deferred to Congress. Congress did not intend to limit punitive damages awards in relation to oil spills in maritime law,<sup>22</sup> and Congress was better suited to address the public policy concerns of *Exxon v. Baker* due to its democratic accountability, resources, and legislative role.<sup>23</sup> Though there are several other approaches the Court could have taken, such as upholding the award under abuse-of-discretion review<sup>24</sup> or creating a ratio, which provides an exception for extreme cases,<sup>25</sup> this article will focus solely on an analysis of the aforementioned issues.

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<sup>18</sup> See Tanya Paula de Sousa, Note, *Oil over Troubled Waters: Exxon Shipping Co. v. Baker and the Supreme Court's Determination of Punitive Damages in Maritime Law*, 20 VILL. ENVTL. L.J. 247, 263 (2009).

<sup>19</sup> Vincent T. Davis, *Retired RV'ers Keep Holiday Tradition Alive*, SAN ANTONIO EXPRESS-NEWS, December 18, 2002, at 3H.

<sup>20</sup> *Exxon to Pay \$600,000 Fine over Birds*, BOSTON GLOBE, August 14, 2009, at A2.

<sup>21</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626–27 (2008).

<sup>22</sup> *Id.* at 2635 (Stevens, J., concurring in part and dissenting in part).

<sup>23</sup> See RICHARD E. LEVY, *THE POWER TO LEGISLATE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 86 (Jack Stark ed., 2006).

<sup>24</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2638 (Stevens, J., concurring in part and dissenting in part) (“[T]he Court never explains why abuse-of-discretion review is not the precise antidote to the unfairness inherent in such excessive awards.”). Justice Breyer commented that the district court did a comprehensive review; the punitive damages award was reconsidered not just once, but *three times on remand*. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part) (emphasis added). Further, the district court and the Ninth Circuit thoroughly applied the Supreme Court's due process punitive damage standards to the *Exxon v. Baker* facts. *Id.*

<sup>25</sup> See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (“A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.”).

With this focus in mind, Part II provides a background of maritime law, its unique place in federal common law, and the availability of punitive damages in maritime law. Part III discusses the basic facts, procedural history, and both the majority and dissenting rationales on the punitive damages matter in *Exxon v. Baker*. Part IV first analyzes why the Court created a ratio, despite its requirement to exercise discretion. The analysis considers the Court's growing hostility to punitive damages awards in the due process realm, the development of state tort reform, and the advantages of a bright-line rule. Second, Part IV contemplates congressional intent as indicated by the lack of a limitation on punitive damages awards in statutes relating to oil spills, which the Court paradoxically failed to consider when fashioning the ratio. Third, Part IV asserts the argument that Congress is in a superior position to weigh issues of public policy because of its democratic accountability, resources, and legislative role. Part V offers concluding remarks and questions for future study.

## II. BACKGROUND

### A. Maritime Law and Its Unique Placement in Federal Common Law

*Exxon v. Baker* arises under the original jurisdiction of the United States federal district courts for maritime law and admiralty.<sup>26</sup> Even though "admiralty" and "maritime law" were historically separate terms, they are now synonymous and broadly referred to as "the rules and legal practices which govern the business of carrying goods and passengers by water."<sup>27</sup> In another definition, maritime law refers to "the set of legal rules, concepts, and processes that relate to navigation and commerce by water."<sup>28</sup> Issues often arising in maritime law include personal injuries occurring to seamen and passengers in United States seas, collisions, the

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<sup>26</sup> U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to all Cases of admiralty and maritime Jurisdiction . . ."). Congress codified this constitutional grant: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . ." 28 U.S.C. § 1333 (2006).

<sup>27</sup> LINDA L. SCHLUETER, PUNITIVE DAMAGES 804 (Matthew Bender & Company, Inc. 2005) (1980). See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (4th ed. 2004) (1987), for an overview of general admiralty and maritime law.

<sup>28</sup> THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 1 (1987).

law of salvage and finds, and of most importance to this article, oil pollution.<sup>29</sup>

Maritime law is unique because it is an area subject to federal common law rulemaking.<sup>30</sup> Maritime law draws from “an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.”<sup>31</sup> In addition to common law created by the courts, Congress has passed numerous regulatory measures that affect maritime law generally, such as the Clean Water Act (CWA).<sup>32</sup> With specific reference to the regulation of oil, Congress has passed several pieces of legislation, such as the Trans-Alaska Pipeline Authorization Act (TAPAA)<sup>33</sup> and the Oil Pollution Act of 1990 (OPA).<sup>34</sup> Notably, the OPA was created in direct response to the Exxon Valdez disaster and passed quickly in both chambers of Congress by 1990, one year after the oil spill.<sup>35</sup>

The term “federal common law” often defies an easy definition and one commentator called it a “puzzle.”<sup>36</sup> Justice Oliver Wendell Holmes cautioned, “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .”<sup>37</sup> This “voice” is still difficult to identify. A definition from the Supreme Court states that “federal common law” is “a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but rather, to the judicial ‘creation’ of a special federal rule of decision.”<sup>38</sup>

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<sup>29</sup> *Id.* at 108–09.

<sup>30</sup> Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. REV. 585, 602 n.109 (2006) (referring to several United States Supreme Court cases). In addition to admiralty, federal common law is limited to narrow areas such as “the rights and obligations of the United States, [and] interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations . . . .” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnote omitted).

<sup>31</sup> *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864–65 (1986).

<sup>32</sup> *See* 33 U.S.C. §§ 1251–1387 (2006).

<sup>33</sup> 43 U.S.C. §§ 1651–1656 (2006).

<sup>34</sup> 33 U.S.C. §§ 2701–2762 (2006).

<sup>35</sup> GERARD J. MANGONE, *UNITED STATES ADMIRALTY LAW* 272, 278 (1997). *See also* Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is It Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 105 (2002).

<sup>36</sup> Tidmarsh & Murray, *supra* note 30, at 585.

<sup>37</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>38</sup> *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997). Another definition states the federal common law is “any rule of federal law created by a court . . . when the

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One of the major reasons for federal common law authority in admiralty has been the desire to preserve uniformity in maritime law.<sup>39</sup> Even so, federal common law rulemaking often raises a separation of powers problem, which leads to tension between the legislative and judicial branches of the federal government.<sup>40</sup> The Supreme Court, recognizing this dilemma, has “emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is ‘subject to the paramount authority of Congress.’”<sup>41</sup> The idea is that “once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished.”<sup>42</sup> Further, the need for uniformity should be great enough to outweigh the need for uniformity within a state “or when national interests require.”<sup>43</sup>

In specific regards to maritime law the “continuing tradition” is to develop federal common law so it can be “harmonize[d] with the enactments of Congress in the field.”<sup>44</sup> As the Court stated on another occasion, “Even in admiralty, however, where the federal judiciary’s lawmaking power may well be at its strongest, it is our duty to respect the will of Congress.”<sup>45</sup>

Although the Supreme Court has not adopted a specific test, the basic process of determining when a new rule should be created under federal common law authority can be divided into two prongs.<sup>46</sup> The first is the

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substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.” Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis omitted).

<sup>39</sup> Joel K. Goldstein, *Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange*, 43 ST. LOUIS U. L.J. 1337, 1337 (1999); see also *S. Pac. Co.*, 244 U.S. at 215. This reasoning is not without its critics, however. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1332 (1996).

<sup>40</sup> See *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981); *New Jersey v. New York*, 283 U.S. 336, 348 (1931).

<sup>41</sup> *Nw. Airlines, Inc.*, 451 U.S. at 95 (quoting *New Jersey v. New York*, 283 U.S. at 348).

<sup>42</sup> *Id.* at 95 n.34.

<sup>43</sup> Field, *supra* note 38, at 962.

<sup>44</sup> *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994).

<sup>45</sup> *Nw. Airlines, Inc.*, 451 U.S. at 96.

<sup>46</sup> See Field, *supra* note 38, at 886. Professor Martha Field, amongst other scholars, simplified the Court’s reasoning process by breaking it down into an easily applicable test.

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authority prong, which instructs a federal court to contemplate “whether the issue before it is properly subject to the exercise of federal power.”<sup>47</sup> The second is the choice prong, which considers “whether, in light of the competing state and federal interests involved, it is wise as a matter of policy to adopt a federal substantive rule to govern the issue.”<sup>48</sup>

*B. The Definition and Objective of Punitive Damages*

Although there are many definitions for punitive damages,<sup>49</sup> one of the most common states, “Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”<sup>50</sup>

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.<sup>51</sup>

As the Supreme Court has emphasized, punitive damages “should reflect ‘the enormity of [the defendant’s] offense.’”<sup>52</sup>

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Her test is derived from a series of Supreme Court decisions including, but not limited to, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–27 (1979); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 592–94 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943).

<sup>47</sup> Field, *supra* note 38, at 885–86.

<sup>48</sup> *Id.*; see also *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (“[T]he guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.”); *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997).

<sup>49</sup> See, e.g., SCHLUETER, *supra* note 27, at 21–22 (noting “punitive damages” and “exemplary damages” are synonymous, and most jurisdictions use these terms, despite the fact that other terminology exists, including smart money, vindictive damages and presumptive damages). See *id.*, at 1–17; JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES §§ 4:1–4:7 (3d ed. 1997), for a historical overview of punitive damages.

<sup>50</sup> RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

<sup>51</sup> *Id.* § 908(2).

<sup>52</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

Although there are many possible objectives for punitive damages, the two main modern purposes are deterrence and punishment of the defendant.<sup>53</sup> Importantly, compensatory and punitive damages serve different purposes.<sup>54</sup> Compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.”<sup>55</sup> Punitive damages, on the other hand, do not fulfill an economic or pecuniary purpose.<sup>56</sup> Instead, they intend to reprove a reckless defendant and discourage them and other potential defendants from performing the same wrong in the future.<sup>57</sup>

### C. Punitive Damages in Maritime Law

Punitive damages have been clearly recognized as a remedy in maritime law “since the early nineteenth century.”<sup>58</sup> For example, in 1818, the Supreme Court openly offered approval for punitive damages in maritime law when it stated, “[I]f this were a suit against the original wrong-doers, it might be proper to go yet farther [than compensatory damages], and visit upon them in the shape of exemplary damages [punitive damages], the proper punishment which belongs to such lawless misconduct.”<sup>59</sup>

Punitive damages are generally acceptable in maritime law; however, there are some important restrictions.<sup>60</sup> For one, they are not allowed “in a seaman’s personal injury or death case either under the Jones Act or unseaworthiness.”<sup>61</sup> The Supreme Court reached this result in *Miles v. Apex Marine Corporation*,<sup>62</sup> which was based on the preemptive effect of

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<sup>53</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008). See David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374–81 (1994), for other purposes of punitive damages.

<sup>54</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979).

<sup>58</sup> SCHLUETER, *supra* note 27, at 803; see generally David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997) (providing a thorough historical overview of punitive damage awards in general maritime law).

<sup>59</sup> *The Amiable Nancy*, 16 U.S. 546, 558 (1818).

<sup>60</sup> SCHOENBAUM, *supra* note 27, at 171.

<sup>61</sup> *Id.*

<sup>62</sup> 498 U.S. 19 (1990).

legislation.<sup>63</sup> Some courts have tried to extend *Miles* to non-seafarer plaintiffs,<sup>64</sup> but punitive damages generally are permitted as long as there is no overlap between statutory and general maritime law.<sup>65</sup> Second, “punitive damages are not available in actions involving wrongful death on the high seas.”<sup>66</sup> Third, “a principal . . . cannot be held liable for an agent[’s] . . . wanton or willful misconduct unless it participated in or ratified the wrongful conduct.”<sup>67</sup> Despite these other restrictions, punitive damages awards for property damage are not restricted by *Miles*.<sup>68</sup>

### III. DISCUSSION

#### A. Facts<sup>69</sup>

In 1989, Exxon Shipping operated a tanker called Exxon Valdez, by which it transported oil from Valdez, Alaska.<sup>70</sup> The tanker was commanded by Captain Joseph Hazelwood, who was an experienced and talented mariner, but unfortunately also a known alcoholic.<sup>71</sup> On the evening of March 23, 1989, the tanker left the Valdez port.<sup>72</sup> Ships normally follow an established sea-lane, but it is wise to avoid the lanes when there is too much ice in their paths, which was the situation and what

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<sup>63</sup> SCHOENBAUM, *supra* note 27, at 171 (quoting *Miles*, 498 U.S. at 27). The Jones Act addresses seaman personal injury claims. See 46 U.S.C. § 30104 (2006).

<sup>64</sup> *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1506–07 (5th Cir. 1995); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531, 534–35 (E.D. La. 1992). The United States Supreme Court has defined a nonseafarer to include persons who are not “seaman covered by the Jones Act.” *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996).

<sup>65</sup> SCHOENBAUM, *supra* note 27, at 172; see also John W. DeGravelles, *Uncertain Seas for Maritime Punitive Damages*, 40 TRIAL 50 (Jan. 2004) (analyzing the effect of *Miles* on maritime punitive damages).

<sup>66</sup> SCHOENBAUM, *supra* note 27, at 172–73.

<sup>67</sup> *Id.* at 173.

<sup>68</sup> SCHOENBAUM, *supra* note 27, at 170; see, e.g., *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995).

<sup>69</sup> There are several resources that recount the background, facts, and consequences of the Exxon Valdez oil spill in more detail. See, e.g., JOHN KEEBLE, *OUT OF THE CHANNEL: THE EXXON VALDEZ OIL SPILL IN PRINCE WILLIAM SOUND* (E. Washington Univ. Press 1999); Exxon Valdez Oil Spill Trustee Council, *Publications Overview*, <http://www.evostc.state.ak.us/facts/teachers.cfm> (listing numerous books, articles, and reports about the Exxon Valdez oil spill).

<sup>70</sup> *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1048 (D. Alaska 2002).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Captain Hazelwood opted to do.<sup>73</sup> Unless redirected, the ship's path would lead toward Bligh Reef, a known hazard.<sup>74</sup> Regrettably, Captain Hazelwood mysteriously left the steering of this maneuver to his fatigued third mate, Gregory Cousins, while he went to do paperwork.<sup>75</sup> Hazelwood put the ship on autopilot, which is not common when ships are not in the shipping lane.<sup>76</sup> Although "[t]here are supposed to be two officers on the bridge, . . . after Hazelwood left, there was only one."<sup>77</sup> The only other person on the bridge was a helmsman, Robert Kagan.<sup>78</sup>

Cousins and Kagan thought they had completed the turn, but "[w]hen Cousins realized that the vessel was not turning, he directed an emergency maneuver."<sup>79</sup> However, Cousins was too late, and just after midnight, Exxon Valdez ran into Bligh Reef in Prince William Sound, Alaska.<sup>80</sup> The ship was carrying fifty-three million gallons of oil, of which about eleven million gallons leaked into Prince William Sound.<sup>81</sup> The crude oil floated towards Kenai Peninsula, Cook Inlet, and Kodiak Island.<sup>82</sup>

The response to the oil spill was slow at first for various reasons, including the fact that those in charge were not prepared.<sup>83</sup> Eventually, Exxon, the Coast Guard, and others began a combined clean-up effort.<sup>84</sup> The primary cause of the oil spill was Exxon's recklessness.<sup>85</sup> In particular, Captain Hazelwood was intoxicated at the time the ship ran into the reef.<sup>86</sup> Even more, Exxon knew about Hazelwood's extensive alcohol problems, but employed him anyway.<sup>87</sup> Unsurprisingly, a slew of criminal

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<sup>73</sup> *In re Exxon Valdez*, 270 F.3d 1215, 1222 (9th Cir. 2001).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1222–23. Cousins was not even supposed to be on watch, but since his replacement had not arrived, he decided to stay until he was relieved. *Id.* at 1223.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1046–47 (D. Alaska 2002).

<sup>82</sup> *Id.* at 1047.

<sup>83</sup> See, e.g., SKINNER & REILLY, *supra* note 6, at 22.

<sup>84</sup> *Id.* at 21.

<sup>85</sup> *In re Exxon Valdez*, 236 F. Supp. 2d at 1049.

<sup>86</sup> *Id.* at 1046.

<sup>87</sup> *Id.*

prosecutions and civil lawsuits ensued from this accident, one of the most prominent being *Exxon v. Baker*.<sup>88</sup>

## B. Procedural History

### 1. *Exxon v. Baker*

*Exxon v. Baker* has a complicated and lengthy procedural history that spans from 1994 to 2008.<sup>89</sup> With a few exceptions, all private civil actions filed in federal court were consolidated before Judge Holland in the District Court of Alaska; the district court also certified a mandatory punitive damages class.<sup>90</sup> At the District Court of Alaska in 1994, a three-phase trial resulted in a jury award of \$287 million in compensatory damages and \$5 billion in punitive damages against Exxon.<sup>91</sup> The district court entered judgment against Hazelwood and Exxon in accordance with the jury's verdict.<sup>92</sup>

In 2001, Exxon appealed the 1994 ruling to the Ninth Circuit Court of Appeals.<sup>93</sup> In light of the recent Supreme Court cases *BMW of North America, Inc. v. Gore*<sup>94</sup> and *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*,<sup>95</sup> the Ninth Circuit remanded the case to the district court with instructions to reduce the award.<sup>96</sup> In 2002, the district court, following the Ninth Circuit's instructions to consider the punitive damages award in light of *BMW* and *Cooper*, reduced the punitive damages award to \$4 billion.<sup>97</sup>

Exxon appealed again, but before the Ninth Circuit could address the case, the Supreme Court decided another due process case on punitive damages: *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>98</sup> After the Ninth Circuit heard oral arguments from the parties, it vacated

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<sup>88</sup> See *In re Exxon Valdez*, 270 F.3d 1215, 1223–24 (9th Cir. 2001); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 775 (9th Cir. 1994).

<sup>89</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2613–14, 2617, 2634 (2008).

<sup>90</sup> *In re Exxon Valdez*, 236 F. Supp. 2d at 1048. See *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769 (Alaska 1999), for an example of a case that was not consolidated.

<sup>91</sup> *In re Exxon Valdez*, 270 F.3d at 1225.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1215, 1225.

<sup>94</sup> 517 U.S. 559 (1996).

<sup>95</sup> 532 U.S. 424 (2001).

<sup>96</sup> *In re Exxon Valdez*, 270 F.3d at 1241. See *BMW*, 517 U.S. at 574–75 (holding that a two million dollar punitive damage award was grossly excessive); *Cooper*, 532 U.S. at 441–42 (applying the “Gore” factors established in *BMW*).

<sup>97</sup> *In re Exxon Valdez*, 236 F. Supp. 2d at 1068.

<sup>98</sup> *Id.* at 1075; *State Farm*, 538 U.S. 408 (2003).

the award entirely.<sup>99</sup> In 2004, the district court considered the Exxon case again, this time in light of *State Farm*, and increased the award to \$4.5 billion.<sup>100</sup>

Exxon appealed for a third time to the Ninth Circuit in 2006.<sup>101</sup> The court vacated the award and remanded it to the district court to lower it to \$2.5 billion.<sup>102</sup> In 2007, still unhappy with this result, Exxon appealed again to the Ninth Circuit Court of Appeals, but the court declined Exxon's request for another hearing.<sup>103</sup> Finally, Exxon appealed to the Supreme Court, which granted certiorari and heard the case in February 2008.<sup>104</sup>

## 2. Other Litigation

The United States "and the State of Alaska sued Exxon for environmental damage"; this litigation was jointly settled by consent decrees "where Exxon agreed to pay the governments . . . \$900 million over a period of ten years."<sup>105</sup> Exxon Shipping also pled guilty to environmental crimes including one count each of violating the CWA, the Refuse Act, and the Migratory Bird Treaty Act, while Exxon Corporation pled guilty to one count in violation of the Migratory Bird Treaty Act.<sup>106</sup> Both "were jointly fined \$25 million and were ordered to pay" \$100 million in restitution.<sup>107</sup> There were also numerous private civil actions filed by various parties and criminal prosecutions against Captain Hazelwood.<sup>108</sup> Excluding the *Exxon v. Baker* litigation costs, Exxon spent \$3.4 billion in clean-up costs and other legal-related issues, such as state and federal fines.<sup>109</sup>

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<sup>99</sup> *In re the Exxon Valdez*, 296 F. Supp. 2d at 1076.

<sup>100</sup> *Id.* at 1110.

<sup>101</sup> *In re Exxon Valdez*, 472 F.3d 600, 601 (9th Cir. 2006).

<sup>102</sup> *Id.* at 625.

<sup>103</sup> *In re Exxon Valdez*, 490 F.3d 1066, 1068 (9th Cir. 2007).

<sup>104</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2614 (2008).

<sup>105</sup> *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1047 (D. Alaska 2002).

<sup>106</sup> *Id.* at 1048.

<sup>107</sup> *Id.*

<sup>108</sup> *See, e.g.*, *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993); *State v. Hazelwood*, 946 P.2d 875 (Alaska 1997).

<sup>109</sup> Anna S. Persky, *At Sea over Punitives: Justices Sail into Murky Waters over Damages from Infamous Disaster*, 94 A.B.A. J. 22, 22 (Feb. 2008).

### C. Issues and Holdings

Justice Souter wrote the majority opinion, and Justices Kennedy, Roberts, Thomas, and Scalia joined.<sup>110</sup> Although Justices Breyer, Ginsberg, and Stevens joined the majority opinion for Parts I, II, and III, these three justices each wrote their own dissenting opinions on Part IV, which concerned the punitive damages award.<sup>111</sup> Justice Scalia also wrote a concurring opinion, in which Justice Thomas joined.<sup>112</sup> Ultimately, *Exxon v. Baker* held that (1) a defendant could be held vicariously liable for the reckless acts of its managerial employees,<sup>113</sup> (2) the CWA does not preempt maritime common law on punitive damages,<sup>114</sup> and (3) the punitive damages award against Exxon was excessive and is limited to an amount equal to compensatory damages in federal maritime law (a 1:1 ratio).<sup>115</sup>

#### 1. Vicarious Liability: A Defendant Can Be Held Liable for the Reckless Acts of Its Managerial Employees

First, the Court addressed whether punitive damages liability could be imposed on a corporate employer for the reckless acts of a managerial employee who was acting in the scope of employment.<sup>116</sup> Relying on *The Amiable Nancy* and *Lake Shore & Michigan Southern Railway Co. v. Prentice*,<sup>117</sup> Exxon argued the Court's precedents disallowed punitive damages against a shipowner for an employee's recklessness.<sup>118</sup> On the other hand, Baker asserted that the Ninth Circuit correctly followed the

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<sup>110</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611 (2008). Due to ownership holdings of Exxon stock, Justice Alito recused himself and took no part in this case. Linda Greenhouse, *Justices to Hear Exxon's Challenge to Punitive Damages*, N.Y. TIMES, October 30, 2007, at C5.

<sup>111</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2634 (Stevens, J., concurring in part and dissenting in part), 2639 (Ginsburg, J., concurring in part and dissenting in part), 2640 (Breyer, J., concurring in part and dissenting in part).

<sup>112</sup> *Id.* at 2611 (majority opinion).

<sup>113</sup> *Id.* at 2615–16.

<sup>114</sup> *Id.* at 2618–19.

<sup>115</sup> *Id.* at 2634.

<sup>116</sup> *Id.* at 2615.

<sup>117</sup> 147 U.S. 101 (1893).

<sup>118</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2615.

Restatement (Second) of Torts, recognizing corporate liability in punitive damages for reckless acts of managerial employees.<sup>119</sup>

The Court was unable to garner a majority opinion on either argument presented by the parties and therefore left the Ninth Circuit's opinion untouched, which affirmed the imposition of punitive damages on a corporate employer for the reckless acts of its employees.<sup>120</sup> Consequently, punitive damages can be imputed to a corporate employer for the reckless acts of its employees, at least in the Ninth Circuit.

2. *Federal Preemption: The CWA Does Not Preempt Maritime Common Law on Punitive Damages*

Second, the Court considered whether the CWA preempted the imposition of punitive damages.<sup>121</sup> Earlier in the litigation, the Ninth Circuit accepted Exxon's renewed motions regarding the preemption of punitive damages almost thirteen months after the stipulated motions deadline.<sup>122</sup> In normal circumstances, such a claim would be waived, but the Ninth Circuit reasoned that Exxon had "'consistently argued statutory preemption' throughout the litigation, and the question was of 'massive . . . significance' given the 'ambiguous circumstances' of the case."<sup>123</sup> Even so, after allowing Exxon to argue the issue, the Ninth Circuit held that the CWA did not preempt maritime common law on punitive damages.<sup>124</sup>

The Supreme Court agreed with the Ninth Circuit's end result that the CWA does not preempt punitive damages, but it disagreed with the circuit court's reasoning.<sup>125</sup> Specifically, the Court refused to abolish the common

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<sup>119</sup> *Id.* at 2611. The Ninth Circuit had previously adopted the Restatement Second of Torts. *Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1386 (9th Cir. 1985). "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if (a) the principal or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act." RESTATEMENT (SECOND) OF TORTS § 909 (1979).

<sup>120</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2616; *In re Exxon Valdez*, 270 F.3d 1215, 1236 (9th Cir. 2001).

<sup>121</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2616.

<sup>122</sup> *Id.* at 2617.

<sup>123</sup> *Id.* (quoting *In re Exxon Valdez*, 270 F.3d at 1229–30).

<sup>124</sup> *In re Exxon Valdez*, 270 F.3d at 1230.

<sup>125</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2617.

law rule that oil companies must abstain from injuring private parties when the statute is based explicitly on protecting natural resources.<sup>126</sup> It based its second rationale on field preemption and found there was a lack “of congressional intent to occupy the entire field of pollution remedies.”<sup>127</sup>

3. *Punitive Damages: Creation of a 1:1 Ratio Between Compensatory and Punitive Damages in Maritime Law*

a. *Majority Rationale: “The Stark Unpredictability of Punitive Damage Awards”*<sup>128</sup>

Third, *Exxon v. Baker* presented “an issue of first impression about punitive damages in maritime law,” which the Court had jurisdiction to decide as a common law court.<sup>129</sup> Justice Souter began by presenting an historical backdrop of the development and rationales of punitive damages in American law, and then compared these to the present day rationale.<sup>130</sup> Although there were several rationales in the past, such as “for example’s sake” and “to compensate for intangible injuries,” the contemporary rationale is aimed mainly at “retribution and deterring harmful conduct,” which are the twin goals of punitive damages.<sup>131</sup>

From this background, the opinion considered how states approach regulation of punitive damages, such as those that will allow them only when authorized by statute (i.e., Louisiana, Massachusetts, Washington, and New Hampshire) and others that consider compensatory and punitive damages as the same (i.e., Connecticut).<sup>132</sup> Some states went further and imposed statutory limits.<sup>133</sup> Procedurally, punitive damages awards are

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<sup>126</sup> *Id.* at 2619.

<sup>127</sup> *Id.* (citing *United States v. Texas*, 507 U.S. 529, 534 (1993) (“In order to abrogate a common-law principle, the statute ‘must speak’ directly to the question addressed by the common law.” (internal quotations omitted))).

<sup>128</sup> *Id.* at 2625.

<sup>129</sup> *Id.* at 2619.

<sup>130</sup> *Id.* at 2620–22. While contemporary American practice in punitive damages stemmed from 1763, their existence goes back as far as ancient history. *Id.*

<sup>131</sup> *Id.* at 2620–21.

<sup>132</sup> *See id.* at 2622–23.

<sup>133</sup> *Id.* at 2623. For example, Ohio imposes a 2:1 ratio in most tort cases, and Alaska provides the “greater of 3:1 ratio or \$500,000 in most actions.” *Id.* “Oklahoma has a graduated scheme,” depending on the defendant’s conduct, which ranges from the “greater of 1:1 or \$100,000 in cases involving ‘reckless disregard’” to “no limit where the conduct is intentional, malicious, and life threatening.” *Id.* at 2623 n.12.

generally determined first by the jury and then reviewed by the court to ensure reasonability.<sup>134</sup>

Justice Souter then stated that awards of punitive damages in the United States are higher and awarded more frequently than anywhere else.<sup>135</sup> He also addressed the pervasive criticism of punitive damages in American law as compared to other countries, which rests on the assumption that there are too many runaway awards and there has been an increase in punitive damages cases over time.<sup>136</sup> In spite of this discussion, the opinion clearly denounced these assumptions as unfounded.<sup>137</sup> Instead, Justice Souter argued that “the median ratio of punitive to compensatory awards has remained less than 1:1,” and data does not show a “marked increase in the percentage of cases with punitive awards over the past several decades.”<sup>138</sup>

Justice Souter thought the main trouble lay elsewhere. The main thesis posited that the real problem was not excessiveness or volume of the awards, but “the stark unpredictability of punitive damage awards.”<sup>139</sup> Relying on eleven empirical studies, Justice Souter wrote that “the available data” on punitive damages suggests that “the spread between high and low individual awards” is not acceptable.<sup>140</sup> He anchored his reliance on one study in particular that surveyed jury awards from state civil trials, which “found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1.”<sup>141</sup> Justice Souter also asserted that the margin is lower when judges assess punitive damages; nonetheless, he felt they are still too high.<sup>142</sup> The primary issue was not

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<sup>134</sup> *Id.* at 2623 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991)).

<sup>135</sup> *Id.* at 2623 (providing a comparative analysis on England, Canada, Australia, and various other European countries).

<sup>136</sup> *Id.* at 2624–25.

<sup>137</sup> *Id.* at 2624.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2625.

<sup>140</sup> *Id.* at 2624 nn.13–15

<sup>141</sup> *Id.* (citing Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUDIES, 263, 267–69 (2006)). The study examined a representative sample of “tort, contract, and property cases disposed of by trial” between 1991–1992, and in 1996 and 2001 in forty-six of the “most populous counties in the United States.” Eisenberg, *supra*, at 267.

<sup>142</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2625. The median ratio is 0.66:1 and the mean ratio is 1.60:1 when punitive damages are imposed by judges. *Id.* Relying on the same  
(continued)

necessarily the amount of the award, but that these results were not reached through a standard method of determining deterrence and retribution.<sup>143</sup> Instead, Justice Souter argued that consistency is lacking in awarding punitive damages,<sup>144</sup> and he was aware of no studies providing support for consistency.<sup>145</sup>

With this in mind, Justice Souter explained that the Court's previous approach to outlier punitive damage awards was based on due process analyses, and in those opinions, it rejected a "simple mathematical formula" for marking an appropriate constitutional line.<sup>146</sup> However, because this case arose under federal maritime jurisdiction, the Court was not required to undertake due process analysis; as a common law court, it had the authority to make the rule that it laid out in the opinion.<sup>147</sup>

There are two main ways to determine punitive damages awards: verbal and quantitative.<sup>148</sup> The majority clearly preferred the quantitative approach and openly criticized the verbal method.<sup>149</sup> The Court's review of states that use the verbal method left them "skeptical that verbal formulations . . . are the best insurance against unpredictable outliers."<sup>150</sup> Drawing an analogy to federal sentencing standards, which rejected an "indeterminate" system, the Court likened the inconsistency found before sentencing guidelines were implemented to inconsistent outlier punitive

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data, another analysis showed that 14% of punitive damages awards in 2001 were greater than four times the compensatory damages. THOMAS H. COHEN, PUNITIVE DAMAGE AWARDS IN LARGE COUNTIES, 2001, at 5 (U.S. Dep't of Justice 2005). In financial injury cases, another study using different data found that 34% of the punitive awards were greater than three times the compensatory damages. Erik K. Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 333 (1999).

<sup>143</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2625–26.

<sup>144</sup> *Id.* at 2625–27 (noting that in *BMW*, an Alabama jury awarded \$4 million dollars in punitive damages, but a second Alabama case with similar facts produced similar compensatory awards and no punitive damages at all).

<sup>145</sup> *Id.* at 2626. The Court added that while there was some research, Exxon partly funded it, and consequently the Court declined to use it. *Id.* at 2626 n.17.

<sup>146</sup> *Id.* at 2626 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)). The Court reiterated, "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

<sup>147</sup> *Id.* ("[W]e are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process.").

<sup>148</sup> *Id.* at 2627–29.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2627–28.

damages awards.<sup>151</sup> Although some states impose caps, the Court found the better approach was a numerical ratio between compensatory and punitive damages, a method that Congress uses when “providing treble damages in antitrust, racketeering, patent, and trademark actions.”<sup>152</sup>

Before setting out its new rule, the majority addressed the dissent’s policy concerns that courts should leave the rulemaking to Congress, but ultimately decided that its common law authority was sufficient to fashion the ratio it set forth.<sup>153</sup> In a footnote, the majority addressed Justice Stevens’ concern that courts should leave remedies to Congress by providing examples of its common law authority in maritime cases.<sup>154</sup> It stated that a “slim majority of the States” with ratios have a 3:1 cap that applies across the board.<sup>155</sup> However, the Court determined that this case was unique because it involved recklessness that was profitless for Exxon, but resulted “in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.”<sup>156</sup>

Consideration of treble damages rules, whether they be federal patent cases or state environmental issues, did not provide sufficient connection to this case.<sup>157</sup> Instead, “better evidence” lay in analyzing “the median ratio of punitive to compensatory verdicts” across many cases, which should reflect fair judgments.<sup>158</sup> The median represented cases from “the least blameworthy” to gross negligence; “[t]he data put the median ratio for the entire gamut of circumstances at less than 1:1.”<sup>159</sup> The Court reasoned that a ratio of 0.65:1 “probably marks the line near which cases like this one largely should be grouped.”<sup>160</sup>

The Court considered the 1:1 ratio as “a fair upper limit” in maritime cases such as this one, because of the “need to protect against the possibility . . . of awards that are unpredictable and unnecessary.”<sup>161</sup> In a footnote, the Court addressed the abuse-of-discretion standard that Justice

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<sup>151</sup> *Id.* at 2628–29.

<sup>152</sup> *Id.* at 2629.

<sup>153</sup> *Id.* at 2629–30.

<sup>154</sup> *Id.* at 2630 n.21.

<sup>155</sup> *Id.* at 2631–32.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* at 2632.

<sup>158</sup> *Id.* at 2632–33.

<sup>159</sup> *Id.* at 2633.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

Stevens raised, but argued that this approach did not solve the problem of outlier awards.<sup>162</sup> In concluding remarks, the Court reasoned that the CWA provision regarding daily fines supported its 1:1 limit “in cases of this type” because the fine for a knowing violation is double the fine for a negligent one.<sup>163</sup> Furthermore, the award was not too low in light of the constitutional “upper limit,” as defined in *State Farm*, because a “single-digit maximum is appropriate in all but the most exceptional of cases, . . . a lesser ratio” is constitutionally appropriate “[w]hen compensatory damages are substantial.”<sup>164</sup>

*b. Justice Stevens’ Dissenting Opinion: Judicial Restraint and Congressional Intent*

Justice Stevens presented several criticisms of the majority’s opinion in Part III, the first being that though the Court had authority to fashion law under its common law power, it must exercise judicial restraint.<sup>165</sup> Consequently, by weighing legislative authority against judicial authority, Justice Stevens would have left the decision to craft a ratio, if at all, to Congress.<sup>166</sup> He conceded that maritime law is federal common law “to a great extent.”<sup>167</sup> However, he countered this with the fact that it is “dominated by federal statute.”<sup>168</sup> He furthered this argument with the observation that Congress had not altered punitive damages in maritime law, which “suggests that Congress would *not* wish us to create a new rule restricting the liability of a wrongdoer like Exxon.”<sup>169</sup> For support, Justice Stevens noted that Congress recently passed legislation regarding maritime

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<sup>162</sup> *Id.* at 2633 n.27 (“Justice Stevens would find no abuse of discretion in allowing the \$2.5 billion balance of the jury’s punitive verdict here, and yet that is about five times the size of the award that jury practice and our judgment would signal as reasonable in a case of this sort.”).

<sup>163</sup> *Id.* at 2634 (“Congress set criminal penalties of up to \$25,000 per day for negligent violations of pollution restrictions, and up to \$50,000 per day for knowing [violations],” thereby giving discretion to courts to double the penalty for knowing violations.).

<sup>164</sup> *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). “In this case, the constitutional outer limit may well be 1:1.” *Id.* at 2634 n.28.

<sup>165</sup> *Id.* at 2634–35 (Stevens, J., concurring in part and dissenting in part).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2634 (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979)).

<sup>168</sup> *Id.* at 2635 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990)).

<sup>169</sup> *Id.*

law issues such as the Limitation of Liability Act (Limitation Act)<sup>170</sup> and TAPAA, but neither of these acts included any restrictions on punitive damages.<sup>171</sup> Justice Stevens also disapproved of the Court's empirical analysis.<sup>172</sup> He argued that maritime law is unique and counsels against using land-based tort cases and applying them to maritime cases.<sup>173</sup> Implying that the ratio may lead to more unfair results than in land-based cases, he stated, "[G]eneral maritime law limits the availability of compensatory damages" and consequently, "there may be less reason to limit punitive damages in this sphere than there would be in any other."<sup>174</sup> Justice Stevens noted that, though states have imposed ratios on punitive damages, "the Court fails to identify a single state court that has imposed a precise ratio . . . under its common-law authority."<sup>175</sup> Addressing the Court's analysis concerning outlier awards, Justice Stevens argued that the "Court never explains why abuse-of-discretion review is not the precise antidote to the unfairness inherent in such excessive awards."<sup>176</sup> Accordingly, Justice Stevens would have affirmed the punitive damages award.<sup>177</sup>

*c. Justice Ginsberg's Dissenting Opinion: A Solution in Search of a Problem*

Justice Ginsberg agreed with Justice Stevens that the decision should have been left to Congress, but felt the Court's authority to craft a ratio was a close call.<sup>178</sup> Justice Ginsberg also asserted that, regarding punitive damages awards, the majority assumed a problem in need of a solution.<sup>179</sup> Much like Justice Stevens, she questioned whether there was an "urgent need" to break away from traditional abuse-of-discretion review because the Court failed to prove "outlier awards . . . occur more often or are more

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<sup>170</sup> 46 U.S.C. § 183 (1982).

<sup>171</sup> See *Exxon Shipping Co.*, 128 S. Ct. at 2635–36. By enacting TAPAA, "Congress altered the liability regime governing certain types of Alaskan oil spills, imposing strict liability but also capping recovery; notably, it did not restrict the availability of punitive damages." *Id.* at 2636.

<sup>172</sup> See *id.* at 2636.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.* at 2636–37.

<sup>175</sup> *Id.* at 2637 (emphasis omitted).

<sup>176</sup> *Id.* at 2638.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

<sup>179</sup> See *id.*

problematic in maritime cases than in other areas governed by federal law.”<sup>180</sup> She also shared Justice Stevens’ concern that no court has ever imposed a ratio like the majority did in this case.<sup>181</sup>

However, the brunt of Justice Ginsberg’s critique centered on the impact of the majority’s ruling for future cases and the unresolved questions it leaves. Challenging the rigidity of the ratio, she asked what a ratio might be for a defendant who acted not recklessly, but maliciously, and whether the magnitude of the risk should increase the ratio.<sup>182</sup> With constitutional due process standards in mind, Justice Ginsberg also pondered whether the “1:1 ratio is the maritime-law ceiling,” or “that any ratio higher than 1:1 will be held to exceed ‘the constitutional outer limit.’”<sup>183</sup> Finally, she considered whether the Court’s limited decision in federal maritime law will open Pandora’s Box to other areas of the law and asked, “On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?”<sup>184</sup>

*d. Justice Breyer’s Dissenting Opinion: The Problems of Rigid Ratios*

Like his other two dissenting colleagues, Justice Breyer also argued that a rule imposing a ratio should have been left to Congress, not the Supreme Court.<sup>185</sup> He conceded the ratio offers uniformity, which is desired in the law, but ultimately concluded a fixed ratio was not needed to reach this objective.<sup>186</sup> In particular, he disliked that the ratio was made without exceptions for extreme cases, of which Exxon might be a contender.<sup>187</sup> Finally, Justice Breyer noted that the district court and Ninth

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<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (quoting *id.* at 2634 n.28 (majority opinion)).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part).

<sup>186</sup> *See id.*

<sup>187</sup> *See id.* Justice Breyer noted that in the Court’s recent constitutional due process cases, it reasoned that “‘few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.’” *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). He added, “We thus foresaw exceptions to the numerical constraint.” *Id.*

Circuit did a thorough abuse-of-discretion review and on this basis, the Supreme Court should uphold their meticulous analysis.<sup>188</sup>

#### IV. ANALYSIS

##### A. *Explaining the Court's Failure to Exercise Adequate Discretion as Required by Federal Common Law*

When analyzing the *Exxon v. Baker* opinion, one of the most crucial aspects to consider is jurisdiction: the Supreme Court decided this case as a federal common law court sitting in admiralty.<sup>189</sup> Interestingly, and perhaps fortuitously, depending on one's view of the outcome, this freed the Court from analyzing the case within the constitutional due process realm.<sup>190</sup> Although not a legal no-man's land, federal common law does give a court much more power than it normally possesses.<sup>191</sup> However, with this power comes potential risks. The power risks blurring the lines between the federal judiciary's traditional role—interpretation of law—and the accompanying role of Congress—creation of laws.<sup>192</sup> These risks become even more evident when courts fail to employ the discretion required in federal common law rulemaking.

As mentioned earlier in this article, federal common law courts must consider first their authority to create new rules, and second, despite having authority, the wisdom to create new rules.<sup>193</sup> There is no dispute that the Court had authority to rule in *Exxon v. Baker*<sup>194</sup> because admiralty

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<sup>188</sup> See *id.* (mentioning that the district court “‘engaged in an exacting review . . . not once or twice, but three times, with a more penetrating inquiry each time’” (quoting *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1110 (D. Alaska))).

<sup>189</sup> See *id.* at 2619 (majority opinion).

<sup>190</sup> See *id.* at 2626–27. Analyzing the *Exxon v. Baker* case in light of the Court's other due process cases is beyond the scope of this article, but the Court's most recent jurisprudence demonstrates an increasing desire to reign in excessive punitive damage awards. See, e.g., Erwin Chemerinsky, *Supreme Court Review: A Narrow Ruling on Punitive Damages*, 44 TRIAL 62 (Sept. 2008).

<sup>191</sup> See *supra* text accompanying notes 36–38.

<sup>192</sup> Whether the power given to courts under federal common law is desirable is beyond the scope of this article, but there is certainly scholarly debate about the issue. See, e.g., Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761(1989).

<sup>193</sup> Field, *supra* note 38, at 885–86.

<sup>194</sup> See *supra* text accompanying notes 36–38.

is one of the unique areas subject to federal common law.<sup>195</sup> Regardless of authority, the Court curiously sidestepped the adequate reasoning required by the second prong of federal common law rulemaking. Because the Court analyzed the case under maritime law, Justice Souter could fairly rebut the dissent's criticism that the opinion "smacks too much of policy and too little principle" because "we are acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy."<sup>196</sup> Even with common law on the majority's side, its failure to scrutinize whether the "perceived defect"<sup>197</sup> was a real problem made the opinion seem a bit disingenuous, as if the majority did not consider the importance of maritime law dispositive to the case.<sup>198</sup> However, the context is important, especially because Justice Stevens aptly noted that some injuries in maritime law are "not compensable at all,"<sup>199</sup> thereby effectively eliminating punitive damages in those cases.

Meeting the requirement of the first prong does not provide courts free rein to create rules. If that were the case, then federal common law would be a legislative free-for-all in an institution that is generally supposed to interpret the law, not make it. Why then, did the Court not exercise more discretion? Did the Court lose sight of its own mantra that "[e]ven in admiralty, . . . where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress?"<sup>200</sup>

From the text of the opinion, the clearest reason for the Court's decision is the desire for predictability of punitive damages awards in maritime law.<sup>201</sup> Because uniformity is one of the most desired features of rulemaking in admiralty,<sup>202</sup> this argument makes sense on a superficial level. However, this reasoning is hollow in light of the entire majority opinion. The Court framed the issue as "whether the award of \$2.5 billion in this case is greater than *maritime law* should allow in the

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<sup>195</sup> See Tidmarsh & Murray, *supra* note 30, at 602 n.109. Despite historical federal common law authority in admiralty, some scholars are beginning to question this uniqueness. See generally Goldstein, *supra* note 39; Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004).

<sup>196</sup> Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2629 (2008).

<sup>197</sup> *Id.*

<sup>198</sup> See Chemerinsky, *supra* note 190, at 62.

<sup>199</sup> Exxon Shipping Co., 128 S. Ct. at 2637 (Stevens, J., concurring in part and dissenting in part).

<sup>200</sup> Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 96 (1981).

<sup>201</sup> See Exxon Shipping Co., 128 S. Ct. at 2625–26.

<sup>202</sup> See Goldstein, *supra* note 39, at 1337.

circumstances,”<sup>203</sup> but omitted any substantial analysis about such a problem in maritime law.<sup>204</sup> Indeed, one of the most troubling aspects about the new ratio is its lack of reliance on both statutory law and other maritime cases.<sup>205</sup> Justice Ginsberg astutely noted this discrepancy by stating, “Nor has the Court asserted that outlier awards, insufficiently checked by abuse-of-discretion review, occur more often or are more problematic in maritime cases than in other areas governed by federal law.”<sup>206</sup> The opinion passed over the normal precedential and statutory analysis and instead relied directly on studies and ratios created by state legislatures, as opposed to judiciaries, to support its decision as a federal common law authority.<sup>207</sup> One commentator bluntly argued, “As Justice[s] Oliver Wendell Holmes and Benjamin Cardozo taught us, common law adjudication requires, at the crudest level, a balancing of history (precedent) and policy (normative judgment).”<sup>208</sup> As already noted in this article, there are maritime cases addressing punitive damages,<sup>209</sup> and the Court’s failure even to address them, whether one agrees the cases are adequate, falls short of satisfying the reasoning required by the second prong.

### *1. The Court’s Growing Hostility to Punitive Damage Awards*

There does not appear to be an explicit reason why the Court dodged the second prong, but there are potential implicit explanations. For one, the Court has shown a growing hostility to punitive damages in the due

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<sup>203</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2611 (emphasis added).

<sup>204</sup> The Court only referenced maritime law in a couple instances, neither of which referenced punitive damage awards. *See id.* (citing maritime cases for the Court’s authority to fashion rules under common law authority). *See also id.* at 2630 n.21 (analyzing maritime cases for its authority to fashion a remedy). However, there is an excellent article providing an overview of punitive damages awards in historical, modern, and contemporary American maritime law, which might have served as a useful context for analyzing this case. *See* Robertson, *supra* note 58.

<sup>205</sup> *See* Liptak, *supra* note 4, at A19.

<sup>206</sup> *See Exxon Shipping Co.*, 128 S. Ct. at 2639 (Ginsburg, J., concurring in part and dissenting in part).

<sup>207</sup> *See id.* at 2622–23 (majority opinion).

<sup>208</sup> Anthony J. Sebok, *The Lessons of the Supreme Court’s Recent Decision Granting a Huge Victory to Exxon in the Exxon Valdez Oil Spill Case*, FINDLAW, Jul. 1, 2008, <http://writ.lp.findlaw.com/sebok/20080701.html>.

<sup>209</sup> *See supra* Part II.C.

process realm.<sup>210</sup> *Exxon v. Baker* presented one of the first legitimate opportunities the Court had to consider the issue outside the constitutional area.<sup>211</sup> Although the Court limited this decision to the unique area of maritime law, this statement may resound more in theory than practice, considering its recent decisions on punitive damages, the reasoning in the *Exxon v. Baker* case itself, and the current makeup of the nine justices.<sup>212</sup> As one blogger suggested, “to look at it only in those narrow terms is to miss the signal that the Court is giving—that is, it has grown highly skeptical that it can spell out, in words rather than numbers, workable guidelines that could bring some sense—some consistency—to punitive damages awards.”<sup>213</sup> Another commentator speculated that “[t]he reasoning behind the Supreme Court's adoption of the 1:1 limit is not based on any peculiarities of maritime law. [Instead, i]t is based on fairness concerns arising from the wild unpredictability of outlier punitive damages awards, an issue that is obviously not limited to maritime cases.”<sup>214</sup> Indeed, the Court's exclusive reliance on state and land-based punitive damages in its opinion, and its omission of punitive damage issues in maritime law, gives this explanation credence.

If the Court's concern for fairness is the reason it imposed the 1:1 limit, this raises an important and potentially problematic issue. As one commentator mentioned, “The decision could have an effect far beyond

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<sup>210</sup> See Garrett T. Charon, *Beyond a Bar of Double-Digit Ratios: State Farm v. Campbell's Impact on Punitive Damages Awards*, 70 BROOK. L. REV. 605 (2005), for analysis of the Supreme Court's punitive damage jurisprudence trends.

<sup>211</sup> Posting of Amy J. Wildermuth to SCOTUSBLOG, <http://www.scotusblog.com/wp/exxon-discussion-board-court-draws-clear-lines-for-punitive-damages> (June 25, 2008, 14:45 EST) (“Given the recent cases of limiting punitive damages under the Due Process Clause, it is unsurprising that when the Court had its first opportunity to consider a limit in the common law context, it did not leave the line drawing to Congress as the dissenters would have.”).

<sup>212</sup> Posting of Curt Cutting to California Punitive Damages: An Exemplary Blog, <http://calpunitives.blogspot.com/2008/06/exxon-shipping-co-v-baker-illustrates.html> (June 25, 2008, 13:56 EST).

<sup>213</sup> Posting of Lyle Denniston to SCOTUSBLOG, <http://www.scotusblog.com/wp/analysis-a-new-day-on-punitive-damages-law> (June 25, 2008, 13:51 EST).

<sup>214</sup> Cutting, *supra* note 212; see also Chemerinsky, *supra* note 190, at 62 (“Souter's reasoning was less about maritime law and more about the need for predictable and consistent rules for punitive damages awards.”).

federal maritime law.”<sup>215</sup> It could even become “‘persuasive precedent’ in guiding state courts.”<sup>216</sup> Although some disagree about this assessment of the opinion,<sup>217</sup> the full effect of the *Exxon v. Baker* ruling has yet to be seen. However, advocates outside the maritime context are already using Exxon’s reasoning to support their position.<sup>218</sup>

## 2. *The Developments in State Tort Reform*

The Court also may have been persuaded by the developments in state tort reform, which favor reeling in large punitive damage awards.<sup>219</sup> “Tort reform” has become an American catchphrase whose adherents aim to alleviate the high cost of damages for certain areas like products liability and appears frequently in debates concerning the tobacco, pharmaceutical, and asbestos industries, and medical malpractice.<sup>220</sup> Along with the Court’s increasing skepticism in due process cases, *Exxon v. Baker*

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<sup>215</sup> Robert Barnes, *Justices Slash Damages for Exxon Oil Spill*, WASH. POST, June 26, 2008 at A16. See also Tony Mauro, *Supreme Court Reduces Damages Awarded in Exxon Case*, LEGAL TIMES, June 26, 2008, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202422548621> (the Courts’ reasoning could provide light on other areas such as “federal Section 1981 civil rights actions and in state court review of the excessiveness of damage verdicts”).

<sup>216</sup> Barnes, *supra* note 215, at A16.

<sup>217</sup> See *id.* (“Those in the business community who claim this decision stands for a generalized punitive damage limit are wrong.”); Chris Rizo, *Legal Expert Calls Exxon Valdez Decision 'Limited'*, LEGAL NEWSLINE, June 25, 2008, <http://www.legalnewsline.com/news/213771-legal-expert-calls-exxon-valdez-decision-limited> (“[T]he case is not a landmark decision” and will not “influence a lot of rulings down the road.”).

<sup>218</sup> See, e.g., *Valarie v. Mich. Dep’t of Corr.*, No. 2:07-cv-5, 2008 WL 4939951, at \*7 (W.D. Mich. Nov. 17, 2008) (stating a party in a 42 U.S.C. § 1983 case argued that the 1:1 ratio in Exxon should apply to its liability for punitive damages); *Line v. Ventura*, No. 1070736, 2009 WL 1425993, at \*11 (Ala. May 22, 2009) (stating the defendant argued Exxon rationale for punitive damages in suit involving surety of conservatorship and attorney).

<sup>219</sup> See, e.g., Rachel M. Janutis, *The Struggle over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 944 (2006) (stating tort reform refers to “legislative measures aimed at limiting the availability of relief and the amount of relief in personal injury actions”); Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899 (2008). One of the most vocal advocates for tort reform is the American Tort Reform Association. See American Tort Reform Association, <http://www.atra.org> (last visited October 1, 2009).

<sup>220</sup> See Feit, *supra* note 219; Janutis, *supra* note 219.

provided an ideal case for application of such reform.<sup>221</sup> On one hand, the Court acknowledged that much of the rhetoric surrounding punitive damages was untrue.<sup>222</sup> On the other hand, its linguistic tone was detached and less than welcoming. Without fanfare, the Court bluntly stated that “punitive damages overall are higher and more frequent in the United States than they are anywhere else” and then proceeded to compare how other countries rarely award or tightly control punitive damages.<sup>223</sup> Even when the other countries allow punitive damages, “they are subject to strict, *judicially imposed guidelines*.”<sup>224</sup> Though not explicitly referencing “tort reform,” the Court’s internationally-based reasoning essentially reaches the same desired result. Further, it props up the judicial power argument to create the rule themselves, as opposed to waiting on the legislature.

### 3. *The Advantages of a Bright-Line Rule in Punitive Damages*

The Court may have simply desired to end the Exxon Valdez legal saga with a bright-line rule. A bright-line rule is simple and straightforward; it resolves legal ambiguities and makes them certainties, but equity is often sacrificed in the process.<sup>225</sup> The typical alternative to a bright-line rule is a balancing test, which resolves legal issues by measuring competing interests and deciding which interest outweighs the other.<sup>226</sup> Because the ratio is a bright-line rule, the days of unpredictability in punitive damages awards are over in federal maritime law. As long as compensatory awards are determined reasonably, defendants will not have to worry about outlier awards, which were the concern in *BMW* and *State Farm*.<sup>227</sup> Further, rightly or wrongly, the Court may have believed Exxon

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<sup>221</sup> See William A. Lovett, *Exxon Valdez, Punitive Damages, and Tort Reform*, 38 TORT TRIAL & INS. PRAC. L.J. 1071 (2003), for an analysis of the Exxon Valdez litigation in light of tort reform.

<sup>222</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2624 (2008).

<sup>223</sup> *Id.* at 2623–24.

<sup>224</sup> *Id.* at 2623 (emphasis added).

<sup>225</sup> BLACK’S LAW DICTIONARY 81 (3d Pocket ed. 2006).

<sup>226</sup> *Id.* at 60.

<sup>227</sup> In *BMW*, an Alabama jury awarded \$4,000 in compensatory damages for fraudulent damage to the plaintiff’s car and \$4 million in punitive damages, which was later ruled unconstitutional by the Supreme Court. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565, 585 (1996). In *State Farm*, a plaintiff sued State Farm for bad faith for failing to adequately represent their interests after a car crash and a Utah jury awarded the plaintiff \$2.6 million in compensatory damages and \$145 million in punitive damages. *State Farm Mut. Auto.*

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was punished enough already because Exxon paid \$3.4 billion in clean up and in costs related to other litigation,<sup>228</sup> making the benefits of a bright-line rule even more attractive. Even though the new rule provides uniformity and predictability, there is still usefulness in leaving a balancing test in place. In areas where there are important public policy concerns, such as the environment, as was the case in *Exxon v. Baker*, courts should consider whether some legal nuance may leave the flexibility needed to create a fair result. As one commentator mentioned, there may be value to this “messier” approach.<sup>229</sup>

*B. Lack of Congressional Intent for the Court to Create a Ratio*

The Court’s failure to adequately acknowledge Congress’ role in federal common law is even more curious than its omission of maritime case law analysis.<sup>230</sup> Much of the disagreement between the dissent and majority centered on the Court’s discretion to create the 1:1 ratio. Although all three dissenters—Justices Stevens, Ginsberg, and Breyer—acknowledged that the Court could create rules as a common law court, they argued the balance in this situation favored restraint in deference to Congress.<sup>231</sup> Even though the dissenters’ balancing act requires more involvement, their argument was more persuasive. As required by the second prong, courts are expected to weigh the wisdom of crafting a new rule in federal common law in light of congressional intent.<sup>232</sup> In *Exxon v. Baker*, however, the Court only mentioned Congress briefly throughout its discussion of punitive damages. It stated that the Court “may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule.”<sup>233</sup> If Congress dislikes the rule, it may legislate otherwise.<sup>234</sup> Although this may be the opinion of the Court, there was no attempt to consider whether Congress even had intent regarding lowering

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*Ins. Co. v. Campbell*, 538 U.S. 408, 414–15 (2003). The Supreme Court later ruled the amount of punitive damages unconstitutional. *Id.* at 429.

<sup>228</sup> See Persky, *supra* note 109, at 22.

<sup>229</sup> Wildermuth, *supra* note 211.

<sup>230</sup> See De Sousa, *supra* note 18, at 263–67, for an article analyzing the lack of congressional intent guiding the Court to limit punitive damages in admiralty.

<sup>231</sup> See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634–41.

<sup>232</sup> See Field, *supra* note 38, at 885–86.

<sup>233</sup> *Exxon Shipping Co.*, 128 S. Ct. 2605, 2631 n.21.

<sup>234</sup> See *id.* at 2619.

punitive damages in regards to oil spills.<sup>235</sup> This is especially strange because there is a slew of federal legislation addressing oil spills.<sup>236</sup>

Justice Stevens' analysis of the legal consequences of oil spills and the regulatory scheme that governs them is influential, specifically in regards to the Limitation Act and TAPAA. Congressional omission can sometimes be a speculative enterprise, but Justice Stevens' approach is convincing because not only has Congress implemented several pieces of legislation regarding regulation of oil, but also Congress enacted the OPA *specifically in response* to the Exxon Valdez oil spill.<sup>237</sup> Given this obvious connection and the Court's obligation to consider congressional intent, it is odd that neither the dissent nor the majority mentioned OPA, especially because it modified the remedies scheme in response to oil spills. Indeed, Congress has explicitly allowed for punitive damages in numerous other statutes from those covering bankruptcy to those addressing trademarks.<sup>238</sup> By reviewing various statutes in the oil pollution context<sup>239</sup> it is clear that Congress has dominated rulemaking in this area, which should have given the Court pause before using federal common law to modify punitive damages in maritime law.

### *1. Congress' Stepping Stones: Pre-1970's Legislation*

The first significant piece of legislation in this area was the Shipowner's Limitation of Liability Act of 1851 (Limitation Act),<sup>240</sup> which limited shipowners' liabilities to the value of the ship after the casualty occurred.<sup>241</sup> Congress then implemented the first Oil Pollution Act in

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<sup>235</sup> Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) certainly made his viewpoint clear about this omission: "This ruling is another in a line of cases where this Supreme Court has misconstrued congressional intent to benefit large corporations." David G. Savage, *Justices Slash Exxon Valdez Verdict*, L.A. TIMES, June 26, 2008 at A1, A18.

<sup>236</sup> See statutes cited *infra* Part IV.B.

<sup>237</sup> See U.S. Environmental Protection Agency, Oil Pollution Act Overview, <http://www.epa.gov/emergencies/content/lawsregs/opaover.htm> (last visited Feb. 10, 2009).

<sup>238</sup> See Fisher, *supra* note 13, at 9 n.33.

<sup>239</sup> This article does not attempt to analyze the statutes in exhaustive detail, however. See Daniel Kopec & Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597 (1992); Lewis, *supra* note 35, for a more in depth overview.

<sup>240</sup> Ch. 804, § 1, 49 Stat. 960 (1982) (current version at 46 U.S.C. § 30505 (2006)).

<sup>241</sup> *Id.* Importantly, the Limitation Act only applied if the spill was not in the "privity and knowledge" of the defendant. *Id.* Because Exxon knew about Captain Hazelwood's  
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1924,<sup>242</sup> creating shipowner liability for “reasonable cleanup costs when a spill resulted from the discharger's willful misconduct or gross negligence.”<sup>243</sup> The last piece of legislation before the 1970s was the Outer Continental Shelf Lands Act (OCSLA) in 1953,<sup>244</sup> which imposed strict liability on shipowners who carry oil from the outer continental shelf.<sup>245</sup>

## 2. A Flurry of Legislation: Federal Regulation from 1970 to 1977

During the 1970s, Congress was extremely active in implementing various legislation affecting oil pollution. In response to several oil spills in the late 1960s, Congress first enacted the Water Quality Improvement Act of 1970 (WQIA).<sup>246</sup> This repealed the Oil Pollution Act of 1924<sup>247</sup> and imposed strict liability for cleanup costs resulting from an oil spill.<sup>248</sup> Soon after, in 1972, Congress passed the Federal Water Pollution Control Act (FWPCA),<sup>249</sup> thereby setting express limits on shipowners' liabilities to \$250,000 per vessel.<sup>250</sup> FWPCA declared it national policy to prohibit oil spills and impose civil penalties for cleanup costs.<sup>251</sup> However, private parties still could not recover damages under the Act.<sup>252</sup> Congress then implemented TAPAA in 1973, which “imposed strict liability

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drinking problems, the corporation would not have likely succeeded on a defense under the Limitation Act. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071,1077 (D. Alaska 2004).

<sup>242</sup> Law of June 7, 1924, ch. 316, §§ 1–8, 43 Stat. 604 (codified at 33 U.S.C. §§ 431–437), *repealed by* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 108, 84 Stat. 113.

<sup>243</sup> Amy McKaig, Comment, *Liability for Oil Tanker Spills*, 44 Sw. L.J. 1599, 1601 (1991).

<sup>244</sup> 43 U.S.C. §§ 1331–1356, 1801–1866 (2006).

<sup>245</sup> James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 275 (2001).

<sup>246</sup> Law of June 30, 1948, ch. 758, §§ 1–15, 62 Stat. 1155 (codified at 33 U.S.C. §§ 1151–1175), *repealed by* Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 2, 88 Stat. 816; *see* Kopec & Peterson, *supra* note 239, at 603.

<sup>247</sup> Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 505 (2000).

<sup>248</sup> Kopec & Peterson, *supra* note 239, at 603.

<sup>249</sup> 33 U.S.C. §§ 1251–1377 (2006).

<sup>250</sup> *Id.* § 1321.

<sup>251</sup> *See id.* §§ 1251–1276.

<sup>252</sup> *Id.* § 1321(o)(1).

upon . . . [shipowners] carrying oil from the Trans-Alaska Pipeline Terminals for the first \$14 million in oil spill damages.”<sup>253</sup> Notably, from this point on, oil pollution enactments generally provided economic damages for private parties, though there has been no mention of punitive damages.<sup>254</sup> In 1974, Congress passed the Deepwater Port Act (DPA),<sup>255</sup> another piece of legislation that held owners of deepwater ports strictly liable for oil-spill-cleanup costs of up to \$20 million.<sup>256</sup> Finally, Congress passed the landmark CWA in 1977,<sup>257</sup> which among other things, amended the FWPCA by removing the \$14 million limit on liability, and instead set a minimum bar of strict liability of \$250,000.<sup>258</sup>

### 3. *Deadlocked Until 1990: Congress Passes OPA After the Exxon Valdez Oil Spill*

Although shipowners’ liability was generally limited, there was no limit if the shipowner had knowledge of or was in privity to an employee’s potential to cause a spill by willful negligence or misconduct.<sup>259</sup> However, this exception was not useful for private parties because the regulations mentioned above focused on clean-up costs and lacked compensatory remedies for other damages.<sup>260</sup> Further, the multitude of federal regulations often conflicted with one another.<sup>261</sup> Congress recognized these conflicts, and consistently introduced legislation during the late 1970s and the 1980s.<sup>262</sup> However, concerted efforts did not emerge until the Exxon Valdez oil spill in 1989, spurring Congress to finally act.<sup>263</sup>

The legislative result was the OPA of 1990. The OPA addressed the following problems: “changes to federal response authority; penalty

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<sup>253</sup> Kopec & Peterson, *supra* note 239, at 615.

<sup>254</sup> See 43 U.S.C. § 1653(a)(1) (2006).

<sup>255</sup> 33 U.S.C. §§ 1501–1524 (2006).

<sup>256</sup> *Id.* § 1517(d) *repealed by* Deepwater Ports Act of 1990, Pub. L. No. 101-380, 104 Stat. 507; Kopec & Peterson, *supra* note 239, at 613–14.

<sup>257</sup> *Id.* § 1251–1387 (2006).

<sup>258</sup> *Id.* § 1321(f)(1); Kopec & Peterson, *supra* note 239, at 604.

<sup>259</sup> See *supra* note 245 and accompanying text.

<sup>260</sup> See Kopec & Peterson, *supra* note 239, at 597–98.

<sup>261</sup> See Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 332–38 (1994).

<sup>262</sup> See *id.* at 340 n.54 (listing bills introduced in 1979, 1983, 1985, 1986, and 1987).

<sup>263</sup> Ironically, another bill regarding oil spills was introduced on March 16, 1989, only eight days before the Exxon Valdez oil spill occurred. *Id.* at 340. Differences of opinion included liability limits and preemption. *Id.* at n.56.

increases for oil spills; establishment of U.S. Coast Guard response plans; mandated tank vessel and facility response plans; and the formulation of area contingency plans for selected areas.”<sup>264</sup> Although the OPA focused on improvement of responses to oil spills, it also addressed regulatory noncompliance, fines, and liability.<sup>265</sup> For example, §4301(b) states: “Civil penalties are authorized at \$25,000 for each day of violation or \$1,000 per barrel of oil discharged. Failure to comply with a Federal removal order can result in civil penalties of up to \$25,000 for each day of violation.”<sup>266</sup> Interestingly, the Act provides that “there is no limit of liability where an incident” is caused by gross negligence.<sup>267</sup> Shipowners cannot limit their liability to the value of the vessel either, which the Limitation Act previously allowed.<sup>268</sup>

Further, the OPA specified damages. A provision “[p]rovides that the responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge, is liable for: (1) *certain specified damages* resulting from the discharged oil.”<sup>269</sup> These damages include natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services.<sup>270</sup> Notably absent is a mention of punitive damages, but contrary to some courts analyzing this issue, this does not mean that Congress intended to wipe out punitive damages in maritime law.<sup>271</sup> The statutory language states that the OPA will apply to responsible parties “[n]otwithstanding any other provision or rule of law.”<sup>272</sup> This statutory language indicates that a party may be found liable under other liability schemes if applicable and not preempted by the OPA. Further, the statutory language and legislative history of the OPA demonstrate clear respect for states’ rights to impose additional liabilities.<sup>273</sup> Thus, punitive damages may be foreclosed under

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<sup>264</sup> Robyn Kenney, Oil Pollution Act of 1990, United States, The Encyclopedia of Earth (Nov. 10, 2008), [http://www.eoearth.org/article/Oil\\_Pollution\\_Act\\_of\\_1990,\\_United\\_States](http://www.eoearth.org/article/Oil_Pollution_Act_of_1990,_United_States).

<sup>265</sup> See U.S. Environmental Protection Agency, *supra* note 237.

<sup>266</sup> 33 U.S.C. §§ 2701–2761 (2000) (emphasis added).

<sup>267</sup> MANGONE, *supra* note 35, at 279.

<sup>268</sup> *Id.*

<sup>269</sup> U.S. Environmental Protection Agency, *supra* note 237.

<sup>270</sup> 33 U.S.C. § 2702(b)(2).

<sup>271</sup> *Contra* Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127, 1133–34 (D. Or. 2001); S. Port Marine, LLC v. Gulf Oil Ltd. P’ship, 234 F.3d 58, 64–66 (1st Cir. 2000).

<sup>272</sup> 33 U.S.C. § 2702(a).

<sup>273</sup> *Id.* § 2718(a)–(c).

OPA claims, but it is unreasonable to conclude that the Act foreclosed all basic tort law.

Because the OPA specifically addressed oil spill liability and aimed to correct the problems that came to light during the Exxon Valdez oil spill, it is not unjustifiable that Congress could have addressed punitive damages as well. However, this does not lead to the conclusion that Congress intended to allow the Court to fashion a ratio of its own accord without considering congressional intent. Instead, given Congress' active role in crafting oil spill legislation from TAPAA to the OPA and the Court's common law obligation to exercise discretion, the Court should have considered whether its ratio meshed with the overall statutory scheme that Congress had enacted already. In other words, federal common law rule-making authority in admiralty should not be viewed in a vacuum. Instead, federal common law courts should analyze the existing statutory framework and balance other factors, such as policy and a need for uniformity. If that balance favors creation of a new rule, then the new rule should be fashioned in a way that best comports with congressional legislation.

With this framework in mind, the Court's rule should have been construed in light of the purpose of OPA, which "is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil."<sup>274</sup> Additionally, the Court should have considered how the statutes have developed, because that demonstrates Congress' desire to hold oil polluters more accountable for their actions—not less accountable—through increasing the amount and types of recoverable damages. Nevertheless, the Court's 1:1 ratio moves in the opposite direction, thereby holding oil polluters less accountable by tying punitive damages to compensatory damages.

*C. Why Congress is Better Suited to Address the Issues Presented by Exxon v. Baker*

Even if the Court did not consider congressional intent dispositive in this case, it should have ultimately left the decision to craft a ratio, if one at all, to Congress. Not only did Congress lack intent to modify punitive damages in relation to oil spills, but also Congress is better able to address the public policy issues presented by *Exxon v. Baker*. This is especially

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<sup>274</sup> 15 C.F.R. § 990.10 (1998).

true given its democratic accountability, available resources, and legislative role.

1. *David Meets Goliath: The Broad Public Policy Issues and Interests Presented by Exxon v. Baker*

Another major shortcoming of the Court's decision was its failure to consider the important public policy issues *Exxon v. Baker* presented. In this case, the Supreme Court was bluntly confronted not only with balancing the goals of reasonability and proper punishment in punitive damages, but due to unique facts, it also had to balance two often-conflicting policies in American life: the love of capitalism and oil against the simultaneous respect for nature and justice. Further, the Court was confronted with some of the most extreme players in America to illustrate this social tension.

First, consider Exxon Mobil. The multinational corporation regularly competes with other global heavyweights, such as Wal-Mart and General Motors, for the title of the largest company in the United States.<sup>275</sup> In the annual Fortune 500 list of largest companies, Exxon held the number one position in 2001 and 2006, and had come in the top three since 1989 with the exception of 1999 when it came in fourth.<sup>276</sup> In 2008, Exxon was "the most profitable company on the Fortune 500 list for the fifth year in a row, raking in a record-breaking \$40 billion in 2007 earnings."<sup>277</sup> Second, contrast the oil behemoth with its also large, but less powerful opposition: Alaskan Natives, about 10,000 commercial fishermen, about 35 seafood processors, about 5000 employees of the seafood processors, about 200 area businesses, and landowners, whose 2.3 million acres of real estate were affected.<sup>278</sup>

The case clearly presents a David and Goliath situation.<sup>279</sup> Although courts around the country face power differentials every day, it is rare to find the situation *Exxon v. Baker* presented. The Supreme Court was in the position to use its judicial power as a common law court to craft an entirely

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<sup>275</sup> See Fortune500 Database, Fortune, available at [http://money.cnn.com/magazines/fortune/fortune500\\_archive](http://money.cnn.com/magazines/fortune/fortune500_archive) (viewing years over the past decade shows the same companies at the top of the list).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Keith E. Sealing, *Civil Procedure in Substantive Context: The Exxon-Valdez Cases*, 47 ST. LOUIS U. L.J. 63, 70–71 (2003).

<sup>279</sup> As one business owner reflected, "[w]e were the mouse that roared, but we got squished." Savage, *supra* note 235, at A18.

new rule affecting thousands of individuals involved in oil pollution issues, a role usually left to Congress. Overemphasis on the policy aspects of this case would be undesirable because the law is intended to be objective, and rightly so. However, Justice Souter's failure to acknowledge the herculean legal battle that has wrought enormous anxiety for all those involved created an opinion more mechanical than nuanced. Upholding the decision and recommending that Congress consider the Court's argument about the unpredictability of punitive damages awards could have remedied this unsatisfying result.

2. *Congress' Democratic Accountability, Legislative Role, and Resources*

Accompanying its assessment of public policy, Congress' role is to evaluate the often-conflicting interests of various sectors before enacting legislation. An example of this process will show the value of Congress, as opposed to the Supreme Court, in making rules affecting oil pollution liability.<sup>280</sup> Before enacting the OPA, Congress held numerous public hearings in front of several different committees to determine what goals, ideas, and provisions should be included in a comprehensive oil spill bill.<sup>281</sup> Diverse interests were represented, such as the oil industry, the Coast Guard, state attorney generals, and environmental groups.<sup>282</sup> The American Petroleum Institute, the Coast Guard, and the Natural Resources Defense Council all testified.<sup>283</sup> This testimony addressed issues such as liability, compensation, oil spill prevention, and removal.<sup>284</sup> There was disagreement; the oil industry supported preemption, but most organizations did not, and environmental groups supported the double hull requirement, but the oil industry did not.<sup>285</sup> There were studies; House members relied on a Coast Guard study that concluded the Exxon Valdez spill would have been reduced significantly had the tanker possessed a double hull, and initially skeptical members were eventually persuaded by a Secretary of Transportation study showing the value of construction design.<sup>286</sup> Per usual procedure, the House introduced its ideas, and the

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<sup>280</sup> This example is derived from the excellent overview of OPA' legislative process described in Millard's piece. *See* Millard, *supra* note 261, at 332–40.

<sup>281</sup> *Id.* at 347 & n.93 (listing the various committees and interest groups).

<sup>282</sup> *Id.* at 347–48 & n.93.

<sup>283</sup> *Id.* at 347–49.

<sup>284</sup> *Id.* at 346–47.

<sup>285</sup> *See id.* at 347–48.

<sup>286</sup> *See id.* at 348 & n.97.

Senate introduced its own ideas.<sup>287</sup> A joint committee then met to coordinate the efforts between both chambers, and a year and a half after the Exxon Valdez oil spill, legislation that had been stalling for years finally passed to become the OPA.<sup>288</sup>

Although Congress' enactment of the OPA was certainly imperfect, especially given its stagnation, the process is preferable because 535 elected individuals (the House and Senate combined) representing diverse interests from the Alaskans to the Texans compromised on legislation that benefits the entire national populace. The process is messy, time-consuming, and often frustrating. Ultimately, it is still better than nine unelected justices who represent no one in particular fashioning a rule that affects the entire nation, especially given that the conclusion is determined from an appellate perspective and only five people need to agree.

*Exxon v. Baker* also presented numerous conflicting interests. Just some of the groups involved were oil-related companies, environmental advocates, small businesses, fishermen, Alaskans, and landowners.<sup>289</sup> Naturally, some of these constituencies would have liked lower punitive damages awards, higher punitive damages awards, or punitive damages just to stay the way they were. As illustrated by the legislative process leading to the enactment of the OPA, the Court is in an inopportune position to weigh these constituencies because it does not have the democratic accountability, resources, or legislative role that Congress possesses. Congress is expected to sort through all these special interests and create the legislation that is best for all.<sup>290</sup> As understood from basic civics class, the Court has a rather different role—to interpret what the legislation means.

To highlight the problems associated with allowing the Court to craft a rule in this area, consider first democratic accountability and what value that may offer in creating a ratio based on the *Exxon v. Baker* facts. For example, one plaintiff lamented, "I don't think [the Justices] have a clue as to the losses this area suffered."<sup>291</sup> This is a valid point, because it is not likely that the nine members of the Court visited the scene of the Exxon

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<sup>287</sup> See *id.* at 360.

<sup>288</sup> See *id.* at 361–62.

<sup>289</sup> See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611, 2613 (2008). For a sample of the wide variety of interests involved, see the amicus curia briefs filed on behalf of both Exxon and the plaintiffs.

<sup>290</sup> See U.S. CONST. pmbl.; U.S. CONST. art. I; U.S. CONST. amend. XIV.

<sup>291</sup> Nicholas Riccardi, *Ruling Pains Many in Alaska Fishing Village*, L.A. TIMES, June 26, 2008, at A16.

Valdez oil spill, but Alaskan politicians certainly did.<sup>292</sup> Unsurprisingly, Alaska's two U.S. Senators, Ted Stevens and Lisa Murkowski, and one U.S. Representative, Don Young, said the "ruling adds insult to injury to the fishermen, communities and Alaska natives who have been waiting nearly twenty years for proper compensation following the worst environmental disaster in our nation's history."<sup>293</sup> If Congress were considering a ratio, then the plaintiff could voice this concern to a representative, and it would be weighed in the legislative process. Further, congressional representatives are accountable to the plaintiff as their constituent.<sup>294</sup> In the eyes of the Supreme Court, however, the plaintiff is a plaintiff, not a constituent that votes that justice into office. Indeed, no one expects Justice Scalia to spend time reading mail from 32,000 plaintiffs who are expressing their concerns about their fate, let alone include their thoughts in his opinion.

Then consider the resources needed to adequately address the public policy issues. Another plaintiff, a fisherman, thought the Court sent the message that big corporations have the freedom to be irresponsible and violate the law because they have money and political power.<sup>295</sup> The plaintiff was quoted as saying, "I mean, \$500 million for Exxon? That's not even a blip on their radar."<sup>296</sup> Whether one agrees with him or not, this plaintiff raises a good point. Will a ratio tying compensatory damages to punitive damages adequately punish a wealthy corporation like Exxon? Obviously, Exxon "argued that it had been punished enough."<sup>297</sup> In order to answer this question ideally, testimony and studies from various viewpoints might be considered, such as corporations, business groups, economists, and law professors. Congress could then weigh competing

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<sup>292</sup> See Barnes, *supra* note 215, at A16.

<sup>293</sup> *Id.*

<sup>294</sup> See U.S. CONST. art. I; Williams v. United States, 71 F.3d 502, 507 (5th Cir. 1995) ("[T]he legislative duties of Members of Congress are not confined to those directly mentioned by statute or the Constitution. Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents."); Diggs v. Comm'r of Internal Revenue, 715 F.2d 245, 252 (6th Cir. 1983) (explaining a primary responsibility of Congressmen and Congresswomen is to represent their constituents).

<sup>295</sup> Tom Kizzia & Megan Holland, *Plaintiffs React to Exxon Decision*, ANCHORAGE DAILY NEWS, June 25, 2008, at A1.

<sup>296</sup> *Id.*

<sup>297</sup> Barnes, *supra* note 215, at A16.

issues, such as the declining marginal utility of money, risk management, and the public interest.

Statistical evaluation of the optimal ratio also requires resources. Justice Souter stated the problem was “the stark unpredictability of punitive damages awards,”<sup>298</sup> but he relied only on a small amount of studies. The Court stated that “[t]he available data” suggests that the spread between high and low individual awards is unacceptable,<sup>299</sup> but before making a far-reaching rule, more investigation should have been completed. The Supreme Court should not be undertaking empirical and statistical analyses because the Court does not have the capabilities to employ statisticians, economists, law professors, listen to hours of testimony, or retain a committee staff to draft reports in order to reach an adequate result.<sup>300</sup> These resources certainly rival the Court’s, which mainly include law clerks and the justices themselves.<sup>301</sup>

Further, there are a variety of ways that states monitor punitive damage awards. Some employ ratios, but others impose a monetary cap or sometimes a hybrid of the two.<sup>302</sup> For example, Alaska employs a cap, but will modify that cap if there are aggravating circumstances, such as if the defendant was motivated by financial gain.<sup>303</sup> Virginia has a \$350,000 punitive damage cap with no exceptions.<sup>304</sup> This variety demonstrates that “one-size does not fit all” and that before imposing a ratio there should be extensive debate about the pros and cons of numerical based methods.

Finally, consider the legislative role of Congress. Justice Stevens raised an excellent point that courts do not impose ratios or caps, but state legislatures do.<sup>305</sup> On the federal level, the Court even admitted that Congress, not the judiciary, has passed legislation creating “treble damages in antitrust, racketeering, patent, and trademark actions.”<sup>306</sup> This is an obvious separation of powers problem, but the Court’s language does not sufficiently appreciate this conflict. For example, Justice Stevens

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<sup>298</sup> Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624 (2008).

<sup>299</sup> *Id.* at 2625.

<sup>300</sup> See CONGRESSIONAL QUARTERLY INC., THE SUPREME COURT AT WORK 95 (1990).

<sup>301</sup> *See id.*

<sup>302</sup> Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1338–48 (2005).

<sup>303</sup> *Id.* at 1348.

<sup>304</sup> *Id.* at 1346.

<sup>305</sup> Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2637 (2008) (Stevens, J., concurring in part and dissenting in part).

<sup>306</sup> *Id.* at 2629 (majority opinion).

suggested that Congress should fashion remedies, and the majority responded, “[W]e think modern-day maritime cases are to the contrary and support judicial action to *modify a common law landscape largely of our own making*.”<sup>307</sup> This is a very bold statement. For support, the Court refers to its jurisprudence in *United States v. Reliable Transfer Co., Inc.*<sup>308</sup> However, as another commentator suggested, the reasoning in *Reliable Transfer* brought maritime law in line with congressional enactments regarding personal injury cases and international consensus.<sup>309</sup> Thus, the Court does not fully honor its own statement that “Congress retains superior authority in maritime matters,”<sup>310</sup> and “[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance.”<sup>311</sup>

## V. CONCLUSION

The main significance of this case is that recent Supreme Court opinions, such as *Exxon v. Baker*, favor reeling in punitive damage awards, and, in the absence of legislative action, the Court is willing to take the lead under its federal common law authority by fashioning its own limiting approach to reign in awards that suffer from “unpredictability.”<sup>312</sup> Though the Court clearly stated the 1:1 ratio will technically apply only to maritime law,<sup>313</sup> it is likely that future lawyers will cite this decision as persuasive authority in civil cases outside maritime law. As Professor Chemerinsky noted, this opinion has less to do with maritime law and more to do with the problems of punitive damages generally.<sup>314</sup>

This case also leaves many other unanswered questions and concerns. It will be interesting to see if Congress will react to the Court’s ratio by either leaving it stand or fashioning a new rule, perhaps an amendment to the OPA. As of yet, Congress has taken no legislative action in response to *Exxon v. Baker*. Further, as Justice Stevens suggested, perhaps comparing land-based tort cases to water-based cases was mismatched because compensatory awards in maritime law are often lower than those based on

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<sup>307</sup> *Id.* at 2630 n.21 (emphasis added).

<sup>308</sup> 421 U.S. 397 (1974).

<sup>309</sup> De Sousa, *supra* note 18, at 264.

<sup>310</sup> *Id.* at 255.

<sup>311</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

<sup>312</sup> *Exxon Shipping Co.*, 128 S. Ct. at 2625.

<sup>313</sup> *See id.* at 2633.

<sup>314</sup> Chemerinsky, *supra* note 190, at 62.

land.<sup>315</sup> The accuracy of the Court's empirical analysis also may be considered, especially given the relatively few studies it relied on to reach its dramatic conclusion. Examining whether lower punitive damages awards in maritime law will achieve the dual goals of deterrence and punishment is also an important deliberation.<sup>316</sup> Finally, *Exxon v. Baker* raises interesting issues about corporate power and its intersection with the legal system. Should it make any difference that Exxon, with all its monetary prowess, already paid \$3.4 billion in clean up costs, fines, claims, and other expenses beyond its litigation costs?<sup>317</sup> One may certainly laud Exxon for its clean-up response, of which it spent \$2.2 billion,<sup>318</sup> but one counter to this is that their reaction was likely more from political, economic, and legal necessity than sincere goodwill.

Despite the opinion's faults, this decision ended the Exxon Valdez court saga, which was so long that it outlived four of its own lawyers.<sup>319</sup> As the tribunal of last resort in an epic legal conflict, the Court was faced with a difficult problem and lacked an ideal answer. Still, although it was clear the Court had rulemaking authority as a federal common law court, its reasoning in *Exxon v. Baker* was short on analysis of the factors that favor restraint. Specifically absent were considerations of congressional intent in light of the existing statutory framework culminating in the OPA, and an evaluation of whether Congress might have been better equipped to assess the advantages and disadvantages of a ratio. The Court should have resisted the temptation to create a bright-line rule and left in place the messier, though extremely meticulous, appellate process. The jury thought Exxon deserved a larger punitive damages award, as did the district court and the Ninth Circuit Court of Appeals. The Supreme Court should have

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<sup>315</sup> See *Exxon Shipping Co.*, 128 S. Ct. at 2636–37; De Sousa, *supra* note 18, at 268–69.

<sup>316</sup> See, e.g., Editorial, *Anger and Restraint*, N.Y. TIMES, June 26, 2008, at A22 (“The problem with the rule [the court's holding] is not that it is judge-made, but rather that it subverts the purpose of punitive damages, which have a venerable place in the law. They are meant to punish and deter. A \$500 million award for what the appeals court called ‘egregious’ conduct, against a company that earned more than \$40 billion last year, is unlikely to do either.”).

<sup>317</sup> See Persky, *supra* note 109, at 22.

<sup>318</sup> *Morning Edition: Supreme Court Weighs Exxon Valdez Damages* (NPR radio broadcast Feb. 27, 2008), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=48308288>.

<sup>319</sup> *Two Decades After Oil Spill, Alaskans Still Await 'New Start'*, USA TODAY, February 26, 2008, at 10A.

realized that, on those facts, with these parties, and in this judicial system, justice had already been served.

