

U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Its Own Tort Law—Defamation, Preemption, and Punitive Damages

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U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Its Own Tort Law—Defamation, Preemption, and Punitive Damages analyzes and critiques the three primary areas in which the U.S. Supreme Court has found federal constitutional limits on a state’s power to articulate, develop, and apply its common law of torts. It is the first piece to consider all three areas together as an emerging body of jurisprudence which Professor Galligan calls U.S. Supreme Court tort reform.

After setting forth a modest model of adjudication, the article applies that model to each of the three areas: defamation and related torts, preemption, and punitive damages. While each discrete body of law manifests consistencies and inconsistencies with the model of adjudication, Professor Galligan concludes that the punitive damages cases are the most troublesome of the three because those decisions are the most intrusive on state power, the most thinly reasoned, and the least respectful of the jury’s role in tort cases. Professor Galligan concludes with proposals for punitive damages cases, such as a constitutional recovery threshold and a heightened burden of proof that would bring the punitive damages cases more in line with the other U.S. Supreme Court tort reform jurisprudence.

I. Introduction

Ian McEwan’s most recent novel, *Saturday*,² is about one very eventful day in the life of London neurosurgeon, Dr. Henry Perowne. Perowne is a gifted, accomplished, and confident surgeon with a loving, devoted family. During the day he and the reader are struck by how much Perowne does not know as he is faced with a world of terror, war, violence, and subjects beyond

¹Dean and Elvin E. Overton Professor of Law, University of Tennessee College of Law. Many thanks for Anita Monroe for her tireless work on this piece and to Tiffany Batchelor Porter for her research assistance. Thanks also to my colleagues Ben Barton and Jeff Hirsch for listening to my ideas on the subject. Thanks particularly to Ben Barton for his insights on the role of the jury and thanks to Jeff for his insights on the preemption question.

²Ian McEwan, *Saturday* (2005).

his expertise including, poetry. In the end, Perowne acts and acts well but his place in the world might be a little less stable than it was before he awoke “[s]ome hours before dawn.”³

Today’s American tort lawyer or torts teacher may well feel a bit like McEwan’s Dr. Perowne. Our comfort in knowing our subject is not enough today. Something else is going on and it requires us to reach outside our narrow world of intellectual comfort–torts. That something that is going on is U.S. Supreme Court tort reform. Ignoring it is risky; rejecting it is impossible.⁴

Normally, when one mentions “tort reform” one thinks of proposed or enacted legislation. Most frequently, perhaps, the legislation is at the state level and may involve modification of some substantive standard governing liability such as the right to recover in a products liability case or a medical malpractice case.⁵ Alternatively, the state statute may involve a limitation on remedy such as a modification of the collateral source rule⁶ or caps on recovery of compensatory⁷

³*Id.* at 1.

⁴ When it comes to the U.S. Supreme Court, when the Court speaks, it is the law of the land. And, as Sonny Curtis (the song’s author) and the Crickets, The Bobby Fuller Four, The Clash, and even Colin Farrell have all sung: “I fought the law and the law won.” So, one had better adjust.

⁵*See, e.g.*, Jay M. Finnman, *Unmaking and Remaking Tort Law*, 5 *High Tech L.* 61 (2005); Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law*, Chs. 15 & 21 (2004 ed.).

⁶*See*, Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 *U.C. Davis L. Rev.* 449 (1989).

⁷*See*, Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 *N.Y. L. Rev.* 392 (2005).

or punitive damages.⁸ Or, the state legislation may involve immunity.⁹ Recently, legislative tort reform has occurred at the federal level with the passage of the Class Action Fairness Act, an intensive regulation of the jurisdiction of federal courts in class actions.¹⁰ The Class Action Fairness Act is procedural tort reform as it modifies procedures applicable in class actions but frequently those class actions are tort cases.

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

This piece is about neither legislative tort reform nor judicial retrenchment in rights of recovery in state and federal courts applying state or federal substantive law. Rather, this piece is about what might be called United States Supreme Court tort reform or Constitutional tort reform.¹¹ It is about the U.S. Supreme Court effectively reforming state tort law through the

⁸See, Dan B. Dobbs, *The Law of Torts*, § 384 at 1074.

⁹Frank L. Maraist & Thomas C. Galligan, Jr., *The Ongoing “Tort War” for Louisiana Tort Law: Interpreting Immunity and the Solidarity Skirmish*, 56 *La. L. Rev.* 215 (1995).

¹⁰Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005).

¹¹Professor Mark Geistfelt apparently coined the phrase “constitutional tort reform.” See Mark Geistfelt, *Constitutional Tort Reform*, ____ *Loyola L.A. L. Rev.* ____ (2005) (forthcoming).

application of constitutional limitations on state power in ways that limit a plaintiff's right to recover in certain tort cases. Concomitantly, these Supreme Court decisions limit a state's ability to articulate and apply its own law. This limit raises a federalism issue involving a federal limit on state power and autonomy.

This piece discusses the three primary instances of U.S. Supreme Court tort reform: First Amendment (through the Fourteenth Amendment) limitations on state power, particularly in defamation and related cases; Supremacy Clause-based limitations on state tort law in preemption cases; and Fourteenth Amendment limitations on punitive damages recovery. While commentators have discussed these discrete legal topics, this piece brings all three together for comprehensive treatment and analysis.

In order to set some scheme or matrix for review and critique of these developments and cases, Section II articulates a modest model of adjudication that contemplates judicial opinions manifesting a process of reasoned elaboration; growth, development, and at least some consistency in jurisprudence over time; purposive statutory interpretation; and respect for the role of the jury in tort cases. Section III analyzes the defamation and related cases, concluding that they are generally consistent with the model. The Supreme Court's defamation cases have constitutionalized state tort law by raising or placing what one may call elemental and constitutional burdens or hurdles in the plaintiff's prima facie case. While these burdens limit the right of the plaintiff to recover under state law and limit the state's power to articulate its own tort law, the burdens are built into traditional tort processes of adjudication and leave a

significant, continuing role for the jury. Section IV considers the Supreme Court's preemption cases noting that for the most part these cases represent a Court interpreting statutes in a manner which is consistent with the model. However, the preemption cases do raise some trouble issues regarding the difference between contract-related state claims and pure tort claims. They also raise issues about general and special duties in tort cases. Section V reviews the Supreme Court's recent punitive damages cases, concluding that the punitive damages cases are the most intrusive upon state power because the Supreme Court arguably has made *every* state punitive damages case a constitutional case. Courts are left having to ask how much is too much as a constitutional question in virtually *every* punitive damages case. The punitive damages cases also are the least consistent with the Section II adjudication model because certain aspects of the opinions, such as the ratio presumption articulated in *State Farm Mutual Automobile Insurance v. Campbell*,¹² lacks a reasoned or principled base. Likewise, the punitive damages cases radically limit the jury's authority in traditional tort cases. Section VI compare, summarizes, and makes several suggestions for un-muddying the punitive damages waters such as a Constitutional standard for recovery and heightened burdens of proof.

This article is traditional legal scholarship. It reviews jurisprudence and seeks to find common themes as well as conflicts. Necessarily, as it goes through the three areas discussed, it winds and occasionally follows the Court's lead and raises interesting and related side issues. Like Henry Perowne on his Saturday, this piece hopefully forces tort lawyers to go beyond their comfort zones.

¹²538 U.S. 408 (2003).

II. A Modest Model of Adjudication

This section sets forth a modest model of what judges do when they adjudicate cases.¹³ The articulation of a model of adjudication is important in its own right because it describes and sheds light on an important institution in American government—the judiciary. In a society which purports to be governed by a rule of law a model of adjudication is of paramount importance.¹⁴ It is important in its explanation of the common law. Tort cases are common law cases. Thus, in writing about Supreme Court tort reform or Constitutional tort reform, it is important to have some underlying basis for analyzing the relevant cases. Moreover, insofar as the cases limit the power of state courts to articulate their common law, the Supreme Court’s impact on the common law is manifest and some explanation of the common law judging process is critical. Additionally, an articulated model of adjudication is important in a democracy where courts play a key role in deciding cases that both articulate and impact upon our basic rights and values. Moreover, a model is important in explaining the relationship between courts and legislatures and the relationship between federal courts interpreting and applying the Constitution and state courts interpreting and applying state law. It is a modest model because it merely purports to be descriptive and makes no bold normative claims about the nature or extent of the adjudication process.

¹³The model does not make refined distinctions between trial and appellate judges but necessarily is more concerned with appellate judges as the focus of the article is on appellate cases.

¹⁴*See generally*, James W. Torke, What Is This Thing Called the Rule of Law, 34 Ind. L. Rev. 1445 (2001).

In *The Forms and Limits of Adjudication*,¹⁵ Lon Fuller described adjudication as a mode of social ordering.¹⁶ Fuller claimed that the “distinguishing feature of adjudication lies in the mode of participation which it accords to the party affected by the decision.”¹⁷ He stated adjudication is “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”¹⁸ Fuller claimed that as a result of the nature of the adjudication process there was a requisite standard of rationality that was not necessarily present in other modes of social ordering.¹⁹ But why rational and reason from what? Here Fuller claimed that the judge’s reasoned decision was to be based on “principle.”²⁰ He wrote: “Courts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity.”²¹ For Fuller, principles that the court would apply came from what one commentator has called a sort of

¹⁵92 Harv. L. Rev. 353 (1978). While the article was published in 1978, portions of it had been included in two previous articles and initial versions had been circulated to a legal philosophy discussion group at Harvard Law School in 1957 and other versions had been used in Professor Fuller’s jurisprudence course and for other purposes.

¹⁶*Id.* at 357.

¹⁷*Id.*

¹⁸*Id.* at 366.

¹⁹*Id.* at 367.

²⁰*Id.* at 372.

²¹*Id.* at 373.

secular natural law.²²

²²Neil Duxbury, Faith and Reason: The Process Tradition in American Jurisprudence, 15 *Cardozo L. Rev.* 601, 623 (1993).

While one may not necessarily accept Fuller's optimistic aspirations for the development of a secular natural law, his emphasis on the importance of reason either as a ground for decision, or as a tool for justification, remains important. It bears emphasis that Fuller was writing in the World War II and post-World War II era and was attempting to articulate some justification or theoretical basis for law and adjudication that avoided both the excesses of positivism and the harsh reality of the realist criticism that, at its extreme, would equate judging with pure political fiat or whim.²³

Others complemented and built on Fuller's work. Professors Hart and Sacks created teaching materials called *The Legal Process*.²⁴ In *The Legal Process*, Hart and Sacks analyzed and articulated various institutions in American law, including, of course, the courts. Drawing on an earlier phrase first used by Professors Wellington and Bickle,²⁵ Hart and Sacks emphasized the importance of "reasoned elaboration" in the judicial opinion. Thus, Fuller, Hart, and Sacks all called for courts to engage in a process of reasoning which judges hopefully elaborated in their opinions. These process theories grew up in the grand tradition of jurists such as Benjamin Cardozo whose book, *The Nature of the Judicial Process*,²⁶ is one of the most insightful and oft

²³See generally Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 *Law & Soc. Inquiry* 89 (2005); William P. Marshall, *Constitutional Law as Political Spoils*, 26 *Cardozo L. Rev.* 525 (2005).

²⁴Duxbury, *supra*, note 22 at 653-70. In 1995, Foundation Press for the first time published Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process*, (1994) (William N. Eskridge, Jr. & Phillip P. Frickey, eds.).

²⁵Duxbury, *supra*, note 22 at 639.

²⁶Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

read judicial texts ever written.

While Fuller had highlighted the importance of reasoning from principle in the judicial process and Hart and Sacks had proclaimed the need for reasoned elaboration, Herbert Wechsler went a step further in calling for courts, particularly the U.S. Supreme Court, to ground decisions in what Wechsler called general and neutral principles.²⁷ Notably, both Wechsler and Hart were critical of the Court's "reasoned elaboration" in *Brown v. Board of Education* and the Court's failure to come up with a principled explanation for the result in the case. Wechsler offered a theory for *Brown* based upon freedom of association but never fully developed it.²⁸ Hart never could articulate a principled basis for the decision.²⁹ Perhaps Hart's and Wechsler's failures ultimately impacted their effort to fully justify and explain judicial review in a democratic state.³⁰ However, their efforts did emphasize the importance of reason, or the appearance of reason, in the process of adjudication.

Naturally, one is so far left somewhat troubled. From what should judges reason? Bias? Prejudice? Predilection? All would agree these are improper sources for decision. Among the important lessons learned from the realists,³¹ feminist scholars,³² and the critical legal studies

²⁷Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

²⁸*Id.* at 32.

²⁹*See, e.g.,* Duxbury, *supra*, note 22 at 670-71

³⁰*See, id.*

³¹*Id.* at 620.

movement³³ are that we must beware of these possible underlying forces or motives in the process of adjudication. Alternatively, one may be equally concerned about the judge's personal view of policy. Are judicial opinions based on judges' *personal* views of policy? If so, how is judging different from the legislative function? Alternatively, if, Fuller, Hart, Sacks and Wechsler were right and judges must reason from principle, how is the court to choose the appropriate principle? Does the principle truly come from prior decisions or principles articulated in prior decisions?³⁴ If so, how does the law change? If judges are not reasoning from prior decisions or existing principles, are judges, in deciding cases, making purely legislative or policy choices and not relying on preexisting law? If courts are not relying on preexisting law and are not engaging in a process that is truly different from the legislative process, then are we in fact truly governed by a rule of law? These questions are at the heart of explaining and/or justifying judicial review in a democracy. The model articulated herein does not purport to answer those questions. However, even without those answers, judges continue to strive to engage in a reasoning process or at least to display reason in their opinions. That is, whatever the internal motives or processes (and this remains a key concern for both judicial awareness and restraint) judges tend to use reason in explaining their decisions. Or, at least, they purport to do

³²See, e.g., Robin West, Re-Imagining Justice, 14 Yale J. of Law & Feminism 333, 337-40 (2002).

³³See, e.g., Paul Butler, Should Judges Be Radicals, 32 Hofstra L. Rev. 1203 (2004); Duncan Kennedy, Imagining a Judge's Reasoning Process, in Analytic Jurisprudence Anthology 204 (Anthony D'Amato ed. 1996); Calvin Woodard, Toward a "Super Liberal State," The New York Times, Sunday, November 23, 1986, Section 7, page 27; *reviewing*, Roberto Mangabeira Unger, The Critical Legal Studies Movement (1986) available at <http://www.robertounger.com/cls.htm>

³⁴See generally, Gregory C. Keating, Fidelity to Pre-Existing Law and the Legitimacy of Judicial Decision, 69 Notre Dame L. Rev. 1 (1993)

so. And, this core of reason, or appearance of reason, from precedent, statute, common sense, or principles remains a key part of any model of adjudication in America.

Continuing, let us switch gears to a key judicial development of the last 25 to 30 years that merits consideration in this modest model of adjudication. It is the development of the public law model of litigation. The most noteworthy early proponent of the public law model of litigation or adjudication was Abram Chayes. In his seminal article, *The Role of the Judge in Public Law Litigation*,³⁵ Chayes argued that the traditional bipolar lawsuit was being replaced by a larger amorphous type of lawsuit. In this public law suit, courts were being called upon to reorder public institutions, such as schools and prisons. This change had many potential ramifications including a more vibrant and amorphous remedial context and a more active role for the judge. Several years later, Professor Owen Fiss wrote about this new model. In the process of doing so, Fiss argued judges under the public law model were not merely, nor even primarily, deciding discrete cases. Instead, judges were giving meaning to our Constitutional values.³⁶ Thus, the public law model called for a potentially more active (if not activist) role for the judge. But, even the proponents of the public law model understood the need for judges to explain themselves, i.e., judges articulated reasons for their decisions. How else could a judge (for Professor Fiske) give meaning to our Constitutional values without explaining herself?

Of course, there has been an abiding concern both in the traditional models of

³⁵Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

³⁶Owen M. Fiss, *Forward: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

adjudication described and in the public law model that judges might do too much. They might decide too much thereby threatening the delicate balance we call American government. They might unduly interfere with the authority of another branch of government. Or, in the case of federal judges, they might unduly trample upon the authority of the states. Perhaps the most famous proponent of judicial minimalism in the face of the risks of judges overdoing was Professor Alexander Bickel. In *The Least Dangerous Branch*,³⁷ Bickel argued that the U.S. Supreme Court should employ passive virtues to avoid decisions if possible. These virtues included various and sundry devices such as standing doctrines, mootness, and denials of certiorari that would allow judges to avoid key decisions where that seemed the wisest course. One may view Bickel's passive virtues as a response to Wechsler's demand that a judge could not avoid a constitutional decision if called upon to make one.

Recently, Professor Jonathan T. Molot has articulated and recalled both the process theorists' call for principled reasoned elaboration and Bickel's minimalism.³⁸ Molot has argued that courts today must not rely too heavily on judicial minimalism but must recall Wechsler's plea to decide cases based upon neutral principles. Molot's theory of principled minimalism (one might call it "Weckselian") provides that there are institutional and historic constraints on judicial activism that will tend to both frustrate and later correct broad, erroneous principles articulated in earlier opinions. Molot sees two versions of principled minimalism: forward

³⁷Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

³⁸*See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 Va. L. Rev. 1753 (2004). *See also*, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 133 Yale L. J. 27 (2003).

looking minimalism and backward looking minimalism. As he states:

In its ideal form, principled minimalism relies on judges to decide cases in a principled manner but to be consciously minimalist where they lack confidence in their decisions and do not wish to impose sweeping doctrinal pronouncements on their successors. The article will suggest, however, that even the less-than-ideal version exhibited by the Supreme Court—a version which often relies on later decisions to make sense of earlier ones and to confine their scope—is superior to minimalism alone.³⁹

In his article, *On Analogical Reasoning*,⁴⁰ Professor Cass Sunstein articulates another important, related notion about adjudication. Sunstein points out the virtues of reasoning by analogy and the strength of analogical reasoning vis-a-vis other top down theories and other more idealistic theories of adjudication such as John Rawls' reasoned equilibrium, or Ronald Dworkins' theory of fit. To Sunstein, analogical reasoning "has four different but overlapping features: principled consistencies; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction."⁴¹ To Sunstein, the strength of analogical reasoning is that it typifies what lawyers do—reasoning by analogy—without the need to articulate grand theories about the law or democracy. Analogical reasoning also is desirable because it may enable one to make decisions in concrete cases where there is no agreement on overarching principles. Implicit in Sunstein's work is the notion that judges articulate their reasoning *in* the cases before them. That is, the case provides the reason to decide and hence to reason. Moreover, courts frequently develop law slowly, adding an element here, modifying or deleting one there.

³⁹Molot, *Principled Minimalism*, *supra* note 38 at 1759.

⁴⁰Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741 (1993).

⁴¹*Id.* at 746.

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

However, the model is not yet complete. Most certainly, one of the key aspects of adjudication since the earliest days of our democracy,⁴² is that courts have been called upon to interpret statutes. In interpreting statutes, courts are called upon to give meaning to words used by legislature. But, one of the tensions in our democracy is the court's role in interpreting legislation. This tension is apparent in the discussion already concluded. How does a court when interpreting legislation avoid a purely political act? How is the court's interpretation of legislation different from the legislature's role in enacting legislation? Among Hart and Sacks' enduring legacies is the idea that courts must engage in a purposive interpretation of a statute. Obviously, there can be much disagreement regarding how a court should engage in such a purposive interpretation. Should the court rely merely on the words of the statute? Should the

⁴²*See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803)..

court delve behind the words to so-called legislative intent? How does a court “discover” or “divine” legislative intent? Should a court interpret the statute in light of other statutory enactments? In derogation of the common law? All of these are basic but thorny questions. But, for our purposes, it seems beyond cavil that part of the post-modern model of adjudication includes the interpretation of statutes and it does not seem particularly controversial to add the word purposive—that is, courts engage in the purposive interpretation of statutes.

Finally, let me slightly refine this modest model of adjudication to consider the role of the jury, particularly the role of the jury in tort cases. Certainly, the jury plays a key role in the American justice system, particularly in criminal trials. Likewise, the jury plays a key role in civil trials as the right to a trial by jury at common law is guaranteed by the Seventh Amendment to the Constitution.⁴³ At its most basic level, the jury in tort cases decides the facts. However, the jury also makes certain normative decisions, deciding mixed questions of fact in law. This would not necessarily have had to have been the case. Tort law could have developed in a way in which courts gave juries detailed, case specific instructions and asked juries to decide *only* the facts.⁴⁴

But, instead, juries in tort cases decide whether a person has breached the standard of care of a

⁴³The Seventh Amendment right to a jury trial does not apply to the states but many state constitutions have similar provisions.

⁴⁴*See, Molot, Old Judicial Role, supra, note 38 at 82-83.*

reasonable person under the circumstances. This is clearly a normative question as it involves the application of a broad standard of care to the particular facts of the case before the court. Likewise, juries make normative judgments when deciding cause-in-fact and proximate cause. Moreover, they make normative judgments in setting both compensatory and punitive damages and in allocating fault.

One might conclude that American courts ask juries in tort cases to decide those issues where explanation is virtually impossible. That is, juries decide those issues where persuasive and reasoned elaboration is extremely difficult. Juries decide issues a court might decide but where the reasons for the decision would either not be rationally persuasive or would inherently be the result of the judge's personal views.⁴⁵ Thus, rather than having one person decide such a matter based upon their personal view of policy, we ask a larger group to make that decision based upon the common sense of the community.

Critically, it is a characteristic of American law and American tort law that the decisions of juries are given great deference on appeal. Indeed, the Seventh Amendment forbids the reexamination of a fact tried to the jury.⁴⁶ That said, there is still a notable tension in American tort cases between the role of the judge and the role of the jury. The debate between Justice

⁴⁵ Indeed, recently, Professor Mark Geistfelt has argued that many issues that are now given to the jury in tort cases may be subject to constitutional challenge in the wake of the punitive damages cases discussed below. Geistfelt, *supra*, note 11.

⁴⁶U.S. Const., Seventh Amendment.

Cardozo and Justice Andrews in *Palsgraf v. Long Island Railroad*⁴⁷ was, to be precise, a dispute over the role of the jury. Should the judge decide whether there is a duty in the particular case before the court based on the particular facts (the Cardozo position) or should the jury decide the scope of liability in a particular case when it decides proximate cause (the Andrews position)? At least since the work of Dean Leon Green⁴⁸ the tension between judge and jury in deciding duty, reasonable care, and proximate cause has been manifest. Likewise, judges exercise some control over the jury in tort cases through summary judgments, judgments as a matter of law, new trials, remittiturs and additurs. While the judge's power to utilize these procedural devices is cabined by applicable standards and deference to the role of the jury, these are areas where the tension between the role of the judge and the jury in the tort case may become both manifest and critical.

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

⁴⁷162 N.E. 99 (1928).

⁴⁸Leon Green, *Judge & Jury* (1920).

cases limiting state tort law.

III. Defamation and Related Cases

The seminal United States Supreme Court decision articulating a constitutional limit on a state's power and ability to articulate and apply its own law of defamation⁴⁹ was *New York Times Co. v. Sullivan*.⁵⁰ Of course, *New York Times Co. v. Sullivan* is one of the Supreme Court's most well known, most oft cited and most important First Amendment cases. For the defamation lawyer, there is perhaps no more important case. But, *New York Times Co. v. Sullivan* also is important because of its significance to the American civil rights movement and its significance to the federalization or constitutionalization of state tort law. The facts are poignant and well known, but a brief recitation is appropriate. L. B. Sullivan, one of the elected commissioners of the City of Montgomery, Alabama, sued *The New York Times* contending that a full page advertisement published in *The New York Times* in 1960 had libeled him. The advertisement was entitled, "Heed Their Rising Voices." It had called for Americans to take note of the civil rights movement, the brave role African-American students and others were playing in the movement through non-violent demonstrations, and the "wave of terror" facing civil rights proponents in the American South. The ad appealed for funds to support the students, the right to vote campaign, and the legal defense of Dr. Martin Luther King, Jr., one of the civil rights' movement's leaders. The advertisement's text was followed by the names of sixty-four famous

⁴⁹In actuality all of the Supreme Court cases involving constitutional limits on defamation are libel cases, printed word defamation.

⁵⁰376 U.S. 254 (1964).

Americans and then another line providing: “We in the South who are struggling daily for dignity and freedom warmly endorse this appeal. . . .” Thereunder appeared the names of sixteen other individuals, fourteen of whom were identified as clergy in various Southern cities.

Critically, the advertisement made several statements which were not one hundred percent factually accurate descriptions of events. For instance, the advertisement stated that Dr. King had been arrested seven times when he had been arrested only four times. There were other factual inaccuracies as well.

Sullivan sued The Times and the alleged signatories for libel, contending that the factual inaccuracies in the ad harmed his reputation, i.e., they defamed him. Although Sullivan was not named in the advertisement, he contended that a person could read the false statements of fact as referring to him because he was the Montgomery Commissioner of Public Affairs whose duties included supervision of the Police Department. Thus, any criticism of the Police Department could be construed as a statement “of and concerning,” Sullivan—an element of Sullivan’s Alabama common law libel claim. The jury which heard the case awarded Sullivan \$500,000 in damages, although he had not pointed to any particular pecuniary loss. The \$500,000 award did not differentiate between compensatory and punitive damages.

The trial judge had rejected the defendants’ arguments that the decision abridged their rights to freedom of speech and freedom of the press under the First and Fourteenth Amendments to the United States Constitution—the First as applied to the states through the Fourteenth. On

appeal, the Supreme Court of Alabama had affirmed.⁵¹ On the First Amendment issue, the Alabama Supreme Court summarily stated that the First Amendment did not protect libelous publications and that the Fourteenth Amendment was directed against state action and not private action, i.e., a court's application of its common law of defamation was not state action.⁵² The United States Supreme Court granted certiorari. In the United States Supreme Court, The New York Times' position was argued by Professor Herbert Wechsler, who had also played an instrumental role in writing The Times' brief and who had articulated the theory of judicial decisions based on neutral principles discussed in Section II. Critically, Justice William Brennan, who wrote the majority opinion for the Court, turned first to the plaintiff's argument that the Alabama decision was not state action. In rejecting this argument, Justice Brennan stated:

Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.⁵³

Thus, the Court had held that a state court decision, applying state tort law—here, defamation—was state action for purposes of the Fourteenth Amendment.⁵⁴ State tort law was potentially limited

⁵¹144 So. 2d 25 (Ala. 1962).

⁵²*Id.* at 40.

⁵³376 U.S. at 265.

⁵⁴Indeed, in one of the early preemption cases *San Diego Builders v. Garmon*, 359 U.S. 236 (1959), the Court had held that a state court's decision in a tort case was state action which could be preempted by federal legislation. The conclusion that a decision in a "common-law" case was state action had indeed been the subject of an earlier Supreme Court case involving restrictive covenants, *Shelley v. Kramer*, 344 U.S. 1 (1948). Ironically, Wechsler had criticized

by the federal Constitution.

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

Libel, he said, "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."⁵⁵ He then noted that "uninhibited, robust, and wide-open"⁵⁶ debate on public issues sometimes included "unpleasantly sharp attacks on government and public officials."⁵⁷ The ad was speech about a major public issue and did not lose its First Amendment protection because of its falsity. Nor, did it lose its First

that opinion in his neutral principles. Wechsler, *supra* note 27 at 29-30.

In *New York Times* itself, after rejecting the plaintiff's arguments that a common law decision was not state action, the Court turned to the argument that the First Amendment was inapplicable because the statement was published as part of a commercial advertisement. Rejecting that argument, Justice Brennan stated that the publication at issue was not a purely commercial advertisement. Rather, it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at 266. Any other conclusion would adversely affect a newspaper's willingness to carry an editorial advertisement and would "shackle the First Amendment" and place "a handicap upon the freedoms of expression. . . ." *Id.*

⁵⁵*Id.* at 269.

⁵⁶*Id.* at 270.

⁵⁷*Id.*

Amendment protection because it was defamatory. Here, Justice Brennan quoted James Madison: “Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.”⁵⁸ Thus, Justice Brennan concluded that “neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct. . . .”⁵⁹ Moreover, “the combination of the two elements is no less inadequate.”

Pointedly, Justice Brennan noted that concern over a potential damage award in a tort case “may be markedly more inhibiting than the fear of prosecution under a criminal statute.”⁶⁰ This was because the various protections afforded to a defendant in a criminal case were not available in a civil case and thus the civil case might have a severe chilling effect upon the defendant’s willingness to speak. Moreover, the defense of truth or total truth as it was applied by Alabama did not save Alabama law. “A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions--and to do so on pain of libel judgments virtually unlimited in amount--leads to . . . self-censorship.”⁶¹ As further support for his conclusions, Justice Brennan related the controversy arising from the Sedition Act of 1798, which the Court had never considered nor declared unconstitutional. However, protest against the Act had been pronounced and persuasive and the attack on the Sedition Act had “carried the day in the court of

⁵⁸*Id.* at 271.

⁵⁹*Id.* at 273.

⁶⁰*Id.* at 277.

⁶¹*Id.* at 279.

history.”⁶²

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

Critically, Justice Brennan stated:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official misconduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁶³

Thus, according to the Court, a public official plaintiff in a defamation case would in order to recover be required to prove that any statement was made with “actual malice”. The Court, seemingly, had borrowed a word or an element from the common law of torts—malice. Likewise, it had arguably, taken the privilege of fair comment on matters of public concern and turned that privilege from an affirmative defense which could be lost (if the plaintiff behaved with malice or other fault) into a part of the plaintiff’s prima facie case, i.e., the public official plaintiff had to prove that the defendant had acted with malice. In this regard, the opinion reasoned from pre-existing common law authorities.⁶⁴ And, it reasoned by analogy, i.e., the common law privilege

⁶²*Id.* at 276

⁶³*Id.* at 280.

⁶⁴The Court cited and discussed a Kansas Supreme Court defamation case as analogous authority for its rule. *Id.* at 279-80, *citing*, *Coleman v. MacLennan*, 98 p. 281 (Kan. 1908). The Court also analogized to the limited liability of a public official *sued* for defamation and cited several tort treatises. 396 U.S. at 282-83.

cases were analogous and supported the creation of a new Constitutional rule. In this regard, the Court's rule articulation is consistent with the modest model of adjudication described above.

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

Returning to the Section II model of adjudication, the critic might contend that the Court's opinion was not at all minimalist and that it was thinly reasoned. The Court had created a rule out of whole cloth (albeit in the name of articulating and giving meaning to our Constitutional values). It had relied on state common law cases involving a privilege (or defense) to create an element a plaintiff must prove—"actual malice." And, in part of the opinion

had analyzed defamation cases *against* government officials in a suit *by* a government official *and* it had analogized to had relied upon an act of Congress that had never come before the Court and been repealed more than one hundred and fifty years before the decision. In these regards, the case is arguably inconsistent with the model's call for reasoned elaboration. My bias runs with those who praise the opinion but this paragraph points out that there are at least two ways to read it.

Returning to the decision, the Court also held that in order to recover in a libel suit the public official plaintiff would have to establish absolute malice with "convincing clarity."⁶⁵ The phrase "convincing clarity" seems analogous to the more commonly used "clear and convincing evidence" and one wonders why the Court did not use that phrase.⁶⁶ While the "convincing clarity" burden was uttered in deciding whether at a second trial Sullivan could meet his burden of proof (he could not),⁶⁷ the phrase and its similarity to "clear and convincing evidence" imply that a jury or fact finder might have a meaningful role to play in a public official libel case. This contemplation and/or respect for the jury's role in a tort case is consistent with the modest model of adjudication articulated above.

Arguably, there are two other constitutional aspects to the opinion. The Court also held

⁶⁵*Id.* at 285-86.

⁶⁶Perhaps, like good literature or good poetry the Court merely used slightly different words to convey a slightly different meaning. Sadly, for this tort lawyer with a little mind, a foolish consistency might have been both more helpful and more desirable. *See*, Ralph Waldo Emerson, Self-Reliance.

⁶⁷*Id.* at 286-87.

that from a constitutional perspective the statements in the advertisement were not sufficiently “of and concerning” the plaintiff. In defamation cases the plaintiff must establish that the false statements of fact were made about him, i.e., of and concerning him. In *New York Times*, the Court noted that there was no reference to Sullivan in the advertisement either by name or official position. If the Constitution allowed such vague references as those in the ad to be read as referring to Sullivan, then any criticism of the government could be translated into criticism of individual governmental officers in defamation cases. Such a state of affairs would unduly chill the defendants’ right to free speech. Consequently, upholding a libel judgment for the plaintiff was constitutionally suspect.⁶⁸ Critically, the Court neither did nor has provided a clear constitutional standard for what a plaintiff must show regarding the “of and concerning” requirement. This aspect of the opinion in *New York Times v. Sullivan* has not received significant Supreme Court development or attention since.

Finally, the Court refused to hold that The New York Times had knowledge that some of the facts in “Heed Their Rising Voices” were false even though the paper’s news files contained stories against which the facts contained in the advertisement could have been checked.⁶⁹ Arguably, this aspect of the case has some constitutional dimension to it—i.e., limiting inconsistent state law on imputed knowledge or vicarious liability in cases like *New York Times*. But, like the “of and concerning” aspect of the case, the constitutional limits on vicarious liability

⁶⁸*Id.* at 287-88.

⁶⁹*Id.* at 287-88. The Court also refused to find a refusal to retract and a later retraction sufficient to establish “actual malice”. *Id.* at 286-87.

have not been further plumbed.⁷⁰

Thus, *New York Times Co. v. Sullivan* was a major victory for the proponents of the civil rights movement. It deprived a state of the ability to frustrate the progress of the movement through its common law of defamation. By the time the decision was published there were numerous other suits against The New York Times alleging defamation and the victory was a significant one both in principle and because of the negative financial impact that liability would have had.⁷¹ That financial impact may have had a very serious chilling effect on The Times, in particular, and on the news' industry in general. Moreover, the case was a victory for the First Amendment. It established the press's right in public official defamation cases to be free from state common law defamation liability which had bordered on strict liability. The decision also recognized that the right to comment and criticize the government and government officials included a limited right to publish false statements of fact that may, from the common law perspective, be defamatory.

Critically, the Court's opinion balanced the critic's First Amendment right to speak against the state's interest in protecting its citizen's reputations. Implicitly, the state's right to articulate and apply its own law of defamation also went into the balance. In the context of the public official plaintiff, the First Amendment right was paramount. As a result, for the civil

⁷⁰Justice Black concurred in the opinion and Justice Douglas joined in that concurrence. *Id.* at 293. Justice Black would have recognized that The Times and the individual defendants "had an absolute, unconditional constitutional right to publish in The Times advertisement their criticisms of the Montgomery agencies and officials." *Id.* Justice Goldberg also concurred. He, too, was joined by Justice Douglas. *Id.* at 297. Like Justice Black, Justice Goldberg thought that The Times was afforded even greater protection than the majority's absolute "actual malice" rule.

⁷¹Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991).

rights movement and for the media, *New York Times v. Sullivan*, is a great and significant decision. Indeed, more than forty years later, it remains a great and significant decision. But, critically, the Court's judicial regulation of the common law of defamation did not stop with *New York Times*. Thus, it is appropriate now to turn to discuss the nature of this judicial regulation in light of the articulated model of adjudication.

First, as noted, in *New York Times v. Sullivan*, the Court took a significant step in limiting a state's power to articulate and apply its own tort law in the name of the First Amendment right to free speech and a free press. The Supreme Court imposed additional burdens in a public official plaintiff's defamation case that arose out of the Constitution, not out of state tort law. These developments can be viewed as bold. While the Court looked to the common law and the purposes of the First Amendment in a reasoned manner, the articulation of the limit was new and unprecedented. Moreover, the Court invented a rule--"actual malice"-- and infused it with a constitutional dimension. To the extent the opinion reasoned from analogous cases and history, one may view it as reasoned and consistent with the model of adjudication. To the extent the rule was a rather bold articulation of Constitutional law, one may view it as radical. However, the Court did incorporate its burdens and hurdle into the common law of torts. Arguably, in doing so, the Court did what courts do. It balanced competing interests and articulated a rule. This rule or rules would then be applied in particular cases, at least cases involving public official plaintiffs. According to the Court's rule, a public official plaintiff must show "actual malice". One will note the "elemental" nature of "actual malice". "Actual malice" is an element (albeit a constitutional element) of the public official's case. If the public official plaintiff

proved “actual malice,” the public official plaintiff would recover. Moreover, the Court announced that the burden of proof on “actual malice” was convincing clarity. The reader obviously notes the Court’s expectation that its “actual malice” rule would be applied within the context of the common law of torts, utilizing both the judge and a jury. That is, the Court’s rule regarding “actual malice” is an appropriate one for a jury instruction. For instance, one might imagine a jury instruction that provides, in part: “Ladies and gentlemen of the jury, in this defamation case involving a public official plaintiff in order to recover the plaintiff must establish with convincing clarity (by clear and convincing evidence) that the defendant published defamatory statements about the plaintiff with actual malice. Actual malice means knowledge of falsity or reckless disregard for the truth.” Relying on the jury in a tort case is consistent with the model.⁷²

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

⁷²Of course no statutory interpretation was involved in *New York Times*.

Predictably, while the Court's *New York Times* decision built upon and incorporated its rules into the common law of torts, the fit was not quite seamless. That is, the Court's use of the phrase "actual malice" to mean something different from what the word "malice" means at common law has led to the need for further development and to confusion.⁷³ Indeed, in *Masson v. New Yorker Magazine, Inc.*,⁷⁴ the Court went so far as to say that it might be better to altogether jettison the phrase "actual malice" in jury instructions because of the confusion it has engendered.⁷⁵ Additionally, the Court's imposition of a burden of proof higher than a mere preponderance of the evidence in public official defamation cases arguably signaled an increased role for judges in deciding defamation cases involving public officials. While the Court's rule contemplated an orderly and traditional process of defamation litigation (with a Constitutional twist), the imposition of a slightly higher burden of proof arguably meant a more aggressive role for the judge hearing defamation cases both at trial and on appeal. Indeed, this concern proved accurate in later jurisprudence. But, before we reach that point let us turn to subsequent significant developments in the constitutionalization of state defamation law after *New York Times*.

⁷³*See generally*, *Garrison v. State of Louisiana*, 379 U.S. 64 (1964) (state criminal statute is unconstitutional where it punishes false statements made against public officials where those statements are made with ill will, the common law definition of malice, without regard to whether they were made with knowledge of falsity or reckless disregard for the truth); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (indicating that "actual malice" is a subjective standard but leaving some room for doubt about its possibly objective nature); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (purposeful avoidance of the truth may constitute "actual malice"). The Court also has addressed just who is a public official. *See Rosenblatt v. Baer*, 383 U.S. 75 (1966).

⁷⁴501 U.S. 496 (1991).

⁷⁵*Id.* at 511.

Notably, the Court extended the *New York Times*' "actual malice" requirement to libel suits filed by public figures, that is, public figures who were not public officials. The case, *Curtis Publishing Co. v. Butts*,⁷⁶ was actually two consolidated cases involving the athletic director at the University of Georgia and a private citizen who had "pursued a long and honorable career in the United States Army before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957."⁷⁷ Next, in a fractured and divided opinion, *Rosenbloom v. Metromedia, Inc.*,⁷⁸ the Court indicated that *The New York Times* standard may apply to any case in which the speech involved was a matter of public concern or interest. The Court seemingly backed away from this requirement in its next significant decision involving state tort law and defamation, *Gertz v. Robert Welch, Inc.*⁷⁹

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

⁷⁶388 U.S. 130 (1967).

⁷⁷*Id.* at 140.

⁷⁸403 U.S. 29 (1971).

⁷⁹418 U.S. 323 (1974).

Justice Powell, refused to apply the *New York Times*' standard to the case. Once again, the Court was faced with balancing the individual's interest in his reputation against the interests of the press and free speech. Once again, although not expressly stated, the Court also was considering the state's right to develop and apply its own law of defamation, its own tort law.

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

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

constitutionally permissible.⁸⁰

Who was a private figure and who was a public figure? The *Gertz* Court noted that there were two types of public figures: universal public figures and vortex public figures. The universal public figure was someone who had gained such notoriety as to be a public figure for all purposes. The more common (or vortex) public figure was someone who had thrust herself into the limelight of some public controversy. The Court felt that *The New York Times* standard was applicable to a public figure because the public figure had greater access to the media than the private figure and because the public figure, from a normative standpoint, had voluntarily entered the field of public debate thereby assuming the risks of scrutiny and even possible defamation. The private figure did not have the public figure's access to the media. Nor had she assumed the risk of a public life.

Clearly, *Gertz* signaled a major modification of *New York Times v. Sullivan*. It held that the rule or standard of *New York Times* did not apply in a case involving a private figure. However, the Court imposed (or at least seemed to impose) significant limitations on the private figure's right to recover in a defamation action. The private figure had to establish at least

⁸⁰At common law, once the plaintiff established that a defamatory statement had been published of and concerning him or her, presumed and often punitive damages were recoverable. Presumed damages left the jury free to conclude that defamation had harmed the plaintiff even though the plaintiff could not establish any particular loss. Of course, there were significant limitations on the doctrine of presumed damages in slander cases in which the plaintiff had to establish special injury or special damage—loss of a pecuniary nature. But, if the defamation involved slander per se, then the plaintiff did not have to establish special damages. Moreover, in certain libel cases the plaintiff had to establish injury if the libel was not apparent on its face. This was known as the doctrine of libel per quo. *See, Lent v. Huntoon*, 143 Vt. 539, 470 A. 2d

negligence, and had to establish actual injury unless he or she proved *New York Times* “actual malice” in which case presumed and punitive damages would be constitutionally permissible.

Let us now reconnoiter and consider the judicial mode of analysis after *Gertz*, in light of *New York Times*. Like *New York Times*, the holding in *Gertz* may be said to be both consistent with state tort law and to tinker with state tort law. It tinkers with state tort law by imposing or seeming to impose a constitutional hurdle for the private figure plaintiff in a defamation case. That hurdle provides that the plaintiff, in order to recover, must establish at least negligence and must establish actual injury unless he or she proves *New York Times* “actual malice.” These are constitutional hurdles which would not be present absent the Supreme Court’s intervention in the state tort case. In this regard, *Gertz*, like *New York Times*, is an intrusion in the development and application of state tort law. To this extent it might be called constitutional tort reform.

Like *New York Times v. Sullivan*, the *Gertz* opinion operates within the context of the traditional tort case and within the process of traditional tort law. While the source of the fault rule or requirement is not clear and thus subject to some criticism, the reasoning process seems to follow and emanate from *New York Times*—the precedent. A Constitutional hurdle is appropriate but not one as stringent as “actual malice.” To this extent the opinion’s reasoned elaboration is consistent with the model. Moreover, the actual injury requirement reasonably derives from the common law of torts and the alternative “actual malice” requirement for presumed and/or punitive damages is derived from *New York Times*. Thus, while the *Gertz* rules do intrude upon

state power, they attempt to build themselves into the traditional tort process. *Gertz* articulates elements, albeit perhaps additional elements, that the plaintiff must establish in his traditional defamation case. *Gertz*, like *New York Times*, contemplates that defamation claims will go forward. It is just that within the context of the traditional common law tort suit, the plaintiff must establish or clear the applicable constitutional hurdles.

Moreover, the *Gertz* decision contemplates a continuing and meaningful role for the jury in deciding defamation cases. That is, the fault requirement, the actual injury requirement, and the alternative *New York Times* “actual malice” standard may be neatly tailored and employed as jury instructions. Thus, the Court must have contemplated the continued involvement of the jury in state law defamation cases after *Gertz*—again consistent with the model of adjudication. Moreover, one could argue that *Gertz* is even more familiar to the state judge and jury than *New York Times* because the state judge and jury will have had significant experience and background with the concept of negligence and by requiring actual injury, Justice Powell made a noted commitment to traditional state law because he defined actual injury as those damages normally recoverable in a tort suit.⁸¹ Thus, like *New York Times*, *Gertz* limited state power through the application of constitutional law but it did so in a manner which was consistent with the model of adjudication.

Predictably, the development of the constitutional law of defamation did not stop with the

⁸¹*Id.* at 350.

Gertz case. Later, the U.S. Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*,⁸² held that a state could not constitutionally require a defendant in a case like *Gertz* to establish truth as a defense. Rather, the plaintiff had to establish falsity.⁸³

Of more significant in the overall development of the constitutional tort of defamation is *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁸⁴ There, defendant Dunn & Bradstreet had employed a high school student to check bankruptcy filings. As a result of the high school student's error, the defendant reported the plaintiff, Greenmoss Builders, had filed bankruptcy. This was not true but it was communicated through a credit report to five people with whom Greenmoss dealt or hoped to deal. Greenmoss filed a libel action against Dunn & Bradstreet. Critically, the United States Supreme Court held that Vermont's interest in protecting the reputation of its citizens (and in articulating its own law of defamation) justified a Vermont court in awarding presumed and perhaps even punitive damages to a private figure even when *New York Times* "actual malice" was not proved because the speech was not a matter of public concern. Justice Powell wrote the majority opinion in *Greenmoss* as he had written the opinion in *Gertz*. Interestingly, by reintroducing the "matter of public concern" criteria, the Court seemed to reinterpret the *Gertz* case. *Gertz* had not expressly conditioned its holding on the

⁸²475 U.S. 767 (1986).

⁸³Requiring the plaintiff to establish falsity in a case like *Gertz* was probably implicit in the decision. Likewise, one may say that the requirement was implicit in *New York Times* and that *Hepps* made the requirement explicit. Interestingly, in one post *New York Times* case, the Court seemed to indicate that truth could still be a defense. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 489-90 (1975). *Hepps* seems to put this possibility to rest.

⁸⁴472 U.S. 749 (1985).

speech involved being a matter of public concern. But, of course, the facts of *Gertz* indicated that the speech was, in fact, a matter of public concern. While the *Gertz* majority had jettisoned the *Rosenbloom* holding and the “matter of public concern” test as devoid of meaningful content, the Court in *Greenmoss* reiterated and resuscitated a similar test which the dissent attacked as vacuous.⁸⁵

According to the *Greenmoss* majority, determining whether or not speech was a matter of public concern was to be decided based upon the form, content, and context of the relevant speech. One may justifiably wonder about a court or jury’s ability to determine whether or not speech is legitimately a matter of public or private concern. In the wake of *Greenmoss*, obviously, the Court has indicated that where the speech involved is not a matter of public concern a state has a greater interest in protecting the reputation of its citizens and in articulating, developing, and applying its own tort law. In a case where the speech involved is not a matter of public concern, the balance between the state’s right to protect the reputations of its citizens and the state’s right to develop its own tort law weighs more heavily than free speech concerns.⁸⁶ Critically, one may wonder whether, in the wake of *Greenmoss*, a state is free to once again impose strict liability in a defamation case where the speech does not relate to a matter of public concern and whether a state could, in such a case, make truth a defense rather than making falsity

⁸⁵*Id.* at 774, 786-94 (Brennan, J., dissenting).

⁸⁶Perhaps, critically, the Court noted that the motive for the defendant’s speech was profit and such an activity would not be easily deterred. Thus, the Court seemed to say that the chilling effect of liability would be mitigated by the profit seeking context in which the speech was articulated.

an element of the plaintiff's prima facie case.⁸⁷ If the balance between the plaintiff's reputation, the state's interest, and the First Amendment authorizes the imposition of presumed and punitive damages, one wonders why it might not also authorize strict liability and treating truth as a defense (rather than treating falsity as an element of the plaintiff's prima facie case). In such a case, the Constitution (today) may leave state tort law alone. It is clear that what the Court did in *Greenmoss* was consistent with its approach to state tort law in *New York Times*, *Gertz*, and other cases. That is, the Court did not radically alter the landscape of state tort law. While in *New York Times* and *Gertz*, the Court tinkered with state tort law, in *Greenmoss* it, in essence, left it alone. The reasoned or precedential basis for the speech which is a "matter of public concern" criterion or test is no doubt *Rosenbloom*, in part. But the "matter of public concern" test also seems to be an attempt to give meaning to the balance between the defendant's federal Constitutional rights and the state's rights to protect its citizen's reputation. Moreover, as noted below, *Greenmoss* manifests the development of doctrine through analogous reasoning from and to prior cases over time.

Of course, there have been other Supreme Court cases involving defamation. In *Milkovich v. Lorain Journal Co.*,⁸⁸ the Court, in essence, following the lead of *Greenmoss*, refused to create a constitutional law of opinion in defamation cases. Instead, the Court held that if a statement, albeit couched as opinion, implied the existence of underlying facts, a state would be free to apply its traditional law of defamation. Moreover, in *Masson v. New Yorker*

⁸⁷See, e.g., Frank L. Maraist and Thomas C. Galligan, Jr., *supra* note 5, Chapter 19 (2004 edition).

⁸⁸497 U.S. 1 (1990).

Magazine,⁸⁹ the Court considered the constitutional relevance of altering quotations and noted that as long as the alteration was not substantial, liability would not necessarily ensue. Moreover, the Court refused to constitutionalize a doctrine of incremental harm. Thus, after *Greenmoss*, *Milkovich*, and *Masson*, one may have wondered whether the Court, while not backing off *New York Times*, *Gertz*, and *Hepps*, was at least not extending those cases to further limit a state's power to determine its own common law of defamation.

Here, it is appropriate to take a paragraph or two to discuss some of the procedural developments articulated in and applicable to defamation cases. Notably, in *Anderson v. Liberty Lobby, Inc.*,⁹⁰ the Court, in essence, articulated the standard applicable in Federal Rule Civil Procedure 56 summary judgment cases. Notably, the case was a defamation case and the Court, properly and adeptly, tied the burdens in a summary judgment motion to what the various parties would have to prove at trial.

More critically for present purposes, the Court in *Bose Corporation v. Consumers Union of United States, Inc.*,⁹¹ treated a trade libel or trade disparagement case as a defamation case and held that the clearly erroneous standard of review was not the applicable standard when reviewing a determination of "actual malice" in a case governed by *New York Times*. The Court held that in such a case appellate judges must exercise independent judgment to determine

⁸⁹501 U.S. 496 (1991).

⁹⁰483 U.S. 635 (1986).

⁹¹466 U.S. 485 (1984).

whether the record established “actual malice” with convincing clarity. Interestingly, the *Bose Corporation* holding regarding the exercise of independent review on appeal may have been foreshadowed by *New York Times*’ requirement that the burden of proof in public official defamation cases was convincing clarity. That is, as noted above, if the requirement that the public official plaintiff prove his or her case to a level of convincing clarity signaled the possibility of a more aggressive role for judges in defamation cases, *Bose Corporation* brought that concern to the fore. The holding in *Bose* arguably is an intense intrusion into the normal processes by which tort cases are decided. That is, once a jury or judge renders a finding it normally is entitled to great deference. However, appellate review under an independent judgement standard signals a heightened role for the appellate court. In this regard, one may conclude that *Bose Corporation* is more than a mere tinkering with the traditional allocation of decision making power in a tort case and signals more aggressive federal constitutional oversight and review. In this regard, *Bose* arguably deviates from the Section II model of adjudication because it disrupts and diminishes the jury’s traditional role. The *Bose* case also is significant because it is a case in which the Court assumed that the *New York Times* requirement applied in another, albeit related, area—trade libel. But, before we turn to other areas in which *New York Times* has been applied, let us summarize.

First, arguably, *New York Times* and its progeny are cases where federal constitutional concerns with free speech limited a state’s ability to apply and develop its own tort law and to protect its citizen’s reputations. Of course, significant interests of the press and the interests of other citizens were also at stake. Notably, *New York Times* and its progeny, while imposing

constitutional hurdles in traditional tort cases, articulated hurdles that, while sometimes different from state tort doctrine, were arguably different in kind rather than in degree. In other contexts, such as *Gertz*, the additional hurdles—negligence and actual injury—were hurdles with which state courts were familiar. The Court’s reasoned elaboration and reliance on precedent and analogy are consistent with the Section II model of adjudication. As noted, the independent review standard of *Bose* may constitute a more significant limitation on state power and its limitation of jury power in a tort suit is somewhat inconsistent with the model.

Moreover, one may be left wondering whether or not the extensive post-*New York Times* development of the constitutional law of defamation has been worth the confusion. The pendulum has swung back and forth in different cases at different times and *New York Times*, *Gertz*, and their progeny had a profound and sometimes confusing impact on the development of state tort law as state judges attempted to reconcile the state tort of defamation with the constitutional requirements of *New York Times*. The Restatement (Second) of Torts reflected this confusion as the Restatement (Second) attempted to incorporate *New York Times* into its redaction of the common law. But, the drafters, obviously could not completely anticipate the details of subsequent Supreme Court decisions and so one is left wondering whether aspects of the Restatement (Second) were informed by the drafters’ sound decisions about tort law or by the drafters’ concern that their work would be consistent with the constitutional tort of defamation.⁹²

Interestingly, consistent with the Section II model, one may view the series of three major defamation cases—*New York Times*, *Gertz*, and *Greenmoss*—as examples of what Professor Molot

⁹²See, *Lund v. Chicago and Northwestern Transportation Company*, 467 N.W. 2d 366,

calls backward looking principled minimalism.⁹³ In *New York Times*, the Court articulated a broad and arguably bold rule or principle, a rule or principle that limited state autonomy in the field of defamation. But, in subsequent decisions, *Gertz* and *Greenmoss*, the Court has modified *New York Times* and possibly recognized an area—speech which is a matter of private concern—in which a state’s power over its law of defamation remains unfettered by any Constitutional limit.⁹⁴

Now, let us turn to the extension of *New York Times v. Sullivan* to other torts. That is, *New York Times* has not been neatly cabined to the law of defamation but has been applied and parties have attempted to apply it in other contexts, including invasion of privacy, intentional infliction of emotional distress, and promissory estoppel. Let me turn first to the invasion of privacy cases. Here again, the Court has often limited state power and its anchor in reason (or precedent) was *New York Times* and progeny.

The privacy torts are appropriation or right to publicity, intrusion, publicity of private facts, and false light invasion of privacy. The United States Supreme Court has considered the extension of *New York Times* and its constitutional protections to three of the four types of invasion of privacy. The only one of the four to which it has not considered extension is

(Minn. App. 1991) (Crippen, J., dissenting).

⁹³See, generally, Molot, *Principled Minimalism* *supra* note 38.

⁹⁴Defamation cases continue to reach the Court. See *Tory v. Johnnie L. Cochran, Jr.*, ___ U.S. ___ (2005) (death rendered injunction in defamation case an overly broad prior restraint).

intrusion.⁹⁵ False light invasion of privacy arises where the defendant casts the plaintiff in a false light in the public eye. The Court first considered the application of *New York Times* to a false light case in 1967 in *Time, Inc. v. Hill*.⁹⁶ *Hill* involved the review of a play. The play dealt with a family held hostage by three escaped convicts. The review linked the play to the real events which had arguably inspired it. The play had certain significant differences from the real life events. Family members filed suit under a New York privacy statute alleging false light invasion of privacy. Critically, and in general, the tort of false light invasion of privacy protects the right to be left alone and the emotional tranquility associated with privacy. It protects against public portrayals of the plaintiff in a “false light.”

The Court in *Hill* held that the magazine publisher was entitled to a jury instruction under New York law that liability could be predicated only on a finding of knowing or reckless falsity in the publication of the article. That is, the Court extended the *New York Times* “actual malice” requirement to a false light invasion of privacy case. Whether that decision was proper or improper is debatable,⁹⁷ but for present purposes *Time, Inc. v. Hill* was consistent with *New York Times* and its progeny. That is, *Hill* imposed an additional hurdle on a plaintiff in a state court tort case but it worked within the context of state tort law and traditional tort processes in its contemplation of continuing case by case development and contemplated its utilization of the

⁹⁵*But see*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (interpreting and applying wiretap statutes in case against radio station playing recorded conversation in a way to avoid first amendment issues).

⁹⁶385 U.S. 374 (1967).

⁹⁷*See, e.g.*, Anthony Lewis, *supra*, note 71.

jury as a vehicle for decision making. The Court's reliance on *New York Times* as authority or analogical authority was based on reason and, at the time, the Court had not worked through the public/private figure issue or the public/private speech issue. Likewise, in *Cantrell v. Forest City Publishing Company*,⁹⁸ the Court considered a false light invasion of privacy where the jury had found that the defendant had published with *New York Times* "actual malice". Without having to decide whether that was the appropriate standard (in light of *Gertz*), the Court affirmed in a manner consistent with *Time, Inc.* and *New York Times*.⁹⁹

The Court also has considered the application of *New York Times* in cases involving the disclosure of private facts. In *Cox Broadcasting Corporation v. Cohn*,¹⁰⁰ the father of a rape victim who had not survived the ordeal filed suit against a broadcasting company for disclosing his daughter's identity thereby allegedly invading *his* right to privacy in violation of a Georgia statute which prohibited the publication of a rape victim's name. The station had gained access to the rape victim's name in judicial records which were open to the public. In fact, the station had identified the victim by name accidentally in violation of its own policies. However, it argued that the disclosure of the identity still was constitutionally protected. The Supreme Court agreed, holding that there was no claim under the circumstances because the defendant had lawfully obtained the name from judicial records which were open to the public.

⁹⁸419 U.S. 245 (1974).

⁹⁹Interestingly, the Court held the publisher was vicariously liable for the reporter's fault, without noting the arguable discrepancy between that holding and the failure to impose vicarious liability in *New York Times v. Sullivan*. On false light, *see also, Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

¹⁰⁰420 U.S. 469 (1975).

Interestingly, one may view *Cox* as slightly different in style from *New York Times* and its progeny because the Court in *Cox* banned an entire claim. That is, the Court did not contemplate that the claim could go forward after the plaintiff cleared a hurdle or threshold in a common law case. Instead, the claim was barred. But, the Court did purport to limit its analysis to the facts of the particular case and in doing so acted consistently with the role of a court in a common law case. The *Cox* Court relied upon and extended the pre-existing authority of *New York Times*. Applying *New York Times* to another tort can also be viewed as reasoning by analogy. Thus the decision, in this regard, is consistent with the model.

Subsequently, in *The Florida Star v. B.J. F.*,¹⁰¹ the Court faced a similar privacy claim. There, a rape victim filed suit against a newspaper for publishing her name in violation of a Florida statute. As in *Cox*, the defendant newspaper had lawfully obtained the name of the victim through a publicly released police report which had been made available in the police press room. The defendant argued that the Court should hold that truthful publications are never punishable. Had the Court accepted the defendant's invitation, the Court would have barred an entire arena of disclosure claims. However, the Court refused to do so instead limiting its holding by stating that the paper had lawfully obtained truthful information about a matter of public significance so there could be no liability. The Court cited its previous opinion in a case involving a criminal indictment for publishing the name of the youth charged as a juvenile

¹⁰¹491 U.S. 524 (1989).

offender.¹⁰² After *Florida Star*, one justifiably wonders whether the Court's jurisprudence has effectively foreclosed the disclosure of private facts claim, at least where the subject of the controversy is a matter of public interest. However, the Court's opinions purport to limit the holdings to the particular facts and, in this way, the opinions are consistent with common law development of law in general and tort law in particular. One may also view them as minimalist. There was no reason to articulate a broad rule beyond the facts of the case.

The Court considered the application of *New York Times* to appropriation cases in *Zacchini v. Scripps-Howard Broadcasting Company*.¹⁰³ Zacchini was a human cannonball. That is, he performed as a human cannonball—i.e., he was fired out of a cannon. While performing at a fair in Ohio, a television station broadcast Zacchini's *entire* 15 second act on the local news. Zacchini sued for appropriation of his identity or right to publicity. The defendant claimed that its broadcast of the act was constitutionally protected under *New York Times* and its progeny. In a 5-4 opinion, the United States Supreme Court held that although the State of Ohio may provide greater protection to the press, the First and Fourteenth Amendments of the United States Constitution did *not* bar the appropriation claim. As in *Greenmoss*, the Court found that the balance between free speech and private interests tipped in favor of the private interests. Notably, tipping in favor of private interests also authorized the state to impose liability if the imposition of liability was consistent with state constitutional law and state tort law. Notably, Justice White, speaking for the majority, drew a distinction between liability for appropriating

¹⁰²Smith v. Daily Mail Publishing Company, 443 U.S. 97 (1979).

¹⁰³433 U.S. 562 (1977).

property—the human cannonball act—and defamation or placing the plaintiff in a false light. Justice White said that the false light and defamation did not involve “an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid.”¹⁰⁴ He also said that in a false light case the injury is in the publication itself whereas in a right to publicity case the issue is not the publication but rather arises from who does the publishing.¹⁰⁵ Critically, Justice White stated that the “broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.”¹⁰⁶ The right of control was critical to that economic value. One may justifiably wonder why a state seemingly has greater freedom to provide protection to a property interest than to reputation or emotional tranquility. On its face at least the Court’s reasoning seems suspect. *New York Times* is limited to speech and reputation; it does not apply to property. But, the Court explains no more—i.e., there is no reasoned elaboration. The *Zacchini* claim was allowed to proceed without any constitutional limitation.

Turning from invasion of privacy to intentional infliction of emotional distress brings one face to face with *Hustler Magazine v. Falwell*.¹⁰⁷ As part of a popular ad campaign, Campari Liquor had included interviews with various celebrities about their “first times.” The ads expressly made reference referred to the first times the celebrities had sampled Campari, but played on the sexual double entendre of the subject of first times. Apparently unable to resist the

¹⁰⁴*Id.* at 574.

¹⁰⁵*Id.* at 573.

¹⁰⁶*Id.* at 575.

¹⁰⁷485 U.S. 46 (1988).

temptation, Hustler Magazine ran a parody on Jerry Falwell's "first time." The details are somewhat sordid but suffice it to say that the parody involved alcohol, immorality, drunkenness, an outhouse, and Mr. Falwell's mother. Reverend Falwell filed suit against Hustler seeking damages for libel, invasion of privacy, and intentional infliction of emotional distress. The district court granted a directed verdict on the invasion of privacy claim and the jury found against Reverend Falwell on the libel claim concluding that the parody could not "reasonably be understood as describing actual facts. . . or actual events. . . ." ¹⁰⁸ However, the jury ruled in favor of Reverend Falwell on the intentional infliction claim awarding him \$100,000 in compensatory damages and \$50,000 each from the various defendants. The United States Court of Appeals for the Fourth Circuit affirmed. ¹⁰⁹

The United States Supreme Court granted certiorari and held that the requirements of *New York Times v. Sullivan* applied even though the claim was for intentional infliction of emotional distress. The Court stated that parody, particularly in cartoons, had long been a part of America's conversation, comment and debate on public issues. Notably, the Court held that where speech about a public figure was involved (and arguably speech about a matter of public concern), the plaintiff in an emotional distress claim had to establish that the speech involved a false statement of fact that was uttered with knowledge of falsity or reckless disregard for the truth ("actual malice"). The defendant argued that the common law requirement in intentional infliction cases that defendant's must be "outrageous" provided sufficient constitutional

¹⁰⁸ *Id.* at 49.

¹⁰⁹ 797 F. 2d 1270 (4th Cir. 1986).

protection. The Supreme Court disagreed; the Court concluded outrageousness lacked sufficient meaningful content to protect the defendant from liability for properly exercising its right to free speech. Notably, because the jury had concluded that no reasonable person could believe that the parody contained a false statement of fact, liability for intentional infliction was precluded.

Interestingly, one may wonder whether the Court's extension of *New York Times* to intentional infliction cases is a neat fit. That is, is it rational and consistent with the Section II model? While the Court was clearly concerned with protecting *Hustler Magazine's* freedom of speech, one must question whether wholesale importation of the falsity requirement from defamation cases was the best or most appropriate way to deal with intentional infliction cases. Why transport a defamation-based requirement to intentional infliction cases? Mightn't the Court have implied some constitutional content into the outrageous requirement? Or, was the "actual malice" requirement appropriate because the alleged intentional infliction involved speech and an alternative holding might have weakened *New York Times* because public officials and public figures would try and turn defamation claims into intentional infliction claims? Perhaps the Court saw the common law "outrageous" element as akin to the common law's malice requirement in defamation cases, i.e., susceptible to manipulation because of its alleged vagueness. Of course, at common law malice could be presumed in a defamation case; the same could not legally be said of the "outrageous" conduct requirement in intentional infliction cases. And, the Court could have articulated its own constitutional definition of outrageous. Be that as it may, it is clear that the Court in *Falwell* applied the *New York Times* requirement to an intentional infliction case. In doing so, the Court limited the ability of a state to articulate and

apply its own tort law concerning intentional infliction involving speech about a public figure (and arguably a matter of public concern). Clearly, while *Hustler Magazine* resulted in no recovery for Reverend Falwell, it was consistent with *New York Times* and its progeny as it contemplated that public figure/speech/intentional infliction claims may proceed as long as the public figure clears the hurdles imposed by *New York Times* via *Hustler Magazine v. Falwell*. Additionally, in its defense, one could say that the *Falwell* court reasoned by analogy from *New York Times*, as courts, according to the model, are supposed to do.

Notably and finally, let us turn to *Cohen v. Cowles Media Co.*¹¹⁰ *Cohen* is *not* a tort case; it is a promissory estoppel case, but it raises critical questions about the application of *New York Times* and its progeny. *Cohen* was employed by a Minnesota gubernatorial candidate. During the closing days of his employer's campaign *Cohen* contacted reporters from two papers and offered to provide them with information concerning another candidate in the upcoming election. *Cohen* made clear to the reporters that he would provide the information only if he was given a "promise of confidentiality."¹¹¹ The reporters published the information and independently decided that they would publish *Cohen*'s name as part of the stories. After the publication, *Cohen*'s employer fired him and *Cohen* then sued the newspaper claiming fraudulent misrepresentation and breach of contract. The jury found in *Cohen*'s favor and awarded him \$200,000 in compensatory damages and \$500,000 in punitive damages. The Minnesota Court of Appeals reversed the award of punitive damages but upheld the compensatory damages award.

¹¹⁰501 U.S. 663 (1991).

¹¹¹*Id.* at 665.

The Minnesota Supreme Court reversed the compensatory damages award finding that a contract cause of action was inappropriate and that the only possible avenue of recovery under Minnesota law was promissory estoppel, which had neither been tried to the jury nor briefed (nor argued) by the parties on appeal. In addressing promissory estoppel, the Minnesota Supreme Court noted that promissory estoppel was applicable where injustice could be avoided *only* by enforcing the promise--here the promise of confidentiality. However, in considering that “avoiding injustice” element, the Minnesota Supreme Court looked to the First Amendment as articulating and providing a relevant and important value. The Minnesota Supreme Court held that using promissory estoppel to enforce the promise of confidentiality would violate the defendant newspaper’s First Amendment rights.

The United States Supreme Court granted certiorari and reversed. Notably, the Court held that state action was involved. Damages awarded under a promissory estoppel theory would be enforced through the official power of the states, so there would be state action. This aspect of the opinion clearly is consistent with *New York Times* and its progeny. But, the Court said, promissory estoppel was a “law” which would be generally applied and it did not single out the press in any fashion. The Court held that the Minnesota law of promissory estoppel simply required those making promises to keep them. Thus, any restriction on publication was self imposed by the promise. The liability was generated, at least in part, by the promise and not (simply) by the operation of state law. Of course, the promise would not even be enforceable absent the state law of promissory estoppel. But critically, the Court noted that the plaintiff in *Cohen* was not trying to avoid the strictures of defamation law (as is *Falwell*) and was not

seeking damages for harm to reputation or state of mind. The plaintiff had lost his job and his earning capacity. Thus, the Court held that the case was distinguishable from *Falwell* and that the U.S. Constitution did not limit Cohen's state law promissory estoppel claim.

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

To conclude this section, *New York Times* and its progeny, while not always consistent and while not free from troublesome distinctions and detail, rely upon rules in analogous cases and in this sense appear based on pre-existing authority—albeit authority extended in the

particular cases. Thus, they are consistent in their reliance on and manifestation of “reasoned elaboration.” *New York Times* articulates limitations on the state’s power to articulate and apply its own tort law, *but*, at the same time, attempts, in principle at least, to work within the traditional tort system. That is, *New York Times* and *Gertz* impose and articulate rules to be applied in the context of the traditional tort case. If the plaintiff clears the rule or hurdle then the plaintiff’s claim may proceed and may be successful. Notably, these hurdles are rules *or* elements—“actual malice,” negligence, and actual injury. In that regard, they are either clearly defined (“actual malice” means knowledge of falsity or reckless disregard for the truth) or are commonly used “tort” terms or concepts (negligence and actual injury). Moreover, the jury plays a key role in deciding whether the plaintiff clears that threshold or hurdle. While the Court’s appellate review in *Bose* somewhat threatens the jury’s traditional role, *New York Times* and its progeny arguably still represent common law constitutional decision making which is implemented in the context of the particular case. And, critically, the common law jury will (subject to *Bose*) play a meaningful role in deciding those cases.

Arguably, the disclosure of private facts cases are somewhat different as their results hint at the preclusion of an entire line of liability in state court but the Court expressly limited its holdings to the relevant facts. Perhaps most troublesome are *Zacchini* and *Cohen* which arguably set up a hierarchy of private law. Under this hierarchy, contract and property rights seem entitled to greater protection under state law than “tort” rights protecting reputation and state of mind. Tort protections of reputation and state of mind are subject to constitutional limitation under *New York Times* and *Falwell*, at least where the plaintiff is a public official or figure and/or the speech

involves a matter of public concern. Contract or property rights, even where the event is newsworthy and the speech involves a matter of public concern, are not subject to the same constitutional limitations. One wonders if the articulated differences are persuasive. Let us now turn to the second of our three areas of constitutional tort reform: the preemption of state tort claims by federal legislation under the Supremacy Clause.

IV. Preemption of State Tort Claims

Commentators have ably written on the preemption jurisprudence and some of its implications.¹¹² This piece does not seek to create a unified theory to explain the preemption jurisprudence. Rather, it places the preemption cases within the larger framework of Supreme Court tort reform. It analyzes the preemption cases insofar as they limit the power of a state to articulate and develop its own tort law and comments on the cases' impact and interpretation of tort law in general, i.e., their consistency or lack thereof with the modest model.

Notably, the Section II model provides that one common characteristic of adjudication is statutory interpretation. All of the preemption cases involve statutory interpretation and in this regard fall under the umbrella of the model. Moreover, while the different statutory words at issue preclude broad general rules, the cases may be subject to general analysis and criticism

¹¹²See, generally, Richard C. Ausness, Preemption of State Tort Law by Federal Safety Statutes Supreme Court Preemption Jurisprudence Cipollone, 92 Ky. L.J. 913 (2004); Michael Green, Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption, 82 Iowa L. Rev. 1257 (1997); David G. Owen, Federal Preemption of Product Liability Claims, 55 S.C. L. Rev. 411 (2004). *See also*, Thomas C. Galligan, Jr., Cigarettes and Cipollone: What's

based on their reasoning and consistency in approach.

The basis of preemption is that under the Supremacy Clause of the United States Constitution¹¹³ federal law is supreme over state law. Thus, where there is a congressional intent to displace state law or where state law would conflict with federal law, state law must give way. Preemption may be express or implied. When preemption is express, Congress, in the relevant legislation, has expressed its intent regarding the operation of state law. If Congress expressly provides that state law is displaced, then it is displaced. However, express preemption clauses must be interpreted as to their extent and purpose. And, even if Congress has not expressly preempted state law, the operation of state law may be impliedly preempted where there is a conflict between state and federal law, where it is impossible for both state and federal law to operate, or where the application of state law would obviate or frustrate the federal purpose or end. Traditionally, the question of preemption arose most commonly where some state statute was arguably preempted by a federal enactment.¹¹⁴ But, since at least 1959, it has been apparent that federal law may preempt the operation of state tort law, i.e., federal law may preempt a state court's ability to hold a defendant liable under a state tort theory.

Left? What's Gone?, 53 La. L. Rev. 713 (1993).

¹¹³Article VI, U.S. Constitution.

¹¹⁴Arguably, the dormant commerce clause cases can be viewed as a type of federal preemption. Moreover, the extent to which federal maritime law, whether articulated or inchoate, preempts the operation of state law in a maritime case is in essence a preemption issue and it is arguably a preemption issue of constitutional dimension; however, given the highly specialized nature of that inquiry, I elected not to pursue it here. *See, generally*, Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in a Nutshell*, Chapter I (5th ed. 2005, forthcoming); Frank L. Maraist & Thomas C. Galligan, Jr., *Personal Injury in Admiralty*, 3-10 (2000); Frank L. Maraist, Thomas C. Galligan, Jr., & Catherine M. Maraist, *Maritime Law*, 4-30 (2003).

In *San Diego Building Trades Council, Millman's Union Local 2020 v. Garmon*,¹¹⁵ an employer sued a union alleging that its picketing constituted an unfair labor practice under state tort law. The California court issued an injunction and awarded damages. The case reached the U.S. Supreme Court twice. The second time the case reached the Court the issue was the state court's jurisdiction to award damages for injuries caused by the picketing. Critically, in an opinion by Justice Frankfurter, the Court held that where the picketing was arguably within the ambit of the National Labor Relations Act section dealing with employees rights to organize, collectively bargain, or avoid unfair labor practices, the California court's jurisdiction to hold the defendant liable under state tort law was preempted. Notably, the Court did what a Court must do in any preemption case, it interpreted the scope and reach of a federal statute. Interestingly, *Garmon* preceded *New York Times* by five years.

Later, in *International Paper Company v. Ouellette*,¹¹⁶ Vermont land owners sued the operator of a New York pulp and paper mill alleging that the operation of the paper mill in New York constituted a nuisance under Vermont law. The Supreme Court held that the federal Clean Water Act preempted Vermont's nuisance law to the extent that Vermont sought to impose liability on a New York point source. However, the Clean Water Act did not bar the plaintiffs from claiming the source was a nuisance under New York law.¹¹⁷ While obvious federalism

¹¹⁵359 U.S. 236 (1959).

¹¹⁶479 U.S. 481 (1987).

¹¹⁷Perhaps one might have foreseen the *Gore/State Farm* sovereignty limits on punitive damages (i.e., a state cannot punish conduct occurring in another state that has no effect inside

concerns were at stake in the decision, both the logic and the result indicate that the Court parsed various claims, those under Vermont law and those under New York law, and concluded that some were preempted and some were not. Thus, *Ouellette* exemplifies a Court doing what a Court is frequently called upon to do in a preemption case. That is, the Court is required to interpret the relevant statute, apply it to the existing common law, and determine the statute's reach and effect. Consistently, with the defamation cases noted above, the Court engaged in a traditional judicial function--statutory interpretation. Somewhat differently from the defamation cases, the result in a preemption case may be that a whole set of claims is precluded or preempted. In the defamation cases, the Court frequently concluded that the plaintiff's claim could proceed once the plaintiff cleared the judicially articulated constitutional hurdle. Contrariwise, in the preemption case a whole category of claims may be precluded. But, the Court is still engaged in a traditional judicial function--the interpretation of a statute and the application of that interpretation to the common law. To that extent the Court's role is consistent with the model.

While *Garmon* and *Ouellette* are cases involving the preemption of state tort law, perhaps the first major, modern case dealing with state preemption (or lack thereof) of traditional personal injury claims was *Silkwood v. Kerf McGee Corporation*.¹¹⁸ In *Silkwood*, the plaintiff's decedent, Karen Silkwood, was exposed to nuclear contaminants--plutonium. The plaintiff's allegations were that Silkwood was exposed in the workplace. Unfortunately, Karen Silkwood

the forum state) from the *Ouellette* holding.

¹¹⁸464 U.S. 238 (1984).

was killed in an unrelated traffic accident shortly after the contamination was discovered. Her father then filed suit against her employer seeking compensatory and punitive damages. The lower court had held that plaintiff's claims for punitive damages were preempted by extensive federal regulation of the safety aspects of nuclear energy. The extensive federal regulation included the Atomic Energy Act of 1954 which the Court had earlier interpreted as preempting state regulation of the safety aspects of nuclear energy.¹¹⁹ That preemption holding was based upon Congress' conclusion that the Nuclear Regulatory Commission had superior technical expertise with nuclear power and safety that the states did not possess. However, in *Silkwood*, the Court held that while Congress might have displaced state safety (administrative) regulation, Congress did *not* intend to displace state tort law. Thus, the plaintiff's punitive damages claim was not preempted.

The Court noted that Congress had been silent on state tort law in the relevant statutes and that this "silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."¹²⁰ This concern that a finding of preemption would leave the plaintiff without a remedy is an important one that the Court has reiterated in later cases.

Interestingly, the *Silkwood* Court, in its preemption analysis, essentially lumped

¹¹⁹Pacific Gas & Electric Co. V. State Energy Resources Conservation & Development Comm'n., 461 U.S. 190 (1983).

¹²⁰464 U.S. at 251.

compensatory and punitive damages together and rejected Kerr-McGee's argument that the two types of damages should be treated differently. In rejecting that argument, the Court stated that punitive damages had long been a part of traditional state law.¹²¹ Justice Blackmun, joined by Justice Marshall dissented, noting the extensive federal regulation of safety in the provision of nuclear energy. Justice Blackmun also noted that the punitive damages which the jury had imposed were one hundred times greater than the maximum fine that could be imposed by the Nuclear Regulatory Commission for a single violation of federal standards. Additionally, Justice Blackmun drew what he thought was a critical distinction between punitive and compensatory damages. In drawing that distinction, he said that:

It is to be noted, of course, that the same preemption analysis produces the opposite conclusion when applied to an award of compensatory damages. It is true that the prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility. But so did the state statute upheld in *Pacific Gas*. The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims. Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the preemption analysis established by *Pacific Gas* comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not preempted whereas punitive damages are.¹²²

Justice Blackmun also noted the difference between the methods for calculating compensatory and punitive damages. Compensatory damages are calculated in order to make the victim whole for his or her injuries. Punitive damages are awarded and calculated to “compel adherence to a

¹²¹*Id.* at 255. Interestingly, Professor Geistfelt has echoed a similar theme when he wrote: “Insofar as the incentive effects of a damage award provide the direct restriction of the defendant's liberty interest, there is no fundamental difference between punitive damages and compensatory damages.” Geistfelt, *supra* note 11 at 110.

¹²²*Id.* at 263-64 (Blackmun, J., dissenting).

particular standard of safety. . . .”¹²³ He argued that the punitive award, thus, would allow a state to punish a defendant nuclear provider’s failure to adhere to a standard that was stricter than the federal standard. This state punishment would interfere with the Federal regulatory scheme. Justice Powell, with whom Chief Justice Burger and Justice Blackmun joined, also dissented. Like Justice Blackmun, Justice Powell argued that punitive damages were regulatory.¹²⁴ Interestingly, in a footnote, he, too, drew a distinction between compensatory and punitive damages stating:

The distinction in this case between the two types of damages is of major importance. There is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault as authorized by state law. Moreover, personal injuries are finite. To be sure, as the compensatory award in this case illustrates, these can result in large compensatory judgments. But juries do have guidance from physicians, medical records, lost wages, and—where permanent disability or death occurs—actuarial testimony as to lost earnings and life expectancy. None of these is present when punitive damages are awarded. The contrast also is illustrated by this case. A jury with neither pretrial knowledge of nuclear plant operations nor evidence to guide or limit its discretion, chose \$10 million. It could, as well have been almost any other amount.¹²⁵

Justice Powell also called the case “disquieting”¹²⁶ because it showed how the “jury system can function as an unauthorized regulatory medium.”¹²⁷

Thus, the *Silkwood* majority engaged in a preemption analysis which effectively lumped

¹²³*Id.* at 264. (Blackmun, J., dissenting).

¹²⁴*Id.* at 274-75 (Powell, J., dissenting).

¹²⁵*Id.* at 276 n. 3 (Powell, J., dissenting).

¹²⁶*Id.* at 283 (Powell, J., dissenting).

¹²⁷*Id.* (Powell, J., dissenting).

together compensatory and punitive damages, i.e., the tort claims at issue in the case. Both dissents, whether persuasively or not, argued for a more precise claim by claim analysis splitting compensatory and punitive damages. Both dissents would have treated the two types of claims differently under their preemption analyses, concluding that compensatory damage claims were not preempted but punitive damage claims were. The essential distinction to the dissenters was that compensatory damages were designed to make the plaintiff whole and calculated in reference to the plaintiff's injury whereas punitive damages were, by their nature, regulatory. Thus, the award of punitive damages would result in state "regulation" that could be inconsistent with the federal scheme and thereby, according to the dissenters, should be preempted. But why are punitive damages regulatory and compensatory damages not regulatory? Liability in a tort suit, by encouraging expenditures that might induce different behavior might be said to be "regulatory." Of course, the defendant need not change behavior; it might choose to keep doing what it was doing and pay the judgment (and possibly future judgments). The Court in *Silkwood* began a wrestling match with the nature of tort law: corrective justice or regulation? It has yet to successfully come to a meaningful resolution of the question and that failure detracts from the Court's reasoning and consistency. But whatever criticism may be leveled at the preemption jurisprudence, the Court was engaged in a traditional judicial activity –interpreting statutes and explaining itself. Interestingly, the disagreement in *Silkwood* was over the Court's treatment of punitive damages, clearly a concern in the First Amendment cases (*New York Times*, *Gertz*, and *Greenmoss*) and, obviously, in the punitive damages cases discussed below.

After *Silkwood*, in *Goodyear Atomic Corp. v. Miller*,¹²⁸ the Court held that federal regulation of nuclear energy did not preempt the operation of state worker's compensation law and, in *English v. General Electric Co.*,¹²⁹ the Court held that the Energy Reorganization Act did not preempt an employee's state law claim for intentional infliction of emotional distress. *English* involved preemption of a relatively narrow area of state law and the Court refused to find the claim preempted.

What is arguably the most significant preemption case of all was on the horizon, *Cipollone v. Liggett Group, Inc.*¹³⁰ *Cipollone* was a tobacco case. The plaintiff's mother, Rose Cipollone, had smoked cigarettes for many years and died from tobacco related diseases. Before her death, she and her husband had filed suit against various cigarette manufacturers alleging design defects, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud. During the pendency of the case, Ms. Cipollone's husband died and the case was continued by her son. The case reached the United States Supreme Court approximately nine years after it had been filed and after a lower court decision that certain of the plaintiff's claims were preempted while others were not. The case required the Court to interpret the preemptive effect of the Federal Cigarette Labeling and Advertising Act, passed in 1965, and the Public Health Cigarette Smoking Act of 1969. The 1965 Act required a warning on all cigarette packages and the Act included an express preemption section. The preemption section

¹²⁸486 U.S. 174 (1988).

¹²⁹496 U.S. 72 (1990).

¹³⁰505 U.S. 504 (1992).

stated that no statement relating to smoking and health, other than the federally mandated warning, would be required on a cigarette package or in advertising. Seven justices held that the 1965 Act did not preempt common law damages actions. In his majority opinion, (on the 1965 Act) Justice Stevens articulated a presumption against preempting state police power. This presumption seems consistent with the *Silkwood* majority's concern about leaving tort victims remediless in the wake of a preemption decision. In *Cipollone*, Justice Stevens concluded that the 1965 Act was best read as preempting only positive enactments by legislatures and administrative agencies mandating particular warning fields; it did not preempt the operation of state law through decisions in common law tort cases. That decision too was consistent with *Silkwood*. Thus, tort cases were not preempted. Two Justices, Justice Scalia and Justice Thomas, concluded that the 1965 Act preempted state tort claims for breach of express warranty and intentional fraud a misrepresentation.¹³¹

Turning to the 1969 Act, the Public Health Smoking Act of 1969 had strengthened the package statements on cigarettes by requiring a statement that cigarettes were dangerous and the 1969 Act also banned advertising in electronic communication subject to the jurisdiction of the Federal Communications Commission. Moreover, the 1969 Act modified the express preemption provision to provide that: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarette the packages of which are labeled in conformity with the provisions of this Act."¹³² The

¹³¹*Id.* at 544, 544-45 (Scalia, J., dissenting).

¹³²15 U.S.C. § 1334(b).

Court was severely divided in its interpretation of the 1969 Act. Thus, as to the 1969 Act, Justice Stevens' opinion was a plurality opinion. Consistent with what the Court had done earlier in *Ouellette*, the Court engaged in a claim by claim analysis to determine which claims were preempted and which were not under the 1969 Act. Thus its reasoning method was consistent with what it had done in *Ouellette*—claim by claim analysis against the statute.

The Court held that the 1969 statute's language was broad enough to reach tort judgments in common law cases, noting state tort law (including compensatory damages) can regulate activity.¹³³ The plurality's critical inquiry for determining whether claims were expressly preempted by the Act was "[w]hether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion,' given that clause a fair but narrow reading."¹³⁴ In answering the preemption questions for each claim, one must praise the plurality's analytic effort while sometimes questioning its consistency. The answers to the questions asked were varied. On the failure to warn claims the plurality held that insofar as those claims would require additional or clearer statements about the effects of smoking and health, those claims were preempted. However, failure to warn claims based solely on testing, research or activities unrelated to advertising and promotion were not preempted. Furthermore, the plurality held that breach of express warranty claims were not preempted because those claims were not imposed under state law but were best viewed as being voluntarily undertaken by the

¹³³505 U.S. at 521.

¹³⁴*Id.* at 522-23.

manufacturer/seller.

Notably, one may question why an express warranty claim is not one imposed under state law. After all, it is state law that creates and recognizes the claim.¹³⁵

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

As to the fraud claims in *Cipollone*, the plurality's analysis was even more complex. The plurality indicated that the plaintiff's claims that the defendant had neutralized the mandated

¹³⁵Recall the Court's language in *Cohen* stating that state law was the source of any obligation arising under a theory of promissory estoppel.

warnings through advertising were preempted. However, claims that the defendant had falsely misrepresented a fact or had concealed a fact were not preempted because those claims were based on a general duty not to deceive--not a duty based on smoking and health. The plurality reached the same conclusion on the conspiracy claims. Thus, the fraud and conspiracy claims were not preempted to the extent that they were based on a general duty not to deceive rather than a particular duty based on smoking and health. Using this logic, one may wonder why failure to warn claims were *not* preempted (the reader will recall that the Court held that some of them were preempted) because they were based on a general duty to exercise reasonable care to provide a fair warning, as opposed to a particular duty with respect to smoking and health. While the majority's statutory interpretation and reasoning is judicial by nature and consistent with the modest theory of adjudication articulated above, one is left puzzling over the persuasiveness, wisdom, and rationality of that reasoning.

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

majority on the post 1969 Act claims.

Certainly, one may justifiably scratch one's head in frustration over the result in *Cipollone*. In particular, one may express doubt about the plurality's distinction between specific duties and general duties. The applicable state law, New Jersey, did not draw particularized distinctions between tort duties based on smoking and health with respect to advertising or promotion and general duties, such as the duty to warn. But, the Court did draw (or create) those distinctions. Likewise, one is justifiably confused about the different treatment of tort (state imposed) and contract (supposedly self-imposed) duties. Whatever frustration one may sense, the basic point is that in *Cipollone*, the Federal cigarette labeling statutes preempted at least certain state tort claims. To that extent, the opinion operates as what I have called Supreme Court tort reform. Moreover, to reiterate the obvious, the court held that state tort law can be inconsistent state regulation for preemption purposes. Despite whatever criticism is levied at the Court for *Cipollone*, the Justices engaged in a traditional judicial function in interpreting legislation and its impact. But one may be justifiably critical of the "reasoned elaboration."

The next significant preemption case to come before the Court was *CSX Transportation Inc. v. Easterwood*.¹³⁶ There, the plaintiff's decedent was killed at a grade crossing when the truck he was driving collided with the defendant's train. His wife filed a state law wrongful death action alleging the defendant was negligent in failing to provide adequate warning devices at the crossing and for operating the train at an excessive speed. The defendant claimed that both

¹³⁶507 U.S. 658 (1993).

claims were preempted by the Railroad Safety Act of 1970. The Act's preemption and saving provisions allow states to adopt or continue in force any laws, rules, regulations, etc. relating to railroad safety until the Secretary of Transportation had adopted a rule covering the same subject. Even after the promulgation of federal safety standards a state has the right to adopt more stringent safety standards when necessary to eliminate or reduce essentially local safety hazards if those standards are not incompatible with federal laws or regulations and do not pose an undue burden on interstate commerce. In *CSX*, the Court held that legal duties imposed by common law courts fall within the language of the preemption statute. However, in order to be preempted there had to be a federal regulation that covered or subsumed the subject matter of the relevant state law. The "cover or subsume" test was a particularized interpretation of the relevant statute. The Court said that the aspect of the federal regulations requiring the installation of certain safety devices at grade crossings could have some preemptive effect, but that the defendant had not established that those regulations applied. Thus, the plaintiff's claims as to warning devices were not preempted. However, the Court held that the applicable speed regulations were preemptive. It did not make any difference to the majority that the speed regulations were apparently adopted to prevent derailments rather than to prevent grade crossing accidents. As to the speed requirements, the Court held that the statute's savings clause did not apply because the savings clause was addressed to local hazards and the law of negligence deals with due care applicable to all hazards, not just those hazards arising from local conditions, and it was the law of negligence which applied. In *CSX*, the general duty claim, rather than the special local duty claim, was preempted. Justice Thomas, joined by Justice Souter, dissented. They argued that none of the plaintiff's claims were preempted.

Consistent with *Ouellette* and *Cipollone*, the *Easterwood* Court engaged in a claim by claim preemption analysis, i.e., the Court engaged in a traditional analysis of the applicable statutes and applied the legislation to particular claims. However, interestingly, the majority seemed to treat the existence of any speed regulation as determinative of the preemptive effect of the statute rather than engaging in a more careful analysis of the applicable speed regulation's purpose. Thus, if speed regulations were enacted to avoid derailments, it is hard to see how Congress' and the Secretary's purpose of avoiding derailments would be frustrated by tort judgements aimed at affecting speed to limit grade crossing accidents.

In *American Airlines, Inc. v. Wolens*,¹³⁷ the Court considered claims that were not true common law tort claims. However, the analysis and result are both interesting and relevant. In *Wolens*, members of defendant's frequent flyer program sued the defendant airline alleging breach of contract and violations of the Illinois Consumer Fraud and Deceptive Practices¹³⁸ Act—statutory claims that were akin to common law fraud claims. The plaintiff alleged that changes made in the defendant's frequent flyer program constituted breach of contract and violations of the Illinois law. The defendant alleged that the claims were preempted by the Airline Deregulation Act which prohibited states from enacting or enforcing any “law ... or other provision having the force and effect of law relating to [air carrier] rates, routes, or services.”¹³⁹

¹³⁷513 U.S. 219 (1995).

¹³⁸45 Ill. Comp. Stat. § 505.

¹³⁹49 U.S.C. App. §§ 1305 (a)(1).

As to the Illinois Act, the majority held that those claims were preempted. It stated the “Act is prescriptive; it controls the primary conduct of those falling within its governance.”¹⁴⁰ Thus, the majority apparently believed that the operation of the Illinois Act would upset Congress’ regulatory scheme and was therefore preempted.

However, the majority held that the contract claims were not preempted. Harkening back to the *Cipollone* (and *Cohen*) distinction between contract and tort claims, the Court stated: “We do not read the ADA’s preemption clause, however, to shelter the airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own self-imposed undertakings. As persuasively argued ... terms and conditions airlines offer and passengers accept are privately ordered obligations”¹⁴¹ and thus do not amount to state enactment or enforcement of law. According to the majority, a remedy for breach of contract is not state imposed but merely holds a party to its agreement.

Justice Stevens, the author of the *Cipollone* partial majority/partial concurrence, concurred, in part, and dissented, in part.¹⁴² Justice Stevens would not have found the consumer protection claims preempted. He argued that those claims were analogous to a codification of common law negligence.¹⁴³ Thus, he viewed them as arising out of a general rule that a person

¹⁴⁰513 U.S. at 227.

¹⁴¹*Id.* at 228-29.

¹⁴²*Id.* at 235 (Stevens, J., concurring, in part, and dissenting, in part).

¹⁴³*Id.* at 236 (Stevens, J., concurring, in part, and dissenting, in part).

has a duty to exercise reasonable care. Recall his general versus special duties in *Cipollone*. That general standard of ordinary care is a “general background rule against which all individuals order their affairs.”¹⁴⁴ As such, he would not find the consumer protection act claims preempted because they were not a state policy but rather a mere negligence rule. He also pointed to the general duty to avoid deception.

Justice O’Connor, with whom Justice Thomas joined, also concurred, in part, and dissented, in part.¹⁴⁵ She agreed with the majority that the Illinois statutory claims were preempted but she would also have found the contract claims preempted. Justice O’Connor powerfully argued that contract claims, like tort claims, can only be enforced through state law. She pointed out that under modern contract theory many principles of contract law are, in essence, the effectuation of state public policy, rather than merely the enforcement of a promise. She quoted Professor Fried for the proposition that the “law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments.”¹⁴⁶ She noted that the legal system allows private parties to use the “coercive power” of the state to enforce contractual obligations. Impliedly, therefore, she saw no difference for preemption purposes between contract claims and tort claims. Notably, the Court (all the Court) engaged in reasoned, purposive statutory construction. But the legacy of *Cippollone* infected at least some of the Court’s reasoning. The Court still did not effectively explain a principled distinction between the

¹⁴⁴*Id.* at 236-37 (Stevens, J., concurring, in part, and dissenting, in part).

¹⁴⁵*Id.* at 238 (O’Connor, J., concurring, in part, and dissenting, in part).

¹⁴⁶*Id.* at 249, (O’Connor, J., concurring, in part, and dissenting, in part), *quoting* Charles Fried, *Contract as Promise*, 69 (1981).

tort and contract claims. Moreover, the dispute over appropriate levels of generality remained. But at the end of the day, it *was* apparent which claims were preempted (the Illinois statutory claims) and which claims could go forward (the contract claims).

Next, in *Freightliner Corporation v. Myrick*,¹⁴⁷ plaintiff alleged that design claims against manufacturers of vehicles without anti-lock braking systems rendered the vehicles unreasonably dangerous. The Court held that the claims were neither expressly nor impliedly preempted by federal legislation or regulations. There was no anti-lock braking system regulation and a finding of liability would not undermine any federal rule, regulation or policy as none was in place.

Subsequently, in *Medtronic, Inc. v. Lohr*,¹⁴⁸ the Court engaged in a more extensive and meaningful preemption analysis. In *Lohr*, a pacemaker recipient sued the product's manufacturer in negligence and strict liability, alleging a range of claims involving the manufacture, design, and warnings associated with the sale and use of the pacemaker. The pacemaker was a Class III medical device marketed and sold under the Medical Device Amendments of 1976 as substantially equivalent to products that the FDA had previously approved. The Act's express preemption provision stated that no state may "establish or continue in effect with respect to any device intended for human use any requirement . . . which is different from, or in addition to, any

¹⁴⁷514 U.S. 280 (1995).

¹⁴⁸518 U.S. 470 (1996).

requirement applicable under this chapter to the device”¹⁴⁹ The Court held that Congress did not intend to preempt any and all common law actions brought against medical device manufacturers. The Court concluded that it seemed that Congress had used the word “requirement” to mean state statutes and regulations rather than the “general duties enforced by common law actions.”¹⁵⁰ Congress did not intend to preempt plaintiffs’ design claims. Nor did the Act preempt a state’s right to provide remedies for violations of common law duties that paralleled federal requirements. The applicable FDA regulations confirmed the plaintiffs’ reading of the statute. Interestingly, *Lohr* represents one of the first cases in which the Court articulated the possibility that a state may provide a remedy for the violation of a federal standard. In essence, the Court seemed to say that even if, arguably, the federal statute did not create a federal right of action, a state could provide a remedy for violation of the federal standard. This statement may create of a sort of negligence per se standard, but the interesting aspect is that the statute violated was a federal statute rather than a state statute.

Returning to the *Lohr* holding, the Court held that manufacturing and labeling claims were not preempted. While the regulations contained some general labeling requirements and an obligation to comply with what the FDA calls Good Manufacturing Practices, the regulations did not preempt the relevant claims because the federal requirements “reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation that the statute or regulations were designed to protect from

¹⁴⁹21 U.S.C. § 360k (a).

¹⁵⁰518 U.S. at 488. Of course the “general” duty reference is an analytically uncomfortable reminder of *Cipollone* and its levels of generality.

potentially contradictory state requirements.”¹⁵¹ Nor were the state common law requirements at issue in the suit specifically developed with regard to medical devices. The relevant common law duty for the negligent manufacturing claim was the general duty to use due care. The relevant common law duty regarding the warning claim was the general duty to inform of risks. The Court concluded that these general duties were not a threat to applicable federal requirements. But, once again, what are general duties? And, do states really have specific tort duties?

Justice Breyer concurred.¹⁵² He believed that “requirements,” as used in the statute can include those growing out of state tort law, but he found no express or implied preemption. Justice O’Connor concurred, in part, and dissented, in part.¹⁵³ She thought that the negligent manufacture and labeling claims were preempted. Again, while the Court was divided, it carefully parsed the relevant statute, sought to explain its reasons, and even accommodated parallel but non-conflicting state tort liability.

The Court’s next foray into preemption was in *Geier v. American Honda Motor Company, Inc.*¹⁵⁴ In *Geier*, an injured motorist and her parents sued an auto manufacturer claiming that the car which she was driving when injured was negligently designed and was

¹⁵¹*Id.* at 501.

¹⁵²*Id.* at 503 (Breyer, J., concurring).

¹⁵³*Id.* at 509 (O’Connor, J., concurring, in part, dissenting, in part).

¹⁵⁴529 U.S. 861 (2000).

defective because it did not have an air bag or other passive restraint system. The car was equipped with manual shoulder and lap belts. An administrative regulation in effect at the time had given auto manufacturers a choice as to whether or not to install air bags. The choice was part of a regulatory policy designed to encourage seat belt use, allow development of alternatives at reasonable costs, and improve overall auto safety. The relevant act under which the standard was promulgated was the National Traffic and Motor Vehicle Safety Act of 1966. The Act contained an express preemption clause preempting state safety standards not identical to any applicable federal safety standard in effect. However, the statute also contained a saving clause providing that compliance with a federal statute did not exempt any person from liability under common law.

The Court held there was no express preemption of state common law claims; however, the Court noted that there still might be frustration of purpose implied preemption if a particular common law claim conflicted with the federal statutes or limitations. The Court concluded that the plaintiffs' claims were preempted because allowing the claims to proceed would have interfered with the federal scheme which provided a range of choice designed to bring about a "mix of different devices introduced gradually over time; and [that the regulation] would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance... ." ¹⁵⁵ Interestingly, the Court treated the potential for liability in a particular case arising from failing to install a passive restraint system as the equivalent of a state statute regulation or rule requiring the installation of a passive restraint device, which would

¹⁵⁵*Id.* at 875.

be applicable across the board to all manufacturers. Of course, liability in a tort case does not necessarily mean any such thing.¹⁵⁶ Liability can result in a defendant's decision to keep doing business exactly the way that it does business because one isolated jury verdict does not mean that the product is necessarily unreasonably dangerous. Alternatively, the defendant might choose to simply pay judgments and continue doing business the way it had done business in the past. However, the Court noted that generally in a preemption analysis it is to be presumed that the defendant would comply with any conflicting regulation. Treating liability in a single tort case or the potential for liability as conflicting regulation which a manufacturer would "obey" by changing its design, takes a rather public law view of tort liability. It treats liability in a tort case not as a balancing of the rights of the individual plaintiff and defendant in a particular case, but as a judicial decision that a change in conduct is necessarily required. Moreover, the treatment of tort law as regulation was somewhat inconsistent with the *Silkwood* Court's treatment of the matter, especially the dissents' views concerning compensatory damages.

Returning to *Geier* itself, Justice Stevens, joined by three other justices dissented.¹⁵⁷ He argued that there should be a special burden on the defendant to prove interference with purpose and hence preemption. He relied upon federalism concerns for this special burden. He also questioned whether liability in a particular case would frustrate Congress' purpose. Liability in a particular tort case, he argued, was not an "immutable, mandatory"¹⁵⁸ rule requiring the

¹⁵⁶*But see*, Geistfelt, *supra* note 11 at 109. ("Tort law also directly restricts the defendant's liberty interest by imposing behavioral requirements on the defendant as duty-holder. The negligence standard of reasonable care, for example, requires certain conduct on the part of the duty-holder with respect to particular forms of risky behavior.").

¹⁵⁷529 U.S. at 886 (Stevens, J., dissenting).

¹⁵⁸*Id.* at 903, n. 18 (Stevens, J., dissenting).

installation of an air bag in every car.

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

After *Geier*, in *Buckman v. Plaintiffs' Legal Committee*,¹⁵⁹ the Court held that the Medical Device Amendments preempted plaintiffs' claims that defendant had committed fraud on the agency—the FDA—during the approval process for surgical bone screws. Then came *Sprietsma v. Mercury Marine*;¹⁶⁰ there, plaintiff's decedent fell overboard while traveling in a vessel manufactured by defendant. She was struck by the vessel's propeller and killed. Plaintiffs alleged that the vessel was defectively designed under Illinois law because the boat's motor was not

¹⁵⁹ 531 U.S. 341 (2001).

¹⁶⁰ 537 U.S. 51 (2002).

protected by a propellor guard. The defendant argued the claims were preempted by the Federal Boat Safety Act of 1971 and by the Coast Guard's failure to promulgate a regulation requiring outboard motor propellor guards.

The Federal Boat Safety Act of 1971 provides that a state may not “establish, continue in effect, or enforce a state law or regulation establishing a recreational vessel or associated equipment performance or other safety standard imposing a requirement for associated equipment ... that is not identical to a regulation proscribed under ... this title.”¹⁶¹ However, the Act has a savings provision providing that “[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.”¹⁶² The Court interpreted the express preemption clause as only applying to positive enactments and not to common law claims. This is, in essence, what the Court had also done in *Silkwood*, *Lohr*, and in *Cipollone*, insofar as the 1965 Act was concerned. In *Sprietsma*, the Court noted that it “would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims.”¹⁶³ Thus, as in *Silkwood*, *Lohr*, and several other cases, the Court relied upon the fact that a finding that a claim is preempted may leave a plaintiff remediless. Of course, after *Geier* a state tort law claim might still be impliedly preempted because of a conflict with federal law. But, in *Sprietsma* the Court found that neither

¹⁶¹46 U.S.C. § 4305.

¹⁶²46 U.S.C. § 4306.

¹⁶³537 U.S. at 64.

the Coast Guard's failure to adopt a propellor regulation nor the entire statutory scheme at issue preempted the state law claims involved.¹⁶⁴

The Supreme Court's most recent foray into preemption of state law tort claim is *Bates v. Dow Agrosciences LLC*.¹⁶⁵ In *Bates*, the issue was preemption of state law tort claims under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁶⁶ FIFRA's preemption provision provided: "Such State shall not impose or continue in effect and requirements for labeling or packaging in addition to or different from those required under this subchapter."¹⁶⁷ While the Court indicated that judge-made rules--tort decisions--may be preempted under FIFRA, it said the statute's preemption provisions apply to requirements articulated in state law, not to an occurrence, such as liability, "that merely motivates an optional decision"¹⁶⁸ The Court's statement regarding an occurrence that merely motivates an optional decision was in response to the holding below. However, the idea can be true of all tort liability, at least tort liability in particular cases. One may view all tort judgments as occurrences that merely motivate an optional decision. This was, in essence, the thrust of Justice Stevens' partial concurrence partial dissent in the *Geier* case. The optional decision idea treats tort liability not as regulation but as giving rise to a decision to change or not change (and keep paying judgments). Again one sees the Court

¹⁶⁴Interestingly, the Court did not consider because the parties did not raise it below the issue of the extent to which maritime law might have preempted the operation of state law.

¹⁶⁵125 S. Ct. 1788 (2005).

¹⁶⁶7 U.S.C. sec. 136 et seq.

¹⁶⁷7 U.S.C. Sect. 136 v(b).

¹⁶⁸*Id.* at 1798.

wrestling with the nature of tort law.

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

Interestingly, in reference to the express warranty claim, the Court said: “a cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment it voluntarily undertook by placing that warranty on its product.”¹⁶⁹ The Court held that a common law liability rule for breach of an express warranty was not a requirement. Once again, one sees in this language the Court’s belief that warranty or contract claims are somehow to be treated differently from tort claims. Arguably, under the Court’s hierarchy of laws, contract claims are subject to less constitutional scrutiny than tort law claims. The precise reasoning or underlying principle remains unclear.

Returning to the holding in *Bates*, the Court also held that a claim based on violation of

¹⁶⁹*Id.*

the Texas Deceptive Trade Practices–Consumer Protection Act was not preempted, to the extent the claim was based upon an express warranty claim. The Court did remand on plaintiffs’ fraud and failure to warn claims. These claims were based upon common law rules that “qualify” as requirements for labeling or packaging. But the Court held that it must be determined on remand if these so-called requirements were “in addition to or different from”¹⁷⁰ FIFRA’s misbranding provisions, which prohibit “false or misleading statements” on a label.¹⁷¹ The Court held that state law need not explicitly incorporate FIFRA’s standards to survive a preemption analysis and that state law would only be preempted if the state law requirement was “in addition to or different from” the FIFRA standards, i.e., the lower court must determine if the state “common-law duties are equivalent to FIFRA’s misbranding standards.”¹⁷² The Court called this analysis a “parallel requirements reading”¹⁷³ of the statute. A state may impose additional or different remedies but not additional or different requirements. An alternative reading would favor, rather than disfavor, preemption. Moreover, “[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA.”¹⁷⁴ And, FIFRA, unlike the cigarette warning statute at issue in *Cipollone*, contemplated the evolution of label content over time. According to the Court, in examining the issue on remand, the lower court should consider, for instance, if falsity under Texas law is broader than falsity under FIFRA. If

¹⁷⁰7 U.S.C. § 136 v(b).

¹⁷¹7 U.S.C. § 136 (q)(1)(A).

¹⁷²125 S. Ct. at 1800.

¹⁷³*Id.*

¹⁷⁴*Id.* at 1802.

so, then to the extent Texas law was broader, it would be preempted. Moreover, if Texas law required use of the word DANGER instead of CAUTION (the FIFRA requirement) Texas law would be preempted.¹⁷⁵ Finally, the Court said:

In undertaking a pre-emption analysis at the pleading stage of a case, a court should bear in mind the concept of equivalence. To survive pre-emption, the state law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA. If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as the regulations that add content to those standards. For a manufacturer should not be held liable under a state labeling requirement subject to ... [the FIFRA pre-emption clause] unless the manufacturer is also liable for misbranding as defined by FIFRA.¹⁷⁶

The use of the jury is, of course, reminiscent of the Court's contemplation of the jury's role in libel

cases after *New York Times*.

Justice Breyer concurred in *Bates*.¹⁷⁷ He emphasized the EPA's authority and expertise and its potentially superior ability to determine the impact of state liability rules. In some ways, one may analogize his concurrence to a sort of "negligence per se" reading of FIFRA and FIFRA regulations. Justice Thomas, joined by Justice Scalia, concurred, in part, and dissented, in part. Substantively, Justice Thomas thought the majority mistreated the breach of warranty and Texas DTPA claims.

¹⁷⁵*Id.* at 1803-04.

¹⁷⁶*Id.* at 1804.

¹⁷⁷*Id.* (Breyer, J., concurring).

Let us pause for a moment over the *Bates* Court's conclusions regarding preemption and equivalence. As the Court did in *Lohr*, the *Bates* Court apparently contemplated that there could be potential liability under state law for violation of a federal statute or standard. A state is free, the Court seemed to say, to provide a remedy for violation of a federal standard. This is, in many ways, consistent with the holding in *Silkwood*, allowing plaintiffs' punitive damage claims to go forward. However, it seems to ignore the concerns in *Geier* regarding the potential for state court liability to frustrate Congress' purpose. Of course, it is difficult to read too much into any of the preemption cases since each one must be based upon the particular statutes at issue. This "particular statute" based focus of each case makes it hard to draw general conclusions and, in fact, contributes to the overall confusion. However, it does seem clear that the Court would, in an appropriate case, authorize, as it did in *Lohr* and *Bates*, and indeed in *Silkwood*, a state's provision of a remedy for violation of a federal standard. What the state apparently lacks the power to do, where federal regulation is sufficiently complete to mandate potential preemption, is to require or impose a different standard of liability.

More generally, *Bates* continues the Court's analytical approach of analyzing various claims separately in a preemption case. This seems to be complex but it also seems to be appropriate. What *Bates* also does is continue the Court's trend towards exempting contract and contract-based claims from preemption because those claims merely enforce the defendant's promise or private undertaking. Perhaps this distinction for contract or promise-based claims is appropriate because of the normative power of promise. Alternatively, as Justice O'Connor

pointed out in her concurrence/dissent in *Wolens*, it may take an overly simplistic view of the role of courts and public policy in enforcing or refusing to enforce contracts. It also may understate the normative importance of tort law in our culture and legal system. Moreover, the contract/tort distinction's source is unclear and unarticulated. Thus it seems based on intuition or uncertain views of contract or promise rather than precedent.

More broadly, the lessons to be drawn from the preemption cases are that the preemption cases are cases where federal interests, through the Supremacy Clause, have a limiting effect upon the state's ability to articulate, develop, and apply its own tort law. Clearly, as many of the preemption cases show, where the Court finds preemption an entire universe of claims may be preempted. Thus, there is a real public law impact in a finding of preemption. To that extent, one may argue that a finding of preemption over a type of claim is more intrusive into state law and state authority than the additional hurdles imposed upon recovery in *New York Times* and its progeny. Of course, claims that are not preempted go forward under state law. Courts in preemption cases are interpreting and applying statutes. In this regard, they are behaving in a manner which is consistent with the articulated modest model of adjudication. They also are coming up with clear guidelines for the future concerning those state law claims which may proceed and those claims which may not because they are preempted. Likewise, these decisions are based on reasoned (if not always persuasive) elaboration, although, as noted one may be critical of the contract versus tort reasoning *and* the attempt to distinguish general and specific duties. On the last point, rather than refer to special duties, which arguably do not exist as such under state law, the Court might ask simply whether the factual predicate for plaintiff's (general)

state tort claim implicates a (preemptively) regulated subject. This, in *Cipollone*, the question would not be whether the “legal duty” is a requirement based on smoking and health with respect to advertising or promotion. Instead, the question is whether the *facts* alleged to constitute the breach of a general state tort duty involve smoking and health with respect to advertising and promotion.

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

V. Punitive Damages

Punitive damages are, by definition, an award of damages in addition to compensatory damages that are designed to punish and deter the defendant and others like him from engaging in conduct which is universally more blameworthy than mere negligence. Critically, when the punishment aspect of punitive damages is emphasized it becomes apparent that there may be some

potential overlap between the goals of the criminal law and the law of punitive damages. However, punitive damages are awarded in civil cases and, thus, the various constitutional and statutory protections available to criminal defendants are generally not available in punitive damages cases. This has led to much gnashing of teeth by commentators, legislative reform in various states,¹⁷⁸ and, as discussed herein, several U.S. Supreme Court decisions limiting a state's ability, under both the substantive and procedural due process clauses of the Fourteenth Amendment, to award punitive damages.¹⁷⁹ Interestingly, one will note that several of the cases that are discussed above as defamation cases and preemption cases involve the award of punitive damages. These include *New York Times*, *Gertz*, *Greenmoss*, and *Silkwood*.

The Supreme Court's recent¹⁸⁰ significant treatment of punitive damages beyond the cases listed above began with *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*¹⁸¹ *Browning-Ferris* was an antitrust and commercial dispute between two warring refuse disposal companies. The lower court had affirmed a \$6 million jury verdict for the plaintiff and the defendant appealed. On appeal, the defendant argued that the Eighth Amendment's prohibition on cruel and unusual punishment limited the state's authority to impose a punitive damage award

¹⁷⁸Michael L. Rustad, Happy No More: Federalism Derailed By the Court That Would Be King of Punitive Damages, 64 Md. L. Rev. 461, 495-97 (2005).

¹⁷⁹Thomas C. Galligan, Jr., Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence And Punishment, 71 Tenn. L. Rev. 117 (2003);

¹⁸⁰See Rustad, *supra* note 178 at 497-505 for a discussion of pre-Rehnquist constitutional punitive damages cases.

¹⁸¹492 U.S. 257 (1989). See also, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (Due Process claims not been raised and considered by state court). *Aetna Life Ins. Co. v. Laroie*, 475 U.S. 813 (1986) (decided on other grounds).

which it argued was excessive. The United State Supreme Court rejected that Eighth Amendment argument reasoning that the Eighth Amendment only applied to cases where the state was a party and not to cases between private parties.¹⁸² In *Browning-Ferris* the Court held that defendant's claim that the award violated Due Process had not been properly preserved.

After *Browning-Ferris* while the Eighth Amendment argument had failed, the door remained wide open for defendants in punitive damages cases to continue to make arguments based upon the Due Process clause, contending that particular awards of punitive damages in individual cases were so high as to offend traditional notions of Due Process. The first such case, after *Browning-Ferris*, to reach the Supreme Court was *Pacific Mutual Life Insurance Co. v. Haslip*.¹⁸³ In that case, Cleopatra Haslip brought an action against her life insurance company and an insurance agent for fraud. She alleged that the agent had accepted premium payments from her even though the policy had been canceled without notice. The trial court had awarded over \$800,000 in punitive damages, which was more than 200 times Ms. Haslip's out of pocket expenses. The defendant alleged that the award violated its rights to Due Process. The award, by the way, was more than four times the compensatory damages Haslip had *claimed*. First, the Court indicated that holding the insurance company vicariously liable for the agent's act did not violate substantive Due Process. Imposing liability based on *respondeat superior* principles was

¹⁸²Interestingly, the Court has never considered the constitutionality of various state statutes which provide for the sharing of recovered punitive damages between a private party plaintiff and the state or a special state fund. To the extent that the state benefits from recovery of punitive damages in these cases, one may argue that the Eighth Amendment's prohibition on cruel and unusual punishment may have application.

¹⁸³499 U.S. 1 (1991).

not violative of the Constitution. Next, the Court held that the “common-law method for imposing punitive damages does not in itself violate Due Process.”¹⁸⁴ While the Court did indicate that unlimited jury or judicial discretion in awarding punitive damages might violate the Constitution, a mathematical bright line between the constitutional and unconstitutional could not be drawn. Nor was the award in the particular case unconstitutional. The award, given the process applied, did not “jar”¹⁸⁵ the Court’s “Constitutional sensibilities.”¹⁸⁶ The jury instructions, post-trial procedures, and appellate review were sufficient.¹⁸⁷ Justice Scalia concurred arguing that the process by which punitive damages were awarded was longstanding and did not violate the defendant’s Due Process rights.¹⁸⁸ Justice Kennedy also concurred.¹⁸⁹ Justice O’Connor dissented.¹⁹⁰ She found the jury instructions vague and provided the fact finder with unlimited discretion. Post-trial and appellate review provided no cure.

While the plaintiffs prevailed in the case, the opinion did signal the Court’s willingness to engage in a substantive Due Process review of punitive damage awards. However, one *might* have read the case as saying that as long as the procedures followed were reasonable, consistent with tradition, and objective, an award made (and affirmed) pursuant to those procedures would

¹⁸⁴*Id.* at 17.

¹⁸⁵*Id.* at 18.

¹⁸⁶*Id.*

¹⁸⁷*Id.* at 18-23.

¹⁸⁸*Id.* at 24 (Scalia, J., concurring).

¹⁸⁹*Id.* at 41 (Kennedy, J., concurring).

not violate the defendant's right to Due Process.

The Court next considered the issue of punitive damages in tort cases in *TXO Production Corp. v. Alliance Resources Corp.*¹⁹¹ TXO involved a slander of title claim arising out of a joint venture in an oil and gas development project. The jury awarded the counter-claimants, who had alleged slander of title, \$19,000 in compensatory damages and \$10 million in punitive damages, more than 400 times the compensatory damages awarded. Critically, the slander of title counter-claimants had alleged that the potential damages they could have suffered were substantially greater. In a fractured plurality opinion, the Court held that the award did not violate Due Process. Justice Stevens, writing for the plurality, said that in deciding whether or not a punitive damage award is so grossly excessive as to violate the Due Process clause no mathematical bright line can be drawn between constitutionally acceptable and unacceptable awards. He stated that a general concern with reasonableness necessarily entered the constitutional calculus and that in the case before the Court the punitive award was not so grossly excessive as to violate the defendant's right to Due Process. The Court pointed to the possibility that the jury could have found that the defendant engaged in a malicious and fraudulent course of conduct. Potentially millions of dollars were at stake and given the reprehensibility of the defendant's conduct, the award was not excessive. Justice Kennedy concurred, arguing that Justice Stevens' reasonableness formulation was an inadequate guide.¹⁹² Justice Scalia and Justice Thomas concurred claiming that while

¹⁹⁰*Id.* at 42 (O'Connor, J., dissenting).

¹⁹¹509 U.S. 443 (1993).

¹⁹²*Id.* at 466 (Kennedy, J., concurring, in part, and dissenting, in part).

procedural Due Process required judicial review of punitive damage awards there was no substantive Due Process right to a reasonableness determination of the amount of punitive damages.¹⁹³

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

Then, in *Honda Motor Company Ltd v. Oberg*,¹⁹⁴ the Court, for the first time, struck down a punitive damage award in a state law personal injury case. *Oberg* involved a products liability action filed against the Honda Motor Company. The Oregon jury which heard the case awarded compensatory damages and \$5 million in punitive damages. The Honda Motor Company appealed. Under applicable Oregon constitutional law and procedure, judicial review of the amount of punitive damages was proscribed *unless* the court affirmatively held that there was *no* evidence to support the jury's verdict. Thus, once the Oregon court found that there was evidence to support the jury's decision to award *any* punitive damages, review of the amount was precluded. The United States Supreme Court held that the failure to provide meaningful post-trial or appellate review of the *amount* of punitive damages violated the defendant's right to procedural Due Process. While *Oberg* was a procedural, rather than a substantive Due Process case, it

¹⁹³*Id.* at 470 (Scalia, J., concurring, in part, and dissenting, in part).

¹⁹⁴512 U.S. 415 (1994).

signaled the Court's willingness to strike down a punitive damage award. Thus, *Oberg* was the Court's first holding limiting the authority of a state court in a personal injury action to award punitive damages under the Due Process Clause itself and alone. Necessarily, the decision limited the state's ability to articulate and apply its own law of punitive damages. Of course, the reader will note that the Supreme Court had earlier limited recovery of punitive damages in *New York Times*, *Gertz*, and *Falwell*. However, *Oberg* was the first case where punitive damages were limited outside the First Amendment context.

Significantly, following *Oberg*, the United States Supreme Court decided *BMW of North America, Inc. v. Gore*.¹⁹⁵ In *Gore*, a doctor bought a BMW. Thereafter, he took the car to a local car painter to be detailed. The painter informed Dr. Gore that the car had already been repainted. When Dr. Gore investigated the matter, it turned out that, in fact, his car had been damaged by acid rain in transit and BMW had repainted it. BMW had a national policy that where pre-sale damage to a car constituted less than 3% of the value of the car, the car would be repaired, repainted and sold as new, without disclosure. Dr. Gore alleged that as a result of the repainting and repair, the car was worth \$4,000 less than he had paid for it. Consequently, he filed suit. The jury awarded Dr. Gore \$4,000 in compensatory damages and \$4 million in punitive damages, ostensibly sending a national message. The Alabama Supreme Court conditionally affirmed the award of punitive damages after reducing it to \$2 million. The U.S. Supreme Court granted certiorari and reversed. The Court, in an opinion by Justice Stevens, held that conduct that was lawful outside the state of Alabama could not be considered by an Alabama court in awarding

¹⁹⁵517 U.S. 559 (1996).

punitive damages. Moreover, the Court held that the award was unconstitutionally excessive in light of three factors, the defendant's reprehensibility, the ratio between punitive and compensatory damages, and a comparison between existing criminal and civil penalties for similar misconduct and the punitive award. Justice Breyer filed a concurring opinion in which Justices O'Connor and Souter joined.¹⁹⁶ Justice Scalia filed a dissenting opinion in which Justice Thomas joined.¹⁹⁷ They saw no Due Process limit on Alabama's ability to award the punitive damages at issue. Justice Ginsberg filed a dissenting opinion¹⁹⁸ in which Chief Justice Rehnquist joined. Critically, *BMW* was the first time the Supreme Court overturned an award in a particular case as offensive to substantive Due Process.

Critically, the Court's three guidelines were drawn from those factors which common law courts consider in instructing juries in punitive damage cases and in reviewing awards of punitive damage both post-trial and on appeal. In this regard, one could say that the Court in *Gore* was acting in a way which was analogous to what it had done in *New York Times* and its progeny—reasoning from the common law of torts and imposing tort-derived constitutional standards. This reading would be consistent with the Section II model calling for “reasoned elaboration.” Recall how in *New York Times* and *Gertz* the Court had relied upon the common law word “malice,” the privilege of fair comment, negligence, and actual injury to impose constitutional requirements. But there, the tort-based hurdles were in the nature of rules or elements and they were either clearly defined or of long lineage. In *Gore*, the common law punitive damages factors are not

¹⁹⁶*Id.* at 586 (Breyer, J., concurring).

¹⁹⁷*Id.* at 598 (Scalia, J., dissenting).

¹⁹⁸*Id.* at 607 (Ginsberg, J., dissenting).

elements. They are a melange. Of course, that is true of the factors at common law as well. But the point is that the *Gore* factors (reprehensibility, ratio, and similar fines and penalties) were incorporated into an uncertain constitutional dynamic. Somewhat ironically, the common law factors that ostensibly provide inadequate notice for defendants and inadequate instruction and control for juries are transformed into a constitutional test for judges to administer. Clearly, jury mistrust sits at the core of this transformation as members of the Court had indicated in earlier cases, such as *Haslip*, *Gertz*, and more. That fact of jury mis/distrust became crystal clear in the Court's next punitive damages case. Moreover, the source of the Court's power to limit the right of a state to punish out-of-state conduct remains unclear¹⁹⁹ although the Court referred to this territorial limit again in its most recent punitive damages case. But first, let us turn to the current role of and respect for the jury in punitive damages cases.

In *Cooper Industries, Inc. v. Leatherman Tool Corp., Inc.*,²⁰⁰ the Court overturned a jury's punitive damages award of \$4.5 million in a case alleging false advertizing and "passing off." The jury had awarded \$50,000 in compensatory damages. Critically, the Court held that, at least in federal cases, an appellate court, when reviewing a punitive damage award should not apply the clearly erroneous standard but rather, should undertake *de novo* review. The Court concluded that *de novo* review was mandated because an award of punitive damages was *not* a finding of fact. Consequently, *de novo* review was not proscribed by the Seventh Amendment's "reevaluation" clause. The decision is somewhat reminiscent of the *Bose Corporation* trade libel/defamation

¹⁹⁹One is reminded of *Ouellette* where New York law could apply to the New York source but not Vermont law. See text accompanying notes 116 and 117, *supra*.

²⁰⁰532 U.S. 424 (2001).

case. There, the Court held that appellate review of decisions finding “actual malice” under *New York Times* demanded the independent judgement of the reviewing judge, not a clearly erroneous review. Put together with *Gore*, *Leatherman* stands for the proposition that punitive damages may be excessive in individual cases under substantive Due Process and that appellate review of those individual awards should be *de novo* rather than with deference to the lower court’s findings. *Leatherman* radically altered the role of the jury and appellate court in a tort case—giving the court more power and the jury less.

Most recently, the Court considered the issue of punitive damages in *State Farm Mutual Automobile Insurance v. Campbell*.²⁰¹ *Campbell* arose out of a bad faith insurance claim brought against a third party insurer by one of its insureds. Campbell, the insured, was driving on a Utah road when he decided to pass six vans traveling ahead of him. Ospital was approaching from the opposite direction. To avoid a collision with Campbell, who was by then passing the vans and driving on the wrong side of the road, Ospital swerved onto the shoulder, losing control of his vehicle and colliding with a vehicle driven by Slusher. In the collision, Ospital was killed and Slusher suffered permanent disabling injuries. In the torts claim against Campbell, Campbell insisted he was free from fault. Despite early indications that Campbell’s negligence had caused the crash, Campbell and his insurance company, State Farm, decided to contest liability and declined offers to settle the claims against Campbell for the policy limits of \$50,000. State Farm assured the Campbells that their assets were safe; that they would be represented by counsel; and that they did not need separate counsel. The jury that heard the case decided that the Campbells

²⁰¹538 U.S. 408 (2003).

were 100% at fault and returned a verdict of \$185,849 against them,²⁰² an “excess judgment” of \$135,000.

Initially, State Farm refused to cover the excess judgment. In fact, State Farm’s counsel told the Campbells: “You may want to put for sale signs on your property to get things moving.”²⁰³ Additionally, State Farm refused to post a supersedeas bond. Campbell sought separate representation to appeal the verdict. While the appeal of the underlying tort suit was pending, Slusher and the Ospital interests and the Campbells reached an agreement under which Slusher and Ospital agreed not to seek full satisfaction against the Campbells personally if the Campbells agreed to pursue a bad faith insurance action against State Farm and to be represented in that action by Slusher and Ospital’s attorneys. The parties also agreed that Slusher and Ospital would have a right to be involved in major decisions concerning the bad faith action and that they would receive 90% of any verdict against State Farm.²⁰⁴

The Utah Supreme Court affirmed the trial court in the underlying tort suit and State Farm then paid the entire judgment, including the excess. The Campbells still filed an action against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. At trial,²⁰⁵ the court bifurcated the case into two phases before two different juries. The first jury determined

²⁰²*Id.* at 412-13.

²⁰³*Id.* at 413.

²⁰⁴*Id.* at 413-14.

²⁰⁵In actuality, the trial court first granted State Farm’s motion for summary judgement because State Farm had paid the entire judgment. That ruling was reversed.

that State Farm’s decision not to settle the underlying case was unreasonable. The second jury held that State Farm was liable to the Campbells for fraud and intentional infliction of emotional distress. It awarded compensatory damages of \$2.6 million and punitive damages of \$145 million. The punitive award was based, in substantial part, on the plaintiff’s attack of what was referred to as State Farm’s “performance, planning and review policy,” an alleged nationwide scheme to “meet corporate fiscal goals by capping pay outs on claims company wide.”²⁰⁶ The trial court reduced the compensatory award to \$1 million and the punitive award to \$25 million. On appeal, the Utah Supreme Court applied the three guideposts for Due Process review of punitive damage decisions from *BMW of North America, Inc. v. Gore*.²⁰⁷ The Court reinstated the \$145 million punitive damages award concluding State Farm’s conduct in implementing and conducting the PP & R policy was reprehensible. The Utah Supreme Court also pointed to State Farm’s massive wealth and to testimony that “State Farm’s actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability”²⁰⁸ Thus, the Utah Supreme Court concluded that the ratio between punitive and compensatory damages was not constitutionally excessive and that the award was not excessive in comparison to civil and criminal penalties which could have been imposed against State Farm including a \$10,000 fine for each act of fraud, the potential suspension of its license to conduct business in the state, the disgorgement of profits, and imprisonment.²⁰⁹

²⁰⁶*Id.* at 415, *quoting*, 65 P. 3d at 1143.

²⁰⁷517 U.S. 559 (1996).

²⁰⁸538 U.S. at 415, *quoting*, 65 P. 3d at 1153.

²⁰⁹538 U.S. at 416.

The United States Supreme Court granted *certiorari* and, in an opinion by Justice Kennedy, reversed. Generally, the Court pointed out that while compensatory damages are designed to put the plaintiff where the plaintiff would have been but for the wrong, punitive damages “serve a broader function. They are aimed at deterrence and retribution.”²¹⁰ Critically, the Court said: “The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”²¹¹ Reiterating what it had said in both *Gore* and *Cooper Industries, Inc.*, the Court said that consistent with “elementary notions of fairness,”²¹² a person must receive fair notice not only of the conduct which was subject to punishment, including punitive damages, but must also receive fair notice of the potential severity of the penalty.²¹³ Justice Kennedy noted that punitive damages, at least in some aspects²¹⁴ serve the same purposes as the criminal law but without the constitutional and other protections applicable in a criminal proceeding. He noted that this lack of protection could lead to an imprecise administration of punitive damages, potential arbitrariness, wide jury discretion in

²¹⁰*Id.* at 416.

²¹¹*Id.*

²¹²*Id.* at 417.

²¹³*Id.*

²¹⁴As to other potential purposes of punitive damages arising from economic efficiency based deterrence, *see* Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982); Galligan, *Disaggregating*, *supra* note 179; Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 LA. L. Rev. 3 (1990); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998); Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 Yale L. J. 347 (2003).

choosing the amount of punitive damages under very general instructions, and net worth considerations that could lead to bias, particularly against big business.²¹⁵ Continuing, and critically, he stated: “Our concerns are heightened when the decision maker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded.”²¹⁶

The Court then turned to the application of the *Gore* guideposts to the jury’s punitive damage award. As *Gore* mandated, the Court began its discussion of the guideposts by considering what it has called the most important indicium of the reasonableness of a punitive damages award—its reprehensibility. The Court articulated the factors that it has considered to gauge reprehensibility: Was the harm physical or economic? Did the tortious conduct evince an indifference to or a reckless disregard for the health or safety of others? Did the target of the conduct have financial vulnerability? Did the conduct involve repeated actions or was it an isolated incident? Was the harm the result of intentional malice, trickery, or deceit, or mere accident?²¹⁷

Justice Kennedy stated that the existence of one factor may not be sufficient to sustain a punitive damage award, but that the absence of any of them would render an award suspect.²¹⁸ In

²¹⁵*Id.* at 417.

²¹⁶*Id.* at 418.

²¹⁷538 U.S. at 419, citing *Gore*, 517 U.S. at 576-77.

²¹⁸*Id.* at 419.

conducting the reprehensibility review, Justice Kennedy stated that it “should be presumed the plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”²¹⁹

The Court then applied its reprehensibility factors to the facts before it. Justice Kennedy said that State Farm’s conduct merited no “praise”²²⁰ and that a punitive award might be justified, but the punitive award in the particular case was unconstitutionally high. The Court concluded that the Utah Supreme Court was punishing State Farm for its nationwide policies. Critically, Justice Kennedy, pointing once again to *Gore*, noted that a state does not have the Constitutional authority to punish a defendant for conduct that was lawful where it occurred. Moreover, he extended that prohibition stating that generally a state does not have a legitimate interest in imposing punitive damages as punishment for “unlawful acts committed outside”²²¹ the state. Importantly, the Court noted that federalism concerns effectively limited the state’s interest in punishing conduct that occurred outside the state. Once again, as in *Gore* the principled source of this limit on state power was unclear. But, Justice Kennedy continued and stated that the award against State Farm was flawed “for a more fundamental reason... .”²²² That is, the Utah courts had

²¹⁹538 U.S. at 419.

²²⁰*Id.* at 419.

²²¹*Id.* at 421.

²²²*Id.* at 422.

“awarded punitive damages to punish and deter conduct that bore no relation to the Campbell’s harm.”²²³ The Court went on to discuss how some of the evidence admitted at trial related to State Farm’s insurance practices that bore no relation to the defense of a third party liability claim, the type of claim that the Campbells had filed. The Court referred to this and other evidence in the reprehensibility analysis as “tangential.”²²⁴ Justice Kennedy state that “the reprehensibility guidepost does not permit courts to expand the scope of the case so that the defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm’s similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.”²²⁵ As noted above in the *Gore* discussion, the Court’s reprehensibility factors and its analysis build on common law punitive damages ideas but it does so on a Constitutional level. The common law’s multi-factor analysis is generally used to instruct juries and review these decisions. At common law, they are *not* part of a constitutional stew.

Justice Kennedy then turned to the second *Gore* guidepost dealing with the ratio between harm or potential harm to the plaintiff in the punitive damages award. He began his discussion by reiterating that the Court was not imposing a “bright-line ratio which a punitive damages award cannot exceed.”²²⁶ But, somewhat belying that statement, he continued and said:

²²³*Id.*

²²⁴*Id.* at 424.

²²⁵*Id.* at 424.

²²⁶*Id.* at 425.

Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy Due Process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24, 111 S. Ct. 1032. We cited that 4-to-1 ratio again in *Gore*. 517 U.S., at 581, 116 S. Ct. 1589. The Court further referenced the long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, triple, or quadruple damages to deter and punish, *Id.* at 581, and n. 33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with Due Process, while still achieving the state’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, *Id.* at 582, 116 S. Ct. 1589, or, in this case, of 145 to 1.²²⁷

Then, the Court said that there are no rigid benchmarks and that ratios greater than those previously sustained might be constitutional where “a particularly egregious act has resulted in only a small amount of economic damages.”²²⁸ The Court also noted that where the injury is hard to detect or where the monetary value of non-economic harm difficult to determine a higher ratio may be appropriate.²²⁹ However, the Court also noted that when the compensatory damages are “substantial”²³⁰ a lesser ratio, perhaps only 1 to 1, might “reach the outermost limit of the Due Process guarantee.”²³¹ Of course, Justice Kennedy noted “the precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”²³² Thus, one may summarize by saying that while there is no bright-line, the

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Id.*

²³¹*Id.*

²³²*Id.*

Court indicated that double digit ratios will rarely satisfy Due Process. In fact, the Court has twice mentioned 4 to1 as the possible outer bounds of a constitutionally permissible award. Finally, 1 to1 may reach the outermost limit where compensatory damages are substantial. However, consistent with theoretical examinations of punitive damages, the Court indicated that where the amount of economic loss was small, a greater ratio may be justified since small damages to many may not be sufficient incentive for any to sue. Alternatively, where injury or damage is difficult to detect, an increased award for those who detect and prove their injury may be appropriate.

The Court then turned to the facts of the particular case and indicated that there was a presumption against constitutionality where the ratio was 145 to1. Critically, the Court stated that courts must “insure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”²³³ Interestingly, the focus for the particular case was on the amount of actual harm and compensatory damages rather than actual and potential harm. As noted, earlier, the Court had often spoken of the ratio between punitive damages and actual *and* potential harm. In any event, in *State Farm* the Court focused on the ratio between punitive damages and actual harm suffered by the particular plaintiffs involved. Likewise, in the context of deciding that the punitive award in the particular case was outside the bounds of any acceptable ratio, the Court indicated that because there were no physical injuries and only minor economic injuries, the “compensatory damages for the injury suffered here ... likely were based on a component which was duplicated in the punitive award. Much of the

²³³*Id.* at 426.

distress was caused by the outrage and humiliation that Campbell suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.”²³⁴ What the Court was indicating was that outrage and humiliation overlap with emotional distress and, in *State Farm*, they arguably overlapped with components of the punitive award. In dicta, the court pointed out that the wealth of a defendant cannot justify an otherwise unconstitutional punitive award.²³⁵

Finally, the Court turned to the third *Gore* guidepost, that of comparable penalties. The third *Gore* guidepost focused on the relationship or disparity between the punitives awarded and the criminal and civil penalties which could be authorized or imposed in comparable cases. But, in *State Farm* the court indicated that when used to measure or assess a punitive damages award, the criminal penalty has less utility. In any event, the Court rather tersely compared the punitive damages with the most relevant sanction under Utah law, a \$10,000 fine for an act of fraud. The Court stated this fine was an amount “dwarfed” by the punitive damages awarded.²³⁶

Thus, the Court in *State Farm* reiterated the *Gore* guideposts: reprehensibility, ratio, and comparison to other (civil) penalties. In its statement and reiteration of the reprehensibility factors, the Court continued to adhere to the statement that reprehensibility is the most important

²³⁴*Id.* at 426, *citing*, Restatement (Second) of Torts § 908, *comment* C, page 466 (1977).

²³⁵538 U.S. at 427.

²³⁶*Id.* at 428. I recently saw a road sign in a construction area while traveling in Michigan which read: “Kill or Injure a Worker—\$7,500 and 15 Years in Jail.” I wondered how the court would deal with those penalties in a punitive damages case involving an injured or dead Michigan road construction worker. What would be more important, the \$7,500? Or, the 15 years?

factor in assessing the reasonableness of a punitive damage award. Notably, the reprehensibility factors which the Court has articulated are what might be called qualitative factors. That is, they are part of a multi-factor test in which no one factor is either sufficient nor determinative of the ultimate Due Process review. The factors are part of a blend. The Court, in assessing and considering the factors, considers the presence, absence, and importance of each to the particular case. Thus, one may opine that the Court assesses the factors in the assessment of its cumulative analytical judgement on reprehensibility. There is no magic nor clear line to which the factors either draw or point. And, while arising from the common law, they are to be applied somewhat haphazardly in the Constitutional setting.

Prior to *State Farm*, one also might have concluded that the ratio analysis was a qualitative analysis albeit in the fabric of a quantitative statement: the ratio between punitive damages and actual or potential damages. But, after *State Farm*, the numbers seem more important. And, critically, there seems to be absolutely *no* articulated basis for the Court's 9 to1 guideline. There is no principled basis for 9 to1. It is not tied to any clear purpose of punitive damages. Nor is it tied to any arguable theoretical basis. Finally, it does not appear to be based on any identifiable body of jurisprudence, certainly not Supreme Court jurisprudence. It is not based on pre-existing law, principle, reason, or analogy. Consequently, it seems entirely inconsistent with the Section II model.

Professor Geistfelt has defended the ratio rule as follows:

As a matter of individual deterrence, a presumptive ration between the plaintiff's harm and the punitive damages award make sense. Ordinarily, a defendant who must pay some

single-digit multiple of damages to the plaintiff presumably has a sufficient incentive to avoid future violations of the plaintiff's right.²³⁷

But he does not say (as he cannot) where the 9 to 1 ratio comes from. There is no apparent source. And, he clearly notes that exceeding the inexplicable multiple *is* only a presumption of unconstitutionality.²³⁸

Clearly, the Supreme Court's punitive damages cases constitute a significant intrusion on a state's ability to define, articulate, and apply its own tort law. Indeed the aggressive, judicial case-by-case review mandated by *Gore*, *Leatherman*, and *State Farm* make *every* punitive damages case a potential constitutional case. Interestingly, the punitive damages cases are similar to the defamation cases in that particular aspects of traditional tort law are incorporated into the constitutional factors. However, the cases are different in that they do not contemplate "elemental" rules ("actual malice", negligence, actual injury) to be applied by judges and juries in particular cases. Instead, the punitive damage holdings in *Gore*, *Leatherman*, and *Campbell* signify intensive review of punitive damages on a case by case basis. Thus, any punitive damage case may, and arguably, from the defense lawyer's perspective must be potential constitutional law cases. The exception to the "every case a constitutional case" statement may be in states where punitive damages are capped by statute. Those statutorily regulated cases may not raise constitutional issues of the same dimension.

²³⁷ Geistfelt, *supra* note 11 at 108.

²³⁸ *Id.*

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

Alternatively, the Court might have taken the tack that it took in the defamation cases by prescribing a constitutional fault standard which had to be established before punitive damages could be awarded (such as recklessness or willfulness). Alternatively, the court might constitutionally increase the burden of proof from a preponderance of the evidence to proof by clear and convincing evidence.²³⁹ While these changes might not have necessarily solved the problem of potentially excessive punitive damage awards in particular cases, they at least would have been consistent with constitutional development in First Amendment cases and respect for the traditional role of the jury. In fact, the line drawing that will go on in punitive damages cases is line drawing for which we typically use juries because juries do not have to explain themselves.

²³⁹Rustad, *supra*, note 178 at 496-77, states that this heightened burden of proof is already the law in the "vast" majority of states. Perhaps the Court felt such a requirement was not sufficient.

Finally, in the preemption cases the Court is guided by extensive statutory language and legislative history; the punitive damages cases involve none of that. At least, in the preemption cases, the Court is parsing legislative history to determine which claims are preempted and which claims may go forward. However, in the punitive damages context the Court on a case by case basis is saying too much or not too much. Punitive damage cases now promise to be troublesome and confusing and to raise questions about the future predictive value of opinions in the area.²⁴⁰

VI. Recap & Conclusion

Let us now back up to reconsider and to reiterate some of the themes raised in the three bodies of case law considered. First, and perhaps most basically, each of the three areas—the defamation and related cases, the preemption cases, and the punitive damage cases—are areas where the Supreme Court has constitutionally limited the power of the state to impose tort liability under the state’s common law. Thus, in each of the three areas, the Supreme Court’s decisions impose a constitutional restriction on a particular area of state tort law. At least, they impose constitutional restrictions on particular parts of particular areas of tort law. From a federalism perspective, the defamation and related cases, the preemption cases, and the punitive damage cases are areas where the Court has used the U.S. Constitution (the federal Constitution) to limit the state’s ability and authority to articulate, apply, and develop its own tort law. To this extent,

²⁴⁰Curiously, what of *Greenmoss* after *Gore* and *Campbell*? *Greenmoss* the reader will recall, authorized the recovery of presumed and punitive damages under state law absent any constitutional limitation if the speech involved did not involve a matter of public concern. But how could punitive damages pass muster under *Gore* and *Campbell* where the compensatory damages are presumed, not actual?

the cases are not “minimalist” decisions as that word is used in Section II’s model of adjudication.

The defamation and related cases are consistent with the modest model of adjudication outlined in Section II. As noted, the paradigm defamation cases (*New York Times* and *Gertz*) articulate what I have referred to as elemental rules for decision. These rules (“actual malice,” negligence, and actual injury), while apparently radical in their initial pronouncements, were articulated in opinions in which the Court reasoned from precedent and from the underlying principles of the First Amendment. In that regard, whether one agrees with the decisions or not, they are based upon and manifest a process of reasoned elaboration. Notably, the decisions are also consistent with the role of the jury in the American tort system as the decisions impose elemental burdens in the way of certain plaintiffs seeking to recover for defamation and related torts. In this regard, whether the plaintiff has cleared the burden (“actual malice,” negligence, actual injury) or not is a question susceptible of decision by a jury which must be convinced to a level of “convincing clarity” or a preponderance of the evidence depending upon the type of plaintiff and speech. Somewhat inconsistently with the Section II model’s respect for the jury, the Court in *Bose Corporation* pronounced a standard of review under which the appellate court would review lower court decisions finding “actual malice” under an independent judgment rule rather than a more deferential standard.

Moving beyond *New York Times* and *Gertz*, the *Greenmoss* decision potentially removes all federal control if the speech is *not* a matter of public concern. While one may be somewhat cynical about the Court’s “speech which is a matter of public concern” test, the *Greenmoss*

opinion, when considered in light of *New York Times* and *Gertz*, represents what Professor Molot has called an example of backward looking principled minimalism. That is, the Court has set up what may be an overly complex but still logical taxonomy of increasing liability in defamation cases as the subject of the speech moves from private to public and as the plaintiff moves from private figure to public figure or public official. A series of logical rules and principles appears when one looks at *New York Times*, *Gertz*, and *Greenmoss* together.

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

Moving from the defamation related cases to the preemption cases, one is struck by the fact that the Court in the preemption cases is not simply dealing with constitutional limits on common law claims, but rather is dealing with a constitutional limit arising out of a congressional regulatory scheme and that scheme's affect on the state's common law under the Supremacy

Clause. While the focus of the cases may arguably be more public law oriented, the cases are consistent with the modest model of adjudication articulated above. The preemption cases reveal the Court interpreting and applying statutes, a traditional judicial function which has become even more common since the early Twentieth Century. One may argue with the results in the cases and one may quibble with the levels of generality articulated in the Court's analysis. And, one may scratch one's head trying to find a principled basis for the difference between a tort duty imposed by law and a supposedly self-imposed contract duty (and somehow *not* imposed by law). The vague but "special"²⁴¹ treatment accorded to contract based claims in the preemption cases parallels the "special" treatment accorded appropriation and promissory estoppel in the First Amendment cases. But, despite these criticisms, the preemption cases still manifest reasoned elaboration and the conclusions are drawn from a combination of the statutory scheme, prior jurisprudence, and the Court's understanding of the law. Notably, at the close of the day in the preemption cases while there may be some doubt, the state and its citizens is left knowing which claims are preempted and which claims are not preempted. Alternatively, after *Bates*, the state court is left with guidelines to apply in determining which claims are preempted and which are not and those guidelines are based, in part, upon whether the state regulation is parallel to the federal regulation or it conflicts with it.

Turning to the punitive damages cases, there are ways in which those cases are consistent with the modest model of adjudication and ways in which they are not. The punitive damage cases, like the defamation and preemption cases, attempt to reason from pre-existing principle.

²⁴¹Special here is used to mean less constitutional scrutiny.

Like the defamation cases, the Court attempts to shape its constitutional rules from the common law itself. However, there are some significant differences between the punitive damage cases and the defamation and preemption cases which make the punitive damage cases more inconsistent with the model of adjudication and more of a threat to state sovereignty. Most basically, in the punitive damages cases there are no rules. That is, in the defamation and related cases the courts articulate elemental rules and burdens. This is not true in the punitive damage cases which, while they employ common law principles in articulating the three *Gore* guideposts, result not in elements but rather in a multi-factor melange. Certainly, there are many multi-factored tests in tort law, including many courts' tests for whether a person owes a duty to another, whether a person has exercised reasonable care under the circumstances, proximate cause, allocation of fault, damages, punitive damages, and more. However, the *Gore* goulash is not a stew entrusted to the jury and it is not a stew used to define mere liability in a particular case. Rather, it is a constitutional gumbo.

While a multi-factor constitutional test may not be objectionable in and of itself, it is problematic in the punitive damages context. This is because, after *Gore*, *Leatherman*, and *State Farm*, potentially every punitive damage case that arises under state (or federal) law is a Constitutional case. After *Gore* and *State Farm*, the prudent defense lawyer in a punitive damages case will necessarily raise a constitutional challenge to any punitive damage award and will do so at the earliest possible time because otherwise that constitutional challenge may be waived.²⁴² Thus, the *Gore* goulash is a constitutional “standard” that will be applied or potentially

²⁴²*See, e.g.,* Mosing v. Domas, 830 So. 2d 967 (La. 2002).

applied in virtually every state punitive damages case.

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

Next, turning to the ratio articulated in *State Farm*. Quite simply, the rationale articulated for the 9 to 1 rule is not consistent with the model of adjudication articulated above. There is no articulated, principled reason for the 9 to 1 ratio. Clearly it is based on the idea that an articulated (albeit presumptive) number provides notice and certainty. But, where did the 9 to 1 come from? There was only one previous United State Supreme Court case that had struck down a punitive damages award on substantive Due Process grounds, *Gore*, and the 9 to 1 ratio was not mentioned

in *Gore*. Moreover, in the wake of *Gore*, there was no roiling of competing constitutional ratios in the courts of appeal which the Supreme Court relied upon. The 9 to 1 ratio does not seem tied to punishment, deterrence, or any other purpose of punitive damages. While an outside ratio certainly gives notice of the severity of a potential limit on recovery, the analytical anchor of the limit is simply missing.

I must confess that when I first read *Campbell*, I wondered whether a 7 to 1 ratio might make more sense as the number 7, rather than the number 9, has mystical significance. But then, it occurred to me that the 9 to 1 test may have been a principled application of baseball thinking. After all, there were 3 *Gore* guideposts, and there are 3 outs in each side of an inning of a baseball game, and 3 strikes make an out. Then, it occurred to me that the Court had referred to the 4 to 1 ratio as another possible guideline, and that there are 4 bases and 4 balls yield a walk. Finally, it struck me that there are 9 players on a team in a baseball game. Thus, I opined that the constitutional limit may be based on the game of baseball—and underlying principles of the game.²⁴³ Unfortunately, when I explained my thinking to a friend, she reminded me that in the American League there are 10 players, so my analogy was not apt (and 10 to 1 is presumptively unconstitutional). However, rather than give up the analogy, I prefer to use the baseball principle to conclude that the designated hitter rule, because it involves a 10th player, is unconstitutional.²⁴⁴

²⁴³ And, baseball is America's National Past Time. *Cf.*, *Flood v. Kuhn*, 407 U.S. 258, 259n.1 (1972)(upholding the reserve clause against an antitrust challenge)

²⁴⁴ *See id.* at 274 (quoting an historical brief's argument that *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) was wrong and should be overruled—it was not). And thanks to Jeff Hirsch for the last two footnotes. Interestingly, even before *Flood*, Hart and Sacks devoted significant discussion in *The Legal Process* to the ridiculousness of the Court's baseball cases. *See Hart & Sacks, supra* note 24 at 1333-38.

The point is that even though the baseball principle may work (and I apologize to the Court for any disrespect), courts do not rely on just *any* principle to justify a holding. We lawyers prefer a legal principle.

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

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

Finally, rather than articulate an elemental hurdle, as in the defamation cases, or articulate a rule concerning which cases can proceed and which cases cannot, as in the preemption cases, the

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

Now, it may be a little unfair to level these criticisms at the punitive damage cases because there has neither been a significant body of case law nor a significant period of time as in the First Amendment and preemption cases. Thus, the punitive damages cases may work themselves out over time and provide another example of Professor Molot's backward looking principled minimalism. That said, how might the Court deal with punitive damages in a manner that is more consistent with at least the defamation and defamation related cases? Perhaps, as noted, the Court

could articulate some constitutional hurdle applicable in punitive damages cases. That is, the Court could require plaintiffs in punitive damages cases to prove the defendant was reckless or willful. In this regard, the hurdle would be like the “actual malice” or negligence requirements under *New York Times* and *Gertz*. Alternatively, one might be concerned that a recklessness requirement would be unduly vague and not provide sufficient constitutional protection. This concern is apparently what led the Court in *Falwell* to reject outrageousness under state law as a constitutionally sufficient limitation on speech-based intentional infliction claims by public figures. However, in *Falwell*, the argument was that state law outrageousness supplied sufficient constitutional protection. In the punitive damages arena, the Court could articulate its own definition of malice or recklessness akin to its articulation of the “actual malice” requirement in *New York Times*.

Moreover, the Court could require that plaintiffs in punitive damages cases clear a heightened burden such as clear and convincing evidence. This heightened burden would be consistent with what the Court did in *New York Times* by requiring certain plaintiffs to prove “actual malice” by “convincing clarity.” Arguably, these limitations would be consistent with what courts do best, articulate rules, (here elemental rules), for application in particular cases and would increase respect and reliance upon the jury in deciding key punitive damages elements. Such requirements would place the constitutional law of punitive damages on a sounder and less intrusive basis than the aggressive line drawing that is apparently the current state of the law. Finally, it should be pointed out that should state legislatures act to impose ratio limitations on punitive damage awards, these limitations in a purely political sense would seem rational. If the

limitations are rational, they should pass constitutional scrutiny. Intuitively, it would seem that a legislatively articulated and drawn line is more acceptable than a randomly drawn judicial line. Such statutes will provide a state response to the dilemma raised by *Gore*, *Leatherman*, and *Campbell*.²⁴⁵

In closing, the insights and proposals set forth herein may all turn out, over time, to be wrong and ill-conceived. Be that as it may, the most significant contribution of this jurisprudential review may, in the long run, be the reality that the Supreme Court has and continues to play a large and prominent role in the development of tort law. Since at least *Garmon* and *New York Times*, the Court has utilized the U.S. Constitution to impact and define state tort law and consequently state power. Consequently, like Dr. Henry Perowne in *Saturday*, the tort lawyer and professor may continue to take solace in what he or she loves and does well but he or she had better open their eyes to the reality of U.S. Supreme Court tort reform.

²⁴⁵See generally, Geistfelt, *supra* note 11.