SHIFTING COURSE IN ADMIRALTY: *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008)

The Admiralty Clause grants maritime jurisdiction to federal courts without establishing a particular substantive standard of rulemaking for those courts to follow.[1] Since *Erie Railroad Co. v. Tompkins*,[2] however, courts have required common-law rules—including admiralty rules—to be grounded in an identifiable sovereign authority.[3] Last Term, in *Exxon Shipping Co. v. Baker*, the Supreme Court disregarded *Erie*'s mandate when it held that the ratio of punitive to compensatory damages in maritime cases could not exceed 1:1.[4] The Court's 5-3 decision found compelling reason to limit recovery for maritime punitive damages where Congress had not yet legislated,[5] but its ruling adhered to no set standard of rulemaking in admiralty. Rather than ground its judgment in a sovereign authority, the Court neglected to conform to federal statute or state law and thereby

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1. "[T]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2. The Judiciary Act of 1789 confers exclusive "original jurisdiction" of maritime cases to federal district courts. Judiciary Act of 1789, ch. 20, 1 Stat. 76–77 (codified at 28 U.S.C. § 1333 (1994)).

2. 304 U.S. 64 (1938).

3. *See* Am. Dredging v. Miller, 510 U.S. 443, 457 (1994) (following the Jones Act in applying state *forum non conveniens* rules to admiralty claims); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–403 (1970) (following policies of related but not controlling federal statutes to recognize recovery for wrongful death in admiralty); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,* 144 U. PA. L. REV. 1245, 1360 (1996) (arguing that until Congress establishes rules of decision to govern "maritime transactions relating to navigable waters within the United States," the "imposition of 'general maritime law' under [*Southern Pacific Co. v.*] *Jensen*[, 244 U.S. 205 (1917),] arguably intrudes upon the constitutional authority of Congress and the states no less than the federal courts' application of 'general commercial law' under *Swift* [*v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)]"); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 277 (1999) (arguing that, like the general common law applied in the pre-*Erie* era, "the law of the sea did not emanate from any particular sovereign and did not qualify as 'federal law'" as it is now understood).

4. 128 S. Ct. 2605, 2634.

5. *Id.* at 2630 n.21 (citing United States v. Reliable Transfer Co. 421 U.S. 397, 409 (1975)).

engaged in the type of federal common-lawmaking that is no longer constitutionally permitted.

As early as 1985, Exxon Shipping's upper-level management was aware of Captain Joseph Hazelwood's drinking problem.[6] Yet despite a series of alcoholic relapses, on the night of March 23, 1989, several miles from the Alaskan coastline, Captain Hazelwood was navigating the *Exxon Valdez*, a 900-foot oil tanker, after downing five double vodkas prior to departure from port.[7] Shortly before midnight, an intoxicated Hazelwood steered the *Valdez* off course to avoid hitting an iceberg.[8] He then abruptly abandoned his position and left at the mast a third mate who was unlicensed to navigate.[9] The *Valdez* continued to stray from its course, and shortly after midnight it collided with Bligh Reef.[10] The hull of the ship broke, spilling an estimated eleven million gallons of crude oil into the waters of Prince William Sound.[11] The marine life and its surrounding environment never completely recovered from the widespread resulting devastation, and the area's fishing industry suffered extensive damage in the aftermath of the accident.[12] A group of affected local residents, commercial fishermen, and native Alaskans subsequently filed a class action suit against Exxon, seeking reparations for their economic losses.[13]

The U.S. District Court for the District of Alaska separated the trial into three phases and ruled in favor of the plaintiffs in each phase.[14] In Phase I, the jury determined that Captain Hazelwood had acted recklessly and that Exxon was liable for his conduct

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6. *In re* the Exxon Valdez, 270 F.3d 1215, 1223 (9th Cir. 2001). Hazelwood was a member of Alcoholics Anonymous and he had completed a twenty-eight-day residential alcohol treatment program. *Id.*

7. *See id.* at 1222–23.

8. *Id.* At the time of the accident, Hazelwood's blood-alcohol level was about 0.241%, three times the legal driving limit in most states.

9. *See id.*

10. *Id.* at 1223.

11. *Id.*

12. *In re* the Exxon Valdez, 296 F. Supp. 2d 1071, 1078 (D. Alaska 2004).

13. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2605 (2008). Exxon paid over $2.1 billion in voluntary clean-up efforts; $125 million in fines for violations of federal statutes; $900 million in a suit brought by Alaska and the United States for environmental harms; and $303 million in voluntary settlements to affected Prince William Sound residents.

14. *In re* the Exxon Valdez, 229 F.3d 790, 793 (9th Cir. 2000) (describing the 1994 district court trial).

occurring within the scope of his managerial duties.[15] In Phase II, the jury awarded $287 million in compensatory damages and an additional $2.6 million for claimants who had opted for the out-of-court settlement.[16] In Phase III, the jury awarded plaintiffs punitive damages of $5 billion against Exxon and $5,000 against Hazelwood.[17] Exxon appealed the judgment.

The Ninth Circuit remanded the punitive damages award twice on due process grounds.[18] On the third appeal, a panel of the Ninth Circuit upheld the Alaska jury's determination that Exxon was liable for the reckless conduct of its employees acting within the scope of their managerial duties.[19] After conducting a review of punitive damages for conformity with due process standards, the Ninth Circuit concluded that an award of $4.5 billion remained excessive and reduced it to $2.5 billion.[20] Exxon appealed, arguing that even the reduced punitive damages award was excessive and disputing its liability for an employee's recklessness.[21]

The Supreme Court affirmed in part and reversed in part.[22] The Court divided equally on the first issue concerning Exxon's liability, leaving undisturbed the Ninth Circuit's opinion that a ship owner could be liable in punitive damages for the reckless conduct of managerial employees occurring within the scope of their employment.[23] Moving to the second issue, federal preemption, Justice Souter affirmed that federal civil penalties for the company's environmental violations did not preempt punitive damages awarded in admiralty.[24] For the final issue, regarding the appropriate level of punitive damages, the Court held that a punitive damages award of $2.5 billion was excessive, and more

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15. *Exxon Shipping*, 128 S. Ct. at 2613–14.

16. *Id.* at 2614.

17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.*

21. *See* Reply Brief for Petitioners, *Exxon Shipping*, 128 S. Ct. 2605 (2008) (No. 07-219). Exxon disputed its liability for punitive damages and contested the excessiveness of the award.

22. *Exxon Shipping*, 128 S. Ct. 2605. Justice Souter wrote for the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Alito took no part in the consideration or decision of the case. *Id.* at 2634.

23. *Id.* at 2616.

24. *Id.* at 2616–19 (referring to 33 U.S.C. § 1321 (b), (o) of the Clean Water Act).

generally, that punitive damage awards in maritime cases may not exceed compensatory damages.[25] The judgment against Exxon was capped at $507.5 million and vacated and remanded to the Ninth Circuit.[26]

In arriving at this determination, the Court described its inquiry as occurring "in the exercise of federal maritime common law authority."[27] Modern admiralty practices, the majority asserted, "support[ed] judicial action to modify a common law landscape" of the courts' own formation.[28] In the majority's view, number-based rules such as a "maximum multiple" produce predictable punitive damages awards.[29] Several states had adopted a 3:1 or 2:1 ratio, but the Court reasoned that those approaches generally covered conduct such as malice and negligence and did not properly apply to the present case.[30] Basing its reasoning upon an empirical study of punitive damages from a random selection of county jurisdictions, the Court embraced a "median ratio of punitive to compensatory verdicts" of 0.65:1, which it rounded to an even 1:1 ratio.[31] To justify its new rule, the majority pointed to past judicially created maritime rules as compelling precedent.[32] The majority declared the cap on maritime punitive damages as "no less judicial" than selecting "an outer limit of constitutionality for punitive damages" in non-maritime cases.[33]

Justice Scalia wrote a brief concurrence, joined by Justice Thomas.[34] Although Justice Scalia supported the Court's references to *State Farm Mutual Automobile Insurance Co. v. Campbell*[35] and *BMW of North America v. Gore*,[36] both of which imposed constitutional limits on punitive damages, he continued to distance

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25. *Id.* at 2634.

26. *Id.*

27. *Id.* at 2626.

28. *Id.* at 2630 n.21.

29. *Id.* at 2628–30. The Court rejected verbal formulations as an insufficiently reliable standard of limiting punitive damages. *Id.*

30. *Id.* at 2633–34.

31. *Id.* at 2632–34.

32. *Id.* at 2630 n.21.

33. *Id.* at 2630 (citing State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (1996)).

34. *Id.* at 2634 (Scalia, J., concurring in part and concurring in the judgment).

35. 538 U.S. 408 (2003).

36. 517 U.S. 559 (1996).

himself from those decisions.[37] Despite his support for the majority's overall reasoning and judgment, he still maintained that *State Farm*'s and *Gore*'s due process holdings were in error.[38]

Justice Stevens dissented in part,[39] contending that the Court should have affirmed the Ninth Circuit's punitive damages ruling.[40] Justice Stevens insisted that the preferred authority for making "empirical judgments" to limit punitive damages was Congress and not the Court,[41] and that "a policy of judicial restraint" should be followed in the absence of federal legislative enactments.[42] In his view, the majority failed to justify its refusal to defer to Congress or adequately to consider the unique features of maritime law that make comparison to non-maritime punitive damages caps ill-advised.[43]

Justice Ginsburg dissented in part, criticizing the majority's decision to reduce the punitive damages award.[44] She also agreed with Justice Stevens's position that Congress was the better decision maker on the matter and argued that the shift from the "traditional common law" review of jury awards to a mandatory cap upon punitive damages responded to an illusory problem.[45] Even if the problem were real, the new solution was too fact-specific to the circumstances.[46] Moreover, the majority's holding neglected to establish in what contexts outside of maritime law the 1:1 ratio would be binding.[47]

Justice Breyer dissented in part, arguing in favor of affirming the Ninth Circuit judgment on punitive damages.[48] He contended that the majority's goal of providing a uniform punitive damages standard could be accomplished through means other

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37. *Exxon Shipping,* 128 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment).

38. *Id.*

39. *Id.* (Stevens, J., concurring in part and dissenting in part).

40. *Id.* at 2634–38.

41. *Id.* at 2634.

42. *Id.* at 2635.

43. *Id.* at 2636 (noting that the "[g]eneral maritime law limits the availability of compensatory damages").

44. *Id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

45. *Id.*

46. *Id.* (questioning whether the ruling also applied to a defendant who acted "maliciously" or with an intent to profit from his wrongdoing).

47. *Id.*

48. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part).

than a fixed ratio.[49] In any event, Justice Breyer asserted that an exception to the rule was warranted in cases of particularly egregious conduct, which Exxon had exemplified.[50]

The majority's attempt to constrain punitive damages reflects a mistaken understanding of the sources of authority that shape federal maritime common law. The construction of federal common law in admiralty is not to be treated as distinct from other types of federal common-lawmaking. In the absence of applicable federal statutes, the Court should have conducted a review of relevant state laws.[51] Although judges ruling in non-admiralty cases tend to defer to state legislatures' judgments about limits on punitive damages, the Court took a different approach with respect to federal maritime punitive damages. Rather than attach its ruling to an identifiable authority, the majority rested its decision upon the results of an empirical study. By declaring that punitive damages may not exceed the equivalent of compensatory damages, the Court constructed a maritime rule that improperly substituted its judgment for that of state legislatures.

The Court is bound by *Erie*'s restrictions on federal common-lawmaking in the absence of clear statutory or delegated authority.[52] Prior to *Erie*, in cases such as *Swift v. Tyson*,[53] federal courts applied "general common law" in diversity cases without requiring that the law rest in "any particular sovereign."[54] When *Erie* overruled *Swift*, the Court declared that in diversity cases, save for "matters governed by the Federal Constitution or by acts of Congress," federal courts were to apply "the law of the state."[55] From that point forward, judges and scholars have overwhelmingly acknowledged that the establishment of rules of decision required that federal common law arise from

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49. *Id.*

50. *Id.*

51. *See* Am. Export Lines, Inc. v. Alvez, 446 U.S. 274, 284–85 (1980); Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587–88 (1974); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314–17 (1955).

52. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

53. 41 U.S. (16 Pet.) 1, 8 (1842) (holding that general commercial law should be applied in lieu of New York state common law), *overruled by Erie*, 304 U.S. 64.

54. *See generally* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

55. *Erie*, 304 U.S. at 78.

an identifiable sovereign; without question, the "defining characteristic" of federal common law is "its ultimate authorization in enacted federal law."[56]

Courts sitting in admiralty cannot exempt themselves from *Erie*'s mandate. Where Congress has provided no legislative direction, the Court must still try to conform admiralty common law to Congress's intent as expressed in related statutes.[57] Maritime law has striven to "harmonize"[58] rules of decision in admiralty with federal statutes, which are considered the primary source of "policy guidance."[59] When congressional legislative guidance is utterly lacking, the Court should proceed by applying appropriate state law. The Court certainly possesses the authority to fashion rules specific to maritime law, but its decisions must nevertheless be founded upon an identifiable source of law. Justice Holmes, in his famous dissent in *Southern Pacific Co. v. Jensen*,[60] pronounced that the source of maritime law could not rest in the "brooding omnipresence in the sky."[61] Indeed, Justice Holmes wisely forewarned that admiralty federal common-lawmaking without Congressional guidance was unconstitutional and should be supplemented by state common law.[62]

Exxon Shipping therefore fails the standard of federal common-lawmaking in three notable respects. First, it disregards the post-*Erie* approach of conformity with congressional intent and substantiation in federal statutes with the mistaken claim that Congress typically bows to the discretion of courts sitting

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56. Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 879 (2007) ("While there is much scholarly debate about the proper contours of federal common law, there is widespread agreement that federal common law must be grounded in a federal law source."); *see* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986) (arguing for broader treatment of federal common law but requiring that the federal common-law rule rest on a "federal enactment, constitutional or statutory"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 47 (1985) (arguing for a narrower construction of federal common law and asserting that rules must have a certifiable basis in "the specific intentions" of the drafters of a federal statute).

57. Bradley et al., *supra* note 56, at 919.

58. Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001).

59. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

60. 244 U.S. 205 (1917).

61. *Id.* at 222 (Holmes, J., dissenting).

62. *Id.* at 221.

in admiralty.[63] The *Exxon Shipping* majority analogized its rulemaking approach to that of *United States v. Reliable Transfer Co.*,[64] in which the Court eliminated the rule for divided damages in the absence of a congressional statute directly on point.[65] Yet the majority notably failed to acknowledge that in that case the Court had actually sought guidance in legislative enactments—in particular, borrowing the rule for proportional fault from the Jones Act.[66] The principle in *Reliable Transfer* found support in a federal maritime statute, but *Exxon Shipping*'s rulemaking lacked any perceptible origin in federal statutory law.

Next, the Court deviated from the second step, the application of relevant state law. When courts in admiralty seek but do not find direction from Congress, the authority for the substantive law comes from prevailing state law.[67] Rather than review state law on the matter, the majority in *Exxon Shipping* adopted a median ratio of punitive-to-compensatory damages found in an empirical study of court judgments.[68] The empirical research, however, does not articulate a legal principle reflecting a consensus among states. The study, which covered cases collected from a random selection of forty-six of seventy-five of the most populous counties in the United States over three years, found that the median ratio of awards was 0.62:1 for jury trials and 0.66:1 for bench trials.[69] Taking these two figures, the Court determined the median ratio to be 0.65:1.[70] As evidence of the Court's inability to grasp the fine distinctions of number crunching, the resulting ratio fails to actually specify the reasonable *limits* on such awards; it merely indicates that half of the award ratios were higher and the other half were lower. Not only is the major-

63. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2630 n.21 (2008) (citing United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975)).

64. 421 U.S. 397 (1975).

65. *See id.* at 409.

66. *See id.*

67. D'oench, Duhme & Co. v. FDIC, 315 U.S. 447, 473–74 (1942) (Jackson, J., concurring in the judgment) (arguing that federal courts should apply state law where no federal statutory provision governs).

68. *Exxon Shipping*, 128 S. Ct. at 2633 n.26 (referring to Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006)).

69. *Id.* at 2625 nn.14 & 16.

70. *Id.* at 2633.

ity's treatment of and reliance upon the research flawed in that respect, but its attempt to displace the importance of substantiating authority in state law is also plainly wrong.

Instead, *Exxon Shipping* ignores precedent pointing to the application of state law in the absence of congressional authority. *Sea-Land Services, Inc. v. Gaudet*,[71] for example, held in favor of following the direction of state law[72] in extending a cause of action for recovery under loss of society to the surviving spouse of a harbor worker injured in territorial waters.[73] Likewise, *American Export Lines, Inc. v. Alvez*[74] adopted an identical approach and noted that, where the statutory or general maritime law gives no clear precedent, federal courts sitting in admiralty may consider prevailing state law for guidance.[75]

Furthermore, even if the majority in *Exxon Shipping* had relied on the methodology of state legislatures, there was an utter lack of consensus among jurisdictions as to what punitive-to-compensatory ratio was appropriate. A number of states had ratios ranging from 1:1 to 5:1, but *Exxon Shipping*'s approach followed no general consensus among a majority or minority of states.[76] In addition, the Court's recent due processs jurisprudence in *State Farm*[77] and *Gore*[78] roundly rejects a bright-line definition of the outer limits of excessive punitive damages with "a simple mathematical formula."[79]

Finally, and perhaps most troubling of all, the Court neglected to attach an identifiable legal authority to its judgment. In resolving any statutory gaps, courts may not make law from

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71. 414 U.S. 573 (1974).

72. *Id.* at 587–88 (noting that the Court's decision "aligns the maritime wrongful-death remedy with a majority of state wrongful-death statutes").

73. *Id.* at 584–85; *see also* Miles v. Apex Marine Corp., 498 U.S. 19, 31 (1990) (distinguishing *Gaudet* as permitting recovery for loss of society only in territorial waters and only to longshoremen).

74. 446 U.S. 274 (1980) (granting a loss of consortium claim by the spouse of a longshoreman who encountered nonfatal injuries in territorial waters).

75. *Id.* at 283–85.

76. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2622–23, 2631–33 (2008).

77. State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425–26 (2003) (holding that a punitive-to-compensatory damages ratio of 145:1 exceeds the constitutional standards of due process).

78. BMW of N. Am. v. Gore, 517 U.S. 559, 582–83 (1996) (holding that a punitive-to-compensatory damages ratio of 500:1 exceeds the constitutional standards of due process).

79. *State Farm*, 538 U.S. at 424; *Gore*, 517 U.S. at 582.

thin air, and admiralty is no exception. Indeed, the majority's undue emphasis on social science studies falls short of establishing an adequate legal principle to sustain the Court's reasoning. Empirical research as reliable legal authority is questionable, considering the lack of a proper mechanism for independent judicial evaluation of its validity.[80] If judges feel compelled to legislate in maritime cases, their desire must ultimately be grounded in an accompanying discernable authority; *Exxon Shipping*, in contrast, is marked by an absence of support in federal or state law.

Following the steps counseled by *Gaudet* and *Alvez*, the Court should have first considered whether Congress had legislated on the matter of punitive damages in admiralty. Although the Trans-Alaska Pipeline Authorization Act imposes strict liability and caps recovery in some Alaskan oil spills, it specifically fails to limit the availability of punitive damages.[81] The Jones Act and the Death on the High Seas Act bar punitive damages for claims arising from a seaman's wrongful death or injury,[82] but they do not preclude recovery in circumstances that do not involve harm to seamen; they also do not designate a mandatory ceiling on punitive damages in any other contexts. Evidently, Congress has not enacted a statute limiting punitive damages or indicated an intent to delegate that responsibility to the Court in maritime collision cases where claimants suffered economic losses.

The next appropriate inquiry was thus an evaluation of the direction of state law. In its second step, the Court should

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80. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 91 (1993); *see also* David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544 (1991) ("The Court fails to distinguish between normative principles and empirical propositions, analyzing empirical research as it might arguments about the text or precedent." (citations omitted)); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986) (arguing that "establishing stable judicial views of particular empirical findings has proven elusive").

81. *Exxon Shipping*, 127 S. Ct. at 2635; Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653 (2006).

82. The Merchant Marine Act of 1920 ("Jones Act"), 46 U.S.C. § 30104 (2006); Death on the High Seas Act, 46 U.S.C. §§ 30302–30303 (2006); *see also* Miles v. Apex Marine Corp., 498 U.S. 19, 32–33 (holding that courts may not enlarge remedies beyond a congressionally proscribed tort recovery scheme by permitting nonpecuniary damages).

have recognized that the absence of a punitive damages limit in state common law supported a similar rule in general maritime law. The Court's prior holding in *Wilburn Boat v. Fireman's Fund Insurance*[83] noted Congress's reluctance to "disturb[]" the present system of state regulation of maritime insurance[84] and stressed the Court's inability to fashion a nationwide insurance code by way of the common law.[85] Similarly, the Court in *Exxon Shipping* should have acknowledged that building a federal scheme limiting recovery in admiralty was beyond the scope of its institutional competence. The type of decision making involved in selecting an appropriate number-based rule to cap maritime punitive damages is far better left to Congress. Although punitive damages face varying types of limits under state regulation,[86] all of the prohibitions on recovery above a simple monetary cap[87] or a set ratio of punitive-to-compensatory damages were adopted not by state courts but by state legislatures.[88] Further underlining this discrepancy, Justice Stevens emphasized that the majority was unable to identify "a single state court" that attempted to bar recovery through use of a "precise ratio."[89]

One possible explanation for *Exxon Shipping*'s rejection of state law may be the Court's concern for uniformity in shaping the contours of maritime law.[90] Neither the need for consis-

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83. 348 U.S. 310 (1955).

84. *Id.* at 320–21.

85. *Id.* at 314–17.

86. *Exxon Shipping*, 128 S. Ct. at 2622–23 (commenting on Nebraska's complete bar to punitive damages recovery and limitations imposed in Louisiana, Massachusetts, Washington, New Hampshire, Michigan, and Connecticut to narrow the scope of recovery in punitive damages).

87. *See id.* at 2623. Virginia has a $350,000 absolute monetary cap. VA. CODE § 8.01-38.1 (2007). Ohio has a 2:1 punitive-to-compensatory damages ratio in most tort cases. OHIO REV. CODE § 2315.21(D)(2)(a) (2005); Alaska has a combination of both, applying the greater of a 3:1 ratio or $500,000 in most actions. ALASKA STAT. § 09.17.020(f) (2006).

88. *See Exxon Shipping*, 128 S. Ct. at 2622–23.

89. *Id.* at 2637 (Stevens, J., concurring in part and dissenting in part).

90. *See* D'oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 471–75 (1942) (Jackson, J., concurring in the judgment) (arguing that "federal law is no juridical chameleon" and that in non-diversity cases, federal courts need not adopt state law where the Constitution, federal statutes, or the common law provide adequate authority); *see also* Theodore F. Stevens, Erie R.R. v. Tompkins *and the Uniform General Maritime Law,* 64 HARV. L. REV. 246, 270 (1950) (arguing that uniformity in maritime law is impossible if federal courts adopt individual state law interpretations).

tency nor the Constitution's grant of admiralty jurisdiction, however, justifies an open-ended invitation for judicial law-making without sufficient basis in legal doctrine. Maritime rules that lend uniformity to the body of admiralty law must still rest upon the basis of extant authorities, and *Exxon Shipping* failed to locate an authority in federal or state law supportive of its rulemaking approach.

Another theory for the Court's departure from the standard for rulemaking in admiralty is that it had fallen victim to the temptation of external political pressures.[91] It is likely that the larger societal debate on rising levels of punitive damages had persuaded the Court that jury awards were spiraling out of control.[92] Indeed, amicus briefs on punitive damages have sought to show, often in misleading depictions, that runaway verdicts are either a crisis for American businesses or a manufactured and exaggerated phenomenon.[93] There may be a pressing demand for federal regulation that places reasonable parameters on awards.[94] Because Congress had not spoken, however, the source of authority was state law. State courts were noticeably silent on the matter, yet the Court dismissed following a like approach and proceeded to create its own ratio limiting recovery. Convinced that admiralty jurisdiction supplied a unique opportunity to remodel the system of tort recovery, the Court acted without deference to Congress or the States.

In setting aside the need to base its rulemaking on a recognizable source of law, the Court has made the "mess"[95] of admiralty law still more difficult to navigate. Rather than construct a coherent standard of maritime rulemaking, the Court's opinion reinforces the misconception that judges may make admiralty rules without regard to "basic constitutional rules

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91. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA 15–17, 69–71 (1990) (observing that the imposition of judges' external moral and political values on legal doctrine has resulted in a "disguised" judicial activism).

92. *Exxon Shipping*, 128 S. Ct. at 2625–26. The Court noted that "outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." In particular, the "unpredictability" of awards was worrisome. *Id.*

93. *See* Rustad & Koenig, *supra* note 80, at 120 (noting the absence of a conclusive academic consensus on the need to reform punitive damages).

94. Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 290–91 (1999).

95. David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 158.

about preemption and federal lawmaking."[96] Most troubling, it has succeeded in pushing the bounds of judicial discretion in maritime law, a deeply concerning development. Dismissing *Erie*'s requirements, the Court in *Exxon Shipping* misinterpreted congressional silence as acquiescence and proceeded to fashion a new maritime rule with inadequate legal authority.

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96. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 471 (2004).