UNCOMMON LAW AND THE BILL OF RIGHTS: THE WOES OF CONSTITUTIONALIZING STATE COMMON-LAW TORTS

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During the two-hundred-year history of the Bill of Rights, the Supreme Court occasionally has used those first ten Amendments to constitutionalize state common-law torts. In this essay, Professor Elaine Shoben argues that the Court would be well advised to forgo that practice. Pointing to the Court’s experience in constitutionalizing defamation law under the First Amendment, Professor Shoben says when the Court meddles in state tort law, the result is a highly complex and very unsatisfactory body of law. On the Bicentennial of the Bill of Rights, this author recommends that if the Court feels compelled to reform a state common-law doctrine, the Justices should abolish rather than constitutionally refine that doctrine. Professor Shoben believes if the Court restricted itself to the choice of either affirming a doctrine’s constitutionality or banning the doctrine outright, the Justices would undertake the more drastic step only in extraordinary circumstances.

I. INTRODUCTION

Judicial conversion of a state common-law tort into federal constitutional law is a monumental legal step. The process changes rights and remedies for litigants in an area which is traditionally the domain of the states. At one dramatic point in our nation’s history—the height of the civil rights movement in the early sixties—the Supreme Court took that monumental step with respect to common-law defamation. The decision, New York Times v. Sullivan,¹ may have been socially and politically justified at the time,² but the legal ramifications have been staggering. Virtu-

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2. Anthony Lewis argues persuasively that the Court’s holding in New York Times v. Sullivan was socially and politically justified because the true purpose of the lawsuit was to prevent the press from covering the civil rights movement. Anthony Lewis, Make No Law: The Sullivan
ally nobody appears satisfied with the complex constitutional law of defamation that has developed since that case. Our experience with defamation law should cause the Supreme Court to pause before undertaking similar transformations of other areas of state common-law torts.

For years the Supreme Court has been threatening to undertake a similar transformation of a state tort remedy—punitive damages. Several Justices have hinted over the years that they might find constitutional infirmities in some aspect of punitive damages law; a few have declared such intention unequivocally. For example, in 1983 Justice Rehnquist, now Chief Justice, made a "wholesale condemnation"5 of punitive damages in a dissent joined by two Justices no longer on the Court.6 In 1989 the Court considered an Eighth Amendment challenge to punitive damages, but held that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damages because they are civil rather than criminal penalties.7 The Court, however, specifically reserved the issue of whether punitive damages can violate the Due Process Clause because that question had not been preserved for appeal; the majority opinion observed that the due process issue must "await another day."8 Moreover, several Justices hinted strongly that they were ready to impose due process restrictions on punitive damages awards.9

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CASE AND THE FIRST AMENDMENT 42 (1991). He describes the "real target" of the suit as "the role of the American press as an agent of democratic change." Id. Lewis believes that the intent of Commissioner Sullivan and the other Southern officials who had sued the Times for libel was "to choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue." Id.


8. Noting that "we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages," the majority opinion says that the inquiry "must await another day." Id. at 277.

9. Justice Brennan, joined by Justice Marshall, wrote a concurring opinion that clearly invited a due process challenge: "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." Id. at 280.

Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part. She noted:
This past Term another punitive damages case, *Pacific Mutual Life Insurance Co. v. Haslip*,\(^{10}\) presented the due process question that the Court had hinted it wanted. The defendant insurance company challenged Alabama's jury instructions on punitive damages. In this case, the plaintiffs' health insurance lapsed because Ruffin, an agent for the defendant insurance company, had misappropriated premiums. The fraud was discovered when one of the plaintiffs was hospitalized and insurance could not be confirmed. The suit named as defendants both Ruffin and the insurance company.

The case was submitted to the jury under a theory of respondeat superior for the corporate defendant. The jury was instructed: "Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion . . . award an amount of money known as punitive damages."\(^{11}\) The judge described the purpose of punitive damages to punish the defendant and to protect the public by deter ring the defendant and others from doing such wrong in the future. Finally, the trial court instructed: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong."\(^{12}\)

Despite the anticipation that *Pacific Mutual* would determine the constitutionality of punitive damages, the Court did not resolve the question. Rather, the Court held that, although some punitive damages instructions might offend the Constitution, Alabama's did not.\(^{13}\) Although the majority opinion expressed some concern for the vagueness of the instructions, it placed great weight on the opportunities for postverdict judicial review.\(^{14}\) Currently, there are not five Justices on this rapidly changing Court who are ready to affirm definitively the constitutionality of punitive damages, nor five who are ready to take the dangerous plunge into constitutional reform of such awards.

Justice O'Connor's dissent in *Pacific Mutual* argues that "the time has come to reassess the constitutionality of a time-honored practice. The explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system."\(^{15}\) It is uncertain how many votes there might be for this position the next time. Justice Souter did not participate in the decision. Justice Thomas had not yet replaced Justice Marshall, who was one of the five

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11. Id. at 1037 n.1.
12. Id.
13. Id. at 1046.
14. Id. at 1044-46.
15. Id. at 1066 (O'Connor, J., dissenting).
votes for Justice Blackmun's majority opinion. Only Justice Scalia, in his concurring opinion, said that he would "end the suspense and categorically affirm" the validity of punitive damages. Justice Kennedy invited future challenges based upon the jury's "passion" or prejudice (including punitive damages awards disproportionate to the actual damages) and he criticized the majority opinion for the "tension in its analysis [which] now must be resolved in some later case."

As the Court contemplates future action with respect to punitive damages, it should weigh the potential cost of its contemplated action against the potential gain. The potential cost is that punitive damages might develop into complex constitutional law in the same manner as defamation law, with virtually no one ultimately satisfied with the result. The potential gain is that the Court could relieve corporate America of some of the sting of the high liability costs arguably caused by the self-interest of states in large awards for their citizens against large out-of-state corporate defendants. The relevant questions are: Are we suffering an economic crisis caused in part by the impact of punitive damages on industry? Is the country at a dramatic point in history, like the civil rights movement in the early sixties, that calls for bold judicial action?

The common law develops slowly and undramatically, corrected on occasion by legislation. Many state legislatures are currently undertaking such correction because tort law is at the center of the "liability crisis" that has attracted national attention. Numerous recent state statutes have enacted malpractice reform or generic tort reform, generally with respect to tort procedures and remedies.

This process of common-law innovation and change is an excellent example of the states as social "laboratories." Justice Brandeis's famous observation was that "one of the happy incidents of the federal system" is that the states serve as laboratories that can "try novel social and economic experiments without risk to the rest of the country."

16. In addition to Justice Marshall, the Justices who joined Justice Blackmun's majority opinion were Chief Justice Rehnquist and Justices Stevens and White. Neither Chief Justice Rehnquist nor Justice Stevens explained the apparent inconsistency between their observations in dicta in previous cases and their vote in Pacific Mutual.
17. 111 S. Ct. at 1054 (Scalia, J., concurring).
18. Id. at 1055 (Kennedy, J., concurring).
19. The silence of Chief Justice Rehnquist and Justice Stevens as to the basis of their vote in Pacific Mutual, in light of their earlier comments that would appear inconsistent with their vote, perhaps suggests that these two Justices have indeed engaged in this cost-benefit analysis and concluded that the Court should not intervene at this time.
Historically the Court has not interfered with this process, with the major exception of *New York Times v. Sullivan* and its progeny. The argument here is that the Court should not make further exceptions unless compelled by exceptional circumstances. If important national interests are unprotected by the fifty social laboratories, Congress can act. If Congress will not act for reasons unrelated to the genuineness of the threat to the national interest, and if the Court is convinced that there is an imminent threat to an important national interest, then—and only then—should it consider intervention in state tort law. Moreover, the form of that intervention should be carefully tailored to avoid elastic standards that will create a complex federal constitutional law in the area.

Not relevant to this argument is whether the Court has erred by creating complex minimum requirements for many other areas of state law. Others may indeed argue for a general increase in states’ rights, especially with a more conservative Court, but that is not the thrust of this argument. Rather, this article urges that the Court’s longstanding general practice of deference to the state common-law torts has been wise and that the defamation experience underscores that wisdom. It would be even wiser to articulate the general practice as an explicit principle, to guide future Justices away from the temptation to redesign common-law doctrines in their own image.

**II. Supreme Court Temptations: An Illustration**

A hypothetical example is useful to illustrate the issues presented when the Supreme Court considers constitutional constraints on state tort law. Consider *Baker v. Abel*, a tort case arising out of an incident where Abel, an outspoken and unpopular lawyer, puts his hand on the shoulder of Baker, a prominent citizen and lawyer in the community. Abel is an active member of a national environmentalist group that endorses radical strategies. Many local citizens hate Abel because he has fought the major employer, a paper mill, with many political and legal maneuvers. Baker represents the paper mill and also has a substantial financial interest in it. Abel and his group have been attacking many other employers throughout this hypothetical state, where the people are generally unsympathetic to environmental extremists like Abel.

The incident that prompts the lawsuit occurs outside the courtroom where these two lawyers are trying a case unrelated to the present claim. Abel, posturing for the press, puts his hand on Baker’s shoulder and says, “My friend, you are a formidable opponent, but I’m going to knock the socks off you on this one.” Although this passing incident was only

24. See infra notes 31-59 and accompanying text.
25. See infra notes 60-87 and accompanying text.
26. See infra notes 88-92 and accompanying text.
mildly annoying to Baker, he seizes upon this public touching as an opportunity to sue Abel and intimidate him into ceasing his radical activities.

Baker sues Abel for assault and battery. The suit alleges that Baker feared for his immediate safety when Abel touched him “aggressively” and spoke of “combat.” The case gets substantial publicity, with press coverage that includes the names and addresses of the jurors. All of Abel’s procedural objections and motions fail, and the jury awards substantial compensatory and punitive damages.

Assume from these facts that most objective observers would find that the jury acted with passion and prejudice, but the state appellate courts do not reverse the judgment. Further assume that under the common law of most states these facts alone are insufficient to establish an assault and battery. Indeed, the precedents in this state itself would suggest that these facts alone are insufficient for assault and battery, but there is no reversal in the state courts. If this case becomes a national cause célèbre, social commentators and future historians will likely attribute ill motives to all the parties involved. The goal of the suit appears to be to intimidate Abel and his radical group.

Should the Supreme Court intervene? What if the Court believes that there is fundamentally no doctrinal problem with the state’s assault and battery law, but that the problem is the application of the doctrine in this particular case? If the Court believes that important rights are at stake, should the Court right a wrong which the state courts are content to let lie? If the Court feels compelled to act, what should the opinion say? Should the Court choose a procedural point or a substantive one?

Hard state cases can make bad constitutional law. When the state courts have applied sound doctrinal law improperly because of a political agenda, how in our system can this wrong be reversed? Should the Court choose the narrowest procedural point possible? Should the Court set minimum constitutional standards for assault and battery—torts with one of the best pedigrees in Anglo-American law? Should the Court reduce the damages by finding a constitutional infirmity in some amount of the award, such as the punitive component?

Alternatively, consider that a majority of the Court may believe that there are indeed doctrinal difficulties with assault and battery law in general. The majority may believe that those problems are more pronounced in other types of cases—such as in sexual harassment suits—but

27. The tactic of publicizing the names and addresses of the jurors was done during the original defamation trial in New York Times v. Sullivan. The Times protested that the publicity would put local pressure on the jurors to favor the plaintiff police commission, but the trial judge rejected the complaint. Lewis, supra note 2, at 27.

28. The use of strategic lawsuits in response to individuals’ or groups’ taking part in public concerns is not uncommon. Some researchers estimate that “every year in the United States, hundreds, perhaps thousands, of civil lawsuits are filed that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.” Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation, 35 Soc. Probs. 506, 506 (1988).
this majority may believe that this case also illustrates the problem of giving the states unfettered discretion to award assault and battery damages. If the Court finds such doctrinal infirmity, is it appropriate for the Court to act? Should it matter if this one state in the hypothetical case has developed law that is inconsistent with other states? If so, then should the Court restrict itself to a narrow ruling?

When the Court decides to set minimum constitutional standards for state doctrine, it is supplanting the common-law process with its own judgment. Once that process is started, it cannot be arrested easily because the Court then must provide guidance on how to apply the constitutional requirements.

Consider the consequences if the Court were to hold in this hypothetical case, for example, that words possible to construe as "fighting words" cannot support an assault claim unless there is a "clear and present danger." The Court then would need to clarify that elastic standard in subsequent opinions. Most certainly it would distinguish between harmful batteries and merely offensive ones. The Court might further decide to distinguish between public circumstances and private circumstances leading to the assault and offensive battery, or perhaps to distinguish between contexts in which the speech and gesture related to matters of public concern rather than purely private concerns. Once the Court finds that the Constitution constrains the ability of states to allow civil tort awards in some area, further clarification and elaboration will be necessary. The greatest amount of such clarification and elaboration will be necessary if the Court substitutes its own standard to replace that of the common law, rather than if it absolutely bars the common-law claim.

III. THE DEFAMATION EXPERIENCE

In 1964, the Court for the first time applied the First Amendment to state libel law in New York Times v. Sullivan. The case was a very sympathetic appeal from the New York Times and four civil rights clergymen, against whom an Alabama jury assessed half a million dollars. The Montgomery chief of police, Sullivan, sued the newspaper and the clergymen because of an advertisement that appeared in the New York Times appealing for funds for the civil rights movement. The civil rights movement at that time in history was directed toward ending ra-

29. Compare the use of this standard for criminal convictions based upon speech. See Abrams v. United States, 250 U.S. 616, 626 (1919) (Holmes, J., dissenting); Schneck v. United States, 249 U.S. 47 (1919). The standard proved to be highly elastic. See Dennis v. United States, 341 U.S. 494 (1951) (courts must evaluate whether the gravity of the evil, discounted by its probability, justified the invasion of free speech so as to avoid the danger).

30. Compare the use of this distinction in libel. See infra text accompanying notes 53-57.


32. This $500,000 damage award in 1964 is the approximate equivalent of a $2,225,000 award in 1991.

33. 376 U.S. at 256-59.
cial segregation. Only a decade before, the Supreme Court had held that racial segregation in the public schools was a violation of equal protection, but progress in implementing this change was very slow. Racial segregation otherwise remained entirely legal at that time; Congress did not pass the Civil Rights Act prohibiting racial discrimination in public accommodations until 1964, the same year that this case reached the Supreme Court.

The advertisement said: "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." The advertisement said that the students were encountering a "wave of terror" to stop them, including several specific incidents.

Sullivan complained in particular about the recitation of incidents in Montgomery, Alabama, where he was the police commissioner. The advertisement said that after one peaceful demonstration "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus." The advertisement further said that Dr. Martin Luther King, Jr. had been arrested seven times. These descriptions, and several others, were inaccurate in some particulars. For example, the police were simply deployed near the campus and did not "ring" it. Moreover, Dr. King had been arrested only four times rather than seven.

The advertisement did not mention Sullivan by name, nor did it refer to him in some identifiable way, such as referring to the "police chief." The Alabama jury nonetheless was permitted to find that these allegations were "of and concerning" the plaintiff.

*New York Times v. Sullivan* arose at a time of great activism by the Court and of great national turmoil concerning the civil rights movement. The Court wanted to reverse this verdict that the Alabama state courts let stand. The Justices could have done so with only a limited ruling on the colloquium issue, i.e., whether the advertisement was "of or concerning" the plaintiff. Indeed, the Court held as one of its alternative holdings that an impersonal attack on governmental operations constitutionally could not support libel actions by the officials who ran the government. If the Court had limited its ruling to this narrow ground for reversal, the opinion may have accomplished its social objective in this particular case, but otherwise would have been a legal obscurity.

Instead of narrowing its holding so that it would not have had much effect on future cases, the Court embarked on a different constitutional

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35. 376 U.S. at 256.
36. *Id.*
37. *Id.* at 257.
38. *Id.* at 259.
39. *Id.* at 263.
40. *Id.* at 292.
course. It held that there was a constitutionally required privilege to speak with either truth or falsity about public officials in their official capacity unless the plaintiff can establish that the defendant acted with "actual malice." The facts in this case were insufficient to meet that high constitutional standard.

The Justices did not completely agree about this case, although all nine Justices agreed that the judgment of the Alabama court should be reversed. Three Justices concurred in two separate opinions that urged the Court to adopt an absolute privilege to speak truth or falsity about public officials in their official capacity. Rather than merely delimiting such defamation actions with the "actual malice" standard, they would have prohibited them altogether.

Justice Black, a native of Alabama, explained in his concurring opinion that one of the most "acute and highly emotional issues" in the country at the time was the opposition by many—including some state officials—to the desegregation of schools and public places. Montgomery, he noted, was "one of the localities in which widespread hostility to desegregation" had been manifested. The hostility had been extended to local citizens who supported integration and to "outside agitators" like the New York Times. Justice Black further noted that there were then pending eleven more libel suits in Alabama against the New York Times, with potential liability totaling more than five and one-half million dollars. Five other suits against CBS sought almost two million dollars. "Moreover," he added,

this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

He concluded that the First Amendment requires no less than an absolute bar to public officials for defamation suits concerning their official conduct.

Justice Brennan's opinion for the majority also noted the threat of multiple and large judgments against the press. He noted that the "pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms can-

41. Id. at 279-80.
42. Justices Black and Goldberg each wrote separate opinions, each of which Justice Douglas joined.
43. 376 U.S. at 294 (Black, J., concurring).
44. Id.
45. See discussion of hypothetical case involving environmental radical supra text accompanying notes 27-30.
46. 376 U.S. at 295 (Black, J., concurring).
47. Id.
48. Id. at 296.
not survive.” 49 It is not sufficient, he continued, to allow truth as a defense because, when the burden of truth is on the defendant, the result will be self-censorship; both true and false speech will be deterred. The solution was to require the plaintiff to prove the falsity of the statement and that the defendant acted with “actual malice.” 50 The Court explained that “actual malice” meant acting with “knowledge that it was false or with reckless disregard of whether it was false or not.” 51

Having charted a broad new course of constitutional law, the Court needed to provide further guidance on its application. As Justice Goldberg noted in his concurring opinion, the Court “must recognize that we are writing upon a clean slate.” 52 In the quarter century since then, the federal courts have been writing furiously on this “clean slate,” which by now is very dirty indeed.

Following its rule in New York Times v. Sullivan that defamation of public officials must be committed with “actual malice,” the Court considered whether the same standard applied to public figures who were not officials. 53 The Court found it necessary to give consideration to private figures, 54 to public issues, 55 to evidence relevant to the “actual malice” standard, 56 to remedial standards, 57 and so forth. Each opinion added more layers of complexity and uncertainty to the law of defamation.

The struggle to create a coherent body of law in this area has frustrated many, 58 including ultimately Justice White. This Justice had been among the original majority in New York Times v. Sullivan and he had joined most of the subsequent majority opinions expanding and applying the new law. In 1985, however, he reconsidered this history. When the Court added to its already unwieldy scheme another new layer of analysis—distinguishing between public and private issues when the plaintiff is a private figure—Justice White looked at the past and regretted it. He observed in his separate opinion in that case, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., that the Court had “engaged in severe overkill.” 59

Under current defamation law, each state has a choice of how to apply the constitutional requirements to its own law, but there is little opportunity for common-law growth or innovation. The fifty laborato-

49. Id. at 278 (majority).
50. Id. at 283.
51. Id. at 279-80.
52. Id. at 299 (Goldberg, J., concurring).
57. Gertz, 418 U.S. 323 (standards for compensatory and punitive damages).
58. See supra note 3.
59. 472 U.S. at 771 (White, J., concurring).
ries are gone; there is just the United States Supreme Court groping for a rational scheme.

IV. CONSTITUTIONALIZING STATE COMMON LAW

The Court has many tools from the Bill of Rights that it could use to constitutionalize state common-law torts if it wished. The First Amendment alone lends itself to scrutinizing far more law than just defamation. The Court has already relied on that Amendment to restrict the states' ability to award damages for common-law invasions of privacy by the press and for intentional infliction of emotional distress when the press was involved. These restrictions on suing the press were found necessary to maintain consistency with the defamation principles that the Court had devised. There may be more developments in these areas.

There are many more First Amendment possibilities. As in the previous hypothetical example, actions for assault could be restricted to provide protection in some instances for the speech component usually involved in such actions. The First Amendment also could affect state common-law rules governing the availability of attorney's fees to prevailing parties when the litigation was brought in bad faith. The First Amendment might even be relevant to failures to speak, such as rescission for nondisclosure of a material fact.

The Second Amendment right to bear arms could be implicated in some state tort cases. For example, any tort action involving the negligent maintenance, use, or storage of a firearm might raise constitutional questions. Perhaps that same Amendment might be applied to tort actions involving strict liability for the use or storage of explosives.

Other portions of the Bill of Rights could constitutionalize state tort law. The famous “penumbra” could affect the availability of some tort actions, such as those for wrongful birth or wrongful life. The Seventh Amendment right to a trial by jury where the amount in controversy exceeds twenty dollars could be applied to the states. This Amendment

63. See DOBBS, supra note 4, at 199.
64. An amusing recent case on the subject of equitable rescission for nondisclosure of a material fact about real estate is Stamovsky v. Ackley & Ellis Realty, 572 N.Y.S.2d 672 (App. Div. 1991). In this case a seller of a Victorian home failed to disclose to an out-of-town buyer that the seller had publicly declared the house to be haunted. Id. at 674. The court refused to apply the doctrine of caveat emptor that governs damage actions for misrepresentation in New York. Rescission was appropriate because the seller had created the local publicity about the ghost. Id. at 677.
68. The Seventh Amendment to the Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. This Amendment has never been applied to the states.
could be used very creatively to affect tort rights and remedies. For example, the Court could devise complex rules concerning when states could make judicial or legislative changes in common-law rules or actions without running afoul of the right to a jury trial. The Court has already hinted that it may impose limitations on the modification of common-law remedies as a matter of due process.

The purpose here is not to dwell on the potential for creative uses of the Constitution; to the contrary, the purpose is to argue that constitutionalizing state tort law is unwise. Fifty jurisdictions decide independently—but with remarkable overall uniformity—how to resolve the disputes of their citizens. Doctrines develop slowly, and that development rarely is governed by passion or prejudice. Although individual applications of the doctrine might be tainted, as in the hypothetical case of Baker v. Abel, the doctrines themselves are the product of a sound system.

Doctrinal development can have dramatic moments, of course. Sometimes there is a path-breaking decision in one state, such as the 1984 New Jersey decision to impose social host liability for auto accidents caused by drunken guests. Dramatic decisions then either capture the attention of other jurisdictions, or they virtually disappear even in their own jurisdictions. Disappearance happens through judicial reconsideration or through state legislative enactments in response to those decisions.

Why should the Supreme Court ever interfere with such a process? Common-law doctrinal mistakes correct themselves over time without unduly trampling on the rights of citizens. When the Court decided in

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69. Compare Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946), where the Illinois Supreme Court held under the state constitution that the legislature could not eliminate an existing common-law right. The legislature had passed a "Heart Balm" statute eliminating several common-law torts, including alienation of affections. Id. at 298, 68 N.E.2d at 465. The court held that the statute was beyond the power of the legislature because of a state constitutional provision that every person injured in person, property, or reputation ought to find a certain remedy in the law. Id. at 299-300, 68 N.E.2d at 466.

Although this state constitutional provision is not the same as the right to a jury trial, it could serve as an inspiration. The Supreme Court has already held that the Seventh Amendment right to a jury trial, as it is applied in the federal courts, applies to newly created statutory rights. Curtis v. Loether, 415 U.S. 189 (1974). If the new right, such as the civil right to nondiscriminatory housing, is enforced by a remedy that was historically a "legal" one at the time the Seventh Amendment was written, then there is a right to a jury trial. Id. at 195.

70. In Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), the Court upheld provisions of the Price-Anderson Act, 42 U.S.C. § 2210 (1988), which places a dollar limit on the possible liability of a company from a nuclear power accident. The Court reserved the question whether due process requires that a statutory scheme duplicate the recovery at common law or provide a substitute—a reasonable quid pro quo—for the common-law remedies. Duke Power, 438 U.S. at 88.

71. See supra text accompanying notes 27-30.


73. Consider, for example, the gradual acceptance of comparative negligence by many jurisdictions that formerly had the rule that contributory negligence completely barred a plaintiff's recovery. See, e.g., Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

74. See, e.g., N.J. REV. STAT. § 2A:15-5.6 to .7 (Supp. 1991) (effectively overruling Gwinnell).
New York Times v. Sullivan to constitutionalize defamation law, it declared that the common-law doctrine itself was tainted. It was a monumental step that the Court should not readily undertake again.

If the Supreme Court does ultimately decide that it is absolutely necessary to constitutionalize punitive damages or any other aspect of tort law, the next question is how to implement such reform. The defamation experience suggests two choices: (1) delimiting the rule, as the Supreme Court did in New York Times v. Sullivan, or (2) absolutely barring the offending doctrine, as the three concurring Justices urged in that case. The disadvantage of the first choice is that it necessitates excessive Court involvement in developing future doctrine. The disadvantage of the second choice is that it may be too drastic a solution to the harm caused by the unconstitutional common-law doctrine.

Justice O'Connor touched upon this question in her dissenting opinion in the punitive damages case last term, Pacific Mutual Life Insurance Co. v. Haslip. She suggested there that the “would require Alabama to adopt some method, either through its legislature or its courts, to constrain the discretion of juries in deciding whether or not to impose punitive damages and in fixing the amount of such awards.” She questioned why more of her colleagues did not join her dissent and speculated that they feared that “such a ruling would force us to evaluate the constitutionality of every State’s punitive damages scheme.” She expressed confidence, however, that “if we announce what the Constitution requires and allow the States sufficient flexibility to respond, the constitutional problems will be resolved in time without any undue burden on the federal courts.”

The defamation experience is inconsistent with Justice O'Connor’s optimism about the ease of accomplishing punitive damages reform. Her confidence is based on the belief that the Court can leave the solution to the states by requiring them to adopt, legislatively or by common law, some type of constraints without any guidance whatsoever from the Court. She thought that such guidance would not be necessary: “As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem.”

If the Court does not set minimum standards, however, how will the lower federal courts know if a state has selected enough of the efficient safeguards to pass constitutional muster? Apparently anticipating this

75. 376 U.S. 254 (1964).
76. See supra text accompanying notes 4-18.
77. See supra text accompanying notes 41, 49-57.
78. See supra text accompanying notes 42-48.
80. Id. at 1067 (O'Connor, J., dissenting).
81. Id.
82. Id.
83. Id.
question, Justice O'Connor said that all that is necessary is to “announce what the Constitution requires” so that the states can respond. 84 This second thought apparently contemplates that the Court would indeed set minimum standards, as the Court has done in defamation law. Once such standards are set, however, they must be clarified and applied to an infinite variety of situations, as we learned when the Court constitutionalized defamation law. How, then, could she confidently assert that the federal courts would not be burdened?

There are further difficulties with Justice O'Connor's optimistic appraisal of how the Court could implement punitive damages reforms. She said that the Court should “require” the state to “adopt” constraints, either by statute or by common law. 85 Certainly she must not be suggesting that federal courts venture into uncharted constitutional law by ordering state legislatures to pass punitive damages reforms. Presumably she had in mind an order that forbids the state courts from awarding punitive damages until such time as the state, by statute or common law, enacts reforms. In other words, she must have been contemplating an order that would absolutely bar punitive damages awards until such time as the federal courts were satisfied that the state had enacted sufficient reforms.

The problem is that the lower federal courts would not know the standard by which to measure the sufficiency of the state's reforms until the Supreme Court has provided some kind of guidance. Once the Court begins to provide guidance, as with the defamation law in the post-Sullivan cases, 86 it is the Court that is devising the law rather than the states.

Justice O'Connor indicated as early as 1983 that she did not endorse a “wholesale condemnation” of punitive damages. 87 Following the dichotomy of choice that arose from the New York Times v. Sullivan experience—delimiting or barring the doctrine—she would appear to prefer to delimit punitive damages rather than to bar absolutely their award. In the absence of congressional, state legislative, or state common-law reform, however, the only option for delimiting punitive damages rests ultimately with the Court, and those other agents cannot realistically be required to take on the task themselves as Justice O'Connor would prefer. If the Court perceives that it must act—that there is truly a national emergency to which it must boldly respond—then an outright ban on punitive damages would appear preferable to the nightmare of constitutionalizing it with complex federal doctrine.

V. CONCLUSION

Chief Justice Marshall, in his 1819 opinion McCulloch v. Maryland,

84. Id. at 1067.
85. Id.
86. See supra notes 53-57 and accompanying text.
spoke of the Constitution as an instrument "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." The Court has made such adaptations as it has seen necessary, including its decision in *New York Times v. Sullivan* to constitutionalize state defamation law. That decision responded to the crisis of its time—the apparent effort by the plaintiff and his supporters to intimidate civil rights leaders and to keep the press from covering the movement.

The "constitutionalization" of defamation has taught lessons relevant to the Court's decisions whether to provide minimum constitutional standards for other areas of common law, such as punitive damages. The Court should not lightly replace the common-law process of growth and change with federal constitutional requirements. States can manage tort law with minimal supervision and should be allowed to do so.

If the Court finds that the states cannot manage some aspect of tort law to the extent that a national crisis requires the Court to act, then an outright ban would be preferable to the development of complex federal standards. If the Court undertakes an outright ban, its opinion should be definitive and sweeping in order to foreclose hope of reforming the doctrine to meet constitutional standards. If state courts and legislatures try to resurrect the doctrine in a different form, the Court should resist the temptation to draw fine lines concerning the application of the ban.

An outright ban on a state tort doctrine—not an invitation to experiment with reform—is a drastic step. So conceived, the Court is unlikely to take such a step except in extreme circumstances. A ban would interfere with legitimate state interests as well as illegitimate ones, and states may not be able to adjust other doctrines to accommodate the legitimate interests adversely affected by the outright ban. Such a result, however, is preferable to the alternative—complex constitutionalized state tort law.

While the Supreme Court decides whether destiny calls it to solve the industrial ills caused by punitive damages, the states are continuing to act as fifty "social laboratories." Several state legislatures, for example, have acted to restrict punitive damages. This process might have gained more momentum if the Court had not hinted so strongly that it was predisposed to find constitutional infirmities in punitive damages. Now that the Court has temporarily resisted that temptation, perhaps the state reform process will continue while we await future developments from the new Court.

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89. 376 U.S. 254 (1964).
91. See supra text accompanying notes 4-9.
92. See supra text accompanying notes 10-18.