

# POSITIVE POLITICAL THEORY AND PUNITIVE DAMAGES REFORM: CONGRESSIONAL REACTION TO *BMW OF NORTH AMERICA V. GORE*

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## INTRODUCTION

Federal punitive damages legislation seems more certain than death and taxes. Regardless of data indicating otherwise,<sup>1</sup> the public perception is that punitive damages are escalating uncontrollably.<sup>2</sup> The views of legislators and lobbyists, however, are not so uniform.<sup>3</sup> The battle waged over punitive damages has pitted big business against consumer advocates,<sup>4</sup> and Republicans against Democrats.<sup>5</sup>

Reforming and restricting punitive damages is a high priority lobbying issue for much of the corporate community, with the reform effort largely funded by big contributions from national companies.<sup>6</sup> The goal of such reform is to protect corporate manufacturers from

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1. See generally Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 256-60 (1997) (suggesting that awarding unduly excessive punitive damages may be exception rather than rule).

2. See Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 845 (1996) [hereinafter Pace, *Tax Deductibility*] (“The public’s perception that punitive damages are ‘running wild’ and ‘skyrocketing’ has given rise to a call for national tort reform.”); Jonathan Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753, 755 (1993) (“Regardless of the actual size of the increases [in punitive damage awards], the public seems to feel that the increases have been dramatic.”).

3. See *infra* Part II.C. for a discussion of legislators’ voting records on punitive damages legislation. See generally Salbu, *supra* note 1, at 248-49 (noting that consumer and business lobbies are at odds over punitive damages reform).

4. See Salbu, *supra* note 1, at 248-49.

5. See *infra* Part II.C. for a discussion of Republican and Democrat voting records on punitive damages legislation.

6. See Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 795 (1997) (stating that large firms spend large sums of money to lobby for punitive damages restrictions).

excessive punitive damages awards—ones that wound corporate America by raising production costs and disabling the companies from competing internationally.<sup>7</sup> Supporters of reform argue that “the current [inconsistent] patchwork of state tort laws is ineffective against unjustified, excessive awards.”<sup>8</sup>

Opponents of reform point out that punitive damages, which serve to punish and deter, have existed untouched by legislation for a long time.<sup>9</sup> They claim that punitive damages awards are modest and infrequent.<sup>10</sup> Moreover, opponents argue that the issue should not be addressed at the federal level since the size of awards varies by locale.<sup>11</sup>

The Supreme Court recently entered the punitive damages conflict with its decision in *BMW of North America, Inc. v. Gore*,<sup>12</sup> striking down a punitive damages award as excessive and in violation of due process. However, even though the Court set out three guideposts,<sup>13</sup> some commentators clamor for still stronger federal reform in the form of legislation.<sup>14</sup>

The clamoring has already elicited a response from the Senate. This Note examines one particular bill born in the aftermath of *Gore*: Senate Bill 1554, the Fairness in Punitive Damage Awards Act (“Fairness Act”).<sup>15</sup> Part I begins by recounting the *Gore* decision. It goes

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7. See Pace, *Tax Deductibility*, *supra* note 2, at 869 & n.215 (“[U]ltimately[,] consumers are paying for excessive punitive damage awards, as companies will pass the burden off on the consumer in the form of higher prices for their goods and services.”); Salbu, *supra* note 1, at 252.

8. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1576 (1997) [hereinafter Pace, *Recalibrating the Scales*].

9. See Pace, *Tax Deductibility*, *supra* note 2, at 836-37; see generally Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 6-7 (1990) (tracing common law history of punitive damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998); Salbu, *supra* note 1, at 266-70.

10. See Salbu, *supra* note 1, at 256-57. See generally Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 807 (1991) (discussing data indicating that awards are generally moderate).

11. See Greene, *supra* note 10, at 807.

12. 517 U.S. 559, 585-86 (1996).

13. See *id.* at 574-75.

14. See Pace, *Recalibrating the Scales*, *supra* note 8, at 1606-07. Cf. *The Supreme Court 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 145 (1996) (“Although it is significant that the Court finally produced a definitive holding on this issue, the Court’s analysis in *Gore* provides little guidance to either legislatures or lower courts regarding the contours of the constitutional limitations on excessive punitive damages awards.”).

15. See Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. § 2(a)(9)(B) (1997). See also *Fairness in Punitive Damages Awards Act: Hearing on*

on to describe the Fairness Act and evaluate whether the bill could cure the ills that motivated its introduction. The evaluation concludes that while the bill would lower punitive damages awards, it would not decrease their arbitrariness. Part II takes a step back from the actual legislation to study the broader picture: the interplay between the Supreme Court and Congress. Testing the utility of Positive Political Theory (PPT)—a model often employed to analyze the relationship shared by the Court and Congress, Part II explores how the two bodies interacted with regard to *Gore*, and how this interaction induced the proposal of Senate Bill 1554. Although the analysis in Part II indicates that PPT is not useful for explaining this particular interaction, a different theory that builds on the premises of PPT is offered. Part III combines the insights gained in the previous sections with a discussion of public policy to suggest a path along which this bill should be redirected. This Note concludes that the legislation should better incorporate discretion as a factor in awarding punitive damages.

## I

### AN EVALUATION OF THE FAIRNESS IN PUNITIVE DAMAGE AWARDS ACT

#### A. *The Uproar in Gore*

In January 1990, Dr. Ira Gore purchased a black BMW sedan for approximately \$41,000 from a BMW dealer in Birmingham, Alabama.<sup>16</sup> After driving the car for nine months without noticing any flaws in its appearance, Dr. Gore took the car to a detailer—Slick Finish—to make the BMW look “snazzier.”<sup>17</sup> Mr. Slick, the proprietor of Slick Finish, detected evidence that the car had been repainted.<sup>18</sup> Dr. Gore, convinced that he had been duped, sued BMW for \$500,000 in compensatory and punitive damages.<sup>19</sup>

At trial, BMW admitted that the car had been repainted in accordance with their nationwide policy concerning cars that were damaged in the course of manufacture or transport.<sup>20</sup> Their policy dictated that a damaged car be repaired and sold as new, without notice to the dealer or retail customer, if the repair cost on the car was less than 3

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S. 1554 *Before the Senate Comm. on the Judiciary*, 105th Cong. 2-3 (1998) (statement of Sen. Orrin G. Hatch) [hereinafter Statement of Sen. Orrin G. Hatch].

16. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996).

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.* at 563-64.

percent of the suggested retail price.<sup>21</sup> The damage to the car that Dr. Gore bought totaled about \$600, or 1.5 percent of the retail price.<sup>22</sup>

Dr. Gore, however, claimed that the damage was more than simply the cost of repair.<sup>23</sup> An expert witness testified that the car had actually lost \$4,000 in value.<sup>24</sup> The jury believed the expert witness and awarded Dr. Gore \$4,000 in compensatory damages—along with \$4 million in punitive damages for fraud.<sup>25</sup>

BMW quickly changed its policy to provide “full disclosure of all repairs, no matter how minor,” and “filed a post-trial motion to set aside the punitive damages award.”<sup>26</sup> In its motion, BMW included a survey of state fraud laws; the most stringent law required disclosure for repairs totaling over 3 percent of the suggested retail price.<sup>27</sup> The trial judge denied BMW’s motion, “holding . . . that the award was not excessive.”<sup>28</sup> On appeal, the Alabama Supreme Court, likewise, declined to find that the award was excessive.<sup>29</sup> However, the Alabama Supreme Court did finally lower the award to \$2 million after concluding that the amount of the award had been “improperly computed.”<sup>30</sup> BMW appealed this reduced award to the United States Supreme Court.<sup>31</sup>

The Supreme Court ruled that the \$2 million award violated due process.<sup>32</sup> The Court found that BMW did not receive fair notice of the severity of the penalty that might be imposed for its policy.<sup>33</sup> In determining that notice was inadequate, the Court considered “[t]hree guideposts[:] . . . the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”<sup>34</sup>

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21. *See id.* at 564.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 565.

26. *Id.* at 565-66.

27. *See id.* at 565.

28. *Id.* at 566.

29. *See id.*

30. *See id.* at 567.

31. *See id.* at 562-63.

32. *See id.* at 574-75.

33. *See id.*

34. *Id.*

### B. *The Fairness Act*

Some commentators believed that the *Gore* opinion, although serving to limit punitive awards, still left too much discretion to the jury.<sup>35</sup> So, on November 13, 1997, less than one year after the *Gore* decision,<sup>36</sup> Senators Orrin Hatch and Joseph Lieberman introduced the Fairness Act.<sup>37</sup>

The crux of Senate Bill 1554 limits the possible award of punitive damages in civil financial injury cases to the greater of three times the awarded economic damages or \$250,000.<sup>38</sup> Financial injury is characterized as harm that does not result in: (1) death, (2) serious and permanent physical scarring or disfigurement, (3) loss of limb or organ, or (4) serious and permanent physical impairment of an important bodily function.<sup>39</sup>

The bill possesses several caveats. If the defendant is a “shallow pocket”—an individual whose net worth is less than \$500,000 or an organization with fewer than twenty-five full-time employees—the applicable punitive damages cap is the lesser of \$250,000 or three times the awarded economic damages.<sup>40</sup> If the defendant is a charity, the plaintiff must also meet a raised burden of proof: “clear and convincing evidence that the harm . . . [resulted from] an intentionally tortious act . . . .”<sup>41</sup> However, if the defendant was inebriated or under the influence of unlawful drugs at the time the harm occurred, or if the alleged activity was a hate crime, an act of terrorism, a violent crime, or a felony sexual offense, the defendant, regardless of net worth, is not eligible for the financial cap provided by this bill.<sup>42</sup>

The Fairness Act aims to curb excessive, unpredictable, and arbitrary punitive damages by defining a relationship between punitive

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35. See *Fairness in Punitive Damages Award Act: Hearing on S. 1554 Before the Senate Comm. on the Judiciary*, 105th Cong. 35 (1998) (statement of George L. Priest, John M. Olin Professor of Law and Economics, Yale Law School) [hereinafter Statement of George L. Priest].

36. *Gore* was decided on May 20, 1996. See *Gore*, 517 U.S. at 559.

37. See Statement of Sen. Orrin G. Hatch, *supra* note 15, at 1.

38. See Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. §§ 4, 5 (1997). The Act would not preempt any state legislation which further limits punitive damages awards, see S. 1554 § 6(3); however, a ceiling is established for any state legislation or common law which allows larger punitive awards. See *id.* § 5(a).

39. See S. 1554 § 4(a)(1). Note that this definition of financial injury is different from the one mentioned in Senate Bill 1554 § 2(a)(1)(A). This discrepancy signifies that persons alleging physical injury, if not serious and permanent, are still subject to the bill's punitive damages cap.

40. See *id.* § 5(a)(2)(A).

41. *Id.* § 4(a)(1).

42. See *id.* § 4(b)(1).

and compensatory damages.<sup>43</sup> Another issue related to arbitrariness that Senate Bill 1554 intends to address is the different treatment of in- and out-of-state defendants by juries.<sup>44</sup> Higher punitive damages are typically assessed against out-of-state defendants,<sup>45</sup> especially if the defendant is a big corporation.<sup>46</sup> For this reason, the Senators felt a national remedy was appropriate.<sup>47</sup>

The bill also endeavors to combat the “serious and growing problem” posed by punitive damages awards in financial injury cases—cases in which the plaintiff alleges financial injuries only, not injuries to either person or property.<sup>48</sup> Supporters of the legislation note the injustice of awarding punitive damages in cases without tangible detriment and involving ordinary business transactions that were entered into freely.<sup>49</sup> Furthermore, because financial and insurance institutions are already regulated, the safeguard of punitive damages is superfluous.<sup>50</sup> Hence, the bill focuses on insurance and contract-related litigation.<sup>51</sup>

Finally, the Senators allegedly crafted Senate Bill 1554 to deliver a blow to frivolous litigation—litigation that resembles a “crap shoot” because the plaintiff files suit against a “deep-pocket” defendant, hoping to get a windfall with the help of a jury biased against big corporations.<sup>52</sup> At the same time, the bill was devised to be fair to both the

43. See *id.* §§ 2(a)(3)-(5), (9). See also Statement of Sen. Orrin G. Hatch, *supra* note 15, at 1. See generally *Fairness in Punitive Damages Awards Act: Hearing on S. 1554 Before the Senate Comm. on the Judiciary*, 105th Cong. 30 (1998) (statement of Timothy A. Lambirth, Partner, Ivanjack & Lambirth) [hereinafter Statement of Timothy A. Lambirth]; Statement of George L. Priest, *supra* note 35, at 37 (“Any effort made to limit [the] unfortunate effects [of excessive punitive damages] deserves serious support.”). Some critics of the current status of punitive damages point out that an unworkable appeals process hampers any possible correction of excessive or arbitrary awards, see *Fairness in Punitive Damages Awards Act: Hearing on S. 1554 Before the Senate Comm. on the Judiciary*, 105th Cong. 19 (1998) (statement of Mark E. Dapier, General Counsel, Mercury Finance Co.) [hereinafter Statement of Mark E. Dapier]. However, there is no evidence to suggest that Senate Bill 1554 was intended to improve the present status by establishing a better appellate process.

44. See Statement of George L. Priest, *supra* note 35, at 37; Statement of Mark E. Dapier, *supra* note 43, at 17.

45. See Statement of George L. Priest, *supra* note 35, at 37; Statement of Mark E. Dapier, *supra* note 43, at 19.

46. See Statement of Timothy A. Lambirth, *supra* note 43, at 29-30.

47. See generally S. 1554 § 2(a)(6) (“[I]ndividual State legislatures can create only a partial remedy . . . because each State lacks the power to control the imposition of punitive damages in other States[.]”).

48. See S. 1554 § 2(a)(1).

49. See Statement of Mark E. Dapier, *supra* note 43, at 17.

50. See *id.* at 18.

51. See Statement of Sen. Orrin G. Hatch, *supra* note 15, at 1.

52. See *id.* at 2; Statement of Mark E. Dapier, *supra* note 43, at 17.

plaintiff and the defendant,<sup>53</sup> recognizing that punitive damages, when deployed as leverage, may lead to efficient dispute resolution.<sup>54</sup>

### C. *Measuring the Effectiveness of Senate Bill 1554*

On the whole, the Fairness Act reasonably addresses the criticism of punitive damages. The cap imposes a ceiling on awards so that they do not become excessive, while the clear formula appears to eliminate the arbitrary aspect of punitive damages awards. Furthermore, by covering both in- and out-of-state defendants, the bill ensures equal treatment. The Fairness Act is limited to financial injury cases and does not meddle in the other realms of tort law. Finally, the cap effectively decreases the incentives of plaintiffs, and plaintiffs' lawyers, to bring frivolous claims.

Despite those positive aspects, the formula presented in the Fairness Act is not necessarily the most functional tool in the area of punitive damages reform.<sup>55</sup> In fact, punitive damages caps have been thoroughly denounced, even by those in favor of punitive damages reform.<sup>56</sup> Caps, whether in the form of an absolute dollar figure or a ratio to compensatory damages, severely impair the punishment and deterrent purposes of punitive damages.<sup>57</sup> The reprehensibility of the defendant's conduct, to which the punishment should be proportional, is ignored by statutory caps.<sup>58</sup> In particular, ratio-based caps essentially leave unharmed a defendant whose egregious conduct, although having the potential to cause grave economic damage, fortuitously only caused slight damage.<sup>59</sup>

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53. See S. 1554 § 2(a)(9)(A) (explaining that one goal of Fairness Act is fairness to plaintiffs and defendants).

54. See *Fairness in Punitive Damages Awards Act: Hearing on S. 1554 Before the Senate Comm. on the Judiciary*, 105th Cong. 31 (1998) (statement of Peter D. Zeughhauser, Principal, Clientfocus) [hereinafter Statement of Peter D. Zeughhauser].

55. See generally *BMW of N. Am., Inc. v. Gore*, 701 So.2d 507, 521, 523 (Ala. 1997) (Houston, J., concurring) ("Both the Alabama Legislature and Congress have established treble damages as the most common punitive standard. . . . However, other considerations persuade me that a \$12,000 punitive damages award—i.e., an amount three times the compensatory damages award—would not suffice in this case.").

56. See, e.g., Pace, *Recalibrating the Scales*, *supra* note 8, at 1620-32; Polinsky & Shavell, *supra* note 9, at 900; *Developments in the Law—Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1533-34 (1997) [hereinafter *Jury Determination*]; Kagan, *supra* note 2, at 780-81.

57. See Polinsky & Shavell, *supra* note 9, at 900; *Jury Determination*, *supra* note 56, at 1533-34; Kagan, *supra* note 2, at 780-81.

58. See Kagan, *supra* note 2, at 780-81.

59. See Pace, *Recalibrating the Scales*, *supra* note 8, at 1627; *Jury Determination*, *supra* note 56, at 1533-34. Professor Pace also argues that, because compensatory damages are often calculated in terms of lost wages, ratio-based caps discriminate

The cap prescribed by Senate Bill 1554 certainly provides an easy solution to the problem of excessive and arbitrary damages. Yet, the bill sacrifices “flexibility and precision in the imposition of punishment and deterrence for the sake of greater control over the size of the awards.”<sup>60</sup> The Fairness Act falters because it misunderstands the reasoning behind the drive toward reform. The problem is not that large punitive damages are awarded, but rather that they appear to be determined arbitrarily or are larger than needed for the goals of punishment and deterrence.<sup>61</sup> Disparate punitive damages awards for similarly reprehensible acts indicate either that juries do not know the relevant factors to consider in determining awards, or that juries are improperly evaluating the factors.<sup>62</sup> Thus, inconsistent punitive damages imply that the awards system is malfunctioning.<sup>63</sup> By establishing caps and limiting the range of awards, the Fairness Act does not fully remedy the punitive damages problem. Awards, though below the cap, may still be arbitrary. Thus, the Fairness Act simply covers up the problem; it eliminates the symptoms of the disease, but does not provide a cure.

## II

### POSITIVE POLITICAL THEORY ANALYSIS

#### A. *The Positive Political Theory Model*

Despite the imperfections of the Fairness Act, valuable lessons can be learned from it. Because the Fairness Act was introduced in response to the Supreme Court’s decision in *BMW of North America, Inc. v. Gore*,<sup>64</sup> the proposal of the Act provides a good case study for testing the utility of PPT in explaining the interaction between the legislature and the courts. Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit dubbed the PPT model of interaction “the theory of the core”: In effect, a court’s decision must fall within a prescribed zone of viable outcomes; any move outside of that boundary will quickly be reversed by a congressional

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against women and minorities, who typically earn less than white men. See Pace, *Recalibrating the Scales*, *supra* note 8, at 1630-32.

60. *Jury Determination*, *supra* note 56, at 1534.

61. See Kagan, *supra* note 2, at 784-85.

62. See *id.*

63. See *id.*

64. See Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. § 2(a)(9)(B) (1997); see also Statement of Sen. Orrin G. Hatch, *supra* note 15, at 2-3.

response.<sup>65</sup> Thus, the legal entity with the authority to move (a court) chooses a position within the “policy space [that is] as close to its preferred position as possible without being outside the core.”<sup>66</sup>

Positive political theorists argue that policymaking is a dynamic process, with sequential moves taking place in real time.<sup>67</sup> For example, “Congress can, and often does, react to [specific] court decisions.”<sup>68</sup> However, because federal judges are nominated and confirmed by the executive and legislative branches, respectively, typically judicial doctrine will not differ greatly from the preferences of those branches.<sup>69</sup> Furthermore, positive political theorists argue that the Supreme Court has seldom resisted incorporating popular sentiment into its judgments.<sup>70</sup> Given these two conditions, judge-made law will rarely be reshaped by congressional reaction.<sup>71</sup> Only when a court’s decision does not reflect the political realities will Congress respond with a statute that modifies the new status quo created by the judgment.<sup>72</sup>

The PPT model has several sequential steps. First, a status quo policy (Q) exists on a one-dimensional scale of all conceivable policy outcomes.<sup>73</sup> The Supreme Court, the House of Representatives, and the Senate have favored policies (C, H, S) that also appear on the

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65. See Frank H. Easterbrook, *Some Tasks in Understanding Law through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284, 285 (1992) (describing and criticizing PPT model).

66. *Id.*

67. See John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 266 (1992).

68. *Id.*

69. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1652 (1995). However, the passage of time and the finite terms of elected officials can cause divergent preferences between the branches of government. For example, the president who nominated and the senators who confirmed a judge could be replaced in elections. This could lead to a situation in which the views of the appointed judge and the other bodies differ.

70. See *id.* at 1631 (citing ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 23 (1960)).

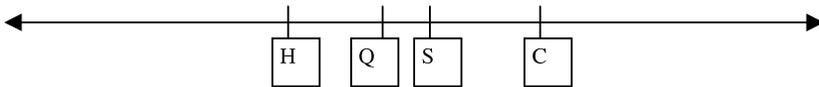
71. See *id.* at 1652.

72. See Ferejohn & Weingast, *supra* note 67, at 263. This is not meant to imply that Congress reacts only to decisions to which it objects. For example, Congress may decide to codify a judgment with which it agrees, or not to respond at all. However, the contention PPT makes is that Congress will not pass a law that changes the Court’s ruling unless the ruling is far from congressional preferences. See McNollgast, *supra* note 69, at 1633. See generally Easterbrook, *supra* note 65, at 285 (describing and criticizing PPT model).

73. See Ferejohn & Weingast, *supra* note 67, at 267. A one-dimensional scale is the traditional approach, primarily for simplicity.

scale;<sup>74</sup> none of these entities prefer the status quo (see Figure 1).<sup>75</sup> Thus, when a case comes before the Court, the Court has an opportunity to change the status quo prior to the issue reaching Congress.<sup>76</sup> The Court's opinion, altering the status quo, triggers a legislative response only if the House and the Senate can choose a position that is closer to their respective preferences than the new status quo.<sup>77</sup>

Figure 1



The PPT model relies on two assumptions to analyze the relationship between the Congress and the Court.<sup>78</sup> First, each law-making body involved has a coherent, consistent set of preferred policy outcomes and each body behaves as a single, rational actor that takes account of the preferences and strategies of the other bodies.<sup>79</sup> Second, each body acts rationally in pursuit of policies that are as close as possible to its own favored outcomes.<sup>80</sup>

### *B. Setting Up the Punitive Damages Scale and the Status Quo to Apply the Case Study*

As with the model described above, the punitive damages scale is one-dimensional. The extreme left represents complete jury discretion, without any guidance or review by the courts, the state government, or the federal government. The extreme right represents a complete bar to any common law punitive damages through amendment to the Constitution.

74. The president is not a necessary element of the model as it would not add to an understanding of the interaction between the Court and Congress. *See id.* at 270 n.14.

75. *See id.* at 264, 267-72. Ferejohn and Weingast write about two congresses, the enacting Congress and the sitting Congress. The enacting Congress creates the status quo legislation; the sitting Congress, some sessions later, reacts to the Court that interpreted the legislation and thus altered the status quo. *See id.* at 264. *See also* McNollgast, *supra* note 69, at 1633 (stating that instigating event is disagreement between preferred policies of Supreme Court and Congress).

76. *See* Ferejohn & Weingast, *supra* note 67, at 268-69; *see also* McNollgast, *supra* note 69, at 1654.

77. *See* Ferejohn & Weingast, *supra* note 67, at 268-69, 272.

78. *See* McNollgast, *supra* note 69, at 1636-37.

79. *See id.* at 1637.

80. *See id.* at 1636. *But cf.* Ferejohn & Weingast, *supra* note 67, at 268 (explaining that although judges may faithfully try to reach best decision independent of their own desires, it is unclear how judges with this motivation should act).

The status quo is somewhere between these two extremes. Punitive damages awards are reviewed by higher courts, sometimes even by the Supreme Court.<sup>81</sup> Yet, prior to *Gore*, the Supreme Court had never struck down a punitive damages award as excessive.<sup>82</sup> A myriad of state legislation regulates punitive damages,<sup>83</sup> but legislation at the federal level is virtually non-existent.<sup>84</sup> These observations do not indicate an exact location on the scale; however, they do help identify the location of the status quo relative to the positions of the Court, the Senate, and the House.

### C. *The Positions of the House and Senate*

Before *Gore* was decided, the 104th Congress passed, and the President vetoed, a sweeping tort reform bill.<sup>85</sup> This bill, the Common Sense Product Liability Legal Reform Act of 1996 ("Common Sense Act"), included several provisions that would have altered how punitive damages were awarded.<sup>86</sup> First, the legislation would have raised the burden of proof required for punitive damages to "clear and convincing evidence."<sup>87</sup> Second, the bill would have capped punitive damages at the greater of either \$250,000 or two times the compensatory damages awarded.<sup>88</sup> This bill would have preempted any state legislation that established higher caps, but not legislation that instituted lower caps.<sup>89</sup> Finally, the Common Sense Act would have allowed the court to bifurcate trial proceedings and to consider punitive damages awards separately from compensatory damages.<sup>90</sup>

The Common Sense Act received strong support from Republicans, the majority party in both the House and the Senate in the 104th

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81. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (holding that punitive award was not "grossly excessive"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (holding that assessed punitive damages did not violate due process).

82. See Peter A. Antonucci, *BMW v. Gore: What Signal Is the Supreme Court Really Sending on Punitive Damages?*, WEST'S LEGAL NEWS, Nov. 22, 1996, at 1.0, available in 1996 WL 672396.

83. See, e.g., *Gore*, 517 U.S. at 614-19 (Ginsberg, J., dissenting) (listing state laws).

84. Cf. S. REP. NO. 104-69, at 15 (1995) (noting that Congress has been attempting to pass tort reform since 1982).

85. See generally H.R. DOC. NO. 104-207 (1996) (vetoing H.R. 956).

86. See H.R. 956, 104th Cong. § 108 (1996).

87. See *id.* § 108(a).

88. See *id.* § 108(b). The bill proposes a lower amount for small businesses and individuals whose net worth is \$500,000 or less; however, a judge can increase the caps for any defendant in exceptional cases. See *id.*

89. See *id.* § 108(b)(3)(D).

90. See *id.* § 108(c).

Congress.<sup>91</sup> Of the 53 Republicans in the Senate, 47 voted in favor of the legislation.<sup>92</sup> These Republicans were joined by 12 Senate Democrats.<sup>93</sup> However, 34 of the 47 Senate Democrats voted against the bill.<sup>94</sup> There was a similar trend in the House, where 221 of the 231 Republicans, joined by 38 House Democrats, voted for the bill.<sup>95</sup> Meanwhile, the Common Sense Act was opposed by 152 of the 199 House Democrats.<sup>96</sup>

These statistics show that, aside from having control of both chambers, the Republicans were more unified in their vote than the Democrats. In the Senate, the Republicans voted for the bill at a ratio of 8 to 1, while the Democrats voted against the bill at a ratio of 3 to 1. The House Democrats were more allied than their Senate counterparts, voting “nay” at a ratio of 4 to 1. However, their House Republican opponents voted in favor of the legislation at a ratio of 44 to 1. Comparatively, the House during the 104th Congress was a more zealous advocate of the Common Sense Act than the Senate.<sup>97</sup>

The Fairness Act was introduced in the 105th Congress and, since its introduction, it has languished in the Senate Judiciary Committee.<sup>98</sup> In fact, Senate Bill 1554 remained in the Committee even after the election of the 106th Congress.<sup>99</sup>

Despite the elections, the compositions of the House and Senate have changed relatively little between the 104th and 106th Congresses. The 105th Congress consisted of 55 Republican Senators and 228 Republican Representatives.<sup>100</sup> Republicans have the same number of seats in the Senate of the 106th Congress and slightly fewer

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91. See [1995-1996 Transfer Binder] Cong. Index (CCH) at 37,256 (Mar. 21, 1996); [1995-1996 Transfer Binder] Cong. Index (CCH) at 37,260 (Apr. 15, 1996). See also Note, “*Common Sense*” Legislation: The Birth of Neo-Classical Tort Reform, 109 HARV. L. REV. 1765, 1769 (1996).

92. See [1995-1996 Transfer Binder] Cong. Index (CCH) at 37,256.

93. See *id.*

94. See *id.*

95. See *id.* at 37,260.

96. See *id.*

97. Cf. Note, *supra* note 91, at 1765, 1769 (noting that legal reform was critical component of House Republicans’ 1994 platform and reform bills were passed quickly in House).

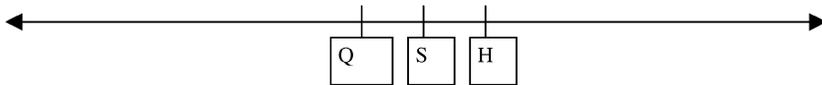
98. See *Bill Summary & Status for the 105th Congress*, LIBRARY OF CONGRESS (visited Nov. 15, 1999) <<http://thomas.loc.gov>>.

99. See *id.*; see also *Senate Approves Bill To Limit Awards In Faulty-Product Suits*, ST. LOUIS POST-DISPATCH, Mar. 22, 1996, at 6A (suggesting that President Clinton’s strong ties to litigation lobby would cause him to veto any bill that curbs awards).

100. See [1997-1998 Transfer Binder] Cong. Index (CCH) at 10,101, 24,151 (1998).

seats, 223, in the House.<sup>101</sup> Thus, the percentage of Republicans in the Senate has increased marginally between the 104th and 106th Congresses, from 53 percent to 55 percent, while the percentage in the House has decreased from 54 percent to 51 percent. These numbers illustrate that the preferences of the 105th Congress, which proposed the Fairness Act, and the 106th Congress, which will likely vote on the Fairness Act, are essentially identical to the preferences of the 104th Congress. Therefore, in PPT terms, the Republican gains in the Senate elections since the 104th Congress and the losses in the House, perhaps bring the two chambers' positions closer together on the scale, but their placement relative to each other and the status quo remains the same. As both the Senate and the House favor punitive damages awards legislation,<sup>102</sup> both S and H are to the right of Q; but H, the more fervent supporter of federal reform,<sup>103</sup> is to the right of S.

Figure 2



#### D. The Position of the Court

The Fairness Act was introduced in response to the Supreme Court's decision in *BMW of North America, Inc. v. Gore*.<sup>104</sup> Hence, the position of C may be determined by examining the various preferences of the nine Justices on the Court at the time *Gore* was decided.<sup>105</sup> For the PPT model to function, the Justices who favor or disfavor a particular course of action, namely federal legislation, must be identified. However, identification is more difficult than it appears. A Justice might favor legislation but not view punitive damages as raising any constitutional issues. Or, a Justice may believe that punitive damages raise constitutional issues but not issues relevant to the case before the Court. Even among Justices endorsing reform, there

101. See *Election98, Balance of Power*, CABLE NEWS NETWORK, INC. (visited Sept. 1, 1999) <<http://cnn.com/ELECTION/1998/>>.

102. See *supra* notes 91-101 and accompanying text for a discussion of congressional voting records.

103. See *supra* note 97 and accompanying text for a comparison of Senate and House voting records.

104. See Statement of Sen. Orrin G. Hatch, *supra* note 15, at 2-3.

105. The Justices who decided *Gore* are: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. See generally *THE AMERICAN BENCH, JUDGES OF THE NATION 1* (Marie T. Finn et al. eds., 9th ed. 1997) (listing Supreme Court Justices in 1996).

may be divergent policy preferences and disagreement about what reform is constitutional.

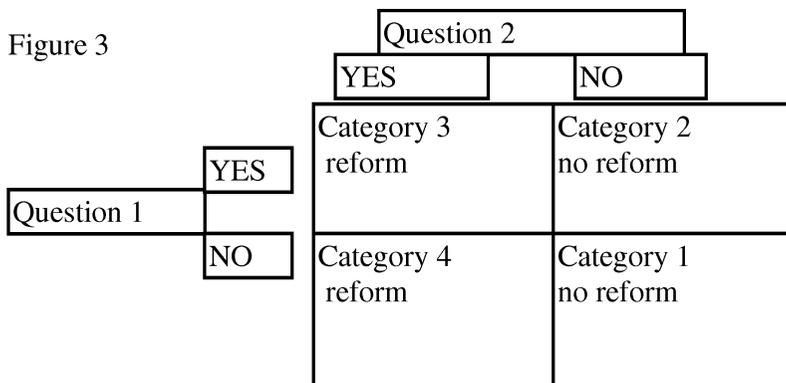
In addition, Justices' preferences may be cloaked in hopes of prompting or discouraging congressional action. For example, a Justice who dislikes the current status quo may render an opinion that causes an outcome widely perceived as unjust, hoping that Congress will enact legislation to prevent such future unfair results. Or, a Justice may deliver an opinion that leads to an outcome that is seen as just, while writing persuasively about the pitfalls of the status quo and expressly advocating congressional action. Thus, not every Justice in the *Gore* majority, which struck down the punitive damages award as excessive, can be said to support federal legislation.

The Justices' preferences, and the Court's median position, C, must be determined by interpreting the opinions of each Justice. This type of analysis attempts to glean from the opinions how the Justices would answer two yes-or-no questions: (1) are punitive damages a problem? and (2) is federal legislation the correct solution?

Based on the answers to these two questions, the Justices' preferences can be classified into four categories. First, a Justice may believe that punitive damages are not a problem and, therefore, no federal reform is necessary (no, no). Second, a Justice may concede that punitive damages awards are problematic, but believe that federal legislation is still not required—the states' legislatures or the court system can adequately resolve the issue (yes, no). Third, a Justice may consider punitive damages to be problematic and conclude that congressional action is needed (yes, yes). Fourth, a Justice may determine that punitive damages are currently under control, but federal reform is necessary to avoid future problems (no, yes). Only in the third and fourth categories would a Justice welcome congressional reaction to the ruling (see Figure 3).<sup>106</sup>

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106. The opinions are examined for the answers to both questions to create a more precise process, breaking down a complex analysis into smaller, more manageable parts. Scouring the opinions for the answer to only the second, bigger question would likely make interpretation more difficult.



Justices O'Connor and Souter are most easily placed in the third category. In *TXO Production Corp. v. Alliance Resources Corp.*,<sup>107</sup> Justice O'Connor, in a dissent joined by Justice Souter, stated that punitive damages awards were skyrocketing out of control.<sup>108</sup> She noted that the "increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability."<sup>109</sup> In other words, neither the courts nor the states' legislatures had responded properly to the situation. In *Gore*, Justices O'Connor and Souter joined Justice Stevens's majority opinion, which emphasized the appropriateness of the federal government's role in curbing punitive damages.<sup>110</sup>

Justice Kennedy, although not issuing statements about his position as forthrightly as Justices O'Connor and Souter, may also be classified as a member of the third category. Justice Kennedy joined in Justice Stevens's majority opinion in *Gore*, thereby voicing his support for a federal role in limiting punitive damages awards.<sup>111</sup> Justice Kennedy's position is further underscored by his assertion that the plurality opinion in *TXO Production Corp.* may "discourage legislative intervention that might prevent unjust punitive awards."<sup>112</sup>

107. 509 U.S. 443 (1993).

108. *See id.* at 500-01 (O'Connor, J., dissenting) ("Recently, however, the frequency and size of such awards have been skyrocketing.").

109. *Id.*

110. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("[BMW's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

111. *See id.*

112. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring). *Cf. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 41-42

In their dissenting opinions in *Gore*, Chief Justice Rehnquist, and Justices Scalia, Thomas and Ginsburg expressed the belief that punitive damages awards are an issue best left to the states.<sup>113</sup> Justices Scalia and Thomas reasoned that “the Court’s activities in this area are an unjustified incursion into the province of state governments . . . . The Constitution provides no warrant for federalizing yet another aspect of our Nation’s legal culture (no matter how much in need of correction it may be) . . . .”<sup>114</sup> Justice Ginsburg, with whom the Chief Justice joined, opposed the majority’s decision because it ventured “into territory traditionally within the States’ domain . . . .”<sup>115</sup> By reading the dissenting opinions in *Gore*, one can deduce that Justices Scalia, Thomas, Ginsburg, and the Chief Justice do not favor a federal legislative response.

Ascertaining the preferences of the remaining Justices is more complex. Justice Stevens, who wrote the majority opinion in *Gore*, noted the importance of a federal role in curbing punitive damages.<sup>116</sup> In addition, he joined the majority opinion in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>117</sup> in which the Court expressed “concern about punitive damages that ‘run wild.’”<sup>118</sup> Despite this seemingly clear indication of Justice Stevens’s views, *Haslip* was decided five years prior to *Gore*,<sup>119</sup> raising the possibility that his views had changed during that time. Furthermore, unlike Justices O’Connor, Souter, and Kennedy, Justice Stevens never articulated any explicit desire for legislation.<sup>120</sup> Therefore, Justice Stevens may be placed in the third category, but with difficulty.

Justice Breyer, as the most recently appointed member of the Supreme Court,<sup>121</sup> has the shortest paper trail; thus, his position is hardest to gauge. The only punitive damages awards case in which he participated at the Supreme Court level is *Gore*.<sup>122</sup> In *Gore*, Justice

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(1991) (Kennedy, J., concurring) (“Some inconsistency of jury results can be expected . . . . [T]he laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change.”).

113. See Antonucci, *supra* note 82, at 8.0, 9.0.

114. *Gore*, 517 U.S. at 598-99 (Scalia, J., dissenting).

115. *Id.* at 612 (Ginsburg, J., dissenting).

116. See *id.* at 585.

117. 499 U.S. 1 (1991).

118. *Id.* at 18.

119. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Haslip*, 499 U.S. at 1.

120. See, e.g., *Gore*, 517 U.S. at 559; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Haslip*, 499 U.S. at 1.

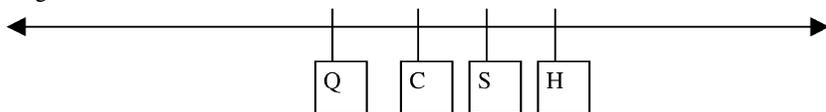
121. See THE AMERICAN BENCH, *supra* note 105, at 22.

122. See, e.g., *Gore*, 517 U.S. at 559; *TXO Prod. Corp.*, 509 U.S. at 443; *Haslip*, 499 U.S. at 1. Justice Breyer’s opinions prior to his elevation to the Supreme Court would not be good indicators of his current preferences.

Breyer joined the majority opinion and wrote a concurring opinion, in which Justices O'Connor and Souter joined.<sup>123</sup> Hence, by association, he can be tenuously located in the third category.

After reviewing the preferences of the nine Justices, the median opinion of the Court is best captured by either Justice Stevens or Justice Breyer. Therefore, the position of C on the scale should be somewhere in between Q and S (see Figure 4). In summary, the Court may be said to favor mildly federal punitive damages legislation that offers less comprehensive change than the Senate would like, but more guidance than currently available under the status quo.

Figure 4



#### *E. Interpreting the Results in Light of the Actual Sequence of Events*

By striking down the punitive damages award and establishing guideposts in *Gore*,<sup>124</sup> the Court shifted the status quo slightly to the right.<sup>125</sup> In response to *Gore*, Senators Hatch and Lieberman introduced the Fairness Act, a bill designed to move Q even farther to the right.<sup>126</sup> The proposed legislation would have placed Q farther to the right than the Court, represented by its median member, would prefer.<sup>127</sup>

Given that Congress passed the Common Sense Act,<sup>128</sup> a bill more sweeping than the Fairness Act, both chambers will likely support this narrower legislation. The House would clearly favor a broader bill;<sup>129</sup> however, the narrower statute is more preferable to the House than the status quo established by *Gore*.<sup>130</sup> Thus, retrospectively, the Court's ruling did incite a congressional response.

123. See *Gore*, 517 U.S. at 561.

124. See *id.* at 575.

125. See *supra* Part II.B. for a discussion of the location of the status quo prior to *Gore*.

126. See Statement of Sen. Orrin G. Hatch, *supra* note 15, at 2-3.

127. See *supra* Part II.D. for a discussion of the position of the Court.

128. See *supra* Part II.C. for a discussion of the positions of the Senate and the House of Representatives.

129. See *supra* Part II.C.

130. See *supra* Part II.C.

The principal question that the model should answer is what decision should the Court have handed down, as a rational and strategic player, in order to avoid a congressional reaction and to institute a status quo near the Court's ideal preference. According to the model, maintaining the pre-*Gore* status quo would certainly have invited federal legislation.<sup>131</sup> This means that the Supreme Court acted judiciously by altering the status quo, yet failed to maximize its policy preferences by effectuating a new status quo that was sufficiently close to S so as to avoid congressional reaction.<sup>132</sup>

#### F. Questioning the Model

However, the conclusion leads to another question: What ruling would have been deemed sufficiently close to avoid congressional reaction? Finding a point on Figure 4 that represents such a decision is easy, but conceiving of an actual holding is difficult. The Court can neither legislate nor impose caps on punitive damages awards. Indeed, it is unclear how the *Gore* Court could have framed its majority opinion so as to shift the status quo adequately near to S.

This dilemma highlights an underlying flaw in the PPT model. The choices, and hence the preferences, available to the Court and Congress concerning the possibilities for a new status quo cannot be accurately illustrated on a common scale shared by the actors. The House and Senate plainly possess more options. This does not mean that the preferences of the three entities, C, H and S, cannot be ordered linearly; a line can be drawn in one-, two-, or three-dimensional spaces. But, to properly depict each body's preferences, entirely different scales are necessary. If a court's preferences could be grouped on a one-dimensional model, the preferences for the legislature should be shown on a planar model. If a court's preferences could be reflected on a planar model, a cubic model is needed for a legislature. Only in an exceptional case is it possible for the preferences of all the players to be identical, conforming to the common scale PPT model.

This geometry undermines the usefulness of the PPT model in defining the relationship between the Court and Congress. The model is helpful in cases where the preferences of the entities are the same;

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131. See *supra* note 74 and accompanying text for a discussion of policy preferences and the positions of the players. The model assumes that the president is not involved. However, Senate Bill 1554 was proposed despite President Clinton's potential opposition to punitive damages reform. Therefore, the possibility of a presidential veto does not alter the model's conclusion regarding the impracticability of the status quo.

132. See Ferejohn & Weingast, *supra* note 67, at 268-69, 272 (discussing when congressional reaction is triggered).

however, this rarely happens. The preferences of a court and a legislature can always be compared, but a direct, causal action-reaction relationship purportedly diagramed by the PPT model is doubtful.

An argument can be made that this particular case of punitive damages awards is a poor choice for a case study of the PPT model. As Congress had already passed the Common Sense Act,<sup>133</sup> the proposal of Senate Bill 1554 was not a reaction at all. Rather, the introduction of the Fairness Act was imminent, no matter what the outcome of *Gore*.

However, this argument is faulty. The PPT model gives rise to the inference that anytime the House and the Senate can be positioned on one side of the status quo, legislation is likely. When the order of the players on the scale is Q-C-S-H, regardless of the spacing, the Senate and the House will always be able to agree on a new status quo at S. This ordering and agreement is just one of the scenarios of the model; the Court can still attempt to act as gatekeeper and Congress can still react to the Court's gate-keeping decision.

A more fruitful argument is that PPT's utility is limited to analyzing the relationship between the Court and Congress with regard to judicial statutory interpretation.<sup>134</sup> In other words, PPT analysis is suitable only for situations that involve a status quo with an enacted federal statute—the Court interprets a statute and Congress reacts by revising or enacting a new statute. The *Gore* Court, however, interpreted the Constitution as it applied to common law doctrine, rather than a statute.

Yet, even with this argument, questions remain: Why is PPT not as suitable for situations that do not involve an enacted statute? What is the central difference between the status quo with a statute and the status quo without a statute? The model seems to fail in this case study because the scales for the Court and Congress are not identical. Thus, a statute should hypothetically correct this problem by creating a common scale for the two institutions. While there may be some intuitive truth to this claim, it is uncertain that a statute completely corrects the imbalance of options available to the players. After all, a Congress unhappy with the Court's statutory interpretation has more alternatives than simply fine-tuning the existing statute.

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133. See *supra* Part II.C. for a discussion of congressional approval of the Common Sense Act.

134. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 334 (1991); Ferejohn & Weingast, *supra* note 67, at 263.

### G. *Moving Beyond PPT*

Whether or not one accepts the arguments criticizing the case study undertaken in this Note, PPT's utility remains limited in detailing the relationship between the Court and Congress with respect to *Gore*. However, employing some of the same assumptions as positive political theorists, different conclusions about the interaction between the Court and Congress can be ascertained. Recall, first, that positive political theorists view policymaking as a dynamic process, with sequential moves taking place in real time.<sup>135</sup> Second, there is no dispute that Congress often reacts to Court decisions.<sup>136</sup> Third, because federal judges are nominated and confirmed by the other branches of government, judicial doctrine typically will not differ greatly from the policy preferences of the legislative and executive branches.<sup>137</sup> Finally, the Supreme Court usually incorporates popular sentiment into its judgments.<sup>138</sup>

All of these premises accord with the theory that the Court and the Congress often act in concert.<sup>139</sup> Thus, the Supreme Court's ruling in *Gore* can be interpreted as granting approval for federal punitive damages legislation. Moreover, the guideposts in the Court's majority opinion can be viewed as instructions,<sup>140</sup> not only for the lower courts, but also for Congress to enact legislation that meets due process standards.<sup>141</sup>

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135. See Ferejohn & Weingast, *supra* note 67, at 266.

136. See *id.* at 263.

137. See McNollgast, *supra* note 69, at 1652.

138. See *id.* at 1631 (citing ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 23 (1960)).

139. An empirical test of this theory is beyond the scope of this paper. The test would necessarily be more complicated than simply searching for codifications of court holdings. Congress may be influenced by a Court decision, but may (a) unintentionally alter the status quo in a direction contrary to the desires of the court or (b) intentionally or unintentionally, move the status quo in the direction signaled by the court but past the court's policy preference. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 442-43 (1994) (explaining that Supreme Court and Congress sometimes collaborate).

140. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

141. See generally Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. § 2(a)(9)(B) (1997) (noting legislators' desire to conform to due process standards issued in *Gore*).

## III

RE-THINKING THE FAIRNESS IN PUNITIVE DAMAGE  
AWARDS ACTA. *Understanding Gore*

Some legal scholars have disparaged the *Gore* decision as not providing substantial guidance on determining punitive damages.<sup>142</sup> However, a close reading of the majority opinion shows that the ruling is not devoid of material instruction. For example, the Court explained that juries should have wide discretion in determining punitive awards; but, this discretion violates due process when juries grant “grossly excessive” punitive awards.<sup>143</sup> The Court further explained that grossly excessive awards are those that are extremely large in relation to the interests of punishment and deterrence, not those that are extremely large in relation to economic damages.<sup>144</sup> Additionally, the Court noted that fundamental fairness dictates that defendants receive sufficient notice of the conduct that will subject them to punishment and of the severity of the possible penalties.<sup>145</sup>

The first guidepost, the conduct’s degree of reprehensibility, states the most important consideration in awarding punitive damages:<sup>146</sup> Some wrongs are more blameworthy than others.<sup>147</sup> In particular, conduct that is non-violent or causes only economic harm is less abhorrent than violent conduct, unless the target is financially vulnerable.<sup>148</sup> Trickery, deceit, or intentional malice are more detestable than negligence;<sup>149</sup> a deliberate false statement is more nefarious than an omission of a material fact.<sup>150</sup> Therefore, triers of fact should deliberate on whether the actor displayed indifference, reckless disregard, and whether the conduct was repeated.<sup>151</sup> They also should examine the outcome of the conduct.<sup>152</sup>

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142. See, e.g., *Gore*, 517 U.S. at 605-07 (Scalia, J., dissenting); *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 145 (1996) (“Although it is significant that the Court finally produced a definitive holding on this issue, the Court’s analysis in *Gore* provides little guidance to either legislatures or lower courts regarding the contours of the constitutional limitations on excessive punitive damages awards.”).

143. See *Gore*, 517 U.S. at 568.

144. See *id.*

145. See *id.* at 574.

146. See *id.* at 575.

147. See *id.* at 575-76.

148. See *id.*

149. See *id.*

150. See *id.* at 579-80.

151. See generally *id.* at 575-79.

152. See *id.* at 575-76.

The second guidepost, the ratio of the punitive damages to the harm inflicted on the plaintiff, is a gauge of the appropriateness of the award.<sup>153</sup> The Court clarified that the harm considered need not be actual, but may also be that which might have resulted from the defendant's conduct.<sup>154</sup> Thus, low compensatory damage awards may support high punitive damages awards where an especially egregious act produces only a small amount of economic damages or the damages are difficult to detect.<sup>155</sup>

The final guidepost, comparable sanctions for comparable misconduct, requires juries to examine the range of civil and criminal penalties that could be imposed for similar acts.<sup>156</sup> This provides both a benchmark for excessiveness, as well as notice to defendants about possible penalties.<sup>157</sup>

Read out of context, the Court's emphasis on notice could be interpreted as strongly supporting the establishment of punitive damages caps or formulas, since such measures clearly spell out the possible punishments. Yet, based on the generality of the three guideposts,<sup>158</sup> it becomes clear that the notice to which the Court refers is not so much an exact dollar amount as a standard against which the conduct will be judged and the appropriate penalty imposed.

In addition to the guideposts, the *Gore* Court made two other interesting points. First, in the wake of *Gore*'s discussion on state sovereignty and interstate commerce, the Court recognized a federal interest in ensuring that one state does not overly burden defendants that actively participate in the national economy, and thus harm the economic welfare of the entire country.<sup>159</sup> The Court seemed to place these defendants in a separate category of defendants that merit extra care and protection. Second, meaningful deliberation about the defendant's wealth is notably absent from the opinion. Intuitively, a case involving a punitive damages award against a huge corporation demands a discussion of the corporation's wealth as a factor in the assessment of damages; however, the Court side-stepped the issue,

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153. *See id.* at 580-81.

154. *See id.*

155. *See id.* at 582-83. For this reason, a simple mathematical formula is unsuitable for judging whether a punitive award is grossly excessive.

156. *See id.* at 583-84.

157. *See id.*

158. *See id.* at 574-75.

159. *See id.* at 585.

saying only that it is unclear whether a lesser award could be expected to achieve the same goal.<sup>160</sup>

### B. *Gore as a Blueprint*

To some extent, Senate Bill 1554 incorporates the *Gore* reasoning, thus supporting the idea that the Court and Congress act as partners. The bill, narrowly drawn to encompass mainly financial injury cases,<sup>161</sup> accords with the Court's belief that non-violent conduct is less heinous than violent conduct.<sup>162</sup> Also, the Fairness Act exempts hate crimes, acts of terrorism, and felony sexual offenses.<sup>163</sup> This indicates an attempt by Congress to take aggravating factors into account.<sup>164</sup>

The treble economic damages formula establishes a close link between the actual harm and the punitive award, observing the Court's second guidepost.<sup>165</sup> Furthermore, since the treble damages formula is found elsewhere in American law,<sup>166</sup> the legislation provides a safeguard against excessiveness and notice to the defendant.<sup>167</sup>

However, Senate Bill 1554 departs from the blueprint put forth by the *Gore* Court in significant ways. Most strikingly, it sets a cap on punitive damages without considering the reprehensibility of the defendant's conduct. The exemptions and the bill's narrowness may be a limited version of the factors in the first guidepost, but the uniform application of treble damages negates the possibility of a comprehensive evaluation of the defendant's conduct. It is easy to imagine cases that, while resulting in only minor financial injury and not qualifying under the exemptions, possess detestable elements wor-

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160. See *id.* at 584-85. Justice Breyer's concurring opinion, in which Justices O'Connor and Souter joined, stated that information regarding a defendant's wealth should not act as a constraint on an award but may serve as a basis for an increase. See *id.* at 591 (Breyer, J., concurring).

161. See *supra* Part I.B. for a discussion of Senate Bill 1554's coverage. See also Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. § 4(a) (1997).

162. See *supra* Part III.A. for a discussion of the Court's beliefs regarding conduct.

163. See *supra* Part I.B. for a discussion of Senate Bill 1554's exemptions. See also S. 1554 § 4(b).

164. See *supra* Part III.A. for a discussion of the Court's beliefs regarding conduct.

165. See *supra* Part III.A. for a discussion of the Court's opinion concerning the relationship between punitive damages and harm. See also S. 1554 § 5.

166. See Salbu, *supra* note 1, at 292 (noting anti-trust, racketeering, patent infringement, and unfair trade statutes allow for treble damages awards). Cf. Statement of Timothy A. Lambirth, *supra* note 43, at 30 (maintaining that organized crime receives better treatment than big companies because RICO limits damages imposed on crime syndicates while punitive awards against corporations are limitless).

167. See *supra* Part III.A. for a discussion of the importance of notice.

thy of larger punitive damages.<sup>168</sup> Moreover, the cap similarly punishes conduct that may differ with respect to the degree of reprehensibility. The Fairness Act creates too strong a bond between actual and punitive damages, completely neglecting the reasoning underlying the Court's second guidepost.<sup>169</sup>

Despite the disparities between *Gore* and Senate Bill 1554, the Court and Congress may still be seen as working together to design punitive damages legislation. Since Senate Bill 1554 expresses a desire to "address the constitutional objection of the United States Supreme Court" in *Gore*,<sup>170</sup> a plausible view of the situation is that Congress, while endeavoring to adhere to the guideposts set forth in *Gore*, is simply not succeeding.<sup>171</sup>

### C. Public Policy Issues

Although Congress might be trying to act as the Court's partner in crafting punitive damages legislation,<sup>172</sup> given that the two bodies interact with each other on different scales,<sup>173</sup> Congress may delve into areas that the Court did not explore. Proposed legislation should be congruous with *Gore*'s instructions while weighing options that did not appear in the ruling. Therefore, public policy considerations not discussed in *Gore* are, nonetheless, relevant.

Expediency and stability should not be the primary drivers of a system for calculating punitive damages.<sup>174</sup> To serve the purposes of punishment and deterrence, punitive damages awards should be discretionary, not formulaic.<sup>175</sup> Consistency in awards should not be used as a goal, but rather as a signal that the system for determining punitive damages is functioning correctly:<sup>176</sup> comparable conduct, by

168. See, e.g., *Seymore v. Reader's Digest Ass'n.*, No. 77 Civ. 4825, 1980 WL 241 (S.D.N.Y. Sept. 12, 1980) (racial discrimination); *Lankford v. Scala*, No. CIV.A.94C-04-023, 1995 WL 156220 (Del. Super. Ct. Feb. 28, 1995) (sexual harassment); *Jackson v. Consolidated Rail Corp.*, 223 N.J. Super. 467 (Ct. App. Div. 1988) (racial discrimination).

169. See *supra* Part III.A. for an explanation of the second guidepost.

170. Fairness in Punitive Damage Awards Act, S. 1554, 105th Cong. § 2(a)(9)(B) (1997).

171. Another view is that Congress, although wishing to address *Gore*, also seeks to tackle other issues. Therefore, Congress is willing to part, to some degree, with *Gore*. If this is correct, however, Congress has arguably ventured too far from *Gore* to claim that Senate Bill 1554 addresses the constitutional issues.

172. See *supra* Part II.G. for an introduction to the theory that the Court and Congress act as partners.

173. See *supra* Part II.F. for a discussion of the scales.

174. See Salbu, *supra* note 1, at 296.

175. See *id.* at 279-80; Kagan, *supra* note 2, at 756.

176. See Kagan, *supra* note 2, at 756.

comparable defendants, merits comparable punishment. As the Court noted, punitive damages should be more closely associated with the reprehensibility of the conduct than with the nature or extent of the harm.<sup>177</sup> Calculating punitive awards as a multiple of economic damages places too much emphasis on harm, unwisely favoring the second guidepost over the first. The relationship between compensatory damages, which deal directly with harm, and punitive damages is tenuous as they are intended to achieve entirely different ends.<sup>178</sup>

Some legal scholars have argued that the third guidepost should examine the wealth of the defendant instead of comparable penalties.<sup>179</sup> These scholars contend that defendants feel the impact of punitive damages only when the awards are linked to their wealth.<sup>180</sup> While this seems logical, at some point, high punitive damages violate due process rights,<sup>181</sup> even of enormously wealthy defendants.<sup>182</sup> Furthermore, this policy would appear to punish defendants simply for being wealthy.<sup>183</sup>

The wealth of the defendant is an even more complex issue when the defendant is a corporation. When a corporate entity is penalized, the blameworthy individuals usually escape any personal liability while stockholders, who are generally not responsible for the corporation's actions, bear the brunt of the punishment.<sup>184</sup> However, stockholders can, arguably, be categorized as culpable agents. In theory, shareholder investment funds every corporate action.<sup>185</sup> Therefore, when a corporation develops an innovation that improves its performance, shareholders benefit even though they personally had little role in the development. Conversely, when a corporation performs poorly, shareholders suffer although they did not personally cause the poor

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177. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (explaining that reprehensibility is most important guidepost). See also Salbu, *supra* note 1, at 282.

178. See Salbu, *supra* note 1, at 292-96.

179. See generally Pace, *Recalibrating the Scales*, *supra* note 8, at 1583 ("The many factors that legislators and judges have created can be reduced to three basic considerations: (1) the character of the defendant's act; (2) the nature and extent of the plaintiff's injuries; and (3) the defendant's wealth.").

180. See generally Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate *Just Deserts*, 31 U. MICH. J.L. REFORM 289 (1998).

181. See, e.g., *Gore*, 517 U.S. at 559.

182. See Koenig & Rustad, *supra* note 180, at 289.

183. See Polinsky & Shavell, *supra* note 9, at 911 ("[I]mposing punitive damages on the basis of corporate wealth effectively imposes a tax on corporate size and success . . .").

184. See *id.* at 875-76.

185. See LEWIS D. SOLOMON ET AL., *CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS* 271 (2d ed. 1988) (noting that shareholders "own" corporation, but delegate management to board of directors).

performance. Stockholder misery does not offend notions of fairness because investors may exercise significant control over the corporation,<sup>186</sup> hence they should bear some responsibility for its actions. Also, investing in the stock market has built-in risks: the company could go bankrupt, or the entire market could collapse.<sup>187</sup> Why not consider punitive damages in litigation to be among those risks? Why should shareholders be exempt from participating in this downside? While the wealth of the defendant remains a controversial factor, the reasons for treating corporations differently from individuals are unpersuasive.

#### D. Some Proposals

Treble economic damages have not been the only possible solution offered in the effort to fix punitive damages. Some scholars have suggested that trials be bifurcated, determining compensatory and punitive damages separately to eliminate jury bias in awarding punitive damages.<sup>188</sup> Others favor diverting part of the punitive award to a government body so as to reduce a plaintiff's incentive to seek an award.<sup>189</sup> Yet, neither of these recommendations provide guidance for juries. Likewise, procedural barriers, such as raising the burden of proof because punitive damages are quasi-criminal,<sup>190</sup> will reduce the number of times that juries consider punitive damages, but do not provide guidance to juries faced with this issue.<sup>191</sup> However, there are some proposals that address arbitrariness while staying consistent with *Gore*.

##### 1. Have Judges Set Punitive Damages<sup>192</sup>

Writing a statute that transfers to judges the duty of deciding punitive awards might be easier for Congress than inventing a new sys-

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186. See *id.* at 272 (“In all corporations, the shareholders do retain certain authority . . .”). But see *id.* at 503-05 (explaining that, in practice, shareholders retain little control).

187. See, e.g., Brian Bollen, *How to Defuse Potential Time Bombs*, FIN. TIMES, July 10, 1998, at Global Custody 3 (noting that general market risk includes “theoretical collapse of an entire market”).

188. See Pace, *Recalibrating the Scales*, *supra* note 8, at 1620.

189. See Kagan, *supra* note 2, at 782-83.

190. See Pace, *Recalibrating the Scales*, *supra* note 8, at 1617-18.

191. See Kagan, *supra* note 2, at 781-82.

192. See generally Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998) (explaining that it is constitutional, as well as good policy, to have judges set punitive damages).

tem for determining punitive damages.<sup>193</sup> Since Congress would not enact such a statute if it believed that the Court would award punitive damages in a manner inconsistent with Congress's wishes, the adoption of this idea would be the best indication that the Court and Congress are working together as partners.

Judges are certainly very capable of applying the *Gore* guideposts, and thus limiting arbitrary awards. Defendants can trust judges to treat both in- and out-of-state parties equally.<sup>194</sup> Plaintiffs will be less likely to engage in frivolous litigation knowing that judges, who are harder to persuade than juries, will determine punitive damages.<sup>195</sup>

Nonetheless, entrusting judges with determining punitive awards may not improve the consistency of the awards. After all, the primary motivation behind the development of Federal Sentencing Guidelines was to ensure consistent criminal penalties.<sup>196</sup> Why should legislators believe that judges would behave uniformly in setting punitive awards when they were not consistent in criminal sentencing?

## 2. *Establish a Punitive Damages Guidelines Grid*

Another promising approach is to develop guidelines similar to the Federal Sentencing Guidelines, allowing for "bounded discretion."<sup>197</sup> Under this approach, compensatory damages would serve as a base while aggravating and mitigating factors would provide a sliding discretionary scale.<sup>198</sup> However, to fully incorporate Senate Bill 1554 and *Gore*, this mechanism needs a little fine-tuning.

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193. This assumes that such a statute is constitutional. See generally Mogin, *supra* note 192.

194. Cf. *id.* at 208 (stating that judges are less susceptible to emotional factors).

195. Cf. *id.*

196. See Todd A. Buchman, Comment, *Due Process and Sentencing: Third Circuit Holds That Plea of Guilt Waives Fifth Amendment Privilege*, 103 DICK. L. REV. 227, 229 (1998).

197. See Kagan, *supra* note 2, at 758. See also Note, *supra* note 91, at 1774-75.

198. See Kagan, *supra* note 2, at 789-93. Jonathan Kagan also presents an alternative base: figuring out a minimum deterrent award and then using that figure instead of harm. See *id.* at 795-96. This Note does not fully discuss this alternative because it is decidedly inferior. First, such a base would focus on the defendant's wealth, which, although relevant, is too controversial to be the bedrock of a system. See *supra* notes 179-87 and accompanying text for a discussion of wealth as a factor in determining punitive damages. Second, this suggestion is too great a departure from both Senate Bill 1554 and *Gore*, neither of which include a wealth element. Third, if it were possible to accurately define a minimum award for the purposes of punishment and deterrence, a system for punitive damages would be superfluous. Punitive damages would be consistent and not arbitrary; awards above the minimum would unfairly overburden a defendant. Cf. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584-85 (1996) (discussing whether lesser award would adequately protect Alabama's interests).

First, like Senate Bill 1554, the legislation should be narrowly drawn to encompass only financial injury cases.<sup>199</sup> Additionally, the defendant should be a “national defendant,” an active participant in the national economy.<sup>200</sup> The issue of whether a defendant is national should be determined prior to awarding punitive damages.<sup>201</sup>

To be concordant with *Gore*, if harm is used as the base, the system should examine possible harm, not actual harm.<sup>202</sup> The *Gore* Court also presented a good list of mitigating and aggravating factors to consider in altering the award from simply possible harm.<sup>203</sup> But, the list is not exhaustive. Wealth, a factor neglected by the Court, should be added. If a significant power disparity exists between the plaintiff and the defendant, the relationship should be thought of as an aggravating factor. Such a “David-Goliath” factor would be very useful in providing consumer protection.

Whatever the factors considered, the system must afford the factors substantial weight in determining punitive awards. Otherwise, the main component of the award will be the base—harm, while the reprehensibility of defendant’s conduct, the most important guidepost according to *Gore*, will be a secondary element.<sup>204</sup> Additionally, because jurors could evaluate the factors based on personal sentiment, unlike the mathematical calculation of harm, assigning significant value to the factors allows the awards to function correctly by remaining discretionary.<sup>205</sup> Increasing discretion and the weight of the factors certainly has a downside: It limits consistency and predictability, causing the guidelines to cease functioning as a system. To truly address the problem presented by punitive damages, Congress must introduce legislation that integrates *Gore* and strikes an effective balance between the guideposts. Legislation that accomplishes this task will limit excessive damages, arbitrariness, and frivolous litigation and equalize the treatment of in- and out-of-state defendants.

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199. See *supra* Part I.B. for a discussion of financial injury in punitive damages cases.

200. See *supra* Part III.A. for an explanation of “national defendant.”

201. See *supra* Part III.A.

202. See *supra* Part III.A. for a discussion of possible harm as opposed to actual harm.

203. See *supra* Part III.A. for a discussion of the factors mentioned in *Gore*.

204. See *supra* Part III.A. for a discussion of the first guidepost.

205. See *supra* Part III.C. for an explanation of the importance of discretion in awarding punitive damages.

## CONCLUSION

The intent of the Fairness Act is certainly noble. If it is true that punitive damages awards are excessive and arbitrary, that similar defendants face disparate results, that plaintiffs pursue frivolous litigation, and that financial injury cases are particularly serious examples of these problems, legislation that confronts these injustices is desirable. Although the Fairness Act attempts to solve these problems, it creates a more ominous situation, essentially destroying punitive damages by severely restraining discretion.

Positive Political Theory's failure to explain the interaction between the Court and Congress in crafting punitive damages law hints at a consociate relationship between the two bodies. But, despite the appearance of a concerted effort in proposing Senate Bill 1554, this legislation would have to be radically altered to stay faithful to *Gore* and survive public policy analysis. Perhaps the title of Part III of this Note—"Re-thinking the Fairness in Punitive Damage Awards Act"—is really a misnomer. The new legislation suggested by this Note reflects more than just re-thinking. Yet, many of the concepts of Senate Bill 1554 would endure in the guidelines system: heeding *Gore*, addressing financial injury cases, and creating a more concrete bond between actual harm and punitive damages.

The future of Senate Bill 1554 is uncertain. Some political commentators believe that, with President Clinton in the Oval Office, Congress will not undertake punitive damages reform.<sup>206</sup> If Congress does decide to pursue reform, the legislators should bear in mind that guidelines and legislation that leave discretion intact are the best solutions to the perplexities inherent in punitive damages awards.

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206. See *Senate Approves Bill To Limit Awards In Faulty-Product Suits*, ST. LOUIS POST-DISPATCH, Mar. 22, 1996, at 6A (suggesting that President Clinton's strong ties to litigation lobby would cause him to veto any bill that curbs awards).