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Pacific Mutual Life Insurance Co. v. Haslip: Punitive Damages and the Modern Meaning of Procedural Due Process

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In May 1990 a Texas jury found that agents of Woodmen of the World Life Insurance Company had defrauded teacher's aide Sylvia Uriegas of $212,000.[1] The jury awarded her compensatory damages, plus punitive damages of over $55,000,000.[2] Although only the jury members will ever know precisely how they reached this figure, it is clear that plaintiff's attorney provided them with scant encouragement to apply any rational process in making their determination. Reflecting on the case, which he characterized as "a classic passion play,"[3] plaintiff's attorney Pat Maloney summarized his trial strategy:

> "The case wasn't that exciting unless the jury became outraged. We told the jury that this company took advantage of Sylvia when she was at her nadir; she was pregnant and her husband had just died. . . . So I said that since Woodmen of the World took Sylvia's nest egg, they ought to take the company's. I asked for the entire nest egg."[4]

Nor did the court provide the jury with much rational guidance. In Texas, as in most states,[5] the decisions whether to award punitive damages, and, if so, how much to award, are left almost entirely to the jury's discretion.[6] The only appeal to the jury's sense of reason came, presuma-

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1. *See Et Al.*, NAT'L L.J., Jan. 21, 1991, at S7. This article describes the trial and verdict in *Uriegas v. Woodmen of the World Life Ins. Co. Id.*

2. *Id.*

3. *Developing a Mutual Rapport*, NAT'L L.J., Feb. 11, 1991, at S5.

4. *Id.* (quoting Pat Maloney). The company's nest egg amounted to $212,000,000. *Id.* Attorneys are not entirely free to appeal to the jury's passion. *See, e.g.*, 1 LINDA R. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 5.5(c), at 213-14 (2d ed. 1989) (observing that courts place general limits on attorney conduct in closing statements, disallowing misleading statements, improper innuendos, and prejudicial remarks, as well as any mention of insurance, compromise, or settlement).

5. *See infra* note 30 and accompanying text.

6. If anything, Texas juries receive more guidance than most. *Compare* Transcontinental Gas Pipe Line Co. v. American Nat'l Petroleum Co., 763 S.W.2d 809, 819 (Tex. Ct. App. 1988) (enumerating factors for the jury to take into account) *with* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1037 n.1 (1991) (excerpting jury instructions given by Alabama trial judge permitting jurors wide discretion to impose or not impose punitive damages). The Texas court instructed the jurors to consider

> not merely the act or acts of a Defendant, . . . [but also] all the circumstances, including (1) the extent of any damages suffered by Plaintiff; (2) the nature of the wrong; (3) the frequency of the wrongs committed; (4) the character of the conduct involved; (5) the degree of the wrongdoer's culpability; (6) the situation and sensibilities of the parties concerned; (7) the extent to which the defendant's conduct offends a public sense of propriety; and (8) the size of an award needed to deter similar wrongs in the future.

bly, from defense counsel. The jurors were free to ignore that plea and to subjugate it to the strong sense of indignation and outrage that Maloney invoked in his closing argument.

Both lawyers and laymen perceive rationality and proportionality as fundamental to the legitimacy of law.[7] Accordingly, most lawyers and laymen would probably sense something egregious about the verdict in this Texas case; there must be something unjust, and perhaps even unconstitutional, about any process that yields such a disproportionate verdict. In fact, recent large awards of punitive damages have awakened the constitutional sensibilities of several Justices of the United States Supreme Court.[8] More specifically, such sizeable awards raise serious questions under the Excessive Fines Clause of the Eighth Amendment[9] and the Due Process Clause of the Fourteenth Amendment.[10] In the past few years, as both the frequency and amount of punitive damages awards have increased dramatically,[11] the Court has had several opportunities to consider fully the legality of such awards. The Court, however, has thus far refused to impose any constitutional limits on punitive damages. In 1989 it rejected the argument that the Excessive Fines Clause applies to punitive damages awards.[12] Last term the Court com-

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Transcontinental Gas, 763 S.W.2d at 819. For the instructions in *Pacific Mutual*, see *infra* text accompanying note 23. The jury in *Transcontinental Gas* awarded plaintiff $16,000,000 in punitive damages. *Transcontinental Gas*, 763 S.W.2d at 819.

For a discussion of the detrimental effects of unpredictability, see John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 986-94 (1984) (arguing that uncertainty in legal standards, including damage awards, generates economic inefficiency).

7. *See, e.g.*, Weems v. United States, 217 U.S. 349, 349 (1910) ("[I]t [is] . . . a precept of justice that punishment for crime should be graduated and proportioned to offense.").

8. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 280-81 (1989) (Brennan, J., concurring) (noting that although the due process issue was not properly before the court, "[s]everal of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive' " (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909))); *id.* at 282-301 (O'Connor, J., concurring in part and dissenting in part) (arguing strenuously that the Excessive Fines Clause of the Eighth Amendment proscribes excessive punitive damages awards); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87-89 (1988) (O'Connor, J., concurring in part and concurring in the judgment) ("Appellant has touched on a due process issue that I think is worthy of the Court's attention . . . .").

9. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

10. The relevant portion of the Fourteenth Amendment reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

11. *See, e.g.*, *Pacific Mut.*, 111 S. Ct. at 1038 n.4; *id.* at 1066 (O'Connor, J., dissenting). *See generally* MARK PETERSON ET AL., PUNITIVE DAMAGES—EMPIRICAL FINDINGS (1987) (documenting evidence of dramatic rise in frequency and amount of punitive damages awards).

12. *Browning-Ferris*, 492 U.S. at 263-64. For a discussion of this case, see *infra* note 173.

pleted its detachment of the Federal Constitution from the regulation of punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*[13] when it held that the Due Process Clause places practically no limits on state courts' ability to allow these awards. Thus, punitive damages awards remain almost completely within the discretion of the jury.

After analyzing the majority,[14] concurring,[15] and dissenting[16] opinions in *Pacific Mutual*, this Note will examine the prior holdings that guided the Court in placing punitive damages within the context of due process.[17] The Note concludes that the Court effectively blocked future due process challenges to the standard common-law practice of awarding punitive damages. After imposing a vague, easily met standard for due process, the Court left open the possibility that the amount of some awards may be unconstitutionally excessive.[18] In terms of *Pacific Mutual*'s wider impact on due process analysis, the Note determines that the Court is reorienting itself toward the traditional view that when a procedure was well established at the time of the adoption of the Due Process Clause, its history is dispositive of its constitutionality.[19] Finally, the Note argues that, although its result was essentially correct, the Court's muddy explanation has created a great deal of confusion; this confusion could have been avoided had the Court explicitly stated its holding, as Justice Scalia did in his concurring opinion.[20] Thus, the Note concludes that Justice Scalia's description better presents the proper test for due process and should form the standard.

In 1982 Cleopatra Haslip and several coworkers who had purchased similar health insurance policies from Pacific Mutual Life Insurance Company filed suit in Alabama state court against the company and one of its agents, alleging that the agent had failed to remit to Pacific Mutual the premiums he had collected from the plaintiffs, and thereby had caused their policies to lapse.[21] The judge submitted the case to the jury

13. 111 S. Ct. 1032 (1991).

14. Justice Blackmun wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Marshall, and Stevens joined; Justice Souter did not participate. *See infra* notes 27-51 and accompanying text.

15. Justices Scalia and Kennedy wrote separate opinions concurring with the judgment. *See infra* notes 52-81, 82-91 and accompanying text.

16. Justice O'Connor was the sole dissenter. *See infra* notes 92-129 and accompanying text.

17. *See infra* notes 134-74 and accompanying text.

18. *See infra* notes 191-96 and accompanying text.

19. *See infra* notes 204-12 and accompanying text.

20. *See infra* note 213 and accompanying text.

21. *Pacific Mut.*, 111 S. Ct. at 1036-37.

on a theory of fraud,[22] further instructing them as follows:

> 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.
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> This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff . . . has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
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> Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs . . . by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.
>
> Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.[23]

The jury returned a general verdict for Haslip in the amount of $1,040,000, the punitive component of which amounted to at least $840,000.[24] Defendants appealed to the Supreme Court of Alabama, which affirmed and specifically upheld the punitive damages award;[25] the Supreme Court of the United States granted certiorari to review that decision. In the Supreme Court, Pacific Mutual argued that the common-

22. *Id.* at 1037. The case against Pacific Mutual was submitted under the doctrine of respondeat superior. The Court upheld the constitutionality of that decision over Pacific Mutual's contention that doing so unfairly shifted the jury's focus toward the assets of the company in determining the amount of punitive damages appropriate for the agent's actions, thereby violating Pacific Mutual's Fourteenth Amendment right to fundamental fairness. *Id.* at 1040-41.

23. *Id.* at 1037 n.1 (citation omitted). Pacific Mutual did not object to this charge at the time, and no evidence of its financial worth had been introduced. *Id.* at 1037.

24. *Id.* at 1037 n.2. Plaintiff's attorney had requested $200,000 in compensatory and $3,000,000 in punitive damages; for the purposes of its decision, the Court credited the greatest possible amount to compensatory damages ($200,000), leaving a minimum punitive damages amount of $840,000 out of $1,040,000. *Id.*

25. *Id.* at 1037. *See* Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537, 543 (Ala. 1989), *aff'd*, 111 S. Ct. 1032 (1991).

law procedure for awarding punitive damages provides the jury with unlimited discretion in violation of defendant's right to due process under the Fourteenth Amendment.

The Court rejected Pacific Mutual's argument and affirmed the award,[26] but divided into four analytical camps. The majority held the award valid for two reasons. First, giving juries free rein in assessing punitive damages was an established common-law practice at the time Congress adopted the Due Process Clause; consequently, the procedure cannot per se violate due process.[27] Second, the award against Pacific Mutual was not reached by an entirely irrational process, and thus did not lack fundamental fairness.[28]

The majority first noted that punitive damages have long been a part of the common law.[29] At common law, the imposition of punitive damages consisted of two general steps. First, the jury was instructed "to consider the gravity of the wrong and the need to deter similar wrongful conduct"[30] in determining the appropriateness and amount of punitive damages. Second, the jury's award then was reviewed for reasonableness by the trial and appellate courts.[31] Juries had unlimited discretion to determine and award punitive damages before the Fifth Amendment was adopted,[32] and the two-step common-law method of assessing punitive damages was well entrenched at the time of adoption of the Fourteenth Amendment.[33] That amendment's drafters offered no indication that they intended to modify the practice.[34] Accordingly, the Court concluded that vesting the jury with great discretion in awarding punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional."[35]

The Court, however, stated that the antiquity of the practice of awarding punitive damages was not dispositive. Instead, it held that pu-

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26. *Pacific Mut.*, 111 S. Ct. at 1046.

27. *Id.* at 1041-43.

28. *Id.* at 1044.

29. *Id.* at 1041-42.

30. *Id.* at 1042. The Alabama instructions are typical of those adopted in other states. *See, e.g.*, 1 ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL § 35.01 (2d ed. 1971); 1 OHIO JURY INSTRUCTIONS § 23.70 (1988).

31. *Pacific Mut.*, 111 S. Ct. at 1042. *See generally* SCHLUETER & REDDEN, *supra* note 4, § 6.1 (noting that most courts have not enunciated clear standards for review of punitive damages awards).

32. *Pacific Mut.*, 111 S. Ct. at 1042. For a detailed history of punitive damages, see 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 1 (2d ed. 1989); SCHLUETER & REDDEN, *supra* note 4, § 1.

33. *Pacific Mut.*, 111 S. Ct. at 1042.

34. *Id.* at 1043.

35. *Id.*

nitive damage awards that " 'run wild' " might violate due process if the award is an "extreme result[ ] that jar[s] one's constitutional sensibilities."[36] Refusing to adopt a "bright line" test for determining the constitutionality of punitive damages, the Court held merely that "concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[37] Applying this calculus to the facts before it, the Court indicated that a future, successful constitutional challenge to a punitive damages award will require a showing either that the award possessed no rational basis whatsoever, or that the jury received absolutely no guidance.[38]

The Court first examined whether the *Pacific Mutual* jury's discretion had been meaningfully restrained.[39] In making that determination, the Court assessed the adequacy of the instructions given by the trial judge[40] and sought to determine whether they advanced a legitimate state interest while still protecting defendant's interest in avoiding irrationally imposed liability.[41] The Court considered several aspects of the instructions given by the trial judge in concluding that they provided adequate guidance to serve these ends.[42] First, the instructions advised the jury that the purposes of punitive damages are to punish the defendant and to deter others from similar conduct.[43] In addition, the instructions informed the jurors that they were to take into account the character and degree of the individual defendant's wrong, as well as the necessity of deterrence.[44] Overall, the majority held that in their entirety, the instructions advanced a legitimate state interest in punishment and deterrence and thereby provided a basis for rational correlation with the defendant's conduct.[45]

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36. *Id.*

37. *Id.*

38. Reasonableness exists when the award does not lack "objective criteria," *id.* at 1046; so long as the jury receives at least minimum guidance, and "discretion is exercised within reasonable constraints, due process is satisfied." *Id.* at 1044. After articulating the parameters of its constitutional test, the Court announced that it was limiting its holding to a determination whether the punitive damages assessed against Pacific Mutual met the requirements of due process. *Id.* at 1043.

39. *Id.* at 1044.

40. *Id.* For the trial judge's instructions, see *supra* text accompanying note 23.

41. *Pacific Mut.*, 111 S. Ct. at 1044. An irrational award, the Court suggested, would thwart defendant's "interest in rational decisionmaking." *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* The Court noted that discretion in punitive damages cases was no greater than that in many well-established areas of law, such as "the best interests of the child," "reasonable care," "due diligence," or compensation for pain and suffering or mental anguish. *Id.*

Once the Court determined that the jurors had received sufficient guidance, the only remaining issue was whether they had exercised their discretion reasonably.[46] In addressing that issue, the Court considered two additional features of Alabama procedure: the post-trial review and the further appellate review.[47] The Court concluded that the trial court's review sufficiently guaranteed that the jurors had reached a decision within reasonable constraints.[48] Trial courts in Alabama, when reviewing damages for excessiveness, consider several factors: defendant's culpability, desirability of deterrence of others, impact on the parties, and other considerations such as the effect on innocent third parties.[49]

The Court then observed that Pacific Mutual had received the full protection of additional review by the Alabama Supreme Court, including a comparative analysis.[50] Because Pacific Mutual had received the benefit of all the procedural safeguards of Alabama law, the Court held that the state had not violated the company's right to due process.[51]

Justice Scalia concurred in the result, but sharply criticized the majority's reasoning.[52] In his view, the Court's inquiry into the due process sufficiency of the assessment of punitive damages should have ended with the determination that the practice existed at the time of the adoption of the Fourteenth Amendment.[53] Because "a process that accords with

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46. *Id.*

47. *Id.* at 1044-46.

48. *Id.* at 1044. Often, however, appellate courts merely rubberstamp the jury award. *See, e.g.*, Durham v. Pekrul, 104 Wis. 2d 339, 349, 311 N.W.2d 615, 620 (1981) ("[T]he trial judge, who was familiar with the demeanor of the parties and the intricacies of the conduct of the trial, upheld the jury's finding of punitive damages. Where the record supports the jury's award of punitive damages . . . an appellate court should not set aside the award in toto."); *see also* 2 GHIARDI & KIRCHER, *supra* note 32, § 18.04, at 13-16 (noting that the trial judge must affirm the verdict if there is evidence to support it, and that only a verdict that is excessive as a matter of law may be overturned).

49. *Pacific Mut.*, 111 S. Ct. at 1044. The Supreme Court of Alabama had established those factors in Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986), and refined them in Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989), which announced several other factors to be taken into account in determining whether the size of an award is reasonably related to deterrence and retribution. *Green Oil*, 539 So. 2d at 223-24; *see also Pacific Mut.*, 111 S. Ct. at 1045 (discussing *Green Oil* and its effects); *infra* text accompanying note 106 (same).

50. *Pacific Mut.*, 111 S. Ct. at 1045-46. The Alabama Supreme Court considers several factors set forth in *Green Oil*, *see infra* text accompanying note 106, in assessing the appropriateness of the award. *Pacific Mutual*, however, is ambiguous as to whether such further review is constitutionally mandated; the Court stated that the post-trial procedure "ensures meaningful and adequate review," *Pacific Mut.*, 111 S. Ct. at 1044, and characterized the appellate review as "an additional check on the jury's or trial court's discretion." *Id.* at 1045.

51. *Pacific Mut.*, 111 S. Ct. at 1046.

52. *Id.* at 1046-54 (Scalia, J., concurring in judgment).

53. *Id.* at 1048 (Scalia, J., concurring in judgment).

such a tradition and does not violate the Bill of Rights necessarily constitutes 'due' process," Justice Scalia charged, any inquiry into "fairness" or "reasonableness" was inappropriate.[54]

Justice Scalia began his analysis by discussing the Fifth Amendment framers' understanding of the term "due process of law."[55] He concluded that the term meant merely customary procedure according to the "law of the land"—a guarantee which originated in the Magna Carta[56]—and that the framers possessed this understanding through their acquaintance with the writings of Sir Edward Coke.[57] He observed that the seminal case interpreting the Due Process Clause of the Fifth Amendment, *Murray's Lessee v. Hoboken Land & Improvement Co.*,[58] adopted precisely this understanding of due process.[59] Justice Scalia found no evidence that any change in this understanding had occurred in the twelve years between *Murray's Lessee* and the adoption of the Fourteenth Amendment.[60] In fact, examining Fourteenth Amendment jurisprudence, he determined that the Court incorporated precisely this understanding into the Due Process Clause of the Fourteenth Amendment. The process of incorporation began just six years after the amendment's adoption with *Walker v. Sauvinet*,[61] which affirmed the notion that "[d]ue process of law is process due according to the law of the land."[62]

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54. *Id.* at 1047 (Scalia, J., concurring in judgment).

55. *Id.* at 1048-49 (Scalia, J., concurring in judgment). For Justice Scalia's description of his own judicial philosophy of original intent, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable."); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185-86 (1989) (expounding his preference for general rules of law).

56. *Pacific Mut.*, 111 S. Ct. at 1047-49 (Scalia, J., concurring in judgment); *see* MAGNA CARTA § 39 (1215) ("No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined . . . except by the lawful judgment of his peers or by the law of the land."), *reprinted in* MAGNA CARTA 327 (James C. Holt ed., 1965).

57. *Pacific Mut.*, 111 S. Ct. at 1049 (Scalia, J., concurring in judgment); *see* RODNEY L. MOTT, DUE PROCESS OF LAW 87-90, 107 (1926).

58. 59 U.S. (18 How.) 272 (1855).

59. *Pacific Mut.*, 111 S. Ct. at 1049 (Scalia, J., concurring in judgment). In *Murray's Lessee* plaintiff had been ejected by distress warrant authorized by act of Congress and challenged the validity of that act under the Due Process Clause of the Fifth Amendment. *Murray's Lessee*, 59 U.S. (18 How.) at 274-75. The Court upheld the procedure, citing its history at common law. *Id.* at 277-78.

60. *Pacific Mut.*, 111 S. Ct. at 1049-50 (Scalia, J., concurring in judgment).

61. 92 U.S. 90 (1876).

62. *Pacific Mut.*, 111 S. Ct. at 1049-50 (Scalia, J., concurring in judgment) (quoting *Walker*, 92 U.S. at 93). Defendant in *Walker* had demanded trial by jury under the Seventh Amendment, which the Supreme Court denied was applicable to the states. *Walker*, 92 U.S. at 92-93.

By definition, he argued, a procedure that has been the historical practice of the law is sufficient to provide due process as the term was understood by the drafters of both the Fifth and Fourteenth Amendments.[63]

Justice Scalia next analyzed how the Court has dealt with practices that were not in existence at the time of adoption of the Due Process Clause; it is in these cases, according to him, and only in these cases, that a line of inquiry beyond history is appropriate.[64] He first noted the Court's holding in *Hurtado v. California*[65] that historical practice, although sufficient to provide due process, is not a necessary component of due process; otherwise, the law would be incapable of change.[66] Therefore, when government departs from historical practice, it becomes necessary to formulate a standard for determining whether the new practice comports with due process.[67] It is only at this point, Justice Scalia argued, that inquiry into " 'fundamental principles of liberty and justice' "[68] becomes appropriate.[69]

Having explained that the first issue in all due process determinations centers upon whether the practice is historically approved, and then having analyzed the appropriate response to each type of case, Justice Scalia noted a second issue that the Court's jurisprudence has attached to all due process analysis: whether the practice violates the Bill of Rights.[70] Over time, he observed, the Court has come to regard virtually all of the guarantees of the Bill of Rights as essential to due process, and has held that the Fourteenth Amendment requires the states to provide these protections regardless of historical precedent.[71] A new test for due process emerged.[72] Still, when a state's procedure does not violate a right enumerated in the Bill of Rights, the traditional standards (historical procedure or fundamental fairness) apply as the sole tests.[73]

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63. *Pacific Mut.*, 111 S. Ct. at 1049-50 (Scalia, J., concurring in judgment).

64. *Id.* at 1050-51 (Scalia, J., concurring in judgment).

65. 110 U.S. 516, 528 (1884).

66. *Pacific Mut.*, 111 S. Ct. at 1050 (Scalia, J., concurring in judgment).

67. *Id.* (Scalia, J., concurring in judgment).

68. *Id.* (Scalia, J., concurring in judgment) (quoting *Hurtado*, 110 U.S. at 535).

69. *Id.* (Scalia, J., concurring in judgment).

70. *Id.* at 1051 (Scalia, J., concurring in judgment).

71. *Id.* at 1051-52 (Scalia, J., concurring in judgment) (citing Malloy v. Hogan, 378 U.S. 1, 4-6 (1964) (applying Fifth Amendment right against self-incrimination to state trials); Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963) (Sixth Amendment right to counsel); Adamson v. California, 332 U.S. 46, 54-58 (1947) (denying that Fifth Amendment privilege against self-incrimination applies to state trials); Betts v. Brady, 316 U.S. 455, 462 (1942) (Sixth Amendment right to counsel); Palko v. Connecticut, 302 U.S. 319, 323-25 (1937) (denying application of Fifth Amendment Double Jeopardy Clause to states)).

72. *Id.* at 1052 (Scalia, J., concurring in judgment).

73. *Id.* (Scalia, J., concurring in judgment) ("To say that unbroken historical usage can-

According to Justice Scalia's model, recent decisions that did apply a fundamental fairness test to all due process cases, without first inquiring into the history of the practice at issue or whether it violates the Bill of Rights,[74] were wrongly decided as to the broad principle they apply.[75] He observed that few of those decisions overturned historically approved practices without invoking a Bill of Rights guarantee;[76] those that did,[77] Justice Scalia would overrule.[78]

Applying the due process test he enunciated to punitive damages, Justice Scalia concluded that not only is the majority's fairness analysis inappropriate, its standards are so weak as to render it meaningless:

> I can conceive of no test relating to "fairness" in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined. If the imposition of millions of dollars of liability in this hodge-podge fashion fails

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not save a procedure that violates one of the explicit procedural guarantees of the Bill of Rights (applicable through the Fourteenth Amendment) is not necessarily to say that such usage cannot demonstrate the procedure's compliance with the more general guarantee of 'due process.' ").

74. *Id.* (Scalia, J., concurring in judgment); *see* Ake v. Oklahoma, 470 U.S. 68, 76-87 (1985) (fundamental fairness requires state to hire expert witness for indigent defendant in certain cases); Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25 (1981) (denying right to appointed counsel for indigent parent in parental status termination proceeding); Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (fundamental fairness test applies to termination of social security disability benefits).

75. *Pacific Mut.*, 111 S. Ct. at 1053 (Scalia, J., concurring in judgment).

76. *Id.* at 1052 (Scalia, J., concurring in judgment). *Mathews*, for example, applied a general due process analysis to a social security termination procedure, which was not a historical practice. *Mathews*, 424 U.S. at 332. For a discussion of *Mathews*, see *infra* notes 147-54 and accompanying text.

77. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977) (requiring minimum contacts to establish quasi in rem jurisdiction); Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969) (overturning garnishment of wages).

78. *Pacific Mut.*, 111 S. Ct. at 1053 (Scalia, J., concurring in judgment). Justice Scalia justified his seemingly injudicious, broad-brush rejection of the line of cases represented by *Shaffer* and *Sniadach* on the grounds that the Court's later cases "give [the principle of applying indiscriminate fundamental fairness analysis] nothing but lip service, and by their holdings reaffirm the view that traditional practice (unless contrary to the Bill of Rights) is conclusive of 'fundamental fairness.' " *Id.* (Scalia, J., concurring in judgment); *see, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2117-18 (1990) (upholding practice of transient jurisdiction despite lack of fundamental fairness). Justice Scalia thus believed that there was no reason to defer to the earlier cases:

> When the rationale of earlier cases (*Sniadach* and *Shaffer*) is contradicted by later holdings—and particularly when that rationale has no basis in constitutional text and itself contradicts opinions never explicitly overruled—I think it has no valid stare decisis claim upon me. Our holdings remain in conflict, no matter which course I take. I choose, then, to take the course that accords with the language of the Constitution and with our interpretation of it through the first half of this century.

Pacific Mut., 111 S. Ct. at 1053 (Scalia, J., concurring in judgment).

> to "jar [the Court's] constitutional sensibilities," it is hard to say what would.[79]

Asserting that the instruction provided to the jury was "not guidance but platitude,"[80] and that the only standard for review was what the court had awarded in other cases, Justice Scalia concluded that the only rational basis on which the majority could have found that the procedure comports with due process is that it is historically approved.[81] For Justice Scalia, this historical approval is the only test that matters.

Justice Kennedy, concurring separately, endorsed Justice Scalia's basic reasoning, but approached the issue of the dispositive weight of historical practice from a slightly different angle.[82] He stressed that the reason historical practice merits great weight is that "we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair."[83] In his view, widespread adherence to historical practice creates a strong presumption that the practice provides due process, but does not necessarily foreclose further inquiry.[84] Instead, Justice Kennedy left open the possibility that a case might exist for which widespread historical adherence to a practice would not prove dispositive;[85] he determined, however, that the common-law method for assessment of punitive damages did not provide such a case.[86] Acknowledging that jury determination of punitive damages generates inconsistent results,[87] Justice Kennedy contended that a certain amount of nonuniformity inheres in all jury determinations for two reasons. First, the jury exists on a case-by-case basis; second, the law often provides the jury with rather general instructions in order to promote flexibility and fairness.[88] Because juries are asked " 'to make the

79. *Pacific Mut.*, 111 S. Ct. at 1053 (Scalia, J., concurring in judgment) (quoting *id.* at 1043).

80. *Id.* (Scalia, J., concurring in judgment).

81. *Id.* (Scalia, J., concurring in judgment). Justice Scalia made certain to note that the historical test applicable to due process cases is inappropriate when applied to other provisions of the Constitution, such as the Equal Protection Clause, which, unlike the Due Process Clause, "might be thought to have some counterhistorical content." *Id.* at 1054 (Scalia, J., concurring in judgment). It is only because "due process" is an "explicit invocation of the 'law of the land' " that history is dispositive. *Id.* (Scalia, J., concurring in judgment).

82. *Id.* at 1054-56 (Kennedy, J., concurring in judgment).

83. *Id.* at 1054 (Kennedy, J., concurring in judgment).

84. *Id.* at 1054-55 (Kennedy, J., concurring in judgment).

85. *Id.* (Kennedy, J., concurring in judgment). Justice Kennedy did not give an example of a case for which history would not prove conclusive, nor did he enunciate what showing would be necessary for a finding of unconstitutionality of an ancient practice.

86. *Id.* at 1055 (Kennedy, J., concurring in judgment).

87. *Id.* (Kennedy, J., concurring in judgment).

88. *Id.* (Kennedy, J., concurring in judgment).

difficult and uniquely human judgments that defy codification,' "[89] Justice Kennedy concluded, "nonuniformity cannot be equated with constitutional infirmity."[90] He chastised the majority for finding the practice constitutional in this case and in general, while leaving open the possibility that it might nonetheless violate due process, without offering any guidance as to the circumstances under which this speculative unconstitutionality would occur.[91]

Justice O'Connor was the sole dissenter.[92] She offered two arguments to support her conclusion that the common-law method for assessing punitive damages denies defendants due process:[93] the jury instructions provided in such cases are void for vagueness, and thus violate due process; and further, the Court's holding in *Mathews v. Eldridge*[94] established a test for due process that standard punitive damages procedure does not meet.[95]

Justice O'Connor first observed that the void-for-vagueness doctrine, which requires that laws contain meaningful standards in order to afford due process,[96] applies even to cases in which the ultimate decisions are committed to the discretion of the jury.[97] She stated that the Alabama method for imposing punitive damages is unconstitutionally vague because the judge provides no meaningful guidance to assist the jury either in deciding whether to impose them, or in determining their amount.[98]

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89. *Id.* (Kennedy, J., concurring in judgment) (quoting McClesky v. Kemp, 481 U.S. 279, 311 (1987)).

90. *Id.* (Kennedy, J., concurring in judgment).

91. *Id.* (Kennedy, J., concurring in judgment).

92. *Id.* at 1056-67 (O'Connor, J., dissenting).

93. *Id.* at 1067 (O'Connor, J., dissenting). Although she specifically addressed the deficiencies of the Alabama procedure throughout her opinion, she made it clear that her analysis applies to the "common-law scheme" in general. *Id.* (O'Connor, J., dissenting) ("[W]e need not dictate to the States the precise manner in which they must address the problem.").

94. 424 U.S. 319, 335 (1976). For a discussion of *Mathews*, see *infra* notes 147-54 and accompanying text.

95. *Pacific Mut.*, 111 S. Ct. at 1056 (O'Connor, J., dissenting).

96. *Id.* at 1057 (O'Connor, J., dissenting) (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)). For a discussion of the void-for-vagueness doctrine, see *infra* notes 156-61 and accompanying text.

97. *Pacific Mut.*, 111 S. Ct. at 1057 (O'Connor, J., dissenting) (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)) ("The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty.").

98. *Id.* (O'Connor, J., dissenting). Justice O'Connor argued by analogy to Giaccio v. Pennsylvania, 382 U.S. 399 (1966). *Pacific Mut.*, 111 S. Ct. at 1057-59 (O'Connor, J., dissenting). *Giaccio* involved a statute that left to the standardless discretion of the jury the decision whether to impose court costs on an acquitted criminal defendant; the Court held that the statute violated due process by its vagueness. *Giaccio*, 382 U.S. at 401-03. The *Pacific Mutual*

The instructions of the Alabama trial judge[99] directed the jurors to do as they felt, Justice O'Connor argued, and provided little or no rational guidance for their decisionmaking process:[100] "The State offers no principled basis for distinguishing those tortfeasors who should be liable for punitive damages from those who should not be liable."[101] In addition, once the jury decided to impose punitive damages, their sole guidance in determining the appropriate amount was the judge's admonition to consider the "character and degree of the wrong" and the "necessity of preventing similar wrong."[102] She further observed that the practical effect of such instructions in Alabama has produced wildly unpredictable and inconsistent results. For example, in two factually identical insurance fraud cases,[103] one jury awarded punitive damages fifteen and one-half times the amount of the compensatory damages, while the other awarded punitive damages 249 times the amount of the compensatory award.[104]

Justice O'Connor noted that jury instructions featuring more precise standards are readily available. For example, the Supreme Court of Alabama had formulated seven factors relevant to a review of a punitive damages award, which she suggested always should be included in jury instructions.[105] These factors include: (1) whether the award bears a reasonable relationship to both the amount of harm done to the plaintiff and the amount of harm that still could be implicated; (2) the reprehensibility of defendant's conduct measured by its duration, defendant's degree of awareness, attempts at concealment, and defendant's past conduct; (3) the award's ability not only to remove any profit defendant has made but also to create a loss; (4) the financial position of defendant; (5) imposition of costs of litigation on defendant; (6) criminal sanctions against defendant, as mitigation; and (7) other civil awards against de-

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majority dismissed in a footnote the applications of the *Giaccio* void-for-vagueness doctrine to jury determination of punitive damages, drawing the distinction that "[d]ecisions about the appropriate consequences of violating a law [such as decisions regarding punitive damages] are significantly different from decisions as to whether a violation has occurred [such as the decision in *Giaccio*]." *Pacific Mut.*, 111 S. Ct. at 1046 n.12. For a discussion of *Giaccio*, see *infra* notes 156-61 and accompanying text.

99. *See supra* text accompanying note 23.

100. *Pacific Mut.*, 111 S. Ct. at 1057 (O'Connor, J., dissenting).

101. *Id.* at 1057-58 (O'Connor, J., dissenting).

102. *Id.* at 1059 (O'Connor, J., dissenting) (citation omitted).

103. Land & Assocs. v. Simmons, 562 So. 2d 140 (Ala. 1989); Washington Nat'l Ins. Co. v. Strickland, 491 So. 2d 872 (Ala. 1985). In both cases, an insurance agent had defrauded the plaintiff. *Simmons*, 562 So. 2d at 141-42; *Strickland*, 491 So. 2d at 873-74.

104. *Pacific Mut.*, 111 S. Ct. at 1060 (O'Connor, J., dissenting).

105. *Id.* (O'Connor, J., dissenting).

fendant, as mitigation.[106] Justice O'Connor believed that appellate courts' post hoc application of these criteria could not cure the harm caused by vague jury instructions, given that the review would be limited to the amount of the award and not to its appropriateness. More precise jury instructions are necessary in order to provide due process.[107]

Even if the jury instructions were not void for vagueness, Justice O'Connor argued, they nonetheless would be inadequate under the three-pronged test for procedural due process set forth in *Mathews v. Eldridge*.[108] In *Mathews* the Court held that a determination of whether a particular practice provides due process turns on a balancing of: (1) the private interest at stake; (2) the risk that the procedure will wrongly impair that interest weighed against the feasibility of an alternative; and (3) the state's interest in avoiding the alternative.[109] Expressly rejecting Justice Scalia's argument that historical practice is dispositive,[110] Justice O'Connor pointed out that the *Mathews* Court spoke of due process as " 'flexible' " and variable according to " 'time, place and circumstances.' "[111] This difference is the crux of her dispute with Justice Scalia;[112] he argued that *Mathews* applies only in those cases in which the practice in question is not a traditional one,[113] whereas she contended that *Mathews* applies to all due process cases.[114]

Given the drastic increase in the frequency and amount of punitive damages in recent years, Justice O'Connor felt that the time had come to reevaluate their constitutionality.[115] Applying the *Mathews* test to common-law punitive damages procedure, Justice O'Connor concluded that

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106. *Id.* at 1060-61 (O'Connor, J., dissenting) (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially))).

107. *Id.* at 1061 (O'Connor, J., dissenting).

108. 424 U.S. 319, 335 (1976); *see Pacific Mut.*, 111 S. Ct. at 1061-62 (O'Connor, J., dissenting).

109. *Mathews*, 424 U.S. at 335.

110. *Pacific Mut.*, 111 S. Ct. at 1065 (O'Connor, J., dissenting).

111. *Id.* (O'Connor, J., dissenting) (quoting *Mathews*, 424 U.S. at 334-35).

112. *See infra* notes 177-82 and accompanying text.

113. *Pacific Mut.*, 111 S. Ct. at 1052 (Scalia, J., concurring in judgment); *see supra* notes 74-78 and accompanying text.

114. *Pacific Mut.*, 111 S. Ct. at 1065 (O'Connor, J., dissenting). *Compare id.* at 1053 (Scalia, J., concurring in judgment) (Justice Scalia citing his plurality opinion in Burnham v. Superior Court, 110 S. Ct. 2105, 2118 (1990), for the proposition that history is controlling) *with id.* at 1065 (O'Connor, J., dissenting) (citing the concurring *Burnham* opinions of Justices Brennan, 110 S. Ct. at 2120 (Brennan, J., concurring), and White, 110 S. Ct. at 2119 (White, J., concurring in part and concurring in the judgment), for the proposition that even traditionally approved procedures must defer to contemporary due process standards).

115. *Id.* at 1066 (O'Connor, J., dissenting); *see supra* note 11.

the Alabama practice denies defendants due process.[116] In reaching her conclusion, Justice O'Connor first examined the private interests at stake and found them significant.[117] These interests included avoiding potentially uncontrollable liability that may bankrupt a defendant (indeed, the award may be calculated to do so), and evading the stigma attached to quasi-criminal punishment.[118]

Next, Justice O'Connor examined both the risk that these interests would be invaded, and the feasibility of a less threatening alternative.[119] Because it invites random and in some cases discriminatory deprivations of property,[120] Justice O'Connor concluded that the lack of jury guidance inherent in common-law punitive damages assessment creates an enormous risk that their imposition will wrongly impair defendants' property interests.[121] Additionally, she noted that post hoc judicial review does little to alleviate this concern.[122] Weighing this risk against the feasibility of an alternative, Justice O'Connor found the risk constitutionally unacceptable.[123] The factors set forth by the Alabama Supreme Court in *Green Oil Co. v. Hornsby*,[124] she argued, could be incorporated easily into jury instructions and would provide infinitely greater guidance than the present practice.[125]

Finally, applying the third *Mathews* prong, Justice O'Connor determined that, although states do have an interest in deterring wrongful

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116. *Pacific Mut.*, 111 S. Ct. at 1062 (O'Connor, J., dissenting).

117. *Id.* (O'Connor, J., dissenting).

118. *Id.* (O'Connor, J., dissenting).

119. *Id.* at 1062-64 (O'Connor, J., dissenting).

120. *Id.* at 1062 (O'Connor, J., dissenting). Justice O'Connor observed the Court's recognition that jury discretion in awarding punitive damages leads to potentially discriminatory results; she noted the Court's restrictions on punitive damages in First Amendment and other cases, on the grounds that the jury may be left free to punish an unpopular defendant or opinion. *Id.* (O'Connor, J., dissenting) (citing Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); Electrical Workers v. Foust, 442 U.S. 42, 50 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83 (1971) (Marshall, J., dissenting)).

121. *Id.* at 1062-63 (O'Connor, J., dissenting).

122. *Id.* (O'Connor, J., dissenting); *see supra* note 107 and accompanying text.

123. *Pacific Mut.*, 111 S. Ct. at 1063 (O'Connor, J., dissenting).

124. 539 So. 2d 218, 223-24 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)); *see supra* text accompanying note 106.

125. *Pacific Mut.*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). Justice O'Connor suggested several additional reforms, including fixing monetary limits by legislation, bifurcating trials into liability and punitive damages stages, and requiring clear and convincing evidence to impose punitive damages. *Id.* (O'Connor, J., dissenting). *See* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 735-38 (1982); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 947-60 (1982).

conduct, unpredictability in legal consequences of behavior undermines the overarching legal goal of providing a framework within which citizens may order their behavior.[126] She thus concluded that " 'the States have *no substantial interest* in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury.' "[127] Justice O'Connor's solution to the constitutional deficiency would require the states to adopt a more stringent method for providing juries with sufficient guidance for determining both the appropriateness and the amount of punitive damages.[128] Instead of imposing a uniform standard, however, she would leave it to state legislatures and courts to devise their own methods.[129]

In summary, *Pacific Mutual* divided the Court four ways. The majority upheld the award because the procedure by which the award was reached was a historically accepted practice, and because that procedure as applied in *Pacific Mutual* was not fundamentally unfair.[130] Justice Scalia contended that historical acceptance of the practice should have been dispositive.[131] Justice Kennedy felt that history should have been controlling in *Pacific Mutual*, but acknowledged the possibility of a case for which history would not control.[132] Finally, Justice O'Connor argued that history is irrelevant and concluded that the common-law punitive damages scheme violates due process on the grounds of both vagueness and lack of fundamental fairness.[133]

The Court always has operated with a certain uneasiness when defining precisely what due process entails, and often appears to be torn—as in *Pacific Mutual*—between the competing concepts of "law of the land," advocated by Justice Scalia, and "fundamental fairness," embraced by Justice O'Connor. In the early Fourteenth Amendment case

126. *Pacific Mut.*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). Justice O'Connor rejected plaintiff Haslip's argument that unpredictability is essential to the deterrent effect of punitive damages, in that if businesses are able to calculate the probability of a predictable award, they will merely factor it into the cost of the unlawful behavior. *Id.* (O'Connor, J., dissenting). *But see* Calfee & Craswell, *supra* note 6, at 986-89 (arguing that "[o]nly when uncertainty has been introduced will excessive damage awards tend to increase . . . the incentives to overcomply").

127. *Pacific Mut.*, 111 S. Ct. at 1064 (O'Connor, J., dissenting) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974)).

128. *Id.* at 1067 (O'Connor, J., dissenting).

129. *Id.* (O'Connor, J., dissenting).

130. *Id.* at 1042-46; *see supra* notes 29-51 and accompanying text.

131. *Pacific Mut.*, 111 S. Ct. at 1054 (Scalia, J., concurring in judgment); *see supra* notes 52-81 and accompanying text.

132. *Pacific Mut.*, 111 S. Ct. at 1054-55 (Kennedy, J., concurring in judgment); *see supra* notes 82-91 and accompanying text.

133. *Pacific Mut.*, 111 S. Ct. at 1061, 1067 (O'Connor, J., dissenting); *see supra* notes 92-129 and accompanying text.

of *Davidson v. New Orleans*[134] the Court observed that the term was "without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights" found in the Constitution.[135] Surveying the English roots of due process as Justice Scalia did in *Pacific Mutual*,[136] the *Davidson* Court found it somewhat difficult to apply the original understanding of due process to the practices of the states.[137] Instead, it determined that the intent of the drafters is best reached "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[138] In the context of an assessment on real estate, the Court held that, so long as the laws provide a means for confirming or contesting the assessment in court, with notice to the person assessed, the judgment necessarily affords due process, "however obnoxious it may be to other objections."[139]

In *Snyder v. Massachusetts*[140] the Court suggested that fairness is, theoretically, the ultimate measuring rod of due process.[141] Justice Cardozo, writing for the Court, upheld the constitutionality of a state practice that permitted the jury to view a murder scene in the absence of the defendant.[142] In doing so, the Court held that the Fourteenth Amendment mandates the defendant's presence only to the extent that "a fair and just hearing would be thwarted by his absence."[143] In determining the constitutional threshold of fairness and justice, however, the Court found that the practice had a long history, dating back to 1747, and thus, met the standard of fairness embodied in the Fourteenth Amendment

134. 96 U.S. 97 (1877).

135. *Id.* at 101-02.

136. *Pacific Mut.*, 111 S. Ct. at 1048-49 (Scalia, J., concurring in judgment); *see supra* notes 55-57 and accompanying text.

137. *Davidson*, 96 U.S. at 102. Because the Magna Carta protected the barons, who controlled Parliament, from the King, the Court reasoned that the protection of "the law of the land" was originally not envisioned as operating against laws of Parliament. *Id.* But if such protection, applied to the states via the Fourteenth Amendment, was not intended to operate against state legislatures, due process would be meaningless, because a state could "make anything due process of law which, by its own legislation, it chooses to declare such." *Id.*

138. *Id.* at 104.

139. *Id.* at 104-05.

140. 291 U.S. 97 (1934). For Justice Scalia's interpretation of *Snyder*, see *Pacific Mut.*, 111 S. Ct. at 1051 (Scalia, J., concurring in judgment).

141. *Snyder*, 291 U.S. at 116-17.

142. *Id.* at 122. Defendant Snyder, on trial for first-degree murder, had asked the trial court to allow him to be present with the jury at their viewing of the crime scene. *Id.* at 103. The judge denied his request, permitting only his attorney to go. *Id.* Defendant was convicted and his judgment affirmed by the Supreme Judicial Court of Massachusetts. *Id.* at 102.

143. *Id.* at 107-08.

that itself "ha[d] not displaced the procedure of the ages."[144] Justice Kennedy's due process analysis in *Pacific Mutual*[145] strongly resembles that of Justice Cardozo in *Snyder*: both describe fairness as the ultimate measure of due process, but accord history dispositive weight in determining fairness.[146]

More recently, the Court held in *Mathews v. Eldridge*[147] that, at least in the case of a newly created right or practice, a due process analysis requires balancing private and governmental interests. In *Mathews* the plaintiff, whose social security benefits had been terminated prior to a hearing, challenged the sufficiency of the procedures provided him under the Due Process Clause of the Fifth Amendment.[148] The Court, without first inquiring into or discussing whether the practice was historical, noted that " '[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' "[149] It then established the three factors that Justice O'Connor would have applied in *Pacific Mutual*: (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest weighed against the feasibility of alternative methods; and (3) the governmental interest in avoiding an alternative method.[150] *Mathews* arguably provides support for Justice O'Connor's notion that historical practice is not dispositive.[151] In deciding due process cases such as *Mathews* without mentioning the issue of historical practice,[152] the Court left open the question whether it was dropping history from

144. *Id.* at 111.

145. *Pacific Mut.*, 111 S. Ct. at 1054-56 (Kennedy, J., concurring in judgment).

146. *See id.* at 1054-55 (Kennedy, J., concurring in judgment); *Snyder*, 291 U.S. at 110-11; *infra* notes 183-85 and accompanying text.

147. 424 U.S. 319, 334 (1976).

148. *Id.* at 324-25.

149. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

150. *Id.* at 335; *see supra* notes 108-16 and accompanying text.

151. *See Pacific Mut.*, 111 S. Ct. at 1043; *id.* at 1065 (O'Connor, J., dissenting). *But see Pacific Mutual*, 111 S. Ct. at 1052 (Scalia, J., concurring in judgment) (criticizing *Mathews* and other due process opinions for "indiscriminately appl[ying] balancing analysis to determine 'fundamental fairness' " without regard for historical practice); *supra* text accompanying notes 64-69 (discussing Justice Scalia's concept of the proper role of balancing test in due process analysis).

152. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 76-87 (1985) (not examining the validity of a historical practice, but imposing the duty on trial courts to provide certain indigent defendants access to a psychiatrist's assistance and expertise); Lassiter v. Department of Social Servs., 452 U.S. 18, 27-32 (1981) (not examining the validity of a historical practice, but applying *Mathews* to determine that there is no automatic due process right to appointed counsel for indigent parents in state parental status termination proceeding). *But see* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (striking down historical practice of quasi in rem jurisdiction absent minimum contacts with forum); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (overturning historical practice of wage garnishment).

due process analysis[153] or simply ignoring the issue of history in cases where the Court was not actually overturning a historically accepted procedure.[154] This unresolved question is the vortex of the tension between Justices O'Connor and Scalia.[155]

Another apparent counterweight to historical-practice analysis is the void-for-vagueness doctrine. In *Giaccio v. Pennsylvania* the jury acquitted the defendant of wantonly discharging a firearm.[156] It imposed the costs of prosecution on him nonetheless, under a state statute[157] that gave the jury the option of awarding costs against a defendant it had acquitted when it felt defendant was guilty of some wrong, albeit not of the crime charged.[158] Although the law had existed since 1860, prior to the adoption of the Fourteenth Amendment, the Court, without any reference to the antiquity of the procedure, held that the statute violated the Due Process Clause because of its vagueness.[159] The Court reiterated its understanding of due process as the law of the land, but held that "[i]mplicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."[160] The Court reasoned, in other words, that any law that provides no standard for compliance is no law at all. Certainly, it cannot be "the law of the land," the only legitimate means by which a person may be deprived of property. A historically accepted practice that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case" is void for vagueness under the Due Process Clause.[161]

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153. This position lies at the heart of Justice O'Connor's argument in *Pacific Mutual*. *See Pacific Mut.*, 111 S. Ct. at 1065-66 (O'Connor, J., dissenting) (contending that "[a]lthough history creates a strong presumption of continued validity," no procedure can escape scrutiny under *Mathews*); *supra* notes 108-14 and accompanying text.

154. This interpretation reflects Justice Scalia's view, in *Pacific Mutual*, of the Court's recent jurisprudence. *See Pacific Mutual*, 111 S. Ct. at 1052-53 (Scalia, J., concurring in judgment) (arguing that the rationale in *Mathews* is limited to cases that do not strike down a traditionally approved procedure). Unable to distinguish cases such as *Sniadach* and *Shaffer*, which overturned historical practices, Justice Scalia must view them as wrongly decided. *Id.* at 1053 (Scalia, J., concurring in judgment).

155. *See infra* notes 177-82 and accompanying text.

156. 382 U.S. 399, 400 (1966).

157. *Id.* (quoting PA. STAT. ANN. tit. 19, § 1222 (1964), *repealed by* Judiciary Act Repealer Act, 1978 Pa. Laws 202).

158. *Id.* at 403-04.

159. *Id.* at 402-03. The statute contained "no standards at all," nor did it "place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him." *Id.* at 403. As a result, a person could not order his behavior in any way to assure compliance with the law. *Id.*

160. *Id.* at 403.

161. *Id.* at 402-03.

Although it held constitutional the common-law *procedure* by which punitive damages are awarded,[162] the Court in *Pacific Mutual* indicated that an excessive *amount* might be constitutionally unacceptable nonetheless.[163] Long ago the Court said in dictum that a disproportionate damages award may trigger a violation of due process, despite the adequacy of the procedure by which it was reached.[164] In *Waters-Pierce Oil Co. v. Texas*[165] the Court refused to overturn the state's fines for the violation of antitrust laws, despite defendant's contention that the fines were so excessive as to violate due process.[166] The Court held that fixing penalties fell within the police power of the state, but recognized that the Court still could interfere with that power in some instances, "if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law."[167] Thus, the Court paved the way for an eventual conclusion that even when the particular procedure itself is legitimate, if the amount reached under it in a particular case is egregious, the award will be unconstitutional.

Before *Pacific Mutual*, then, potential avenues for a due process attack on a punitive damages award included the lack of fundamental fairness,[168] the vagueness of the procedure by which it was reached,[169] and the excessiveness of the amount.[170] In recent years, the Court has come ever closer to conducting a due process analysis in the context of punitive damages. In *Bankers Life & Casualty Co. v. Crenshaw*,[171] for example, defendant challenged the validity of a punitive damages award under the Due Process Clause of the Fourteenth Amendment.[172] Because this issue had not been raised in the court below, the Court unanimously refused to address it.[173] Justices O'Connor and Scalia, however, expressed serious

162. *Pacific Mut.*, 111 S. Ct. at 1043.

163. *See id.* ("[U]nlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.") (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)).

164. *Waters-Pierce Oil*, at 111 (1909).

165. The jury had assessed penalties against defendant of $1,500 per day for the period of May 31, 1900 to March 3, 1903 for violation of one act, and $50 per day for the period of April 1, 1903 to April 29, 1907; the total penalty was $1,623,500. *Id.* at 96-97.

166. *Id.* at 111. Defendant did not argue that the Eighth Amendment prohibition of excessive fines applied to the states. *Id.*

167. *Id.*

168. *See supra* notes 134-55 and accompanying text.

169. *See supra* notes 156-61 and accompanying text.

170. *See supra* notes 162-67 and accompanying text.

171. 486 U.S. 71 (1988).

172. *Id.* at 76. Defendant also advanced a challenge under the Excessive Fines Clause of the Eighth Amendment. *Id.*

173. *Id.* at 76-80. The Court rejected the Eighth Amendment argument on the same grounds. *Id.* The following year, the Court eliminated the possibility of an Eighth Amend-

doubts that the punitive damages award comported with due process, and indicated an eagerness to address the issue in the future.[174]

Pacific Mutual is the first case in which the Court has placed common-law punitive damages in the context of Fourteenth Amendment due process. In doing so, the Court encountered the theoretical conflict between the two aspects of due process: the principle of depriving a defendant of property only by the law of the land[175] versus the principle of fundamental fairness to the defendant,[176] which arguably is the essence of due process. These two principles do not always, or even usually, clash; when a procedure is both historically approved and fundamentally fair, it necessarily provides due process. Conversely, when a procedure possesses neither of those attributes, it necessarily denies due process. In addition, when a procedure is not historically-approved, the only test for due process is its fairness. Thus, the friction between the two competing claims of due process present in *Pacific Mutual* arises only when the fairness of a traditionally approved practice is called into question. Because the opinions of Justices Scalia and O'Connor both reflect assumptions that the traditional method for assessing punitive damages is unfair,[177] but arrive at antithetical conclusions as to whether history or fairness is controlling in a due process determination, they squarely frame the debate on the competing principles of due process. It is in the context of this debate that the majority's reasoning is best understood.

Justice Scalia envisions due process as a method of achieving at least minimal fairness by ensuring that people not be deprived of their rights

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ment challenge in Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989). The majority rejected the defendant's valid argument based on the Excessive Fines Clause, holding that it applies only to criminal actions and civil actions that the government prosecutes or by which it becomes entitled to a share of the damages awarded. *Id.* at 263-64. Justice O'Connor disagreed, constructing an elaborate argument based on the history of amercements in England, from which fines originated, which she believed indicated that the antecedents of the Excessive Fines Clause depicted punitive damages as fines. *Id.* at 282-301 (O'Connor, J., concurring in part and concurring in judgment). As in *Bankers Life*, defendant also improperly raised a due process issue, which the Court refused to address. *Id.* at 276-77.

174. *Bankers Life*, 486 U.S. at 87-89 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor stated:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

Id. at 87 (O'Connor, J., concurring in part and concurring in the judgment).

175. *See supra* notes 134-39 and accompanying text.

176. *See supra* notes 140-55 and accompanying text.

177. *See Pacific Mut.*, 111 S. Ct. at 1053 (Scalia, J., concurring); *id.* at 1056 (O'Connor, J., dissenting).

except in accordance with an established legal process. That he perceives fairness as the underlying policy of the Due Process Clause is demonstrated by his approval of the Court's recognition of " 'fundamental principles of liberty and justice' "[178] as the only standard by which to judge due process in the absence of traditional practice. Thus, Justice Scalia's analysis of the proper relation between the law of the land and fairness is that by adopting the Due Process Clause, the framers intended to impose upon the states a certain guarantee of minimal fairness to their citizens. Namely, this fairness ensured that they would not be deprived of their property except in accordance with the law of the land; that guarantee remains in effect when a state changes its laws.[179] But Justice Scalia argued that when the established law of the land is itself unfair, the Due Process Clause provides no recourse, because the clause specifically invokes the law of the land, and not general fairness, as the measure of compliance.[180] The clause is not, for him, a general license for the federal courts to police the fairness of all the laws of the states.

Conversely, Justice O'Connor perceives the Due Process Clause as just such a license for free judicial review of state procedures, and thereby departs from Justice Scalia's position. Relying on the *Mathews* concept of due process as flexible, the essence of her argument is that the Court in recent years properly has stripped compliance with the law of the land from due process analysis, in order to implement more effectively and directly the Due Process Clause's underlying principle of fairness. Because she makes no concession to historical practice in her analysis, she presumably believes that it has no place in determining due process, and that a modern fairness test, similar to the balancing test in *Mathews*, applies to all cases.[181] Justice O'Connor, however, does not address Justice Scalia's contention that *Mathews*, which scrutinized a social security administrative procedure and its kin, are distinguishable from cases such as *Pacific Mutual*, insofar as the former involve only

178. *Id.* at 1050 (Scalia, J., concurring in judgment) (quoting Hurtado v. California, 110 U.S. 516, 535 (1884)).

179. *See supra* text accompanying notes 64-69.

180. *See Pacific Mut.*, 111 S. Ct. at 1054 (Scalia, J., concurring in judgment).

181. *See id.* at 1066-67 (O'Connor, J., dissenting). Justice O'Connor stated:

> [T]he time has come to reassess the constitutionality of a time-honored practice. . . . The Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results. When we lose that confidence, a change must be made.

Id. (O'Connor, J., dissenting).

nonhistorical practices.[182]

From this perspective, it becomes apparent that Justice Kennedy, who seems to offer a mere modification of Justice Scalia's opinion,[183] actually views due process in a manner more similar to the vision of Justice O'Connor. Justice Kennedy's argument is that history should be dispositive not because it is the ultimate measure of due process, but because a strong presumption exists that a practice that has lasted throughout the ages cannot be unfair.[184] Thus, for him, at least in theory—but for Justice O'Connor in practice—fairness is the ultimate measuring rod of due process. His analysis, however, and his conclusion that the common-law punitive damages scheme is not unfair within the meaning of due process[185] indicate he would rarely find that the unfairness of a practice outweighs its historical acceptance. Only when the practice is so unfair that it undermines even the minimal guarantee of fairness provided by the Due Process Clause would Justice Kennedy find a constitutional violation. Thus, although he began, as did Justice O'Connor, with the premise that fairness is the ultimate test of due process,[186] the threshold of fairness he would apply to a traditional practice is so high that the result of his analysis resembles that of Justice Scalia. Justice Kennedy attempts to reconcile history and fairness by equating the two concepts.[187]

The *Pacific Mutual* majority attempted to place the historically approved method for awarding punitive damages into the context of due process without first making the necessary choice between history and fairness, or at least fixing the relationship between the two. Instead, it gave great weight to the historical acceptance of the practice, and applied an attenuated fairness test as well.[188] The result is that the Court proceeded—without the guidance of a priori principles for interpreting the Due Process Clause—to reach implicitly essentially the same result Justice Scalia would reach explicitly. The effect of the decision on the area of state-imposed punitive damages is to affirm the constitutionality of the process by which they are awarded, imposing a hopelessly vague standard of fairness, and leaving open, as Justice Scalia would not, the possibility of an unconstitutionally excessive result.[189] The decision has the

182. For Justice O'Connor's argument that a "static notion of due process" was rejected by both *Mathews* and the majority in *Pacific Mutual*, see *id.* at 1065 (O'Connor, J., dissenting).

183. *See id.* at 1054-56 (Kennedy, J., concurring in judgment); *supra* notes 82-91 and accompanying text.

184. *Pacific Mut.*, 111 S. Ct. at 1054 (Kennedy, J., concurring in judgment).

185. *Id.* at 1055 (Kennedy, J., concurring in judgment).

186. *Id.* at 1054-55 (Kennedy, J., concurring in judgment).

187. *See id.* at 1055 (Kennedy, J., concurring in judgment).

188. *See supra* notes 29-51 and accompanying text.

189. *See supra* text accompanying note 53.

further effect of adopting the historical method of due process analysis endorsed by Justice Scalia; the Court indirectly subordinated the "fundamental fairness" test to historical practice without actually eliminating it.[190] Thus, the majority followed Justice Scalia's lead in substance even though it maintains the formality of the balancing test.

The *Pacific Mutual* Court, by its reference to *Waters-Pierce Oil Co. v. Texas*,[191] indicated that a punitive damages award may violate due process by its size as well as by the method pursuant to which it is rendered.[192] It then decided the case by considering the fairness of the procedure.[193] It purported to limit its decision to the Alabama guidelines,[194] but because the procedure for assessing punitive damages is essentially the same in all states,[195] the Court effectively held constitutional the common-law punitive damages scheme in all states. As a result, the only remaining basis for constitutional challenge is the amount of an award; the Court indicated that it maintains a strong presumption that proportionality is guaranteed by state appellate review.[196]

The Court failed to adopt any clear principles upon which to base a determination of the fairness of a historically accepted practice; this failure led it to an unclear conclusion as to what due process requires of state courts in evaluating their procedures for awarding punitive damages. Specifically, the Court left three major issues unresolved. First, although it evaluated Alabama's practice in light of three considerations—the sufficiency of guidance to the jury, the adequacy of trial court review, and the adequacy of appellate review[197]—the Court did not give any indication whether these considerations are necessary to such an evaluation, or whether the specific features it noted in Alabama's procedure are necessary to afford due process.[198] Second, the Court was am-

190. *See supra* notes 79-81 and accompanying text.

191. 212 U.S. 86, 111 (1909); *see supra* notes 164-67 and accompanying text.

192. *Pacific Mut.*, 111 S. Ct. at 1043.

193. *Id.* at 1044-46. Although it considered the award "close to the line," the Court found it appropriate because it "did not lack objective criteria." *Id.* at 1046.

194. *Id.* at 1044.

195. *See id.* at 1056 (O'Connor, J., dissenting).

196. *See id.* at 1045.

197. *See id.* at 1044-45.

198. Already state supreme courts have diverged on this matter. Alabama has considered its standards to be constitutionally mandated. *See* Valley Bldg. & Supply, Inc. v. Lombus, 590 So. 2d 142, 147 (Ala. 1991); Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854, 856-59 (Ala. 1991); Seaboard Sys. R.R. v. Russell, 582 So. 2d 1092, 1094 (Ala. 1991). Other courts have interpreted *Pacific Mutual* more liberally. Upholding Mississippi's post-trial review, which is more deferential than Alabama's, the Fifth Circuit held in Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991), that "the procedural protection adequate to support the constitutionality of a punitive damages award varies with the circumstances," em-

biguous as to whether its requirement that there be a "rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter"[199] mandates consideration of defendant's financial condition in post-trial and appellate review for excessiveness.[200] Finally, it is uncertain whether the Court's statement that it refused to "draw a mathematical bright line,"[201] while it simultaneously held that the proportion of punitive to compensatory damages in *Pacific Mutual* was "close to the line,"[202] requires any specific ratio between compensatory and punitive damages.[203]

Pacific Mutual's significance to the jurisprudence of due process is greater than it appears on the surface of the Court's circuitous opinion. As Justice Scalia observed, the "fairness" test which the majority purports to add to the historical analysis is extraordinarily weak.[204] The Court, though not explicitly rejecting it, reduced almost to surplusage the role of "fairness" analysis in cases in which a practice is historically approved.[205] In deferring to historical practice, the Court implicitly rejected Justice O'Connor's argument that *Mathews v. Eldridge* imposed a flexible due process test on all procedures, including those for which a

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phasizing "the fact intensive nature of the due process analysis articulated in *Haslip*." *Id.* at 1385-86; *accord* Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991).

Other courts, however, seem to sidestep *Pacific Mutual* altogether, reviewing punitive damages by their own standards. *See, e.g.*, Republic Ins. Co. v. Hires, 107 Nev. 317, 319, 810 P.2d 790, 792-93 (1991) (dismissing defendant's due process argument with the assertion that *Pacific Mutual* stands for the proposition that "the availability of punitive damages is accepted as settled law by nearly all state and federal courts," and reducing award from $22,500,000 to $5,000,000 based on its own concept of disproportionality).

199. *Pacific Mut.*, 111 S. Ct. at 1045-46.

200. Again, lower courts are split. *Compare* Principal Fin. Group v. Thomas, 585 So. 2d 816, 818 (Ala. 1991) (holding that such consideration is essential to determining excessiveness) *with* Adams v. Murakami, 54 Cal. 3d 105, 116-17, 813 P.2d 1348, 1355-56, 24 Cal. Rptr. 318, 325-26 (1991) (holding that *Pacific Mutual* "weighs strongly in favor of requiring evidence of a defendant's financial condition" but does not require it).

201. *Pacific Mut.*, 111 S. Ct. at 1043.

202. *Id.* at 1046.

203. Once more, there is confusion among lower court judges. *Compare Principal Fin. Group*, 585 So. 2d at 819 (Houston, J., concurring) ("I do not know whether this indicates that there must be some kind of proportionality between compensatory damages and punitive damages. I trust that it does not . . . .") *with* Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854, 860 (Ala. 1991) (Maddox, J., concurring) (concluding that *Pacific Mutual*'s guidelines include considering the size of punitive damages compared to actual loss).

204. *Pacific Mut.*, 111 S. Ct. at 1053 (Scalia, J., concurring in judgment).

205. Justice Scalia read the "fairness" analysis completely out of the Court's opinion: noting that recent cases have given "nothing but lip service" to the view that "fundamental fairness" is not conclusively demonstrated by traditional practice, he stated that nothing other than deference to history could explain the majority's decision. *Id.* (Scalia, J., concurring in judgment).

traditional practice exists.[206] Instead, the Court applied not a *Mathews* test, but a much weaker "fairness" analysis. *Pacific Mutual* epitomizes a trend in which the Court is slowly turning away from "fairness" and back toward history as the basis of analysis, with Justice Scalia leading the way.[207] The due process debate in *Pacific Mutual* was recently replayed almost verbatim in *Schad v. Arizona*,[208] which upheld the state's practice of allowing a jury to reach a verdict of first-degree murder on separate theories.[209] The *Schad* plurality announced that the history of the practice is to be given great weight, but then considered the fairness of the practice.[210] Justice Scalia, concurring in the judgment, argued that "[u]nless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.' "[211] As in *Pacific Mutual*, he contended that the plurality's analy-

206. *See id.* at 1061-65 (O'Connor, J., dissenting); *supra* notes 108-14 and accompanying text. Again, what the majority does indirectly, Justice Scalia proclaims directly: "Such cases [as *Mathews*], at least in their broad pronouncements if not with respect to the particular provisions at issue, were in my view wrongly decided." *Pacific Mut.*, 111 S Ct. at 1053 (Scalia, J., concurring) (footnote omitted).

207. This trend began last term in Burnham v. Superior Court, 110 S. Ct. 2105 (1990), in which a plurality, led by Justice Scalia, upheld the doctrine of transient jurisdiction on the grounds of historical acceptance, emphasizing the "tradition" in "traditional notions of fair play and substantial justice," and holding that the minimum-contacts analysis of Shaffer v. Heitner, 433 U.S. 186 (1977), did not apply to cases involving in-state service. *Burnham*, 110 S. Ct. at 2109-17 (plurality opinion). *See generally* Douglas A. Mays, Note, Burnham v. Superior Court: *The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory*, 69 N.C. L. REV. 1270 (1991) (analyzing *Burnham*).

The debate in *Pacific Mutual* between Justices O'Connor and Scalia epitomizes the fundamental rift between conservative judicial activism, as exemplified by Justice O'Connor's approach to *Pacific Mutual*, *see supra* notes 92-129 and accompanying text, and judicial conservatism, as exemplified by Justice Scalia's approach to the same case, *see supra* notes 52-81 and accompanying text. This division is becoming a key element of debate in the Court. *See* Beau J. Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 637-49 (1991) (contrasting the approaches taken by Justices O'Connor and Scalia in Ohio v. Akron Ctr. for Reproductive Health, 110 S. Ct. 2972 (1990) (informed consent for abortion); Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (same); Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990) (right to die); Carden v. Arkoma Assocs., 494 U.S. 185 (1990) (diversity jurisdiction); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (obscenity); Penny v. Lynaugh, 492 U.S. 302 (1989) (cruel and unusual punishment)). The author concludes that the essence of this debate is the conflict between "Justice Scalia's use of positivism and history in attempting to establish legal certainty" and "Justice O'Connor's . . . balanc[ing] the interests of the conflicting societal elements in each case." *Id.* at 637.

208. 111 S. Ct. 2491 (1991).

209. *Id.* at 2497 (plurality opinion).

210. *Id.* at 2497-505 (plurality opinion); *see* James J. McGuire, Note, Schad v. Arizona: *Diminishing the Need for Verdict Specificity*, 70 N.C. L. REV. 936, 964-67 (1992).

211. *Schad*, 111 S. Ct. at 2507 (Scalia, J., concurring in judgment).

sis "ultimately relies upon nothing but historical practice."[212]

The effect of *Pacific Mutual* on the law is thus twofold. First, it affirms the constitutionality under the Due Process Clause of the Fourteenth Amendment of state common-law punitive damages assessment, leaving open the slim possibility that a jury award may be so grossly excessive as to deny due process. More fundamentally from a jurisprudential point of view, it represents a movement toward the historical approach to due process.

The Court could have avoided a great deal of confusion by fully adopting Justice Scalia's opinion, which reaches the same result in a manner far more direct, lucid, logical, and elegant. As Justice Scalia convincingly demonstrates, both the intent of the Fourteenth Amendment and most of the cases construing it indicate that historical practice is dispositive. The Court's simultaneous enervation and perfunctory execution of "fairness" analysis contributes nothing to the law and much to the confusion surrounding it. Indeed, although it stumbled on the correct general result, the Court's fuzzy reasoning accounts for its failure to establish any meaningful standard of review of state practice, or to settle the issue of the size of a jury award required to trigger a violation of due process. Because most punitive damages awards are challenged on the basis of their size, a large gap remains in the law, one which should have been filled. In the words of Justice Kennedy, "[i]t is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter, and this tension in its analysis now must be resolved in some later case."[213] Although the Court often leaves unresolved tensions, it could have avoided the one left in *Pacific Mutual* by adopting Justice Scalia's opinion. The Court has placed the burden of reforming the method for assessment of punitive damages squarely on the states,[214] but has given them scant guidance as to what it is the Constitution requires. Fortunately, the Court emphasized that its holding is limited to the facts of the case.[215] State courts would do well to take the Court at its word.

R. McKENNA RICHARDS, JR.

212. *Id.* (Scalia, J., concurring in judgment).

213. *Pacific Mut.*, 111 S. Ct. at 1055 (Kennedy, J., concurring in judgment).

214. As the Court noted, Alabama already had imposed limits on punitive damages before the case reached the Supreme Court (but after the cause of action arose). *Id.* at 1044 n.9; *see* Act of 1987, No. 87-185, §§ 1, 2, 4, 1987 Ala. Acts 87-185 (codified at ALA. CODE §§ 6-11-20 to -30 (1991)).

215. *Pacific Mut.*, 111 S. Ct. at 1043.