"Common Sense Legal Reform" and Bell's Toll: Eliminating Punitive Damage Claims from Jurisdictional Amount Calculations in Federal Diversity Cases

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"Common Sense Legal Reform"
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Punitive Damage Claims from
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BY RUSSELL G. MURPHY*

INTRODUCTION

The 1995 swearing in of Newt Gingrich’s 104th Congress marks the beginning of another phase in the longstanding debate about the proper role of the federal courts. The Republican “Contract with America” contains litigation reform proposals that would limit punitive damage awards. The recently released Proposed Long Range Plan for the Federal Courts carries the Contract’s attack on punitive damages one step further by advocating the elimination of punitive damage claims from jurisdictional amount calculations in diversity of citizenship lawsuits in the federal courts. These legal and political developments offer an opportunity to re-evaluate the impact of punitive-damage-based diversity cases on the operation and effectiveness of the federal court system.

The diversity of citizenship jurisdiction of the federal courts has long been a source of controversy. Although expressly created by the United States Constitution,1 Congress has consistently conferred it with signifi-

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significant restrictions, and the United States Supreme Court has narrowly construed implementing legislation.

The Access to Justice Act submitted to Congress in 1992 contained significant proposals for reform of federal court practice. One provision would have excluded punitive damage claims from the calculation of the jurisdictional amount in diversity lawsuits. The proposal was defeated, and its sponsors did not resubmit similar legislation. However, the issue of punitive damages has been revitalized by the Republican “Contract with America,” legislation proposed to implement the Contract’s “tort

2 See 28 U.S.C. § 1332(a) (1988) (imposing a jurisdictional amount requirement of $50,000 exclusive of interest and costs); id. § 1441(b) (1988) (stating removal of state cases to federal courts is available “only if none of the parties . . . joined . . . as defendants is a citizen of the State in which [the] action is brought”).

3 See, e.g., Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 105-09 (1941) (declaring that the right to remove a state case is limited to the named defendant; original plaintiff facing counterclaim may not remove); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (construing diversity statute to require “complete diversity” in that no plaintiff may be a citizen of the same state as any defendant).


5 See Dan Quayle, Civil Justice Reform, 41 AM. U. L. REV. 559, 568 (1992) (commenting on the Access to Justice Act). Section 2 of the Senate version of the Access to Justice Act required that the jurisdictional amount requirement of 28 U.S.C. § 1332 be indexed on an annual basis to reflect the change in the Consumer Price Index. S. 2180, 102d Cong., 2d Sess. § 2 (1992). The Act also provided that the prevailing party in diversity actions shall be entitled to attorney’s fees to the extent that he or she prevailed on the claim. Id. § 3. In addition, the Act imposed a notice requirement on potential plaintiffs seeking to file suit in federal district court. Id. § 5.

6 S. 2180, 102d Cong., 2d Sess. § 2 (1992). Section 2 provided for an amendment to 28 U.S.C. § 1332, adding a new section: “(d) In determining whether a matter in controversy exceeds the sum or value of $50,000, the amount of damages for pain and suffering or mental anguish, punitive or exemplary damages, and attorney’s fees or costs shall not be included.”

7 Telephone Interview with Staff Member, Offices of Senator Charles E. Grassley (Oct. 13, 1993) (stating that the bills were not resubmitted because of a “change in priorities” and “lack of interest.” This staff person seemed reluctant to discuss whether the change in presidential administrations deterred resubmission.)

8 The “Contract with America” was signed by 345 Republican candidates on September 27, 1994. Among the ten promises for legislative action within the first one hundred days of the 104th Congress was a pledge to implement “common sense legal reform” including “reasonable limits on punitive damages.” The Coming Attack, INDIANAPOLIS STAR (Final Makeover Edition), Nov. 22, 1994, at A8.
reform" agenda,⁹ and the 1995 recommendations of the Committee on Long Range Planning of the Judicial Conference of the United States.¹⁰
The prominence of punitive damages reform in these plans highlights the burdens placed on federal courts by diversity of citizenship jurisdiction based on punitive damage claims and calls for limitation or abandonment of this type of jurisdiction.

This Article examines the rule of Bell v. Preferred Life Assurance Society,¹¹ that punitive damage claims may provide the jurisdictional amount required by 28 U.S.C. § 1332 even if the damage claim is facially excessive,² in the context of modern diversity practice. After a review of the history of diversity jurisdiction and summary of its major criticisms,³ the Article outlines the remedy of punitive damages,⁴ describes the primary issues in the debate over their viability and legality,⁵ and examines how jurisdiction based on punitive damages disrupts the proper functioning of federal courts.⁶ The Article concludes with a recommendation that either the Supreme Court or Congress reverse Bell and adopt a rule that the jurisdictional amount in diversity cases be calculated without regard to punitive damage claims.⁷

I. FEDERAL COURT DIVERSITY OF CITIZENSHIP JURISDICTION

Federal courts possess jurisdiction to hear cases and controversies between citizens of different states under Article III, Section 2, of the United States Constitution.¹⁸ Congress has implemented this constitutional grant by legislation dating back to the first diversity statute, the Judiciary Act of 1789.¹⁹ These laws and their interpretation by the United States

⁹ H.R. 10, 104th Cong., 1st Sess. (1995). Section 103(c) of Title I of H.R. 10 provided for punitive damage awards only upon clear and convincing proof of conduct manifesting actual malice. Such damages were limited to the greater of three times actual damages awarded for economic injury or $250,000.
¹¹ 320 U.S. 238 (1943).
¹² Id. at 243 (stating that decisions on whether a party meets the jurisdictional amount requirement will not be made based on the assumption that a verdict for the claimed amount would be excessive).
¹³ See infra notes 18-65 and accompanying text.
¹⁴ See infra notes 66-159 and accompanying text.
¹⁵ See infra notes 160-223 and accompanying text.
¹⁶ See infra notes 224-38 and accompanying text.
¹⁷ See infra notes 239-58 and accompanying text.
¹⁸ See supra note 1.
¹⁹ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (1789); see supra note 2.
Supreme Court have imposed restrictions and limitations going significantly beyond the express terms of the Constitution. Two of the most important restrictions are the jurisdictional amount requirement and the “rule of complete diversity.”

These restrictions reflect both historical reservations about the need for federal diversity jurisdiction and concerns about the effects of diversity on the capacity of federal courts to perform essential functions. Commentators have asserted that diversity jurisdiction has outlived its usefulness, overwhelms the federal docket with routine state matters,

The Judiciary Act of 1789 created 13 districts and 13 district courts. The Act also created three circuit courts and endowed them with original jurisdiction over the following:

- all suits of a civil nature . . . where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

The Act only endowed the 13 district courts with jurisdiction to hear, inter alia, cases concerning federal law, admiralty, aliens, cases where the United States was a plaintiff, and cases involving suits against foreign ministers. The jurisdictional amount requirement is currently $50,000. Under this rule, all of the plaintiffs must have state citizenship different from the state citizenship of all the defendants.

See generally Report of the Federal Courts Study Committee (Apr. 2, 1990), reprinted in 22 CONN. L. REV. 615, 733-942 (1990) (setting forth the proposals, analyses, and recommendations of a committee appointed by Chief Justice Rehnquist and Congress which conducted a fifteen month study of the problems of the federal courts). The Committee concluded that “in most diversity cases . . . there is no substantial need for a federal forum.” Id. at 779. The Committee recommended that Congress limit diversity jurisdiction to complex multi-state cases, interpleader, and cases involving aliens. Id. at 778. Martha Middleton, Judge Urges Ending Diversity Jurisdiction, 68 A.B.A. J. 252, 252 (1982) (reporting remarks made by Judge Wilfred Feinberg, Chief Judge of the United States Court of Appeals for the Second Circuit, endorsing a bill which “would eliminate diversity of citizenship as a basis for federal jurisdiction”).

Report, supra note 22, at 778-89; see also M. Caldwell Butler, Diversity in the Court System: Let’s Abolish It, 3 ADELPHIA L.J. 51, 54-56 (1984) (asserting that diversity cases constitute roughly twenty-five percent of the federal courts’ caseload and roughly half of such cases involve primarily state matters of tort and contract); Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L. REV. 67, 90, 94 (asserting that federal question and diversity cases constitute two-thirds of the district court docket; arguing for line drawing in diversity cases to limit access); Diana G. Culp, Fixing the Federal Courts, 76 A.B.A. J. 63, 63 (1990) (asserting that, in recent years, federal courts “have been transformed primarily into drug courts and courts of death-penalty
drains off severely limited resources,\textsuperscript{24} and interferes with the federal courts' ability to decide crucial federal law cases.\textsuperscript{25}

A. Justifications, Criticisms and Reforms

Diversity cases are state law cases over which state and federal courts have concurrent jurisdiction.\textsuperscript{26} The primary contemporary justification for diversity of citizenship jurisdiction is that it eliminates or reduces the potential for state court bias, prejudice, or unfairness against out-of-state litigants.\textsuperscript{27} At various times, commentators have asserted that diversity

\textsuperscript{24} See, e.g., Report, supra note 22, at 780 ("The problem is not merely that diversity cases misuse federal judicial resources. It is that they misuse a lot of federal judicial resources."). For example, it is not uncommon for a plaintiff to bring a diversity action in a federal district court that is, for the most part, similar to a suit already pending in a state court. Roger J. Miner, The Tensions of a Dual Court System and Some Prescriptions for Relief, 51 ALB. L. REV. 151, 154 (1987). When one of the two courts enters a judgment on the case, the doctrine of res judicata operates to terminate the suit in the other court, and thus, renders useless the judicial resources expended by the second court. Id.

\textsuperscript{25} See, e.g., HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 141 (1973) ("The first and greatest single objection to [diversity jurisdiction] is the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state."); cf. Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 VA. L. REV. 1671, 1674-75, 1687 (1992) (arguing against diversity jurisdiction because it forces federal courts to intrude upon the sovereign right of state courts to make state law). See Report, supra note 22, at 780 (asserting that the "primary role" of federal courts is to "litigat[e] federal constitutional and statutory issues").

\textsuperscript{26} See Miner, supra note 24, at 155 (noting the problems created in diversity cases when there is no state decision on point: "the federal court must predict what the highest state court would do when confronted with the question"). A plaintiff's choice of forum will be driven by tactical and strategic factors. When the choice is for federal courts, such courts function for the private interests of the litigant, rather than to advance important national policies or principles. See generally GEORGE C. HOLT, THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS §§ 23-24 (photo. reprint 1980) (1988) (noting general principles of concurrent federal and state jurisdiction). The existence of concurrent or shared state and federal court jurisdiction is at the core of many of the problems generated by diversity jurisdiction.

\textsuperscript{27} Report, supra note 22, at 778-80. See generally Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) ("[T]he Constitution itself ... entertains apprehensions" on the impartiality of state courts); FRIENDLY, supra note 25, at 146-50 (labeling bias against out-of-state parties as the only substantive justification for diversity jurisdiction); Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 492-99 (1928) (noting that while a bias justification was put forth in state
has been required to do the following: solidify or enhance the powers of a national/central government;\textsuperscript{28} create better staffed and funded forums to hear the more complex cases brought in diversity;\textsuperscript{29} promote expansion to the western United States by providing neutral forums for private railroads;\textsuperscript{30} provide stability for the growth of commerce;\textsuperscript{31} offer protection against state court reliance on debtor-oriented state legislatures;\textsuperscript{32} and strengthen state courts and lawyers practicing in those courts through exposure to federal procedures and federal judges.\textsuperscript{33}

The Federal Courts Study Committee Report contained a comprehensive critique of diversity of citizenship jurisdiction. In 1990, the Committee concluded that:

- the diversity docket amounts to over 50,000 cases annually and accounts for twenty-five percent of the civil case load of the federal courts;\textsuperscript{34}
- these cases are generally routine lawsuits in contract or tort that result in a disproportionately high number of trials\textsuperscript{35} and one of every ten appeals;\textsuperscript{36}
- costs for handling diversity cases exceed $130 million annually, more than ten percent of the federal judicial budget;\textsuperscript{37}
- diversity lawsuits generate complex procedural and jurisdictional problems.\textsuperscript{38}

conventions on ratification of the Constitution, there is a paucity of cases showing such bias by state judges).
\textsuperscript{28} See \textit{ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS} 101 (1969); \textit{FRIENDLY, supra} note 25, at 141.
\textsuperscript{29} See \textit{FRIENDLY, supra} note 25, at 146.
\textsuperscript{30} \textit{MITCHELL WENDELL, RELATIONS BETWEEN FEDERAL AND STATE COURTS} 93 (1968).
\textsuperscript{31} See, e.g., Miner, \textit{supra} note 24, at 153.
\textsuperscript{32} \textit{Report, supra} note 22, at 778.
\textsuperscript{33} \textit{FRIENDLY, supra} note 25, at 144-46; see also John P. Frank, \textit{Diversity Jurisdiction: Let's Keep It}, 3 \textit{ADELPHIA L.J.} 75, 82 (1984) (considering the advantages, criticisms, and effects of diversity jurisdiction and noting widespread state emulation of federal rules of procedure).
\textsuperscript{35} Half of all civil trials are routine contract or tort lawsuits. See \textit{Report, supra} note 22, at 778-79.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} See \textit{id.} at 778, 780; Culp, \textit{supra} note 23, at 64.
\textsuperscript{38} See Butler, \textit{supra} note 23, at 54 (discussing a number of "Erie problems" that a federal court must resolve in diversity actions before addressing the substance of the claim
the lack of precedential effect of state law rulings in diversity cases creates inconsistencies in the interpretation of state law, contradictory results in similar cases, and state-federal friction.\textsuperscript{49}

Diversity jurisdiction is particularly difficult to justify when the mobility of American society, together with the internationalization of commerce, trade, and business, seem to have substantially reduced the fear of state court bias that constitutes a primary rationale for this jurisdiction. Even if there are isolated instances of favoritism toward in-state parties, the Federal Courts Report concludes that diversity jurisdiction interferes with the federal court's capacity to decide federal law cases, civil and criminal.\textsuperscript{40} This problem grows in severity as Congress steadily expands federal question jurisdiction.\textsuperscript{41}

Broad-based diversity jurisdiction also presents a threat to healthy federalism by exacerbating the tensions created by a dual court system.\textsuperscript{42} Under contemporary \textit{Erie}\textsuperscript{43} practice, tensions arise from the difficulties

(Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts are to apply the law of the state in diversity cases except in cases involving a question concerning the United States Constitution or an act of Congress)); \textit{see also} \textit{Report}, supra note 22, at 784-85 (noting complex issues associated with diversity jurisdiction, such as choice of law, statutes of limitations, removal, and joinder).

\textsuperscript{39} \textit{Report}, supra note 22, at 781; \textit{see also} Kramer, \textit{supra} note 34, at 104.

\textsuperscript{40} \textit{See} \textit{Report}, supra note 22, at 778-80 (noting the drain on federal judicial resources caused by diversity jurisdiction). \textit{See generally} FRIENDLY, \textit{supra} note 25, at 22-26 (discussing the plethora of federal statutory rights and causes of action over which federal courts have jurisdiction).


\textsuperscript{42} \textit{See} \textit{supra} note 39 and accompanying text.

\textsuperscript{43} Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts sitting
cited by the Federal Courts Report as well as the confusion generated by federal court certification of state law issues. Diversity jurisdiction thus unduly interjects federal courts into purely state matters while seriously disabling those courts from meeting intensifying needs to decide federal law cases.

Reform proposals have been offered by scholars, federal judges, the Federal Court Study Committee, and political leaders. The Federal Court Study Committee Report proposed that Congress legislatively prohibit in-state plaintiffs from invoking diversity jurisdiction, treat corporations as citizens of each state in which they are licensed to do business, exclude pain and suffering, attorney’s fees, mental anguish and punitive damages from the jurisdictional amount, and raise the jurisdictional minimum to $75,000 or higher.

The Access to Justice Act would have limited the damages to be considered in pleading the jurisdictional amount to “economic” damages. For jurisdictional purposes only, the Act excluded claims for pain,

in diversity must apply the substantive law of the state where the court sits; state substantive law includes legislation and court decisions).

See supra notes 34-40.

Approximately three-fourths of states allow various state and federal courts to certify questions of state law to the state’s highest court. See, e.g., UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 U.L.A. 52 (1967) (amended 1994); see Ira P. Robbins, The Uniform Certification of Questions of Law Act: A Proposal for Reform, 18 J. LEGIS. 127, 139-51 (1992). Federal court certification most often occurs when a question of state law is presented in a federal diversity case, the question may be determinative of the case, and “it appears to the certifying court there is no controlling precedent in the decisions of [the state’s highest] court.” MASS. SUP. JUD. CT. R. 1:03; see also ALI STUDY, supra note 28, § 1371(e) (describing the certification process and related problems). Statutes and rules are collected in 17A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 2D § 4248 (1988) (discussing certification to state courts).

See, e.g., Butler, supra note 23, at 51, 70-73 (advocating abolishment of diversity jurisdiction except in cases involving interpleader, alienage, and multiparty injury actions); Culp, supra note 23, at 64.

See generally FRIENDLY, supra note 25, at 141-52; Middleton, supra note 22, at 252; Sloviter, supra note 25, at 1674-75.

See supra note 22 and accompanying text.

See, e.g., Quayle, supra note 5, at 559, 568, 569.

Report, supra note 22, at 781 (arguing that in-state plaintiffs have no colorable claim of state court bias).

Id. at 782. Thus, the in-state plaintiff rule would apply to a corporation in every state where it does business. Id.; see supra note 50 and accompanying text.

Report, supra note 22, at 782.

Id.

ELIMINATING PUNITIVE DAMAGE CLAIMS

suffering, and mental anguish, attorney's fees and punitive damages.\textsuperscript{55} Another provision indexed the jurisdictional amount by requiring that the amount automatically increase by annual percentage increases in the Consumer Price Index.\textsuperscript{56} Thus, under the Act, the amount would go up gradually and consistently rather than sporadically according to Congressional whim.\textsuperscript{57}

Other reforms in the Act included the following: adoption of the "fairness" rule for the award of attorney's fees;\textsuperscript{58} creation of "multi-door courthouses" in the form of alternative dispute resolution systems and plans;\textsuperscript{59} imposition of a 30 day notice of "intent to sue" requirement as a prerequisite to the filing of a federal court case;\textsuperscript{60} and restoration of full immunity to state court judges.\textsuperscript{61}

In March 1995, the Committee on Long Range Planning of the United States Judicial Conference announced 101 recommendations for limiting the jurisdiction of federal courts "to allow the trial and appellate courts to continue to operate into the next century and to preserve the core values of the federal court system."\textsuperscript{62} The Conference, although approving most of the recommendations, elected to defer consideration of measures that would limit federal court jurisdiction, including the elimination of diversity jurisdiction.\textsuperscript{63}

\textsuperscript{55} Id.

\textsuperscript{56} Id. Congress has always relied on cumulative changes in the Consumer Price Index in raising the jurisdictional amount. See, e.g., H.R. Rep. No. 1706, 85th Cong., 2d Sess. 11 (1958) (increasing the jurisdictional amount in controversy from $3000 to $10,000 in cases concerning federal questions or diversity of citizenship and also fixing the citizenship of a corporation in the state in which it was incorporated or its principle place of business). Congress is notoriously slow to act on required changes in the jurisdictional amount. In 1988, Congress accounted for inflation and added a cushion to the amount out of concern that it might not "revisit the issue for another three decades." H.R. Rep. No. 889, 100th Cong., 1st Sess., pt. 1, at 45 (1988); see also Thomas F. Baker, The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction, 102 F.R.D. 299, 324-25 (1983) (discussing numerous increases in the jurisdictional amount).

\textsuperscript{57} See Access to Justice Act of 1992, supra note 4, § 2.

\textsuperscript{58} Id. § 3 (reimbursing the prevailing party for attorney's fees up to the amount of attorney's fees incurred by the nonprevailing party).

\textsuperscript{59} Id. § 7.

\textsuperscript{60} Id. § 5 (suggesting that the purpose of written notice of claims and damages is to act as a facilitator of settlement).

\textsuperscript{61} Id. § 9.


\textsuperscript{63} Id.
This Article examines a narrow but important component of these reform proposals: elimination of punitive damages in the calculation of the jurisdictional amount in diversity cases. The Article proceeds on the premise that the more radical restructuring of diversity jurisdiction proposed above is desirable and supportable. However, such reform can only be accomplished by comprehensive legislation that has not been, nor will likely be, forthcoming. In comparison, the limitation offered in this Article can be easily accomplished by a targeted amendment to 28 U.S.C. § 1332 or judicial reconsideration of \textit{Bell v. Preferred Life Assurance Security}.

\textbf{B. Jurisdictional Amounts and Punitive Damages}

\textit{1. The Role of Jurisdictional Amounts in Diversity Jurisprudence}

Short of the complete abolishment of diversity or enactment of the more sweeping reforms proposed by the Report of the Federal Court Study Committee, the Access to Justice Act, and various scholars, the jurisdictional amount is currently the exclusive Congressional mechanism for limiting the flow of state law cases into the federal courts.

\footnote{See, e.g., \textit{supra} notes 46-53 and accompanying text.}

\footnote{See \textit{supra} note 2 (discussing 28 U.S.C. § 1332); \textit{supra} note 11 and accompanying text (discussing \textit{Bell v. Preferred Life Assurance Sec.}, 320 U.S. 238 (1943)).}


\footnote{Butler, \textit{supra} note 23, at 74 (proposing the elimination of federal diversity jurisdiction); Chemerinsky & Kramer, \textit{supra} note 23, at 94 (proposing setting priorities that would exclude certain diversity cases); Culp, \textit{supra} note 23, at 64 (proposing that federal diversity jurisdiction be abolished except in cases involving complex multistate litigation, interpleader, and suits with aliens as parties).}

\footnote{A jurisdictional amount has been statutorily required since the first diversity statute. Judiciary Act of 1789, \textit{supra} note 19, § 11, 1 Stat. at 78. From that statute's $500 threshold, Congress raised the amount to $2000 (1887), $3000 (1911), $10,000 (1958), and the current $50,000 (1988). Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988) (amending 28 U.S.C. § 1332). \textit{See generally} Baker, \textit{supra} note 56, at 304-18 (discussing the original jurisdictional amount and subsequent increases, excluding the current $50,000 amount).}
The essential purpose of the jurisdictional amount is to screen out minor, trivial, unimportant state cases. It is demonstrated by the steady increase in the minimum amount from $500 in 1789 to the $50,000 figure set in 1988. The Federal Court Study Report described the function of a jurisdictional amount as limiting "federal court intrusion into everyday lawsuits . . . ." To the extent that federal court diversity effectuates important governmental interests, the jurisdictional amount channels only substantial cases to the federal courts, leaving "run-of-the-mill" lawsuits to the states. It is a "pragmatic but essentially arbitrary attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues."

Allowing punitive damages to be considered in meeting the jurisdictional amount undermines its "doorkeeper" function and defeats legislative intent. This is especially true in reference to the prevailing United States Supreme Court construction of such intent. The Court has ruled that a case will not be dismissed unless it appears "to a legal certainty that the claim is really for less than the jurisdictional amount . . . ." It has also decided that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." This flexible standard dilutes the power of a jurisdictional threshold. The approach to punitive damages established in Bell in 1943 combined with the "to a legal certainty" test of St. Paul renders the jurisdictional amount requirement almost meaningless.

Judge Abner Mikva aptly described the jurisdictional amount in this regime as a "kind of puffing game that you play with lawyers." As noted by the Federal Courts Study Committee, "parties seek to inflate their claims to come within the $50,000 minimum" and use punitive and other noneconomic damages to "skirt the jurisdictional minimum." The Bell rule leads to speculative or inflated punitive damages claims, aggravates the problems identified with punitive damages as a remedy,

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70 Cf. Report, supra note 22, at 778 (noting that the jurisdictional amount was established to keep everyday lawsuits in state courts).
71 See supra note 69.
72 Report, supra note 22, at 778.
73 Id. at 780.
74 See infra notes 88-159 and accompanying text.
76 Id. at 288.
78 Report, supra note 22, at 780, 782.
and results in federal courts deciding minor, insignificant, and frivolous state cases.

2. Bell

Bell v. Preferred Life Assurance Society\(^7\) established the basic test for the use of punitive damages to satisfy the jurisdictional amount requirement in diversity cases. According to Bell, "[w]here both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining jurisdictional amount.\(^8\)

The complaint in Bell disclosed actual damages of $202.35, the amount the plaintiff paid for an insurance certificate allegedly fraudulently sold by the Society's agent, and consequential damages of $1000, the maximum value of the policy.\(^9\) The inclusion of a claim for unspecified punitive damages brought the amount claimed to $200,000\(^2\) which was found to be sufficient to support diversity jurisdiction\(^3\) under a diversity statute requiring a jurisdictional amount in excess of $3000.\(^4\) The Court relied heavily on the fact that state law authorized punitive damages under the circumstances of the case.\(^5\) However, over time the most critical aspect of the Court's holding was Justice Black's refusal to dismiss the case based on "the assumption 'that a verdict, if rendered for that amount [$200,000], would be excessive and set aside for that reason ....'"\(^6\) He observed that such "'a statement ... could not ... be judicially made before such a verdict was ... rendered.'"\(^7\)

Bell introduced a bright line test for federal court diversity jurisdiction: punitive damage claims, if authorized by state law and requested in good faith, may be used to satisfy the jurisdictional amount requirement. The requirement is met even if it can be determined before trial that such damages, if awarded, would be excessive and require a trial judge to set a verdict aside or order a remittitur after trial.

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\(^7\) 320 U.S. 238 (1943).
\(^8\) Id. at 240 (citing Barry v. Edmunds, 116 U.S. 550, 560 (1886) and Scott v. Donald, 165 U.S. 58, 89, 90 (1897)).
\(^9\) Bell, 320 U.S. at 239-40.
\(^2\) Id. at 240.
\(^3\) Id. at 240, 243.
\(^5\) Bell, 320 U.S. at 241-43.
\(^6\) Id. at 243 (citing Barry v. Edmunds, 116 U.S. 550, 565 (1886)).
\(^7\) Id. (citing Barry v. Edmunds, 116 U.S. 550, 565 (1886)).
3. Bell in Operation

In the past few years a growing number of federal courts have decided issues involving the impact of punitive damage claims on federal court jurisdiction and practice. These decisions strongly support the proposal advanced in this Article by pointing out the dangers of cases structured around punitive damages.

In the 1993 case of *Capstick v. Allstate Insurance Company*, the plaintiff sued his insurance company for refusing to pay a claim for the value of his car after it was destroyed by fire. The company treated the claim suspiciously partly because its agent failed to report that witnesses confirmed the insured’s claim that the fire was an accident. A federal court jury awarded $1500 in compensatory damages for the actual value of the car, a 1982 Chevrolet Celebrity, $3000 in consequential damages, and $2 million in punitive damages for the company’s “bad faith” handling of Capstick’s claim.

Neither the trial nor the appellate courts questioned subject matter jurisdiction. Counsel for the defendant insurance company made no motion to dismiss for lack of jurisdiction, even though maximum provable damages were $4500. The Court of Appeals, applying Oklahoma’s punitive damages standard of “wanton or reckless disregard of plaintiff’s rights,” upheld denial of defendant’s trial and post-trial motions attacking the punitive damages award, and refused to order a new trial. Both the court and counsel accepted jurisdiction on seemingly exaggerated claims for punitive damages. This deference by the court and counsel is a primary influence of Bell.

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98 998 F.2d 810 (10th Cir. 1993).
99 Id. at 812.
100 Id. at 814.
101 Id. at 813.
102 Id. at 812.
103 Id. at 816 (citing OKLA. STAT. tit. 23, § 9 (1987)).
104 Id. at 819-23.

*Capstick* contains a lengthy review of the propriety of the trial court’s instructions to the jury on the Oklahoma standards for the various categories of damages awards, its rulings on post-trial motions, and the conformity of Oklahoma law to United States Supreme Court constitutional requirements for jury awards of punitive damages. Id. at 815-23. Such analyses by federal courts are required precisely because trial court and counsel fail to address the preliminary jurisdictional issue of the adequacy of jurisdictional amount claims.
Another 1993 case, *Schieb v. Grant*, based jurisdiction solely on a claim of punitive damages. The complaint in *Schieb* alleged a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and a claim for punitive damages under the Illinois Eavesdropping Statute. The trial court entered summary judgment for the defendants, two attorneys and a guardian ad litem, on both counts. It concluded that Title III did not reach the unauthorized parental taping of a minor child's telephone conversations through an extension line in the parental home, and that attorneys and court appointed guardians were immune from the civil sanctions authorized by the Illinois Eavesdropping Statute to the extent that alleged violations of the statute involved actions reasonably related to ongoing litigation.

On the state law claim, the court noted that it possessed jurisdiction based on diversity and the claim for punitive damages. Citing *Bell*, the court took jurisdiction even though it concluded that "any award in excess of $50,000 would be excessive and likely set aside ...." Factually, the state law claims in this case related to the defendant's disclosure, in connection with state custody proceedings, of portions of two tape recorded phone conversations between the plaintiffs' minor son and his mother. In the court's view, even though punitive damages for such disclosures could not lawfully exceed $50,000, jurisdiction would exist by the mere pleading of such damages.

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*Capstick* is an example of the extensive review of trial procedures relating to proof of punitive damages required by *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (rejecting an insurance company's due process challenge to an award of punitive damages). The test for punitive damages under OKLA. STAT. tit. 23, § 9 (1987), requires acts amounting to "oppression, gross negligence, malice, or reckless and wanton disregard of plaintiff's rights." *Capstick*, 998 F.2d at 818. This standard was met because plaintiff suffered “mental distress, inconvenience, annoyance and expense” because Capstick had to "convince Allstate that ... [he] was not an arsonist"; every night he would “go to sleep thinking about this situation" and how it put “turmoil” in his life. *Id.* at 816.

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100 *Id.* at 738-40.
101 *Id.* at 740-41.
102 *Id.* at 740 n.2. The court failed to consider supplemental jurisdiction over the state claim based on 28 U.S.C. § 1367(a) (Supp. V 1993). See infra note 128 (describing principles of supplemental jurisdiction).
103 *Schieb*, 814 F. Supp. at 740 n.2.
104 *Id.* at 737-38.
105 See supra note 102 and accompanying text.
In Sharp Electronic Corp. v. Copy Plus, Inc., the district court concluded that "any recovery of punitive damages was highly unlikely to be sufficient to bring the recovery within the jurisdictional prerequisite" of $50,000 and dismissed the case for lack of jurisdiction. Copy Plus had sued Sharp in a Wisconsin state court for the return of monies used to purchase three copiers and two sorter bins after Sharp terminated a distributor agreement with Copy Plus. Copy Plus requested compensatory damages of $15,000, unspecified damages for loss of customer good will, and punitive damages. In response to a request for admission, Copy Plus denied that the value of its various claims totalled less than $50,000. It stated that "[d]epending upon the amount the jury awards for punitive damages, recovery may exceed $50,000, but that is not readily ascertainable at this time."

Sharp then filed a federal court suit to stay the Wisconsin case and compel arbitration under the Federal Arbitration Act. The trial court dismissed the case on a finding that plaintiff Sharp claimed "to be subjected to more damages than [Copy Plus] ... claims to be seeking." On appeal, the Seventh Circuit reversed because Copy Plus had "acknowledged that more than $50,000 could be at stake" in its response to the admission request. Punitive damages were available under state law and it could not be said that such damages would be excessive. Even though the trial judge's dismissal strongly suggested an excessive claim, Bell seemed to prohibit that inquiry. Sharp thus indicates that the mere availability of punitive damages makes diversity jurisdiction automatically available.

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106 939 F.2d 513 (7th Cir. 1991).
107 Id. at 515.
108 Id. at 514.
109 Id.
110 Id.
111 Id. See also 9 U.S.C. § 4 (1988) (authorizing a district court to order arbitration if it has jurisdiction over the case).
112 Sharp Elec. Corp., 939 F.2d at 514.
113 Id. at 515.
114 Id.
115 See id. (stating that the Seventh Circuit reversed the district court's dismissal of the claim because Bell required more deference to the plaintiffs' claims for punitive damages).
116 See id. (upholding jurisdiction where punitive damages are available under state law and a verdict for more than the jurisdictional amount would not be excessive).
Capstick, Scheib, and Sharp are hardly anomalies.\textsuperscript{117} The plaintiffs in \textit{Rodriguez v. American Cyanamid Company}\textsuperscript{118} purchased three Combat indoor fogger “bug bombs,” distributed by American Cyanamid, for use in their new mobile home. The instructions warned users to turn off flames and pilot lights prior to activating a bomb. Plaintiffs set off the foggers while a stove light was burning. Within minutes, there was an explosion and fire that destroyed the mobile home, which was valued at $14,000, and its contents, which were valued at $6500.\textsuperscript{119}

Plaintiffs filed a lawsuit in federal district court against various defendants alleging claims under strict liability, negligence, breach of warranty, and punitive damages.\textsuperscript{120} No subject matter jurisdiction challenges were made. Rather, partial summary judgment was awarded on (1) state product labeling claims based on a finding that the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”)\textsuperscript{121} preempted state law causes of action\textsuperscript{122} and (2) negligence per se claims because FIFRA does not create private rights of action.\textsuperscript{123} However, the case was allowed to proceed on the punitive damages claim. Under Arizona law, punitive damages are available where “defendant’s wrongful conduct was guided by evil motives . . . . [P]laintiff must prove that defendant’s evil hand was guided by an evil mind.”\textsuperscript{124} This must be proven by “clear convincing evidence.”\textsuperscript{125}

Plaintiffs alleged that American Cyanamid had knowledge of “prior incidents of fires and explosions involving the Combat Room Fogger product,” but continued to distribute the product with “knowledge or

\textsuperscript{117} Rodriguez v. American Cyanamid Co., 858 F. Supp. 127, 131 (D. Ariz. 1994) (maintaining jurisdiction after denial of defendant’s motion for partial summary judgment on the issue of punitive damages, even though actual damages were far short of the jurisdictional amount); Wagner v. Ohio Bell Tel., 673 F. Supp. 908, 910 (N.D. Ohio 1987) (upholding jurisdiction where punitive damages are allowed under state law and a verdict in the amount necessary to satisfy the jurisdictional requirement would not be excessive); Diana v. Canada Dry Corp., 189 F. Supp. 280, 281 (W.D. Pa. 1960) (upholding diversity jurisdiction based on plaintiffs’ claim for damages because to determine to a legal certainty that plaintiff cannot recover claimed amount the court “would have to put itself in the place of the jury”).

\textsuperscript{118} 858 F. Supp. 127 (D. Ariz. 1994).

\textsuperscript{119} Id. at 128.

\textsuperscript{120} Id.


\textsuperscript{122} 858 F. Supp. at 128.

\textsuperscript{123} Id. at 131.

\textsuperscript{124} Id. (quoting Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986)).

\textsuperscript{125} Id. (quoting Thompson v. Better-Bilt Alum. Prod. Co., 832 P.2d 203, 210 (Ariz. 1992)).
conscious disregard that the product was dangerous."\textsuperscript{126} The record was found to create a jury issue on punitive damages.\textsuperscript{127}

The court's opinion made no reference to the amount of punitive damages claimed. The case was not pleaded as a supplemental jurisdiction\textsuperscript{128} action even though one might have been asserted on the alleged private right of action in FIFRA.\textsuperscript{129} The case remained in federal court on the highly questionable conclusion by the court that the facts raised a jury question under Arizona's stringent punitive damages tests.\textsuperscript{130}

\textit{Bell} extends so far as to establish jurisdiction even though "[w]hen all the proof is in the trial judge may conclude that jurisdiction never existed."\textsuperscript{131}

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\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} See 28 U.S.C. § 1367 (Supp. V 1993). Supplemental subject matter jurisdiction over factually related state law issues in a well-pleaded federal law case may be asserted without reference to the $50,000 jurisdictional amount imposed in diversity of citizenship cases. See, e.g., Lindsay v. Kvortek, 865 F. Supp. 264, 271-76 (W.D. Pa. 1994) (discussing federal supplemental jurisdiction). The Lindsay case represents a dangerous potential expansion of punitive damage based diversity jurisdiction. It construes the recently amended supplemental jurisdiction statute to extend jurisdiction over a claim that does not meet the $50,000 jurisdictional amount so long as other parties in the case present such claims. \textit{Id.} at 272-76 (analyzing recently amended 28 U.S.C. § 1367 and case law interpretation); \textit{see also} Patterson Enter., Inc. v. Bridgestone/Firestone, Inc., 812 F. Supp. 1152, 1154 (D. Kan. 1993) (upholding federal supplemental jurisdiction over claims by other plaintiff because the claims involved the same facts and were controlled by the same legal issues); Garza v. National Am. Ins. Co., 807 F. Supp. 1256, 1257-58 (M.D. La. 1992) (exercising supplemental jurisdiction based on 28 U.S.C. § 1367(a) over claims that did not independently meet the amount in controversy requirement). Under this analysis, plaintiffs may use punitive damage theories to inflate one party's claim and then piggyback into federal court additional claims by other plaintiffs even though such claims do not meet the jurisdictional minimum.


\textsuperscript{130} \textit{Supra} notes 124-27 and accompanying text.

In Mullins v. Harry’s Mobile Homes, Inc., the district court denied a motion to remand a case removed from a state court in which plaintiff sought $17,995 in compensatory damages for a defective mobile home purchased from the defendant, damages for some portion of the $1,381.44 finance charge, unspecified damages for “aggravation, annoyance, and inconvenience,” and punitive damages. Plaintiffs offered to settle for $45,000. Relying on its “common sense” and Sharp Electronics, and acknowledging that the removal statute “is to be construed strictly against removal,” the court refused to find to a legal certainty that the damages did not exceed $50,000.

Cadek v. Great Lakes Dragaway presents a contrasting result. The District Court first concluded that punitive damages were not available under Wisconsin law on the facts alleged. Such damages could be recovered for fraud only if the defendant’s actions were “willful and wanton, in reckless disregard of [the plaintiff’s] rights or interests . . . .” Plaintiff alleged that he had paid a fee to race his car at defendant’s race track, observed a fire engine parked on the track’s premises, and concluded that the engine was properly manned and operating to combat fires. Unbeknownst to him, the engine was inoperative. Plaintiff’s car was involved in a crash during the race; this car, and another owned by him, were destroyed by fire. From these facts plaintiff argued that Great Lakes Dragaway intended to induce him to believe that adequate fire safety equipment was on site and to rely on that representation in paying the racing fee.

133 Id. at 23.
134 Id. at 23-25.
135 Id. at 23.
136 Id. at 24.
138 Mullins, 861 F. Supp. at 23.
139 Id. at 23.
140 No. 93 C 1402, 1994 WL 449284 (N.D. Ill. Aug. 17, 1994); see also Hohn v. Volkswagen of Am., Inc., 837 F. Supp. 943, 945-46 (C.D. Ill. 1993) (remanding, sua sponte, a removed case in which compensatory damages exceeded $15,000 but fell short of $50,000 and claims for punitive damages were “wholly unquantified and ambiguous” and were “based upon probabilities, surmise, or guesswork”).
141 Cadek, No. 93 C 1402, 1994 WL 449284, at *3.
142 Id. (citing Loehrke v. Wanta Builders, Inc., 445 N.W.2d 717, 721 (Wis. Ct. App. 1989)).
143 Id. at *1.
144 Id.
The judge found that these facts did not justify plaintiff’s conclusions and could not be characterized as wanton and willful. As a result, punitive damages were not available and could not be used to reach the jurisdictional amount on a claim involving $45,000 in compensatory damages.

_Gober v. Allstate Insurance Company_ was similarly decided and offers a mode of analysis that would be highly instructive to a Supreme Court willing to reevaluate the _Bell_ rule.

_Gober_ filed a complaint in a Mississippi county court alleging negligence and bad faith in Allstate’s denial of an insurance claim. The plaintiff claimed actual damages of $10,000, the uninsured motorist limit under the policy, and requested unspecified punitive damages. By statute, the county court had jurisdiction over cases “wherein the amount of value of the thing in controversy shall not exceed, exclusive of costs and interest, the sum of [$50,000].”

Defendant Allstate removed the case to federal court, claiming that its liability could exceed $50,000 based on the plaintiff’s demand for punitive damages. The District Court ordered the case remanded.

The removal statute “must be construed narrowly to limit federal jurisdiction and avoid undue encroachment on a state’s right to adjudicate a case filed in one of its courts.” Defendant’s efforts to show that liability could exceed $50,000 by citing recent examples of bad faith

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145 Id. at *3.
146 See id. (seeking $45,000 in compensatory damages and $150,000 in punitive damages). On facts of this kind, counsel’s strategy should include a _Fed. R. Civ. P. 12(b)(6)_ motion to dismiss for failure to state a claim under existing state punitive damages law, accompanied by a _Fed. R. Civ. P. 12(b)(1)_ dismissal motion for lack of jurisdiction based on striking punitive damages from jurisdictional calculations; see also _Furman & Halpern, P.C. v. Nexgen Software Corp., No. CIV.A.93-CV-2788, 1994 WL 287795, at *5_ (E.D. Pa. June 28, 1994) (dismissing the case for lack of jurisdictional amount because granting summary judgment on the fraudulent misrepresentation claim eliminated the legal basis for punitive damages).
147 855 F. Supp. 158, 162 (S.D. Miss. 1994) (remanding case to state court because defendant failed to establish jurisdiction by not meeting the amount-in-controversy requirement).
148 Id. at 159.
149 See _Miss. Code Ann. § 9-9-21_ (1972) (describing cases over which Mississippi’s county courts have jurisdiction).
150 _Gober_, 855 F. Supp. at 159. Allstate apparently took the position that county court verdicts could exceed $50,000 but judgments on these verdicts could be entered only for amounts that did not exceed that figure. Id. at 161 n.4.
151 Id. at 162.
152 Id. at 159.
punitive damage awards above that figure were unavailing.\textsuperscript{153} It was “mere speculation” that damages would exceed $50,000.\textsuperscript{154} Accordingly, doubts about jurisdiction should be resolved in favor of nonremovability.\textsuperscript{155} To grant removal in Gober’s case would be no more than “‘poaching on the hunting grounds of a coordinate judicial system . . .’.”\textsuperscript{156}

The \textit{Gober} decision seeks to protect both federal and state court jurisdiction by imposing strict requirements on a defendant’s application for the removal of a state case. It recognizes that federal subject matter jurisdiction is limited. Such limits must have meaning if court resources are to be protected and healthy federalism promoted.\textsuperscript{157} An approach similar to \textit{Gober} should be taken to modern diversity jurisdiction. Because punitive damages are inherently speculative, they should be unavailable as a means of access to federal courts, both horizontally\textsuperscript{158} and vertically.\textsuperscript{159}

\section*{II. PUNITIVE DAMAGES: A BESIEGED REMEDY}

\textit{Bell v. Preferred Life Assurance Society} is an application of the \textit{Erie Railroad v. Tompkins}\textsuperscript{160} principle that federal courts must follow state substantive law in the determination of diversity cases.\textsuperscript{161} Therefore, to the extent that punitive damages are a recoverable state law remedy for the plaintiff’s injuries,\textsuperscript{162} federal court judges and juries must assess and

\begin{footnotesize}
\begin{enumerate}
\item Id. at 161.
\item Id.
\item Id. at 162.
\item Id. at n.6 (quoting Robinson v. Quality Ins. Co., 633 F. Supp. 572, 577 (S.D. Ala. 1986)).
\item See Lindsay v. Kwortek, 865 F. Supp. 264, 267-70, 267 n.2 (W.D. Pa. 1994) (refusing to accept punitive damage claims amounting to $40,000 for “abdominal and back pain, menstrual difficulty, and a bruise to . . . [the] knee, as well as shock, fright and distress resulting from an automobile accident”).
\item 304 U.S. 64 (1938).
\item Id. at 78.
\item The right to recover punitive damages is deeply rooted in the jurisprudence of the United States and is nearly universally recognized by the laws or court decisions of the states. See, e.g., GEORGE W. FIELD, LAW OF DAMAGES 66 n.5 (1876) (describing how widespread awards of punitive damages are in England and the United States); Michael Rustad, \textit{In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes}
review such damages pursuant to systems set up by state law. This manifestation of *Erie* does not extend to federal court analysis of the amount in controversy component of diversity jurisdiction. The existence of diversity jurisdiction, including the standard to be followed and its application to the facts, is purely a matter of federal law.

Under this model, federal courts are inevitably burdened with the multiple legal and policy problems created by the remedy of punitive damages and the procedural complexities of state punitive damages systems. Striking punitive damage claims from jurisdictional amount calculations and returning cases involving mostly punitive damages to the states will save the federal courts from some of these burdens.

During the past several years, punitive damage awards have generated intense criticism. Judges, business leaders, scholars, and legislators have questioned the validity and fairness of punitive awards, and have called for reforms to limit their size and scope. This has led to a significant number of cases where federal courts have applied state punitive damages laws.

With empirical data, courts have been able to analyze the impact of punitive damages on defendants and society. However, the use of punitive damages has been challenged on grounds of unfairness, unpredictability, and excessive awards. Various scholars and legislators have advocated for reforms to limit the use of punitive damages or even abolish them entirely.

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163 See supra note 43 (noting that under *Erie*, federal courts sitting in diversity must apply the substantive law of the state, including state punitive damages principles relating to standards of proof, formulae for recoverable amounts, and procedures (*Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)); supra notes 88-159 and accompanying text (analyzing cases where federal courts apply state punitive damages laws).

164 See infra notes 176-78 and accompanying text.

165 See infra notes 179-223 and accompanying text.

166 See generally Rustad, supra note 162, at 1-24.

167 See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42-43 (1991) (O'Connor, J., dissenting) ("Punitive damages are a powerful weapon. . . . Imposed indiscriminately . . . they have a devastating potential for harm. . . . Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.").

168 See, e.g., Letter from Lee R. Raymond, Chairman, Exxon Corporation, to New York Times (Sept. 27, 1994), reprinted in N.Y. Times, Nov. 3, 1994 (asserting that the five billion dollar punitive damages award in the Exxon Valdez oil spill case constituted a "ruinous verdict").

tors\textsuperscript{171} and politicians\textsuperscript{172} have attacked these damages. Such criticisms demonstrate that diversity cases based on punitive damages exacerbate the general problems caused by federal court diversity jurisdiction\textsuperscript{173} by intensifying the burdens on federal courts trying state law cases\textsuperscript{174} and restricting the courts' capacity to decide federal law cases.\textsuperscript{175}

\section*{A. Policy Objections to Punitive Damages}

The reform proposed by this Article is not premised on the correctness or provability of criticisms of punitive damages. Rather, the very existence of the punitive damages debate supports the reform proposed by the Article.

The major policy criticisms of punitive damages are the following:

1. Punitive damages are economically destructive to American business.\textsuperscript{176}

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\textsuperscript{172} See, e.g., Quayle, supra note 5, at 564-65; President's Council on Competitiveness, \textit{Agenda for Civil Justice Reform in America} 22-23 (Aug. 1991) (reprinted at 42 AM. U. L. REV. 1761 (1993)) (recommending several reforms in the awarding of punitive damages); \textit{Republicans Take Aim at Punitive Damages in Product Liability Cases}, BOSTON GLOBE, Nov. 27, 1994, at 20 (reporting that Republicans are proposing national legislation to limit punitive damages by capping awards at three times actual damages, barring product liability lawsuits against retailers and distributors, and prohibiting punitive damages against makers of drugs approved by the FDA and airplanes approved by the FAA). "Recently the House of Representatives passed broad legislation limiting punitive damage recoveries in state and federal courts .... The Senate went along with caps on punitive damage recoveries only in products liability cases," but the President has said that he will veto the Senate limits. Paul S. Edelman, \textit{Tort Reform and Maritime Law}, N.Y. L.J., May 30, 1995, at 3.

\textsuperscript{174} See \textit{supra} notes 22-45 and accompanying text.

\textsuperscript{175} See \textit{supra} notes 23-24, 34-39, and 42-45 and accompanying text.

\textsuperscript{176} It is broadly asserted that punitive damages harm the American economy. Punitive damage awards are said to be anti-competitive because added costs (i.e., increases in insurance premiums, attorney's fees, public relations expenditures, and inspection/product testing) place American companies at a disadvantage in the domestic and world economies. See Quayle, \textit{supra} note 5, at 561 n.12 and accompanying text (survey of over 250 American companies showed more than three quarters of executives believe that American products will be disadvantaged in world markets without tort/product liability reform); see also Schwartz & Behrens, \textit{supra} note 170, at 1371 & nn.37-38 (discussing how the uncertainty of punitive damages law in the United States disadvantages American businesses with regard to foreign competitors); Rustad, \textit{supra} note 162, at 20 (asserting
that American manufacturers perceive a competitive disadvantage against European and Japanese companies, which operate in systems that exclude punitive damages).

For example, it is reported that the insurance costs of foreign manufacturers are twenty to fifty percent lower than comparable costs for American companies. Quayle, supra note 5, at 561 n.11 and accompanying text (citing American Textile Mach. Assn., U.S. Dept. of Commerce, Cooperative Agreement No. 99-26-07151-10, An International Study of Product Liability Costs and Systems For Five Domestic Manufacturing Industries 299 (1984)); see also S. REP. NO. 215, 102d Cong., 1st Sess., 1, 9 (1991) (discussing how insurers do not discount premiums for exports, making them less competitive).

It is argued that civil damage awards, including punitive damages, can drive up the prices of American products and force American businesses out of many markets. Quayle, supra note 5, at 561; see also H.R. REP. No. 748, 100th Cong., 2d Sess., pt. 1, at 23 (1988) (discussing how the current products liability system impedes America's competitiveness). The threat and reality of constant litigation, especially the specter of punitive damages, can discourage the development of new products, Quayle, supra note 5, at 561; see also Schwartz & Behrens, supra note 170, at 1371-72 nn.39-40 (reporting that companies ceased research on possible HIV vaccine because of fears of liability), create a disincentive for innovation and experimentation, Quayle, supra note 5, at 561; see also E. Patrick McGuire, The Conference Bd., Res. Rep. No. 908, The Impact of Product Liability, 6, 22 (1988), and invite foreign business, supported by government subsidies and relatively free from exposure to lawsuits, to accelerate the development and marketing of new or better products desired by world consumers. Cf. Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 AM. U. L. REV. 1269, 1309-11 n.193 (1993) (arguing that punitive damages deter higher risk corporate behavior, "shield" the public from excessive profit taking, and deter premature marketing of improperly tested and, thus, potentially dangerous products). Ultimately, it is asserted that punitive damages awards may force American companies into bankruptcy or out of business while simultaneously penalizing the consuming public. See, e.g., Sales & Cole, supra note 170, at 1154-55 (describing the effect of asbestos litigation in driving manufacturers into bankruptcy). American companies have refused to market the French abortion medicine, R.U. 486, in the past because of fears concerning litigation. Gary M. Samuelson, Commentary, DES, RU-486, and Dejavu, 2 J. PHARMACY AND L. 56, 70 (1993) (discussing why American companies would refuse to market RU-486 even if the FDA ban was lifted).

177 This criticism targets perceived inherent contradictions in the theory and practice of punitive damages systems. Punitive damages purportedly serve a quasi-criminal purpose by punishing the defendant; see, e.g., Rustad, supra note 162, at 2-3 n.7 (tracing the history of punitive damages and summarizing basic goals for egregious, malicious, willful, wanton, oppressive, or outrageous behavior), deterring others from engaging in similar reckless or dangerous conduct, see, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (describing motives for awarding punitive damages); Grube, supra note 170, at 845 n.22 (declaring that the only legitimate purpose of punitive damages is to deter conduct), and educating society about communal expectations regarding responsible individual and corporate action, see, e.g., Rustad & Koenig, supra note 176, at 1291 nn.112-14 (noting a case where punitive damages were imposed for "example's sake"). Punitive damages theory occupies a middle ground.
between the purely criminal (loss of liberty as the ultimate sanction) and purely civil (monetary damages to compensate for losses combined with equitable relief to fully remedy the plaintiff’s injuries) models. See David G. Owen, The Moral Foundations of Punitive Damages, 40 ALA. L. REV. 705, 705 (1989) (noting that punitive damages inhabit “a strange border land between civil and criminal law”); id. at 708-13 (discussing punitive damages in the context of individual freedoms). At the heart of punitive damage systems is the payment of such damages to a private citizen, the plaintiff. To many, this party receives a windfall recovery that is totally unrelated to the goals and justifications for punitive damages. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 74 (1971) (Harlan, J., dissenting) (discussing how punitive damages are essentially windfalls to the plaintiffs); see generally Note, An Economic Analysis of the Plaintiff’s Windfall from Punitive Damage Litigation, 105 HARV. L. REV. 1900, 1903 (1992) (asserting that the goals of punishment and deterrence cannot be fully met if plaintiff is the payee).

Some critics assert that the goals of punitive damages cannot be achieved if the plaintiff is the payee. See, e.g., Grube, supra note 170, at 841 (asserting that plaintiffs are not entitled to windfalls). It is proposed that all or part of a punitive damages award be paid to the state. See generally Randall H. Endo, Punitive Damages in Hawaii: Curbing Unwarranted Expansion, 13 U. HAW. L. REV. 659, 680 (1991) (proposing payment of punitive damages to the state to deter and punish defendants and test the sincerity of plaintiffs’ claims); Brian M. English, Note, Oliver v. Raymark: Holding the Line on Punitive Damages, 63 NOTRE DAME L. REV. 63, 71 (1988) (reviewing criticisms of awarding punitive damages to the plaintiff in strict products liability actions); Sonja Larsen, Annotation, Validity, Construction and Application of Statutes Requiring that Percentage of Punitive Damages Award be Paid Directly to State or Court Administered Fund, 16 A.L.R. 5th 129 (1993) (summarizing court rulings on the constitutionality of statutes compelling plaintiffs to remit punitive damage awards to a state or court fund, or to channel awards to a socially responsible recipient such as nonprofit or public interest organizations). At least eight states have passed laws requiring payment of some portion of punitive damages into state or state sponsored funds. See COLO. REV. STAT. § 13-21-102(4) (1987); GA. CODE ANN. § 51-12-5.1(a)(2) (Supp. 1994); IOWA CODE § 68A.1(2)(b) (1987); MO. REV. STAT. § 537.675(2) (1988); N.Y. Civ. PRAC. L. & R. § 8701 (McKinney Supp. 1993) (expired Apr. 1, 1994); OR. REV. STAT. § 18.540(1) (1993); and UTAH CODE ANN. § 78-18-1(3) (1992). Without laws like these, it is feared that plaintiffs will be tempted to invent or inflate punitive damages claims, losing defendants will escape the public condemnation that should inhere in quasi-criminal penalties, costs will be passed along to the consuming public, and confidence in the legitimacy of the civil justice system will be shaken. See, e.g., Endo, supra note 177, at 680.

As Justice Harlan noted, punitive damages systems result in “private fines levied for purposes that [are] wholly unrelated to the circumstances of the actual litigant.” Rosenbloom, 403 U.S. at 74. See, e.g., Hawkins v. United States, 30 F.3d 1077, 1084 (9th Cir. 1994) (holding that punitive damages are not excludable from taxable income under § 104(a)(2) of the Internal Revenue Code which does not tax “the amount of damages received . . . on account of personal injuries or sickness” because punitive damages bear no logical relationship to actual damages for personal injuries), cert. denied, 115 S. Ct. 2576 (1995); Reese v. United States, 24 F.3d 228, 231 (Fed. Cir. 1994) (ruling that punitive damages received by a taxpayer in a District of Columbia Human Rights Act action are not excludable from gross income); Commissioner v. Miller, 914 F.2d 586,
(3) Punitive damages undermine public confidence in the civil justice system.\textsuperscript{78}

590-91 (4th Cir. 1990) (holding punitive damages received by a taxpayer in a Maryland defamation action includable in taxpayer's gross income).

Such systems invite distrust and misunderstanding. Of equal importance, these systems can be unreliable. Studies of postverdict review of punitive damages awards show that such awards are frequently reduced or reversed. Rustad, supra note 162, at 54-55 (presenting empirical studies of non-asbestos verdicts from 1965 through 1990 in which nearly one-third of punitive verdicts were reversed or remitted by appellate courts). Professor Rustad asserts that "[a] greater number of non-asbestos verdicts involved reversals or reductions of punitive damages than affirmances." See id. at 55 (cited with approval in Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2341 n.11 (1994)); see also William M. Landes & Richard A. Posner, New Light on Punitive Damages Regulation, REG. Sept/Oct. 1986, at 33, 35-36 (presenting findings that federal appeals courts reversed and remanded a majority of appealed punitive damage awards in product liability cases. Data on state cases was even more compelling: only two percent of 199 appealed cases were upheld.). Id. at 36. Plaintiffs overwhelmingly settle post-trial rather than submit punitive damage awards to appellate court scrutiny. Rustad, supra note 162, at 55 (noting settlement rates at 36% to 39%). Plaintiffs rarely collect the full amount of punitive damage verdicts. Id. at 57 (median punitive damages collected for appealed and settled cases is a small fraction — ten to fifteen percent — of the original award).


A variety of explanations are given for this "loss of confidence" criticism. On a more technical level, punitive damages may destabilize the civil trial process by lowering or eliminating a plaintiff's incentive to settle. See Schwartz & Behrens, supra note 170, at 1371 n.36 and accompanying text. The very unpredictability of a jury's appraisal of a punitive damage claim can tempt a plaintiff to hold out for a large verdict and may invite defendants to rely on post-trial motions to undo punitive damage awards rather than reaching an early settlement. Id. There is a sense that this makes civil litigation a "game" instead of a rationally-structured search for truth and justice. As punitive damages shift the purposes of civil trials from compensation and redress of injury to punishment and deterrence, Americans become confused by the process and distrust its results. See, e.g., President's Council on Competitiveness, supra note 172, at 22-23 (referring to the consequences of a system in which damage awards are random, arbitrary, and capricious, and disproportionate to underlying harms).

The variability, generality, and ambiguity of state law standards for punitive damages, see supra notes 88-159 and accompanying text, also lead to public perceptions that punitive damage awards are arbitrary, capricious, and emotionally driven. See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2729 (1993) (O'Connor, J., dissenting) ("[T]he risk of prejudice, bias, and caprice remains a real one [in punitive damages cases because] juries sometimes receive only vague or amorphous guidance [which] heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."); see also WALKER K. OLSON, THE LITIGATION EXPLOSION 175 (1991) (stating that the frequent judicial reduction of jury verdicts "is a sign of distress in the legal system"). This is especially true when state law
B. Constitutional Challenges to Punitive Damages

Beyond policy objections to punitive damages, a more serious set of problems for federal courts arises from constitutional challenges to state punitive damage systems. Under *Erie* and *Bell*, federal courts sitting in diversity must follow complex state systems for the trial and appellate review of punitive damage claims. They must ensure that these systems conform to various constitutional requirements imposed by the United States Supreme Court. Federal courts must also anticipate state appellate decisions on the validity of "reformed" state punitive damage laws. These expensive, time-consuming, and sovereignty-compromising federal court tasks provide strong support for a narrowing of federal court jurisdiction of diversity cases based on punitive damages.

United States Supreme Court decisions impose varied and significant constitutional limits on punitive damage awards. The Court has determined that the Constitution places substantive limits on punitive damage awards and requires that detailed procedural protections be fail to require some proportionality between the amounts of actual and punitive damages awards.

State law forces state punitive damages policies and systems on federal courts, exposing them to potential public condemnation of punitive damage awards. Screening out state diversity of citizenship cases built predominantly on punitive damage claims will at least spare the federal courts the growing public discomfort with allegedly runaway punitive damage awards.

*Supra* note 160.

*Supra* notes 79-87 and accompanying text.

*Supra* note 162-163.

*See infra* notes 185-223 and accompanying text.

*See infra* note 221 and accompanying text.

The central thesis of this Article is that diversity of citizenship cases structured around punitive damage claims represent an extreme manifestation of the burdens imposed on the federal courts by this jurisdiction. The potential for and reality of abuse of federal jurisdiction, at the expense of more essential federal court functions, should be eliminated. It should be noted, however, that eliminating punitive damage claims from jurisdictional amount calculations will still leave the federal courts with jurisdiction over diversity cases in which non-punitive damages exceed the jurisdictional amount. Nonetheless, the incremental reform achieved by removing this area of misuse of federal court jurisdiction is required and may lead to the adoption of other remedial measures. See, e.g., *supra* notes 46-63 and accompanying text (outlining various reform proposals).

See, e.g., Seabord Air Line Ry. Co. v. Seegers, 207 U.S. 73, 78 (1907) (asserting that there are "limits beyond which [judicially imposed] penalties may not go").

afforded parties to a civil action in which punitive damages are sought.\textsuperscript{187}

In \textit{Browning-Ferris Industries v. Kelco Disposal, Inc.},\textsuperscript{188} a majority of the Court concluded that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damage awards in civil cases involving private parties.\textsuperscript{189} However, it presaged later cases by stating in dicta that the issue of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit," would be considered by the Court if properly presented.\textsuperscript{190}

\textit{Pacific Mutual Life Insurance Co. v. Haslip}\textsuperscript{191} met the issue head-on. Justice Blackmun, who wrote the opinion in \textit{Browning-Ferris}, concluded for the Court's majority that the common law method\textsuperscript{192} for imposing punitive damage awards did not, by itself, constitute a violation of Fourteenth Amendment due process.\textsuperscript{193}

Although no "mathematical bright line"\textsuperscript{194} test was imposed, the \textit{Haslip} court sanctioned broad constitutional review of punitive damage awards, both in amount and procedural context.\textsuperscript{195} The constitutional inquiry is whether there are sufficient checks on jury and judicial discretion in awarding punitive damages.\textsuperscript{196} On a case-by-case basis, the \textit{Haslip} analysis requires a review of the following: the accuracy of jury instructions;\textsuperscript{197} the substantive guidance provided by state punitive damages standards;\textsuperscript{198} post-trial

\textsuperscript{187} Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (detailing how Alabama's procedural safeguards were sufficient in the award of punitive damages in that case).

\textsuperscript{188} 492 U.S. 257 (1989).

\textsuperscript{189} \textit{Id.} at 260.

\textsuperscript{190} \textit{Id.} at 276-77. The court stated that the "petitioners made no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice." \textit{Id.} at 276.


\textsuperscript{192} Under the common law method, "the amount of the punitive award [is] . . . determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." \textit{Id.} at 15. This jury determination "is then reviewed by trial and appellate courts to ensure that it is reasonable." \textit{Id.}

\textsuperscript{193} \textit{Id.} at 17-18; see supra note 190 and accompanying text.

\textsuperscript{194} \textit{Haslip}, 499 U.S. at 18.

\textsuperscript{195} \textit{Id.} at 18-24.

\textsuperscript{196} \textit{Id.} at 18.

\textsuperscript{197} \textit{Id.} at 19.

\textsuperscript{198} \textit{Id.} at 19-20.
review procedures;\(^{190}\) and a comparison of compensatory to punitive damages.\(^{200}\)

*TXO Production Corp. v. Alliance Resources Corp.*\(^{201}\) presented a compelling due process challenge to punitive damages. A West Virginia jury awarded $19,000 in actual damages and $10 million in punitive damages for TXO's bad faith claims to Alliance Resources' oil and gas development rights.\(^{202}\) A plurality of the United States Supreme Court refused to find this award, in which punitives were 526 times greater than actual damages, to be "grossly excessive."\(^{203}\) Justice Stevens stressed that punitive damages may be invalid under the substantive component of the Due Process Clause.\(^{204}\)

However, the damages awarded by this jury were rendered by procedures conforming to *Haslip*'s trial and post-trial due process requirements.\(^{205}\) The damages were factually reasonable considering "the amount of money potentially at stake, the bad faith of [TXO], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and [TXO]'s wealth."\(^{206}\)

The jury in *Honda Motor Co. v. Oberg*\(^{207}\) awarded the plaintiff $919,390.39 in compensatory and $5 million in punitive damages for injuries suffered in an accident involving a Honda all-terrain vehicle.\(^{208}\) The Court,

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\(^{190}\) *Id.* at 20.

\(^{200}\) *Id.* at 23. *Haslip* involved an award of approximately $840,000 in punitive and $200,000 in compensatory damages ($4000 in out-of-pocket expenses) because an insurance company employee converted plaintiff's insurance premiums eventually causing a lapse of medical insurance coverage. *Id.* at 6-7 n.2. The Court found that the procedures followed in this case met due process "concerns of reasonableness and adequate guidance from the court," and constrained this jury's discretion in awarding punitive damages. *Id.* at 18, 23. As applied to the facts, punitive damages that were four times the amount of compensatory damages were "close to the line" required for reversal. *Id.* at 23.

\(^{201}\) 113 S. Ct. 2711 (1993) (holding that punitive damages awards do not violate due process).

\(^{202}\) *See TXO Prod. Corp. v. Allied Resources Corp.*, 419 S.E.2d 870, 875 (W. Va.) (affirming an award for $10,000,000 in punitive damages), *cert. granted*, 113 S. Ct. 594 (1992), *aff'd*, 113 S. Ct. 2711 (1993). TXO used a worthless quitclaim deed to attempt renegotiation of TXO's royalty arrangements with Alliance. Alliance asserted a "slander of title" claim based on TXO's false claim of title. *Id.* at 877-78.

\(^{203}\) *TXO*, 113 S. Ct. at 2722-23.

\(^{204}\) *Id.* at 2720.

\(^{205}\) *Supra* notes 196-200 and accompanying text.

\(^{206}\) *TXO*, 113 S. Ct. at 2722.

\(^{207}\) 114 S. Ct. 2331 (1994) (holding that Oregon's constitutional prohibition of judicial review of punitive damages is unconstitutional).

\(^{208}\) *Id.* at 2334.
in another opinion by Justice Stevens and over a strong dissent by Justice Ginsberg, reversed the judgment for the plaintiff and set aside the punitive damages award on constitutional grounds.\(^{209}\)

An unusual amendment to the Oregon Constitution,\(^{210}\) as interpreted and applied by the Oregon courts, prohibited trial and appellate court review of the amount of punitive damages.\(^{211}\) The amendment was construed to mean that Oregon courts were barred from setting aside such awards as excessive.\(^{212}\)

This absence of meaningful review of the size of a punitive damage verdict was held to violate Fourteenth Amendment due process.\(^{213}\) "[U]nreviewable power by [the] jury" is the core constitutional vice identified in \textit{Haslip} and \textit{TXO}.\(^{214}\) Justice Stevens found Oregon's system of checks on jury discretion, including verdicts set aside for errors in jury instructions, lack of any evidence to support the verdict, and awards exceeding amount of punitive damages claimed in the complaint, constitutionally inadequate.\(^{215}\)

A complete absence of judicial review of the amount of punitive damages awarded by a jury made it impossible to test a jury verdict under the \textit{Haslip}/\textit{TXO} reasonableness standard.\(^{216}\) Therefore, an overwhelming Supreme Court majority declared the system unconstitutional.\(^{217}\)

A case-by-case due process analysis of punitive damages under the \textit{Haslip}/\textit{TXO}/\textit{Honda Motor} formula\(^{218}\) may be sound constitutional law and effective public policy. The very necessity of such analysis, however, supports the reform of federal court diversity jurisdiction proposed in this Article. State law cases based primarily on punitive damages compel federal courts to follow increasingly complex trial and post-trial procedures.\(^{219}\)

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\(^{209}\) \textit{Id.} at 2342.

\(^{210}\) OR. \textsc{const.} art. VII, § 3 ("In actions at law . . . no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.").

\(^{211}\) \textit{See} Van Lom \textit{v. Schneiderman}, 210 P.2d 461, 462 (Or. 1949) (holding that Supreme Court had no power to set aside a verdict on the ground of excessive damages).

\(^{212}\) \textit{Id.} at 463; \textit{see} Honda Motor Co. \textit{v. Oberg}, 114 S. Ct. at 2338 (explaining the prior holding).

\(^{213}\) \textit{Honda Motor Co.}, 114 S. Ct. at 2341.

\(^{214}\) \textit{Id.}

\(^{215}\) \textit{Id.}

\(^{216}\) \textit{Id.}

\(^{217}\) \textit{Id.} Justice Stevens was joined in the majority opinion by Justices Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas. Justice Scalia filed a concurring opinion. Justice Ginsburg was joined in dissent by Justice Rehnquist. \textit{Id.} at 2332.

\(^{218}\) \textit{See supra} notes 191-217 and accompanying text.

\(^{219}\) \textit{See}, e.g., Rustad, \textit{supra} note 162, at 7-8 n.24 (listing twenty-seven states that require clear and convincing evidence or proof beyond a reasonable doubt as the trial
of such cases from federal court jurisdiction will save federal judicial and financial resources.

In addition to United States Supreme Court constitutional review of punitive damage trials, federal courts must also, under *Erie Railroad v. Tompkins*, anticipate state court challenges to "state-reformed" systems and apply state court precedents to both jurisdictional and remedial issues. Several state appellate courts have ruled on federal constitutional challenges to legislation requiring the payment of punitive damages into state funds or state-sponsored funds. Due process, equal protection, unlawful taking, and excessive fines theories may be advanced in state courts. State constitutional law attacks cannot be far off.

Thus, punitive damage systems generate extensive constitutional litigation, imposing increasingly heavy burdens on federal courts and compounding the stresses created by diversity jurisdiction.

III. *Bell's Toll: Diversity Jurisdiction Based on Punitive Damages Places Special and Unjustified Burdens on the Federal Courts*

State legislative and judicial reform of punitive damages systems provide additional reasons for eliminating punitive damages from federal court jurisdictional amount calculations. These reforms greatly complicate the procedures for trial and appellate review of punitive damage claims. In fact, the law of punitive damages that federal courts must now follow has come to closely resemble state criminal law.

A majority of American states have raised the standard of proof required for recovery of punitive damages. Some twenty-four states have

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204 U.S. 64, 78 (1937) (stating that federal courts have no power to declare substantive rules of common law applicable in a state).

2 See, e.g., *Kirk v. Denver Post*, 818 P.2d 262, 273 (Colo. 1991) (invalidating a statute requiring plaintiffs to remit one-third of punitive damage awards to the state as violative of the Fifth and Fourteenth Amendments).

adopted a minimum “clear and convincing evidence test” and eleven more require proof of malice.224 States have enacted laws requiring such


Eleven states require proof of malice. ARIZ. REV. STAT. ANN. § 12-553.02-03 (1992) (requiring actual malice for punitive damages in libel or slander claims); CAL. CIV. CODE § 3294(a) (West Supp. 1993) (stating that punitive damages are proper for breach of a noncontractual obligation, since it requires a finding of fraud, oppression or malice); DEL. CODE ANN. tit. 18, § 6855 (Supp. 1992) (requiring malice in a health care malpractice action); MONT. CODE ANN. § 27-1-221 (1993) (requiring actual malice or actual fraud); NEV. REV. STAT. § 41.337 (1991) (making actual malice necessary in a libel or slander action); N.J. STAT. ANN. § 2A:58C-5(1) (West 1987) (making oppression, fraud or malice necessary in a non-contractual obligation action); N.D. CENT. CODE § 32-007 (Supp. 1993) (requiring oppression, fraud or malice for non-contractual obligation action); OHIO REV. CODE ANN. § 2315-21 (Anderson 1991) (stating that acts or omissions require malice, aggravated or egregious fraud, oppression or insult to merit punitive damages); R.I. GEN. LAWS § 28-5-29.1 (Cum. Supp. 1994) (requiring that conduct be motivated by malice); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987) (requiring willful, wanton, or malicious conduct by defendant); VA. CODE ANN. § 8.01-52 (Michie 1992) (requiring willful or wanton conduct that shows disregard for the safety of others). Maine and Maryland case law requires proof of malice. Tuttle v. Raymond, 494 A.2d 1353, 1362-63 (Me. 1985) (requiring proof of malice); Owens-Illinois, Inc. v. Zendba, 601 A.2d 633, 657 (Md. 1992) (stating that actual malice must be shown by clear and convincing evidence to award punitive damages).
measures as bifurcated trials;\textsuperscript{225} judicial assessment of punitive damages after jury determination of liability;\textsuperscript{226} fixed ratio ceilings on punitive awards;\textsuperscript{227} damage caps;\textsuperscript{228} and payment of punitive damages into state funds or state-sponsored funds.\textsuperscript{229}

The United States Supreme Court ruling in \textit{Honda Motor} makes appellate review of punitive damages awards a constitutional necessity.\textsuperscript{230} State court and legislative standards and systems for review dramatically complicate the job of federal courts by injecting them into detailed and time consuming procedures.\textsuperscript{231} As noted previously, the \textit{Erie} doctrine requires that recently reformed state standards and procedures on punitive damages be applied by federal judges.\textsuperscript{232} These state systems have become sophisticated, complex, and multi-layered; they have also become expensive, time consuming, and subject to error.\textsuperscript{233}

Independent federal trial and appellate procedures further encumber trials and appeals in federal court. Rulings on motions for a remittitur or

\textsuperscript{225} Separate trials for compensatory and punitive damages claims. Rustad, \textit{supra} note 162, at 9 n.27 (listing states that require some type of divided, two stage proceeding for the assessment of punitive damages).

\textsuperscript{226} \textit{Id.} at n.28 (noting three states that have adopted judge-assessed punitive damages).

\textsuperscript{227} \textit{E.g.}, \textit{COLO. REV. STAT.} \textsection 13-21-102 (1987) (limiting punitive damages to the amount of actual damages except under certain circumstances); \textit{FLA. STAT. ANN.} \textsection 768.73 (West Supp. 1995) (stating that "the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages"); \textit{TEX. CIV. PRAC. \& REM. CODE ANN.} \textsection 41.007 (West Supp. 1995) (limiting punitive damages to four times the amount of actual damages or $200,000, whichever is greater, except under certain circumstances).

\textsuperscript{228} See, \textit{e.g.}, \textit{ALA. CODE} \textsection 6-11-21(1) (Supp. 1994) (making a $250,000 cap); \textit{VA. CODE ANN.} \textsection 8.01-3.8.1 (Michie 1992) (making a $250,000 cap); \textit{see also Haslip}, 499 U.S. at 20 n.9 (1991); Edith Greene, \textit{Juror's Attitudes About Civil Litigation and Size of Damage Awards}, 40 \textit{AM. U. L. REV.} 805, 806 (1991) (presenting a study on the effect of tort reform publicity on jurors); Rustad, \textit{supra} note 162, at 8 n.25 (listing states which limit punitive damages awards).

\textsuperscript{229} See Rustad, \textit{supra} note 162, at 8 n.26 (listing eight states with state or state-sponsored funds).


\textsuperscript{231} \textit{See, e.g.}, Burke v. Deere & Co., 6 F.3d 497, 513 (8th Cir. 1993) (holding that evidence did not warrant a jury charge for punitive damages), \textit{cert. denied}, 114 S. Ct. 1063 (1994); Ross v. Black & Decker, 977 F.2d 1178, 1183 (1992) (stating that a $10 million punitive damages award was excessive in a products liability case), \textit{cert. denied}, 113 S. Ct. 1274 (1993); Eichenur v. Reserve Life Ins., 934 F.2d 1377, 1378 (5th Cir. 1991) ("[T]he instant case has bounced through the federal courts like a yo-yo on a long string.").

\textsuperscript{232} \textit{Supra} notes 163-66 and accompanying text.

\textsuperscript{233} \textit{See supra} notes 224-31 and accompanying text.
new trial must be made under federal standards that are independent of *Erie*-based punitive damages review.\footnote{FED. R. CIV. P. 59; see also Jeffries v. Harleston, 828 F. Supp. 1066, 1067 (S.D.N.Y. 1993) (stating that a trial court must make independent federal review of a jury’s answers to special questions and apply state law on punitive damages to a request for remittitur on amounts awarded), aff’d in part, vacated in part on other grounds, 21 F.3d 1238, 1250 (2d Cir.), cert. granted and vacated, 115 S. Ct. 502 (1994); Eichenur, 934 F.2d at 1382 n.7 (holding that state law determines when a punitive damages award is too high or too low); Browning Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989) (holding that the Eighth Amendment’s Excessive Fines Clause does not apply to punitive damages awards in cases between private parties).} United States Courts of Appeals and Supreme Court review encompasses these rulings as well as trial court decisions on jurisdiction ab initio,\footnote{A trial court’s grant or denial of jurisdiction can be challenged by a timely motion to dismiss, FED. R. CIV. P. 12(b)(1), or by a motion for summary judgment, FED. R. CIV. P. 56, on the grounds that the jurisdictional amount is not satisfied. See, e.g., Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9, 19-20 (1987) (stating that the Court of Appeals should not have affirmed the District Court’s dismissal for lack of subject matter jurisdiction); D’Amato v. Rhode Island Hosp. Trust Nat’l Bank, 958 F.2d 361, 361 (1992) (affirming the District Court’s grant of a motion to dismiss).} trial court compliance with state substantive and procedural requirements for punitive awards,\footnote{See supra note 163.} application of state court appellate procedures for review of punitive damage verdicts,\footnote{See supra note 220 and accompanying text.} and de novo evaluation of the entire process under the federal constitutional requirements of *Haslip*, *TXO* and *Honda Motor*.\footnote{See supra notes 79-87 and accompanying text (discussing Bell v. Preferred Life} Thus, attempts to minimize the dangers of punitive damages as a remedy and to immunize such awards from constitutional attack have the incidental but inevitable effect of imposing new and unjustified burdens on federal courts sitting in diversity.

**CONCLUSION: ADOPTING A NEW RULE**

Two routes exist to achieve the modest and narrow change in federal court jurisdiction proposed by this Article. Congress could enact a redrafted federal diversity of citizenship jurisdictional statute that would expressly prohibit the pleading of punitive damage claims to satisfy the jurisdictional amount.\footnote{See supra note 185-217 and accompanying text; see also Packard v. Provident Nat’l Bank, 994 F.2d 1039, 1043 (3d Cir.) (dismissing trust beneficiaries’ suit for punitive damages), cert. denied, 114 S. Ct. 440 (1993).} The Access to Justice
Act\textsuperscript{240} would have made this change,\textsuperscript{241} along with other proposed reforms.\textsuperscript{242} Its defeat, the unwillingness of sponsors to resubmit similar legislation,\textsuperscript{243} and the long history of legislative inertia on recommendations like those contained in the Report of the Federal Court Study Committee\textsuperscript{244} suggest that Congress will not pass a revised diversity statute in the near future.\textsuperscript{245}

In the alternative, the Supreme Court of the United States may revisit the policy established in \textit{Bell v. Preferred Life Assurance Society}.\textsuperscript{246} On a technical matter of federal court jurisdiction, reversal of prior precedent is clearly available.\textsuperscript{247} \textit{Bell} is a judicially created rule of statutory


\textsuperscript{241} The critical language of the Act provided that § 1332 of Title 28 would be amended to read "(d) In determining whether a controversy exceeds the sum or value of $20,000 . . . punitive or exemplary damages . . . shall not be included." Access to Justice Act of 1992, H.R. 4155, 102d Cong., 2d Sess. (1992), at 3.

\textsuperscript{242} \textit{See supra} notes 4-6.

\textsuperscript{243} \textit{Supra} note 7 and accompanying text.

\textsuperscript{244} \textit{Supra} note 22 and accompanying text.

\textsuperscript{245} The political climate of the post-1994 congressional elections period may change this conclusion. Proposals by the new Republican legislative majority for "liability-reform" legislation limit punitive damage awards to the higher of three times the actual damages or $250,000, immunize retailers and distributors from product liability/punitive damage suits, and bar punitive awards against the makers of drugs previously approved by the FDA. \textit{Republicans Take Aim, supra} note 172, at 20.

More importantly, a nine judge panel of the Judicial Conference of the United States, established in 1990, will state to Congress that anticipated increases in the civil and criminal case loads of the federal courts requires, inter alia, the elimination of diversity of citizenship jurisdiction in all cases except those in which state court prejudice can be shown. The panel's draft report states that diversity cases constitute a "massive diversion of Federal judge power" and should be essentially removed from federal jurisdiction. Robert Pear, \textit{Judges Proposing to Narrow Access to Federal Court}, \textit{N.Y. Times}, Dec. 5, 1994, at A1, B9.

\textsuperscript{246} \textit{See supra} notes 79-87 and accompanying text.

\textsuperscript{247} \textit{See}, \textit{e.g.}, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). The Court will reexamine prior holdings based on a "series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law" and will balance the "respective costs of reaffirming and overruling a prior case." \textit{Id.} at 2808. The Court will ask "whether the rule has proved to be intolerable simply in \textit{defying practical workability}; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." \textit{Id.} at 2808-09 (emphasis added) (citations omitted).
interpretation — that good faith punitive damage claims may be relied on to satisfy amount-in-controversy requirements even if facially excessive. A rule that causes the kinds of problems presented in this Article should be judicially abrogated.

These problems could not have been foreseen at the time Bell was decided. More importantly, the decision in Bell was not premised on legislative intent. Justice Black’s opinion for the Court provided little guidance on the reasons or justifications for the rule adopted. The only citations supporting the proposition that “actual and punitive damages . . . must be considered . . . in determining [the] jurisdictional amount” under the diversity statute then in effect, were to the 1886 case of Barry v. Edmunds, and the 1897 decision in Scott v. Donald. Neither decision significantly relied on express or implied legislative purpose.

Even if legislative policy was the basis for the Bell Court’s decision, the growth since 1943 of punitive damage remedies and the multiple problems associated therewith have eroded a justification based on legislative intent. Significant weight should not be accorded Congress’ unwillingness to adopt the reforms of the Access to Justice Act or Federal Court Study Report. Many of the reform proposals rejected by Congress were politically charged and unevenly supported. Punitive damages as a jurisdictional issue was never fully isolated for consideration. Far more controversial proposals overshadow this matter and preclude any decisive inferences of Congressional position on this question.

Therefore, either the Supreme Court or Congress should reexamine and reverse the Bell rule. This small but important step will relieve some of the pressures on federal courts sitting in diversity. It may also promote broader discussion on the need for full-scale revision of diversity of citizenship jurisprudence.

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248 Supra notes 79-87.
252 165 U.S. 58, 89-90 (1897). Bell, 320 U.S. at 240 n.4.
253 See, e.g., supra notes 79-159 and accompanying text.
254 See, e.g., supra notes 176-78 and accompanying text.
255 See, e.g., supra note 172 and accompanying text.
256 See, e.g., supra note 172 and accompanying text.
257 See supra notes 176-223 and accompanying text.
258 See supra notes 79-87 and accompanying text.