SUPREME COURT OF THE UNITED STATES

No. 92–479

TXO PRODUCTION CORP., PETITIONER *v.* ALLIANCE RESOURCES CORP., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

[June 25, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

The jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the West Virginia Supreme Court of Appeals. Traditional American practice governing the imposition of punitive damages requires no more. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 15 (1991); *id*., at 26–27 (SCALIA, J., concurring in judgment). It follows, in my view, that petitioner's claims under the Due Process Clause of the Fourteenth Amendment must fail. See *id*., at 31. I therefore have no difficulty joining the Court's judgment.

I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip:* the existence of a so-called "substantive due process" right that punitive damages be reasonable, see *ante*, at 13.[1] I am willing to accept the proposition that the

[1]JUSTICE STEVENS asserts that there is a difference between the constitutional standard that he today proposes, which he describes as "grossly excessive" (a term used in one of the *Lochner*–era cases he relies upon, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909)), and the standard of "reasonableness" that state courts have traditionally applied. *Ante*, at 13, n. 24. I doubt whether there is a difference between the two. As JUSTICE O'CONNOR points out, see *post*, at 5–7, state courts

Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*–era cases the plurality relies upon, see *ante*, at 8–9. It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains *that* it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

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often used terms like "grossly excessive" to describe the sort of award that could not stand. But if there *is* a difference, then one must wonder—since it not based upon any common-law tradition—where the standard of "grossly-excessive-that-means-something-even-worse-than-unreasonable" comes from.

To say (as I do) that "procedural due process" requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination—which is, in my view, what the plurality tries to assure today. Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering); but no one would claim (or at least no one has yet claimed) that a substantively correct determination of sufficiency of evidence and reasonableness of compensatory damages is a federal constitutional right. So too, I think, with punitive damages: *judicial* assessment of their reasonableness is a federal right, but a *correct* assessment of their reasonableness is not.

Today's reprise of *Haslip,* despite the widely divergent opinions it has produced, has not been a waste. The procedures approved here, *ante*, at 18–21 (plurality opinion), are far less detailed and restrictive than those upheld in *Haslip*, *supra*, at 19–23, suggesting that if the Court ever does invent new procedural requirements, they will not deviate significantly from the traditional ones that ought to govern. And the disposition of the "substantive due process" claim demonstrates that the Court's "`constitutional sensibilities'" are far more resistant to "`jar-[ring],'" *ante*, at 17 (plurality opinion) (quoting *Haslip*, *supra*, at 18), than one might have imagined after *Haslip*. There the Court said a 4-to-1 ratio between punitive damages and actual damages "may be close to the line" of "constitutional impropriety," *Haslip*, *supra*, at 23–24; today we decide that a *10*–to-1 ratio between punitive damages and *the potential harm of petitioner*'*s conduct* passes muster — calculating that potential harm, very generously, to

be more than *50* times the $19,000 in actual damages that respondents suffered, see *ante*, at 15–17 (plurality opinion).

The Court's decision is valuable, then, in that the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that "this is no worse than *TXO*." I would go further, to shut the door the Court leaves slightly ajar. As I said in *Haslip*, the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed. 499 U. S., at 27–28 (SCALIA, J., concurring in judgment). State legislatures and courts have ample authority to eliminate any perceived "unfairness" in the common-law punitive damages regime, and have frequently exercised that authority in recent years. See *id*., at 39; Brief for Attorney General of Alabama et al. as *Amici Curiae* 14–17 (collecting state statutes and cases); Brief for National Association of Securities and Commercial Law Attorneys as *Amicus Curiae* 16–30 (same). The Court's continued assertion that federal judges have *some*, almost-never-usable, power to impose a standard of "reasonable punitive damages" through the clumsy medium of the Due Process Clause serves only to spawn wasteful litigation, and to reduce the incentives for the proper institutions of our society to undertake that task.