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Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence

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DUE PROCESS AND PUNITIVE DAMAGES: THE ERROR OF FEDERAL EXCESSIVENESS JURISPRUDENCE

A. BENJAMIN SPENCER[†]

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ABSTRACT

The Supreme Court, in a line of several cases over the past decade, has established a rigorous federal constitutional excessiveness review for punitive damages awards based on the Due Process Clause. As a matter of substantive due process, says the Court, punitive awards must be evaluated by three “guideposts” set forth in BMW of North America v. Gore: the degree of reprehensibility of the defendant’s conduct, the ratio between punitive and compensatory damages, and a comparison of the amount of punitive damages to any “civil or criminal penalties that could be imposed for comparable misconduct.”¹ Following up on this pronouncement in State Farm Mutual Automobile Insurance Company v. Campbell, the Court indicated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”² Unfortunately, neither the “guideposts” nor the single-digit multiple rule have any basis in the law of due process and represent nothing more than the imposition of the Court’s own standards for punishment in place of those of the states.

This Article reveals the defectiveness of this jurisprudence by exposing the absence of precedential foundation for the Court’s current view. More significantly, this Article demonstrates that the Court’s interpretation of the Due Process Clause is at odds with important rules of constitutional construction, mainly those supplied by the Ninth and Tenth Amendments, which protect unenumerated rights and limit the national government to exercising delegated powers, respectively. Together, these amendments

1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75, 580, 583 (1996).
 2. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

prohibit expansive interpretations of the Constitution that disparage rights retained by the people and that arrogate to the national government powers that neither the states nor the people ever relinquished. The Court's interpretation of the Due Process Clause with respect to punitive damages transgresses both of these limitations. This Article suggests that a proper understanding of due process reveals that the doctrine requires only that punitive awards be reserved for wrongdoing beyond simple negligence, jurors be instructed that any punitive award they impose must be designed to further states' legitimate interest in punishment of in-state conduct and deterrence, and judicial review of the awards be available to check adherence to these requirements. Beyond that, the Due Process Clause fails to require punitive damages awards be constrained to a particular level.

“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”³

I. INTRODUCTION

Although the Fourteenth Amendment's Due Process Clause is simple enough in its phrasing—“nor shall any State deprive any person of life, liberty, or property, without due process of law”⁴—this simplicity has permitted the clause to be used, and misused,⁵ as a broad vessel into which many rights and protections have been poured. The clause has been variously used as the source of many procedural protections,⁶ the basis for incorporating much of the Bill of Rights against the states,⁷ and as a source

3. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. U.S. CONST. amend. XIV, § 1.

5. See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 (1999) (describing the past century as “characterized by misguided efforts to ground [fundamental] rights in the concept of due process”).

6. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process requires that a hearing be held before public assistance payments to welfare recipients are discontinued).

7. See *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968). *Duncan* states:

The Fourteenth Amendment denies the States the power to ‘deprive any person of life, liberty, or property, without due process of law.’ In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

for unenumerated substantive rights, such as the right to privacy.⁸

One of the recent contexts in which the clause has been infused with a novel and untenable interpretation is the area of punitive damages. In *BMW of North America, Inc. v. Gore*, the Court for the first time invalidated a punitive damages award on the basis of the Due Process Clause,⁹ announcing, “The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”¹⁰ However, as the Court inaugurated what it termed “the federal excessiveness inquiry,”¹¹ it never paused to justify its view that the Due Process Clause places an upper limit on the amount of punitive damages awards. Relying wholly on its prior case of *TXO Production Corp. v. Alliance Resources Corp.*¹² for support, the Court in *BMW* simply declared, “Only when an award can fairly be categorized as ‘grossly excessive’ in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”¹³ *TXO* itself, however, borrowed this notion from case law that suggested substantive limits on *civil fines* and *penalties*, not punitive damages awards against tortfeasors.¹⁴ More recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court reaffirmed its view espoused in *BMW* that due process places substantive limits on the level of punitive damages awards and boldly pronounced that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁵

Close scrutiny of the precedential underpinnings of the Court’s excessiveness jurisprudence reveals that far from reflecting due process limitations thought by the Court to exist, the Court’s move to impose substantive limits on punitive damages via the Due Process Clause is *completely* unsupported by the Court’s prior holdings. A review of the body of precedent shows that the Court has misrepresented and misused the case law to lend legitimacy to a doctrine it has simply made up. What history and precedent indicate is that due process has never been construed to impair the common law practice of states permitting civil juries to award

8. *Griswold v. Connecticut*, 381 U.S. 479, 482–85 (1965).

9. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996).

10. *Id.* at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion)).

11. *Id.* at 568.

12. *TXO*, 509 U.S. 443.

13. *BMW*, 517 U.S. at 568 (quoting *TXO*, 509 U.S. at 456).

14. *See infra* Part III.B.4.

15. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17, 425 (2003).

exemplary damages at levels they deem appropriate under the circumstances.

Even more significant than the absence of precedential or historical support for the Court's interpretation of the Due Process Clause is its complete inconsistency with certain rules of constitutional construction and the principles of reserved rights and limited powers embodied in the Ninth and Tenth Amendments to the U.S. Constitution. The Ninth Amendment supplies a rule of construction that forbids expansive interpretations of constitutional provisions that infringe on rights retained by the people and the states,¹⁶ and the Tenth forbids the national government from arrogating to itself those powers not delegated to it, but reserved to the states.¹⁷

The Supreme Court's interpretation of the Due Process Clause in the *BMW* line of cases transgresses both of these limitations. Interpreting the Due Process Clause in a manner that denies the right of states to empower civil juries to levy punitive awards at a level of their choosing exploits the Constitution's failure to provide express protection for jury discretion in this area as a license to constrain it, an affront to the Ninth Amendment. Similarly, interpreting the Due Process Clause in a manner that empowers the Court, or Congress,¹⁸ to substitute its common law preferences for those of the states' ascribes power to the national government not delegated to it and certainly reserved to the states, offending the Tenth Amendment.

Both of these points are especially clear in light of the Court's determination that the Eighth Amendment does not pertain to punitive damages awards.¹⁹ Having failed to limit punitive damages awards in the very provision where one would expect such a limitation to reside—the Eighth Amendment—the rules of construction imposed by the Ninth and Tenth Amendments do not leave such an important matter to esoteric implication. Indeed, reading substantive limits on punitive damages into the Due Process Clause after holding that the Eighth Amendment neglects the topic violates two more basic rules of constitutional construction. The

16. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

17. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

18. Congress has the authority, under Section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Thus, presumably the Supreme Court's declaration that excessive punitive damages awards violates due process would mean that Congress should have some authority to legislate in this area to prohibit "excessive" awards. See *infra* text accompanying notes 261–62.

19. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271–76 (1989).

principle of *expressio unius est exclusio alterius*²⁰ suggests that the Eighth Amendment's neglect of punitive damages indicates their exclusion. The rule against constructions that render other provisions of the Constitution redundant²¹ prevents infusing the Due Process Clause with a bar against punitive excessiveness when such an interpretation would make the Eighth Amendment superfluous.

Although certainly many advocates of tort reform may feel that punitive damages awards are exorbitant and need to be limited in the manner suggested by the Court, imposing such limits is a policy goal that legislatures will have to achieve.²² The Supreme Court has itself expressed concern over the level of punitive awards,²³ but rather than defer to legislatures as the proper institutions for addressing this issue, the Court has itself chosen to craft a new jurisprudence of excessiveness to achieve that end. Given the fabricated nature of the Court's doctrine, one suspects that those who call for "strict constructionism" and deride "judicial activism" would otherwise be appalled by the Court's actions were the Court not so acting for the benefit of a policy goal these same critics tend to support.²⁴

20. "Expression of the one is exclusion of the other." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 25 (Amy Gutmann ed., 1997).

21. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

22. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (noting the "reform measures recently adopted or currently under consideration in legislative arenas" concerning punitive damages awards).

23. See, e.g., *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing.").

24. Compare the laudatory remarks from the antijudicial activism lobby with respect to the Court's *BMW* jurisprudence to the outrage expressed over the Court's recent decision in *Kelo v. New London*, 125 S. Ct. 2655 (2005), which was as offensive to the Constitution as the *BMW* line of cases, but resulted in a policy outcome the antiactivists do not support: the government taking of private property to further economic development goals of the government.

The anti-activist Cato Institute has criticized the *Kelo* decision as a manifestation of the Court's "complete disregard for even our explicitly enumerated rights." Radley Balko, *An Excess of Power*, July 4, 2005, http://www.cato.org/pub_display.php?pub_id=3974&print=Y (appearing originally on FoxNews.com). While the U.S. Chamber of Commerce's Institute for Legal Reform—no friend of "judicial activism"—has lauded the Court's holding in *State Farm* saying, "[T]he U.S. Supreme Court decision made great strides in providing guidelines to rein in excessive punitive damage awards," Institute for Legal Reform, *Issues—Punitive Damages*, <http://www.instituteforlegalreform.org/issues/index.php?p=punitive> (last visited Apr. 11, 2006). The Cato Institute put out an extensive document trying to reconcile its support for the holding of *State Farm* with its opposition to judicial activism by casting the issue as follows:

Ultimately, [whether a punitive damages award is excessive] is up to nine justices: not by imposing their own policy preferences—that would truly be judicial activism—but by applying the Constitution, based on a proper theory of that document grounded in the Framers' notions of limited government, separation of powers, federalism, and individual liberty.

Such hypocrisy²⁵ aside, it is the task of legal scholars to hold the Court to account when legally untenable decisions are made, regardless of where their policy preferences may lie. This Article undertakes that task. Part I briefly lays out the Court's excessiveness jurisprudence as announced in *BMW* and modified by *State Farm*. Part II consists of a critique of the doctrine, finding it to be unwise as a matter of legal policy, at odds with the true meaning of the Due Process Clause, and unsound as a matter of constitutional law. Once the doctrine has been shown to be little more than a modern creation of several justices of the Court seeking to achieve certain policy objectives, Part III presents the proper constitutional constraints on the award of punitive damages.

II. THE COURT'S EXCESSIVENESS JURISPRUDENCE

There is no need to rehearse at great length the facts in the cases that underlie the Court's excessiveness jurisprudence. Others have sufficiently accomplished that task, and references to those resources will be adequate for readers interested in a more detailed presentation of the principal decisions in the *BMW* line of cases.²⁶ However, the essentials of the cases underlying the doctrine and its current content are worth repeating here.

TXO Production Corp. v. Alliance Resources Corp. is the first case in which the Supreme Court announced "that the Due Process Clause . . . imposes substantive limits 'beyond which penalties may not go.'"²⁷ There had been earlier attempts by litigants to use the Eighth Amendment's

Robert A. Levy, *Do's and Don'ts of Tort Reform*, May 1, 2005, http://www.cato.org/pub_display.php?pub_id=4566. Of course, the same could be said about the Court's decision in *Kelo*, were these groups interested in defending that decision.

25. This hypocrisy is not unique to the punitive damages context:

Conservatives are hypocrites when it comes to federalism. On the one hand, throughout American history, they have advocated the need to protect and advance states' rights. On the other hand, conservatives are quick to abandon their commitment to states' rights when it gets in the way of their ideological objectives. Just this year, a conservative Congress took class action suits away from the state courts and put them in federal courts because they like the results they get in federal courts better. It was the most conservative wing of the Republican Party that tried to get federal courts to overrule a single state court's decision in the Terri Schiavo case.

Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 69 (2005) (footnotes omitted).

26. See, e.g., Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 110-29 (2005) (discussing the *BMW* line of cases from *Browning-Ferris* through *Cooper v. Leatherman*); Garrett T. Charon, Note, *Beyond a Bar of Double-digit Ratios: State Farm v. Campbell's Impact on Punitive Damages Awards*, 70 BROOK. L. REV. 605, 608-16 (2004-05) (reviewing the *BMW* line of cases from *Browning-Ferris* through *State Farm*).

27. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993) (plurality opinion) (quoting *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907)).

prohibition against excessive fines as a vehicle for imposing the very same limits on punitive damages awards, but the Court rejected those efforts in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*²⁸ Although the *TXO* Court indicated that such limits were found within the Due Process Clause, that Court did not invalidate the punitive damages award before it.²⁹ That task fell to the Court only a few years later in *BMW of North America, Inc. v. Gore*.³⁰ Citing *TXO* and the cases cited therein, the *BMW* Court reiterated that “[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”³¹ To determine whether the punitive damages award before it was grossly excessive and in violation of due process, the *BMW* Court devised three “guideposts”: “the degree of reprehensibility of the [defendant’s misconduct]; the disparity between the [actual] or potential harm suffered by [the plaintiff] and [the] punitive damages award; and the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases.”³²

Applying these guideposts to a \$2 million dollar punitive damages award accompanying a compensatory award of \$4,000, the Court in *BMW* invalidated the punitive damages award under review.³³ The defendant’s misconduct—failing to inform a customer that the new car he purchased had been repainted—was dismissed as “purely economic” and “not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award.”³⁴ Regarding the relationship between the punitive award and the harm inflicted on the plaintiff, the Court concluded that the 500-to-1 ratio was “breathtaking” and “‘raise[d] a suspicious judicial eyebrow,’” placing the award beyond the acceptable range.³⁵ Finally, the Court noted that the maximum criminal penalty for the defendant’s misconduct in Alabama, the plaintiff’s home state, would have been \$2,000, with other states authorizing between \$5,000 and \$10,000, substantially less than the punitive award imposed here.³⁶ From these findings the Court concluded

28. *Browning-Ferris*, 492 U.S. at 262–76.

29. *TXO*, 509 U.S. at 458–62.

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

31. *Id.* at 562 (quoting *TXO* 509 U.S. at 454).

32. *Id.* at 574–75.

33. *Id.* at 565–66, 574–86. The award imposed by the jury was \$4 million; the Alabama Supreme Court, however, remitted the punitive award down to \$2 million in order to remove aspects of the award that reflected the jury’s use of out-of-state conduct. *Id.* at 567.

34. *Id.* at 576, 580.

35. *Id.* at 582–83 (quoting *TXO*, 509 U.S. at 481 (O’Connor, J., dissenting)).

36. *Id.* at 584.

that “the grossly excessive award imposed in this case transcends the constitutional limit.”³⁷

It is important to pause here to make clear the full extent of what the Court said in *BMW*. First, the Court affirmed that due process imposes an excessiveness limitation on punitive damages based on the logic that awards exceeding an amount needed to further a state’s legitimate interests in punishment and deterrence is arbitrary and therefore violates the Due Process Clause of the Fourteenth Amendment.³⁸ Second, the Court indicated that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States,” a derivative of the limits on states’ sovereignty and notions of comity.³⁹ Rather, punitive awards imposed by states “must be supported by the State’s interest in protecting its own consumers and its own economy.”⁴⁰ The Court did find, however, that out-of-state conduct “may be relevant to the determination of the degree of reprehensibility of the defendant’s conduct.”⁴¹ Third, the Court stated, “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁴² According to the Court, it was this requirement of fair notice that suggested to it the three guideposts as indicia of whether prospective tortfeasors would be able to foresee the magnitude of the sanction a state might impose for their malfeasance. Punitive awards going beyond the level that the guideposts suggest as foreseeable would be considered unconstitutionally excessive because defendants would lack adequate notice that such damages could attach to their conduct.

This Article objects to the first and third of these propositions. The Court’s second point, that a state may not seek to punish conduct that is lawful elsewhere, is sound because the sovereign authority of states does not properly extend to the punishment of lawful extraterritorial activity within the federal system.⁴³ In *BMW*, however, this principle was not

37. *Id.* at 585–86.

38. *Id.* at 568.

39. *Id.* at 572.

40. *Id.*

41. *Id.* at 574 n.21.

42. *Id.* at 574.

43. *Pennoy v. Neff*, 95 U.S. 714, 722 (1877) (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.” (citations omitted)).

implicated because the Alabama Supreme Court previously had shorn the punitive damages award imposed by the jury of any elements that relied upon “acts that occurred in other jurisdictions.”⁴⁴ Thus, the U.S. Supreme Court did not, and could not, invalidate the award before it on the ground that it was tainted by reliance on lawful out-of-state conduct. The first and third propositions—that the Due Process Clause bars excessive awards because they are arbitrary and fail to provide defendants with adequate notice of punishment—are the more troublesome aspects of the Court’s excessiveness jurisprudence that this Article challenges.

BMW was not the final word from the Court on these issues. After *BMW*, the Court again faced a constitutional challenge to a punitive damages award in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, although here it focused on the proper standard of review when considering the constitutionality of a punitive damages award.⁴⁵ Stating that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury,” the Court held that a *de novo* standard was appropriate for reviewing punitive awards imposed by juries.⁴⁶ In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court’s most recent case in this area, the Court again invalidated a punitive damages award as excessive under the Due Process Clause.⁴⁷ The punitive award was \$145 million coupled with a \$1 million compensatory award, a ratio the Court simply could not stomach.⁴⁸ Indeed, one of the more important statements made by the Court in *State Farm* pertained to its view of the proportionality guidepost: “[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁴⁹

Together, these cases—in the name of the Due Process Clause—place the Court squarely in the position of taking a nondeferential second look at

44. *BMW*, 517 U.S. at 567 (quoting *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 628 (Ala. 1994)). Indeed, because of this fact, Justice Scalia remarked, “The Court’s sweeping (and largely unsupported) statements regarding the relationship of punitive awards to lawful or unlawful out-of-state conduct are the purest dicta.” *Id.* at 604 (Scalia, J., dissenting).

45. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 424 (2001).

46. *Id.* at 437–43 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996)).

47. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408 (2003).

48. *Id.* at 426.

49. *Id.* at 425.

state-imposed, and Congressionally imposed,⁵⁰ punitive damages awards. The Court has determined for itself whether a defendant's conduct is sufficiently reprehensible to justify a punitive award of a given amount. Furthermore, the Court has declared that awards exceeding a single-digit multiple of compensatory damages are presumptively excessive, placing substantial downward pressure on punitive awards before they reach the High Court for review. The next Part of the Article critiques this doctrine.

III. A CRITIQUE

Having held that the Excessive Fines Clause of the Eighth Amendment⁵¹ does not apply to punitive damages awards,⁵² the Court has determined that the Due Process Clause does apply to such awards and that it supplies a substantive limitation on the level punitive damages awards may reach. The sole question for consideration here is whether such a limitation may properly be found within the Due Process Clauses of the Fifth and Fourteenth Amendments. The answer is no. After touching on some of the familiar criticisms of the Court's excessiveness jurisprudence, this Part turns to an analysis of the precedential underpinnings of the Court's doctrine, followed by a consideration of whether the Court's interpretation of due process is consonant with basic canons of constitutional construction or with interpretive constraints imposed by the Ninth and Tenth Amendments to the Constitution.

50. There is nothing in the language of *BMW* to suggest that the Court's interpretation of due process is limited to the Fourteenth Amendment. Indeed, lower courts have since indicated that the due process principles espoused in *BMW* equally limit the federal government's ability to impose punitive damages awards via the Fifth Amendment. See, e.g., *Johnson v. Howard*, 24 F. App'x 480, 486 (6th Cir. 2001) ("'Grossly excessive' damages awards are prohibited by the Due Process Clause of the Fourteenth and Fifth Amendments."); *Diviney v. Nationsbank of Tex., N.A.*, 225 B.R. 762, 777 (B.A.P. 10th Cir. 1998). The *Diviney* court stated:

We are aware of recent decisions that have imposed some limits on punitive damage awards under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, which applies only to the States, but assume those limits might also be applicable under [11 U.S.C.] § 362(h) through the Due Process Clause of the Fifth Amendment, which applies to the federal government.

Id. (citations omitted).

51. U.S. CONST. amend. VIII.

52. Prior to the Court's holding in *Browning-Ferris*, many commentators argued that the Eighth Amendment should be read to apply to punitive damages awards. See, e.g., Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987).

A. INTERNAL CRITIQUE

The *BMW* doctrine is riddled with various internal deficiencies: its intractable subjectivity, its likely adverse impact on states' policies of retribution and deterrence, and its insistence on *de novo* review of jury decisions traditionally entitled to more deferential review. Each of these internal critiques will be discussed in turn.

1. The Subjective, Takes-the-Judicial-Breath-Away-and-Raises-the-Judicial-Eyebrows Test⁵³

A common criticism of the test created by the Court to evaluate the excessiveness of punitive damages awards is that the *BMW* guideposts fail to provide clear guidance to lower courts as to what level of punitive damages is appropriate.⁵⁴ Justice Scalia's dissent in the case reflected this sentiment: "In truth, the 'guideposts' mark a road to nowhere; they provide no real guidance at all."⁵⁵ Justice Ginsburg was no more charitable in her assessment of the new guideposts in her *BMW* dissent: "It has only a vague concept of substantive due process, a 'raised eyebrow' test as its ultimate guide."⁵⁶ This lack of guidance ultimately derives from the fact that the first two guideposts consist of subjective factors that are not susceptible to principled application.

The first guidepost—the degree of reprehensibility of the defendant's conduct—on its face discloses its subjectivity by its reliance on the concept of "reprehensibility." Reprehensibility is by its very nature a subjective concept because it refers to the degree of moral opprobrium that one would affix to given conduct. Such moral assessments depend heavily on the views and norms of the assessor and will vary to some extent from one person to another. Although the Court purported to give additional guidance regarding the reprehensibility guidepost in *BMW* and *State Farm*, such guidance has failed to infuse the factor with sufficient objectivity:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or

53. This phrase is borrowed from Pamela S. Karlan, Pamela S. Karlan, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment, Lecture (Nov. 4, 2003), in 88 *MINN. L. REV.* 880, 911 (2004).

54. Neil B. Steklloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards after BMW v. Gore*, 29 *CONN. L. REV.* 1797, 1817 (1997) (arguing that "each guidepost is far too subjective and malleable to be meaningful beyond the facts of *BMW v. Gore*").

55. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting).

56. *Id.* at 613 (Ginsburg, J., dissenting) (citation omitted).

a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.⁵⁷

These considerations are of little help in determining reprehensibility within the various categories they describe. In other words, this additional guidance tells a court that wrongdoing causing physical harm is more reprehensible than economic harm. The guidance does not, however, help a court distinguish among or weigh various degrees of physical harm to determine the level of reprehensibility for the purposes of fixing punitive damages.

A further problem with these considerations is that they involve the Supreme Court making its own determination on behalf of the entire nation that conduct with certain characteristics is, always and in all circumstances, more reprehensible than other conduct. For example, the Supreme Court pronounces that all conduct causing physical harm is more reprehensible than all conduct causing economic harm.⁵⁸ But the nature of the harm as physical rather than economic will not always serve as an adequate proxy for determining relative degrees of reprehensibility. Wrongdoing causing physical harm such as cutting someone with a knife or punching a person in the eye can hardly be deemed more reprehensible than, or as causing the same degree of damage, as massive securities fraud or other corporate wrongdoing costing shareholders billions of dollars, their retirement security, and their jobs.⁵⁹ Additionally, reprehensibility seems likely to be a localized judgment that only has meaning with reference to the standards of a relevant local community. Some states may find that consumer fraud is a particularly pernicious and harmful offense that plagues its citizens and costs them millions of dollars annually. Other states may find that consumer fraud really is not much of a problem, but personal property theft is. Still other states that serve as major financial centers might find that they face serious wrongful conduct in the financial and securities area that

57. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW*, 517 U.S. at 576–77).

58. See *BMW*, 517 U.S. at 576.

59. The example of the Enron debacle comes to mind. See *The Impact*, WASH. POST, <http://www.washingtonpost.com/wp-srv/business/enron/front.html> (follow “The Impact” hyperlink) (last visited May 17, 2006). *The Impact* states:

Thousands of Enron employees . . . were left unemployed. Enron encouraged employees to invest in the company, matched their 401(k) contributions with company stock, and briefly froze the plan in late October, barring employee sales, before the stock’s final plunge. Thousands of employees and retirees have next to nothing in their accounts.

Id.

dwarfs other wrongs in importance and reprehensibility. The point is that it is not appropriate for the Supreme Court, an unelected and nonrepresentative *federal* body, to pronounce and enforce universal, national standards of reprehensibility binding upon the states.

The second guidepost—the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award—is subjective on two counts. First, when identifying the magnitude of any disparity, a court has to assess the degree of potential harm and then compare it to the punitive award. This is a somewhat discretionary assessment that is subject to some manipulability.⁶⁰ How can potential harm be measured with any degree of precision? What assumptions should be made? Should judges assume a worst case scenario? Second, once a disparity is quantified, the guidepost calls for a subjective judgment regarding whether that disparity is inappropriate under the circumstances of the case. Is a disparity of 20-to-1 too great? How is a court to make such a determination? Although the Court has indicated that punitive-to-compensatory damages ratios greater than 9-to-1 will rarely be warranted,⁶¹ absent a bright-line rule imposing such a fixed upper limit, lower courts are left to figure out for themselves whether a given disparity is excessive without being given any objective standards for doing so.

The ultimate assessment made by the Court in *BMW* and *State Farm*—that the given punitive damages awards were of an amount greater than that needed to achieve the state's legitimate goals of deterrence and retribution and greater than that warranted by the reprehensibility of the defendants' actions—is wholly subjective.⁶² There is no objective means of

60. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 470 (2004). Chanenson and Gotanda state:

For example, the ratio in *TXO* has been described as being both 526 to 1 (when considering the punitive damages award to the actual compensatory damages) and as not more than 10 to 1 (when considering the punitive damages award to the potential compensatory damages if the tortious plan had succeeded). Thus, the reliability and usefulness of the second guidepost is questionable.

Id. (footnote omitted).

61. See *State Farm*, 538 U.S. at 425.

62. One scholar, in defending the holding of *BMW*, attempted to explain why *BMW's* actions were not sufficiently egregious to warrant the resulting punitive award, but ultimately did nothing more than convey his personal view that the wrong done was slight. See Zipursky, *supra* note 26, at 168–69. Zipursky states:

[I]t seems to me . . . that *Gore* did not really have a particularly serious grievance against *BMW* . . . [I]n light of the relatively minor fraudulent concealment, the grievance legitimately held against *BMW* by *Gore* is quite paltry . . . [I]t is preposterous that the grievance associated with this transaction was anywhere near the size that a jury would have believed warranted personal redress of \$2 million.

determining whether a lower award would indeed achieve the same level of deterrence as the award actually imposed. Similarly, whether a state's goals of punishment or retribution are vindicated by a lower amount is not an objective matter. Indeed, by imposing and approving a higher award the state has already indicated its view that a lower award would not sufficiently further its interest in retribution. Thus, the difference of awards is no more than a subjective difference of opinion, but the Court has the power to have its view control.⁶³ This sad state of affairs makes Justice Scalia's comment in his *BMW* dissent quite apt: "[T]he application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."⁶⁴ With subjective assessments holding sway over the Court's *BMW* analysis, the Court has created a constitutional law of punitive damages that brings about the very arbitrariness that the Court has sought to combat. As Justice Scalia recently remarked in another context, "a test . . . that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed" is no more than "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."⁶⁵ Thus, beyond being ill-founded and constitutionally untenable (defects of the doctrine to be addressed below), the Court's excessiveness jurisprudence is subjective to the point of rendering federal punitive damages review arbitrary and unpredictable.

2. The Problem with Proportionality

The Court's recourse to a proportionality principle as a means of assessing the excessiveness of punitive damages awards is additionally problematic because the magnitude of harm inflicted on plaintiffs is not the

Id. (emphasis added). Well, that is just one man's opinion. Clearly the jury and state judiciary in *BMW* felt differently and the question is the authority of the U.S. Supreme Court to second-guess that judgment.

63. Scalia acknowledged as much in a different context when he rejected a constitutional proportionality principle for reviewing criminal sentences under the Cruel and Unusual Punishment Clause of the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 958, 986 (1991) (plurality opinion). Justice Scalia states:

The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

Id.

64. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting).

65. *Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

proper measure of the reprehensibility of a wrongdoer's actions. There is no clear reason why the magnitude of actual or potential harm bears the most relevance to the reprehensibility of conduct; the degree of harm caused or potentially caused can depend on a host of factors having nothing to do with reprehensibility. For example, the preexisting condition of a victim can affect whether a given act inflicts minor harm or major damage; unpredictable market forces can determine whether securities fraud results in huge profits or major losses for investors; insurance coverage can reduce the harm one suffers compared with harm that is not mitigated by such coverage; acts of God such as severe weather can bring about more harmful consequences than the same conduct may have caused under better conditions; or simple chance events can mean the difference between a minor car accident and a fatal one. Further, as one commentator has noted, quite reprehensible actions can have minimal harmful effects, while wholly accidental conduct can lead to disastrous results, further attenuating the connection between resultant harm and reprehensibility:

[I]f the purpose of punitive damages is to deter behavior that is morally reprehensible, the relevance of the compensatory loss is not immediately evident unless an intent to affect the magnitude of loss was a specific element of the reprehensible action. Many totally inadvertent or accidental actions generate huge loss; many repugnant and reprehensible actions generate little harm, measured solely in compensatory terms of lost income, needed expense, and pain and suffering.⁶⁶

When evaluating punitive damages, what matters more than the magnitude of the harm to the plaintiff is the level of insult to the public. Punitive damages represent the imposition of a penalty by the state against wrongdoers in an effort to express the community's level of disapproval of the unlawful conduct and to punish the wrongdoer accordingly.⁶⁷ Thus, the proper measure of punitive damages awards is this level of public outrage—which can only properly be pronounced by state legislatures and civil juries—not the degree of private harm. Indeed, the Court long ago recognized that punitive damages are not properly measured by their proportion to the degree of harm inflicted on the victim when it wrote:

Nor does giving the penalty to the aggrieved [party] require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust

66. George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 838 (1996).

67. See *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919).

its amount to the public wrong rather than the private injury, just as if it were going to the state.⁶⁸

Because it is the public wrong rather than private injury that is being punished, there is no good reason to exalt proportionality to compensatory damages as the principal measuring rod of excessiveness.

Beyond being an inappropriate yardstick of reprehensibility, the Court's proportionality principle detracts from the legitimate goals of punishment and deterrence that the Court has indicated states have a right to pursue.⁶⁹ A strict proportionality principle—particularly one biased against awards exceeding single-digit multiples—can result in punitive awards too meager in size to deter well-heeled prospective tortfeasors from engaging in similar wrongdoing. An insufficiently substantial penalty will be viewed simply as a tolerable cost of a certain course of action, provided the ultimate benefits to be gained outweigh that cost.⁷⁰ Two commentators have expressed this point in economic terms:

The magnitude of the effect on the firm's production activities and its choice of inputs necessarily depend on the firm's production budget and financial status of the firm[;] the wealthier the firm or greater its ability to pay, the smaller the effect. Accordingly, one of the dominant factors any court should consider when reviewing the award of punitive damages is the financial position of the firm, i.e. its isocost function (or production cost budget). The extent to which a firm is "willing to pay" the punitive price for reprehensible production activities is a function of the firm's [utility] and [budget] functions. To ignore these individual-specific functional relationships renders the stated purposes of punitive damages, i.e. punishment and deterrence, meaningless.⁷¹

68. *Id.*

When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, . . . we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id. at 67.

69. *BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

70. Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779, 808 (2004) ("An amount that might be sufficient to deter a less wealthy defendant could very well be written off as simply a cost of doing business by a much wealthier corporation, undermining the achievement of the deterrence goals of punitive damages.").

71. Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 256 (2005).

Economic realities mean that punitive damages must take into account the wealth of the defendant if states are to have any hope of achieving their retribution and deterrence goals when dealing with defendants of greater means.⁷²

Referring to the tortfeasor's financial position in fixing punitive damages is not a foreign concept to the Court. Prior to *BMW* and *State Farm* the Court had endorsed the proposition that a defendant's wealth properly figured into an evaluation of the propriety of a punitive damages award.⁷³ The strict proportionality principle announced by the Court, however, does not account for the need to tailor punitive damages to the financial condition of the defendant (and prospective wrongdoers) to achieve the desired level of punishment and deterrence. Thus, the Court's move toward requiring a reasonable relationship between punitive damages and compensatory damages undermines the intended purpose of punitive damages.

3. Unjustified De Novo Review

A final point worth mentioning is that the Court's determination that its excessiveness review must be conducted de novo⁷⁴ permits the complete second-guessing of factual determinations made by the jury. Justice Scaha pointed out that the Court was already doing this in *BMW*:

The Court distinguishes today's result from *Haslip* and *TXO* partly on the ground that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence

72. Michael Rustad and Thomas Koenig usefully provided a historical perspective on this point, highlighting the ancient Roman practice of exemplary damages and its justification:

The Roman law of multiple damages blended compensation with punishment. The Twelve Tables dating from 450 B.C. contained numerous examples of multiple damages. One commentator noted the need for Roman multiple damages to constrain wealthy elites:

"The laws of the XII Tables declared that whoever should do a personal injury to another should pay twenty-five [asses], a considerable sum at the time. At a later [period], however, when money abounded, this penalty became so insignificant that one Lucius Veratius used to amuse himself by striking those whom he met in the streets in the face, and then tendering them the legal amends, from a wallet which a slave carried after him for the purpose."

Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285-86 (1993) (quoting *Vindictive Damages*, 4 AM. L.J. 61, 75 (1852) (footnotes omitted) (brackets reflect alterations from original source that were not noted in *Historical Continuity*)).

73. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (plurality opinion) ("The punitive damages award in this case is certainly large, but in light of . . . petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." (footnote omitted)); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (approving the use of the defendant's "financial position" as one criterion in determining whether a punitive award is excessive).

74. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

of improper motive, such as were present in *Haslip* and *TXO*.” This seemingly rejects the findings necessarily made by the jury—that petitioner had committed a fraud that was “gross, oppressive, or malicious.”⁷⁵

Reaching the conclusion that the facts do not support malevolence on the part of the defendant, after the jury has considered the evidence and reached a contrary conclusion, improperly permits the Supreme Court to weigh the evidence and reexamine factual determinations; this conclusion violates the spirit, if not the letter, of the Seventh Amendment.⁷⁶

Additionally, de novo review not only invades the traditional province of civil juries but also invades the traditional province of the states. As discussed in greater detail below, the power to appropriate levels of punishment for violations of state laws is delegated to the states, not to the national government. The Court seemed to affirm this notion in *State Farm* when it wrote, “[E]ach State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”⁷⁷ It is unclear, however, how de novo review of factual determinations made by juries respects state authority in this area when it allows the Court to substitute its own measure of punishment for that of the states.⁷⁸

In sum, the Court’s excessiveness review—which consists of a de novo review using the *BMW* guideposts, heavily shaped by a single-digit-multiple proportionality requirement—is fraught with hopeless subjectivity, is poorly connected to the goals of punishment and deterrence, and enables the Court to engage in unwarranted review of factual judgments made by state courts and juries. In the sections that follow, this Article explores the deeper doctrinal difficulties with the Court’s excessiveness jurisprudence that go beyond the internal problems discussed above.

75. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 606 (1996) (Scalia, J., dissenting) (quoting the opinion of the Court at 579 and ALA. CODE § 6-11-20(b)(1) (1993)) (citations omitted).

76. The Seventh Amendment provides, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States*, than according to the rules of the common law.” U.S. CONST. amend. VII (emphasis added).

77. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

78. *BMW*, 517 U.S. at 600 (Scalia, J., dissenting) (“There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter.”).

B. AN ABSENCE OF PRECEDENT

More serious than the doctrine's shortcomings from a policy perspective is the fact that the Supreme Court lacked any precedential basis for its determination in *TXO* and *BMW* that the Due Process Clause imposes substantive limitations on punitive damages awards. Although the Court has considerable authority to declare the meaning of constitutional provisions, it has presented its due process excessiveness jurisprudence as if it were firmly and deeply rooted in prior case law.⁷⁹ This, however, is simply not the case. Scrutiny of the collection of cases on which the Court has purported to base its doctrine reveals a total absence of precedential support for the notion of due process limitations on the amount of punitive damages that states may impose. Indeed, such a review makes plain that the Court's position is not the product of reason and sound constitutional analysis, but rather is a modern creation falsely clothed in the cover of precedent.

1. Bankers Life and Casualty Co. v. Crenshaw⁸⁰

The road to *BMW* was short, spanning less than a decade. In just that brief period, however, the Court was able to spin out of thin air an entire jurisprudence of excessiveness—based on the Due Process Clause—and present it as if it had always been there. In no case prior to 1988 did any member of the Court express through an opinion the idea that due process placed substantive limits on the amount of punitive damages. In that year, however, in *Bankers Life and Casualty Co. v. Crenshaw*, the Court faced a challenge to a punitive damages award based on the Due Process Clause.⁸¹ Although the Court rejected the challenge because it had not been raised

79. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality opinion).

[S]everal of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits “beyond which penalties may not go.” *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78, 28 S. Ct. 28, 30, 52 L.Ed. 108 (1907). See also *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66–67, 40 S. Ct. 71, 73, 64 L.Ed. 139 (1919); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286, 32 S. Ct. 406, 411, 56 L.Ed. 760 (1912). Moreover, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 35 S. Ct. 886, 59 L.Ed. 1419 (1915), the Court actually set aside a penalty imposed on a telephone company on the ground that it was so “plainly arbitrary and oppressive” as to violate the Due Process Clause. *Id.*, at 491, 35 S. Ct., at 888. In an earlier case the Court had stated that it would not review state action fixing the penalties for unlawful conduct unless “the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.” *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111, 29 S. Ct. 220, 227, 53 L.Ed. 417 (1909).

Id.

80. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988).

81. *Id.* at 75–76.

and considered in the lower courts,⁸² Justice O'Connor seized the opportunity to pen a concurrence that laid the groundwork for the Court's ultimate embrace of substantive due process limitations on punitive damages awards.⁸³

Justice O'Connor's principal concern was the authority of juries under the Mississippi law at issue "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state."⁸⁴ She noted, "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount."⁸⁵ Because of the lack of any objective constraints, she worried that "the impact of these windfall recoveries is unpredictable and potentially substantial."⁸⁶ For that reason, she wrote, "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits."⁸⁷ Because under the Mississippi law "the amount of the penalty that may ensue is left completely indeterminate," and, according to the Mississippi Supreme Court, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury," Justice O'Connor mused, "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."⁸⁸

Although Justice O'Connor's suggestion that "the procedures under which punitive damages are awarded"⁸⁹ deserved scrutiny is certainly correct, her further suggestion that the jury's unfettered discretion in setting the amount of such awards "appears"⁹⁰ contrary to due process is off the mark. One finds no citations in support of Justice O'Connor's claim regarding the purported affront to due process worked by such jury discretion because no Supreme Court precedent supports such a view. To the contrary, as an analysis of all the relevant cases below demonstrates, the Court had historically and continually affirmed jury discretion in this area without ever suggesting any due process limits on the amounts that juries could award.

82. *Id.* at 76 ("We conclude, however, that these claims were not raised and passed upon in state court, and we decline to reach them here.").

83. *Id.* at 87-88 (O'Connor, J., concurring in part and concurring in the judgment).

84. *Id.* at 87.

85. *Id.*

86. *Id.* (quoting *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979)).

87. *Id.* at 88.

88. *Id.* (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985)).

89. *Id.*

90. *Id.*

2. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁹¹

The next case in which the Court faced a due process challenge to a punitive damages award was *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁹² where the Court again declined to consider the issue because it was not properly preserved.⁹³ In doing so, Justice Blackmun, the author of the majority opinion, did take the opportunity to note that the question was one the Court had never addressed:

There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme, *see, e.g., St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66–67 (1919), but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.⁹⁴

But Justice Blackmun declined to opine on the matter and simply wrote, “That inquiry must await another day.”⁹⁵ The award was also challenged as excessive under the Excessive Fines Clause of the Eighth Amendment, but the Court held the clause to be inapplicable to punitive damages awards.⁹⁶

Unfortunately, other justices of the Court were not so reticent. In a concurrence, Justice Brennan, joined by Justice Marshall, took the opportunity to promote his view that the Due Process Clause does impose substantive limits on the amount of punitive damages a jury may award.⁹⁷ Unlike Justice O’Connor’s concurrence in *Bankers Life*, however, Justice Brennan attempted to support his view with precedent stretching back to the turn of the last century:

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are “grossly excessive,” *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,” *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66–67 (1919). *See also Southwestern Telegraph & Telephone*

91. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

92. *Id.* at 257.

93. *Id.* at 277.

94. *Id.* at 276–77.

95. *Id.* at 277.

96. *Id.* at 259–60.

97. *Id.* at 280–81 (Brennan, J., concurring).

Co. v. Danaher, 238 U.S. 482, 491 (1915); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 522–523 (1885).⁹⁸

Ultimately, Justice Brennan's effort to gin up a pedigree for his proposition fails upon scrutiny of his citations. *Waters-Pierce* provides no support for the proposition that due process forbids "grossly excessive" punitive damages awards because it was a case addressing the propriety of a civil penalty referred to as a "fine" by the Court, not punitive damages.⁹⁹ Furthermore, the case that the *Waters-Pierce* Court cites in support of its "grossly excessive" language, *Coffey v. County of Harlan*, also was addressing the propriety of a *criminal fine* and a Fourteenth Amendment challenge to it based on a claim of having been deprived an opportunity to be heard, not based on the fine being excessive.¹⁰⁰

St. Louis, Iron Mountain & Southern Railway Co. v. Williams, the next case cited by Justice Brennan, addressed a civil penalty, rather than punitive damages, as well; in this case, however, the penalty was made payable to the aggrieved private party rather than to the state.¹⁰¹ Although such an arrangement renders the payment akin to punitive damages, the *Williams* Court wrote, "The provision assailed is essentially penal" and "[t]he power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government."¹⁰² Having styled the penalty as penal, the Court indicated the following relationship between the Fourteenth Amendment and a state's power to impose penal sanctions:

That [the Due Process Clause] places a limitation upon the power of the States to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter and that their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. *Coffey v. Harlan County*, 204 U.S. 659, 662 [1907]; *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78

98. *Id.*

99. *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 96, 111 (1909) (noting that the underlying action was a prosecution "brought by the Attorney General of Texas and the county attorney of Travis county, to recover penalties, under [an 1899 state anti-trust law] . . . at the rate of \$5,000 per day, and under [a separate 1903 state anti-trust law] . . . at the rate of \$50 per day").

100. *Coffey v. County of Harlan*, 204 U.S. 659, 663 (1907) ("The plaintiff contends that the sentence awarded against Whitney violated this prohibition, in that Whitney had no opportunity to be heard upon and defend against that part of the sentence which imposed a fine and authorized a judgment against his estate for its collection.")

101. *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919).

102. *Id.* (quoting *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885)) (brackets reflect alterations from original source that were not noted in *Williams*).

[1907]; *Waters-pierce Oil Co. v. Texas*, 212 U.S. 86, 111 [1909]; *Collins v. Johnston*, 237 U.S. 502, 510 [1915].¹⁰³

Clearly, given the Court's determination in *Williams* that the penalty at issue was penal, the Court here is referring to limits on penal sanctions imposed by states, something today's Court would view as deriving from the protections of the Eighth Amendment as incorporated against the states via the Fourteenth Amendment's Due Process Clause.

That the *Williams* Court is discussing limits on criminal penalties is confirmed when one consults the sources cited by the Court. *Coffey* and *Waters-Pierce* were criminal and civil fine cases,¹⁰⁴ *Collins* was a case dealing with a criminal sentence of imprisonment,¹⁰⁵ and *Seaboard* dealt with a civil penalty similar to that at issue in *Williams*.¹⁰⁶ Thus, *Williams* should be seen as an excessive fines case rather than a punitive damages case.

Moving to the third in Justice Brennan's series of citations, *Southwestern Telegraph & Telephone Co. v. Danaher*¹⁰⁷ hardly provides the "see also" support that Justice Brennan advertises.¹⁰⁸ In *Danaher*, the defendant telephone company was held liable for \$6,300 in civil penalties as a result of failing to provide service to a customer in violation of a state statute mandating the delivery of service.¹⁰⁹ The telephone company challenged the penalty because they were denying service pursuant to an impartially enforced regulation that denied service to all customers with delinquencies, a regulation that state law arguably permitted the company to impose.¹¹⁰ In assessing the challenge to the civil penalty, the Court wrote as follows:

103. *Id.* at 66-67.

104. *See supra* text accompanying notes 99-100.

105. *Collins v. Johnston*, 237 U.S. 502, 509 (1915) ("It is contended that a sentence of fourteen years' imprisonment for the crime of perjury is grossly excessive, and therefore illegal, and prohibited by the Fourteenth Amendment of the Constitution of the United States.").

106. *See Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 75-76 (1907). The Court states:

The question in this case is the constitutionality of section 2 of an act of the State of South Carolina, approved February 23, 1903 (24 Stat. 81), which reads: . . . "Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of \$50 for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any court of competent jurisdiction."

Id. (citation omitted for the internal quotation).

107. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

108. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

109. *Danaher*, 238 U.S. at 487-88.

110. *Id.* at 486-88.

There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. . . . The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law.¹¹¹

Danaher does not support the notion that the Due Process Clause imposes substantive limits on the amount of punitive damages states may award. Rather, the case holds that it is "arbitrary and oppressive" to impose civil penalties on a company that has not engaged in intentional wrongdoing or reckless conduct but has instead acted in a way that it had reason to believe was permissible.¹¹²

Justice Brennan's final case, *Missouri Pacific Railway Co. v. Humes*, offers the least support for the claim that due process limits the amount of punitive damages.¹¹³ In *Humes*, Justice Field contradicts that claim when he writes:

"The law," says Sedgwick, in his excellent treatise on Damages, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but [also] to punish the offender." The discretion of the jury in such cases is not controlled by any very definite rules.¹¹⁴

Justice Field actually confirms that jury discretion in this area is *unconstrained*, the opposite of what Justice Brennan is asserting. Further, earlier in his opinion, Justice Field stated that the Due Process Clause affords no vehicle for challenging "the harshness, injustice, and oppressive character" of laws provided that they are enacted "within the legitimate sphere of [the state's] power" and enforced consistent with certain procedural protections.¹¹⁵ Thus, *Humes* can hardly be used to support the

111. *Id.* at 490–91.

112. *Id.*

113. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885).

114. *Id.* at 521 (citation omitted for internal quotation).

115. *Id.* at 520. The Court stated:

idea that the Due Process Clause prohibits “excessive” punitive damages awards.

Justice O’Connor wrote an opinion in *Browning-Ferris* in which she dissented from the Court’s holding that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damages awards.¹¹⁶ Before providing her analysis of the Eighth Amendment issue, however, Justice O’Connor reiterated her views expressed in *Bankers Life*,¹¹⁷ and took time to make several observations about the harmful effects escalating punitive damages were having on the national economy:

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.¹¹⁸

As will be discussed further below,¹¹⁹ these policy concerns are more appropriate for legislative consideration and have no bearing on the existence of constitutional limitations on punitive damages awards. These concerns, however, ultimately seem to be what compelled the Court to embrace such limits in *BMW*.

Beyond sowing seeds of discontent through her litany of policy concerns, Justice O’Connor’s opinion was also pivotal in the pre-*BMW* line of cases because her discussion of how she would apply the Excessive Fines Clause to a review of punitive damages awards reveals the source of the three guideposts the Court ultimately adopted. The following passage, in which Justice O’Connor suggests a framework for evaluating punitive

If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law.

Id.

116. *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 283 (1989) (O’Connor, J., concurring in part and dissenting in part).

117. *See supra* Part III.B.1.

118. *Browning-Ferris*, 492 U.S. at 282 (citations omitted).

119. *See infra* Part III.C.2.

damages awards under the Eighth Amendment, is remarkable for the degree to which it prefigures the guideposts analysis the Court announces in *BMW*:

Determining whether a particular award of punitive damages is excessive is not an easy task. The proportionality framework that the Court has adopted under the Cruel and Unusual Punishments Clause, however, offers some broad guidelines. *See Solem*, 463 U.S., at 290–292. *Cf. United States v. Busher*, 817 F.2d 1409, 1415 (CA9 1987) (applying *Solem* factors to civil forfeiture under RICO). I would adapt the *Solem* framework to punitive damages in the following manner. First, the reviewing court must accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct.¹²⁰

It is apparent that the *BMW* guideposts—which assess the reprehensibility of the defendant’s misconduct, the proportional relationship between harm and the punitive award, “and the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases”¹²¹—derive much of their content from this adaptation of the *Solem* framework.¹²²

In sum, in *Browning-Ferris*, members of the Court alluded to a vague notion that due process substantively limits punitive damages awards, but they each failed to identify any precedent that truly stands for that principle.

3. *Pacific Mutual Life Insurance Co. v. Haslip*¹²³

Two years after *Browning-Ferris*, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court revisited the issue of whether the Due Process Clause imposes limitations on the amount of punitive damages.¹²⁴ In *Haslip*, Justice Blackmun, author of the *Browning-Ferris* opinion, further laid the groundwork for the *BMW* decision when he listed a catalogue of

120. *Browning-Ferris*, 492 U.S. at 300–01.

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

122. *See Solem v. Helm*, 463 U.S. 277, 290–92 (1983).

123. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

124. *Id.* at 7.

cases that he claimed evinced the Court's awareness of, and ultimate concern about, the potential constitutional infirmities of excessive punitive awards.¹²⁵ Although Justice Blackmun concludes, in light of the cases he cites, that "[t]he constitutional status of punitive damages, therefore, is not an issue that is new to this Court or unanticipated by it,"¹²⁶ reference to the cited cases reveals that the constitutional status of punitive damages was raised in none of them. The first of these cases, *City of Newport v. Fact Concerts, Inc.*, simply held that punitive damages were not recoverable against a municipality in a 42 U.S.C. § 1983 suit.¹²⁷ In the process of arriving at that conclusion, the Court had the following to say about punitive damages:

The Court has remarked elsewhere on the broad discretion traditionally accorded to juries in assessing the amount of punitive damages. Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large. Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.¹²⁸

This passage, which is the one cited by Justice Blackmun, hardly raises any issue pertaining to the constitutional status of punitive damages. To the contrary, the Court here affirms that juries have "broad discretion . . . in assessing the amount of punitive damages" and thus acknowledges that a punitive award could be both "unpredictable" and "substantial." No judicial eyebrow is raised here nor is there any hint that such jury authority is improper.

Justice Blackmun's next case, *International Brotherhood of Electrical Workers v. Foust*, held that punitive damages "may not be assessed against a union that breaches its duty of fair representation by failing properly to

125. See *id.* at 12 (citing: *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50-51 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-84, (1971) (Marshall, J., dissenting); *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919); *Mo. Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913)).

126. *Id.*

127. *Fact Concerts*, 453 U.S. at 271. Title 42 U.S.C. § 1983 (2000) allows tortious recovery for individuals deprived of constitutional rights by others acting under color of state law but provides immunity to judicial officers. *Id.*

128. *Fact Concerts*, 453 U.S. at 270-71 (citations and footnotes omitted).

pursue a grievance.”¹²⁹ In explaining its rationale, the Court made no allusions to constitutional concerns with punitive damages. Rather, the Court relied upon the established fact that punitive damages could be unforeseeably large to reach its holding that as a policy matter, allowing unions in such situations to face punitive damages was unwise:

Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members. Absent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions.¹³⁰

Again, the case here acknowledges the “unforeseeable magnitude” of punitive awards without condemning them or suggesting that any condemnation is warranted.

The next case in Justice Blackmun’s string of citations is *Gertz v. Robert Welch, Inc.*, a case that, just like those discussed above, affirms rather than challenges the authority of juries to award substantial punitive damages without substantive constitutional constraints.¹³¹ In *Gertz*, the Court held that States may not permit recovery of punitive damages from publishers or broadcasters for libel or slander when liability is not based on the showing of knowledge of falsity or reckless disregard for truth.¹³² Justice Blackmun’s quotation from the case comes from the following passage:

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the

129. *Int’l Bhd. of Elec. Workers*, 442 U.S. at 52.

130. *Id.* at 51–52.

131. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

132. *Id.* at 349–50.

danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.¹³³

Certainly, this language admits of no belief or suggestion that substantive constitutional limits on punitive damages exist. Indeed, as in the cases discussed above, the Court remarks on the discretion of juries in the area of punitive damages as an established and uncontroversial fact, not as a circumstance potentially at odds with the Court's constitutional sensibilities.

Next in Justice Blackmun's list of citations was a dissent by Justice Marshall in *Rosenbloom v. Metromedia, Inc.*¹³⁴ Justice Marshall expresses his concern about the impact on freedom of the press by permitting punitive damages awards to be imposed against media defendants alleged to have committed defamation as follows:

The concept of punitive or exemplary damages was first articulated in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763)—one of the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of *uncontrolled discretion in the awarding of damages*. Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but *can be awarded in almost any amount*. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions, that they bear some relationship to the amount of compensatory damages awarded. The manner in which *unlimited discretion* may be exercised is plainly unpredictable. And fear of the extensive awards that may be given under the doctrine must

133. *Id.* at 350.

134. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

necessarily produce the impingement on freedom of the press recognized in *New York Times*.¹³⁵

Justice Marshall here makes no mention of constitutional limits on punitive damages. Rather, he affirms the longstanding view that jury discretion in this area is “unlimited” and that punitive damages “can be awarded in almost any amount.”¹³⁶ There is no indication that the limit against excessiveness he mentions is rooted in federal constitutional principles, but is most likely a reference to the limits traditionally imposed by the states themselves.

The remaining cases in Justice Blackmun’s list are equally unavailing. *Missouri Pacific Railway Co. v. Tucker* addresses a fixed civil penalty imposed on common carriers for charging fees in excess of statutorily prescribed amounts,¹³⁷ not the authority of juries to impose punitive or exemplary damages upon tortfeasors. Thus, although the Court struck down the award as “arbitrary and oppressive,” it was deemed “arbitrary” because its predetermined and fixed amount (\$500) had nothing to do with the actual overage in any particular case, and “oppressive” because the pricing regime penalized carriers for violating a price structure they otherwise had no prior opportunity to contest.¹³⁸ *Southwestern Telegraph & Telephone Co. v. Danaher*,¹³⁹ and *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*,¹⁴⁰ the final cases suggested by Justice Blackmun, have already been discussed above and, as shown, provide no indication that substantive constitutional limitations constrain punitive damages awards.¹⁴¹

Having introduced the Court’s “experience” with this issue by reference to the cases just reviewed, Justice Blackmun in *Haslip* declares, “One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”¹⁴² Only *Waters-Pierce Oil Co. v. Texas (No. 1)*¹⁴³ is cited for this proposition, a case already shown to address civil fines, not punitive damage awards.¹⁴⁴

135. *Id.* at 82–83 (Marshall, J., dissenting) (emphasis added) (citations and footnote omitted).

136. *Id.*

137. *Mo. Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 341 (1913).

138. *Id.* at 348–51.

139. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

140. *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

141. *See supra* text accompanying notes 101–12.

142. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (citing *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111 (1909)).

143. *Waters-Pierce*, 212 U.S. at 86.

144. *See supra* text accompanying notes 99–100.

Fortunately, Justice Blackmun largely confined his constitutional thoughts to a concern with whether the *procedures* for imposing punitive damages under the Alabama statute at issue sufficiently guided juror discretion, rather than with whether the *amount* that the jury awarded was excessive.¹⁴⁵ Unfortunately, however, at the end of his opinion, Justice Blackmun referred to the fact that the punitive award was “4 times the amount of compensatory damages” and suggested that such an award was “close to the line” but did not “cross the line into the area of constitutional impropriety.”¹⁴⁶ The line that Justice Blackmun alludes to is of his own invention; he cites no authority for the concept nor does any authority earlier in the opinion suggest the existence of such a line. Nonetheless, this line is one of the seeds of the *BMW/State Farm* doctrine.¹⁴⁷

4. TXO Production Corp. v. Alliance Resources Corp.¹⁴⁸

By the time the Court decided the next in the line of cases leading up to *BMW*, *TXO Production Corp. v. Alliance Resources Corp.*, a majority of justices had signed on to the proposition that due process imposes levels “‘beyond which [punitive damages] may not go.’”¹⁴⁹ Justice Stevens, in an opinion commanding the support of three other justices, asserted that “‘grossly excessive’” punitive damages awards “‘amount to a deprivation of property without due process of law.’”¹⁵⁰ *Waters-Pierce*,¹⁵¹ which in turn cites *Coffey v. Harlan County*,¹⁵² was again cited for support just as in the earlier cases. As should be clear by now, neither *Waters-Pierce* nor *Coffey* in any way make or support the claim that the Due Process Clause prohibits “grossly excessive” *punitive damages* awards as they only involve criminal fines.

145. *Haslip*, 499 U.S. at 19–23.

146. *Id.* at 23–24.

147. Although Justice O'Connor wrote a dissent in *Haslip*, it was on the basis of her belief that the procedures of the Alabama statute at issue were insufficient because they gave the jury only vague guidance for the exercise of its discretion: “Alabama’s common-law scheme for awarding punitive damages provides a jury with ‘such skeletal guidance’ that it invites—even requires—arbitrary results.” *Id.* at 42–43, 63 (O'Connor, J., dissenting) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989)). Her prior arguments regarding substantive upper limits were not featured; rather, her dissent highlighted void for vagueness arguments and an argument under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Haslip*, 499 U.S. at 53 (O'Connor, J., dissenting). For the *Mathews* test, see *infra* note 166.

148. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

149. *Id.* at 453–54 (quoting *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907)).

150. *Id.* at 454 (quoting *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)).

151. *Waters-Pierce*, 212 U.S. at 111.

152. *Coffey v. Harlan County*, 204 U.S. 659 (1907).

Beyond *Waters-Pierce*, Justice Stevens cites several other cases to support the notion of substantive limitations on punitive damages awards. These cases are unavailing, however, because they are basically the same cases cited by advocates of this view in the earlier pre-*BMW* cases just discussed. For example, Justice Stevens cites *Seaboard Air Line Railway v. Seegers*, which dealt with a fifty-dollar *civil fine* imposed on common carriers that failed to pay claimants within a specified period after being held liable for damages.¹⁵³ Another case Justice Stevens cites, *Standard Oil Co. of Indiana v. Missouri*,¹⁵⁴ also offers no support for the view that the Due Process Clause places substantive limitations on the amount of punitive damages. Rather, the case addresses a state-imposed fine and the obligation of states not to impose excessive fines.¹⁵⁵ In short, Justice Stevens provides no precedential support for what now stands as a majority view in favor of substantive due process limitations on punitive damages. Nonetheless, his opinion became the cornerstone of the Court's subsequent opinion invalidating the punitive damages award in *BMW*, where the Court relied exclusively on *TXO* and its antecedents to support its inauguration of federal excessiveness review.¹⁵⁶

This analysis of the relevant cases leading up to *BMW* and their purported turn-of-the-century antecedents reveals that the precedential foundation for the Court's pronouncement that "The Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors"¹⁵⁷ is virtually nonexistent.¹⁵⁸ Far from evincing a long-standing view of the substantive limitations imposed by the Due Process Clause, the handful of continually cited precedents only give us insight into the Court's treatment of criminal and civil fines or other "penal" sanctions.¹⁵⁹ Extrapolating from such cases to divine a substantive limit on punitive damages awarded in tort cases is an untenable step,

153. *Seaboard Air Line Ry.*, 207 U.S. at 75–76.

154. *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270 (1912).

155. *Id.* at 280–86. *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) and *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), cases that were already discussed *supra* text accompanying notes 101–12 round out Justice Stevens's list of citations.

156. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion))).

157. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001).

158. *See BMW*, 517 U.S. at 602 (Scalia, J., dissenting) ("[T]he only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards.").

159. Justice Scalia goes further in his critique by charging that these cases "simply fabricated the 'substantive due process' right at issue." *Id.* at 601.

particularly in light of the Court's determination that punitive damages are not sufficiently penal or fine-like to fall within the protection of the Eighth Amendment. Given that the Court's prior cases do not provide support for the Court's current interpretation of the Due Process Clause, the next section considers whether the Court nonetheless has interpreted the Clause in a manner consistent with its text, history, and original meaning.

C. SUBJECTIVE DUE PROCESS

Shorn from its purported precedential underpinnings, the Court's federal excessiveness jurisprudence must be justified on its own terms as sound constitutional doctrine. It becomes clear, however, when one analyzes the Court's view of the relationship between the Due Process Clause and punitive damages, that the Court's interpretation of the Constitution in this context is not consonant with any understood meaning of the phrase "due process of law."

1. The Meaning of Due Process

The antecedent of "due process of law" is "*per legem terrae*" or "law of the land," which originates from the Magna Carta.¹⁶⁰ The Court has long understood this core phrase, "law of the land" and its descendant "due process of law," as protecting the citizenry against arbitrary exercises of governmental power:

In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.¹⁶¹

160. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta.*"); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368-69 (1911) (tracing the origins of the phrase "due process of law" to the Magna Carta). *See also* *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875) ("Due process of law is process due according to the law of the land.").

161. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519 (1885). *See also* *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974))).

Although this protection initially stood as a guard only against the excesses of the federal government, via the Fifth Amendment, the adoption of the Fourteenth Amendment enshrined a protection against arbitrary exercises of power by the state governments. In both contexts, the Due Process Clause requires that governmental deprivations of life, liberty, or property be effected pursuant to validly enacted laws.¹⁶² It also obligates the government to provide procedures that have long been held to be fundamental to ensuring that such deprivations are fundamentally fair¹⁶³ and nonarbitrary: notice, an opportunity to be heard,¹⁶⁴ and the right to an impartial decisionmaker,¹⁶⁵ who decides matters on the basis of presented information.¹⁶⁶ Additionally, in the Fourteenth Amendment context, the Due Process Clause has been interpreted to mean that state governments have to afford citizens most of the rights given to national citizens in the Bill of Rights to the extent that such rights are deemed critical components of fundamental fairness.¹⁶⁷

162. See Scalia, *supra* note 20, at 24–25 (“Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial.”). See also Corwin, *supra* note 160, at 372 (describing early state interpretations of the phrase “by the law of the land” as meaning “a law for the people, . . . made or adopted by themselves by the intervention of their own legislature”).

163. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (“Due process centrally concerns the fundamental fairness of governmental activity.”).

164. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (citations omitted)); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Mullane* states:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id.

165. *Weiss v. United States*, 510 U.S. 163, 178 (1994) (“A necessary component of a fair trial is an impartial judge.”).

166. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The particulars of these requirements have been held to depend on the level of procedural protection appropriate given the circumstances, something that is determined with reference to a three-factor test articulated by the Court in *Mathews v. Eldridge*:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334–35.

167. See *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968). *Duncan* states:

The Court has indicated, however, that “[t]he Due Process Clause guarantees more than fair process.”¹⁶⁸ Thus, “substantive” due process rights have been determined to exist as well, even though they may find no place within the Bill of Rights.¹⁶⁹ As the Court has explained, “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter,” and this realm constitutes a “substantive sphere of liberty which the Fourteenth Amendment protects.”¹⁷⁰ The limits of this sphere are amorphous but discernible; as the second Justice Harlan explained:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property;

The Fourteenth Amendment denies the States the power to ‘deprive any person of life, liberty, or property, without due process of law.’ In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

Id. Laurence Tribe has argued that the selective incorporation of the Bill of Rights against the states should more properly have been done via the Fourteenth Amendment’s Privileges or Immunities Clause. Tribe, *supra* note 5, at 184 (“In reality, it would accord fully with the history of the Privileges or Immunities Clause and a sensible reading of its language to make it, rather than the Due Process Clause, the basic vehicle for selective incorporation of the Bill of Rights against the states.”). The Privileges or Immunities Clause reads, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

168. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). *See also* *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (stating that the Due Process Clause “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them’” (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))).

169. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992). *Casey* states:

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.

Id. (citation omitted).

170. *Id.* at 847–48. One might plausibly trace substantive due process doctrine at least back to the now repudiated case of *Lochner v. New York*, where the Court indicated, “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” *Lochner v. New York*, 198 U.S. 45, 53 (1905); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003) (“*Lochner* was the progenitor of modern substantive due process cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*.” (footnotes omitted)). Laurence Tribe has suggested that various substantive liberty interests essential to being “a self-governing person” might plausibly fit within the privileges and immunities of Americans, thus warranting protection through the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. *See* Tribe, *supra* note 5, at 184, 188–91, 194 (“[U]se of the Privileges or Immunities Clause [is] a less troublesome vehicle both for selective incorporation and for the elaboration of whatever unenumerated rights merit protection against the states.”).

the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹⁷¹

Among the liberty interests deemed to fall within this sphere of substantive due process protection are: the right to marry,¹⁷² have children,¹⁷³ direct their education,¹⁷⁴ use contraception,¹⁷⁵ and refuse unwanted medical treatment.¹⁷⁶

The Court has made it clear that although substantive due process protects a range of unenumerated rights,¹⁷⁷ the concept must not be treated as unrestricted and used expansively. To the contrary, the Court is to tread carefully in determining that a particular right warrants inclusion within this protective sphere:

[W]e “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.¹⁷⁸

171. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted).

172. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

173. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (passing on the due process challenge and reversing the law at issue on equal protection grounds).

174. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

175. *Griswold v. Connecticut*, 381 U.S. 479, 480–81, 485 (1965).

176. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990).

177. This is not a noncontroversial proposition. Justice Scalia had the following to say about the idea that due process protects unenumerated substantive liberties:

My favorite example of a departure from text—and certainly the departure that has enabled judges to do more freewheeling lawmaking than any other—pertains to the Due Process Clause It has been interpreted to prevent the government from taking away certain liberties *beyond* those . . . that are specifically named in the Constitution. Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation.

Scalia, *supra* note 20, at 24. It is beyond the scope of this Article to quarrel with the notion of substantive due process.

178. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)).

To forestall the unwarranted expansion of substantive due process, the Court has determined that protection is only appropriate for “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that neither liberty nor justice would exist if they were sacrificed.”¹⁷⁹ Thus, the Court has said, “Our Nation’s history, legal traditions, and practices . . . provide the crucial ‘guideposts for responsible decisionmaking’ that direct and restrain our exposition of the Due Process Clause.”¹⁸⁰

Beyond the well-established procedural guarantees and traditional substantive liberties discussed above, text, history, and precedent do not reveal additional protections provided by the right to “due process.” Early after the passage of the Fourteenth Amendment many litigants mistakenly took the phrase “due process of law” to provide a mechanism for propagating challenges to lower court judgments on the generalized ground that the result was “harsh” or “unjust,” notwithstanding the fact that such challengers had been afforded sufficient notice, hearing, and other protections:

[F]rom the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence . . . “that there exists some strange misconception of the scope of this provision[,] as found in the Fourteenth Amendment.” It seems . . . [“]to be looked upon [as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court[] of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.”

This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision.¹⁸¹

In an effort to make clear the scope of protection that the Due Process Clause provides, Justice Field, the author of the opinion just quoted, wrote:

If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive

179. *Id.* at 720–21 (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

180. *Id.* at 721 (quoting *Collins*, 503 U.S. at 125).

181. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519–20 (1885) (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877) (brackets reflect changes from the original source not noted in *Humes*)).

character of such laws will not invalidate them as affecting life, liberty or property without due process of law.¹⁸²

From this statement can be found the sum total of what due process means in the federal system under the Fourteenth Amendment: it obligates states to follow general procedural rules that provide security of private rights—notice, hearing, an impartial decisionmaker, and the like—and it constrains states from acting beyond their “legitimate sphere of legislative power.” Both limitations keep states from exercising their power arbitrarily or in a way that infringes upon traditionally held substantive liberty interests. What due process does not guarantee under this framework is that the law or its application will not produce harsh, unjust, or oppressive results. Protection against such evils must be accomplished by other means designed to impose limitations on what the government can do. Thus, for example, the Eighth Amendment creates an express prohibition against punishments that are unduly harsh because they are “excessive” or “cruel and unusual,”¹⁸³ creating a substantive right that governments in this country may not transgress. In short, due process protects procedural fairness and fundamental liberty interests, but fails to proscribe any harsh or oppressive outcomes a fair process may generate.

2. Policy over Law

The Court’s interpretation of the Due Process Clause, as providing a substantive limit beyond which punitive damages may not go, strays well beyond the boundaries of due process doctrine as heretofore delineated by the Court and briefly sketched out above. The Court has couched its excessiveness jurisprudence in the language of procedural due process—indicating that the *BMW* guideposts are necessary to provide defendants with “fair notice” of the severity of potential punishment and to prevent arbitrary punishment from being imposed—dutifully “mouth[ing] a couple of buzzwords from standard due process jargon.”¹⁸⁴ The doctrine, however, cannot plausibly claim to derive from the Court’s traditional view of those concepts.

It may be true that parties should have notice that specific conduct may subject them to a certain degree of punishment; however, that in no way translates into a constitutionally imposed maximum beyond which

182. *Id.* at 520.

183. U.S. CONST. amend. VIII.

184. The quoted language is borrowed from Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 767 (1999), an article that argues the Constitution should be read holistically for more accurate interpretation.

punitive damages may not go. Rather, it means that prospective tortfeasors must be aware, *ex ante*, that their wrongful conduct will subject them to punitive damages of a level deemed appropriate by a jury of their peers, with jurors measuring propriety with reference to the state's legitimate goals of punishment and deterrence. That the jury's discretion is constrained only in that its award must be limited to an amount sufficient to achieve punishment and deterrence, rather than to any fixed dollar amount, may render prospective punishment potentially harsh, but does not implicate the defendant's right to notice. To paraphrase Justice Field's remarks in *Humes*, the "harshness, injustice, and oppressive" nature of a punitive damages award is not a violation of due process so long as it is imposed "with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights."¹⁸⁵

Similarly, defendants should indeed be protected from arbitrary punitive damages awards; but again, the need to prevent arbitrary awards does not warrant the establishment of a constitutional damages cap. Rather, an interest in avoiding arbitrary awards justifies policing of the procedures under which states impose punitive damages awards and the standards in place to guide and constrain jurors' discretion in this area. Punitive awards that flow from juries attentive to the need to limit damages to an amount sufficient to punish and deter, and subject to state court appellate review for compliance with such strictures are not arbitrary. To the contrary, they reflect a state's considered judgment that punitive awards of a given amount are appropriate.

Notwithstanding, then, the Court's rhetoric of procedural due process, one could more properly classify the Court's excessiveness jurisprudence as having identified a substantive due process right against a "grossly excessive" punitive damages award.¹⁸⁶ Given the Court's statements regarding the nature and limits of substantive due process and the tradition of unconstrained state and jury authority over punitive damages, the Court's excessiveness jurisprudence is an inappropriate expansion creating a new right that due process was never meant to comprehend. Justice Marshall's comments on behalf of the Court regarding the traditional understanding of punitive damages bear repeating here:

The concept of punitive or exemplary damages was first articulated in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763)—one of

185. *Humes*, 115 U.S. at 520.

186. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (describing one of "[t]he most significant aspects of [the *BMW*] decision" as "the identification of a 'substantive due process' right against a 'grossly excessive' award").

the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of *uncontrolled discretion in the awarding of damages*. Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but *can be awarded in almost any amount*.¹⁸⁷

Although Justice Marshall went on to indicate that states have imposed excessiveness or proportionality limitations on the amount of punitive damages,¹⁸⁸ as is their right, he made no mention of federal constitutional constraints on the amount of such awards. As can be seen, then, it is clear that states traditionally have been unconstrained in their ability to award punitive damages.

Thus, the new due process right against excessive punitive damages that the Court has created is clearly not one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that neither liberty nor justice would exist if they were sacrificed," a requirement the Court has indicated a right must fulfill to be protected by substantive due process.¹⁸⁹ Perhaps had the Court determined that the Founders included punitive damages awards within the ambit of the Eighth Amendment's Excessive Fines Clause, it would be possible to argue that a deep tradition against the excessiveness of such awards has long existed. Because, however, the Court itself has indicated that the Founders' decision to omit mention of punitive damages from the Eighth Amendment was deliberate and evinced an intent not to limit punitive damages awards,¹⁹⁰ it is more accurate to say that history and tradition reveal the absence of a deeply-rooted principle against excessive punitive damages awards.

Not fitting neatly within its own procedural or substantive due process jurisprudence, the Court's excessiveness doctrine might rightly be seen as a

187. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82–83 (1971) (Marshall, J., dissenting) (emphasis added).

188. *See id.* at 83.

189. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

190. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273–75 (1989) ("[T]he Framers of the Eighth Amendment did not expressly intend it to apply to damages awards made by civil juries.").

manifestation of what this author calls *subjective due process*: a jurisprudence of substantive legal protections imposed by the Court in the name of due process that have a basis only in the subjective policy interests of their proponents on the Court.¹⁹¹ Justice Black was an early opponent of subjective due process jurisprudence. On several occasions he commented on the difficulty with the Court's practice of invoking "natural law" or "fundamental [principles of] liberty" as the basis for the articulation of various rights or, more problematically, as the basis for the invalidation of legislative actions:

This decision reasserts a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."

. . . [T]he "natural law" theory of the Constitution . . . degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise.¹⁹²

Writing in dissent in *Sniadach v. Family Finance Corp. of Bay View*,¹⁹³ Justice Black lashed out at the Court's lurch toward a subjective due process by writing:

The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a

191. Others have aptly noted how the Court's creation of a substantive due process right against excessive punitive damages awards harkens back to widely repudiated Lochnerism. See, e.g., Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. HIGH TECH. L. 79, 95 (2005) ("Permitting federal appeals judges to determine for themselves the amount of punitive damages . . . 'would be Lochnerism on a massive scale.'" (quoting Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 182 (1991))); Zipursky, *supra* note 26, at 162 (describing the *BMW* doctrine as "an amorphous due process constraint perilously close to delegitimated *Lochner* precedents"). On the Court's rejection of Lochnerian economic substantive due process, see *Ferguson v. Skrupa*, *Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963) ("[W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955))).

192. *Adamson v. California*, 332 U.S. 46, 69-70 (1947) (Black, J., dissenting).

193. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969).

garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. . . .

. . . There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures.¹⁹⁴

Justice Black's description of the Court's excesses in *Sniadach* is apt here; the Court has appointed itself as a super-legislature with the power to supplant state choices regarding appropriate levels of punitive damages with the Court's own view. Indeed, what ultimately has happened here is that Justice O'Connor's (along with Justice Stevens's) policy views regarding the excessiveness of punitive damages—which she initially attempted to vindicate through the Eighth Amendment's Excessive Fines Clause¹⁹⁵—have been embraced by the Court in the name of due process. As Justice O'Connor wrote in *Browning-Ferris*:

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.¹⁹⁶

Justice Blackmun expressed similar concern on behalf of the Court when he wrote, "We note once again our concern about punitive damages that 'run wild.'"¹⁹⁷

Justice Scalia had it right when he responded, "Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state

194. *Id.* at 344–45 (Black, J., dissenting).

195. See *Browning-Ferris*, 492 U.S. at 297 (1989) (O'Connor, J., concurring in part and dissenting in part) ("In my view, the \$6 million award of punitive damages imposed on BFI constitutes a fine subject to the limitations of the Eighth Amendment.")

196. *Id.* at 282 (citations omitted).

197. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

governments.”¹⁹⁸ Setting punitive damages policy is not within the purview of the Court. The Court itself has readily acknowledged that judgments about the propriety of a particular punishment for a given offense are legislative rather than judicial determinations.¹⁹⁹ States through their legislatures, courts, and juries have always enjoyed unconstrained authority over the imposition of punitive damages awards, provided that procedural due process requirements are honored. Therefore, there is no warrant for holding that there is a fundamental liberty interest, protected by substantive due process, in having punitive damages not exceed a particular amount. In insisting that due process supplies and protects such an interest, the Court is not interpreting the Due Process Clause but rewriting it.²⁰⁰ If, as the Court once remarked, the Necessary and Proper Clause is “the last, best hope of those who defend ultra vires congressional action,”²⁰¹ then the Due Process Clause has become the last, best hope of those who defend ultra vires judicial regulation. Without respect for the intended confines of the Due Process Clause, or the principles of federalism protected by the Ninth and Tenth Amendments,²⁰² the Due Process Clause, like the Necessary and Proper Clause, “will always be a back door for unconstitutional federal regulation.”²⁰³

D. AN IMPERMISSIBLE CONSTRUCTION OF THE CONSTITUTION

In view of the fact that the Court’s interpretation of the Due Process Clause vis-à-vis punitive damages is not supported by the language or historical meaning of the phrase “due process of law,” the only remaining question is whether the Court nonetheless may construe the Clause as it has simply by virtue of its status as the ultimate arbiter of what the Constitution means.²⁰⁴ Although the Court’s interpretive authority over the Constitution is supreme, it is not unlimited. Various canons of constitutional

198. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

199. *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (“[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.”); *Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.” (citation omitted)).

200. *Cf. Gonzales v. Raich*, 125 S. Ct. 2195, 2236 (2005) (Thomas, J., dissenting) (“Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.”).

201. *Printz v. United States*, 521 U.S. 898, 923 (1997).

202. *See infra* Part III.D.2.

203. *Cf. Raich*, 125 S. Ct. at 2226 (O’Connor, J., dissenting).

204. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

construction—such as the canon *expressio unius est exclusio alterius*²⁰⁵—serve at least as nominal or presumptive bounds on how the Court may interpret the document.²⁰⁶ More forcefully, the Ninth and Tenth Amendments to the Constitution combine to place strict limits on the construction the Court may give to provisions of the Constitution. The Court may not construe a provision to deny the people rights they have retained simply because those retained rights are not specifically enumerated.²⁰⁷ Neither may the Court interpret the Constitution in a way that vests the national government with powers not delegated to it but reserved to the states.²⁰⁸ The Court's interpretation of the Due Process Clause as supplying substantive limits on the amount of punitive damages that state juries may award not only violates certain canons of constitutional construction, but also is deeply at odds with the limited federal form of government that the Ninth and Tenth Amendments were meant to protect.

The Constitution was not meant to supplant state sovereignty with that of a national government; rather, the Constitution was crafted to unite the states into a Union that could achieve certain national ends while the states retained many, if not most, of the essential aspects of their separate existence. Justice Nelson aptly encapsulated this point during an extensive discussion of state sovereignty in *Collector v. Day*:

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers

205. "Expression of the one is exclusion of the other." Scalia, *supra* note 20, at 25.

206. See, e.g., *Myers v. United States*, 272 U.S. 52, 237 (1926) (McReynolds, J., dissenting) ("[T]he Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of commonly-accepted canons of construction, its history, early and long-continued practices under it, and relevant opinions of this court.").

207. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

208. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

actually granted must be such as are expressly given, or given by necessary implication.²⁰⁹

Thus, although the federal government was delegated certain powers when the Union was formed, the Tenth Amendment indicates that states were left free to perform those functions they had always performed—such as exercising their police powers²¹⁰ and providing for the adjudication of disputes in their own courts²¹¹—provided the powers were “not delegated to the United States by the Constitution, nor prohibited by it to the States.”²¹²

In view of this relationship between states and the national government, the Court rightly indicated in *Erie Railroad Co. v. Tompkins* that the national government is not empowered to develop and impose common law rules that would be applicable within and across all of the states:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.²¹³

To the contrary, the common law traditions of states remained intact under the Constitution. Nothing in the main text of the Constitution or the

209. *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124–26 (1870). *See also* *Younger v. Harris*, 401 U.S. 37, 44 (1971) (explaining that federal-state comity means “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways”); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). The Court states:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them.

Id.

210. *See* *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (“[T]he Constitution reserves the general police power to the States.”). *See also* *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (plurality opinion) (“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.”).

211. *See* *Collector*, 78 U.S. at 126. The Court states:

We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument.

Id.

212. U.S. CONST. amend. X.

213. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Bill of Rights purported to impair the ability of states to continue to follow their common law traditions both with respect to the formulation of substantive legal principles and with respect to principles concerning the judicial process and remedies. Indeed, as Justice Field explained long before the Court adopted its view in *Erie*, the Constitution not only fails to impair state power over state common law but also stands as an affirmative bar, or “perpetual protest,” against such a notion:

[T]he general law of the country . . . has been often advanced in judicial opinions of this court to control a conflicting law of a state. . . . But, . . . there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.²¹⁴

A longstanding element of states’ common law authority has been their power to empanel juries and impose punitive damages awards in appropriate cases. The Supreme Court made this clear long ago in *Day v. Woodworth* when it wrote:

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions *for more than a century* are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.²¹⁵

Indeed, beyond the power to impose such damages it has been equally acknowledged that *the amount* of punitive damages awards under the

214. *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

215. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (emphasis added). *See also* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring) (“In 1868 . . . when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts.”).

common law has always been for the jury to determine.²¹⁶ More recently, and consistent with principles articulated in *Erie*, the Court acknowledged that crafting standards of excessiveness for punitive damages awards is a matter of state common law:

Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons we decline that invitation.²¹⁷

Because it appears that states and their citizens retained the right and authority to impose, through juries, punitive damages awards at a level of their choosing, constrained only by notions of excessiveness devised and imposed by the states themselves, the question then is whether the Fourteenth Amendment can be read to have imposed substantive federal constraints in this area as identified by the Court. The most likely candidate for such a constraint would have been the Eighth Amendment's prohibition against excessive fines or cruel and unusual punishment, given the amendment's concern with the substantive degree of punitive sanctions.²¹⁸ The Court, however, has declared that the Eighth Amendment cannot be read to apply to punitive damages awards because in its view, the amendment was intended to apply only to "direct actions initiated by government to inflict punishment," not "to awards of punitive damages in cases between private parties."²¹⁹

Because it rejected recourse to the Eighth Amendment as a source for a substantive limitation on punitive damages, the Court was left with no other constitutional provisions that addressed the issue on its face. Nonetheless, the Court identified the Due Process Clause of the Fourteenth Amendment as the constitutional provision that supplies the very limitation it determined that the Eighth Amendment failed to provide. But this use of the Due Process Clause is untenable both as a matter of the basic canons of

216. See *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict."). See also *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules.").

217. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

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

219. *Browning-Ferris*, 492 U.S. at 260.

constitutional construction and as a matter of federalism as protected by the Ninth and Tenth Amendments.

1. Canons of Constitutional Construction

Two canons of constitutional construction are violated by the Court's interpretation of due process: *expressio unius est exclusio alterius*²²⁰ and the rule against constructions that render other provisions of the Constitution redundant surplusage.²²¹ The Court relied on the former canon when it held that the Eighth Amendment does not apply to punitive damages awards:

But the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, and the doctrine was expressly recognized in cases as early as 1763. Despite this recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope. Rather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government.²²²

In other words, given the Framers' familiarity with punitive damages, if they wanted the Eighth Amendment to apply to punitive damages awards, they would have said so.

220. See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 591 (1840) (dictum) (opinion of Barbour, J.). Justice Barbour states:

[A]s the Constitution contains several express prohibitions upon the states, from the exercise of powers granted to the federal government; if we were to apply to its construction the maxim so well founded in reason, *expressio unius, est exclusio alterius*, it would seem to lead to the conclusion that all the powers were expressly prohibited which were intended to be prohibited.

Id.

Justice Thomas explained this maxim in the context of qualifications for Representatives when he wrote:

"[F]rom the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." This argument rests on the maxim *expressio unius est exclusio alterius*. When the Framers decided which qualifications to include in the Constitution, they also decided not to include any other qualifications in the Constitution.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 868 (1995) (Thomas, J., dissenting) (citation omitted) (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (1833)).

221. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. . . . It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.")

222. *Browning-Ferris*, 492 U.S. at 274–75 (citation and footnote omitted).

As the Court has held, the Framers' familiarity with punitive damages awards and their failure to include them within the Eighth Amendment's express terms means that the amendment does not pertain to such awards. The same reasoning requires the conclusion that the Framers' failure to mention punitive damages awards anywhere in the Constitution suggests that no substantive limits on punitive damages were intended at all. Put differently, the Court's *expressio unius* reasoning applies not only to the Eighth Amendment, but also to the whole of the Bill of Rights. Such reasoning is consistent with that endorsed by Alexander Hamilton in *The Federalist*, in providing an example of the "proper use and true meaning" of the *expressio unius* maxim in the context of constitutional interpretation, Hamilton wrote the following:

The plan of the convention declares that the power of Congress . . . shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

In like manner the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.²²³

In like manner, by expressly indicating limitations on certain types of judicial impositions (bail, fines, and punishments) but failing to mention others of which the Founders were well aware (compensatory and exemplary damages), one cannot plausibly read into the Due Process Clause a limitation on punitive damages that the Founders failed to mention.

Additionally, where the limitation at issue is of particular importance—as would be the case with the imposition of a theretofore nonexistent constraint on the discretion of juries—the restriction cannot properly be left to implication where other limitations of a similar kind are expressly mentioned. James Madison articulated just such a rule of interpretation that can help reveal the impropriety of the Court's current course. In his speech against a bill proposing that the United States incorporate a national bank, Madison suggested several rules of constitutional interpretation; the fifth among these was as follows: "In

223. See *THE FEDERALIST* No. 83, at 137 (Alexander Hamilton) (Tudor Publishing Co., 1937).

admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction."²²⁴ What Madison means here is that the more important the authority at issue, the less likely it is that the framers of the Constitution would have left the matter to interpretation, speculation, or conjecture,²²⁵ "[t]hus, if it is not expressly listed in the Constitution, the omission likely was intentional."²²⁶ Had the Founders intended to limit punitive damages awards granted in civil cases in the same manner that they limited fines and punishments imposed in actions initiated by the government, "it cannot be that they would not have explicitly said so."²²⁷ It makes little sense to say that the Founders purposely omitted exemplary damages when they wrote the Eighth Amendment but intended them to be covered by implication elsewhere.

One might certainly suggest that applying *expressio unius* reasoning to conclude that a right against excessive punitive damages is not present in the Constitution runs counter to the command of the Ninth Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²²⁸ The problem with such an argument, however, is that history fails to disclose any pre-constitutional protection against excessive punitive damages

224. James Madison, speech before Congress, (Feb. 23, 1791), in *GAZETTE OF THE U.S.* (Phila.), Feb. 23, 1791, reprinted in 14 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: THIRD SESSION: DECEMBER 1790–MARCH 1791* 369 (William Charles DiGiacomantonio et al. eds., 1995). For the curious, the other four rules Madison presented were as follows:

An interpretation that destroys the very characteristic of the government cannot be just.

Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.

In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

Id.

225. *Cf.* Scalia, *supra* note 20, at 29 (“[S]ince congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a ‘clear statement’ rule is merely normal interpretation.”).

226. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *TEX. L. REV.* 331, 387 (2004).

227. *Twp. of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 674–75 (1873). *Pine Grove* states:

The case as to the constitution is a proper one for the application of the maxim, *Expressio unius est exclusio alterius*. The instrument is drawn with ability, care, and fulness [sic] of details. If those who framed it had intended to forbid the granting of such aid by the municipal corporations of the State, as well as by the State itself, it cannot be that they would not have explicitly said so.

Id.

228. U.S. CONST. amend. IX.

awards that one could purport had been “retained.” On the contrary, history reveals that the pre-constitutional state of affairs involved unfettered jury discretion over such awards,²²⁹ a power that the Constitution would have to expressly constrain to reach, given the requirements of the Ninth and Tenth Amendments.²³⁰

The Court’s interpretation of due process as including a prohibition against excessive punitive damages awards also violates the canon against constructions that render other constitutional provisions redundant. If it is the case that the Due Process Clauses—both in the Fifth and Fourteenth Amendments—impose substantive limitations against excessive punitive damages awards, then the clauses must also impose limitations against excessive fines and punishments in actions initiated by the government. The rationale behind the Court’s excessiveness jurisprudence respecting punitive damages and respecting fines and criminal punishments is the same, and the Court has treated the limitations in both spheres as related variants of a unified doctrine, notwithstanding their nominally distinct textual bases.²³¹ But if this is so, the Eighth Amendment, at least to the extent it prohibits *excessive* penal sanctions,²³² is redundant. Indeed, this is the very point raised by Justice Scalia in his dissent in *TXO*:

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

229. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82–83 (1971) (Marshall, J., dissenting) (acknowledging a long-standing tradition of unlimited jury discretion).

230. See *infra* Part III.D.2 for a discussion of the Ninth and Tenth Amendments.

231. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court discussed its excessiveness jurisprudence for the two different spheres as if they were one and the same, conceding only that different texts provide authority for the doctrines:

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing “grossly excessive” punishments on tortfeasors.

Id. at 433–34 (citations omitted) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion))).

The Court went on to discuss the rationale underlying its excessiveness doctrines in an integrated fashion without distinguishing between the doctrine as it applied to punitive damages awards versus fines and criminal punishments. See, e.g., *Cooper Indus., Inc.*, 532 U.S. at 434 (stating, “In these cases, the constitutional violations were predicated on judicial determinations that the punishments were ‘grossly disproportional to the gravity of . . . defendant[s]’ offense[s],” and citing both to criminal and civil cases (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998))).

232. One can only speculate whether the Court, absent the Eighth Amendment, would read into the Due Process Clause a bar against “cruel and unusual” punishment.

Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.”²³³

What is the purpose of the Excessive Fines Clause of the Eighth Amendment if the Due Process Clause just as ably accomplishes the same thing? The Excessive Fines Clause becomes surplusage once the Court’s interpretation is accepted because there is no plausible way to hold that due process limits the excessiveness of punitive damages awards but provides no similar guard against the excessiveness of other punitive sanctions. The more defensible interpretation would be that the Eighth Amendment’s explicit mention of the matter of punitive excessiveness indicates that it is the sole source for substantive limits in this sphere, and that its failure to include punitive damages within its coverage means that the Constitution fails to concern itself with the excessiveness of such awards.

Benjamin Zipursky attempts to address this issue by affirming the Court’s exclusion of civilly imposed punitive damages from the criminally concerned Eighth Amendment but arguing that the “criminal or quasi-criminal idea” embedded in “American punitive damages law today” warrants “the recognition of an Eighth Amendment right, applied through the Due Process Clause,” to be protected against excessive punitive damages awards.²³⁴ In other words, there are novel quasi-criminal aspects of punitive damages awards—absent in the traditional common law model—that justify heightened constitutional scrutiny.²³⁵ One problem with this argument is that it is unclear how the Due Process Clause of the Fourteenth Amendment independently carries out this duty apart from mere incorporation of the Eighth Amendment against the States; there is no particular reason why these asserted quasi-criminal aspects of punitive damages call for *due process* protection against excessive awards rather than Eighth Amendment protection.²³⁶

233. *TXO*, 509 U.S. at 471 (Scalia, J., dissenting).

234. Zipursky, *supra* note 26, at 164–65, 170–71.

235. *See id.* at 166 (“[T]he problem does not lie in the very idea of punitive damages at the common law, but in a particular direction that punitive damages in tort law has, as it turns out, developed.”).

236. Zipursky does allude to concerns about “the vagueness of . . . penalty guidelines, [and] the absence of criminal procedural safeguards” that could implicate procedural due process concerns. *Id.* at 163. However, he fails to connect these issues either to the resulting substantive cap that the Court has imposed or to his own theory that it is the current criminal or quasi-criminal tenor of punitive damages awards that implicates heightened constitutional scrutiny. His quasi-criminal tenor point only carries weight if the argument is that the Excessive Fines Clause should apply to punitive damages and does nothing to support the existence of a procedural or due process right to a substantive cap on punitive awards.

Another problem with this argument is that even if there is a novel “quasi-criminal” aspect to some modern-day punitive awards, Zipursky concedes that this has been the case “for the past several decades,”²³⁷ a time period within which the Court has considered and rejected the applicability of the Excessive Fines Clause to modern punitive damages awards.²³⁸ Thus, even if there were plausible arguments for why punitive damages today have characteristics that render them amenable to regulation under the Excessive Fines Clause,²³⁹ notwithstanding the fact that such damages may not have been seen as being within the clause when it was promulgated, those arguments have not been accepted by the Court. As a result, absent a direct challenge to the Court’s holding of *Browning-Ferris*—something Zipursky does not attempt or suggest—we must accept it. Doing so forecloses recourse to the Eighth Amendment for any justification of the Court’s *BMW* jurisprudence and leaves us with the fact that discovering an anti-excessiveness principle in the Due Process Clause renders the Excessive Fines Clause superfluous.

2. The Ninth and Tenth Amendments

The preceding discussion is mostly prologue to a discussion of rules of constitutional construction the Court may not ignore: those imposed by the Ninth and Tenth Amendments to the Constitution. The unenumerated rights doctrine, as enshrined in the Ninth Amendment, provides a rule of construction that prohibits the Court’s reading of the Due Process Clause in the *BMW* line of cases. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁴⁰ This provision is meant to indicate that rights beyond those mentioned in the Constitution were retained by the people; thus, the fact that these retained rights are unenumerated may not be taken as a license to interpret the Constitution in a manner that offends them. James Madison devised the amendment as a rule of construction that would protect against expansive interpretations of the Constitution that gave the national government the power to limit the rights of the states and their citizens in areas where the document failed to provide explicit protection. As one commentator explains, “Madison conceived the Ninth Amendment in response to calls from state

237. *Id.* at 170.

238. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 (1989).

239. Such arguments are not plausible; it is beyond the scope of this Article, however, to articulate a defense of the Court’s determination that punitive damages are not within the coverage of the Eighth Amendment.

240. U.S. CONST. amend. IX.

conventions that a provision be added limiting the constructive expansion of federal power into matters properly belonging under state control.”²⁴¹ As discussed further below, construing due process to empower the federal government to place substantive limits on the level of punitive damages that may be imposed by states is just such a “constructive expansion of federal power” into an area traditionally under state control.

The Tenth Amendment,²⁴² a companion to the Ninth,²⁴³ compliments this rule of construction with an express declaration that the States have only given limited authority to the national government, retaining all other power and authority they otherwise held and failed to delegate.²⁴⁴ As James Madison explained,

The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.²⁴⁵

Justice Chase further explicated these principles on behalf of the Court in *Calder v. Bull*:

It appears to me a self-evident proposition, that the several State Legislatures *retain* all the powers of *legislation*, delegated to them by the state constitutions; which are not EXPRESSLY taken away by the Constitution of the *United States*. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, *within each State*, according to its laws, *on all subjects not entrusted to the Federal Government*, appears to me to be the *peculiar and exclusive* province, and duty of the *State Legislatures*: All the powers delegated by *the people of the United States* to the *Federal*

241. See Lash, *supra* note 226, at 394.

242. The Tenth Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

243. See Lash, *supra* note 226, at 398 (“Other writers of the Founding generation joined Madison and Tucker in linking the Ninth and Tenth Amendments as twin guardians of federalism.”).

244. JOHN TAYLOR, CONSTRUCTIONS CONSTRUED AND CONSTITUTIONS VINDICATED 49, 172 (De Capo Press 1970) (1820) (“The states, instead of receiving, bestowed powers; and in confirmation of their authority, reserved every right they had not conceded, whether it is particularly enumerated, or tacitly retained.”).

245. THE FEDERALIST No. 45, at 319 (James Madison) (Tudor Publishing Co. 1937). See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 176 (Carolina Academic Press 1987) (1833) (stating that under the Constitution, “every state remains at full liberty to legislate upon the subject of rights, preferences, contracts, and remedies, as it may please”).

government are defined, and NO CONSTRUCTIVE powers can be exercised by it.²⁴⁶

Thus, the clear office of the Tenth Amendment is to indicate that powers beyond those delegated to the national government may not be exercised by it, nor may provisions of the Constitution be construed in a manner that vests the federal government with undelegated powers reserved to the states.

Together, the Ninth Amendment, which guards “against a latitude of interpretation,”²⁴⁷ and the Tenth Amendment, which “exclud[es] every source of power not within the constitution itself,”²⁴⁸ combine to impose a “federalist rule of constitutional construction”²⁴⁹ that bars any interpretation of the Constitution that either infringes upon rights retained by the people or arrogates to the national government power reserved to the states.²⁵⁰ As St. George Tucker, a contemporary of the Founders, put it, “the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”²⁵¹

The question then is whether the people, and derivatively the states, enjoyed a pre-constitutional, or a pre-Ninth and -Tenth Amendment,²⁵² right to impose exemplary or punitive damages awards on wrongdoers in an amount of their choosing. It is clear that juries imposed damages

246. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798).

247. Madison, *supra* note 224, at 489. See also Randy E. Barnett, *The Ninth Amendment: It Means What It Says* 3 (Boston Univ. Sch. of Law Working Paper Series, Public Law & Legal Theory Working Paper Group, Paper No. 05-14, 2005), available at <http://ssrn.com/abstract=789384> (“[T]he Ninth Amendment . . . argues against a latitudinarian interpretation of federal powers.”).

248. Madison, *supra* note 224, at 489.

249. Lash, *supra* note 226, at 410.

250. Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV. 613, 641 (1997). Gedicks states: [T]he Ninth and Tenth Amendments could be understood as complementary jurisdictional statements, together confirming that the states retained sovereign power over individual common law and state constitutional rights not enumerated in the Constitution, and that the federal government could exercise sovereign power only over those matters expressly delegated to it by the Constitution.

Id. See also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1243 n.72 (1995) (“The Ninth and Tenth Amendments should caution us against ‘penumbral thinking’ with respect to grants of national government power.” (quoting Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1995))).

251. WILLIAM BLACKSTONE, 1 COMMENTARIES, Note D Appendix, 154.

252. The ten amendments that comprise the Bill of Rights were ratified on December 15, 1791. Organic Laws of the United States of America, 1 U.S.C. p. LXII n.12 (2000).

exceeding the amount needed to compensate plaintiffs both prior to²⁵³ and after²⁵⁴ the adoption of the Constitution. Such cases reflect a clear belief that where challenged conduct is found to have been particularly “wanton” or reprehensible, an exemplary award is in order.²⁵⁵ The early New Jersey case of *Coryell v. Colbaugh* is particularly illustrative of this view. After finding the defendant liable for breach of a promise to marry:

The Chief Justice, in his charge to the jury, said that the injury complained of was of the most atrocious and dishonorable nature, and called for exemplary damages. That such conduct went to destroy the peace and prospects, not only of the injured woman, but to render families and parents wretched by the ruin of their children. He told the jury that they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example’s* sake, to prevent such offences in future; and also to allow liberal damages for the breach of a sacred promise and the great disadvantages which must follow to her through life. That in this case they were to consider not only the past injury, but every consequence in future. He repeated in very strong terms his detestation of such conduct, and told the jury *they were bound to no certain damages, but might give such a sum as would mark their disapprobation, and be an example to others.*²⁵⁶

Joan v. Shield’s Lessee is in accord:

[T]he jury, who were respectable inhabitants of that county, were so well satisfied that the entry and ouster was so violent as to deserve exemplary damages, that they gave *such as should deter others* from such proceedings; they showed their detestation of the same, and gave damages accordingly. This will appear on viewing the quantity of land recovered. It could not be for any mesne profits, for they were insignificant, as nothing of that sort appears on the record, and the jury were the proper judges of the damages sustained by the entry and ouster; *the law will always presume that what they have done is right.*²⁵⁷

More recent recognition of the traditionally unconstrained authority of juries to impose punitive damages has already been referenced.²⁵⁸ It thus seems clear that the unconstrained authority of the people to impose punitive awards through juries is a pre-Ninth and -Tenth Amendment power not delegated to the federal government but retained by the people.

253. See, e.g., *Genay v. Norris*, 1 S.C.L. 3, 3 (1 Bay 6, 7) (1784).

254. See, e.g., *Coryell v. Colbaugh*, 1 N.J.L. 77, 77–78 (original pagination, 90–91 of the reporter) (1791).

255. *Genay*, 1 S.C.L. at 3 (1 Bay at 7).

256. *Coryell*, 1 N.J.L. at 77–78 (original pagination, 91 of the reporter) (second emphasis added).

257. *Joan v. Shield’s Lessee*, 3 H. & Mch. 7, 8 (Md. 1790) (emphasis added).

258. See, e.g., *supra* text accompanying notes 114, 187–88, 216.

By interpreting the Due Process Clause in a manner that co-opts the authority of state juries to determine the appropriate level of punitive damages and instead permits the Court to do so, the Court has engaged in precisely the expansive and aggrandizing constitutional interpretation prohibited by the Ninth and Tenth Amendments. The Ninth Amendment is offended because interpreting due process as placing limits on the level of punitive damages that juries may award disparages the right retained by the people to determine the appropriate level themselves. Even though no express constitutional provision protects the right of the people, because of juries' right to award punitive damages in an amount of their choosing, no one has ever questioned that such a right was retained.²⁵⁹ Construing the Due Process Clause to limit this right by implication does the very thing the Ninth Amendment was designed to forbid; it enables the Court to construe the Constitution in a manner that disparages clear retained rights. Thus, it may be permissible to give a more expansive interpretation to a clause in the Constitution when that interpretation does not infringe on clear rights retained by the people. Although when an interpretation usurps an indisputable and long-standing principle, such as the jury's authority to impose punitive damages awards as they see fit, it transgresses the text, meaning, and spirit of the Ninth Amendment.

The Tenth Amendment is offended for much the same reason. Prior to the adoption of the Constitution, states had the authority to determine appropriate levels of punitive damages awards, and no provision of that document delegates such authority to the national government. Thus, the power is reserved to the states and the Court's contrary determination that *it* holds that power violates the Tenth Amendment's guarantee of a federal government of limited, delegated powers.²⁶⁰ Indeed, the Court's affront to the Tenth Amendment becomes more apparent when one considers the implications of allowing the Court to interpret the Constitution to convey a power not expressly delegated to the national government. Under the Court's view, if due process bars states from imposing punitive damages awards beyond a certain level, Congress could pass a statute—pursuant to

259. See *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (“[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict.”); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (affirming the century-old principle that juries may impose punitive damages).

260. *New York v. United States*, 505 U.S. 144, 155 (1992) (“[N]o one disputes the proposition that ‘[t]he Constitution created a Federal Government of limited powers.’” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991))); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”).

its authority under Section 5 of the Fourteenth Amendment.²⁶¹ For example, Congress could declare, “No state may impose a punitive damages award greater than nine times the amount of compensatory damages.” If the Court is right about the due process constraints on punitive damages, such a statute would be within Congress’s Section 5 enforcement authority, provided the legislation reached state action prohibited by the Due Process Clause or, if the legislation went beyond that scope, there was “proportionality or congruence between the means adopted and the legitimate end to be achieved.”²⁶²

But as discussed earlier,²⁶³ Congress does not possess—at least not by virtue of the Due Process Clause—such authority over the common law practices of the states:²⁶⁴

Should . . . the common law be held, like other laws, liable to revision and alteration, by the authority of Congress; it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of legislation: For to every such object

261. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

262. *City of Boerne v. Flores*, 521 U.S. 507, 532–33 (1997). The Court has indicated that Congress’s Section 5 enforcement power is broad, and “includes ‘the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.’” *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)). Justice Scalia has vigorously opposed the notion that Section 5 enforcement legislation may reach conduct not itself prohibited by the Fourteenth Amendment. *See id.* at 559 (Scalia, J., dissenting) (“Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or ‘remedy’ conduct that does not *itself* violate any provision of the Fourteenth Amendment.”).

263. *See supra* text accompanying notes 213–15.

264. The Court’s recent decision in *Gonzales v. Raich* indicates that Congress’s authority to regulate interstate commerce is broad enough to permit the regulation of wholly intrastate economic activity. *Gonzales v. Raich*, 125 S. Ct. 2195, 2204–06 (2005). It is thus possible to imagine Congress using its Commerce Clause power as interpreted in *Raich* to regulate punitive damages on the basis of their impact on interstate commerce, if one considered the imposition of punitive damages “economic activity.” In fact, the Court has alluded to the interstate commerce concerns raised by high punitive damages awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (“Indeed, [BMW’s] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.”). Congress has considered such legislation in the past, invoking its authority under the Commerce Clause. *See, e.g.*, Product Liability Reform Act of 1998, S. 2236, 105th Cong. §§ 2, 110 (a)(1), (b) (1998) (proposing to establish a clear-and-convincing evidence rule and caps on punitive damage awards); Product Liability Reform Act of 1997, S. 5, 105th Cong. §§ 2, 108(b) (1997) (proposing to cap punitive damage awards); H.R. 956, 104th Cong. §§ 102, 201 (a)–(b) (1995) (proposing to establish uniform legal standards and caps on punitive damage awards); H.R. 955, 104th Cong. § 8(a)–(b) (1995) (failing to expressly invoke the Commerce Clause but proposing to establish a clear-and-convincing evidence rule and caps on punitive damage awards). Whether Congress’s Commerce Clause power would permit it to limit punitive damages awards imposed by states is a matter beyond the scope of this Article.

does some branch or other of the common law extend. The authority of Congress would therefore be no longer under the limitations, marked out in the constitution. They would be authorized to legislate in all cases whatsoever.²⁶⁵

Any interpretation of due process that would permit Congress to supplant state common law practices with its own common law preferences would be an interpretation at odds with the idea that the national government is one of limited authority. That, however, is what the Court's excessiveness jurisprudence does. The Court has given itself, and presumably Congress, via its Section 5 enforcement authority, power that no provision of the Constitution delegates to the federal government: the power to determine what level of punitive damages is sufficient to achieve states' goals of punishment and deterrence.

Finally, it must be noted that the force of the Seventh Amendment strengthens the arguments made above under the Ninth and Tenth Amendments because it expressly preserves the right of trial by jury as it existed prior to the ratification of the Bill of Rights at common law, rendering constructive limitations on jury discretion even more suspect. The Seventh Amendment provides, in part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."²⁶⁶ At the time of the Founding, the civil jury was a revered institution that was seen as a guard against the excesses of governmental authority and oppression. The importance of the civil jury to American colonists is most exemplified by the closely followed English case of *Wilkes v. Wood*.²⁶⁷ Wilkes, an outspoken member of parliament who spoke out in favor of the rights of American colonists, had been wrongfully arrested for his critical remarks of Lord Halifax and brought suit against the Crown in response.²⁶⁸ The jury awarded Wilkes £1,000, an amount the Crown argued was vastly in excess of Wilkes's actual damages.²⁶⁹ Rejecting this challenge, Lord Chief Justice Pratt wrote:

[A] jury have it in their power to give damages for more than the injury received. Damages are designed . . . as a punishment to the guilty, to

265. See James Madison, *Report on the Alien and Sedition Acts* (Jan. 7, 1800), in JAMES MADISON, WRITINGS 639 (Jack N. Rakove ed., 1999).

266. U.S. CONST. amend. VII.

267. *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (Westminster Ct. of Common Pleas).

268. See generally R.W. POSTGATE, *THAT DEVIL WILKES* (1929) (detailing the public life of John Wilkes); GEORGE RUDÉ, *WILKES AND LIBERTY: A SOCIAL STUDY OF 1763 TO 1774* (1962) (analyzing the nature and significance of the "Wilkite" social movement in London instigated by John Wilkes).

269. *Wilkes*, 98 Eng. Rep. at 493, 499.

deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.”²⁷⁰

This authority of civil juries to impose exemplary damages as a means of punishing the guilty and deterring other similar conduct carried over into the colonies where the institution of the jury became critical to protecting colonists against excesses of the Crown.²⁷¹ The Crown’s interference with the authority of the jury was “‘one of the important grievances leading to the break with England’” and a key impetus behind the development and ratification of the Seventh Amendment.²⁷²

The right of juries to impose punitive damages was clearly an important component of the common law and should be treated as an element that the Seventh Amendment has preserved. However, even if one were not inclined to inculcate the Seventh Amendment’s jury protections with any particular respect to discretionary punitive awards, the Ninth and Tenth Amendments verify that the right cannot be constructively read out of the Constitution and placed in the hands of the national government. To do so would impermissibly alter the architecture of the governmental structure established by the Constitution,²⁷³ a national government of limited and delegated powers balanced by states that retained their preexisting, undelegated powers, and by the authority of the civil jury as it existed at common law.²⁷⁴ Disrupting this balance by permitting the federal

270. *Id.* at 498–99.

271. White, *supra* note 191, at 83.

272. *Id.* at 83–84 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting)).

273. The concept of the “architecture” of constitutionally established structure of government was borrowed from Laurence Tribe. He asserts that the text of the Constitution “does indeed define an architecture—a connected structure rather than simply a sequence of directives, powers, and prohibitions” and thus requires interpreters of the document to “take structure as well as text seriously.” Tribe, *supra* note 250, at 1236. To do so, Tribe states, “one must attend to the ‘topology’ of the edifice—those fundamental features that define how its components interlock and that identify the basic geometry of their interconnected composition.” *Id.*

274. It would not be too far fetched to note that the constitutional guarantee of a republican form of government for each of the states, in conjunction with the various constitutional guarantees of jury trials, also contributes to this architecture, guaranteeing that within the states, each citizen will be an important component of the political decisionmaking process—both as voters and jurors—thereby “safeguard[ing] liberty to ensure that never again will the people of this country be under the beel of a tyrant.” Charles I. Lugosi, *Reflections from Embassy Lakes, Florida: The Effective Teaching of Criminal Law*, 48 ST. LOUIS U. L.J. 1337, 1348 (2004). See U.S. CONST. Art. IV, § 4.

government to invade the traditional province of the civil jury by constraining and second-guessing its discretion gives the national government power over the states and the people, which the Seventh, Ninth, and Tenth Amendments have been designed to forbid.

In sum, although the Court is the ultimate expositor of the meaning of the Constitution, it is constrained in how it may construe provisions of that document. Key among those constraints is that retained, though unenumerated, rights may not be abridged through constructive implication. Also, powers not expressly delegated to the national government may not be expropriated by implication when they have been reserved to the states, particularly in view of the Seventh Amendment's express protections for the institution and authority of the civil jury. By failing to hold itself to these limitations on its interpretive authority, the Court has threatened the notion of a limited federal government,²⁷⁵ and has used the Due Process Clause as a "pretext . . . for the accomplishment of objects not entrusted to the government."²⁷⁶

IV. CONSTITUTIONAL CONSTRAINTS ON PUNITIVE DAMAGES

Having now thoroughly critiqued the Court's excessiveness jurisprudence as being rooted in an unprecedented, untenable, and impermissible construction of the Due Process Clause, it now remains to determine what constraints, if any, the Constitution does place on the award of punitive damages. Due process plays a role with respect to punitive damages awards, but it is drastically more limited than the Court would have it. Defendants certainly are entitled to be on notice regarding what conduct will lead to what type of consequences. Further, defendants do deserve protection against arbitrary exercises of state power. But the Due Process Clause fails to suggest that there should be any numerical or proportionality limitations on the actual size of punitive awards. It is for states to determine how reprehensible various offenses are to state interests

Justice Breyer would likely include this state of popular sovereignty and political engagement as part of his notion of "active liberty," which he adopts from political philosopher Benjamin Constant and defines as "a sharing of a nation's sovereign authority among that nation's citizens," involving citizens in "an active and constant participation in collective power" including the rights of public deliberation, voting, and holding wrongdoers accountable for their misdeeds. See STEPHEN BREYER, *ACTIVE LIBERTY* 3-5 (2005).

275. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.").

276. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (discussing the Necessary and Proper Clause of the Constitution).

when they authorize punitive damages to be imposed and for juries and state courts to determine reprehensibility and desert in particular cases. This Part of the Article proposes a framework of constitutional constraints on the award of punitive damages more in line with the Constitution than the excessiveness jurisprudence of the Court.

A. CULPABILITY BEYOND SIMPLE NEGLIGENCE

The starting point for scrutinizing punitive damages is the legitimate goals of the state that they seek to promote: punishment and deterrence. The Supreme Court has recognized these goals as legitimate state interests that states may rightly pursue through the imposition of punitive damages awards.²⁷⁷ Thus, if punitive damages are imposed in instances where punishment and deterrence goals are not implicated, state power creeps into a sphere of arbitrariness that notions of due process rightly forbid.

How can there be an objective, principled determination of instances in which the state's legitimate goals of punishment and deterrence are not implicated? At the very least, when negligent conduct is at issue, it is difficult to argue that there should be punishment beyond full victim compensation given the unintentional nature of the actions in question. Similarly, deterrence objectives are not significantly implicated in the face of negligent conduct because the conduct at issue is accidental rather than intentional, meaning that the simple encouragement of the exercise of due care is needed rather than the discouragement of conscious wrongdoing. Most persons are chastened to exercise sufficient care to avoid accidental harms simply by the fact that they will bear the cost of any harm their negligence might cause.²⁷⁸ It thus appears that the imposition of punitive damages on tortfeasors liable for simple negligence would be unconnected with a state interest in punishment and deterrence, which in turn would render a punitive award in this context an arbitrary exercise of state power.

As such, the Due Process Clause rightly should be viewed as prohibiting the imposition of punitive damages in cases involving simple

277. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

278. Although insurance coverage can mitigate the costs borne by negligent tortfeasors, it does not necessarily eliminate all costs. For example, one responsible for a car accident may have the tab picked up by his or her insurer, but the insurer typically raises the insured's premiums in response, imposing a direct—though lower—cost on the responsible party.

negligence.²⁷⁹ Stated differently, due process requires that punitive damages be reserved for culpability beyond simple negligence, which would include instances of repeated negligence by the same actor.²⁸⁰ This limitation is consistent with the tradition of punitive damages in this country and in England.²⁸¹ States already require heightened culpability to impose punitive damages awards,²⁸² making this limitation a background requirement that the Supreme Court should not find itself needing to enforce.

279. This discussion only addresses limitations imposed by due process. The Supreme Court has held that the First Amendment requires heightened culpability when imposing punishment against publishers found to have defamed private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–49 (1974) (holding that in defamation suits by private individuals against publishers or broadcasters “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth”).

280. *Carruthers v. Tillman*, 2 N.C. 648, 648 (1 Hayw. 501) (1797). *Carruthers* states:

[I]t is not proper in the first instance [of a nuisance] to give exemplary damages, but such only as will compensate for actual loss [B]ut if after this the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance.

Id.

281. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) (“[I]n England and in this country, [damages] have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of.”); *Emblen v. Myers*, (1860) 158 Eng. Rep. 23, 23 (Ct. Exchequer) (holding that “[i]n an action for wilful [sic] negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff’s rights and convenience, the jury may give exemplary damages”).

282. See, e.g., Cal. Civ. Code § 3294(a) (West 2005) (requiring clear and convincing evidence of “oppression, fraud, or malice” to support an award of exemplary damages); *Bell v. Heitkamp, Inc.*, 728 A.2d 743, 752 (Md. Ct. Spec. App. 1999) (“[F]acts showing actual malice must be pleaded, and if the case goes to trial, plaintiff must prove entitlement to punitive damages by clear and convincing evidence.”). *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987). *Preston* states:

We therefore hold that actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Id. *Hutchison v. Luddy*, 870 A.2d 766, 772 (Pa. 2005). *Hutchison* states:

[I]n Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.

Id. *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 694 N.W.2d 320, 329 (Wis. 2005) (“Punitive damages are not recoverable if a wrongdoer’s conduct is merely negligent. Only when the wrongdoer’s conduct is so aggravated that it meets the elevated standard of an ‘intentional disregard of rights’ should a circuit court send the issue of punitive damages to a jury.” (quoting *Strenke v. Hogner*, 694 N.W.2d 296, 301 (Wis. 2005))).

B. JURY DISCRETION CONSTRAINED BY THE GOALS OF PUNISHMENT AND DETERRENCE

Next, because states may only impose punitive damages in pursuit of the goals of punishment and deterrence, juries must be instructed to constrain their award to the minimum level that in their view would further those goals. The punitive award must at least purport to be one that is derived with reference to promoting the goals of punishment and deterrence. A punitive damages award becomes arbitrary if it is imposed without an eye toward these objectives. Thus, state law providing for punitive damages must require courts to instruct juries to impose an amount based on the jurors' views of what is needed to achieve these goals. That means that jurors must be instructed that they should not include within a punitive damages award any amount intended to compensate the plaintiff for any injury. Additionally, jurors must be instructed that they may not be moved by bias or prejudice in calculating a proper punitive damages award, but must focus solely on determining an amount that would punish the wrongdoing adequately and to deter others from behaving similarly.²⁸³

C. NO IMPROPER CONSIDERATION OF OUT-OF-STATE CONDUCT

The Court has properly indicated that the limits of state sovereignty preclude states from punishing defendants "for conduct that may have been lawful where it occurred" or from using their laws to impose punitive damages for unlawful out-of-state conduct.²⁸⁴ The Court, however, has also affirmed that out-of-state conduct providing evidence of defendants' culpability and intent respecting their actions against plaintiffs may be considered by juries.²⁸⁵ Juries must be informed of these limitations and instructed to punish only the conduct of defendants vis-à-vis their respective plaintiffs, not broader conduct affecting others elsewhere.

283. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("[I]t is not disputed that a jury award may not be upheld if it was the product of bias or passion.")

284. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996).

285. *See BMW*, 517 U.S. at 574 n.21 (indicating that "evidence describing out-of-state transactions . . . may be relevant to the determination of the degree of reprehensibility of the defendant's conduct"). *See also id.* at 603 (Scalia, J., dissenting). Justice Scalia says:

But if a person has been held subject to punishment because he committed an *unlawful* act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of "information concerning every aspect of a defendant's life."

Id. (quoting *Williams v. New York*, 337 U.S. 241, 250 (1949)).

D. MEANINGFUL TRIAL COURT SCRUTINY AND APPELLATE REVIEW

Although jurors need to be told to constrain their award to an amount no greater than needed to achieve the state's legitimate goals, it is always possible that they will miss the mark in that regard. In such an event, any amount of the punitive award beyond that needed to achieve the state's legitimate goals would constitute an "erroneous deprivation," to use the language of *Mathews v. Eldridge*.²⁸⁶ As a result, to ensure that a punitive damages award is limited to an amount sufficient to achieve punishment and deterrence, meaningful and adequate review of jury awards by trial court judges and state appellate courts must be available.

Review by the trial court should simply verify that the jury had before it facts that would support the jury's award with reference to factors such as: the actual level of the defendant's culpability, the intent of the defendant, the state's interest in deterring others from similar conduct and protecting the public from such wrongdoing, the impact of conduct on the victim and others, the defendant's wealth, and any mitigating circumstances. Trial courts must also make certain that the jury did not seek to punish out-of-state conduct through its award, which can be addressed both through proper jury instructions to that effect and upon review of the award.

State appellate review must also be available, not only as a check on the trial court's validation of a jury award, but also to check for intrasystem consistency between a given award and others imposed under similar circumstances. If similarly situated defendants are facing wildly divergent punitive damages awards within a state's judicial system, the state's exercise of its power to impose such damages begins to appear arbitrary. Although no two cases will have identical facts and thus some variance in punitive awards is to be expected, similar offenses under similar circumstances warrant similar punishment. This cannot be a rigid requirement; where facts and circumstances warranting a departure from the typical punitive award are identified, a state appellate court may properly endorse the award without rendering the state's punitive damages regime arbitrary. An unexplained or unwarranted departure, however, is constitutionally problematic because it suggests that the award exceeds the amount deemed in other similar cases to be sufficient to achieve the state's legitimate goals, rendering the award in question arbitrary in the manner described above.²⁸⁷

286. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

287. *See supra* Part IV.B.

What is required by due process here is that states have available a process whereby judicial review of jury awards is undertaken with an eye toward ensuring that punitive damages awards are limited to an amount that furthers the goals of punishment and deterrence and that the award is broadly consistent with awards imposed under similar circumstances. This judgment is for juries and state courts to make, and as discussed above, due process does not require or permit federal courts to make these determinations. Thus, once the state's highest court has weighed in on the matter, their determination regarding the propriety of the award is final, provided the procedural protections outlined above have been respected. In the end, then, the Supreme Court's constitutional review would be limited to assuring that these constitutionally required procedures are respected, with no authority to revisit the state's determination of whether an award of a given amount is appropriate.

V. CONCLUSION

The task of courts with respect to the Constitution is—to the extent possible—to give its passages a meaning consistent with what their texts meant at the time they were drafted and adopted rather than what judges might like them to mean today.²⁸⁸ Courts must make certain that the interpretation is consistent with other provisions of the document and the overall structure of government the Constitution creates. Concocting constitutional limitations that the text fails to reveal or support, and that history fails to endorse, is not the product of judicial interpretation, but of judicial creation.²⁸⁹ If the Court perceives there to be a substantive legal protection that members of the polity should have, it should limit itself to noting the gap and suggesting that appropriate political bodies, Congress and state legislatures, attend to the matter. This admonition is particularly apropos when dealing with the Due Process Clause. As the Court long ago rightly observed:

The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice

288. Of course, the effort to discern the original meaning of constitutional provisions is not a simple or precise endeavor. See Scalia, *supra* note 20, at 45 (“There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.”).

289. Cf. Mary Ann Glendon, *Comment, in A MATTER OF INTERPRETATION* 95, 108 (Amy Gutmann ed., 1997) (describing the Supreme Court's constitutional interpretation throughout the 1950s and 1960s as “creative judicial elaboration”); Scalia, *supra* note 20, at 18 (describing the “legislative intent” approach to statutory interpretation as “a handy cover for judicial intent”).

However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.²⁹⁰

Thus, although punitive damages reform might be a legitimate policy objective, using the Due Process Clause to achieve it cannot plausibly be condoned in light of the historical understanding of the clause or the Court's broader modern day due process jurisprudence. Neither can such use of the clause be defended in view of states' traditional, undelegated authority to fix and impose punitive damages and those constitutional rules of construction that bar constructive disparagement of that authority. Some might argue that the clause should be given a flexible interpretation that accounts for new legal challenges and that the relatively recent explosion of punitive damages awards is such a challenge. Although the magnitude of the punitive awards that concern the Court does appear to be a more modern phenomenon, the meaning of due process should not be flexed to curb perceived excesses surrounding a practice that no text in the Constitution purports to control. The presence of a provision addressing punitive excessiveness—the Eighth Amendment—and its failure to constrain punitive damages awards strongly suggests that the formalized amendment process of Article V rather than the informal process of amending by constructive implication would be the more legitimate route to achieving the Court's goal of imposing constitutional limits on exemplary damages.

Beyond the historical and doctrinal difficulties with the Court's excessiveness jurisprudence, one may marvel at how odd it is for the Court ardently to impose prohibitions against punitive dollar awards beyond a certain amount while it freely permits states to imprison petty repeat offenders to life imprisonment.²⁹¹ On the one hand, the Constitution

290. *Ownbey v. Morgan*, 256 U.S. 94, 110–12 (1921).

291. Other commentators have made a similar observation. See *Leading Cases*, 117 HARV. L. REV. 226, 325 (2003). *Leading Cases* states:

[F]rom a purely doctrinal perspective, the Court's treatment of punitive damages in *State Farm* is in tension with its treatment of criminal sentences last Term in *Ewing v. California*, in which it upheld a sentence of twenty-five years to life imprisonment imposed under California's "Three Strikes" law on a defendant who shoplifted \$1200 worth of golf clubs.

Id. (footnotes omitted). See also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699 n.102 (2005). Lee says:

The Court's proportionality jurisprudence looks even more incoherent if we keep in mind the much-noted tension between the Court's general reluctance in the Eighth Amendment proportionality cases and its relatively enthusiastic embrace of proportionality regulation of punitive damages under the Due Process Clause, an article-length topic in its own right.

explicitly proscribes cruel and unusual punishment, but the Court finds no obstacle therein to the imposition of society's penultimate penal sanction—endless imprisonment—for petty but recidivist thieves.²⁹² On the other hand, the Constitution says *nothing* about a bar against excessive punitive damages, but the Court bends over backwards to twist the document in a manner that regards monetary sanctions beyond single-digit multiples as breathtaking, eyebrow-raising affronts to constitutional sensibilities that must be combated. From the outside looking in, one would gaze upon such a state of affairs and conclude that the Court cares more about protecting businesses against high-dollar payouts than it does about protecting individual convicts from draconian measures that leave them languishing in prison for the rest of their lives. Such is hardly the case; however, one must wonder why no judicial eyebrows are raised on behalf of these unfortunate lifers in the face of Eighth Amendment protections that one might have thought were in place to offer these souls some relief.

What is good for the goose should be good for the gander: if the express protection against “cruel and unusual” punishments fails to constrain states from permanently locking up petty recidivists, then the authority of states to impose stiff punitive damages awards should not be deemed to be limited in the absence of any express (or plausibly implicit) provision to that effect. Life imprisonment for petty repeat offenders might be viewed by many as excessive or “unusual” in that it is a greater penalty than needed to achieve the state's legitimate goals of punishment and deterrence; the Court, however, has not seen fit to second-guess those states that see matters differently. The Court should similarly refrain from second-guessing state judgments regarding proper levels of punitive damages awards.

In any event, punitive damages awards that are the product of the process suggested in this Article have given defendants their due. A defendant who has chosen to act in a jurisdiction with given standards for awarding punitive damages, who has failed to convince a jury and/or a trial judge that no award or a lower one would be more appropriate, and who has failed to convince state appellate courts that the standards for imposing such awards were neglected in some way has no recourse to the federal Constitution to challenge what has occurred as a transgression of due

292. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 263 (1980) (holding that a life sentence imposed after only a third nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment). See also *Lockyer v. Andrade*, 538 U.S. 63, 63, 77 (2003) (holding that imposition of a life sentence for petty theft was not contrary to nor an unreasonable application of the clearly established gross disproportionality principle set forth by the decisions of the Court).

process. To the contrary, the threat of such damages in that event would have been clear and the courts of the state would have provided review sufficient to ensure that the jury was not wildly off the mark in selecting a given amount. States, through the apparatus of the legislature, the civil jury, and the state judiciary should be left free to make the determination that the challenged conduct of the defendant warrants a particular level of approbation reflected in an approved punitive award. No principle of federal constitutional law presently steps in to scrutinize that ultimate conclusion. The Court's insistence on using the concept of due process to impose such scrutiny makes the words of Justice Oliver Wendell Holmes all the more resonant today:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.²⁹³

The Court should abandon its present course and set right the doctrinal damage it has done.

293. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).