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Abstract

This Article analyzes the likely impact of recent Supreme Court jurisprudence applying substantive and procedural due process limits on punitive damage awards to class action punitive damage lawsuits. In BMW v. Gore *and* State Farm v. Campbell *the Supreme Court adopted a tripartite analysis to determine whether punitive damage awards were excessive under the Due Process Clause. Just last year in* Philip Morris v. Williams *the Court took a step further by imposing the additional "procedural" limitation that requires trial courts to take steps to ensure that juries do not punish a tortfeasor through an award of punitive damages in one case for harm caused to anyone other than the plaintiff. There has been some recent scholarly speculation that these cases signal an end to the punitive damage class action by insisting upon an individualized focus for punitive damages that precludes class-wide determinations. In the last year, some lower federal courts have agreed with this view and denied class certification.*

This Article offers a very different reading of these recent Supreme Court opinions, illustrating that the Court's primary concern in these cases has been the possibility of redundant awards of punitive damages by multiple juries in different cases. Thus viewed, increased certification of punitive damage class actions provides a more effective and efficient means of avoiding the redundant punishment problem. Further, Philip Morris *creates a paradoxical command to trial courts—to permit juries to consider evidence of third-party harm in order to assess the "reprehensibility" of a tortfeasor's misconduct but not to allow the jury to use that same evidence to set the award of punitive damages.*

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This dictate will prove impossible for lower courts to implement and actually offers defendants no benefit. Certification of class actions, however, avoids this inexorable problem by transforming the "third-parties" into litigant class members, thereby rending moot the need for the subtle distinctions embodied in Philip Morris. *In essence, rather than portend the death of the punitive damage class action, the recent Supreme Court jurisprudence creates powerful new arguments in favor of the aggregate model of punitive damage adjudication that offers a route back toward the viable use of class actions in mass tort scenarios.*

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I. Introduction

Sometimes judicial decrees have unintended consequences and often their full ramifications are not clear until some significant passage of time. In the instance of the U.S. Supreme Court's evolving jurisprudence on the Due Process Clause's substantive and procedural limits on punitive damage awards, there is much room to wonder where the current path leads. Will the Court reconsider the path it has chosen, perhaps finding some wisdom in Justice Scalia's admonitions that the Court is on a "road to nowhere"?[1] If not, will the Court stick with the current tripartite analysis derived from its seminal decision in *BMW of North America, Inc. v. Gore*[2]—a model that blends a nebulous

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

2. *See id.* at 585–86 (determining that a $2 million punitive damages award was grossly excessive and thus exceeded constitutional limits under the Fourteenth Amendment's Due Process Clause). *Gore* established a three "guideposts" test to determine if a person received fair notice of the severity of a punitive damages award that might be entered against him. *Id.* at 574–75.

standard (reprehensibility) with what appears to be a bright-line mathematical formula (single-digit ratio of punitive-to-actual damages) and a throw-away factor often having no application whatsoever (consideration of other civil penalties)?[3] Where will the Court go next given the additional considerations that it has not yet addressed? "Such issues are of intense practical importance to litigants and lower court judges alike."[4]

The Supreme Court appears to be doing a jurisprudential Sunday afternoon drive—meandering about the countryside making decisions as they present themselves with no clear destination in mind. A turn one direction may make some sense but what impact will this turn make down the road? In that regard, there are many important questions unanswered about punitive damages. While many thoughtful criticisms could be waged against these recent decisions, the focus of this Article is the legal fallout. One of the most intriguing, and practically significant, areas of uncertainty lies at the intersection of the Due Process Clause and a putative class action for punitive damages. What do *Gore* and the recent *Philip Morris USA v. Williams*[5] decision portend for a litigant's ability to obtain a grant or denial of the certification of a punitive damage class action? Both legal commentators and judges have recently begun to opine on this issue and have reached some divergent conclusions, though the prevailing thought seems to be that the Supreme Court has enunciated a death sentence for punitive damage class actions.[6] The basis for this view is that the Court's recent jurisprudence has highlighted the individual nature of the punitive damage inquiry in a way that makes it antagonistic to being considered a common issue suitable for class-wide adjudication.[7]

Part II of this Article provides a focused recapitulation of the recent U.S. Supreme Court's cases on punitive damages, starting with its 1991 suggestion that the Due Process Clause provides substantive limits on punitive damage awards and ending with its 2007 decision offering new, so-called "procedural" limits on such awards. Part II identifies and discusses the Supreme Court's

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3. *See id.* (setting out a tripartite analysis for reviewing punitive damage awards).

4. Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 381 (2008).

5. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (finding that the Due Process Clause forbids a jury from basing a punitive damages award in part upon a desire to punish a defendant for injury inflicted upon nonparties to the instant action).

6. *See infra* notes 153–73 and accompanying text (discussing the opinions of scholars and judges on certification of punitive damages class actions after *Philip Morris*).

7. *See infra* note 163 and accompanying text (discussing the disjoint between the Court's individual harm standard for punitive damage awards and a punitive damage class action trial plan).

concerns that originally motivated these decisions; these concerns should prove useful in understanding the breadth of the ripples emanating from these cases.

Part III of the Article brings into focus the class action aggregation device and analyzes how, during the last few decades, a request for punitive damages has impacted the certifiability of a class action under Rule 23(b)(1)–(3).[8] Part III then squarely raises the quandary concerning how the recent Supreme Court jurisprudence on Due Process Clause limits may impact certification of punitive damage class actions, discussing both scholarly and judicial viewpoints that have emerged in the last few years on the topic. This discussion will demonstrate the suggestion among some legal scholars that the Due Process Clause—as interpreted recently by the Supreme Court—is simply inconsistent with class-wide treatment of the issue of civil punishment. This Article will then offer a different interpretation of these developments—that these cases actually broaden the path for certification of a punitive damage class action, particularly in Fed. R. Civ. P. 23(b)(3) cases.

Rather than portend the death knell for certification of punitive damage class actions, it appears that the Supreme Court's due process tinkering with state civil law on punishment has created new incentives for, and justifications of, the aggregate model for considering civil punishment of a tortfeasor, particularly in contexts involving mass torts. The irony is that it is the very same due process concerns with punitive damage assessment in the traditional one-on-one model, coupled with the paradox created by the Court's attempted fix of that problem in *Philip Morris,* that makes the new case for certification.

II. Judicial Tort Reform of Punitive Damages

For the most part, during the first 200 years of the U.S. experience with its Constitution, the Supreme Court let state courts dole out punitive damage awards with no significant federal oversight, so long as basic procedural niceties such as notice and an opportunity to participate in the adjudication were observed.[9] The last few decades, however, have been marked by cries for

8. *See* FED. R. CIV. P. 23(b)(1)–(3) (establishing the grounds for maintaining class action suits).

9. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (noting that "a person [must] receive fair notice . . . of the severity of the penalty that a State may impose") (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996)); *Gore,* 517 U.S. at 599 (Scalia, J., dissenting) ("What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court . . . .") (citations omitted).

tort reform of both the legislative and judicial varieties.[10] Perhaps as a natural or expected consequence of the era of tort reform, the Supreme Court's centuries-old respect for state autonomy[11] in the area of punitive damage control of socially abhorrent behavior finally cracked. This change first appeared in 1991 when the Supreme Court for the first time realized that the Fourteenth Amendment's Due Process Clause served to provide a substantive limit on a jury's power to punish tortfeasors. The Court held in *Pacific Mutual Life Insurance Co. v. Haslip*[12] that punitive damage awards that "jar one's constitutional sensibilities" in terms of their size were constitutionally prohibited.[13] The Court stated that juries' assessments of punitive damage awards had "run wild"[14]—though in that particular case the Court let stand a 200-to-1 punitive-to-compensatory jury verdict against insurers.[15] While recent empirical studies and actual litigation experiences[16] offer some refutation of the Court's allegiance to tort reformers' agenda, the Court's suggestion of a need for judicial oversight of punitive damages was just beginning.[17]

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10. *See generally* David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1 (2007) (discussing various manifestations of judicial tort reform); David C. Johnson, *The Attack on Trial Lawyers and Tort Law*, COMMONWEAL INST. REP. (2003) (analyzing the tort reform movement and arguing that it is ideologically associated with conservative organizations).

11. *See* Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 391 (2008) (commenting upon the Supreme Court's historic reluctance to entertain constitutional challenges to punitive damages awards and how this began to change in the 1990s).

12. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (finding that jury instructions did not give the jury unlimited discretion in imposing a punitive damages award such that the award violated the Due Process Clause of the Fourteenth Amendment).

13. *Id.* at 18.

14. *Id.*

15. *See id.* at 23–24 (recognizing that the punitive damages award was "more than 200 times the out-of-pocket expenses of respondent," but nevertheless concluding the award did "not cross the line into the area of constitutional impropriety").

16. *See, e.g.*, Larry Lyon, Bradley J.B. Toben, James Underwood, William Underwood & Jim Wren, *Straight from the Horse's Mouth: Judicial Observations of Jury Verdicts and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 430–31 (2007) (indicating that in a survey conducted of all Texas state trial judges, the overwhelming majority found no evidence in their courtrooms during the preceding four years of excessive awards of punitive damages and no need for further tort reform).

17. Just a few years earlier, the Court rejected an argument that the Eighth Amendment's prohibition on excessive fines applied to civil jury verdicts awarding punitive damages. Browning-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257, 259 (1989) (finding that "the Eighth Amendment['s] . . . Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties").

Just two years later, the Supreme Court considered a challenge to a punitive damage award that represented a 526-to-1 ratio of punitive damages to actual damages. In *TXO Produce Corp. v. Alliance Resource Corp.*,[18] the Court again reiterated the need to review substantively large punitive damage verdicts. Considering the facts of that case, however, the Court nevertheless affirmed a relatively large award of punitive damages after reviewing the verdict in light of multiple traditional factors for determining punitive damages. These factors included the egregious nature of the defendant's conduct, the net worth of the defendant, the defendant's "expected gain" from the misconduct, and the repeated nature of the defendant's misconduct.[19]

Although these cases showcased the Court's willingness to scrutinize substantively large punitive damage verdicts under the Due Process Clause, the Court had not yet taken away a punitive damage award on such grounds. The first instance of the Supreme Court using this Due Process rubric to overturn a jury's punitive damage verdict based solely upon its sheer size was in its seminal decision in 1996's *BMW of North America, Inc. v. Gore*.[20] In *Gore*, the Court rejected as unconstitutionally excessive a 1000-to-1 award of punitive damages.[21] In that case, the trial court had entered a $4 million punitive damage judgment against a defendant who had caused the plaintiff $4,000 in compensatory damages.[22] The Court outlined three factors required by the Due Process Clause for review of a punitive damage award claimed to be excessive: "[T]he degree of reprehensibility [of the misconduct]; the disparity between the harm or potential harm suffered [by the plaintiff] and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[23] Using these criteria, the Court was "convinced that the grossly excessive award imposed in [that] case transcend[ed] the constitutional limit."[24] In effect, the Court embraced the

18. *See* TXO Produce Corp. v. Alliance Res. Corp., 509 U.S. 443, 462–63 (1993) (finding that a 526-to-1 punitive damages award was not so "grossly excessive" as to be unconstitutional, nor was the award a result of unfair procedures).

19. *Id.* at 461–62.

20. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (establishing a three "guideposts" test to determine if a person received fair notice of the severity of a punitive damages award that might be entered against him).

21. *Id.*

22. *Id.* at 564–65. The Alabama Supreme Court ordered a remittitur to $2 million. *Id.* at 567.

23. *Id.* at 575.

24. *Id.* at 585–86.

proposition that grossly excessive awards were arbitrary and thereby deprived a tortfeasor of due process.[25]

Joined by Justice Thomas, Justice Scalia wrote a dissent chiefly premised upon two objections to the Court's holding. First, Scalia was bothered by the Court's unprecedented usurpation of states' ability to punish wrongdoers despite the absence of any procedural unfairness in the process. Scalia noted that:

> At the time of the adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. . . . Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury . . . .[26]

Quickly canvassing the jurisprudential landscape, Scalia found:

> [N]o precedential warrant for giving our judgment priority over the judgment of the state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant federal cases, bunched within a few years of one another, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties.[27]

In addition to Justice Scalia's disdain for the Court's affront to federalism, the other major weakness he detected in the majority's opinion was the utter lack of any real analytical framework offered by the Court to govern the mandated search for substantive fairness. Referring to the three guidelines as "criss-crossing platitudes"[28] Scalia observed:

> Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, *the "guideposts" mark a road to nowhere*; they provide no guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," and that "trickery and deceit" are "more reprehensible than negligence." As to the ratio of punitive to compensatory damages, we are told that a "general concer[n] of reasonableness . . . enter[s] into the

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25. *See id.* at 586 (Breyer, J., concurring) (reiterating that the Court found the punitive damages award in that case "an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause") (citation omitted).

26. *Id.* at 600 (Scalia, J., dissenting).

27. *Id.* (Scalia, J., dissenting).

28. *Id.* at 606 (Scalia, J., dissenting).

> constitutional calculus,"—though even "a breathtaking 500 to 1" will not necessarily do anything more than "raise a suspicious judicial eyebrow." And as to legislative sanctions provided for comparable conduct, they should be accorded "substantial deference." One expects the Court to conclude: "To thine own self be true."[29]

Scalia opined that the Court's opinion elevated to constitutional status an attack on the jury's province to determine punishable misconduct while offering "virtually no guidance to legislatures, and to state and federal courts, as to what a 'constitutionally proper' level of punitive damages might be."[30] Justice Ginsburg also dissented and added her objection that transforming punitive damages to a constitutional issue was unnecessary because of the extensive activities of various state legislatures to enact "a variety of measures to curtail awards of punitive damages" including the imposition of severe statutory caps on the amount of punitive damages, requiring payment of punitive damages, in whole or part, to the states rather than the plaintiffs, and requiring bifurcated trials to shield juries from hearing evidence during the liability phase pertaining only to the amount of punitive damages (e.g., net worth evidence).[31]

Seven years later, the Court reaffirmed its commitment to continue providing substantive review of punitive damage verdicts in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[32] The defendant insurer had mismanaged the third-party liability claim on behalf of its insured by refusing to settle a serious death case and then abandoning its insured with the admonition that "You may want to put for-sale signs on your property"[33]—conduct that even the tort reform-bent Court admitted "merits no praise."[34] The jury in that case found actual damages of $2.6 million for the insured's outrage, humiliation, and emotional distress[35] of facing the excess underlying judgment without insurance.[36] The jury assessed punitive damages of $145 million after hearing diverse evidence of the insurance company's bad business practices

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29. *Id.* at 605–06 (Scalia, J., dissenting) (emphasis added) (citations omitted).

30. *Id.* at 602.

31. *Id.* at 614.

32. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (finding a $145 million punitive damages award "neither reasonable nor proportionate to the wrong committed" under a due process analysis that applied the *Gore* guideposts).

33. *Id.* at 413.

34. *Id.* at 419.

35. *See id.* at 426 (commenting on the components used by the jury to arrive at the actual damages amount).

36. *See id.* at 415 (discussing the jury's damages award).

generally across the country,[37] including evidence of spying on their own employees[38]—conduct clearly unrelated to their bad faith defense of an insured.[39] The trial court reduced the actual damages to $1 million and the punitive damages to $25 million.[40] The Utah Supreme Court reinstated the original $145 million punitive damages after reviewing the case in light of the *Gore* factors, observing the insurer's "massive wealth," the great reprehensibility of its many acts of misconduct, and the "statistical probability" that the defendant would be punished in only "one out of every 50,000 cases."[41]

The U.S. Supreme Court utilized the same three-part *Gore* test that the Utah Supreme Court had employed to increase the punitive damages but found its application resulted in the opposite conclusion—neither "close nor difficult"[42]—that the $145 punitive award was unconstitutional.[43] With regard to the first prong of reprehensibility, which the Court described as the "most important indicium of . . . reasonableness,"[44] the Court found two fundamental problems with the trial. First, the jury had been permitted to consider conduct of activities undertaken by the insurance company pertaining to third parties in other states where the conduct may have been lawful.[45] At most, the Court conceded that such extraterritorial lawful conduct might be probative on issues of intent.[46] The other more profound problem was that this conduct directed at out-of-state third parties was not related to the misconduct directed toward the plaintiff for which the punitive damages had been awarded. As the Court analyzed this error:

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37. *See id.* (indicating the jury heard evidence on State Farm's national scheme).

38. *See id.* at 424 (indicating evidence was introduced regarding State Farm's "investigation into the personal life of one of its employees").

39. The Court stated that the insured, at trial, had "shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.*

40. *Id.* at 415.

41. *Id.* at 416.

42. *Id.* at 418.

43. *See id.* (finding "it was error to reinstate the jury's $145 million punitive damages award").

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

45. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (noting that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred").

46. *See id.* at 422 ("Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious . . . .").

> For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.[47]

The Court did note that evidence of related misconduct directed at strangers would be appropriate due to prior holdings that "a recidivist may be punished more severely than a first offender."[48] But the lack of connection between the insurer's mishandling of the liability suit against the plaintiffs in *State Farm* and the evidence of the insurer's "perceived deficiencies . . . throughout the country"[49] probably led to the jury's exaggerated view of the reprehensibility of the defendant's actions toward the plaintiffs. While the Court noted that, to be relevant for reprehensibility, conduct directed at third parties need not be "identical," the Court stated that it cannot be "tangential."[50]

In addition to using the reprehensibility factor to render unconstitutional a jury's consideration of irrelevant misconduct toward third parties, the Supreme Court also found under the second *Gore* factor that the ratio of actual-to-punitive damages was too high.[51] In this regard, the Court purported to retreat from any "rigid benchmarks" and declined to "impose a bright-line ratio"[52] for punitive damages yet immediately stated that "few awards exceeding a single-digit ratio . . . will satisfy due process,"[53] and reaffirmed a prior comment made in *Haslip* that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[54] Certainly

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47. *Id.* at 422–23.

48. *Id.* at 423 (quoting *Gore*, 517 U.S. at 577).

49. *Id.* at 420.

50. *See id.* at 423–24 ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.").

51. *See id.* at 426 (finding "no doubt that there is a presumption against an award that has a 145-to-1 ratio").

52. *Id.* at 425.

53. *Id.*

54. *Id.*

compared to the first *Gore* factor, this presumptive single-digit ratio holding comes across as a fairly bright-line ratio, as that is how most lower courts have applied this holding.[55]

Because the $145 million punitive damages award failed both the reprehensibility and the proportionality tests from *Gore*, the Supreme Court held that the award of punitive damages was unconstitutional.[56] Justice Scalia, of course, dissented again noting his previous opinion in *Gore* that the due process clause provided no substantive protections against high punitive damage awards.[57] Scalia also observed that "the punitive damages jurisprudence which has sprung forth from [*Gore*] is insusceptible of principled application."[58] Justice Ginsburg's separate dissent criticized the Court's application of the *Gore* factors as tantamount to a "swift conversion of those guides into instructions that begin to resemble marching orders."[59] In fact, in the next case the Court dealt directly with the issue of what kind of marching orders on punitive damages a jury must receive in order to comply with the Due Process Clause.

In *Philip Morris USA v. Williams*, the plaintiff's decedent died after being misled into smoking cigarettes manufactured by the defendant.[60] The jury accepted the plaintiff's evidence offered at trial that defendant Philip Morris knew of the dangers of tobacco, but engaged in an extensive publicity campaign to mislead the public, including the plaintiff, concerning those dangers.[61] The jury further found that defendant had "succeeded in tricking" the decedent into believing that the media's warnings about smoking's adverse health risks were overstated—until he was diagnosed with lung cancer and died six months later.[62] The jury found the defendant guilty of negligence and

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55. One commentator who surveyed various lower court rulings after *Gore* and *State Farm* found a fairly consistent adoption by those courts of the admonition that normally only single-digit ratios of punitive-to-actual damages should be considered constitutional. *See generally* Michael A. Nelson, *Constitutional Limits on Punitive Damages: How Much Is Too Much?*, 23 ME. B. J. 42 (2008).

56. The Court briefly considered the third factor from *Gore*—consideration of the disparity between the punitive damage award and other "civil penalties authorized or imposed in comparable cases"—but was unable to find any comparable penalties for analysis and so did "not dwell long on this guidepost." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003).

57. *Id.* at 429 (Scalia, J., dissenting).

58. *Id.* (Scalia, J., dissenting).

59. *Id.* at 439 (Ginsburg, J., dissenting).

60. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060–61 (2007) (discussing the jury's findings).

61. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1257 (Or. 2008).

62. *Id.* at 1257–58.

deceitful conduct (i.e. fraud) and found actual damages of $821,000 while awarding punitive damages of $79.5 million.[63] The case history following the entry of judgment is somewhat tortured, but important to understanding the context for the Supreme Court's opinion ultimately issued in the case.

Using the *Gore* factors, the trial court reduced the punitive award to $32 million but the court of appeals reinstated the original award.[64] The Oregon Supreme Court declined review and the U.S. Supreme Court remanded the case to the Oregon Court of Appeals for reconsideration in light of the *State Farm* decision.[65] That court was not persuaded that *State Farm* altered its original analysis and so it reaffirmed its earlier approval of the entire punitive damage verdict.[66] The Oregon Supreme Court then agreed to hear the case and considered two arguments proffered by Philip Morris.[67] Defendant objected to the punitive award on substantive and procedural grounds.[68] As to the former, defendant contended that a 100-to-1 ratio was excessive.[69] As to the latter, defendant argued that it was error for the trial court to have denied its requested jury instruction on punitive damages that included the following language:

> "[Y]ou may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris's misconduct, "but you are not to punish the defendant for the impact of its alleged misconduct on any other persons, who may bring lawsuits of their own in which other juries can resolve their claims . . . ."[70]

Philip Morris argued that the Due Process Clause required this protecting instruction in light of the plaintiff's arguments to the jury about the impact of its conduct on third parties.[71] The Oregon Supreme Court rejected these points of alleged error, holding that the Due Process Clause did not prohibit a jury from assessing punitive damages to punish a defendant for harm to third parties

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63. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1061 (2007).

64. *Id.*

65. *Id.* at 1061–62.

66. *Id.*

67. *Id.* at 1061.

68. *Id.*

69. *Id.*

70. *Id.*

71. Plaintiff had argued, in part, to the jury: "'[T]hink about how many other Jesse Williams in the last 40 years in the State of Oregon there have been . . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred smokers]. . . .'" *Id.*

and, further, holding that the degree of reprehensibility of Philip Morris's misconduct justified the high ratio of punitive damages.[72]

The U.S. Supreme Court granted certiorari on both issues but only addressed what it termed the "procedural" issue concerning the requested jury instruction.[73] The Court avoided the "substantive" question of the award's excessiveness because it found error in the failure to submit the requested jury instruction and believed a new trial, upon remand, might be necessary.[74] The Court began its analysis indicating that the task before it was to determine "whether the Constitution's Due Process Clause permits a jury to base [a punitive] damage award in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)."[75] The Court conceded that its prior decisions had not directly answered this question but then explicitly held "that a jury may not punish for the harm caused to others."[76] The Court explained its three-fold rationale as follows:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 55, 66, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim *has no opportunity to defend against the charge*, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified.

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72. *Id.* at 1062.
73. *Id.* at 1063.
74. *Id.* at 1065.
75. *Id.* at 1060.
76. *Id.* at 1065.

> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.[77]

Because the Court believed that the Oregon Supreme Court did not correctly grasp this constitutional principle, it remanded the case for further consideration.[78]

If a jury may not punish a tortfeasor for harm caused to absent third parties not before the court, may the jury still consider at all evidence of such impact in determining a possible punitive damage award? This is where the Court's holding becomes murky, the answer apparently being both "yes" and "no." The Supreme Court held in this regard that:

> [A] plaintiff may show harm to others in order to demonstrate reprehensibility [the first *Gore* factor] . . . . Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.[79]

The Court never paused to opine on the appropriateness of Philip Morris's requested charge but at least implicitly suggested that it might have been appropriate, in light of its reversal.[80] The Court concluded with the admonition that:

> Given the risks of unfairness . . . it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. . . . We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.[81]

Near the end of the opinion, the Court clarified somewhat that where there was a risk of "confusion occurring"—which it found present in that case because of the evidence and arguments concerning other tobacco victims—that "a court,

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77. *Id.* at 1063 (emphasis added).

78. *Id.* at 1065.

79. *Id.* at 1064.

80. The Supreme Court did observe that Philip Morris's requested charge did distinguish "between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Id.* at 1064.

81. *Id.*

must upon request, protect against that risk."[82] The Court did not specify exact procedures or instructions, instead stating that it would grant State courts "some flexibility to determine what *kind* of procedures they will implement . . . to provide *some* form of protection in appropriate cases."[83]

While an analytical assault of the *Philip Morris* holding is beyond the ambit of this Article's purpose, one must wonder how much experience the Justices in the majority have had watching how jury trials are conducted. The Court held that evidence of harm to strangers to the litigation could be admitted in a punitive damage trial but that a jury must be advised of limits on how it may be considered—that it is okay for the jury to consider the evidence of third-party harm to show how reprehensible the tortfeasor's misconduct was, but that the jury could not consider that same harm in order to award punitive damages as a punishment for that harm.[84] Yet the only reason for the jury to consider how reprehensible the conduct of the tortfeasor may be is to determine the amount of punitive damages needed to punish that tortfeasor. The jury in such a trial traditionally has only *one* blank to fill in on a verdict form—a single dollar amount that the jury may, in its discretion, require the tortfeasor to pay as punitive damages. This evidence of third-party harm is relevant to the single issue of punitive damages the jury will answer on the verdict form. The *Philip Morris* holding essentially is to instruct juries that in answering that single question they may consider such evidence, but that they also may not consider the evidence. Even if this holding made sense, is there anyone who believes a jury would understand the meaning behind this directive? To say that the Supreme Court was trampling notions of federalism based upon a conceptual or philosophic subtlety that no jury could possibly appreciate would be a good starting point for a critique of the Court's opinion. Justice Stevens said as much in his dissent, calling the majority holding a "novel limit on the State's power to impose punishment,"[85] while relying upon a very ambiguous distinction in the usage of this evidence of third-party harm:

> While apparently recognizing the novelty of its holding . . . the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant "directly"—which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the

82. *Id.* at 1065.

83. *Id.*

84. *See id.* (declaring "that a jury may not punish for the harm caused others" but that a jury "may take this fact into account in determining the reprehensibility").

85. *Id.* at 1066 (Stevens, J., dissenting).

> reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm.[86]

Justice Thomas wrote a separate dissenting opinion observing that this subtle distinction evidences that the Court's "punitive damages jurisprudence is 'insusceptible of principled application.'"[87] Justice Ginsburg's dissent, which was joined by Justices Scalia and Thomas, similarly remarked regarding the disputed Philip Morris proposed jury instruction at issue:

> Under that charge, just what use could the jury properly make of the "extent of harm suffered by others"? The answer slips from my grasp. *A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge* . . . . I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.[88]

Apparently, the majority of the Supreme Court must believe that a lay jury is better able to decipher subtle constitutional distinctions than the four dissenting Justices.

The ironic "rest of the story" from *Philip Morris* is that upon remand of the case, the Oregon Supreme Court still was able to affirm the punitive damage judgment by holding that Philip Morris had failed to preserve its objection to the trial court's refusal by offering a proposed instruction that complied not only with federal but with state law.[89] The Oregon Supreme Court found deficient other unrelated language included in the proposed jury instruction that was inconsistent with an Oregon statute.[90] The Oregon Supreme Court held that this deficiency provided an alternative ground, unrelated to issues of federal law, to affirm the trial court's judgment.[91] The U.S. Supreme Court has since, again, granted writ of certiorari to further consider the case, but only on the grounds relating to the Oregon Supreme Court's holding based on state law.[92]

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86. *Id.* at 1066–67 (Stevens, J., dissenting).

87. *Id.* at 1067 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996)) (Scalia, J., dissenting).

88. *Id.* at 1068 (emphasis added) (Ginsburg, J., dissenting).

89. *See* Williams v. Philip Morris, Inc., 176 P.3d 1255, 1260 (Or. 2008) (articulating its task on remand).

90. *See id.* at 1263 (finding that Philip Morris's proposed jury instruction "did not state the law correctly" as required by Oregon state law).

91. *Id.*

92. *See* Philip Morris USA, Inc. v. Williams, 128 S. Ct. 2904, 2904 (2008) (granting certiorari on the state law issue, but not directly on the punitive damages award); *see also* Petition for Writ of Certiorari, *Philip Morris*, 1285 S. Ct. 2904 (No. 07-1216) (describing the two grounds for its petition for Supreme Court review).

III. The Viability of Punitive Damage Class Actions

While interesting issues remain unanswered after the *Gore*, *State Farm*, and *Philip Morris* decisions in terms of the contours of the substantive and procedural due process limits, the most interesting corollary issue is how these cases impact the certifiability of a punitive damage class action. In other words, does the application of the substantive *Gore* factors or the procedural mandate of *Philip Morris* in some way undermine the ability of a litigant to obtain class certification under Rule 23(b) in a case involving a claim for punitive damages? For reasons that will be explored below, the early prevailing scholarly reaction has thus far been that these constitutional limits on punitive damages spell the death knell for the punitive damage class action. As one commentator declared early in the wake of *Philip Morris*: "Upon additional reflection, it seems likely that the recent Supreme Court decision concerning the constitutional pitfalls of punitive damages awards [citing *Philip Morris*] signals the end of class actions for punitive damages."[93] Or as another scholar observed:

> The Court's latest pronouncement on punitive damages—its February 2007 decision in *Philip Morris USA v. Williams*—crossed the reform divide and has significant implications not only for how juries translate their outrage into dollar figures, but also for class certification procedures. . . . [The scholar then argues] that where harm to the class is individualized, punitive damages cannot be pursued as a class-wide remedy.[94]

This Article takes a decidedly different view of the matter.

A. Class Actions and Punitive Damages

Before tackling the nuances of the effects of the Supreme Court's due process jurisprudence on class actions, we should begin with a brief and focused overview of the origins, goals, and limitations of the class action device and consider how punitive damage claims have fit imperfectly into that general analytical model of aggregate litigation.[95] Class actions offer an unparalleled

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93. Jim Beck & Mark Hermann, Williams v. PM *and the Passing of Punitive Damages Class Actions*, Drug and Device Law Blog, Feb. 27, 2007, http://www.druganddevicelaw.blogspot.com/2007/02/williams-v-pm-and-passing-of-punitive.html (last visited Oct. 27, 2008) (on file with the Washington and Lee Law Review).

94. Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 881–84 (2008).

95. For a somewhat more comprehensive overview of the class action device, see James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class*

and unique joinder device that permits a multitude of claimants' claims to be adjudicated together through the efforts of one or more representative claimants.[96] Without the class action device, each of these claimants would have to initiate and prosecute their own claims separately, typically through the efforts of separately retained and compensated counsel. Class actions can not only achieve rather obvious and tremendous systemic and litigant efficiencies but can, as a practical matter, make claims possible where they would not be economically feasible on their own. As Professors Klonoff and Bilich have articulated, class actions are thus a powerful device that can achieve tremendous good or, alternatively, be used as an instrument of "judicial torture or terrorism":[97]

> In the more than three decades since 1966, when modern Rule 23 was adopted, class actions have grown to dominate the civil litigation landscape in a manner unexpected by all but Rule 23's most ardent supporters and most vehement critics. Not only do practitioners attempt to use the class-action device to address a vast range of subject areas, but the stakes at issue in such cases are on a markedly different scale than in most traditional, bipolar (that is, one-on-one) litigation. Class actions (and other party-aggregation devices) are powerful and pervasive instruments of social change.
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> The dynamics of class-action practice, however, have created a focus that is unprecedented in federal civil practice. Attorneys have made immense fortunes from class actions, and companies have been forced into bankruptcy. As loudly as supporters have applauded the ability of courageous plaintiffs and their innovative attorneys to use Rule 23 to right social and economic wrongs, critics have just as vocally attacked what they have termed attorney-driven litigation almost entirely bereft of accountability.[98]

While the modern class action device can be traced to 1966 when Rule 23 was significantly expanded, class action antecedents go back to ancient English law sources. Professor Hensler has described these early origins as follows:

Action, 46 S. TEX. L. REV. 391, 397–403 (2004).

96. The Federal Rules of Civil Procedure also contemplate and permit the use of defendant class actions whereby a plaintiff can name a defendant representative to defend the interests of a class of unnamed potential defendants. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members.") (emphasis added). Defendant class actions are a rarity and are not the focus of this article.

97. Underwood, *supra* note 95, at 403.

98. ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 1 (2000).

> Early American courts incorporated the notion of collective action in their codes of civil procedure. In 1833, the first provision for group litigation in federal courts was set forth as Equity Rule 48. This rule allowed for a representative suit when the parties on either side were far too numerous for convenient administration of the suit; unlike the Bill of Peace, however, at first the outcomes of such group litigation were not binding on similarly situated absent parties. Ten years later, in a case arising out of the pre-Civil War tensions between North and South, the U.S. Supreme Court held that absent parties could be bound by the outcomes of cases brought under Equity Rule 48.
>
> The Equity Rules were overhauled in the beginning of the next century, but the representative action device remained on the books as Equity Rule 38. The new rule clearly stated that a representative action would bind absent plaintiffs. Equity Rule 38 was probably the most straightforward of all the rules adopted to date to provide for class or representative actions, stating simply: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." For about 25 years, this language provided the basis for class actions in federal courts. Representative actions could also be brought in many state courts under various state court rules.[99]

As is evident from these early origins, the *primary* motivating principle underlying this group litigation device was one of efficiency—so long as there was sufficient general commonality of issues that the group needed to face in pursuing their individual claims, both the litigants and the court could save much time and resources by trying the claims together in one case. You might think of the class action device as the HOV lane of litigation traffic—the more litigants piled into the car, the speedier the process works as they head toward final judgment. Of course these efficiency gains[100] are recognized to be limited by notions of fairness and respect for individual litigant autonomy:

> A uniquely Anglo-American invention, being "virtually unknown in civil law and socialist systems," class actions offer an interesting study in competing principles. These principles include, on the one hand, the right of an individual to make general litigation choices, such as whether to sue and/or settle, which is generally heralded in the U.S. legal system. On the

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99. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10–11 (2000).

100. As will be indicated below, some class actions can be justified as much by the principle of achieving fairness, for either the claimants or the defendants, as by efficiency. This is certainly true with Rule 23(b)(1)(A)–(B) certifications.

> other hand, the systematic interest in judicial efficiency is at the core of most group litigation models.[101]

These twin, sometimes competing principles of efficiency and fairness are embodied in several components of the current Rule 23, such as the four prerequisites to certification of any class found in Rule 23(a), namely (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.[102]

With the changes to Rule 23 in 1966, the modern class action device is currently broken down into three basic categories of application that are permitted by Rule 23.[103] Rule 23(b)(1) covers cases where large groups of claimants have an interest in common such that either (A) the defendant is subject to potentially conflicting court orders regarding the subject or (B) the resolution of one claimant's claim might as a practical matter prejudice another claimant (the so-called "limited fund" scenario discussed below).[104] Rule 23(b)(2) covers cases where the class has a common interest in obtaining either declaratory or injunctive relief, such as in civil rights or employment discrimination scenarios.[105] Rule 23(b)(3)—formerly called the "spurious" class action—is the broadest category. This subdivision contemplates certification of any case where there is sufficient commonality (the common questions "predominate" over the individual questions) and where class treatment is considered likely manageable and a superior device for resolution of the disputes rather than traditional one-on-one litigation, taking into account

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101. Underwood, *supra* note 95, at 398.

102. FED. R. CIV. P. 23(a)(1)–(4). As the Supreme Court has observed regarding the interplay of some of these class action prerequisites:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement . . . .

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982). The only other fundamental ingredient of numerosity is typically scrutinized in terms of whether the proposed class would "achieve economies of time, effort, and expenses or promote any more uniformity of decision than would [traditional] joinder." Bd. of Educ. of Twp. High Sch. v. Climatemp, Inc., No. 79-C-3144, 1981 WL 2023, at *5 (N.D. Ill. Feb. 20, 1981).

103. The changes to Rule 23(b) in 1966 were intended to "shake the law of class actions free of abstract categories . . . and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

104. FED. R. CIV. P. 23(b)(1).

105. FED. R. CIV. P. 23(b)(2).

various factors.[106] Attempts by litigants to obtain class treatment of punitive damage claims have encountered difficulties under each of these subdivisions.

Litigants have attempted to use Rule 23(b)(1)(B) to certify mass tort damage claims under the theory that the defendants had limited resources to satisfy the possible multitude of claimants. This "limited fund theory" argued that, as a practical matter, those claimants who filed suit first and received full satisfaction of their judgments would have a negative impact on later claimants who got to the well only to find it dry.

The most famous of these attempts arose in the context of an "elephantine" mass personal injury asbestos litigation settlement in *Ortiz v. Fibreboard Corp.*[107] In that case, a consortium of entrepreneurial counsel fashioned a "global settlement" involving the establishment of a settlement fund primarily from the defendant's insurers' contributions against which all claimants would have to go to obtain satisfaction for their claims.[108] The trial court certified the case as a mandatory class action under Rule 23(b)(1)(B) using the "limited fund" rationale.[109] The U.S. Supreme Court reversed this certification holding that the case did not present a true limited fund scenario: "We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members."[110] Among other problems, the Court found that tort claims involving "unliquidated damages" present a problem in quantifying the overall size of the claims and that a "fund" could not be artificially limited by agreement of the parties but must include all of the defendant's assets, including insurance.[111]

Both aspects of the *Ortiz* view of a true limited fund have made the utility of Rule 23(b)(1)(B) for obtaining class certification of a tort suit for damages very difficult. As the Sixth Circuit held the following year in a case involving a mass tort product liability suit:

> Presumably *all* companies have limited funds at some point—there is always the possibility that a large mass tort action or other litigation will

106. FED. R. CIV. P. 23(b)(3).

107. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) ("We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.").

108. *Id.* at 824–26.

109. *Id.* at 815–16.

110. *Id.* at 821.

111. *Id.* at 850, 864–65.

> put a company into bankruptcy. Should that eventuality threaten, we have a comprehensive bankruptcy scheme in this country for just such an occurrence. Simply demonstrating that there is a possibility, even a likelihood, that bankruptcy might at some point occur cannot be the basis for finding that there is a "limited fund" in an ongoing corporate concern. The district court cannot discharge the debt in advance of the occurrence, thereby usurping the bankruptcy scheme through settlement, even [if] it believes such an avenue to be in the best interests of most of the plaintiffs.[112]

Notwithstanding the Court's decision in *Ortiz*, there are still a few subsequent decisions certifying punitive damage cases under a "limited fund" theory. These courts have held that the need to "limit repetitive punitive damage verdicts for the same behavior [might argue for a type of limited fund], but assuming there are such limits they probably will vary from state to state, making consideration of this factor difficult in multistate class actions."[113] We will consider briefly in the next section whether the Supreme Court's decision in *State Farm* supports these or any additional arguments in favor of certification under the limited fund scenario.[114] Rule 23(b)(2) class certification tends to be the least controversial variety of class action, at least from a purely procedural perspective. This subsection was created in 1966 to make clear that class certification would normally be appropriate in civil rights and employment discrimination lawsuits seeking either declaratory judgment or injunctive relief.[115] The one wrinkle that courts have grappled with in this area arises in cases where, in addition to the remedy of declarative or injunctive relief, the putative class representative also pleads for monetary relief—compensatory and/or punitive damages. While the subsection makes no mention of these hybrid cases, the Advisory Committee Notes provide that certification under 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[116] The issue courts have divided over is when does a claim for monetary damages "predominate" over the other equitable relief for which the subsection was

112. *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 880 (6th Cir. 2000).

113. RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 316 (Thomson West 2004) (citing as examples *In re* Exxon Valdez, 270 F.3d 1215, 1225 (9th Cir. 2001) and the district court's order in *In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002), *rev'd*, 407 F.3d 125 (2d Cir. 2005)).

114. *See infra* Part III.C.

115. Rule 23(b)(2) provides for certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as whole." FED. R. CIV. P. 23(b)(2).

116. FED. R. CIV. P. 23(b)(2) advisory committee's note.

specifically crafted? Two tests have emerged from the circuit courts though the Supreme Court has not yet resolved this analytical dispute.[117] Among the Ninth and Second Circuits, the test is fairly subjective, inquiring into whether the primary motivation for the suit is financial or equitable. The Second Circuit asks, for example, whether "reasonable plaintiffs would bring the suit to obtain [only] the injunctive or declaratory relief sought."[118] The Ninth Circuit similarly focuses upon "the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing suit."[119]

The Fifth Circuit, by contrast, expressly repudiates that certification in this hybrid context should "hinge on the subjective intentions of the class representatives and their counsel in bringing the suit."[120] Rather, given the mandatory nature of the 23(b)(2) class, the Fifth Circuit believes the focus should be on the extent to which the proposed class remains cohesive despite the injection of monetary relief:

> Monetary relief must be incidental, meaning that it is "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." Additional hearings to resolve "the disparate merits of each individual's case" should be unnecessary.[121]

For this reason, the Fifth Circuit (and most other federal courts) would permit certification of an employment discrimination suit that involved requested injunctive relief in addition to a claim for back pay[122] subject to rather easy objective calculation (a "mechanical task") or a "one-size-fits-all refund."[123] At least three other circuits have indicated agreement with using the Fifth Circuit's test of cohesiveness.[124]

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117. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (expressing doubts regarding the certifiability of claims for monetary relief except under Rule 23(b)(3)).

118. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001).

119. Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).

120. *In re* Monumental Life Ins. Co., 365 F.3d 408, 415 (5th Cir. 2004).

121. *Id.* at 416 (quoting Allison v. Citgo Petroleum Co., 151 F.3d 402, 415 (5th Cir. 1998)).

122. *See* Marshall v. Kirkland, 602 F.2d 1282, 1295 (8th Cir. 1979) ("Though Rule 23(b)(2) relates to class claims on which declaratory and injunctive relief is sought, this Court has observed in conformity with the majority of federal courts, that the fact pecuniary relief in the form of back pay is sought incidental to injunctive relief will not preclude certification.").

123. *Monumental Life*, 365 F.3d at 419 (finding that a claim that included request for repayment of overpaid premiums by minorities did not destroy class cohesion because monetary claims were subject to objective calculation that was not based upon "variables . . . unique to particular plaintiffs").

124. *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 648–50 (6th Cir. 2006)

Using either test, it would appear extremely difficult to argue for certification of a tort case where compensatory damages are almost certain to involve individual variables and subjective information that would necessitate individual hearings. The inclusion into such a case of a claim for punitive damages arguably might not make certification any more difficult, but it would do nothing to minimize the lack of cohesion present due to the actual damages claims. Moreover, using the motivational test from the Second and Ninth Circuits, the inclusion of punitive damages would tend to further minimize the relative importance of the equitable relief and to point to the possible windfall recovery of punitive damages as the predominant purpose behind the suit. Thus, both before and after the recent Supreme Court jurisprudence on due process limits on punitive damages, certification of a punitive damage class action under Rule 23(b)(2) would be unlikely, and any examples of such certification among published decisions are quite rare.[125]

Rule 23(b)(3) provides for the most controversial variety of class action, in part because it now represents the bulk of most class actions.[126] It replaced in 1966 the old "spurious" class action which was not binding on any class members except those who took the affirmative step to "opt in" to the lawsuit after being certified.[127] By contrast, current Rule 23(b)(3) provides for a class action in cases with a predominance of common issues that will bind any class members except those that affirmatively "opt out" of the suit.[128] Given the

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("[T]he reasoning in *Allison* dictates the outcome of this case . . . ."); Cooper v. S. Co., 390 F.3d 695, 720 (11th Cir. 2004), *rev'd on other grounds*, 546 U.S. 454 (2006) (quoting *Allison* to support its argument); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580–81 (7th Cir. 2000) (comparing the plaintiffs to the plaintiffs in *Allison*).

125. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998) (holding that individualized hearings necessary for punitive damages precluded certification under Rule 23(b)(2) in most discrimination cases). *But cf.* Palmer v. Combined Ins. Co., 217 F.R.D. 430, 438–41 (N.D. Ill. 2003) (concluding, after making a "difficult inquiry," that certification in a discrimination suit involving equitable and punitive damage was possible as a unique exception to the normal rule precluding such certification).

126. In a comprehensive empirical study of class actions in 2000 by the Rand Institute, it was found that "the world of class actions in 1995–96 was primarily a world of Rule 23(b)(3) damage class actions, not the world of civil rights and other social policy reform litigation that . . . the 1966 rule drafters had in mind." THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 8 (Federal Judicial Center 1996) (reporting that the Rule 23(b)(3) damages class action comprised between 50% and 85% of all certified class actions in those districts studied).

127. *See Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 930 (1958) (describing the categories of class actions prior to 1966).

128. FED. R. CIV. P. 23(b)(3) (requiring a court finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

power of inertia, indifference, and ignorance on the part of many class members (particularly in smaller, so-called "negative value" consumer rights cases), this seemingly subtle change from an opt-in to an opt-out class has been the most revolutionary aspect of the 1966 rules changes. Comparing Rule 23(b)(3) to the (b)(1) and (b)(2) categories, one finds in what is generally referred to as a "damages class action" a species that is both broader and more limited at the same time. As one court compared:

> The class certification prerequisites should be construed in light of the underlying objectives of class actions. . . . Rule 23(b)(3) is intended to be a less stringent requirement than Rule 23(b)(1) or (b)(2). *See* Amchem Prods., Inc. v. Windsor, 521 U.S. at 615, 117 S. Ct. 2231 ("Framed for situations in which class-action treatment is not as clearly called for as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit may nevertheless be convenient and desirable.").[129]

Yet while being broader in the sense of having more circumstances where certification might be possible, this subdivision is also more exacting because the trial courts are required, prior to certifying under Rule 23(b)(3), to consider issues of case manageability and whether class treatment is superior to other traditional forms of joinder—that is, a party moving for certification under this section must sell the idea of certification to the trial court.

All three of these aspects of Rule 23(b)(3) certification seem to be subject to frequent challenge in mass tort scenarios involving claims for punitive damages. As to the foundational showing that the common issues predominate over individual issues—a significantly more exacting standard than the general notion of "commonality" required by Rule 23(a)(2)—mass tort cases typically involve injuries that are not easily quantifiable and which may be found antithetical to the pure goal of efficiency being sought through representative litigation in the Rule 23(b)(3) environment. The Fifth Circuit's shift from the eager embrace of personal injury damages class actions in the 1980s to a very skeptical view of class treatment ten years later illustrates the federal courts' growing scorn for class treatment of mass torts.

In *Jenkins v. Raymark Industries, Inc.*[130] the Fifth Circuit was confronted with a Rule 23(b)(3) certification in the context of a proposed global settlement of thousands of asbestos cases pending in the Eastern District of Texas—a hotbed for such litigation. These cases involved claims of strict liability,

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adjudication of the controversy"); *see also* FED. R. CIV. P. 23(c)(2)(B) (describing opting out procedures).

129. Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003).

130. *See* Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 469 (5th Cir. 1986) (affirming district court certification of class with asbestos-related claims).

negligence, and accompanying requests for both significant compensatory damages and punitive damages.[131] The trial court refused to find a "limited fund" scenario but certified instead a Rule 23(b)(3) class action after finding that significant common issues predominated.[132] These common issues included product identification, product defectiveness, gross negligence and punitive damages.[133] The Fifth Circuit affirmed the class certification decision, and offered this explanation of its incentive:

> Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past.[134]

Thus, the Fifth Circuit felt that "necessity"[135] required it to begin to embrace class certification of mass torts.[136]

Ten years later, however, in the context of the "largest class action ever attempted in federal court"[137] involving an attempt to secure damages caused to

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131. *Id.* at 470–71 (recounting the history of the cases and the district court's findings).

132. *Id.* at 470.

133. *Id.* at 471.

134. *Id.* at 473 (citations omitted).

135. *Id.* ("Necessity moves us to change and invent.").

136. *See id.* at 475 ("The task will not be easy. Nevertheless, particularly in light of the magnitude of the problem and the need for innovative approaches, we find no abuse of discretion in this court's decision to try these cases by means of a Rule 23(b)(3) class suit."). The Sixth Circuit concurred with these sentiments:

> [T]he problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct. In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196–97 (6th Cir. 1988); *see also In re* A. H. Robins, Inc., 880 F.2d 709, 734 (4th Cir. 1989) (adopting a more "liberal" trend toward Rule 23(b)(3) certification).

137. Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

cigarette smokers by tobacco companies, the Fifth Circuit changed its tune regarding class certification. In *Castano v. American Tobacco Co.*[138] the trial court certified a damages class action under Rule 23(b)(3) in which the class representatives sought to recover compensatory and punitive damages for all nicotine-dependent persons in the United States.[139] Specifically the trial court certified the class on "core liability and punitive damages" and severed those common issues from any individual damage issues.[140] The trial plan included trying the common issue of punitive damage liability and having the class jury develop a ratio of punitive damages to actual damages which the trial court would then apply in individual cases once the separate issue of compensatory damages had been resolved.[141] The Fifth Circuit, however, reversed this order of certification primarily on three different grounds. First, the court found that the trial court had failed to consider in any detail possible difficult choice of law issues that may have required a jury at the common trial to hear instruction on, and to apply, the differing laws of all fifty states.[142] These possible differences undercut the predominance of common issues and also demonstrated negatives in terms of manageability of such a trial.[143] Second, the Fifth Circuit was not impressed that the trial court had appropriately addressed the issue of predominance generally given the individual liability issues present on some of the claims, such as for fraud.[144] Finally, the Fifth Circuit had a different view of the superiority of class treatment for at least this variety of mass tort:

> In addition to the reasons given above, regarding the district court's procedural errors, this class must be decertified because it independently fails the superiority requirement of rule 23(b)(3). In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

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138. *See id.* (reversing district court's certification of class, citing abuse of discretion).

139. *See id.* at 737 (noting trial court's certification). The plaintiffs had initially also requested a declaratory judgment and injunctive relief and requested certification also under Rule 23(b)(2). *Id.* at 738–39. However, the trial court denied certification under that subsection and Plaintiffs did not appeal from that order. *Id.*

140. *Id.* at 739.

141. *Id.* at 740.

142. *Id.* at 739.

143. *Id.* at 740–44.

144. *Id.* at 745.

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.[145]

The Fifth Circuit has repeated these anti-certification sentiments in several more recent decisions, indicating that *Castano*'s skeptical view of personal injury damage class actions under Rule 23(b)(3) was not an aberration.[146] As Professors Marcus and Sherman have noted: "*Castano* can be viewed as part of a movement in reaction against what some considered excessive use of class actions for mass torts. Shortly before the Fifth Circuit's *Castano* decision, cases in the Sixth and Seventh Circuits also imposed stricter standards on mass tort class actions."[147]

Further coloring the landscape of certification of tort lawsuits under Rule 23(b)(3) is the controversy regarding perceived abuses of this subsection:

> Damage class actions have significant capacity to achieve public goals: to compensate those who have been wrongly injured, to deter wrongful behavior, and to provide individuals with a sense that justice has prevailed. But what drives damage class actions is private gain: the opportunity they offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that they might have a legal claim and most of whom play little or no role in the litigation process. These financial incentives produce significant opportunities for lawyers to make mischief, to misuse public and private resources for litigation that does not serve a useful social purpose. How to respond to this dilemma is the central question for public policy.[148]

After debating these and other related issues for more than a decade, and spurred by perceived abuses of the Rule 23(b)(3) class action, Congress finally acted in 2005 by passing, by a rather wide margin, the Class Action Fairness Act.[149] Rather than ratchet-up the requirements for Rule 23(b)(3) certification,

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145. *Id.* at 746 (citations omitted).

146. *See* Regents of Univ. of Calif. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 378–79 (5th Cir. 2007) ("[C]lass certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle . . . ."); Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 605 (5th Cir. 2006) (affirming trial court denial of Rule 23(b)(3) certification in discrimination lawsuit involving claims for compensatory and punitive damages due to perceived problems with predominance and superiority requirements).

147. MARCUS & SHERMAN, *supra* note 113, at 353.

148. HENSLER ET AL., *supra* note 99, at 6–7. *See generally,* Underwood, *supra* note 95, at 403–18 (discussing "the class action critique").

149. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified, in part, at 28 U.S.C. § 1332(d) (Supp. 2006)) (granting minimal diversity jurisdiction for class

however, Congress primarily offered change in the form of opening the federal courts to more state-law based class actions through a softening of the diversity jurisdiction rules for such cases.[150] The logic behind these rather dry, procedural reforms of a topic as heated as the perceived abuses of class actions was that federal courts were already doing a much better job than state courts at refusing to certify mass tort class actions.[151] By allowing most interstate class actions to be removed by defendants from state to federal courts, lawmakers believed that this itself would tend to dilute the problem of class action abuse widely reported by the mass media.[152]

Thus viewed, we have seen two seemingly unrelated paths—one involving increasing concern by the Supreme Court about punitive damage treatment in light of both procedural and substantive due process interests and the other involving increasing federal court hostility toward class certification of mass tort claims giving rise to possible punitive damage awards. After *Gore*, *State Farm*, and *Philip Morris*, were these two paths on a collision course and, if these two paths were to collide, what would be the outcome?

B. Scholars and Courts at the Intersection

In the wake of the Supreme Court's recent jurisprudence applying the Due Process Clause to punitive damages and the trend away from certification of mass tort damages class actions, the conclusion that might be the easiest to

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actions).

150. *See* James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 213 (2006) (describing the impact of the Class Action Fairness Act).

151. The Senate Judiciary Committee, in considering what would later be passed as the Class Action Fairness Act of 2005, reported widespread abuse in the state courts:

> The class action abuse problem has hit critical mass. Like never before, the public, the media, and experts agree that the nation's class action system is seriously broken, and that current practices are far from what the Framers envisioned. A recent study commissioned by the United States Chamber of Commerce found unprecedented support for class action reform. Major media outlets have editorialized in favor of reform and, in many instances, in favor of this very legislation. Further, despite the contrary claims of the increasingly dwindling ranks of critics, the Judicial Conference of the United States has recently embraced the notion of expanded federal jurisdiction for class actions. Likewise, the American Bar Association now recognizes that *federal jurisdiction for selected class actions is the right fix for the growing problem of abuses.*

Comm. on the Judiciary, 108th Cong., Class Action Fairness Act of 2003, S. REP. NO. 108-123, at 26–27 (2003) (emphasis added).

152. *See id.* at 26 ("[D]efendants frequently find it necessary to remove class actions against them to a federal forum—a forum where the threat of prejudice is significantly lower.").

draw would be to proclaim that the punitive damages class action has a terminal disease. That sentiment seems to best capture the early thought that has emerged among legal scholars and commentators and has even been hinted at by some lower federal courts' denials of certification.

Particularly following *Philip Morris*, some legal commentators were quick to smell the blood and declare the death of punitive damage class actions. On an entry at their *Drug and Device Law* blog titled "Williams v. PM and the Passing of the Punitive Damages Class Actions," defense counsel Mark Herrmann and James Beck opine that *Philip Morris* signaled the "end of class actions for punitive damages."[153] This view is expressly premised upon three debatable concepts. First, that *State Farm*'s substantive Due Process analysis demonstrated that the issue of punitive damages was tied to each individual claimant's own harm as the Court embraced a requisite limit on the ratio of punitive-to-actual damages.[154] Second, that *Philip Morris*'s admonition that a jury could not be permitted to punish a defendant for harm caused to "nonparties" and "strangers" to the litigation means that unnamed class members could not have their claims for punitive damages tried by class representatives.[155] Third, that *Philip Morris* also repudiated any bifurcated class punitive damage trial whereby a defendant was forced to defend the issue of punitive damage liability divorced from, and in advance of, its opportunity to defend on the merits against the individual claims of each class member.[156] With these conclusions in mind, these commentators exhorted their defense cohorts to be vigilant in attacking any certification of punitive damage class actions: "From now on, we'll certainly be viewing anything in the trial of cases involving punitive damages context with an eye towards preserving constitutional objections that might not have previously existed. We recommend that other defense counsel do the same."[157]

These arguably tainted views might be easy to discount entirely were it not for the fact that some legal scholars have also published articles sharing at least some of these same views. Professor Scheuerman very recently published an article opining that "[t]he only sound reading of the [Supreme] Court's punitive damages decisions is that we are now left with compensatory damages-only

153. Beck & Herrmann, *supra* note 93.

154. *See id.* ("[T]he great bulk of recent precedent had concluded that aggregation of punitive damages was an unconstitutional violation of Due Process . . . .").

155. *See id.* ("If 'strangers to the litigation' can't recover punitives, that pretty well shuts down the logic of class actions in this area.").

156. *See id.* ("Williams'[s] conception of Due Process gives defendants the right to 'every available defense' before being held liable for punitive damages.").

157. *Id.*

class actions unless the harm to the class is identical."[158] She begins her analysis by detecting in the Court's punitive damages opinions a shift in the emphasis for the underlying punitive damage rationale from one of predominantly general deterrence to one that is focused only upon specific deterrence, being linked to, and limited by, the actual harm caused to a particular claimant rather than the harm inflicted upon society in general:

> In sum, the Supreme Court's jurisprudence has evolved from an approach that at least gave lip service to the premise that punitive damages serve general and specific deterrence functions to the more recent cases that have focused, almost laser-like, not on harms to society as a whole when setting the amount of the award, but on only the parties to the lawsuit.[159]

From this Professor Scheuerman concludes that the ascertainment of a defendant's substantive due process rights "requires an *individual* assessment of punitive damages except where the class shares an identical harm . . . ."[160] She rejects any class action trial plan whereby punitive damages would be treated as a common issue and adjudicated in a bifurcated proceeding (as, for example, was ordered in *Castano* by the trial court) prior to the individual determination of either any merits-based questions relating to a particular claimant's claim or finding of that claimant's own specific compensatory damages:

> [T]he amount of a punitive damages award is a fact-specific inquiry that depends on the specific amount of an individual's compensatory damages award. . . .

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158. Scheuerman, *supra* note 94, at 940. Professor Keith N. Hylton finds implicit within the Court's recent decisions an even more revolutionary message that "class actions are unconstitutional." Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams 2 (Boston Univ. L. Sch. Working Paper Series, L. & Econ. Working Paper No. 07-06, 2007), *available at* http://ssrn.com/abstract_id=977998. He reaches what he calls this "easy" conclusion from *Philip Morris* by arguing that unnamed class members are not really parties to the litigation:

> In the class action lawsuit, the class is only there in theory, not in fact. The only real plaintiffs are the class representatives. If the Due Process Clause does not permit a court to impose a damage award or penalty [on] behalf of "persons who are not before the court", then it would appear to invalidate [all] class action[s].

Id. at 15. This is a pretty extreme reading of cases that did not involve, in any form, class or other representative litigation or any contextually relevant language from the Court's opinions stating anything close to this conclusion. It also ignores the reams of published federal court opinions treating class members as parties to certified class actions.

159. Scheuerman, *supra* note 94, at 905.

160. *Id.* (emphasis added).

> [A]djudicating punitive damages as a common issue before a defendant can challenge an individual class member's underlying entitlement to relief violates the most basic procedural due process guarantees—the defendant's due process right to present defenses to claims against them.[161]

Professor Stier likewise reaches the conclusion that "while *Philip Morris* does not itself put to death mass tort class actions, it does hasten the continuing demise of those mass tort, punitive damages class actions with individualized issues such as decision [sic] causation, medical causation, product use, damages, and choice of law."[162] Professor Stier reaches this grim depiction by linking the Supreme Court's holding that punitive damages must be tied to individual claimant's harms with his assessment that trying as a common class issue punitive damages *prior* to these individual assessments would offend due process:

> Two of plaintiffs' proposals for class-wide punitive damages awards likely fail the due process requirements set forth by the United States Supreme Court. Because determining the compensatory harm involves individual assessments of liability and compensatory damages for each class members [sic], some courts have turned to trial plans that first sought to determine punitive damages for the entire class after hearing evidence only as to the class representatives. Similarly, other plaintiffs' counsel have proposed that the class action jury create a punitive damages multiplier based only on the evidence of class representatives, and that the multiplier subsequently be applied to compensatory damage awards determined for class members. By stating that due process requires punitive damages to be based on the harm to particular plaintiffs whose evidence is before the jury, *Philip Morris* suggests that these punitive-first class trial plans will offend due process—neither the multiplier nor lump-sum approach allows the defendant to offer every available defense, nor provides sufficient information on the extent of harm to those other than the class representatives, such that the punitive award can be said to bear a "reasonable relationship" to compensatory damages.[163]

This attack on what some have termed a "reverse bifurcation" process of deciding punitive damages as a common class issue prior to individual liability and compensatory damages is also joined by Schwartz and Appel.[164] They take

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161. *Id.* at 907–08.

162. Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 433, 458 (2008).

163. *Id.* at 445–46 (citations omitted).

164. *See generally* Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375 (2008).

issue with the practice of trying punitive damages before individual compensatory damages in a class action context:

> Determining punitive damages before liability raises serious constitutional issues. In a series of decisions, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment places procedural and substantive limits on punitive damages awards to protect civil defendants from arbitrary or excessive punishment. A reverse bifurcation procedure violates procedural due process, because it leaves the jury to determine a punitive damages ratio without a nexus to the defendants' conduct toward any particular plaintiff or group of plaintiffs.[165]

For these authors, asking a jury to award punitive damages—or at least a punitive damage multiplier—before a jury determination of individual liability or compensatory damages is akin to the practice *State Farm* and *Philip Morris* condemned of permitting the punishment of tortfeasors for generally being a bad actor or for harm caused to third party "strangers" to the litigation.[166]

In addition to these scholarly attacks on punitive damages following the recent Supreme Court jurisprudence, some lower federal courts have seen in these decisions a justification for denying class certification of some punitive damage cases. A very good recent example of this attitude is evidenced by the Eastern District of Arkansas in *Nelson v. Wal-Mart Stores, Inc.*[167] in which the court refused to certify a punitive damage claim under either Rule 23(b)(2) or (b)(3) because of the presence of a request for punitive damages.[168] Plaintiffs in that case were suing Wal-Mart for racial discrimination in its hiring practices and sought injunctive and declaratory relief along with back-pay and punitive damages.[169] The court believed that both *State Farm* and *Philip Morris* demanded individualized inquiries into each plaintiff's circumstances in order to first determine if each class member could receive any punitive damages and, if so, to determine the appropriate amount:

> Even after such a finding [of engaging in a pattern of discriminatory conduct], a jury would not be able to determine the extent of harm caused by Wal-Mart's conduct, and as a corollary the extent of the need for punishment and deterrence, at the class wide stage without engaging in further individualized determinations. . . . Typically, a court or jury is not

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165. *Id.* at 397 (citations omitted).

166. *Id.* at 400.

167. *See* Nelson v. Wal-Mart Stores, Inc., 245 F.R.D 358, 380 (E.D. Ark. 2007) (certifying a class for classwide liability, declaratory relief, and injunctive relief, but not for punitive damages).

168. *Id.* at 373–78.

169. *Id.* at 374–75.

> able to determine, until [later] which alleged class members were actually harmed by the defendant's pattern of discriminatory acts and which were not. Thus, unless each alleged class member *has actually suffered harm from the pattern of illegal acts*—which is highly unlikely—Wal-Mart would be over-deterred by any class-wide award of punitive damages.[170]

The court used this perceived problem both to defeat certification under Rule 23(b)(2)—concluding that the punitive damage claims predominated over the equitable relief sought—as well as to conclude that class treatment was neither manageable nor superior for purposes of Rule 23(b)(3) certification.[171] Fearing that individual hearings would "swamp the litigation"[172] and defeat the class method as superior to traditional litigation, some other lower federal courts have similarly concurred in rejecting certification under Rule 23(b)(3) due to the presence of a punitive damage claim and in reliance upon the perceived general principle of the individualized nature of a punitive damage inquiry from the Supreme Court's recent decisions in *State Farm* and *Philip Morris*.[173]

C. *The Case for Certification After* Philip Morris

The view that *State Farm* and *Philip Morris* are hostile toward punitive damage class actions is certainly overstated if not misguided. Such views tend to be based upon overbroad interpretations of their application and a failure to appreciate the Supreme Court's deepest concerns underlying these cases. While *State Farm*'s demand for single-digit punitive-to-actual-damage ratios certainly throws a wrinkle into a punitive damage class action trial plan, at its roots *State Farm* reaffirms that the common focus in punitive damage adjudication remains on the defendant and also shows the advantages class

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170. *Id.* at 377–78 (emphasis in original) (citations omitted).

171. *Id.* at 378–79.

172. *Id.* at 379.

173. *See, e.g.*, Williams v. Telespectrum, No. 3:05CV853, 2007 U.S. Dist. LEXIS 78415, at *25 (E.D. Va. June 1, 2007) (refusing to certify Rule 23(b)(3) class seeking statutory and punitive damages for violation of FCRA partly due to due process concerns with class-wide punitive damage adjudication); O'Neal v. Wackenhut Servs., Inc., No. 3:03-CV-397, 2006 U.S. Dist. LEXIS 34634, at *68–69 (E.D. Tenn. May 25, 2006) (determining not to certify a class based, in part, on the requirement that the court hear "extensive individualized damages proof throughout a series of mini-trials" to determine whether each individual class member should receive punitive damages and, if so, in what amount); Carlson v. CH Robinson Worldwide, Inc., No. 02-3780 (JNE/JGL), 2005 U.S. Dist. LEXIS 5674, at *50–51 (D. Minn. Mar. 31, 2005) (indicating that individualized factual determinations required by punitive damages claim would undermine manageability).

treatment offers for punitive damages in scenarios involving multiple potential claimants. Further, *Philip Morris* actually creates a paradoxical problem for traditional one-on-one litigation that virtually disappears in the class action context, thus providing significant new arguments for the superiority of class treatment of punitive damages. Properly understood, these authorities actually create pro-certification arguments that suggest a possible path for resurgence of the Rule 23(b)(3) class action. The Supreme Court may have inadvertently just breathed new life into the punitive damage class action.

A good starting point in understanding the impact of the Supreme Court's jurisprudence on punitive damage limits is to acknowledge that the Court has never applied these due process constraints in the context of a class action. Even Professor Stier, who believes punitive damages class actions are no longer constitutionally viable, concedes that *Philip Morris* "specifically addressed only a plaintiff suing individually, not even commenting on the effect of the personalized punitive damage requirement upon class actions, with its emphasis on representation of one by another."[174] Thus, any commentary declaring that punitive damage class actions are necessarily dead after *Philip Morris* is hyperbole. Those who would, for example, equate unnamed class members with "strangers" to the litigation—whose harm cannot be used to punish a tortfeasor under *Philip Morris*—are obviously misapplying the Court's mandate because class members are clearly bound by the results of a properly certified class action and their claims are finally adjudicated on their behalf with the Court's oversight and permission.[175] Class members in a certified case are hardly strangers to the litigation as the Supreme Court has found the Due Process Clause protects their interests in such proceedings.[176]

With regard to the idea that the Due Process Clause now rejects punitive damage classes, one must bear in mind that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[177] Any perceived slight in a litigant's procedural rights would certainly have to be weighed in view of the procedural context, the historical uses of the procedure in question, the alternatives, and the advantages of the process entailed, for procedural due process seldom demands perfection.[178] "A construction of the

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174. Stier, *supra* note 162, at 434.

175. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that unnamed class members have some due process rights as they are bound by the decision entered on their behalf).

176. *Id.* at 811.

177. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

178. The Supreme Court's seminal opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) illustrates the Supreme Court's flexible approach to procedural due

Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."[179] Opponents of the punitive damage class action are too quick to disregard the many examples of such certified classes and to strain to read between the lines in finding some message of abandonment of the device. As the Supreme Court has not yet attempted to apply *Gore*, *State Farm*, or *Philip Morris* in the Rule 23 context, any such absolute prognostications as to the true impact of this jurisprudence for class actions should be viewed skeptically.

It is also important to note that the Supreme Court has never shied away from a view that punitive damages are about punishing the defendant to deter that defendant and others from future related acts of wrongdoing. In *Philip Morris* the Court reaffirmed that it had "long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'"[180] The Court has also made it clear that in adjudicating claims for punitive damages the primary focus remains on the defendant rather than individual claimants as the most important *Gore* factor is the reprehensibility of the defendant tortfeasor's misconduct.[181] And with respect to ascertaining the degree of reprehensibility, the Court has expressly stated that the focus need not be limited to a particular claimant's harm.[182] Thus, the Court has not retreated from the concept of states' legitimate use of punitive damages for the purpose of providing general deterrence from abhorrent behavior. In crafting the appropriate degree of punitive damages to meet this goal, the focus still remains primarily upon the defendant rather than individual claimants. Each of these considerations still provides ample grounds for arguing that the issue of punitive damage liability for a mass tortfeasor is one shared in common by all claimants, supporting findings of both commonality under Rule 23(a), predominance under Rule 23(b)(3), and offering a general refutation of the suggestion that the Due

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process analysis. In determining what type of notice was due a litigant, the Court emphasized that the inquiry was one of determining the "notice and opportunity for hearing *appropriate to the nature of the case*." *Id.* at 313 (emphasis added). The Court also spoke in terms of "notice reasonably calculated" and of "achieving a balance between these interests in a particular proceeding" in determining when constructive notice would suffice. *Id.* at 314.

179. *Id.* at 313–14.

180. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)).

181. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

182. *Philip Morris*, 127 S. Ct. at 1064.

Process Clause declares punitive damages to be an individualized inquiry limited to one claimant at a time.

As discussed earlier in this article, only a small number of courts, since *Ortiz*, have certified a punitive damage class action under the "limited fund" theory of Rule 23(b)(1)(B).[183] While some of the concerns mentioned by the Supreme Court in *State Farm* and *Philip Morris* arguably imply a possible need for an outside demarcation of total punitive damage liability under the Due Process Clause and thus the legal creation of a de facto "limited fund," there is no current Supreme Court precedent for such certification.[184] And as discussed earlier, it is a very difficult argument to make that any punitive damage class should be recognized as viable under the current prevailing interpretations of the injunctive class procedure of Rule 23(b)(2).[185] In rejecting precisely this argument in a punitive damage case where the trial court had certified a "limited fund" class action under Rule 23(b)(1), the Second Circuit offered a persuasive rationale:

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183. *See supra* text accompanying notes 103–14.

184. *See* Aileen L. Nagy, *Certifying Mandatory Punitive Damage Classes in a Post-*Ortiz *and* State Farm *World*, 58 VAND. L. REV. 599, 601 (2005) (lamenting the fact that the "traditional application of Rule 23(b)(1)(B) and current Supreme Court precedent interpreting the rule may weigh against the certification of mandatory punitive damages classes").

185. *See supra* notes 130–36 and accompanying text. *But cf.* Anderson v. Boeing Co., 222 F.R.D. 521, 541 (N.D. Okla. 2004) (certifying claims for punitive damages in a Rule 23(b)(2) discrimination suit and concluding, in focusing on "the degree of reprehensibility of the defendant's conduct," that the punitive damages claim did not dwell on individual nuances of the class members' claims but on the defendant) (quoting *Gore*, 517 U.S. at 575). Also, in *Rahim v. Sheahan*, No. 99-C-0395, 2001 U.S. Dist. LEXIS 17214 (N.D. Ill. Oct. 18, 2001), the court observed:

> To the extent that due process places a limit on the amount of punitive damages that can be awarded against a defendant in a class action, fairness would suggest that all class members affected by the conduct share in that amount equitably rather than have the identity of those class members who might receive punitive damages turn on the fortuity of whose hearings proceeded first (before the due process limit is reached). Rule 23(b)(1)(B) seems suited to avoiding this latter result, as it authorizes certification to avoid [this type of] risk . . . .

Id. at *52 n.7. Further, the trial judge in *Exxon Valdez* believed that a limited fund could be established with reference to not only a defendant's assets but with reference to the "due process [clause which] places a limit on punitive damages and, in substance, creates a limited fund from which punitive damages may be awarded." Order No. 180 at 8, *In re* Exxon Valdez, No. A89-0095-CV (HRH), 296 F. Supp. 2d 1071 (D. Alaska 2004); *see also* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We Can Get There from Here*, 2 CHARLESTON L. REV. 407, 423–25 (2008) (discussing *Exxon Valdez* and advocating for possible certification of punitive damage cases under limited fund theory).

> The proposed fund in this case, the [presumed] constitutional "cap" on punitive damages for the given class's claims, is a theoretical one, unlike any of those in the cases cited in *Ortiz*, where the fund was either an existing res or the total of defendants' assets available to satisfy claims. The fund here is—in essence—postulated, and for that reason it is not easily susceptible to proof, definition, or even estimation, by any precise figure. It is therefore fundamentally unlike the classic limited funds of the historical antecedents of Rule 23.[186]

Thus, the most viable current path to certification of a punitive damage class remains with a damages class under Rule 23(b)(3).

For the proposed Rule 23(b)(3) class action, which has been this Article's primary focus, how else might the Supreme Court's due process jurisprudence help make the case for certification? First, class certification of a punitive damage class is superior to traditional one-on-one litigation when viewed through the prism of the multiple punishment concern. A major worry the Supreme Court has expressed with the imposition of punitive damages in traditional litigation is the distinct possibility of redundant punishment in multiple, distinct civil cases. This was mentioned in both *Gore* and in *State Farm* as one of the concerns justifying substantive review of punitive damage verdicts for fairness.[187] This potential problem was also front and center in *Philip Morris* when the Court directed State courts to implement procedures (e.g., jury instructions) to ensure that juries were not punishing a defendant in one case for harm caused to someone (i.e. "strangers") other than the claimant in that case.[188] As one observer has concluded:

> Although plaintiffs surely stand to gain enormously from employment of the punitive damage class, defendants stand to lose even more in its absence. . . . In the mass tort context, multiple awards of punitive damages thus threaten to punish defendants multiple times for the same conduct. Without a predictable standard of review, multiple punitive damages claims threaten to unfairly overdeter defendants and offend due process. The Supreme Court's standard of review for punitive damages . . . makes it clear that claim aggregation is the sine qua non of defendants' procedural safeguards. Without claim aggregation, the Supreme Court's punitive

186. *In re* Simon II, 407 F.3d 125, 138 (2d Cir. 2005).

187. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("Punishment [considering harm not actually caused to plaintiffs] creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.").

188. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064–65 (2007).

> damages jurisprudence does not serve any due process protecting purpose. The punitive damages class is the best, and surest, option for protecting defendants' rights against overkill damages and for safeguarding plaintiffs' interests in equitable distribution.[189]

The American Law Institute similarly recognizes the significance of this redundant punishment danger by offering the following illustration:

> Problems arise especially in the context of product litigation alleging defective designs or warnings. . . . If a defectively designed product is unduly hazardous, it may injure hundreds or even thousands of purchasers and users. If liability for punitive damages can be established for *any* of the resulting tort claims, then such an award should be available for *all* the claims arising out of the single corporate misdeed. Yet the consequence is that beyond compensatory damages it must pay for the actual losses of its victims, the firm will be penalized again and again for a single wrongful judgment or action, a sanction that is antithetical to the protection against double jeopardy that characterizes overtly penal regimes. In addition, substantial payments for the earlier punitive damage awards may strip the firm of its insurance coverage and assets, thus endangering the ability of later claimants to realize their fundamental tort right to compensatory redress.[190]

While not providing an absolute fix for the redundant punishment scenario, it is clear that class treatment of punitive damages would result in far fewer juries attempting to punish a tortfeasor for the same misconduct.[191]

The second major way in which the recent Supreme Court's punitive damage jurisprudence may be used to justify certification of punitive damage classes lies in recognition of the paradox of the *Philip Morris* procedural mandate. The dictate by the Supreme Court to trial courts throughout the land is that the jury may consider harm to third-parties only for purposes of reprehensibility but not for the purpose of punishing the tortfeasor defendant. Apparently permitting evidence of such harm and arguments by plaintiff's counsel using this evidence triggers a constitutional duty to provide some procedural protection to the defendant from a jury's possible misuse of the evidence. Of course the only device mentioned by the Supreme Court was jury instructions and on this point the Court did not see fit to approve any particular

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189. Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1149 (2004).

190. 2 AM. LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260–61 n.5 (1991) (emphasis in original).

191. Of course, Rule 23(b)(3) judgments will not bind an absent class member who has availed herself of her procedural right to "opt out" of the class and pursue her own traditional lawsuit. *See* FED. R. CIV. P. 23(c)(2)(B) (discussing opting out of a class action).

language.[192] At a minimum, this ambiguity creates a significant risk of future reversals of punitive damage verdicts based upon nit-picky review of jury instructions. But the problem is even more profound than that because the jury would consider reprehensibility only for purposes of entering a punitive damage verdict and yet the Supreme Court tells us they should not punish the defendant in this manner. As Professor Michael Allen aptly sees this pickle:

> No doubt, the Court—as well as scores of state and federal judges around the country—will need to wrestle with *Philip Morris*'s Delphic command concerning the jury's use of "non-party" evidence. I have no confidence that the courts will be able to craft a solution to the puzzle the Supreme Court has created. I am relieved, however, that I will not be a trial judge trying to implement that decision.[193]

The paradox created by the Supreme Court's opinion in *Philip Morris* is solved, at least in mass tort scenarios, by resort to the class certification method of group litigation. By converting other victims of the tortfeasor's misconduct from "strangers" into class members, a trial court removes the *Philip Morris* shackles over the jury's use of evidence of the harm caused to them. One scholar refers to this as the "obvious solution to the 'punishment for harm to plaintiffs only' dictate of *Philip Morris*."[194]

Thus, mass tort scenarios involving misconduct by a defendant amounting to malice or gross negligence are currently fraught with a number of inexorable problems—(1) redundant punitive damage punishment that *Philip Morris* has not cured effectively; (2) the current trial court dilemma of figuring how to walk the thin line of permitting evidence of harm to strangers without permitting punishment directly based upon that same evidence; (3) the practical risk of depletion of assets for claimants that lose the race to judgment; and (4) the risk of under-deterrence when victims of a tortfeasor's misconduct fail to sue. Given these problems associated with the adjudication of punitive

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192. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) ("For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. . . . The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer–risks of arbitrariness, uncertainty and lack of notice–will be magnified.").

193. Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 380 (2008). Professor Hylton argues that *Philip Morris* will have the following impact: "[C]reating confusion and encouraging dishonesty, the rule of *Philip Morris* is unlikely to provide any substantial benefit to potential defendants." Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams 16 (Boston Univ. Sch. of Law, Working Paper No. 07-06), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977998.

194. Cabraser & Nelson, *supra* note 185, at 421.

damages—and actually exacerbated by the Supreme Court's due process jurisprudence—the prospect of class-wide resolution of punitive damages offers a procedure that is not only "superior" to that of traditional litigation but seems to be custom made for resolving the problem of civil punishment.

The American Bar Association apparently agrees, as it has recommended in the past that a defendant faced with multiple punitive damage claims be permitted to request class treatment in federal court.[195] Others also see class certification as the remedy for some of these ailments:

> When punitive damages are sought through adjudication of individual claims, it is feared that multiple claims brought by individual plaintiffs will over-punish defendants while giving victims who "race to the courthouse door" a windfall not available to later claimants. For years, courts have struggled with concerns about duplicative punishment of defendants and the equitable distribution of such awards among plaintiffs. With the recent influx of mass tort cases dealing with products liability, courts can no longer ignore these issues.
>
> The concept of a punitive damages class has emerged as a potential means of providing distributive justice to plaintiffs, while still protecting defendants from multiple, successive punishments.[196]

But what about the wrinkle alluded to earlier caused by the Supreme Court's decisions in *Gore* and *State Farm* that reject the entry of a punitive damage judgment in a vacuum removed from consideration of a claimant's own actual harm? Some courts have referred to this as the "individualized" inquiry that argues against class-wide determination of punitive damages and, thus, defeats a showing that common issues predominate in a proposed class action.[197] Of course, for every court that has declared class treatment of punitive damages no longer constitutional, one can find another example of a court detecting no constitutional barriers to treating punitive damages as a common class issue.[198] The issue then turns to whether there is any valid

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195. *See generally* AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE OF PUNITIVE DAMAGES, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 71–85 (1986). The American College of Trial Lawyers has made similar recommendations. *See generally* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (1989).

196. Nagy, *supra* note 184, at 600.

197. *See supra* note 173 (listing cases wherein the courts refused to certify classes because of individualized punitive damage determinations).

198. *See, e.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1241–43 (9th Cir. 2007) (finding that class treatment of punitive damages in "largest certified class in history" sex discrimination case was appropriate), *superseded by* 509 F.3d 1168, 1188 (9th Cir. 2007); Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 643 (N.D. Cal. 2007) (finding punitive damages were

constitutional objection to trying as a common issue a punitive damage claim *prior* to consideration of the various class members' claims involving damages and individual liability questions. Clearly if punitive damages are so tied to individual class members' actual damages that they must be determined at the same time, this creates powerful arguments against class treatment.

One must be careful to avoid reading into the Supreme Court's due process cases more restrictions on trial court dominion over procedures than necessary. *Gore*, *State Farm*, and *Philip Morris* clearly establish that a punitive damage judgment cannot be entered against a defendant in a vacuum, devoid of any relationship to a plaintiff's actual injury. Yet, none of these cases have intimated that the two damage issues must be tried concurrently with one another. Thus far, the Supreme Court has merely expressed a concern that there exist a reasonable relationship between punitive damages and actual damages and that no punitive damage judgment should be entered without a defendant having an "opportunity to present every available defense."[199]

While a plausible argument might be made that a class-wide lump sum punitive damage jury verdict might be objectionable under the *State Farm* dictates as too far removed from any individual harm, there is no compelling reason why the due process clause would create a barrier to trial courts bifurcating the punitive damage issue and allowing the jury in the first phase to enter as its verdict a multiplier of punitive-to-actual-damages. In the subsequent individual trials, the juries could rule on the merits of any individual liability matters and find each class member's actual damages, thus permitting the trial court—upon engaging in the *State Farm*-mandated analysis—to then enter the final judgment using the original jury's multiplier. This procedure expressly links any punitive damages to the actual damages found for each individual class member and permits the defendant to try any individual liability issues before the entry of any final judgment, thus satisfying the twin concerns of the Supreme Court. Further, this procedure has been adopted and approved by various lower federal courts and some state courts around the country as consistent with the due process dictates from the Supreme Court.[200]

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suitable for certification because a Title VII claim "focuses on the conduct of the defendant and not the individual characteristics of the plaintiffs"); Hilao v. Estate of Marcos, 103 F.3d 767, 780–82 (9th Cir. 1996) (approving certification of punitive damages class action as consistent with *Gore*); Watson v. Shell Oil, 979 F.2d 1014, 1020–21 (5th Cir. 1992) (affirming trial court certification order of punitive damage case).

199. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (quoting Lindsey v. Normet, 405 U.S. 56 (1972)).

200. *See, e.g.*, Watson v. Shell Oil, 979 F.2d 1014, 1016 (5th Cir. 1992) (affirming trial court certification order that called for bifurcated trial plan with punitive damage trial to set a

For example, in the *In re Tobacco Litigation (Personal Injury Cases)*[201] the West Virginia Supreme Court specifically approved of a bifurcated punitive damage class action trial.[202] The defendant raised the due process objections articulated above, which the Court rejected.[203] The concurring opinion of Justice Starcher, in particular, provides a thoughtful refutation of any objections by defendants to using a multiplier approach to a bifurcated punitive damage class action trial and is worth setting forth in full:

> The defendants, however, insist that the bifurcation of these cases is improper. The defendants argue that they are entitled, pursuant to the due process clauses of the State and federal *Constitutions*, to try the question of punitive damages one case at a time, so that the jury can assess each defendant's culpability to each plaintiff individually. The defendants insist that the only way punitive damages may be reasonably related to the potential harm caused to an individual plaintiff is by a jury hearing evidence about both a defendant's conduct and the actual or potential harm to the plaintiff at the same time. In sum, the defendants assert that punitive damages can never be assessed . . . in a class action under Rule 23.
>
> The inherent flaw with the defendants' argument is the assumption that due process, particularly to protect property rights, is a concrete concept. Instead, what process is due under the due process clause is determined under a sliding scale, and changes with the facts of each case. . . .
>
> The defendants argue that [*State Farm*] mandates that all evidence of punitive damages must be presented to the jury and heard in relation to the injury caused to each specific plaintiff. . . . The inevitable result of accepting the defendants' argument is that it creates a judicial administrative nightmare. The same lawyers would be working for years,

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multiplier ratio for punitive-to-actual damages, and refuting defendant's contentions of due process violations); *In re* Tobacco Litigation (Personal Injury Cases), 624 S.E.2d 738, 739 (D. W. Va. 2005) (affirming certification of punitive damage class action and trial plan); *see also* Hilao v. Estate of Marcos, 103 F.3d 767, 780–82 (9th Cir. 1996) (approving trying punitive damages prior to compensatory damages in class action as consistent with *Gore*); Jenkins v. Raymark, 782 F.2d 468, 474–75 (5th Cir. 1986) (approving certification of Rule 23(b)(3) asbestos case with a common trial on, among other things, punitive damages prior to any individual damage trials). *Cf. In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358 (SAS), M21-88, 2007 U.S. Dist. LEXIS 45543, at *18–22 (S.D.N.Y. June 15, 2007) (allowing bifurcated trial with punitive damage ratio being set at first set of trials).

201. *In re* Tobacco Litig. (Personal Injury Cases), 624 S.E.2d 738, 771 (D. W. Va. 2005) (determining that the Due Process Clause, as interpreted by *State Farm*, does not preclude a bifurcated punitive damage class action trial).

202. *Id.*

203. *Id.* at 740–41.

> probably decades, to present the same witnesses to testify using the same documents in each separate plaintiff's case.
>
> If the majority opinion had accepted this reasoning by the defendants, we would essentially be saying that the more people a defendant injures with its defective product, the less likely the defendant is going to have to pay compensatory or punitive damages to the people injured by the product. The defendant would therefore be accorded a right to thousands upon thousands of individual trials that would cause the legal system to grind to a halt. At the same time, we would be telling the individual plaintiffs that they have no rights to any process—because of administrative gridlock, the individual plaintiffs would *de facto* be denied their day in court. The majority opinion rightly rejected this position.[204]

The irony in this debate is that it is the same defendant tortfeasors who cry out against class treatment of punitive damages who are, in fact, the beneficiaries of significant due process protection through class adjudication of their punishment rather than facing the alternative of repeated, separate punitive damage verdicts inflicted by separate juries for essentially the same conduct. The fact that defendants continue to argue against class treatment of punitive damages manifests a cynical attempt to avoid class treatment so as to create a litigation gridlock in which to hide from judgment—hardly a goal worthy of the Constitution's respect and certainly not a result preordained by the flexible and practical dictates of the Due Process Clause.

IV. Conclusion

Gore, *State Farm*, and *Philip Morris* tend to be viewed both too broadly and too narrowly. On the one hand, some commentators and courts believe these cases inevitably signal the end of the punitive damage class action due mostly to a perceived individualistic focus upon the impact of the tortfeasor's misconduct upon a single particular plaintiff. This is too expansive a reading of these cases, particularly since the Supreme Court's recent rulings on the due process problems involving punitive damages have not come in the context of a class action. Further, the Court, even while developing the substantive and procedural limits on punitive damages, has expressly and consistently articulated that its view of punitive damages has remained unchanged—that the primary focus remains on the tortfeasor (i.e. reprehensibility) and that the primary purpose is fixed upon punishing that tortfeasor to deter it and others from continuing on such a course of future misconduct. If not for an

204. *Id.* at 748–49 (Starcher, J., concurring) (emphasis in original).

understanding of this general deterrence principle, the Court would never have struggled to permit any continued use of evidence of harm to third parties in *Philip Morris*.

On the other hand, many commentators and courts are myopic in their failure to recognize in these decisions their demonstration of the superiority of the class joinder device in Rule 23(b)(3) cases—a consequence that argues strongly for the enhanced utility of class actions in punitive damage cases. In addition to providing other systemic relief, the class device offers the best hope for a solution to the redundant punishment problem that was itself the original impetus for the Court's initial foray into substantive due process for punitive damages and also renders moot the paradox of the strained *Philip Morris* procedural due process holding. Properly viewed, the Supreme Court has offered a route back toward the viable use of the class action device for resolving mass punitive damage disputes.

NOTES