

The Conservative Split on Punitive Damages

*State Farm Mutual Automobile Insurance Co.
v. Campbell*

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I. Introduction

When a supposedly right-leaning court discovers that diversity is a compelling state interest,¹ reinforces an unenumerated right to privacy,² and expands the federal government's authority to override state sovereign immunity,³ it is hard to find evidence that Republican-appointed justices did much to advance the party's conservative agenda. The most Republican-friendly of this term's opinions is probably the Court's reversal of a bloated \$145 million punitive damages award against State Farm Insurance.⁴ Ironically, that holding withstood separate dissents from the Court's conservative superstars, Justices Antonin Scalia and Clarence Thomas. Liberal Justice Ruth Bader Ginsburg also dissented. The same three justices had dissented from the Court's 1996 decision overturning a punitive damage award against BMW.⁵ In that case, Chief Justice William H. Rehnquist dissented as well. But in *State Farm*, he switched sides without explanation.

That's a healthy sign, say many Court-watchers. It suggests that law and politics operate, as intended by the Framers, within separate realms. Perhaps so. An alternative explanation, however, is that the current Court has no ideological compass. That may be the lesson of the *State Farm* case, in which the Court grappled once again with

¹*Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

²*Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

³*Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003).

⁴*State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).

⁵*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

federal intervention, via the Fourteenth Amendment's Due Process Clause, to prevent states from violating substantive rights that some justices believe to be secured by the U.S. Constitution.

Contrasting the majority opinion in *State Farm* with the terse dissents by Scalia and Thomas, I hope to shed light on the battle between conservatives who want to rein in runaway punitive damage awards and other conservatives who find no federal judicial power to do so. First, I set the stage with a few comments on the purpose of punitive damages, the need for reform, and the Court's major stab at the problem in the *BMW* case. Then I summarize the facts in *State Farm*, the majority holding, and the Ginsburg dissent, which accuses the Court of usurping legislative powers. Next, elaborating on the Scalia and Thomas dissents, I explore the controversy over the Court's substantive due process jurisprudence. Finally, I offer a few recommendations to restore sanity in the punitive damages arena while honoring traditional notions of federalism.

II. Background

A. *The Purpose of Punitive Damages*

Compensatory damages are supposed to redress any loss that the plaintiff suffers because of the defendant's wrongful conduct. Punitive damages serve a different purpose. They "are aimed at deterrence and retribution."⁶ The logic goes like this: A defendant whose misbehavior causes injury will neither be adequately punished nor deterred from similar misbehavior in the future if he is held accountable only for the losses he causes. That's because some wrongful acts are never litigated and others are incorrectly decided in the defendant's favor. Proper deterrence, therefore, has to make adjustments for an imperfect system of compensation. In *State Farm*, for example, the Utah Supreme Court relied on trial testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability."⁷

Naturally, there are also errors that favor plaintiffs, including holding a defendant liable for conduct that is legally permissible. Prominent Washington, D.C., lawyer C. Boyden Gray describes the

⁶Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

⁷Quoted in *State Farm*, 123 S. Ct. at 1519.

ideal tort system, along with the risks of damage awards that are too low, too high, or capricious.

[T]he tort system should perform two functions: compensate victims and deter potentially dangerous behavior. . . . If these principles are applied correctly, torts are minimized, because any benefits of such behavior would be eliminated by the expected costs of the damage award. When awards are too low, bad actors are not deterred. . . . Awards that are too large pose problems as well, as costs increase and products are no longer available. When awards are arbitrary, it becomes impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims.⁸

Paradoxically, most states set no limit on punitive damages for civil acts, yet punishment for criminal acts is strictly limited. One would think that the goal of deterrence would be more compelling in the criminal sphere, where injuries to victims of murder, rape, and robbery are not ameliorated by the social utility of the acts committed. In the civil sphere, by comparison, the product or service that is deterred may have considerable value. Respected law and economics scholars have noted that “overdeterrence is a real danger when punitive damages are available. . . . A doctor who has been negligent once may nonetheless provide useful medical care.”⁹

Moreover, when punitive damages are unbounded and unpredictable, many firms will avoid making rational risk-assessment calculations. That result—the suppression of cost-benefit analyses—is another downside of overdeterrence. “[A]ny consideration of risk in product design can later be interpreted by a jury as evidence that the firm knew it was producing a risky product and ‘traded profits for lives.’”¹⁰

Thus, punitive damages can be an appropriate means of inhibiting injurious behavior or an inappropriate device that restrains trade in valuable goods and services. Tort reform advocates argue that judges

⁸C. Boyden Gray, *Damage Control*, WALL STREET JOURNAL, Dec. 11, 2002, at A18.

⁹Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUPREME COURT ECONOMIC REVIEW 179, 184–85 (1997).

¹⁰*Id.* at 191.

and juries have allowed punitive damage awards to explode without regard to their harmful impact on the economy and without a rational link to the real need for deterrence. The evidence seems to support that view.

B. The Need for Reform

Consider the recent *Engle* tobacco class action litigation,¹¹ in which an inflamed Florida jury resolved to pilfer \$145 billion in punitive damages from hapless cigarette companies. Trial judge Robert Kaye, in the face of a contrary opinion from the state's attorney general, permitted the jury to decide punitive damages for the entire class after hearing evidence on only three of the claimants.¹² The selected plaintiffs were not the designated class representatives; yet they were plucked from among the class members, with the judge's consent, because the lawyers knew that the three case histories would resonate with the jury.

No one knew the names of the other class members. No one even knew how many smokers were in the class; estimates ranged from 30,000 to nearly a million. No one knew anything about their alleged injuries or how much if any compensatory damages might be warranted. Yet Judge Kaye approved an award of punitive damages in the aggregate, as if it did not matter whether 50,000 plaintiffs had a raspy throat or 500,000 died from lung cancer, whether they started smoking as kids or as consenting adults, and whether they were ever influenced by the industry's so-called deceptive ads. Ultimately, a Florida appellate court decertified the class and reversed the punitive damages award because there had been no prior determination of compensatory damages. Still, the *Engle* case demonstrates the enormous potential for mischief when state courts impose punitive damages on out-of-state defendants.

If the *Engle* fiasco were the only evidence that punitive damage awards are out of control, that would be bad enough. But there's more. According to the *National Law Journal*, the largest punitive award in 2002 was \$28 billion. Five verdicts exceeded \$500 million

¹¹See *Liggett Group v. Engle*, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. May 21, 2003).

¹²For further commentary on the *Engle* case, see Robert A. Levy, *Tobacco Class Decertified in Florida: Sanity Restored*, THE HILL, June 11, 2003, http://www.thehill.com/news/061103/ss_tobacco.aspx.

and 22 exceeded \$100 million. The total of the top 100 verdicts for 2002 was nearly three-and-a-half times the total for 2001. Longer term, 38 verdicts topped \$20 million in 1991; 66 verdicts were more than \$20 million in 1996. But in 2002, \$20 million did not make the top 100 list.¹³ No doubt, nine U.S. Supreme Court justices were aware of the problem—if not the specifics, at least the general trend. Perhaps that's why, seven years ago, the Court took a first step toward reform.

C. *BMW v. Gore*

When Dr. Ira Gore discovered that his new BMW had been repainted, he sued the American distributor for fraud. BMW conceded that its policy was not to notify dealers or consumers if repairs for predelivery damage to a new car cost less than 3 percent of the suggested retail price. Gore's car, repainted for approximately \$600, had originally cost \$40,000. On the basis of testimony that a repainted car would lose 10 percent in value, an Alabama jury found BMW liable for \$4,000 in compensatory damages, then imposed an additional \$4 million in punitives, computed by multiplying the compensatory award by roughly 1,000 similar sales nationwide. On appeal, the Alabama Supreme Court concluded that only in-state sales should have been considered, then reduced the punitive award to \$2 million, without explaining how it reached that result. The U.S. Supreme Court declared that state sovereignty and comity prevented one state from imposing its own policy choices on other states. In remanding the case, the Court held that the unwarranted award violated BMW's rights under the Due Process Clause of the Fourteenth Amendment.

First, said the Court, Gore's injury was purely economic. None of the aggravating factors associated with reprehensible conduct by the defendant was present. Second, the ratio of punitive damages to compensatory damages was 500 to 1, which was clearly outside the acceptable range. Third, Alabama's fine for comparable misconduct was only \$2,000—an amount so much lower than the punitive award that out-of-state defendants would not have fair notice of their exposure to a multimillion dollar sanction.

¹³David Hechler, *Tenfold Rise in Punitives*, NATIONAL LAW JOURNAL, Feb. 3, 2003, at C3.

BMW's three-part test—"the degree of reprehensibility . . .; the disparity between the harm . . . suffered [and the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases"¹⁴—provided the business community with a framework, however vague, and offered some hope that the punitive damages crisis was defused. Regrettably, it did not turn out that way. In the seven years since *BMW*, punitive awards have continued their upward spiral. The Court's initial step was not enough. It was time for a second intervention.

III. The State Farm Opinion

A. *The Facts*

Curtis Campbell, trying to pass six vans on a two-lane highway, faced a head-on collision with an oncoming car driven by Todd Ospital. To avoid a collision, Ospital swerved, lost control of his car, and hit Robert Slusher, who suffered permanent disabling injuries. Ospital was killed. Campbell was unharmed.

Campbell's insurer, State Farm, rejected settlement proposals from Ospital and Slusher for the policy limit of \$50,000. Instead, State Farm decided to litigate, assuring Campbell and his wife that their "assets were safe," they had "no liability," and they did not need separate counsel. The jury had other ideas, however, and found the Campbells liable for roughly \$186,000. Initially, State Farm refused to cover the excess liability of \$136,000 and advised the Campbells to "put for sale signs on your property to get things moving." The Campbells then hired their own lawyer and appealed the jury verdict. They lost in the Utah Supreme Court, but State Farm changed its mind anyway and agreed to pay the entire judgment.

Still, the Campbells sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. Because State Farm had ultimately paid the full \$186,000, a Utah trial court ruled in favor of the insurer. That ruling was overturned on appeal and the case was returned to the trial court, which then determined that State Farm's refusal to settle was unreasonable.

Next, the trial court was to address fraud, emotional distress, and damages. But meanwhile the U.S. Supreme Court had decided *BMW*. In that case, the Court disallowed evidence of out-of-state conduct

¹⁴*BMW*, 517 U.S. at 575.

that was lawful where it occurred and had no impact on in-state residents. Based on *BMW*, State Farm asked the trial court to exclude evidence of conduct in unrelated cases outside of Utah. The court denied that request and proceeded to weigh State Farm's alleged fraudulent practices nationwide—in particular, the company's "Performance Planning and Review" (PPR) program that was designed to meet fiscal goals by capping payouts. Most of the PPR practices had nothing to do with third-party automobile insurance claims like those arising out of Campbell's negligence. Nonetheless, the jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the judge reduced to \$1 million and \$25 million, respectively. The Campbells and State Farm both appealed.

Purporting to apply *BMW*'s three guideposts, relying on evidence about State Farm's PPR policy, and considering State Farm's "massive wealth," the Utah Supreme Court reinstated the \$145 million punitive damages award.¹⁵

B. The Majority Opinion

The reinstatement was short-lived. Justice Anthony Kennedy, writing for a six-member majority of the U.S. Supreme Court, put it bluntly: "[T]his case is neither close nor difficult. It was error to reinstate the jury's \$145 million punitive damages award."¹⁶ The high Court returned the case to Utah with this advice: "An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."¹⁷

Then Kennedy proceeded to address in some detail the first two guideposts of *BMW v. Gore*—the reprehensibility of the conduct and the ratio of punitive to compensatory damages. He also discussed at length the propriety of evidence related to the defendant's out-of-state conduct and net worth. As to *BMW*'s third guidepost, comparable fines, Kennedy quickly deduced that it provided no support for the *State Farm* award.

¹⁵Campbell v. State Farm Mutual Automobile Insurance Co., 65 P.3d 1134 (2001).

¹⁶*State Farm*, 123 S. Ct. at 1521.

¹⁷*Id.* at 1526.

[W]e need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, an amount dwarfed by the \$145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.¹⁸

1. *Reprehensibility and Out-of-State Conduct.* To frame his discussion of reprehensibility, Kennedy first laid out the pertinent criteria: whether the harm caused was physical as opposed to economic; whether the wrongful behavior reflected an indifference to or a reckless disregard of the health or safety of others; whether the plaintiff was financially vulnerable; whether the conduct was recurring or an isolated incident; and whether injury arose from intentional malice or mere accident.¹⁹

Weighing the various factors, Kennedy concluded that the Utah courts were justified in awarding punitive damages, but "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."²⁰ That conclusion stemmed in major part from the state courts' misplaced reliance on State Farm's dissimilar out-of-state conduct. Essentially, Kennedy agreed with the stance taken by an alliance of insurance trade associations representing the major property and casualty insurers. In their friend-of-the-court brief, the insurers cautioned, "When the punitive damage case stops being about the harm done to a plaintiff and becomes an indictment of an insurer's nationwide practices involving policyholders in other states, it essentially becomes a nationwide class action without the class and without protections afforded to class members and defendants."²¹

¹⁸*Id.* at 1526 (citation omitted).

¹⁹*Id.* at 1521.

²⁰*Id.*

²¹Quoted in Charles E. Boyle, *Campbell vs. State Farm: U.S. Supreme Court May Resolve Issue*, INSURANCE JOURNAL, Sept. 16, 2002, <http://www.insurancejournal.com/magazines/west/2002/09/16/features/23288.htm>.

Seven years earlier, the *BMW* Court had said in nonbinding language that punitive damages should not be used “with the intent of changing the [defendant’s] *lawful* conduct in other states.”²² Kennedy followed that counsel; he reaffirmed that “A State cannot punish a defendant for conduct that may have been lawful where it occurred.”²³ Then he addressed the question that *BMW* had not addressed: whether punitive damages could be used to deter *unlawful* conduct in other states. “Nor, as a general rule,” stated Kennedy, “does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”²⁴

In other words, out-of-state conduct should not itself be punished, whether lawful or unlawful. Nonetheless, Kennedy added, it may assist the judge or jury in assessing the reprehensibility of similar in-state conduct for which the defendant may be liable. “[O]ut-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is [unlawful], but that conduct must have a nexus to the specific harm suffered by the plaintiff.”²⁵

The key to Kennedy’s reprehensibility analysis is the similarity between in-state and out-of-state acts. “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business,” he remarked.²⁶ That does not mean recidivists must be treated the same as first-time offenders. Ordinarily, recidivism is evidence of reprehensible behavior. But, “in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.”²⁷ While the prior acts do not have to be identical, noted Kennedy, the Utah court had allowed evidence “pertaining to claims that had nothing to do with a third-party lawsuit.”²⁸ The Campbells had shown no conduct by State Farm similar to that which harmed them.

²²*BMW*, 517 U.S. at 572 (emphasis added).

²³*State Farm*, 123 S. Ct. at 1522.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 1523.

²⁷*Id.* (quoting *BMW*, 517 U.S. at 577).

²⁸*Id.* at 1523.

2. *The Punitive-to-Compensatory Ratio.* Turning to the 145-to-1 ratio of punitive-to-compensatory damages, Kennedy made it clear that the Utah courts had overreached. He did not, however, impose a bright-line ratio, although he did volunteer that, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”²⁹ That guideline is somewhat elastic. “[R]atios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”³⁰

Applying that framework to the injuries suffered by the Campbells, Kennedy wrote:

The compensatory award in this case was substantial; the Campbells were awarded \$1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. . . . Much of the distress was caused by the outrage and humiliation the Campbells suffered. . . . Compensatory damages, however, already contain this punitive element.³¹

Future plaintiffs will find little to cheer about in Kennedy’s explanation. But he did hint at one qualification: The Court was dealing with a case in which only economic, not physical, harm had occurred. That suggests the Court might condone a more generous allowance for punitive damages in product liability cases involving injury or death. Nevertheless, if trial courts embrace the *State Farm* ratio guideline—punitive damages roughly bounded by an upper limit of 10 times compensatory damages—the impact on dollar awards could be substantial. Among the *National Law Journal*’s top 100 verdicts

²⁹*Id.*

³⁰*Id.* (quoting *BMW*, 517 U.S. at 582).

³¹*Id.* at 1524–25.

for 2001 and 2002, 31 percent of the punitive awards exceeded 10 times the corresponding compensatory award. In 2001, 24 percent of the 38 punitive awards had double-digit ratios, with a high of 500 to 1. In 2002, it was 39 percent of the 41 punitive awards, with a high of 1,145 to 1.³²

3. *Deep Pockets*. One other aspect of the *State Farm* opinion has especially troubled plaintiffs' attorneys: the Court's apparent reluctance to consider the defendant's net worth. Trial lawyer Barry Knopf, interviewed just after the opinion was issued, said he was concerned that the high Court did not tie damage awards to the size of the defendant. "The purpose of punitive damages is to deter certain types of conduct . . . and what's important to a very small corporation is peanuts to State Farm," he said.³³

True enough, at the margin, a dollar has less utility to a billionaire than to a blue-collar worker. Nevertheless, courts are probably ill-equipped to engage in the tricky business of comparing interpersonal utility functions. If courts were to perform that task, damages would be based not only on what the defendant did but on who he is. That said, courts are already in the business of measuring utility when they award compensatory damages for pain and suffering. For instance, a wrongful act resulting in the loss of a dog owned by a breeder would almost certainly not generate the same pain-and-suffering award as the same act causing the loss of a cherished pet.

The Court, in deemphasizing the importance of the defendant's net worth, neither accepted nor rejected utility as a basis for punitive damages. Instead, Kennedy adopted a more prosaic view of the matter: "[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences."³⁴ He also noted that State Farm's assets are what other insured parties in Utah and elsewhere must rely on for payment of

³²Marcia Coyle, *New Battles to Come over Punitives Ruling*, NATIONAL LAW JOURNAL, Apr. 214, 2003, at A1.

³³Quoted in Edward Walsh & Brooke A. Masters, *Justices Overturn Big Jury Award*, WASHINGTON POST, Apr. 8, 2003, at E1.

³⁴*State Farm*, 123 S. Ct. at 1520 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

claims. Accordingly, he concluded, “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”³⁵

Kennedy’s statement was promptly spotlighted by the media and legal practitioners. Respected *New York Times* reporter Linda Greenhouse proclaimed, “The most significant departure in the 6-to-3 decision was the court’s declaration that juries should generally not be permitted to consider a defendant’s wealth when setting a punitive damage award.”³⁶ Evan Tager, a D.C. lawyer who helped write the amicus brief filed by the U.S. Chamber of Commerce, rejoiced, “The Court has basically rendered impotent the issue of wealth as a way to jack up awards.”³⁷ *Findlaw* columnist Andy Sebok stated, less hyperbolically, “[S]ince the Court decided *BMW v. Gore*, the idea that punitive damages should be used to ‘send a message’ to corporate America has been used in closings in numerous jury trials around America. . . . *State Farm* should go a long way to slowing down that trend.”³⁸

Sebok’s tempered perspective is probably more accurate. By declaring that a defendant’s wealth cannot justify an otherwise unconstitutional punitive damages award, the Court left ample wiggle room for trial courts and juries. Even if Kennedy’s 10-to-1 ratio of punitive-to-compensatory damages were a rigid upper constraint, an award somewhere between zero and ten times a dollar amount that included both economic losses and pain and suffering might still be deemed constitutional. Within that expansive range, net worth evidence can legitimately be used by a jury to decide on a specific punitive award.

If deterrence is a valid objective of tort law—a provocative topic for another day—then the defendant’s wealth is a sensible factor to be weighed. In that respect, the Court may have gotten it right. Evidence of net worth is still admissible, but trial courts are on notice that appellate courts will scrutinize large punitive awards for

³⁵*Id.* at 1525.

³⁶Linda Greenhouse, *Justices Limit Punitive Damages in Victory for Tort Revision*, *NEW YORK TIMES*, Apr. 8, 2003, at A16.

³⁷Quoted in Tony Mauro, *Damage Control on Punitives*, *CORPORATE COUNSEL*, June 2003, at 121.

³⁸Anthony J. Sebok, *The Supreme Court’s Recent Bombshell Punitive Damages Decision: Its Important Holdings and Implications*, *FINDLAW’S LEGAL COMMENTARY*, Apr. 21, 2003, <http://writ.news.findlaw.com/sebok/20030421.html>.

indications of anti-business bias, above all if the defendant is out of state.

C. Ginsburg Charges Judicial Activism

That brings us to the dissenting opinions. The longest of the dissents, by Justice Ginsburg, is discussed below. Then, in the succeeding section on “Substantive Due Process,” the concerns of Justices Scalia and Thomas are addressed in some detail.

Justice Ginsburg raises two principal objections. First, she disagrees on the facts: “[O]n the key criterion ‘reprehensibility,’ there is a good deal more to the story than the Court’s abbreviated account tells.”³⁹ More specifically, said Ginsburg, the jury had ample basis to conclude that the Campbells’ travails were directly related to State Farm’s PPR profit scheme. Because of that connection, “it becomes impossible to shrink the reprehensibility analysis to this sole case.”⁴⁰

Second, Ginsburg balks at the “Court’s substitution of its judgment for that of Utah’s competent decisionmakers.”⁴¹ Referring back to her 1996 dissent in *BMW*, Ginsburg cautioned, “Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court’s swift conversion of those guides into instructions that begin to resemble marching orders.”⁴² If the Utah legislature or the Utah Supreme Court had decided to set single-digit and 1-to-1 punitive damage benchmarks, she added, that would have been within their purview. But “a judicial decree imposed on the States by this Court . . . seem[s] to me boldly out of order.”⁴³

Undoubtedly, the Court does assume a quasi-legislative role when it establishes guidelines for punitive damages. That role evidently bothers some liberals, like Ginsburg, some of the time—like when a federal court overturns a state’s huge award against a corporation that has plainly misbehaved. But concern over judicial usurpation of legislative authority is more often associated with conservatives who reflexively rail against “judicial activism.” Columnist George Will, although not disposed to reflexive railing, puts it this way:

³⁹*State Farm*, 123 S. Ct. at 1527 (Ginsburg, J., dissenting).

⁴⁰*Id.* at 1530.

⁴¹*Id.* at 1527.

⁴²*Id.* at 1531.

⁴³*Id.*

“What, other than the justices’ instincts, provides criteria of proportionality and arbitrariness? . . . And what principle makes the justices’ instincts superior to the jury’s . . .? Furthermore, even if the jury’s award was unjust, the idea that ‘unjust’ and ‘unconstitutional’ can be synonymous gives [the Court] a license to legislate.”⁴⁴

Rigorously applied, however, the Will formulation might even preclude judicial review. Obviously, some unjust outcomes are also unconstitutional. Judicial restraint does not consist in deferring to a legislature that has exceeded its constitutional authority. Statutes that are unconstitutional cannot stand. Nor can unconstitutional outcomes imposed by trial judges or juries. Intervention by the U.S. Supreme Court is our final shield against abuse of government power and our final bulwark against violation of individual rights.

The crucial question, therefore, is whether the legislative enactment or the common law-based verdict of a federal or state court violates the U.S. Constitution. Ultimately, that determination is the job of nine justices. They should not impose their own policy preferences; rather, they should apply the Constitution, based on a proper theory of that document grounded in the Framers’ notions of limited government, separation of powers, federalism, and individual liberty.

To the contrary, asserts Justice Scalia. “[A]pplication of the Court’s new rule of constitutional law is constrained by no principle other than the Justices’ subjective assessment of the ‘reasonableness’ of the award in relation to the conduct for which it was assessed.”⁴⁵ Well, yes, judges are frequently called on to exercise a rule of reason. But, conceptually, an evaluation of reasonableness requires much the same thought process in the context of a punitive damage award as in the context of other murky terms throughout our statutes and Constitution—terms like cruel and unusual punishment, probable cause, unreasonable searches, and just compensation, which our courts must regularly interpret and apply.

If the justices decide that an egregious award breaches constitutional safeguards, they are authorized to do something about it. Their remedy might be couched in the broadest terms, as in *BMW*, or it might be somewhat more concrete, as in *State Farm*. Brighter-line

⁴⁴George F. Will, *License to Legislate*, WASHINGTON POST, Apr. 17, 2003, at A23.

⁴⁵*BMW*, 517 U.S. at 599 (Scalia, J., dissenting).

remedies, despite Justice Ginsburg's occasional distaste for them, do provide greater clarity to all litigants. If the legislature, previously acquiescent, wishes to reclaim its lawmaking role, a subsequent statute will ordinarily supersede the Supreme Court's default guidelines. The existence of those guidelines may even inspire long overdue legislation.

State Farm affords a particularly strong argument for judicial benchmarks. No statute dictated the outcome—just the common law of tort as construed by judge and jury. An appellate court is uniquely qualified to review the common-law decision of a lower court. So the real debate in *State Farm* does not center on separation of powers but on federalism. And that debate, in turn, recalls the muddle over substantive due process—the doctrine intermittently invoked by federal courts to prevent states from violating substantive rights presumably secured by the U.S. Constitution, applied to the states via the Due Process Clause of the Fourteenth Amendment.

IV. Substantive Due Process

The Court should not have imposed its judgment on Utah “under the banner of substantive due process,” insisted Justice Ginsburg.⁴⁶ Predictably, her concern over the scope of that doctrine was echoed by Thomas and Scalia, both of whom cited Scalia's earlier dissent in *BWM*, which Thomas had joined. Virtually no scope best describes their view of substantive due process. Thomas's *State Farm* dissent is little more than one sentence: “[T]he Constitution does not constrain the size of punitive damage awards.”⁴⁷ Scalia's dissent is not much longer: “[T]he Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is unsusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect.”⁴⁸

⁴⁶*State Farm*, 123 S. Ct. at 1531 (Ginsburg, J., dissenting). Notably, Justice Ginsburg has been willing to invoke substantive due process in other contexts. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), which she joined this term, holding that substantive due process protects an unenumerated right to privacy.

⁴⁷*Id.* at 1526 (Thomas, J., dissenting) (quoting *Cooper Inds.*, 532 U.S. at 443 (Thomas, J., concurring) (citing *BMW*, 517 U.S. at 599 (Scalia, J., joined by Thomas, J., dissenting))).

⁴⁸*Id.* at 1526 (Scalia, J., dissenting).

Scalia's second sentence says *BMW* is so poorly reasoned that the Court should not treat it as binding precedent, notwithstanding any reliance on its holding that may have evolved over the past seven years. As we shall see, Scalia's selective dismissal of *stare decisis* is an important adjunct to his substantive due process jurisprudence.

First, however, a celebrated statement from appellate judge Frank H. Easterbrook, who pithily captured the conservative perspective on substantive due process: "The fourteenth amendment contains an equal protection clause, and a due process clause, but no 'due substance' clause. The word that follows 'due' is 'process.'"⁴⁹ In a 1993 opinion concurring in a punitive damages award against TXO Production Corporation, Scalia elaborated on Easterbrook's point:

To say (as I do) that "procedural due process" requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination. . . . Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering); but no one would claim (or at least no one has yet claimed) that a substantively correct determination of sufficiency of evidence and reasonableness of compensatory damages is a federal constitutional right. So too, I think, with punitive damages: Judicial assessment of their reasonableness is a federal right, but a correct assessment of their reasonableness is not.⁵⁰

In short, Scalia believes the U.S. Constitution guarantees defendants that the process followed in determining a punitive award will be reasonable, including judicial review, but not that the award itself will be reasonable. Assurances regarding the appropriate size of an award must come, if at all, from state statutes and constitutions. At first blush, the *TXO* majority opinion by Justice John Paul Stevens seemed to agree. But then Stevens distinguishes semantically between "unreasonable" awards, which are not foreclosed by the Constitution, and "grossly excessive" awards, which are foreclosed.

⁴⁹McKenzie v. City of Chicago, 118 F.3d 552, 557 (7th Cir. 1997).

⁵⁰TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 471 (1993) (Scalia, J., concurring in the judgment).

The Conservative Split on Punitive Damages

Justice Scalia's assertion notwithstanding, we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . [S]tate law generally imposes a requirement that punitive damages be "reasonable." A violation of a state law "reasonableness" requirement would not, however, necessarily establish that the award is so "grossly excessive" as to violate the Federal Constitution.⁵¹

Stevens reminds us that "our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award."⁵²

Interestingly, Kennedy's *TXO* concurring opinion rejected the distinction between "reasonable" and "grossly excessive" in no uncertain terms:

To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? . . . [W]e are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution.⁵³

Instead of a "grossly excessive" standard, Kennedy preferred to focus on the jury's reasons for an award—that is, whether the "award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution."⁵⁴ Fast forward one decade. In *State Farm*, Kennedy now opts for benchmark ratios and cites binding precedent that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments."⁵⁵

Kennedy's earlier apprehension about unmanageable standards like "grossly excessive" remains Scalia's concern today. But Scalia

⁵¹*Id.* at 458 n.24 (internal references omitted).

⁵²*Id.*

⁵³*Id.* at 466–67 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁴*Id.* at 467.

⁵⁵*State Farm*, 123 S. Ct. at 1520 (citing *Cooper Inds.*, 532 U.S. at 433; *BMW*, 517 U.S. at 562).

goes further. He would deny substantive content to the Due Process Clause. He does, however, allow for this exception: "I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights."⁵⁶

On what principled basis does Scalia carve out that exception? Is his litmus test that the right be enumerated? He does say, after all, that the Due Process Clause is not "the secret repository of all sorts of other, unenumerated, substantive rights."⁵⁷ Yet that does not explain why he limits the clause to incorporating only *certain* provisions in the Bill of Rights. Moreover, the question of which substantive rights are encompassed by Due Process is quite different than the question of whether the Due Process Clause can be read to have any substantive content at all.

The answer, according to Harvard law professor Laurence H. Tribe, who argued *State Farm* before the Supreme Court on behalf of the Campbells, is that Scalia is simply relying on *stare decisis*—that is, respect for past decisions now well-settled in law.⁵⁸ That would explain why Scalia took care to say in his *State Farm* dissent, "*BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect."⁵⁹

By asserting that he can invoke *stare decisis* or not—presumably based on a set of neutral criteria that he claims to have formulated—Scalia leaves himself "open to the charge of importing his own views and values into his method of interpretation."⁶⁰ Perhaps that criticism unfairly assumes that Scalia cannot objectively apply his *stare decisis* criteria to determine whether an opinion has generated a sufficiently settled body of law, adequately woven into the fabric of society. Still, Scalia's peremptory refusal to invoke substantive due process in *State Farm* is difficult to square with a case dating back to 1907 holding that Due Process imposes substantive limits

⁵⁶*TXO*, 509 U.S. at 470 (Scalia, J., concurring in the judgment) (internal references omitted).

⁵⁷*Id.*

⁵⁸Laurence H. Tribe, *Comment* in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 82–83 (1997).

⁵⁹*State Farm*, 123 S. Ct. at 1526 (Scalia, J., dissenting).

⁶⁰Tribe, *supra* note 58, at 83.

“beyond which penalties may not go.”⁶¹ Or a 1915 case in which the Court actually set aside a penalty because it was so “plainly arbitrary and oppressive” as to violate the Due Process Clause.⁶²

Moreover, Scalia and Thomas might have sidestepped substantive due process by authorizing federal intervention on procedural rather than substantive grounds. Remember that the Court was dealing in *State Farm* with remedies, not with liability itself. Arguably, remedies have as much to do with procedure as with substance, in the following sense: Proper procedure requires advance notice of the law. Private parties must be able to determine which conduct is necessary to conform to the law’s dictates; and legal outcomes must be reasonably predictable. As the Court stated in *State Farm*, “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁶³ By violating those norms, outrageous punitive damages do not provide adequate notice and therefore offend procedural due process.

Finally, if the Court’s conservatives are serious about resolving the substantive versus procedural quandary implicit in the Due Process Clause, maybe it is time for them to revisit the Fourteenth Amendment’s nearly forgotten Privileges or Immunities Clause. Indeed, Justice Thomas and Chief Justice Rehnquist have indicated a willingness to do so “in an appropriate case.”⁶⁴ Meanwhile, other conservatives, like former judge Robert Bork, demur because “we do not know what the clause was intended to mean.”⁶⁵ Yet that critique is no more persuasive when applied to the Privileges or Immunities Clause than it would be if applied to the General Welfare Clause, the Necessary and Proper Clause, or the Commerce Clause. A compelling case can be made that the Court has misinterpreted

⁶¹*Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907) (cited by *State Farm*, 123 S. Ct. at 454).

⁶²*Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (cited by *State Farm*, 123 S. Ct. at 454).

⁶³*State Farm*, 123 S. Ct. at 1520 (quoting *BMW*, 517 U.S. at 574).

⁶⁴*Saenz v. Roe*, 526 U.S. 489 (1999) (Thomas, J., dissenting, joined by Rehnquist, C.J.).

⁶⁵ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 180 (1990).

each of those clauses, but no one has suggested that they not be interpreted at all.

In any event, probably the clearest discussion of the Privileges or Immunities Clause appears in a 1998 Cato Institute monograph by professor Kimberly Shankman and Cato scholar Roger Pilon. Here's their recap of the rise and fall of the clause:

Shortly after the Civil War, the American people amended the Constitution in an effort to better protect individuals against state violations of their rights. Under the Privileges or Immunities Clause of the new Fourteenth Amendment, constitutional guarantees against the federal government could be raised for the first time against state governments as well. . . . But . . . in 1873, in the infamous *Slaughter-House Cases*,⁶⁶ a deeply divided Supreme Court effectively eviscerated the Privileges or Immunities Clause. Since then courts have tried to do under the Due Process and Equal Protection Clauses of the amendment what should have been done under the more substantive Privileges or Immunities Clause.⁶⁷

As a result of *Slaughter-House*, conclude Shankman and Pilon, we now have “an essentially directionless body of Fourteenth Amendment jurisprudence that often reflects little more than each succeeding Court’s conception of ‘evolving social values.’”⁶⁸ By overturning *Slaughter-House* and reviving the Privileges or Immunities Clause, a more coherent doctrine of the Fourteenth Amendment and federalism is likely to emerge. Along the way, the debate over the substantive content of the Due Process Clause will inevitably diminish.

V. Recommendations and Conclusion

While we wait patiently for an “appropriate case” to revisit Privileges or Immunities, the problem of confiscatory state punitive damage awards need not be irreconcilable with dual sovereignty federalism. First, several remedies can be implemented by the states themselves, without federal involvement. Second, federal reform of long-arm jurisdiction and choice-of-law rules will curb punitive damage

⁶⁶*Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873).

⁶⁷Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance among States, Individuals, and the Federal Government*, CATO INST. POL. ANALYSIS, no. 326, Nov. 23, 1998, at 1.

⁶⁸*Id.* at 33.

abuse yet fit comfortably within a federalist regime. Although a full discussion of those reforms is beyond the scope of this paper, a brief summary—short of final endorsement—might be useful.

A. State Remedies

First, one cure for inflated punitive damage awards might be to take the dollar decision away from the jury. For example, the jury might be instructed to vote “yes” or “no” on an award of punitives, with the amount then set by a judge in accordance with preset guidelines. If the judge complied with the guidelines, an appellate court would grant deferential review. But should the trial court exceed the guidelines, appellate review would be more rigorous. The rationale for a diminished jury role, from a 1989 article by our current Solicitor General, goes like this:

Juries are well constituted to perform as factfinders and determiners of liability. But here they are being given in effect the public function of sentencing—of deciding how high a penalty someone should pay for violating a public standard. Juries are remarkably ill-equipped for that task because they sit in only one case, hear evidence only in that case, and are then given very vague guidance with which to form a judgment. . . . Jurors are drastically swayed by such factors as the wealth, success, or personal demeanor of a defendant, even how far away the defendant lives from the location of the litigation. The jurors are frequently told to send a message back to such and such a corporate headquarters. After being instructed to set aside emotion, bias, and prejudice, juries are bombarded with arguments that are based almost exclusively on emotion, bias and prejudice.⁶⁹

A similarly skeptical view of jurors’ competence to assess punitive damages comes from attorney Mark Klugheit who specializes in class actions and mass tort litigation.

Jurors are hardly expected to be experts in social engineering or economic analyses. They are not likely to understand, let alone apply, any kind of reason-based analyses to punitive damage determinations. Yet in most jurisdictions the law requires lay jurors to decide claims involving millions, or

⁶⁹Theodore Olson, *Some Thoughts on Punitive Damages*, MANHATTAN INST. CIVIL JUSTICE MEMO, no. 15, June 1989, http://www.manhattan-institute.org/html/cjm_15.htm.

sometimes billions, of dollars with virtually no guidance about how to translate abstractions like the need for punishment or deterrence into an appropriate verdict. Instructions predicated on amorphous concepts like ‘punishment,’ ‘deterrence,’ and the ‘public good,’ . . . make the imposition of punitive damages a standardless, if not haphazard, exercise.⁷⁰

Second, another suggestion for reform at the state level is to limit punitive damages to cases involving intentional wrongdoing or gross negligence. In fact, an even higher standard has had a salutary effect in Maryland, where punitive damages are permitted in a tort case only if the plaintiff has proved that the defendant acted with actual malice.⁷¹ Whatever the heightened standard, the idea is that accidental injuries arising out of ordinary, garden-variety negligence are unlikely to require the deterrence for which punitive damages are designed.

Third, states might effect procedural guarantees similar to those inherent in criminal law. In *State Farm*, Kennedy observed that punitive awards “serve the same purposes as criminal penalties [but] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.”⁷² Among the protections that might be offered:

- A higher burden of proof than the usual civil standard, which is preponderance of the evidence. Thirty-one states now require clear and convincing evidence for punitive awards.⁷³
- No double jeopardy. Current rules allow “multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”⁷⁴ Victor Schwartz, a noted torts scholar, has proposed that “punitive damage awards be reduced by the sum of all

⁷⁰Mark A. Klugeit. *Where the Rubber Meets the Road: Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE LAW REVIEW 803, 806 (2002) (footnotes omitted).

⁷¹*See, e.g.,* Darcars Motors of Silver Spring v. Borzym, 818 A.2d 1159, 1164 (2003).

⁷²*State Farm*, 123 S. Ct. at 1520.

⁷³Martin F. O’Connor, *Taming the Mass Tort Monster*, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, Oct. 2000, at 21.

⁷⁴*State Farm*, 123 S. Ct. at 1523.

previous awards for the same misconduct. The result would be what amounts to a single 'rolling' award."⁷⁵

- No coerced self-incrimination, which criminal defendants can avoid by pleading the Fifth Amendment. In civil cases, however, compulsory discovery can be self-incriminating.

Fourth, the Eighth Amendment's prohibition of excessive fines could be applied to punitive damages. Presently, because the Eighth Amendment is primarily directed at prosecutorial abuse, the excessive fines provision does not cover civil damages. That principle was spelled out in the *Browning-Ferris* case.⁷⁶ But Justice Sandra Day O'Connor's dissent,⁷⁷ covering the history of fines, convincingly showed that punitive damages, unless they were merely symbolic, were always treated as fines. Moreover, after *Browning-Ferris*, several states modified their statutes to provide that punitives would, in part, be payable to the state.⁷⁸

Indeed, making punitive awards payable to the state is a fifth possible reform. Because the purpose of punitives is deterrence, not compensation for injury, the identity of the recipient is irrelevant to that purpose, and receipt by the plaintiff is beyond what is necessary to make him whole. Of course, adequate incentive must be provided for the plaintiff's attorney to seek punitive damages. That incentive might be in the form of court-ordered attorneys' fees with the amount set by a judge. Much of the abuse that now exists can be traced to enormous contingency-based fees paid not to "public officials, who are accountable to the citizenry and have a long tradition of ethics and restraint, but private citizens and lawyers whose only interest is the size of the award they can bring in."⁷⁹

B. Federal Reform of Long-Arm Jurisdiction

Apart from state imposed constraints on punitive damage awards, there are at least two areas in which the federal government can

⁷⁵O'Connor, *supra* note 73, at 23.

⁷⁶See *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

⁷⁷*Id.* at 282 (O'Connor, J., concurring in part and dissenting in part).

⁷⁸See, e.g., Roy C. McCormick, *Punitive Damages Defined and Reviewed for Questions and Changes Ahead*, ROUGH NOTES, Nov. 1995, at 68.

⁷⁹Olson, *supra* note 69.

intervene without intruding on long-established state prerogatives. The guiding principle is that federal legislatures and courts are authorized to act when there is a high risk that state legislatures or courts will systematically appropriate wealth from the citizens of other states. One federal reform that is consistent with that principle is to amend the rules that control state exercise of so-called long-arm jurisdiction over out-of-state businesses.

Rather than apply the Due Process Clause to the size of a punitive damages award, a federal court could, for example, use that clause to preclude a local court from hearing a case unless the defendant engages directly in business activities within the state. Sensible rules should protect a firm from being hauled into court unless the firm does in-state business. Those same rules would give firms an exit option—that is, if they withdrew from a state, they could avoid the risk of an unrestrained in-state jury. Unfortunately, federal limits on long-arm statutes remain lax or ambiguous. Perhaps that helps explain the Supreme Court's recent punitive damage jurisprudence. Instead of reining in state jurisdiction, the Court may have resolved cases like *BMW* and *State Farm* with a view toward approximating the same result by other means.⁸⁰

Unpredictable or unclear federal guideposts for punitive damages may not resolve the problem, however. Law and economics scholars Paul Rubin, John Calfee, and Mark Grady argue that the Court should address the jurisdiction problem head-on.

If Alabama juries demonstrate bad judgment in pharmaceutical cases, manufacturers might refuse to sell in Alabama, denying Alabamians drugs that expose the manufacturer to inappropriate punitive damages awards. Middlemen, however, might fill this lacuna by purchasing and reselling drugs in Alabama at a higher cost to compensate for liability, and manufacturers might not be able to escape liability under existing long-arm statutes.⁸¹

An overhaul of the Court's jurisdictional rules would entail a significant shift in its prior case law. First, under *International Shoe Co. v. Washington*,⁸² the Court held that an out-of-state corporation

⁸⁰ See Rubin et al., *supra* note 9, at 179.

⁸¹ *Id.* at 203–04.

⁸² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

could be sued within the state if the corporation had “minimum contacts” in-state. International Shoe was sued in Washington even though it had no office and made no contracts there to buy or sell merchandise. Because the company employed salesmen who resided and solicited business in Washington, it was subject to the jurisdiction of the state’s courts.

Encouragingly, thirty-five years later, in *World-Wide Volkswagen Corp. v. Woodson*,⁸³ the Court signaled that state jurisdiction triggered by nominal ties might violate the Due Process Clause. The Robinsons purchased an Audi from a New York dealership that had acquired the car from a regional distributor. Later, the Robinsons were injured when their car was involved in an accident in Oklahoma, where neither the dealer nor the distributor did business. The Court said the defendant might have foreseen that an automobile bought in New York would be driven through Oklahoma. But that noncommercial contact with the state was insufficient to confer jurisdiction on Oklahoma’s courts.

That hopeful outcome was mostly undone by the Court’s 1987 opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*.⁸⁴ Valves made by Asahi, a Japanese corporation, were installed by another company on Taiwanese tires that were involved in a California accident. The Court refused to confer jurisdiction on the California courts, mainly because the burden on Asahi of litigating in California outweighed the state’s interest in adjudicating the case. But Justice O’Connor could not command a majority of the Court to support this more restrictive proposition: “[A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”⁸⁵ If that rule had won the day, exit from a state with a confiscatory tort regime would be feasible. But only four justices agreed.

Rubin, Calfee, and Grady conclude that “the economically harmful effects of excessive punitive damages awards by unrestrained juries in particular states could . . . largely be ameliorated by a clear and

⁸³*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁸⁴*Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

⁸⁵*Id.* at 112.

realistic ‘minimum contacts’ doctrine. Justice O’Connor’s opinion in *Asahi* suggests how such a doctrine could be formulated, but the Court has not accepted her approach.’⁸⁶

C. Federal Choice of Law

Because the Supreme Court continues to apply capacious jurisdictional rules, oppressive state tort laws remain a threat to out-of-state defendants. If manufacturers could avoid unfair tort regimes—for example, by not doing business in a particular state—juries would not be able to impose their punitive damage awards extraterritorially. Then, consumers in each state would decide whether they want confiscatory tort law or plentiful goods and services. But to the extent that manufacturers cannot avoid a state’s jurisdiction—for example, because long-arm statutes overreach—a different remedy is necessary. The remedy that raises the fewest federalism concerns is a federal choice-of-law rule,⁸⁷ which would allow manufacturers to exert some control over governing law. Here’s how that might work:

Basically, choice of law is the doctrine that determines which state’s laws control the litigation. There are a number of different rules used by courts to decide choice-of-law questions. Federal courts must apply the choice-of-law rules in the state in which the federal court is sitting. Generally, plaintiffs can and will select the most favorable forum state, based in part on its choice of law. The resultant tort law will no doubt be least hospitable to the defendant and might even be contrary to the defendant’s home-state law in important respects. That leaves the defendant at the mercy of the plaintiff.

Of course, there would be no involuntary extraterritoriality and less of a liability crisis if consumers and sellers could choose both their forums and their law by contract. Transacting parties should be able to designate the state whose laws will govern any disputes arising out of their agreements. Unfortunately, however, many transactions are not covered by written agreements and choice-of-law clauses in consumer contracts are generally unenforceable.⁸⁸

⁸⁶Rubin et al., *supra* note 9, at 210.

⁸⁷See, e.g., Michael McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW 90* (Walter Olson ed., 1988).

⁸⁸See Michael Greve, *Eulogy for a Lost Clause*, NATIONAL LAW JOURNAL, May 26, 2003, at 27.

Accordingly, if the forum state's rules call for applying the law of the state in which injury occurred, out-of-state manufacturers will have difficulty avoiding oppressive regimes. But suppose a federal choice-of-law rule were enacted for those cases in which the plaintiff and defendant were from different states. Suppose further that the applicable law were based on the location where the product was originally sold. A manufacturer could thus stamp products by state-of-sale and price them differentially to allow for anticipated product liability verdicts.

Alternatively, the applicable law might be based on the state in which the manufacturer was located.⁸⁹ That would obviate the need to identify where the sale occurred. A manufacturer could decide where to locate and its decision would dictate the applicable legal rules. Consumers, in turn, would evaluate those rules when deciding whether to buy a particular manufacturer's product.

Would there be a race to the bottom by manufacturers searching for the most defendant-friendly tort law? Probably not. More likely, states would balance their interest in attracting manufacturers against the interest of in-state consumers who want tougher product liability laws to ensure adequate redress for injuries. In effect, healthy competition among the states would enlist federalism as part of the solution rather than raise federalism as an excuse for failing to arrive at a solution.

D. Conclusion

By tightening state long-arm jurisdiction and federalizing choice-of-law rules in multistate litigation, the national government would be broadening the procedural guarantees of the Due Process Clause. At the same time, it would be acting pursuant to unambiguous authority under the Commerce Clause to prevent states from using their tort law in a manner that impedes the free flow of trade among the states. Those remedies, which circumvent the difficult controversy over substantive due process, are perfectly consistent with time-honored principles of federalism.

The touchstone of federalism is not states' rights but dual sovereignty—checks and balances designed to promote liberty by limiting excessive power in the hands of either state or federal government.

⁸⁹ See William Niskanen, *Do Not Federalize Tort Law*, 18 REGULATION, no. 4 (1995).

When a state exercises jurisdiction beyond its borders to impose grossly excessive punitive damages on out-of-state businesses, and applies laws that deny both procedural and substantive protection against quasi-criminal punishment, the federal government not only may, but must, intervene. Otherwise, federalism becomes a pretext for constricting rather than enlarging liberty.